**Productivity Commission**
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SUBMISSION BY THE

Housing Industry Association

to the

# Productivity Commission

on the

# Impact of COAG Reforms: Business Regulation & VET

**1 March 2012**

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 40,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.

# 1 Introduction

The Commission's initial findings in relation to the "Seamless National Economy" regulatory reform priorities rightly reflect that the majority of changes are early in their implementation phase. The findings also reflect that the aims of the reforms are to reduce the regulatory burden on firms that operate in multiple jurisdictions.

There are several industries that make up the residential building industry and not all will be equally benefited by the COAG reforms. Manufacturers and suppliers of residential building materials and products generally operate nationally, along with a small number of major residential builders and developers. However their operations still tend to be run on a state by state basis. The majority of businesses involved in the residential building and development industry are small-medium enterprises that do not operate across borders. For example, the top 100 residential builders in Australia in 2011 account for just 33 per cent of homes constructed in 2020/11. Of the top 20 builders in NSW over the same period on 17 constructed more than 100 homes in that year. Nationally only around 80 businesses constructed more than 100 homes in last year.

The residential building and development industry expects that regulatory reforms will eliminate unnecessary regulation, reduce red tape and the administrative burden on business, facilitate the orderly operation of the residential building industry and improve conditions so as to facilitate more efficient and effective delivery of housing across Australia.

HIA does not support harmonisation where it aims to achieve a nationally consistent outcome at the expense of genuine, positive regulatory reform for the residential building industry or where it mandates one or more states to unjustifiably increase regulation stringency in those states, solely for the purpose of 'consistency', rather than rationalisation.

Based on the limited success to date of the current COAG reforms, it is considered that the Commonwealth and State governments (including COAG) should not consider any further proposal for harmonisation without first conducting a cost benefit analysis. Such an analysis needs to consider the impact of the reforms, aimed at the residential building industry, on housing affordability and small businesses that do not operate outside of their state's jurisdiction.

In relation to the costs and benefits assessed in the Draft Report, these are difficult to quantify and HIA does not have any additional information to support or contend these figures. However some comments have been provided that highlight aspects where HIA believes the likely benefits may be overstated.

The Reports findings of what is needed to achieve effective ongoing regulatory reform (p. xxxiv) are supported.

The reforms under the National Seamless Economy which affect the residential building industry include:

- Consumer law and product safety
- Payroll tax
- Occupational health & safety
- Development assessment
- National construction code

These areas have been considered by HIA, along with the VET reforms which are fundamental to the training and development of the residential building and development industry.

# 2 Business regulation reforms

## 2.1 Consumer law and product safety

Changes to the consumer law reforms included the introduction of unfair contract provisions via the *Trade Practices Amendment (Australian Consumer Law) Bill 2009.*

The introduction of generic unfair contract laws has duplicated existing state based regulation without replacing them.

Contracting for domestic building work has been the subject of extensive consumer protection for many years across Australia with a preexisting range of statutory provisions specifically regulating unfair terms and conditions in domestic building contracts. Most State and Territory jurisdictions have specific legislation dealing with home building contracts, for example:

| | |
|---|---|
| NSW | *The Home Building Act 1989* |
| Western Australia | *The Home Building Contracts Act 1992* |
| South Australia | *The Building Work Contractors Act 1995* |
| Victoria | *The Domestic Building Contracts Act 1999* |
| Queensland | *The Domestic Building Contracts Act 2000* |

The ACT, Tasmania and the Northern Territory also regulate domestic building contracts through other legislation.

HIA's view is that the imposition of the unfair contract laws to a residential building industry that already had extensive regulation was unnecessary and has only served to add an additional compliance burden and cost for business.

## 2.2 Payroll tax

Payroll tax whilst a major source of revenue for state and territory governments is also a major cost impost on those businesses liable to pay the tax.

One of the major changes to the residential building industry occasioned by harmonisation was the change in the definition of wages which make all payments made to independent contractors liable for payroll tax, not only those made to contractors who are in substance common-law employees.

Payments made to contractors are only excluded if one of a convoluted set of exemptions can be met. Some of these exemptions include where the contract for services are not ordinarily required for less than 180 days in a financial year or where the services provided by the contractor do not exceed 90 days in aggregate in a financial year.

These exemptions do not reflect industry practice in the residential building industry where contractors are engaged and paid on a "results" basis. Accordingly the days taken by a contractor taken to perform a task are irrelevant provided it is completed within contractual (or scheduling) deadline.

In order to satisfy these exemptions, businesses that engage independent contractors need to record days worked onsite (through site logs and the like) when in many circumstances in the past this was not strictly necessary.

Therefore this change has added rather than decreased the regulatory burden on businesses in the residential building industry for no gain in productivity or changes in the quality of building work.

## 2.3 Occupational health & safety

HIA supports the broad principle of national harmonisation in the area of occupational health and safety laws as a way of eliminating unnecessary barriers for those businesses that operate across jurisdictions. However, unfortunately many of the prospective benefits to the community of harmonisation have been exaggerated whilst the costs to small businesses, the majority of whom do not operate across jurisdictional borders have been understated.

HIA considers that for many small to medium sized enterprises that currently only operate within one state or territory, there will be no immediate economic or tangible benefit from harmonization of OH&S laws. To the contrary the new regulatory framework imposes upon them additional cost, red tape and regulation, and the ultimately rushed implementation has provided unnecessary duress to the transitional period for those states that have proceeded to introduce the changes, again placing upfront costs on business in the early stages of implementation that could have been avoided.

From the outset, while the process for development of the model Act commenced in 2008 and concluded in 2011 with the passing of model legislation, much of the detail required to supplement the broad duties is contained within the model Regulations and draft codes of practice which were developed over a much shorter timeframe and with limited industry consultation.

Industry specific codes were not formulated with the direct engagement of industry representatives and key stakeholders.

Also the Regulatory Impact Assessment that accompanied the Model Act was inadequate, focusing too heavily on the minor savings that will be made by the small 3-4 per cent of businesses who operate nationally.

In this regard, HIA does not believe that the Regulatory Impact Statement (RIS) is an accurate assessment of the impact that the legislative changes will have on specific industries and individual jurisdictions, particularly where that jurisdiction has a substantially different system (such as South Australia or Tasmania) to the current proposal. The RIS does not contain a true assessment of the 'actual' costs and benefits, but provides broad statements about the potential for larger national business to benefit from net saving without any consideration for the costs to small businesses to make substantial changes to their business.

The absence of sufficient state specific and industry specific regulatory analysis has also made it difficult to provide well considered analysis of the effects of the proposed legislation. While states such as Victoria and Western Australia have, appropriately, embarked on their own process of developing a regulatory impact assessment, for those states that did not, the result has been the inappropriate fast-tracking of a legislative package without adequate identification of the impacts or net benefit of the legislative change to the community.

In fact, for the residential building industry the result has largely been a consolidation of the regulation, increasing the regulatory burden in most states without any corresponding benefit.

Importantly the Productivity Commission has noted that the move to national harmonised OHS laws is occurring against a backdrop of continued reductions in workplace injury and illness rates and inter-jurisdiction cooperation. HIA has concerns that several elements of the proposed harmonised laws and regulations will operate to the detriment of existing practical safety solutions and it will take several years for any cost savings from harmonization, rather than from changed practices, to be realised.

Of further note, Safe Work Australia conducts 'Comparative Performance Monitoring (CPM)' and reports on workers compensation data on a state by state basis. Of note, the last report (prepared in October last year) found that:

> *The reduction in the incidence rate of injury and musculoskeletal claims between the base period (2000–01 to 2002–03) and 2009–10 was 25%, which is below the rate required to meet the 2002–2012 National OHS Strategy target of a 40% improvement by 30 June 2012. South Australia was the only jurisdiction which met the required rate of improvement with 39% improvement.*

South Australia is facing some of the most significant changes to the WHS framework yet it is the best performing state in terms of improvement. The data does raise some questions around the benefit of introducing such change and disruption when it seems that the current framework is delivering positive results.

***Scope for improvement of the national OHS regime?***

There is much scope to improve the national OHS regime and has made previous submissions in relation to the Act, Regulations and Codes of Practice which highlight HIA's position.

To avoid repetition, HIA will not traverse all of these previous submissions, but there are a number of broad principles that are essential to securing positive improvements to the national OHS regime.

Firstly, OHS laws and regulations should:

- be framed so that duty holders are be able to know with certainty that they have complied with OHS laws;
- be accompanied with practical, user friendly guidance exist to help them understand what compliance looks like;
- be accompanied a culture of education, consultation and improvement precede any enforcement action.

Secondly, fair and reasonable harmonised laws must be uniform and balanced, based on practical safety solutions, provide certainty of compliance, and must be justified by real and accurate data.

HIA's view is that many of these objectives were not satisfied due to the haste at which the current reforms were rolled out and deficiencies in consultation processes.

Improvement to the national OHS framework can only be achieved via industry specific consultation and via the development of practical guidance that is accepted and embraced by industry as an appropriate way to discharge their obligations and provide a safe work environment.

## 2.4 Development assessment

Development assessment reform is fundamental to improving the operations of many businesses within the residential building industry. Timely and appropriate delivery of new land, assessment of developments that require approval and the appropriate management of minor residential works to limit approvals, are essential elements of the planning system. Getting things right can assist in maintaining and improving housing affordability.

COAG has been taking actions in the development assessment reform area for many years and their efforts are generally supported by industry. However without a national administrative framework for development assessment to effectively implement such changes, the outcomes and benefits of these reforms often fall by the wayside.

The current development assessment reforms seek to deliver outcomes in the five focus areas. Yet there is no implementation framework in place to engage the Commonwealth and States to adopt these reforms. The demise of the Local Government and Planning Ministers Council which could have assisted to push for implementation in some manner will not improve this situation, along with the removal of Commonwealth's support for the Development Assessment Forum in December 2011.

For these reasons it is difficult to accept that significant benefits will flow from the development assessment reforms. Those that do evolve will be limited to those states that choose to implement actions such as electronic development assessment or the code assessment. The national planning principles and the benchmarking exercise will have little value to the residential building industry. These types of outcomes will serve to shine a light on the performance of states and territories but will not demand any actual changes in performance.

In relation to the direct impacts of the reforms, the Commission has identified the categories of potential benefits as:

- More consistent development assessment processes for applicants costs
- More effective development assessment processes on applicants costs
- Changes to government administrative costs and
- Reduced impediments to operating across jurisdictions on productivity.

The presumptions that benefits will flow are understandable, but the reality is that the disjointed administrative framework does not guarantee any real benefits from these reforms. There are only potential benefits and more direction is needed by COAG to realize the benefits suggested by the Commission.

The Report fails to recognise that the development assessment system is only one part of the residential building process. It is unclear if COAG considers that the reforms will improve both planning and building systems or just planning systems. Traditionally the planning system is the more time consuming, complex part of the building process, but the issue is raised in the context of the code assessment project. Code assessment should be focused on the delivery of a 'one approval' approach to single dwellings. This is alluded to in respect to the potential shift towards greater use of private certification (p. 271). However in all states and territories, private certification remains the realm of the building approval process and has been avoided in the planning process.

As stated previously, the operation across jurisdictions for residential builders and developers in minimal and the development assessment process has no impact on the manufacturing and supply sector. Therefore minimal benefit will be realized on this front from the reforms.

Table 14.4 suggests that there would be direct impacts on DA applicants from the performance monitoring and national planning principles. The is more likely to be indirect benefit as they have no bearing the actual processes of development assessment for an applicant.

Table 14.5 is a good example of industry's concerns in relation to benchmarking of performance, given in 2009/10 only half the jurisdictions were able to report information. Whilst Table 14.1 has numerous disclaimers to explain why the information cannot be compared, which again highlights the problems with current efforts at benchmarking.

The estimated benefits of electronic development assessment need to be qualified as to their context. The simple process of 'lodging a DA online' is an important first step, but to the real reforms will come from improvements in the 'assessment' process which to date remains a hands on, administrative process for planners and other staff. The assumptions of the DAF cost

benefit assessment are nowhere far from realization, in particular the improvements 10 years on. This is in part reflected in Table 14.7.

The estimated benefits of code assessment rightly refer to the changes in NSW which were well underway before the COAG reforms were introduced. They have made a significant change in NSW on the basis that only 'one approval' is now required for many homes that had previously required two approvals. It is important for the Commission to note that in most other states, apart from Tasmania, houses already required only one approval. Therefore the code assessment work will have much less of an impact for single dwellings in those states.

South Australia is mentioned in relation to the expansion of complying developments. Again outside the scope of the COAG work, changes were introduced in 2008 however they were underutilized and overridden by local government and 4 years on, work is now being undertaken to attempt to have these changes operate as originally intended and capture the majority of low risk development types, including housing.

Overall, it is not considered that the identified benefits will be as significant as proposed.

## 2.5 National construction code

The development of the National Construction Code (NCC) is a matter HIA has been closely involved with as both a member of the Australian Building Codes Board's (ABCB) Building Codes Committee and now as a member of the new Plumbing Codes Committee.

The reform to amalgamate plumbing standards and in the future electrical and potentially telecommunication standards has merit. The adhoc approaches under state regulations have served to create complexity in the standards over time. However most of the complexity in the regulation of these activities lies within the administration framework. That is, at the state and local government level are the standards applied consistently.

In HIA's submission to the House of Representatives Standing Committee Inquiry into Plumbing Products in 2007, the disjointed nature of plumbing administration was highlighted as key problem for plumbers day to day operations.

The development of the plumbing code will have little impact on the administration of plumbing regulations. Although it is clear that several states have made adjustments to the number of water authorities in their jurisdiction with a view to reduce their number, which is encouraging.

The reference to not every state having adopted the NCC in their legislation (p.290) is slightly misleading in that (as stated later in the report) every state and territory has adopted the BCA components of the NCC through legislation since the mid-1990s. The new referencing only needs to take effect for the purposes of the plumbing code (and in some cases, the change of name of the BCA to the NCC).

The report correctly nominates the direct impacts of the NCC as being improved consistency between building and plumbing regulations and a more flexible compliance regime for plumbing. Also the costs are likely to arise from the transition required in legislation, administration and operation.

HIA would also argue that there may be a direct impact from the future scrutiny of plumbing standards through the COAG principles for best practice regulations. Up to now, AS 3500 and the original PCA were not treated as national standards, despite being referenced by all state and territories legislation. The transition to the NCC will ensure that all future amendments are subject to a cost benefit assessment and ensure plumbing regulations are minimum necessary practice.

The Report seeks feedback on whether extending the NCC into other areas of construction has of merit. Any reforms that serve to ensure building regulation in all its forms meet minimum acceptable standards, in accordance with COAG's own requirements for regulation are supported. However harmonization that does not include effective changes in the administration processes can be less meaningful.

# 3 Vocational Education & Training

## 3.1 Impact of COAG Reforms

Attempts to achieve higher productivity levels through the current VET reforms, at least in the residential construction industry, are like to be thwarted given that the measures:

- omit to regulate the manner in which Registered Training Organisations provide training services,
- fail to incorporate the recognition of a wide range of skill sets in the National Training System to meet the needs of the residential construction industry workplace, and
- seek to increase the scope of the training that is to be provided by the VET sector to overcome the lack of skills that have been caused by (yet is properly the responsibility of) the compulsory school system.

The Report suggests that changes to prices are minor in relation to wages, however experience shows that businesses in the residential building industry are very cost-sensitive to increases in wages. The connection between training and wages in the residential building industry is significant and it is not appropriate to presume that small shifts will not be relevant to the ultimate costs and benefits of the reforms.

### Foundation skills

The Report seeks feedback on whether gains from productivity from improved LLN skills are achievable. HIA considers that the presumption that increases in an individual's language, literacy & numeracy skills should translate into an increase in both productivity and workforce participation is too simplistic and fails to take into account the fact that the level of literacy, language or numeracy skills currently possessed by learners in the VET sector, especially school leavers, falls well short of industry's expectations.

Although it is envisaged that the registered training organisations will take responsibility for this additional training, feedback received from HIA members is that they have had to shoulder at least part of this responsibility in order to bring their apprentices as close as possible to the minimum standard required for the workplace.

This unexpected need to include a remedial teaching component when providing on-site learning for an apprentice needs to be taken into account by the Productivity Commission, as it has an adverse effect on the employer's productivity levels.

## 3.2 Issues for Further Consideration

### Information for Students

Providing VET students with the information they need to make an informed decision about their career path assumes a degree of uniformity amongst training providers, especially with respect to quality. Unfortunately this uniformity does not exist and will not until there is more regulation of the manner in which Registered Training Organisations deliver training services in the VET sector.

### The quality of student outcomes

The Report rightly identifies that there needs to be more control over the quality of delivery of VET to realize improvements in training outcomes.

## Completion rates

It is common for tradespeople to focus on an area that represents a very narrow field of expertise within their trade. Hence non-completion of a full qualification due to the attainment of one's goal in a particular field is common within the residential building industry. The decision to cease training, albeit part way through a broader qualification, is a specific choice and not so much a matter of circumstance. It is recognized as best suited to the way in which a modern worksite operates for residential building trades.

The high level of 'non-completions' is more a reflection upon the fact that training packages are not sufficiently flexible to allow for the recognition of successful completion of 'skills sets' and for the ability of a student who has 'not completed' to re-enter the VET sector at a later stage in order to gain further skills sets and/or a full qualification.

## The importance of sequencing to successful policy initiatives

The Productivity Commission needs to allow for a much longer lead time for the first of this five stage process, as there will be a significant time-lag associated with an improvement in performance.

The new regulatory measures are still in their infancy, especially as not all jurisdictions are subject to the one set of regulations and those that are not bound by ASQA will each include their own regulatory measures.

The current regulatory reforms for the VET sector are unlikely to be effective unless they:

- provide for a minimum standard for entry-level students (especially in terms of language, literacy and numeracy skills but. To a lesser extent, in employability skills); and
- increase the level of control over the manner in which Registered Training Organisations deliver training services.

In addition, consideration needs to be given to the fact that competency-based progression of apprenticeships is currently being introduced by the Australian government which is only consulting with AIG, ACCI and the ACTU. Unfortunately, as has been evidenced by those OH&S reforms that have been recently introduced, this type of industry consultation is clearly inadequate. The reason or this is due to the fact that these reforms areas (being OH&S and the VET sector) have a significant practical effect on the manner in which businesses operating in the residential building industry carry out their business operations.

The industry bodies that have been chosen to consult with the government have an inadequate level of understanding of how these reforms will affect businesses that operate within the residential building industry, in particular low rise domestic construction.

Until industry bodies such as the Housing Industry Association are invited to be part of all aspects of the consultation process when reform is planned for areas that have a significant effect on a residential building business's operations, productivity goals from VET reforms are like to have little real effect.