



Submission by the
Housing Industry Association

AC N 004 631 752

to the
**Australian Safety and
Compensation Council**

on the

**Draft National Standard for
Licensing Persons Performing
High Risk Work**

29 November 2005

1 Executive Summary

Housing Industry Association (HIA) supports the adoption of good regulatory principles when considering any regulatory proposal. These principles are based on a proper cost benefit analysis and the preference for non-regulatory solutions to achieve policy objectives.

HIA supports the adoption of option 3 as set out in the Regulatory Impact Statement (RIS). This option is for nationally recognised competency certificates. These certificates are issued for life. HIA does not support the adoption of the stated preferred option – being option 2

Option 3 achieves the national consistency and national recognition, which is not currently present. Option 3 does not introduce new and unsubstantiated burdens in the form of a more rigorous licensing regime as is proposed in option 2.

HIA submits that the public comment process has not been approached correctly from the outset. It is our view that the ASCC should not put out for public comments documents that are skewed toward the apparently intended, and OASCC, preferred outcome.

In this instance the title of the document, and the heading under which the public comment is presented, indicates that it is intended to implement option 2 without fully considering the other options. It directs everyone to the proposal which is preferred without fully investigating the other options. The public discussion paper does not even elicit information on the options 1 and options 3, except briefly in an additional information chart. The debate should have been more appropriately conducted under a more neutral title such as “Persons doing High Risk Activities”.

The documents should not state OASCC’s preferred outcome. The public comment should be in a regulatory neutral environment based on data and not be led to a particular conclusion. The documents should not display an indication that might indicate the decision on the outcome has already been made.

The public comment documents should have included a draft code for options 1 and 3, have questions relating to those options and have more fully explored those options. The public comment document only provides a draft code modelling elements of the stated OASCC preferred outcome.

HIA

HIA is an association of over 42,000 businesses. HIA is the peak industry association for businesses in the residential, building, renovation and development industry in Australia.

HIA members include builders and building contractors (residential and commercial), consultants, developers, manufacturers and suppliers.

HIA is familiar with the range of compliance and other business issues stemming from the treatment of occupational health and safety under Commonwealth and State legislation.

The Housing Industry

The housing industry is a vital part of the Australian economy, generating 4.4 per cent of gross domestic product (\$32.5 billion in 2002-03) and providing work for 394,000 Australians. The overwhelming majority of people working in the industry are contractors (an estimated 315,000).

As these figures suggest, residential housing is an industry characterised by independent small businesses. In fact, there are more small firms in the building and construction sector than any

other industry sector (19 per cent of all small businesses in Australia operate in building and construction). In residential construction, an average of 2.3 people are employed per firm.¹

Unlike commercial construction, smaller firms command most of the market. The largest 100 housing firms hold some 40 per cent of the market (the equivalent figure for commercial construction is more than 90 per cent).

Over the last ten years, employment in building and construction has risen by 41 per cent or 210,000 jobs. An estimated two-thirds of this growth (c.140,000) has been in the residential sector.

Cost of Regulation

The RIS exposes some of the substantial burden of costs associated with the proposed licensing system in option 2. This raises the question as to whether the degree of intervention is justified and in the best interests of the industry, community and market it serves.

Regulations impose administrative costs, compliance costs and efficiency costs.

Eighty five percent of the housing industry is comprised of small business and our members repeatedly tell us of the daily struggle to manage the paperwork and continuously changing regulations originating from all levels of government.

The effect of over regulation is to reduce competition by limiting new entrants and making it difficult for existing business to keep operating. Regulation adds to the costs of existing businesses as they endeavour to keep abreast of and comply with the layers of regulation confronting them.

Because regulation generates costs as well as benefits, regulation should only occur where it is necessary, where the benefits of doing so exceed the associated costs, and where the approach chosen is designed to yield higher net benefits to the community than other feasible options. The most obvious costs of regulation are the administration and compliance costs, while less obvious are the unintended costs, such as any discouragement of market delivered remedies and innovation.

Characteristics of a Good Regulatory Framework

There has been an increasing trend to regulate as the primary response to policy objectives, irrespective of the economic implications. For some time now regulation has been introduced on the basis of what are perceived to be 'good ideas' and on the basis of administrative convenience with little consideration of net benefit and disproportionate burden.

The more holistic economic and scientific debate being generated by individual entities such as the Productivity Commission and the Victorian Competition and Efficiency Commission are increasingly exposing ill-conceived regulation.

Development of good regulation requires:

- Identification of the problem – evidence, extent, social and economic cost
- Clear identification of the objectives
- Full consideration of the alternatives before regulation (should be least net cost or maximum net benefit)
- Cost benefit analysis – no disproportionate burden on individuals or business

- Application of alternatives – non regulatory solutions
- Minimum necessary regulation to achieve policy objectives

COAG principles for National Standard setting require that regulation must be the minimum necessary to achieve the objective. National Competition Policy dictates that unless it can be demonstrated that a net benefit arises from the existence of regulation and there are no other alternatives of achieving the same end that the regulation should not exist.

HIA submits that the outcome the public consultation process should be viewed through the process of good regulatory practice. Although the code is not in itself regulation, it is the drafting instructions for regulation. The State and Territories that will implement the code may cite this public consultation process as a substitute for doing this consultation at a jurisdictional level. This has actually occurred in relation to other documents that have proceeded through this process.

Certificate of Competency

Clause 5 of the draft standard requires that persons doing certain high risk work will require a license. The draft standard renames a certificate of competency to be a “license”. This changes the status from a formal qualification to an occupational license, often associated with fees, renewal processes and a litany of compliance red tape that adds cost and inconvenience to industry.

A certificate of competency provides evidence that formal training has been completed successfully and that the person is ‘competent’. It seems superfluous for an OH&S authority to then issue a license confirming this competency.

The advantages of having the national VET sector certificate in option 3 is that it gives national consistency and overcomes the current State by State OH&S authority approach to competency.

The certificate proposal in option 3 is identified as having a net mean benefit of \$124.1 million over 10 years.

The RIS alleges that this benefit would be lost if there was no licensing scheme to monitor, confirm and validate. Adopting regulators would not be expected to change safety compliance monitoring activities and certificates (licenses) will still exist. The need to confirm is not understood unless the licensing regime will add an additional double up of checks. The validation is not relevant as competency has been achieved under the VET certificate.

It is not explained how, without a licensing regime, you would have difficulty in providing assurances to the community that persons performing high risk work have achieved a certain level of competency. As an initial comment the system is not about assuring the community. Secondly the VET sector certificate achieves this – the license does not add anything to competency and does not require further assessment. If it did require additional State to Territory competencies, national consistency will be diluted by those requirements.

The basis for the assertion that there would be a resulting deterioration in the quantum of workplace incidents equal to or greater than the benefits attributed to the licensing system mooted under option 2 it is not explained or substantiated in the RIS. It is not explained how the licensing system will be expected to improve the incident rate over that for nationally consistent VET sector training.

It is not clear on what basis it can be asserted that there could not be measurement of adherence to certain minimum standards without a licensing regime. OH&S data is and can be collected without the need for a license for the activity.

The commentary of net benefits as shown in Figure 3 of the RIS observes that the outcome is possibly skewed to the right of the central estimate. This commentary fails to point out that the net benefits to the left in figure 3 still exceed the maximum net benefits from the analysis of option 2

Licensing

The RIS does not make out the case for the proposed licensing system to be favoured over the nationally consistent VET sector training in option 3.

The RIS discusses unquantifiable costs associated with the abandonment of the licensing regime. There is in fact no real change to the current regime other than it is handed over to the VET sector and there is national consistency.

OH&S regulators do not currently have the form of licensing regime being mooted in option 2 that is to be abandoned.

The increased cost of the licensing system policing requirements has not been calculated. This would be an ongoing cost, as such activities would be needed if there were to be additional compliance activities to control behaviour that poses a risk to health and safety.

We would expect that existing practices would continue and that persons breaching duties would, in appropriate circumstances, be prosecuted. The licensing system will not monitor and validate adherence to minimum standards of safe use and operation of equipment over and above current requirements without greater resources being spent on policing work as and when that it is being done.

If the regulator is concerned that formal training will not be completed by those performing high risk work then they can specify the formal training required under the VET system. This renders a licensing system obsolete, unless the primary motivation is renewal and the opportunity dollars renewal generates.

The main argument stated in the RIS in support of a licensing system is that it will require adherence to minimum standards. This could only be achieved by the establishment of the licensing body with inspectors to monitor, confirm and validate adherence to standards. The nature of these activities and the cost of these activities are not canvassed by the RIS.

An occupational license does not guarantee performance or adherence to minimum standards. The license indicates that the holder has attained the qualifications required for the license to issue. Licensing is and has never been, not a performance or adherence guarantee.

The RIS does not discuss the basis for license cancellation or similar enforcement activities.

The cancellation or suspension of a license affects the ability of the license holder to earn a living. Therefore these systems are required to abide by natural justice and transparency. The impact of a decision to suspend or cancel a license has to be open to review by a court or tribunal.

Systems have to be established to monitor and manage these issues. This may involve the States or Territories imposing different considerations to determine competency from that which is under the VET sector.

The concept of the term “authority’s procedures” used in the draft code is not clear. It is a vague and uncertain term allowing for divergence from national consistency. The licensing system also allows greater scope for each State and Territory to move away from national consistency in the requirements to be imposed under the licensing system and the manner in which it is operated.

Other Key issues in Option 2

(a) 18 years of age to obtain a license

HIA does not support the requirement for a person to be 18 years of age to qualify for a license.

This requirement could be a restraint of trade. It is inconsistent with the principles of competency based training. Competency based training is based on achieving competencies, not on attaining a certain age; whether you are 65 years of age or 16 years of age is irrelevant.

While it is unlikely that a 16 year old would be operating a crane, it is likely that a 16 year old may operate a forklift. This arbitrary age barrier may cause problems where it is universally applied. There is no evidence to demonstrate that operators under the age of 18 are less safe than those 18 years of age or older.

(b) Photos on licenses

HIA does not support the use of photographic licenses. This is an unnecessary cost.

While it is important to confirm identity on site, this is easily done by performing a cross-check with other identification (including a driver's license).

The inclusion of photographs on licenses shifts the identification onus from the employer to the RTO issuing the license. The extra administration required to undertake this process will add to the costs which will ultimately be borne by the applicant or the applicant's employer.

(c) License renewal

HIA does not support the proposal to require a license to be renewed every 5 years.

Holding a license is a means of livelihood for many workers. Their ability to earn a living should not be determined by vague renewal requirements not justified in the proposal.

Traditionally competency assessment has not required periodic renewal (a life time recognition), with on the job training and experience keeping the certificate holder current and competent.

State and Territory safety laws impose an obligation on employers to provide ongoing instruction, education and training to their employees and to ensure their employees have the necessary skills and knowledge to perform their work.

The existing legislative framework requires the maintenance of currency. It is HIA's view that to require periodic renewal (whether every 5 years or other period) is of little value and simply adds further administrative costs and inconvenience to industry. The RIS does not justify this requirement.

Any requirement to renew a competency undermines the competency achieved on the successful completion of the course and is a direct challenge to the legitimacy of the VET system.

The draft standard proposes that license renewal will require the license holder to sign a statutory declaration stating that s/he has maintained their competencies. This statutory declaration is to be submitted to the relevant OH&S authority. This proposal is not too onerous but it is foreseeable that more rigorous renewal process will be implemented over time. This may include a full re-assessment or theoretical test and the disclosure of job experience and individual safety records.

If the renewal requirements include more formal; assessment (including written assessment) may result in a current certificate holder who has been operating in the industry for 20 years a license being denied the right to earn a living.

In the absence of any evidence supporting the need for renewal or demonstrating where the current system (that does not require renewal) has failed, renewal is unnecessary, impractical and not justifiable.

Finally, the renewal process will prove to be administratively quite difficult where a licence holder has more than one licence or competency eg crane and forklift operator. If these competencies were obtained at different times would separate cards need to be issued and if not, an issue is created in terms of what is the critical date for determining renewal and validity.

(d) Transitional arrangements

The draft standard proposes that existing certificate holders convert their certificate to a photographic license within 5 years of its introduction.

The competencies, however, will remain valid and will continue to be recognised by safety authorities, although there is some support for evidence of current competency at the point of conversion to a license. This proposal originates from the current situation where competencies are not recognized in all States.

HIA views this as being no different from a renewal process, albeit that the proof of competency is initiated at the front-end. The pursuit of national consistency should not result in an unsubstantiated elevation to the most burdensome system unless such a move is justified by evidence and analysis. A case for this has not been made out in the RIS.