



Trade Practices Act 1974

Notice pursuant to section 91B(3)

in relation to authorisation A122 granted to
the Australian Institute of Building

1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business. This results in a greater choice for consumers with regard to price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.
- 1.3 Broadly, the ACCC may 'authorise' parties to engage in anti-competitive conduct where it is satisfied that the public benefit flowing from the conduct outweighs any public detriment from any lessening of competition.

Revocation of authorisations

- 1.4 Section 91B(3) of the Act provides that the ACCC may initiate consideration of the revocation of an authorisation if it appears to the ACCC that:
 - the authorisation was granted on the basis of evidence or information that was false or misleading
 - a condition of the authorisation has not been complied with or
 - there has been a material change in circumstances since authorisation was granted.
- 1.5 To initiate consideration of the revocation of an authorisation the ACCC is required to write to interested parties advising them of its intention to consider the revocation of the authorisation, the basis on which revocation is being proposed and invite submissions in respect of the revocation.
- 1.6 This document is a **notice pursuant to section 91B(3)** of the Act, informing interested parties that it appears to the ACCC that there have been material changes in circumstance in relation to authorisation A122 since authorisation was granted. Accordingly, the ACCC is considering whether or not to revoke authorisation A122.

- 1.7 After considering any submissions received from interested parties in relation to its revocation considerations, the ACCC is required to issue a written determination either revoking or not revoking the authorisation.

2 Authorisation A122

- 2.1 The ACCC's predecessor, the Trade Practices Commission (the TPC) granted authorisation A122 to the Australian Institute of Building (AIB) on 23 October 1987.
- 2.2 The AIB was granted authorisation by the TPC to publish its *Guideline Terms of Engagement and Scales of Professional Charges* (fee scale), a copy of which is appended and marked as Attachment A. The TPC accepted that the preparation and publication of the fee scale facilitated negotiations between a builder and their client and considered that a public benefit would flow from this. A copy of the TPC's determination is available for download from the ACCC's website at: www.accc.gov.au.
- 2.3 Since 1987, the AIB has continued to publish its fee scale and has provided the ACCC with its most recent version. A copy of the AIB's current fee scale is appended and marked as Attachment B.
- 2.4 The ACCC has conducted a preliminary review of the AIB's authorisation and arrangements. The ACCC is of the view that since authorisation A122 was issued, changes have occurred such that the circumstances of the authorisation are likely to be materially changed from the circumstances in which the authorisation was granted.

3 Material changes in circumstance identified by the ACCC

- 3.1 On the basis of its preliminary review, the ACCC is of the view that a number of material changes have occurred since authorisation was granted to the AIB in 1987. These material changes are outlined below.

Increases in information available to builders and their clients

- 3.2 The ACCC considers that at the time of granting the authorisation (1987), accessing the information of the kind contained in the fee scale may have been difficult for new builders and their clients. The authorisation may therefore have, as accepted by the TPC, facilitated negotiations between the parties.
- 3.3 The ACCC considers that advances in information and technology, for example in the areas of computers and the internet, are likely to have significantly increased the availability of data and information from which builders and their clients can obtain information to facilitate their negotiations. Information is also now more readily available from other sources such as: industry forums (the Australian Construction Industry

Forum); government departments and related associations and institutes (the Australian Property Institute).

- 3.4 The ACCC considers that these increases in information available to builders and their clients constitutes a material change in circumstances.

Increases in the scope of the arrangements

- 3.5 The ACCC notes that at the time authorisation was granted it was proposed that the fee scale would be distributed to AIB's members by mail upon their request. The ACCC considers that the limited proposed distribution of the fee scale, and therefore the potential scope of the arrangements, is likely to have limited the potential detriments of the arrangement as considered by the TPC.
- 3.6 The ACCC notes that the 2005 fee scale is now far more widely available than at the time authorisation was granted. In particular the 2005 fee scale is published by the AIB on its internet website and is downloadable by members of the general public.
- 3.7 The ACCC considers that increases in the accessibility of the fee scale by members of the building industry and by members of the general public is likely have significantly increased the scope of the authorised arrangements and constitutes a material change in circumstances.

Changes in the information contained in the documents

- 3.8 A comparison of the 1987 fee scale to the 2005 fee scale has identified a number of changes in the information provided by the fee scale since authorisation was granted by the TPC. For example, the 1987 fee scale provides a clear and prominent disclaimer at the start of the document as required by the TPC, however, in the current fee scale the disclaimer has been moved reducing the level of its prominence.
- 3.9 The ACCC notes that some degree of change was permitted by the TPC but considers the net effect of the changes made to the document to be a material change in circumstances.

Changes in the regulatory environment

- 3.10 In 1987 responsibility for building regulation lay predominantly with the individual states and territories.
- 3.11 Since 1987 there has been an effort to encourage national consistency across the industry and for the introduction of a national regulatory regime. This has included the introduction of the Building Code of Australia (BCA), which has been adopted by most states, and the commissioning of the Australian Uniform Building Regulations Coordinating Council to develop model legislation for the administration of building legislation.

- 3.12 In addition, the *Royal Commission into the Building and Construction Industry* completed the first national review of the conduct and practices in the building and construction industry and found a need for on-going national reform.
- 3.13 Further, the ACCC considers that the 1995 amendments to the TPA which extended the operation of the competition provisions have also impacted upon the regulatory environment in which the AIB and the authorised arrangements operate.
- 3.14 The ACCC considers that the changes in the regulatory environment constitute a material change in circumstances.

4 Notice

- 4.1 It appears to the ACCC that the matters outlined above constitute a material change in circumstance since authorisation A122 was granted. Accordingly, pursuant to section 91B of the Act, the ACCC is considering the revocation of authorisation A122.
- 4.2 Interested parties are invited to make submissions on these matters. Any submission should be lodged by **close of business Friday 25 August 2006**.
- 4.3 Submissions should be in writing and addressed to:
- The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602
- 4.4 Submissions may also be lodged by e-mail to adjudication@accc.gov.au or by facsimile to (02) 6243 1211.
- 4.5 Interested parties may choose to address any or all of the following issues:
- changes to the authorised conduct
 - changes to public benefit and detriment flowing from the authorisation since it was granted and
 - any other issues that may be relevant to the ACCC's consideration of this matter.
- 4.6 Submissions will be placed on the ACCC's Public Register.