



SUBMISSION BY THE
Housing Industry Association

to the

ACCC

on the

**Application for Authorisation (A91103) for collective negotiations
by owner drivers with earthmoving contractors in South East
Queensland**

31 October 2008

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1.1 Introduction

HIA is the premier industry organisation in the home building sector of the Australian economy, and represents some 44, 000 members throughout Australia. It employs a professional staff of some 350 persons and forms its policies through an internal democratic system of committees made up of its members serving in a voluntary capacity.

HIA wishes to make a submission, on behalf of its members, in relation to the application by the CFMEU Construction and General Division (A91103) for collective negotiations by owner drivers with earthmoving contractors in SE Queensland.

HIA members involved in the housing industry in SE Queensland will be directly affected by the Application, as work done by earthmoving contractors is an essential and inseparable part of the process of land development for housing purposes. HIA members have an immediate and direct interest in any effect on competition which might flow from approval of the application. Indeed, a large HIA member, Boral Limited, is specifically named in the application as a potential target of the collective bargaining approach by owner drivers. Individual owner-drivers are also eligible to be members of HIA, and many are. HIA estimates that about 25 of its members in SW Qld are earthmoving contractors

In order to address the likely effects of approving the application, it is necessary to understand the process of land development for housing, and the actual construction process, in this market.

1.2 The nature of land development for housing

The normal process of the development of broad-acre land for housing in the South-East Queensland, as in most of Australia, is for land to be released from planning and other government constraints for the purposes of development of that land as housing blocks. This includes headworks not directly connected with the physical site, such as installation of water mains and electricity reticulation, as well as the more visible activities like leveling and filling, curbing and guttering, and landscaping. All these activities involve earthmoving contractors, and the costs feed directly into the cost of housing.

In addition, when construction commences, further earthmoving activities are normally involved, in relation to site preparation and foundation laying on individual blocks. During the course of construction, earthmovers are frequently involved in construction of retaining walls and landscaping. Swimming pool installation is another important activity in SE Qld that involves earthmoving. While the CFMEU is correct in saying that relatively small quantities of material are involved at any one detached housing site, the sheer number of such sites makes the overall amount of work done very significant in relation to the whole market. In addition, the increasing trend in SE Qld to apartment living means that what the CFMEU categorise as 'commercial' is in many cases ultimately 'residential'.

Thus, it will be seen that earthmoving contractors play a crucial role in the preliminary and ongoing activities involved in the construction of detached, semi-detached and high-rise housing in SE Qld. Contrary to the CFMEU application, their work is not confined to, or even predominantly focused on, pure commercial and civil construction work.

1.3 Current Industry Practices and Competition

The outline of the industry provided by the CFMEU in their application needs some clarification. The industry currently operates in an environment of unfettered competition, but that does not mean that all the bargaining power always lies with the earthmoving contractors.

The competition for civil contractors and employees from the burgeoning mining and resources sectors over many years, at the same time as the spurt in public and private investment in infrastructure in SE Qld, has put owner operators in this market in a strong bargaining position. HIA therefore doubts it is true that owner drivers are generally price takers with no negotiating power. In any case the laws of supply and demand ensure that prices will fluctuate with the amount of work available to be done. The construction market in SE Qld has been very active over the past 5 years and the costs of earthmoving, along with most other construction costs, have risen. This demonstrates that the owner drivers are able to effectively negotiate on an individual basis to raise prices when their services are in demand, as they now are – if the price offered by an earthmoving contractor is too low, owner drivers have plenty of alternative work available and will work for the contractor offering the highest price.

Given the Qld Government's large capital works program, the ongoing resources boom, and the recent measures by the Federal Government to stimulate the housing industry, there is no reason to believe that this situation will change for the foreseeable future.

1.4 The Proposed Arrangements

HIA considers that, as a general principle, the collective bargaining provisions of the Act are for business transactions and must not be used to create de-facto industrial relations type arrangements that are then imposed on independent contractors, businesses in general or consumers. This is a particularly relevant consideration when, as here, the prime mover in a proposed arrangement involving collective bargaining by independent contractors with head contractors is a trade union which (together with the AWU) has a legal monopoly of coverage of employees performing similar work for head contractors.

At present, a head contractor in the building and construction industry has the option of having work done either by employees or by independent contractors (import competition, in the nature of things, being unavailable in relation to this type of work). A union in a position to control both of the available sources of supply of workers would be in an extremely powerful legal monopoly situation with no competitive pressures whatsoever operating to moderate its demands.

Nor would the industrial relations system and the AIRC or QIRC have any power to control co-ordinated industrial action by contractors in support of industrial action by employees. This would require action by the ACCC in the Federal Court or Federal Magistrates Court which is likely to be difficult to co-ordinate with the dispute resolution activities of the AIRC or QIRC

THE CFMEU application is made on behalf of a class consisting of an indeterminate number of geographically disparate existing CFMEU members and future members. In practice, this means the CFMEU will be in control of the negotiation process rather than a discrete identified group of small business persons. The CFMEU does not detail how the persons to be covered by the application will effectively control the negotiating process from time to time. This does not seem a genuine agency arrangement. Rather it seems an industrial relations arrangement for industrial relations purposes.

HIA notes that the Application expressly states that it is not seeking Authorisation of any exclusionary provision or collective boycott activity. That is, owner drivers will not be legally entitled to collectively refuse to deal with an earthmoving contractor who has not entered into an agreement with them. However, this disclaimer fails to acknowledge the wider role of the union in such matters

Because of the union's ability to exercise both its legal rights and its economic power through the industrial relations system in support of employees performing similar work, it is in a position to strongly influence the behaviour of head contractors. This would inevitably extend to a standard term being included in collective agreements under the **Workplace Relations Act** between the CFMEU and earthmoving contractors (as employers) requiring the earthmoving contractor to engage only those owner drivers who were parties to the CFMEU collective bargaining agreement. While such terms are currently not an allowable matter in workplace agreements, the Federal Government has announced that the range of allowable matters is to be greatly widened in proposed new laws to be introduced later this year.

In any case, the CFMEU has a long history of persuading head contractors to adopt 'union-friendly' policies and of punishing those who refuse to do so through a variety of forms of industrial pressure. An example of this is the so-called 'blue 'flu' which simultaneously struck all employees and subcontractors working on the Perth-Manjimup rail project in 2007 when the head contractor refused to accede to CFMEU/BLF demands. On-site harassment and confected industrial action on other sites of a particular head contractor were common CFMEU tactics identified by the Cole Royal Commission.

The historical record also shows that the CFMEU's commitment to strict legality in of all its actions is not the most prominent feature of its workplace activities.

1.4.1 Competition issues

It is difficult to read the comments at para 4.6 of the CFMEU application while at the same time maintaining a serious mien. It suggests that the application will have little effect on competition, will affect only a small group of CFMEU members, and will be completely voluntary. One is driven to wonder why such an apparently innocuous and ineffective application would be made in the first place.

This market for earthmoving services is currently operating in conditions of almost perfect competition, a situation which the application seeks to alter, in favour of a less competitive market. There is no getting away from this essential point.

HIA agrees that the proposal would not create any barriers to entry into the industry, as such. However, CFMEU membership will be a requirement to be part of the bargaining unit, which may be a small barrier for some workers, such as AWU members.

Para 4.6(a) advances the proposition that because there is currently little or no negotiation on terms and conditions, the institution of an effective collective bargaining unit will have no effect on competition. No mention is made of price, yet price competition currently undoubtedly exists and always has existed in this market. The role of a collective bargaining unit is to agree on a standard price and conditions structure, which can hardly fail to adversely affect competition.

For owner-drivers, the benefits of such a scheme can only be achieved if it results in higher prices and better working conditions for them. If it does so, there is of course every reason for them to adhere to the scheme. It is presumably not the intention of the CFMEU to negotiate prices and conditions downward. Success of the scheme will therefore raise prices and lessen competition, and attract more members to the union. The more successful the union is in its negotiations, the more competition from non-unionised contractors will be reduced as more and more join the scheme to obtain the benefits therein. Naturally, there will be competing owner-drivers who seek to obtain more work by undercutting the union rates, and the scheme will collapse unless earthmoving contractors are persuaded to refuse to deal with such non-union owner-drivers. The CFMEU application does not explain how this will be accomplished.

For earthmoving contractors, it is difficult to see any benefits other than predictability of (higher) costs, and maintaining a 'friendly' relationship with the union. Manifestly, earthmoving contractors will not enter into negotiations unless they are forced to do so, and it is to wilfully disregard commercial and industrial reality to think otherwise. The CFMEU clearly believes that it has the power, one way or another, to ensure that earthmoving contractors will enter into negotiated exclusive agreements of the kind proposed in the Application.

Of course, once an earthmoving contractor has agreed to be bound by an arrangement negotiated pursuant to the scheme, that contractor will be at commercial risk unless all their competitors are also bound by similar, pattern arrangements. Building contractors forced to join the Victorian Building Industry Agreement have extensive experience of how such arrangements snowball, with those who are early entrants being given better terms by the union than those who are later, recalcitrant joiners. The efficacy of the agreement for participating head contractors then depends on its universal coverage and total extinguishment of price competition by competitors.

In short, if the application is granted, the CFMEU proposes to extinguish competition in this market, replacing it with the equivalent of a collective workplace agreement for owner-drivers.

1.4.2 Public Benefit issues

HIA notes that the CFMEU, in its application, identifies collective bargaining as itself a public benefit. HIA strongly disputes this proposition. The Dawson Report did no more than to say that, in some circumstances, a public benefit may flow from improved access to collective bargaining by small businesses. Such a benefit will not inevitably flow, and each case must be assessed on its own merits.

HIA does not accept that increased 'fairness' in negotiations is a public benefit. Fairness is subjective, and negotiations do not necessarily become more 'fair' simply because they are collective rather than individual negotiations.

As a process for sharing the costs of negotiations across participating owner drivers, HIA agrees that this is likely to benefit owner drivers. That is not in itself a public benefit.

HIA does not agree that a single negotiating body would be more attractive to, or lower the costs to, or benefit, earthmoving contractors. The CFMEU (4.12) says "a likely contributor to the reluctance of earthmoving contractors to negotiate in the past is the costs associated with numerous individual

negotiations." No explanation is given as to why this is 'likely' – common sense, and the CFMEU's own description of the industry in their Para 2.21, suggests that earthmoving contractors do not negotiate because price is the only real issue for negotiation, and that is set by the market. The owner driver either accepts the price offered or goes elsewhere.

Furthermore, it is by no means clear that an earthmoving contractor would save time or cost in negotiations with the CFMEU for a collective agreement, in comparison with the time and cost they would spend on negotiations with any number of single owner drivers. Experience in the building industry is quite the contrary. Protracted and intense pay and conditions negotiations with CFMEU officials are generally considered to be an unattractive but unavoidable activity by employers and employer organisations in the commercial building and construction industry. In any case, this alleged public benefit is mere assertion and speculation about other people's inclinations, with not a shred of supporting fact. Perhaps the earthmoving contractors themselves should be asked if they would prefer to negotiate with the CFMEU.

1.4.3 Safety issues.

Arguments that a collective agreement is needed to improve safety in the earthmoving industry, and this is a public benefit, are spurious. If an improvement in safety is required, there are other and better ways of achieving it, such as industry codes of conduct sponsored by Queensland Workplace Health and Safety, or changes to OHS law. There is no need to reduce competition in order to obtain such benefits. There is no evidence that workplace health and safety outcomes are improved in the building and construction industry in those workplaces that have union collective agreements over those that do not.

1.4.4 Efficient business viability.

The proposition that a reduction in competition through a collective agreement is required to improve business viability in the relevant market is again an assertion without a shred of evidence or commonsense to support it. Entry to and exit from the market is unconstrained, and the market provides direct price signals to all involved. Competition is not painless. The only way that businesses could be made more 'viable' is through union management of prices and accredited drivers, to ensure higher prices so that inefficient firms are propped up, and competition between firms is suppressed.

There is no evidence that there is any lack of information on 'industry developments' available to participants in the earthmoving market in SE Qld, and if there is, there is nothing to show why the provision of that information requires a restriction on competition. Organisations such as HIA or the Civil Contractors Federation are able to, and do, provide all required information in this area.

1.5 Conclusion

HIA considers that the CFMEU has not demonstrated sufficient or any public benefit to outweigh the public detriment caused by the lessening of competition involved in this Application.

Either the Application will have relatively little effect, though still negative, on competition, because earthmoving contractors will ignore it, or it will have a significant adverse effect on competition because earthmoving contractors will be forced to negotiate higher prices and better conditions than would have obtained in the existing free market situation.

In neither case is there any significant public benefit that could not be better obtained through other means that do not require a reduction in competition. Benefits to owner drivers are not benefits to the public. The only effect on the public that this application could conceivably have is to raise the costs of earthmoving services, which is clearly not a benefit but a detriment.

Housing Industry Association

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