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The Director
National Competition Policy Unit
Competition Taskforce Division
Treasury
Langton Cres
Parkes ACT 2600

30 September 2024

Via: nationalcompetitionpolicy@treasury.gov.au

Dear Director,

Re: Revitalising National Competition Policy

Master Builders Australia (Master Builders) welcomes the opportunity to make a submission to Treasury's consultation on *Revitalising National Competition Policy* (the consultation).

Master Builders is the nation's peak building and construction industry association which was federated in 1890. Master Builders' members are the Master Builder State and Territory Associations.

Over 130 years, the Master Builders network has grown to more than 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors: residential, commercial and engineering/civil construction.

Master Builders is a member of the Council of Small Business Organisations Australia and endorses the submission they made to the consultation.

Over the next five years, a great deal is being asked of the building and construction industry.

Record volumes of transport and utilities infrastructure need to be delivered alongside the National Housing Accord's (the Accord) target of 1.2 million new homes – a level of home building that has not been achieved in Australia before. The chances of hitting the target will be maximised if the right mix of competitive conditions are present over the Accord period to 2029.

For the most part, competition in the building and construction industry works appropriately. There is competition between suppliers and builders, and new businesses are entering the market each year.

However, much of that position is tainted by the exclusion of industrial relations from competition law. This has allowed anti-competitive and cartel-like behaviour to flourish within the industry for many years, with recent media attention once again shining a spotlight on how this impacts the industry.

Master Builders is of the view that a blanket exemption of industrial relations should not be exempt from competition law.



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In a paper entitled *Breaking Building Bad*¹, Master Builders calls for stronger competition laws and better enforcement of such in the building and construction industry. Despite the current administrative arrangements in place for the CFMEU, Master Builders is of the view that structural changes are required to be implemented to ensure that there is not a repeat of past behaviour once the administration has been lifted.

It is proposed in that paper that an independent regulator in the industry would take on this role.

To support the work of a dedicated competition unit, Master Builders calls for a range of changes to be made to the Competition and Consumer Act 2010 that would only apply to the building and construction industry, and participants therein.

These changes should include, as a minimum, that the *Competition and Consumer Act 2010* is amended to:

- strengthen laws around cartel behaviour,
- better target secondary boycott behaviour,
- clarify that enterprise agreements under the *Fair Work Act 2009* made in the building and construction industry are a contract, arrangement or understanding for the purposes of competition laws, and
- give the independent regulator the powers necessary for enforcement and investigation.

Specific recommendations for law reform are contained in Appendix A, attached. Every single one of the previous Royal Commissions of Inquiry into the building and construction industry have found examples where industry participants have engaged in conduct leading to contraventions of the boycott and cartel provisions of competition and consumer law.

Industrial coercion creates an environment within which criminal and anti-competitive behaviours can exist throughout the industry. The result is that emerging small-to-medium sized competitors are excluded from the market when faced with union dictated pattern EBAs which are unaffordable at their economy of scale. For companies that meet union demands, the inflated costs of union pattern agreements make it impossible for them to compete, unless they are protected from competition by the union.

The CFMEU's tactics are a ready-made vehicle for market manipulation, whereby contractors can either acquiesce or cooperate with the union to suppress competition and even fix prices.

The effect of this 'system' is obviously severely restricted competition, which tends to entrench the market dominance of larger commercial subcontractors and impede the entry of emergent contractors into the commercial market.

Stronger industry specific competition laws backed by better enforcement would remove a key driver of unlawful conduct and poor culture by creating a genuine level playing field for all industry participants.

¹ See https://masterbuilders.com.au/wp-content/uploads/2024/08/Breaking-Building-Bad_final.pdf.



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It would remove the incentive for building unions and officials to engage in industrial coercion, and eliminate the commercial pressure felt by many industry participants to acquiesce to these and other illegal tactics to obtain or receive ongoing work.

Allowing industry participants to compete on merit would drive competition and support industry innovation and remove a key driver of corrupt and criminal behaviour as identified by recent media reports.

Outside the industrial relations space, Australia's building and construction industry is competitive.

Looking beyond the industrial relations environment, Australia's building and construction industry is competitive. Barriers to entry and exit appear to be low; the number of businesses in the industry has grown steadily for years even in a difficult operating environment.

- There were over 452,000 building and construction businesses in operation at the end of June 2024.
- Figures for June 2023 show that the overwhelming majority (98.6 per cent) of the industry's businesses are small in size with fewer than 20 employees.
- Over one half of all construction businesses (58.2 per cent) have no employees (i.e. they are sole traders).
- The majority (55.0 per cent) of construction businesses turn over less than \$200,000 per year.
- A significant number (19.1 per cent) of construction businesses bring in less than \$50,000 in revenue annually.
- The average construction business employs fewer than three people and records \$1.3 million in annual turnover.

Industry performance has deteriorated.

Industry performance has deteriorated significantly over the past decade, especially since the COVID-19 pandemic.

- Labour productivity has plummeted over the past decade. Latest Australian Bureau of Statistics (ABS) data shows that the volume of work done per worker per hour in the industry is 18 per cent lower than a decade ago.
- The average cost of building and construction output is almost one third higher (+31.6 per cent) than it was just before the pandemic. In the case of house building, output prices rose by +42.6 per cent between 2019 and June 2024.
- There has been a major slowdown in the time it takes to create new homes. For new detached houses completed during 2022-23, the typical build time was 11.7 months compared with 8.7 months a decade earlier. Apartment building has lengthened by even more – from 20.7 months in 2012-13 to 28.8 months today.

Higher home building costs and longer build times are bad news at a time when housing affordability is a challenge.



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Housing costs typically eat up such a large share of workers' incomes, meaning associated costs will contribute to reverses in Australia's wage competitiveness. Excessive rents and house prices also work to dissuade potential migrants from making the journey to Australia – exacerbating labour shortages.

Cost inputs play a large part in building affordability and business viability.

Building materials are central to construction activity and are estimated to account for almost one quarter (23.0 per cent) of the inputs used by the industry. As noted earlier, the cost of house building materials has increased since 2019. Rapid materials price growth was problematic during the pandemic and was one of the factors that contributed to the upsurge in insolvencies. Building materials inflation also contributed to sharp increases in the final cost of building and construction output.

Given the magnitude, nature and speed of building product and material cost escalations in recent years, competitive conditions should be investigated in the areas of manufacturing, importing, distribution and the storage of building materials.

Merger notification thresholds may also present a risk to the smooth functioning of our industry. In the case of mergers involving large building and development businesses, it is possible that the waiting times applied for clearance could slow down the process of delivering any new homes or developments which are in the portfolios of either party to the potential merger. Exemptions from notification thresholds should be explored in such situations.

Are industry suppliers competitive?

Services are estimated to make up almost one half (46.5 per cent) of the inputs used by the industry each year. This means that conditions in the market for services have a huge impact on costs, productivity, quality and timeliness across building and construction. That said, the breadth of service providers used is diverse and includes banks, insurance companies, professional service providers, utilities and government.

In recent times, there have been reports that the lending and valuation policies of some banks have been modified in a way that hampers the work of builders. This behaviour has included the reconfiguration of so-called 'staged payments' whereby a larger share of the finance is withheld until the latter stages of the project. Similarly, there is a perception that excessively conservative valuations are applied by potential lenders to building projects. In either case, the effect on project costs is unfavourable. Such actions result in projects being scaled back, delayed or even cancelled. It is an open question as to whether such outcomes would prevail if the banking and lending markets were more competitive.

Lenders are not the only source of discord though. One of the biggest problems faced by builders and developers is natural monopolies, including utilities and local governments. The payment of developer contributions and infrastructure charges is required in the early stages of large-scale new home developments. The financial sums involved are substantial and the process of calculating payments appears to suffer from a lack of regulation, consistency and transparency. It is unlikely that the size of developer contributions and infrastructure charges would be as large as they are now if they were set according to the principles of competition, cost minimisation and client value.

Unfortunately, these major expenses are incurred early on in the project timeline, usually years before a return on investment starts to be realised. Financing costs, combined with the long length of time involved has a significant impact on the final cost of a new home.



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In many cases, large-scale new home building projects do not proceed because infrastructure charges mean they cannot be commercial viable within an appropriate timeframe.

There is competition among the construction industry's buyers.

As with suppliers, the competitive structure of buyers has important implications across the industry. Residential building has a clientele of hundreds of thousands of owner occupiers and investors, with no single buyer or group of buyers able to wield significant market power. This is a good thing for competitive outcomes.

When it comes to non-residential building and civil construction, however, it is different. Australia's defence sector is the single biggest source of demand for construction work. Over the year to July 2024, public sector projects accounted for 29 per cent of all non-residential building approvals. For health buildings, the public sector accounted for 83.8 per cent of demand while 58.1 per cent of education building work was performed on behalf of the public sector.

Government is a major client of the construction industry in this part of the market. This is often a good thing: at times of depressed private demand, the public sector has acted as a vital support to this part of the market, safeguarding its viability and preventing businesses from closing.

The strong bargaining power enjoyed by government, however, means there is a risk of market distortion.

For example, there are aspects of the procurement process which may result in advantageous outcomes for government that would not result if the buyers were more competitive. Construction businesses note that an unfair burden of risk is placed on them in contracts drawn up by government which could place them in a dangerous position should external factors outside their control move unfavourably.

The role of governments and public sector bodies should be examined when it comes to their position as buyers in the construction industry.

Conclusion

Master Builders agrees that competition is critical for lifting dynamism, productivity and wages growth across the Australian economy. There are several inputs where more competition, or protection from competition should be injected within the industry.

Of huge and ongoing concern though, is the CFMEU behaviour that is anti-competitive and cartel-like. Competition law must provide appropriate tools to eliminate this behaviour from the building and construction industry.

Stronger industry-specific competition laws in building and construction, backed by better enforcement, would remove a key driver of unlawful conduct and poor culture by creating a genuine level playing field for all industry participants. It would remove the incentive for building unions and officials to engage in industrial coercion, and eliminate the commercial pressure felt by many industry participants to acquiesce to these and other illegal tactics in order to obtain or receive ongoing work. Allowing industry participants to compete on merit



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would increase competition and support industry innovation and remove a key driver of corrupt and criminal behaviour as identified by recent media reports.

Master Builders welcomes the opportunity to provide this submission. Below is Appendix B which contains some further information that may be of use.

Sincerely,

Denita Wawn
Chief Executive Officer
Master Builders Australia



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APPENDIX A – Amendments proposed to the *Competition and Consumer Act 2010*

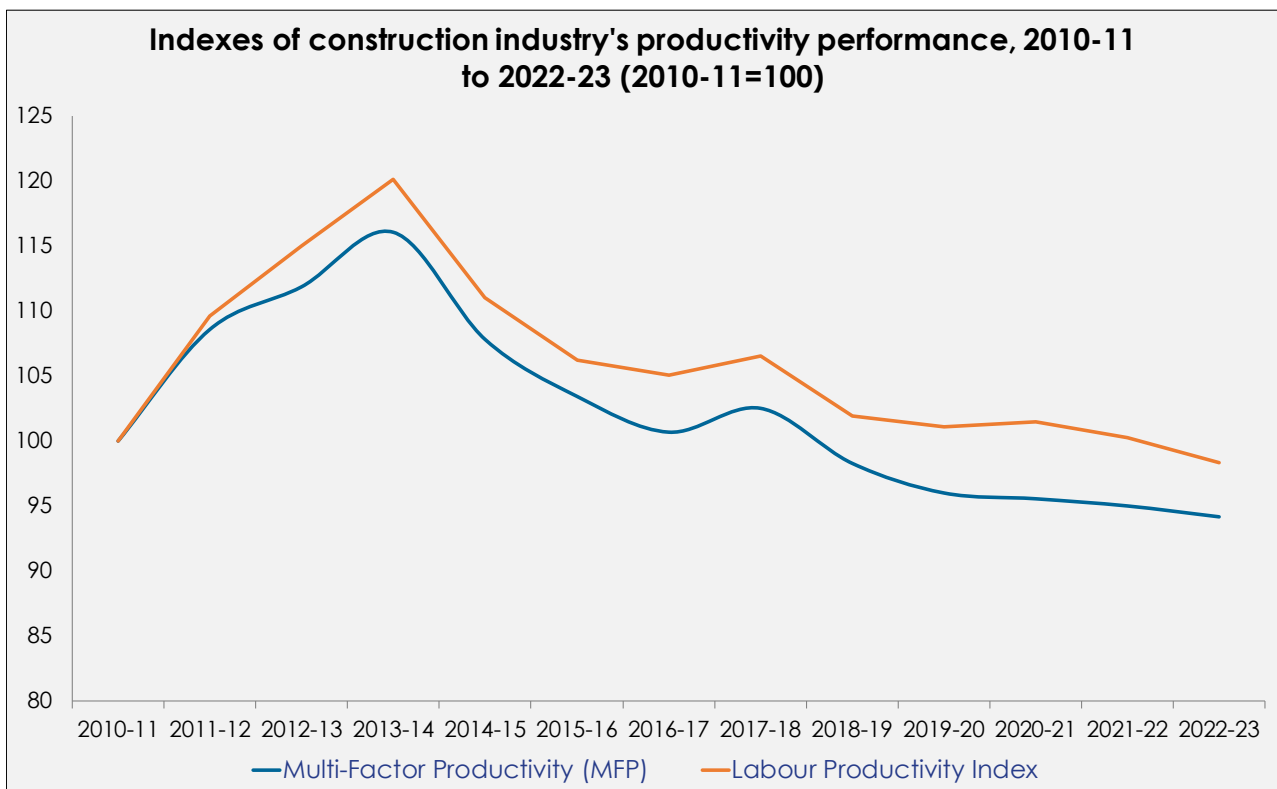
Proposed amendments include:

- ensure the penalties for breaches of ss 45D, 45DB, 45E and 45EA are the same as those that apply to other provisions of Part IV of that Act;
- clarify that to prove the existence of an arrangement or understanding, it is not necessary to establish that there be communication between each of the parties to the arrangement or understanding, merely that they hold the same understanding;
- make clear that sections 45D(1)(b), 45DA(1)(b) and 45DB(1) are contravened where the conduct is engaged in for the purpose, or would have or be likely to have the effect, of causing the consequence identified in those sections;
- provide that a person in competition with the fourth person referred to in ss 45D or 45DA must not knowingly engage in supply or acquisition of services to or from any third persons referred to in those sections with knowledge of the contravention by the first and second persons without first notifying the regulator;
- extend strong immunity provisions in respect of the cartel provisions to secondary boycott conduct and conduct indirectly leading to a secondary boycott;
- give the regulator clear and strong powers to investigate and enforce secondary boycott conduct, and conduct indirectly leading to a secondary boycott, in contravention of the Act;
- clarify that enterprise agreements under the Fair Work Act made in the building and construction industry under the Fair Work Act 2009 are a contract, arrangement or understanding for the purposes of competition laws; and
- clarify that an enterprise agreement that applies to an employer and an employee organisation under the Fair Work Act 2009 is a contract, arrangement or understanding that an employer has with the organisation of employees for the purposes of s 45E of the Act.



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APPENDIX B – ADDITIONAL INFORMATION





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Change in cost of inputs to the house construction industry - June 2024 quarter v 2019 year average (% change)

	Australia	Sydney	Melbourne	Brisbane	Adelaide	Perth	Hobart
All materials used in house building	+34.7%	+32.5%	+35.0%	+37.0%	+34.2%	+35.1%	+38.2%
Timber, board and joinery products	+38.9%	+37.4%	+37.6%	+41.7%	+46.1%	+36.4%	+39.0%
Ceramic products	+39.8%	+33.2%	+38.8%	+29.9%	+23.3%	+89.1%	+36.6%
Concrete, cement and sand	+26.2%	+16.0%	+29.3%	+45.5%	+14.1%	+24.6%	+18.6%
Cement products	+38.1%	+39.1%	+34.3%	+41.7%	+35.4%	+33.7%	+61.2%
Steel products	+28.7%	+37.8%	+22.3%	+27.7%	+30.5%	+28.5%	+72.8%
Metal products (excluding steel)	+32.1%	+27.9%	+36.8%	+30.1%	+28.9%	+26.6%	+50.7%
Plumbing products	+28.9%	+29.5%	+30.2%	+24.6%	+26.0%	+36.0%	+27.9%
Electrical equipment	+43.7%	+36.3%	+50.1%	+42.2%	+45.7%	+33.7%	+49.0%
Installed gas and electrical appliances	+13.7%	+15.8%	+15.9%	+8.8%	+9.3%	+12.1%	+16.6%
Other house building materials	+34.9%	+33.2%	+33.2%	+45.2%	+33.9%	+31.3%	+27.9%

Source: Master Builders Australia analysis of ABS Producer Price Indexes

Total change in cost of building and construction output - June 2024 quarter v 2019 average (% change)

	Australia	New South Wales	Victoria	Queensland	South Australia	Western Australia	Tasmania	Northern Territory	ACT
Total building and construction output	+31.6%	+29.4%	+28.5%	+35.9%	+30.0%	+46.7%	+42.3%	+25.3%	+15.4%
House building output	+42.6%	+35.4%	+33.6%	+46.8%	+55.4%	+79.0%	+51.9%	+16.6%	+48.0%
Other residential building output	+25.1%	+24.8%	+25.4%	+29.9%	+16.7%	+26.7%	+35.6%	+21.8%	+7.2%
Non-residential building output	+27.2%	+28.4%	+26.1%	+31.7%	+15.6%	+27.6%	+30.9%	+28.8%	+8.1%
Road and bridge construction output	+22.3%	+23.1%	+17.5%	+22.1%	+29.7%	+22.5%	No data	No data	No data

Source: Master Builders Australia analysis of ABS Producer Price Indexes



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Estimated shares of inputs to total construction output, 2011-12 to 2021-22 (% share of total inputs)*

	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
Capital services - IT	0.7%	0.7%	0.6%	0.5%	0.4%	0.4%	0.4%	0.4%	0.5%	0.4%
Capital services - Non-IT	9.3%	9.2%	9.2%	8.8%	8.6%	8.6%	8.8%	9.5%	10.0%	9.0%
Labour services	21.4%	21.5%	21.8%	22.1%	22.3%	21.7%	20.8%	20.2%	19.7%	19.8%
Intermediate inputs - Total	68.7%	68.6%	68.4%	68.7%	68.8%	69.3%	70.0%	69.9%	69.8%	70.8%
Energy	1.7%	1.7%	1.6%	1.2%	1.2%	1.2%	1.2%	1.2%	1.1%	1.3%
Materials	22.6%	22.3%	21.4%	21.0%	21.2%	21.4%	21.8%	22.0%	22.3%	23.0%
Services	44.5%	44.7%	45.5%	46.5%	46.5%	46.7%	47.0%	46.8%	46.5%	46.5%
Total - All Inputs	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

*Two period average cost shares (two periods represent t and t-1)

Source: Master Builders Australia analysis of ABS Estimates of Industry Level KLEMS Multifactor Productivity, 2021-22 (Table 5)

Value of products/services (both domestically produced and imported) used by Australia's building and construction industry in 2021-22 (millions of dollars)

Ranking	Product code	Product group	Value of products used (\$ million)	Share of total (%)
1	6901	Professional, scientific and technical services	\$27,637	12.1%
2	1402	Wood product manufacturing (excluding outputs from sawmills)	\$14,989	6.5%
3	2202	Structural metal product manufacturing	\$14,289	6.2%
4	2101	Iron and steel manufacturing	\$13,567	5.9%
5	1901	Polymer product manufacturing	\$11,047	4.8%
6	2003	Cement, lime and ready-mixed concrete manufacturing	\$10,092	4.4%
7	2403	Electrical equipment manufacturing	\$9,883	4.3%
8	6702	Non-residential property operators and real estate services	\$8,899	3.9%
9	6601	Rental and hiring services (except real estate)	\$8,052	3.5%
10	1701	Petroleum and coal product manufacturing	\$7,806	3.4%
Total value of all products and services used by building and construction industry			\$228,892	100.0%

Source: Master Builders Australia analysis of ABS Supply-Use tables 2021-22 [Table 2 Use Table, 5217002.xlsb]



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Value of imported products/services used by Australia's building and construction industry during 2021-22 (millions of dollars)

Ranking	Product code	Product group	Value of imported usage (\$ million)	Share of total (%)
1	2403	Electrical equipment manufacturing	\$6,164.8	14.0%
2	1803	Basic chemical manufacturing	\$4,631.0	10.5%
3	1701	Petroleum and coal product manufacturing	\$4,343.0	9.9%
4	1901	Polymer product manufacturing	\$4,341.3	9.9%
5	2101	Iron and steel manufacturing	\$3,975.0	9.0%
6	2401	Professional, scientific, computer and electronic equipment manufacturing	\$2,515.7	5.7%
7	1402	Other wood product manufacturing	\$2,397.6	5.5%
8	2204	Other fabricated metal product manufacturing	\$2,212.2	5.0%
9	2202	Structural metal product manufacturing	\$2,029.5	4.6%
10	6901	Professional, scientific and technical services	\$1,663.0	3.8%
Total value of imported products and services used by building and construction industry			\$43,989.46	100.0%

Source: Master Builders Australia analysis of ABS Supply-Use tables 2021-22 [Table 2 Use Table, 5217002.xlsb]

