



HOUSING INDUSTRY ASSOCIATION



# Housing Australians



Submission to NSW Fair Trading

on the  
**Easy and Transparent Trading  
Empowering Consumers and Small Business**

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## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*“promote policies and provide services which enhance our members’ business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

# 1. INTRODUCTION

HIA takes this opportunity to provide comments in response to the consultation paper, *Easy and Transparent Trading - Empowering Consumers and Small Business* (Paper).

The Paper sets out a range of reform options which look to further the four core themes of the recently appointed NSW Productivity Commissioner, Peter Archterstraat. While HIA welcomed the appointment of the Productivity Commissioner, this Paper does little to reduce the regulatory burden imposed on the residential building industry, the most heavily regulated sector in the NSW economy.

The average small business builder/principal contractor spends significant hours each week attending to paperwork and compliance obligations arising from regulatory requirements imposed at state and local levels. Examples include planning and land use regulations, payroll tax obligations, a construction industry long service scheme, training regulations that apply to apprentice employees, workplace health and safety management requirements, occupational licensing and home building contract laws.

Additional recent “reforms” that have been announced include further changes to security of payment laws, new strata requirements that impose mandatory inspections and a 2% “defects” bond on developers, significant increases to warranty insurance premiums, coverage and eligibility rules and the introduction of a consumer complaints register.

These regulations impose cost barriers and administrative burdens on firms that distract them from their principal objective of growing and running a profitable business.

Adding to this frustration is the fact that on many occasions, the additional regulation is introduced and implemented on an ad hoc basis and without the Government carrying out an appropriate cost benefit analysis or an assessment of what the cumulative effect of these reforms might be on housing affordability.

This reflects that what is often missing at the machinery of government level is a meaningful commitment to the principles of regulatory best practice.

Regulation is typically seen as a panacea to solving all social and market problems even though governments and government officials often hold insufficient knowledge to be able to identify the causes of all problems, to design solutions that are appropriate, and to identify non-compliance.

Of particular concern, is the fact that there is very little, if any, consideration of the cumulative effect of reforms that are targeted at the same industry.

While the Paper looks to make it ‘easier to do business’ HIA submits that what is proposed will do very little, in a practical sense, to achieve that outcome.

HIA’s comments are confined to those areas that affect the residential building industry including proposals to:

- Extend licence durations.
- Increase the owner builder threshold.
- Remove a number of home building licence categories.
- Trade out of external administration.
- Expand automatic mutual recognition of licences.
- Review Continuing Professional Development requirements.
- Notify key terms in a consumer contract
- Require the disclosure of broker commissions and referral fees.

- Regulate non-disclosure agreements.
- Publish Data on Traders and Licensees (online portal of registers)

## 2. MAKING IT EASIER TO DO BUSINESS

### 2.1 EXTENDING LICENCE DURATIONS

In the residential building industry licence holders are required to renew a licence either annually or every three years.

This approach is needlessly costly and burdensome. HIA supports moves which would reduce this burden including offering renewal options of one, three, or five-year periods across all licence types.

HIA also recommends that consideration be given to providing licence holders the option of an ongoing licence or a licence of lifetime duration.

This approach would result in the greatest reduction of administrative burden and costs for businesses. Moreover, as the Paper points out, consumer protection would be unaffected as the *'Commissioner for Fair Trading already has extensive powers to require licensees to provide her with information. This means she can audit a licensee to check their continuing fitness and propriety, and maintain an appropriate level of industry oversight.'*

#### **Cost of Licence Renewal**

The renewal fees in New South Wales are unacceptably high.

An individual building contractor licence is asked to pay \$459 every year or \$1,102 for three years. While a corporation is charged \$682 for one year and \$1,641 for three. By contrast, in Victoria, the registration renewal fee for five years for an individual is \$428.50 and for a company it is \$440.

HIA calls for a reduction in these fees, or at the very least, if a five-year renewal option is provided, no increase on the fee that is required for the three years duration.

### 2.2 INCREASE THE THRESHOLD FOR AN OWNER BUILDER PERMIT

HIA opposes any increase in the current owner builder permit threshold.

In 2014 the threshold for requiring an owner builder permit was increased from \$5,000 to \$10,000 and the requirement for an owner-builder to carry out WHS training was increased from \$12,000 to \$20,000. There is no evidence that any further changes are justified at this time.

HIA disagrees that such moves will 'strike the right balance', in fact in HIA's view the burdens of licensed builders and owner-builders are unfairly imbalanced, particularly when it comes to compliance with Work, Health and Safety, insurance and hiring of trades.

The reality is that there is a sub-class of unlicensed builders operating principally in the owner-builder market, both as principal contractors and as cohorts for those seeking to operate inappropriately as owner-builders. What is often forgotten in any discussion about the rights of owner-builders are the issues of the purpose of the principles for licensing building trades and the consumer protection and safety considerations for future owners of the dwelling.

HIA assumes the proposed increase would align the permit requirements with the training requirements, and with the requirement to obtain insurance under the home building compensation fund.

The moves to increase the threshold would appear to be based on administrative convenience rather than a true evaluation of the risk involved in having untrained and unskilled persons co-ordinating and supervising workers in an area that exposed high risk in terms of work, health and safety and future building failure.

The consequence of poor building work is often put forward as validation for a hard-line approach against the building occupations. There is very little done to apply the same rigour to those constructing homes as owner-builders.

## **2.3 REMOVING 13 CATEGORIES OF HOME BUILDING LICENCES**

While HIA sees a number of benefits in licencing, licencing also constrains the markets ability to provide services. By restricting entry, license holders maintain an entrenched market position and thereby reduce competition.

As such the need for licencing of any particular trade activity should be assessed against the risk involved. If licencing is justified according to risk, an important task is to identify those risks that require regulation. Conversely, if there is no longer considered a risk, the need for a licence should be reassessed.

HIA also recognises that removing compliance costs for the lower end of the market will result in lower costs, greater choice for consumers and more targeted regulation where it matters the most.

HIA supports business licencing:

- Of trade contractors undertaking high risk construction work relating to electrical, plumbing and gas fitting.
- Of trade contractors engaged (contracting) directly with consumers (subject to a monetary threshold).

On that basis HIA has some concerns with the proposal to remove the 13 categories of home building licences. The Paper provides little justification or evaluation in terms of a cost/benefit analysis to support such moves.

### ***Business vs Occupational licences***

The Paper erroneously refers to the 13 categories, and to trade licences more widely, as being occupational licences<sup>1</sup>. This is not the case; they are business licences. They allow an individual to operate a business and to contract out their skills and services to members of the public.

HIA has long contended that contractors, with the exception of those specialised occupations, in the residential building industry who are directly engaged by a builder should not be required to have a licence. The builder oversees and is ultimately responsible for the quality of the work that the contractor performs for the builder.

Further builders, and industry participants more generally, through their experience know those contractors who perform high quality work and adhere to safe working practises and those who do not. The consumer is much less likely to have this experiential knowledge.

In contrast, an occupation licence signals that an individual has the appropriate skills and qualifications to carry out certain types of work, for example high risk work performed by electricians.

It is possible to work as an employee, not as a contractor, in any of the 13 licensed areas, as it is in all other trade areas, with the exception of the true occupational licensed trades such as electrician or plumber.

HIA submits there is merit in considering removing licensing requirements for contractors who are engaged directly by a builder, but maintaining it for those who contract directly with members of the public.

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<sup>1</sup> See page 18 of the Paper.

## ***Holistic review of NSW Home Building Licences***

HIA submits there should be a holistic review of the home building licensing scheme to ensure it remains 'fit for purpose'. For example, do the current categories reflect industry practice? The continual evolution of building practices demands that the licencing framework is nimble and responsive to innovation. HIA would look forward to engaging in this wider discussion.

### **2.4 ALLOWING LICENCE HOLDERS TO TRADE OUT OF EXTERNAL ADMINISTRATION**

HIA does not oppose businesses attempting to trade out of insolvency. HIA is also not opposed to the proposition of amending legislation requiring the mandatory cancellation of a builder's licence once a corporation has entered into external administration. Giving the Secretary discretion to take into account relevant information and the specific circumstances of licensees, whilst also safeguarding against the practice of 'phoenixing' should be seen as a positive proposition.

If the proposed amendments are not enacted, there is a danger that the effect of the 'ipso facto' insolvency reforms that came into force on 1 July 2018 as a result of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Cth)* could be defeated.

HIA cautions that any amendments in this area would need to take into account that additional measures would need to be put in place to prevent home warranty insurance being triggered. Any proposed legislation would need to be carefully tailored for the residential building industry.

### **2.5 AMR – ARCHITECTS AND OTHER BUILDING RELATED OCCUPATIONS**

Whilst HIA supports Automatic Mutual Recognition (AMR) in principal and would like to see the inclusion of builders' licences in an AMR scheme it is recognised that there are state variations and it is not always a simple matter to determine the equivalent standard. The example that is frequently cited is that of a Queensland builder working in New South Wales not being able to do everything that a NSW builder would be able to do because of the different licence categories that exist in Queensland.

HIA submits that the differences are not insurmountable and that work should be undertaken by the various states to achieve AMR.

### **2.6 REVIEW OF CONTINUING PROFESSIONAL DEVELOPMENT (CPD) REQUIREMENTS**

HIA submits that a review of CPD arrangements should be undertaken separately to this Review and should be considered as part of the wider review of licensing categories as proposed above. It is HIA's view that if this is to be undertaken across a range of industries and not limited to the residential building industry it would nevertheless be appropriate to consider the industry on its own distinct terms.

## **3. INCREASING TRANSPARENCY AND CONSUMER CHOICE**

### **3.1 NOTICE OF KEY TERMS IN A CONSUMER CONTRACT**

The residential building industry is currently one of the most heavily regulated industries in NSW. The consumer protection framework provided by the Home Building Act currently provide for mandatory contract compliance requirements in both the small contracts and the large contracts that requires the inclusion of, the Consumer Building Guide and the Contract Checklist.

As such HIA submits that any changes that may occur in this space should not apply to the residential building industry.

### **3.2 DISCLOSURE OF BROKER COMMISSIONS AND REFERRAL FEES**

HIA supports the policy objectives underlying the reform options and agrees that traders, suppliers and businesses should be required to disclose potential financial benefits associated with a referral so that consumers can make an informed choice. Businesses engaging in deceptive conduct should not be able to profit at the expense of those that are doing the right thing legally and morally.

The only reservation that HIA has is that the options as presented are not industry specific and consequently would call for the public release of any amendments to consumer laws prior to their enactment to allow for scrutiny and to make sure there are no unintended consequences.

### **3.3 NON-DISCLOSURE AGREEMENTS**

The policy objective here states that the 'enforcement of NSW consumer protection laws is undermined by traders settling consumer complaints against them, on terms which limit the consumer's capacity to provide details of the complaint to NSW Fair Trading.'

However, on reading the context and the options for reform presented in the Paper it would appear to be much broader than the stated policy objective and have more far-reaching consequences. It would appear that the Paper is canvassing views on those situations where consumers are prevented from publically commenting on issues they might have with a business or trader under an unfair contracts term in a standard form contract. HIA submits that such situations are adequately and most appropriately dealt with under Australian Consumer Law (ACL) and enforced by the ACCC.

The first proposed option for reform in the Paper is to prevent non-disclosure agreements forming part of any complaint resolution between traders and customers. HIA would oppose any law that interferes with the ability of parties to negotiate their legitimate right to have the terms of a dispute agreement to remain confidential at any stage, particularly on settlement. The focus here is on the ability or right of a party to negotiate, this is not the same as an unfair contract term.

### **3.4 PUBLISH DATA ON TRADERS AND LICENSEES (ONLINE PORTAL OF REGISTERS)**

HIA would express concerns in response to the proposals outlined within the Paper.

It is not clear, but it appears that what is being proposed is a portal that leads members of the public to already existing sites or a website that processes and packages information from existing sites. This looks to be largely available already on the [OneGov](#) website, which contains public registers of the various licence categories.

HIA has serious reservations about linking information aimed at industry participants for example from Government Regulatory websites such as SafeWork to consumer portals. The information held about businesses and traders on these websites is not readily digestible for and by consumers. There are real risks that information provided on regulatory compliance websites will be misinterpreted by consumers and businesses and traders will suffer a detriment as a result.

Before any serious work is done on developing any new data portal or website, work should be undertaken to improve the provision of information that is available on the existing Fair Trading website. As revealed in the NSW Ombudsman's Special Report to Parliament<sup>2</sup>, Fair Trading already experiences significant problems meeting its publication requirements under the Home Building Act 1989. The paragraph below is taken from page 42 of the Ombudsman's Special Report:

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<sup>2</sup> Is your builder 'fit and proper': the weaknesses of the home building licensing scheme in NSW, 16 May 2018

*'Fair Trading is not publishing information on the public register required by s 120 (3) of the Act and cl 69 of the Regulation. The information Fair Trading records on the public register does not have sufficient detail and contemporaneous information to make it fit for purpose, that is, to provide consumer protection and help stop the actions of unscrupulous builders.'*

Additionally, before any further work is undertaken in this area, a detailed cost benefit analysis should be undertaken. HIA submits this should be performed by the newly established NSW Productivity Commission.

## **4. CONCLUSION**

Whilst recognising there may be some slight improvements, the proposals in the Paper do little to reduce the regulatory burden imposed on the residential building industry. Many of the areas on which HIA has provided commentary would require further and more in depth discussion and consultation. HIA looks forward to being involved in those discussions.