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Dr Michael Keating AC
Chairman
Regulation Review
Independent Pricing and Regulatory Tribunal
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Dear Dr Keating

I am writing in response to the Independent Pricing and Regulatory Tribunal (IPART) draft report into the burden of regulation in NSW and options to improve regulatory efficiency. HIA contributed an earlier submission for IPART's consideration and welcomes the opportunity now to comment on the draft report.

As you are aware, escalating red tape is a critical issue for the building and construction industry. The majority of our members are small businesses who struggle daily with the increasing burden of maintaining current knowledge of regulation and ensuring compliance. The amount of paperwork and regulatory requirements faced by businesses in the housing sector, including occupational health and safety (OH&S) requirements for extensive paperwork, increasing planning regulation initiated by local councils, regular professional development requirements, taxation paperwork and general business administration, has contributed to becoming an overwhelming administrative burden, providing a disincentive to continue in business and affecting the costs of housing to consumers.

The Tribunal identified three broad priority areas where regulatory reforms can provide significant, immediate gains to business and the community. These included improvements to regulatory processes, resolving cross jurisdictional issues and a range of other issues specific to NSW.

Adoption of proper regulatory processes

Recognising current systemic failures within the regulatory system is a first step to resolving them. HIA is encouraged about proposals to adopt 'good regulatory practice'. Given that regulators do not consistently apply existing NSW statutes and guidelines for developing and implementing regulation, HIA welcomes IPART's recommendation that Government take immediate steps to strengthen and enforce processes for regulatory design, development, implementation and monitoring. Every effort should be made to discourage the development of poor regulation.

IPART's recommendation that the government establish a 'Better Regulation Office' located in the Premier's Department, could prove an important vehicle to oversight and report on compliance with good regulatory practice by all departments and agencies. The office should play an important role in assessing regulatory impact statements and reporting to the minister on the status of regulatory reform. The Victorian Competition and Efficiency Commission (VCEC) performs a similar role in Victoria in monitoring the development of new regulation, reviewing regulation efficiency, removing areas of duplication and encouraging competitive neutrality. VCEC is now moving to

establish parameters for "good regulation" which could prove a useful model for the Better Regulation Office.

The development of any new regulation should be transparent and accountable. Agencies or Departments which formulate regulation as part of their core responsibilities should equip themselves with the knowledge and skills necessary for developing good regulation. As a matter of practice, agencies should be encouraged to explore non regulatory options or incentives before resorting to new regulation. No regulation should be adopted without a thorough, independent RIS.

Sunset provisions should also be included in regulation as a matter of course. These provisions should trigger a mandatory review and revocation of regulation after a set period. "One in, one out" provisions should require agencies to identify existing regulation that will be removed by way of an offset to any new regulatory proposals. IPART's recommendations regarding that simplifying, repealing, reforming or consolidating existing regulation should be routinely considered as part of the regulatory development and impact assessment process may achieve this outcome.

The Tribunal's review also identified a range of 'cross-jurisdictional issues' related to inconsistencies, duplication and/or overlap between NSW regulations and those of other states and territories and/or the Commonwealth in a range of areas. While reform of these cross jurisdiction issues rests in an intergovernmental process, possibly COAG, the Tribunal's recommendation that the Government establish a multi-jurisdictional taskforce to develop national standard drafting protocols and terminologies should be explored. The role of this taskforce could be extended to vetting new legislation. COAG would be the appropriate vehicle for the establishment of this taskforce.

The Tribunal's review identified a large range of regulatory areas in which stakeholders believe NSW regulations impose unnecessary administrative or compliance burdens. HIA's submission made reference to specific improvements to regulation across four main areas including occupational health and safety, planning and development, continuing professional development and business operations.

1. Occupational Health & Safety

HIA contests the recent review of the Occupation Health and Safety Act 2000 was not wide ranging enough and did not engage with a broad range of stakeholders. HIA supports IPART's recommendation that the planned review of the OH&S Regulation proceed as a matter of priority next year.

Specific recommendations that the Victorian non-mandatory model for Safe Work Method Statements and Management Plans be investigated are very encouraging, as is the suggestion that Clause 56 of the Regulation governing "falls from heights" be reviewed to take into account practices adopted in other jurisdictions. These were both specific HIA suggestions.

HIA welcomes the recommendations that draft NSW OH&S codes of practice be subject to proportionate cost-benefit analysis and consultation and most importantly that the OH&S Act be reviewed again within five years of commencing amendments to the Act. HIA believes that IPART has recognised the significance of OH&S to the housing industry but maintains that the review should commence sooner rather than later.

HIA is also pleased that IPART has recommended that the Government endorse the Federal Regulation Taskforce's recommendation in the area of workers compensation, and support efforts, to achieve national consistency in key areas of workers' compensation, including:

a) Return to work arrangements;
b) Key definitions, such as worker, wages and injury;
c) Premium payments for businesses operating across borders;
d) Audit requirements of each state authority;
e) Reporting and documentation requirements; and
f) Self-insurance arrangements.

IPART recommends that the Government undertake a post implementation review (no later than two years after implementation) of the Definition of Worker arising from the Macken Report. HIA supports a review of the recommendations contained within the Macken Report. HIA remains concerned that the Macken report did not resolve definitional problems created by deeming contractors to be employees. Greater certainty is needed on the current base definition of a worker.

HIA notes that the proposed solutions of having contractor determinations are impractical and inefficient for the construction industry. For example it is not appropriate that a business provide a draft contract to obtain a ruling and then wait for the outcome of that ruling before proceeding. In construction a builder cannot do this for the 20 or more contracts required for each and every project. The efficiency loss associated with handling this new "mountain of red tape" would be significant. Builders need to be able to make an accurate assessment of the costs to be incurred when a contract is signed and not be fearful of the relationship being recast later down the track.

HIA believes that deemed to comply solutions in other Codes of Practice which inform small business in a practical, effective manner on how to comply with a duty will both raise compliance and improve safety while reducing business costs.

IPART does not specifically address HIA's recommendation that the NSW *Code of Practice – Electrical Practices for Construction* be withdrawn from the OH&S Regulation. However, the planned review of the OH&S Regulation will provide further opportunity for HIA to raise this issue.

2. Planning and Development Regulation

IPART recommends that the Government realise efficiency gains in the area of planning and development by considering an expansion of 'exempt' and 'complying' development and by streamlining or removing concurrence and 'integrated development' requirements. HIA welcomes this approach.

HIA also strongly supports IPART's recommendation (number 21) that the government enter into an assessment bilateral agreement under the Environmental Protection and Biodiversity Conservation Act 1999 with the Commonwealth and expedite the signing of such an agreement.

In relation to recommendation 60, HIA supports the Master Plumber's recommendations of a review of plumbing and drainage regulation in NSW, in consultation with stakeholders, to identify the optimal model of regulation in the context of the changing water and energy infrastructure.

It is unfortunate that IPART has not specifically addressed HIA's suggestions of adopting plain language regulation, standardising notification processes for DAs or extending the role of private practitioners to 'sign off' on development assessment processes. These initiatives would have generated significant efficiency gains and reduced the red tape burden on industry, consumers and

local government, IPART also makes no reference to HIA's suggestion to reduce the number of mandatory critical stage inspections for specific classes of buildings. The lack of response on these issues makes it imperative that a review of the Environmental Planning & Assessment Act 1979 be triggered.

IPART also recommends that the Government conduct a post-implementation review of BASIX to identify whether BASIX is meeting its objectives, and publicly report its findings. HIA strongly supports this recommendation on the basis that BASIX only affects 2% of the total housing stock (new construction) in NSW. The Government should move quickly to assess the ongoing environmental impacts of existing housing stock and consider incentives to encourage retrofitting.

3. Continuing Professional Development

Although this matter was raised by HIA as a specific impost on business, the IPART report has not made any specific recommendations on CPD. Most HIA members doubt that compulsory training is required but instead believe knowledge is gained by experience and practical training initiatives.

HIA highlighted the limited consultation and investigative process leading to the introduction of CPD. There was no regulatory impact assessment undertaken prior to the introduction of the CPD scheme and no subsequent review of the net benefits of the scheme to the economy, the industry or consumers. The scheme appears to have been adopted on the basis of presumed support from the industry and anecdotal reports that building skills had diminished. There remains a tendency to confuse skills issues with licensing, contract management and dispute resolution, the result being the development of poor regulation.

The only independent review of a CPD scheme was conducted in Victoria in June 2004 which found that benefits were marginal and fell away when CPD required more than 12 hours a year. There has never been a comprehensive or independent study that substantiates for the need for mandatory CPD in New South Wales. HIA remains opposed to mandatory CPD and the link between CPD and licensing. The existing CPD scheme should be subjected to periodic independent reviews to assess the benefits and whether they justify the significant public and private costs involved in such a scheme. HIA remains committed to this suggestion and recommends that IPART give it serious consideration.

On a separate front, it appears that the Office of Fair Trading, while still committed to CPD, is reconsidering current arrangements and the relevance of acquiring CPD points. HIA is concerned that this limited review is only considering the procedural aspects of CPD whilst not challenging the notion of its relevance, benefits or its mandatory status.

4. Operating a Business

Consistent with HIA's recommendations, the draft report contains recommendations that the processes associated with registering and establishing a business be streamlined. HIA also welcomes the suggestion of a more centralised system and an enhanced role for the Australian Business Register.

HIA supports Recommendation 17 which asks the Federal regulation Taskforce to streamline business names, ABN and related registration process. Consideration should be given to the insertion of an indicator to an ABN showing that the ABN holder is registered for GST. It is an unnecessary and onerous burden for HIA members to perform an on-line search to confirm the validity of an ABN and check whether the holder is registered for GST, particularly given the sheer volume of contractors that are involved in any one project.

IPART has also recommended working with other states/territories to harmonise payroll tax administration to reduce definitional differences for 'employees' and 'contractors' and to ensure consistency with Workers Compensation legislation. HIA strongly opposes any alignment of definitional differences for "employee" and "contractor" where this results in the deeming of payments to particular types of contractors to be "wages". If such recommendations were to proceed, public submissions ought to be sought and given due consideration.

Any discussion paper that is released for comment on this topic should identify:

- Why there was a need to have statutory provisions that deem particular types of contractors to be treated as employees;
- What the underlying assumptions or premises were at the time such a need was identified; and,
- What the definitional differences between jurisdictions are and the reasons for these differences.

Any review should also invite submissions on whether the underlying assumptions remain valid, whether legislative solutions in each jurisdiction achieve their objective, whether jurisdictional differences can be reduced or eliminated, and whether harmonisation of definitions would effectively reduce the red-tape burden.

If such an approach was not adopted, any moves to harmonise definitions would be perceived as purely a revenue-raising exercise without any or due consideration being given to the appropriateness of relevant definitions in the first place. It is worth noting also that the current provisions are so wide, that any steps to harmonise definitions on the basis of them being anti-avoidance measures, would fail.

The approach adopted in Queensland with its workers compensation legislation may be a preferable option. This approach involves the adoption of the APSI tests so that if a contractor passes the "results" test (or any of the other APSI tests), then the onus to prove that the relationship is not, in substance, one of head contractor and sub-contractor, rests on the entity alleging that the relationship is in substance, one of employment. To have anything less would be conveying a message that all contractor relationships are a sham, generating commercial uncertainty and extra costs for both business and regulators.

With respect to the harmonisation of the provisions relating to common law employees (such as FBT treatment and grouping provisions), HIA welcomes any development that would ease the compliance burden to business, so long as the substantive differences in treatment in each jurisdiction were identified and, after due consideration of submissions from the business sector, appropriately addressed.

IPART also provides numerous recommendations on insurance to limit state/Commonwealth overlaps and inconsistencies and state/state inconsistencies in Home Warranty Insurance. While these overarching recommendations will capture some of HIA's recommendations on home warranty insurance, HIA remains committed to reforms to the scheme for the benefit of builders, insurers and consumers.

Specifically HIA suggested that current insurance arrangements could be improved by:

- A completion "guarantee" on all residential building projects involving structural work. Non-structural work should not need to be covered, as currently applies in South Australia;

- A rectification "guarantee" for five years (not six and a half or seven years) limited to major structural failures in a new home or extension leading to lower premiums;
- Post-completion warranty insurance to cover non-structural defects should be available from insurers, just like house and contents, but would not be compulsory;
- 'Spec' builders and developers should only have to arrange the rectification guarantee prior to the title of the property being passed on to a consumer and then just for the balance of the tail period (as currently applies in Victoria);
- Inactive builders who want to maintain their building licence should not need to have a warranty insurance eligibility as currently applies in the eastern states; and
- A consumer to be able to waive the requirement on builders and cabinet makers to take out warranty insurance providing a solicitor has explained to the consumer the consequences of not having cover. Standard information and disclosure statements should accompany consumers opting out of the statutory scheme. This would end the practice of consumers representing themselves as bogus owner-builders to avoid the costs of warranty insurance.

IPART also recommended that the Government consider reviewing the Insurance Act 1902, to identify any unnecessary provisions and requirements. This could provide a further opportunity for industry input on changes to general insurances but would not specifically cover home warranty insurance. HIA's recommendation of an immediate review of the *Home Building Act 1989* will capture the insurance requirements of concern contained within the Act.

IPART also makes specific recommendations on government procurement outcomes, participation of small and medium sized enterprises in government procurement markets and processes, delays and thresholds. HIA supports IPART's recommendations but cautions that any additional mechanisms designed to improve processes should not create additional layers of red tape.

The IPART report did not consider business licensing or the proposal suggested by HIA that there be an exemption from redundancy available for small business. HIA asserts that redundancy should be narrowly defined to ensure it only applies where the employee's position is no longer available as a result of a downturn or restructuring. Redundancy payments should not be available simply due to the fact that an employee ceases to be employed.

5. Regulatory Alternatives

Included in the scope of this review was the option to identify regulatory alternatives. HIA submitted that where regulation is required, the emphasis should always be on outcomes sought rather than the method of achieving them. Light touch regulatory alternatives should be considered in preference to the current regulatory approach including:

- Incentive based regulation;
- Quasi regulation;
- Industry involvement; and
- Information disclosure.

Wherever possible, non regulatory alternatives should be pursued including education campaigns and self regulation etc.

IPART recognises the serious shortcomings of the current regulatory process in NSW and notes the lack of incentive for government, departments and agencies to genuinely explore non-regulatory alternatives.

IPART recommends that the proposed NSW Better Regulation Office be charged with ensuring that alternatives to regulation are considered and pursued where practicable. HIA suggests that the newly established office access stakeholder's suggestions of regulatory alternatives and where regulation is necessary, pursue light handed regulatory alternatives.

HIA welcomes the opportunity to provide further comment on these important initiatives and would be happy to meet with you in this regard. Should you require further information please contact Anita Campbell (Policy Co-ordinator) on 9978 3349.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LTD

Wayne Gersbach
Executive Director – NSW