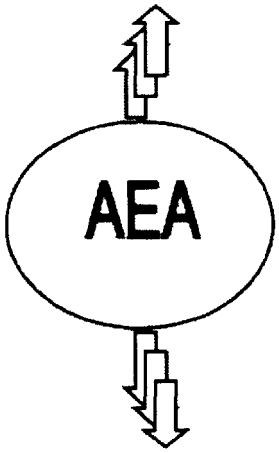

Submission to the

Productivity Commission Research Study

Reform of Building Regulation

By the Australian Elevator Association (AEA) which represents the lift, moving footway and escalator industry in Australia.

We thank you for the opportunity to provide input to this valuable research project.

This paper provides some information to help answer some of the questions raised in the issues paper.

Our members are regularly involved in and influenced by ABCB processes. A review of the draft Premises Standard is our most recent major involvement with ABCB processes and therefore we are well informed and able to provide comment to questions raised in the issues paper relating to it.

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1.1 Background to this study

1.1 ***Have reviews of*** *the regulation of* ***the building and construction industry asked the right questions and identified the areas most in need of reform? Has adequate follow-up occurred to ensure accepted recommendations were adopted and assessed ex-post for their effectiveness?***

1.2 Scope of this study

1.2 The Commission welcomes comments from interested parties on the intended scope *of* ***this study.***

It could be valuable for the Productivity Commission to review public comments submitted to the ABCB in relation to the draft Premises Standard and its Regulatory Impact Statement. This would give greater insight into the quality of work at the ABCB.

2.1 The Commission's approach - Effectiveness

2.1a Is the mission statement of ***the ABCB the appropriate one for the intergovernmental body responsible for reform of building regulation?***

> The ABCB Mission Statement:
> "To provide for efficiency and cost effectiveness in meeting community expectations for health, safety and amenity in the design, construction and use of buildings through the creation of nationally consistent, building codes, standards, regulatory building requirements and regulatory systems"

The ABCB mission statement should be updated to reflect today's needs. When the mission statement was formulated, the major task ahead of the ABCB was to remove inconsistency in building Regulation between States and Territories. We believe that has largely been achieved and the focus on the task ahead needs to change.

The issues paper states that nationally consistent regulation is considered pivotal to achieving efficiency and cost effectiveness. While nationally inconsistent regulation would hinder those outcomes, flexibility in regulation founded on proper risk management can also deliver those outcomes.

Consider this case as an example where the need for national consistency and codes has faded. Some might see this as regulatory microcosm with parallels to BCA regimes:

> The preface of the lift design code AS CA3 Part 11 1971 (a precursor to the AS 1735 series of standards) states that one of its chief endeavours is to achieve "uniformity of Statutory Lift Regulations." Many years ago national uniformity was a major driver of change within the lift codes. Uniformity has not been a driver of change within the Australian lift standards for at least a decade. The main drivers of change behind the lift standards nowadays is allowance of use of the worlds best product through the use of internationally accepted nonprescriptive essential safety requirements, based on hazard identification and risk analysis. This international approach is facilitating the development of innovative and safer elevator products that would not have been possible under the old prescriptive codes. It could even be argued that the current drivers would be

counter to attaining uniformity or consistency. The difference now is that any non-uniformity is driven by manufacturers intent rather than regulatory flaw.

The Australian lift and escalator design standards were very prescriptive and they still contain much prescription albeit greatly improved in recent years through harmonisation with international standards. However even as far back as 1986 the elevator standard AS 1735.1 contained `performance' statements intended to allow flexibility and variance from the deemed to satisfy prescription. It stated about the lift standards:

> *"It is not intended to impose unnecessary restrictions on design, construction, operation, testing, maintenance and inspection of lifts escalators and moving walks or on the development of new, improved, or unusual methods and materials "*

But in reality this `performance based' statement did not work to allow other than compliance to the prescription. The reason is that key persons such as consultant specifiers and government authorities wanted and enforced strict compliance to the prescription status quo.

Advancement towards true performance based regulation that would give flexible and better elevator designs based on risk management only became a reality in 1995 when the Victorian government published the Occupational Health and Safety Plant Regulations. Under that Regulation, like other States, hazard identification and risk management became paramount. However the critically outstanding element of Victoria's regulation was that it did not prescribe compliance to any lift design standard whatsoever. Sure, other States published similar style OHS legislation based on the National Standard for Plant prior to and after Victoria but none of the other States produced a truly productive impact like Victoria. In contrast, all the other States mandated compliance to the status quo; AS 1735. Those other State Regulations only gave the Authorities the power to approve alternative design standard input sources

The Victorian legislation writers knew many things;

- There was great potential for many plant design codes and standards to be inherently flawed and outdated
- Many codes and standards were uneconomic and restricted trade - despite claims to the contrary
- Specification of compliance to a standard would mean that the State government would need to operate a costly ongoing `exemption' scheme. And in providing exemptions the government would be once again increasing their liability risks.
- State authority leaders would defer to `technical experts' within their organization regarding any decisions to allow alternatives. Typically these people came from the plant inspectors ranks.
- Those `technical experts' would not have the capability or incentive to make decisions and therefore would resist change.
- The `technical experts' would employ a range of unreasonable tactics such as delay and obtuse objection, to prevent the use of alternatives. (Note that the Victorian OHS plant legislation, unlike any other, actually imposes a deadline on the State plant authority for registration of plant

designs and if the deadline passes without government response, the design registration is automatically granted.)

No other State took such unique regulatory steps to encourage productivity and safety in plant design. The Victorian lead combined with mutual recognition was eventually able to provide enough leverage on other States to achieve reasonably uniform plant design outcomes across Australia. Since that time the Australian lift industry has undergone substantial change that has greatly aided productivity.

There are however unusual circumstances: Queensland has plant Regulations that are much the same as most other states in that they generally follow the National Standard for Pant but lack the crucial productive regulatory elements that the equivalent Victorian Regulations contain. However those deficiencies have not mattered very much in the State of Queensland because the people who administered plant design Regulations over the last two decades have had excellent attitudes in relation to plant engineering and business. The good outcomes in Queensland came from progressive government culture rather than great Regulation.

In summary; while substantial bodies of prescription exists, unless entrenched government authorities (and independent certifiers too) are compelled to accept performance based solutions and unless their capacity to unreasonably resist is diminished, performance based regulation will be a facade.

The BCA regulatory regime has many parallels with the lift industry regulatory regimes prior to the great change;

- A great quantity of deemed to satisfy prescription being maintained and growing
- A large number of people committed to the prescription for various reasons
- A substantial `compliance' mentality among regulators and industry too
- Performance based provisions that inspectors & certifiers have `difficulty' in applying
- A regulatory regime that promotes "tick & flick" compliance and hinders uptake of broad risk management technique
- Authority exemption and approval schemes are inherent and central to advancement
- Risk of `technical experts' within authorities unreasonably resisting alternatives
- Ignorance of international standards and practices

When we view the BCA with this historical example in mind we are confident that many productivity, efficiency & safety improvements can still be made to the broader building industries. But more needs to be done to lessen the status of Deemed to Satisfy provisions and increase the status and usefulness of performance based provisions.

The ABCB mission statement unfortunately places too much emphasis on creating codes, standards, and regulation. And indeed the culture at the ABCB, based on the output, seems to be one of needing to codify and prescribe "how" to comply. There appears to be too much attention paid to maintaining a `design manual' or `recipe book' to aid the wishes of inspectors and certifiers for simplistic process and lowered public liability insurance costs. In doing that the ABCB is probably overly aiding a small (inspection) sector of the building industry at the expense of the vastly larger whole.

Great effort & research goes into creating strict & specific deemed to satisfy codes that do not focus on broader management of risks and attainment of economic outcomes. The ABCB approach seems to be; "We will analyse the data, we will do the thinking, we will tell industry what to do." Their recent Access Code publication associated with the Attorney Generals Premises Standard for disabled is testimony to this claim. Instead of more prescription, more needs to be done to empower industry to make informed and economic decisions for itself.

It can be argued that the existence and status of the deemed to satisfy prescription actually detracts from improvements to safety in that it causes governments, the building industry and building users to cut short proper efforts to more fully comprehend risk and the foreseeable. For instance, the BCA does not adequately address the risks of people and objects falling from structures in buildings and it is known that deaths have occurred due to falls into voids surrounding escalators. Are substantial efforts and priority towards compliance and maintenance of BCA DTS provisions contributing to this issue remaining neglected?

The ABCB may well claim that the BCA provides for flexible solutions under the performance requirements, however the reality is that majority of BCA user's simply prefer to follow the deemed to satisfy approach, ignorant to, or uncaring of the disadvantage it brings. Furthermore many people place excessive faith in the concept that if you comply with government prescription you will be safe from injury and safe from prosecution and that faith drives them to follow a simplistic compliance approach. This is certainly one driver behind the Premises Standard developments. Our experience is that this approach of seeking absolution is wrong and dangerous and State OHS legislation even tells us that it is wrong. For these reasons the importance of Deemed to Satisfy codification needs to be de-emphasized and the mission statement is the starting point for that change.

2.1b What are community expectations for health, safety and amenity in the design, construction and use of buildings? Has the ABCB been able to adequately determine what the community's expectations are, including preferred cost-quality tradeoffs?

Taking the Premises Standard as an example of the ABCB's most recent major effort to determine community expectations including cost-quality tradeoffs, we believe the ABCB have not adequately carried out that task. The proposed regulation appears to be based on too narrow consultation and input and even though the Regulatory Impact statement does not give a good economic outcome the ABCB still chose to publish the draft.

While the ABCB may have a role to play in facilitating the comprehension of `community expectations' we believe that the Australian Community, Government and Industry should not be so overly reliant on the ABCB to determine & dictate community expectations. The ABCB needs to work towards empowering the community and industry to properly consider such issues as `community expectations'.

2.1c Is the definition of ***amenity in the BCA adequate? Should the term refer to the basic needs of a building or to anything that impacts on the comfort, pleasure and aesthetic qualities of a building? Does it give sufficient attention to factors that impact on those not occupying the building? Alternatively, should the term be interpreted more narrowly to provide greater focus?***

2. Id Why is national consistency considered to be the crucial means by which to meet community expectations for health, safety and amenity in a cost effective and efficient manner?

`National consistency' is often stated by many as important for ensuring cost effective and efficient results particularly for industry, however most of the arguments we've seen for it miss the real issue. What is really critical for cost effective and efficient results are requirements that can promote `the best practice' or in the least, that do not impinge on it. Furthermore it must be understood that `the best practice' will continue to evolve.

For example; if there are eight vastly different State regulations and none of them impinge on `the best practice' then there is no problem, (except having to read a lot of legislation). However as soon as one or more regulations impinges on `the best practice' then there is loss of function, efficiency and economy. The more regulations there are that impinge in different ways the worse things get.

Another way to achieve a similar (but different) result is to combine (or federate) the eight regulations into one thereby lessening the risk of the many regulations impinging on the `best practice' and this approach can be called `national consistency'. The BCA follows this model. However a disadvantage of this approach is that the one federated regulation can still impinge on `the best practice' and because it affects everyone in the federated jurisdictions equally then that impingement can go un-noticed. As we have seen in real life, the uniform impingement on our society usually only gets noticed when people or better products from outside the federation are brought into it.

Given that there can be a tendency for States and Municipalities to regulate differently even when there is a good uniform model to work from (eg; National Standard for Plant), there are probably benefits to be gained from general efforts towards national consistency. But it is wrong to identify national consistency as the key to the way forward.

National consistency is a double edge sword. There can be circumstances when national non-uniformity (of regulations) between jurisdictions can provide the beginnings of a more effective and efficient result. This can occur when one jurisdiction produces a superior regulation in relation to its competitors. (eg; Victorian Occupational Health and Safety Plant Regulations 1995). Furthermore if mutual recognition can be applied, then the improved result can be spread from the most competitive jurisdiction to the other jurisdictions. Unfortunately the concept of `national consistency' and institutions and stakeholders that support it can actually stop or slow that improved result from being applied nationally.

Despite commonly known difficulties of regulatory inconsistency between States, there can be advantages in having some regulation controlled by the States rather than at a

federal level. For example; if a bad regulation exists at a federal level then there is little possibility to manoeuvre around it or get it changed. However if bad regulations exist at State level there is greater opportunity for at least one of the eight jurisdictions to regulate for a better way forward. If there is substantial benefit, incentive can be identified to encourage the others to follow. The incentive for attracting business and taxpayers to a jurisdiction can help that process.

National consistency in regulation is in itself not a major concern to our industry, although we would prefer not to have so much regulation to read. If regulation is a must, then industry and society needs those regulations to avoid impinging on capabilities to apply an ever evolving `best practice'. To do that, the regulations must encourage good comprehension of risks and the foreseeable, avoid restricting innovation and avoid creating excessive regulatory burdens. Furthermore extra care needs to be taken so that such regulation prevents reactionary minions within government departments from unreasonably constraining industry.

National consistency is also not necessarily critical for meeting community expectations for health safety and amenity. In fact it can be argued that prescribed national consistency can stifle innovation and advancement in this regard.

The stated needs for national consistency gives us concern that the ABCB are still too beholden to the desire for prescriptive regulation, because national consistency is a crucial element when the foundations of the regulatory regime are overly prescriptive.

The excessive focus on `national consistency' could be detracting from a broader and more beneficial focus that might be labelled `international consistency'.

2.1e How can more progress be made in adopting uniform administrative legislation?

Through greater emphasis on adequate and economic management of risk utilising a standard like AS4360 so that regulation can better drive for economic and effective outcomes rather than uneconomic `how to' recipes.

2.1f ***Is it feasible for all communities and individuals to use the national standard as their baseline, with the option of altering the standards where this better meets community or individual preferred tradeoffs between price and quality? How difficult/desirable is it for individuals or communities to enforce a higher standard than that in the Code?***

2. ***Ig Why are some differences in regulation intractable?***

We have found that many people tend to believe that the solutions they helped prescribe are either the best or the minimum acceptable. Therefore any thing else is either not the best or is going to eventually undermine their own position of quality. Such narrow views are a symptom of generally poor risk comprehension skills and lack of trust. And

that mistrust within Authorities extends not only to industry but also to other jurisdiction regulators.

People put great effort into constructing Regulations and standards and they no doubt take much pride in their work and enjoy the trips and camaraderie that goes along with the ongoing maintenance of it. Understandably they don't want to lose that participation. Therefore it is defended.

We have even seen that various people, including officers of statutory authorities defend bad prescription in order to enforce their ill conceived notions of a `level playing field'. And others have done it to protect their inspection/certification business.

2.1h What quantitative and qualitative indicators would facilitate assessing performance against some or all of the ten objectives of the ABCB?

We believe that the objectives of the Inter Governmental Agreement (IGA) are outdated and therefore have no comment on this until the IGA is upgraded.

2.2 The Commission's approach - Productivity

2.2 ***In what ways has reform*** *of* ***building regulation affected the various measures*** *of productivity of* ***the building industry? Which is the best measure*** *of* ***productivity or should more than one be used? What factors, other than regulation reform, have impacted on productivity? Is it possible to weight their relative importance?***

The BCA is not the only regulation that influences the building industry, and in general it has until recently had fairly benign influences on the lift industry. State Occupational Health and Safety Plant regulations have a far greater influence on the lift industry and reform of it has dramatically aided the lift industry.

A good inverse measure of productivity in the building industries would be the number of persons employed as government and/or third party inspectors.

Free access to global research and development and production capabilities, with technical barriers to international trade removed, has had a substantial impact on productivity in the lift industry in the last decade. That change was fostered by improved State Plant Regulation, styled on Robens law and importantly, a decrease in the numbers and excess powers of government plant design and inspection personnel.

2.3 The Commission's approach - Efficiency

2.3a Should the IGA objectives of the ABCB be changed, or would it be more appropriate for the ABCB to focus on consolidating the changes that have already been put in train? Or are there problems which have neither been fully recognised nor addressed as yet?

The IGA needs to change so that the ABCB's focus is re-aligned with today's needs. In particular, risk management needs to become a core principle of the IGA.

Some brief comments about some of the ten IGA objectives follow:

Objective 1: This objective needs to be completely overhauled because the principles behind it are outdated and are inappropriate to today's needs.

The phrase "Establish Codes, standards, and regulatory systems..." seems to be driving the ABCB down the primary path of prescription that can not deliver adequate regulatory outcomes. Things like `cost effective-ness' and `performance based' are tacked on, to be provided `as far as practicable' when they should be primary.

As we outlined earlier `consistency' between states is not necessarily important and in fact it can be harmful to productivity.

The objective does not focus attention on allowing for unforeseeable technology.

Objective 2 We contend that the ABCB with a $6.5 million annual budget can not hope to have the resource capacity to be able to determine "minimum least cost solutions". Instead the myriad of people in the multi billion dollar building industry are better able to properly assess that in each circumstance. Instead of the ABCB attempting to do the detailed economics, they should direct their limited resources towards empowering industry to make proper informed economic choices that manage risks.

Objective 3 When there is too much prescriptive regulation, then de-regulation will very likely deliver benefits, but deregulation is not necessarily desirable particularly when the regulation is objective based and well structured. The opposite to de-regulation therefore could be called `equipping to think' or `equipping to self regulate'. The ABCB is failing to do this.

Objective 5 If prescription is to be promulgated then more needs to be done to ensure transparency well into the future. It should be possible for anyone to question the foundations of a technical regulation at any time. All too often industry persists with compliance to a prescriptive technical regulation, not really understanding the real technical reasons for it. A new imported technology that does not comply will often be the trigger to questioning the requirements. All too often we are lucky that some person on a technical committee many years ago is still alive to explain the basis for it and we generally find that the regulation was poorly formulated, based on a limited view of the technology of the day.

2.3b The Commission welcomes input from interested parties on the meaning and application of effectiveness (section 2.1), *productivity (section 2.2) and efficiency (section 2.3)* ***in evaluating the performance*** *of* ***the ABCB and the reform that has taken place in the building sector since 1994.***

3 Institutional arrangements

3a What processes involved in developing and implementing building regulation are most likely to deliver outcomes that are effective and efficient, and meet community objectives at least cost?

COAG good regulation principles should be applied more rigorously within the ABCB and also within the Australian Standards committees and other organisations that formulate documents that are referenced by the BCA. In particular risk management should be applied more broadly and the full analysis from it detailed in regulatory impact statements.

Consideration should be given to reclassifying deemed to satisfy prescription as guidance material so that its status in the regulatory framework is lowered.

The term "Deemed to Satisfy" might not be the most ideal term to describe the body of information that it represents. One disadvantage of this term is that it tends to reiterate the idea "this is the best way" or "this is the minimum". Perhaps a better term would be, for example, the New Zealand term "Acceptable solutions". This term helps engender the idea that the DTS information is not the primary means of compliance, but that it represents a limited range of acceptable and unforeseeable solutions.

It seems that there could be a tendency for the term "Deemed to Satisfy" to cause the technical provisions to elucidate a narrowing range of acceptable solutions over time. Other solutions would be left out; to fall into the broad and ill defined and non-public category of "alternative solutions". However when using a different term like that from New Zealand it can be inherent that the government could recognise and endorse a continually growing number of acceptable and mutually exclusive (or partially exclusive) solutions.

3b How well do planning and building approvals processes operate together in each jurisdiction? How do councils interact with the Code? How difficult would it be to delineate between areas of responsibility for planning approval and building approval?

3c Is there a sound rationale for local councils to impose additional building requirements above those contained in the BCA? Do they have the resources to do this?

If the BCA has got something wrong or is unable to move quickly enough to rectify a regulatory problem there could be valid reasons for local councils to step in and clean up the problem for their area at least. However it can be expected that persons in a local council would not be adequately informed of the broader issues that need to be addressed to create good rules to influence national and international manufacturers. A particularly bad result is likely if many chose to write such rules in prescriptive terms. However if those persons were well educated in risk management and performance based needs, then it is more likely that any special rules they drafted would be outcome based rather than prescriptive and the rule would stand a chance of having broader local and national value.

A local approach to rule making would likely create problems and inefficiencies for people that purchase products that are manufactured in large quantities to strict specifications in order to satisfy national market needs and possibly international markets.

It is unlikely that manufacturers would even know about such a local rule until a local council inspector identified a non-compliance to the local rule on a building site and rejected it and the customer complained back to the manufacturer. Even after that complaint, it is unlikely that a manufacturer would customise their production to satisfy the local rule, especially if the rule did not appear to be valuable. The preference would be to produce as normal for sales to that area but identify & communicate an aftermarket solution to satisfy that market area rule, such as local installer modification. However if the manufacturer believed the local rule was good value for the broader community and for their business, then they would likely incorporate it into their standard product offering.

3.1 Institutional arrangements - The ABCB

3.1a Are ABCB funding and charging arrangements appropriate?

In attachment B to the ABCB chairman's submission to the Productivity Commission we were taken aback to see that on 1 July 2003 the ABCB had $3.7 million in cash reserves on a $6.5 million annual cost base (57%). Given the questionable state of the BCA and the poor quality regulatory efforts as exampled by the Premises Standard proposals, it is very disappointing to see that the ABCB preserved resources rather applying them more fully to improving the regulation and improving the quality and availability of other nonregulatory guidance information and other ABCB resources.

The ABCB has let down the stakeholders by not directing spare capacity towards providing greater benefits to our society sooner. Those spare resources could have advanced the timing and quality of several important programs including; the Premises Standard Access Code, its RIS, the internet web site, training, research, BCA2**1.**

3.1b Is the ABCB structure and membership appropriate for achieving its objectives? Are there other institutional models that would improve the effectiveness of national reform?

The Australian Building Codes Board membership does not have adequate industry representation and that problem can prevent good regulatory outcomes.

In particular the Building Access Policy Committee membership does not have adequate industry representation. One of the few industry representatives is the Property Council and it is not clear if they can equitably represent the whole property ownership market including small commercial and small residential owners that would be hurt most by the proposed regulation.

There appears to be excessive representation of special interest groups relative to industry groups on the BAPC. Furthermore the government organizations represented that may be concerned about unsatisfactory implementation of the DDA are expected to align more closely with the special interests groups than with industry. The desire to expedite `a fix' can give motivation for unreasonable alignment. This committee membership probably has much to do with the poor quality of the draft Premises Standard and its RIS.

There is an example of how an imbalanced committee structure may have allowed a poor regulatory outcome: In the recent draft Access Coe for the Premises Standard it is apparent that the ABCB allowed the views of a single person on the BAPC to dictate Access Code regulatory proposals in an inappropriate manner. This becomes evident when comparing the provisions of the Access Code with a submission to the Australian Standards ME4 lift committee. The draft Access Code proposals that influence lifts match very closely with those in the submission to ME4.

3.1c How important is the direct involvement of the Australian Government in achieving national reform to building regulation? Should the ABCB be more independent?

3.2 Institutional arrangements - Code making processes

3.2a Do the processes by which standards are made, ensure that standards contained in the Code are well based?

No. Some observations follow.

Disturbing Trends
The BCA has some influence on the lift industry and for some time it was fairly benign. However in recent years a disturbing trend of over-regulation through prescription has emerged and that trend left to continue will further harm the productivity of the lift industry and the larger building construction and ownership industries. The most recent example is the publication of the Premises Standard and Access Code.

The past is also catching up
While recent regulatory trends towards greater prescription and ill formed prescription, within the ABCB are readily visible, it is now becoming clear that prescription laid down long ago is harming productivity. The harm becomes particularly apparent when technology and societal needs move forward and the narrow prescriptive regulatory framework remains static.

An example of this observation is related to the introduction of innovative lifts in 1995 that no longer have machine rooms and that are manufactured according to international lift design standards, instead of the traditional Australian Standards. This type of lift proved to be extremely successful around the world and in Australia and undoubtedly its introduction has made vertical access for persons with disabilities an economic reality for many buildings. It has also brought substantial energy savings. All major lift manufacturers provide these lifts.

Firstly; for some time the prescriptive requirements of BCA clause C2.12, which is based on the presumption that lifts always have machine rooms, caused confusion within the lift markets. A detailed and complex analysis of the BCA would prove that lifts without machine rooms were acceptable within its DTS requirements, however the simplistic and obvious DTS requirements of C2.12 caused many to initially doubt it.

Secondly; a difficulty was that BCA prescription referenced AS 1735.2 for the purposes of simply calling up the `fire service' lift control provisions. Some in the markets

wrongly interpreted that reference to mean that the whole lift design must comply with that standard. Others in the markets not pleased with the moves away from Australian lift design standards, would continue to espouse that interpretation in order to promote a reactionary campaign, knowing full well that it was wrong. State Occupational Health and Safety Plant Regulations that govern lift design requirements would clearly allow the use of international standards in lieu of Australian standards and State authorities were, after substantial effort in some cases, permitting it under that legislation.

The time and number of dollars wasted on 'analysis' and un-necessary `alternative solutions' and on non-ideal purchases of other equipment to overcome these prescriptive DTS BCA problems can only be imagined. We are sure that that the harm to productivity was substantial and that it applied to lift purchasers more than lift sellers. The confusion caused by the **BCA** meant that some people either delayed purchasing a lift or restricted their choice to other less economic lift/building solutions. That in turn would have had the effect of reducing the availability of lifts which would adversely impact access for persons with disabilities.

Nine years later in May 2004 the ABCB re-published the **BCA,** finally incorporating revised prescription that would remove the abovementioned confusion and difficulties. However in doing that the ABCB passed up the opportunity to re-think the issues in a proper and full manner. The resulting prescription remains flawed in regard to these two issues. The **ABCB** simply tacked on 'exceptions' or 'extensions' to the existing ill formed code, removing the immediate confusion problems, but effectively making the code even more complex and still unlikely to cater for future technological developments that do not fit the assumptions behind the prescription.

Those proposed regulatory changes were provided to the lift industry for review prior to publication. Rather than complain about the narrow approach to the issues and the resulting poor 'tack-on' prescription, it was agreed to endorse the proposals as they were, rather than risk getting an even worse result or no result at all.

Lack of Risk Management

Risk Management does not appear to have adequate priority within the ABCB processes. This is exampled by the recent **RIS** for the Premises standard which completely failed to address risk management issues as required in COAG guidelines. Use of risk management must not be restricted to the well known yet narrow areas of injury, catastrophe and the like. Risk management can be and needs to be applied in a broad commercial nature as illustrated in AS4360.

The Premises Standard RIS indicates that the ABCB are far too willing to prescribe code that does not deliver economical solutions. We believe that greater application of good risk management technique will go some way to resolving that.

It is often claimed that BCA promotes a minimum level of compliance and we do not disagree with that. Furthermore we believe that simple compliance to a minimum is often not the ideal for many. Unfortunately an excessive and pervasive tendency towards deemed to satisfy prescription causes this to occur. We believe that improved risk management technique can provide a way forward for the ABCB to encourage industry to provide more than a minimum yet maintain the fine balance with economics and other commercial needs in each circumstance.

Command and Control Culture

Recent deemed to satisfy regulatory proposals (eg; the Premises Standard) and even the ABCB Chairman's submission to the Productivity Commission indicate that the **ABCB** have too great a preference for 'command and control' style regulation over other alternatives to regulation. The information indicates that the ABCB have an obsessive desire to be "the leader" and that there is a tendency to do the thinking and tell industry what to do. The ABCB instead needs to do more to let go and empower industry to think for itself and make informed, sensible and safe decisions.

Command and control style regulation can be comforting for those that are able to give the commands and especially so for those in command positions that have few assets that that would be negatively impacted by the commands. And when people that have been traditionally dis-empowered find their way into position of command, the ability to see ones desires fulfilled through just a few words, backed by the might of the government, could be extremely tantalising. When this circumstance is a possibility, the need to guard against ill formed regulation based on vested interest and narrow input is crucial to achieving good regulatory outcomes. It must not be possible to sweep good risk management away.

Many disabled organizations now given an elevated level of command through the Building Access Policy Committee are openly calling for stricter and prescriptive regulation as the only way to make buildings get better. Recent regulatory proposals give us concern that the abovementioned phenomena has occurred within the ABCB and will continue unless better controlled.

Mandating proper and transparent risk management within these committees is essential to assure proper balance and better outcomes. Steps need to be taken to ensure that committee members are properly skilled and qualified in good regulatory practice, economics and risk management. Some of the spare $3.7million cash reserves could have been well invested in training or recruitment to improve these skills within the BAPC. What has the ABCB done to educate committee members and officers to overcome command & control cultures? How can member qualifications be verified?

Self Regulation

We understand that many governments promote self regulation as a regulatory alternative because it has many benefits when properly applied. Under the lead of the Australian Elevator Association the Australian lift industry is continuing to work towards effective and collective self regulatory processes. However the industry personnel involved in working towards self regulation are the same people that must get involved in reviewing and dealing with BCA regulation and regulatory proposals. The workload imposed in relation to BCA regulation and ABCB proposals is significant and it hinders our industries capability to work on its self regulation initiatives.

Problematic Prescription too slow to change

We understand there are good reasons for the ABCB to employ an annual update cycle. However it is also important that problems with deemed to satisfy regulation can be clarified and resolved in the cycle between updates. This is made all the more important when compliance to DTS prescription has primacy for so many.

Poor Regulation Practices with Standardisation Committees

The ABCB maintains a Protocol for the development of referenced documents and it requires material that will be referenced by the BCA to conform to certain principles. This document appears to be aimed mainly at Australian standardisation committees. Our experience indicates that some standardisation committees either do not know about the protocol or do not properly understand it, or do not enforce its requirements. There is inadequate education about good regulatory practices and lack of good regulatory culture within committees.

We believe that the ABCB may sometimes act in seemingly autocratic ways as a reaction to standardisation committees repeated failure to fulfil the ABCB's protocol and COAG good regulation guidelines.

Standardisation committees in Australia are generally manned by volunteers from industry, government and so called independent organizations and that necessarily brings vested interests to the committees. We may be asked to put our vested interests aside when on a committee, but do we all really do that? The volunteers may be well skilled in their technology or industry however it is probably universal that these volunteers are not adequately educated and practiced in the science of good regulation. There can even be incentive to avoid learning and promoting the rules of good regulation within committees, because many people know that good regulatory practices would diminish their capacity to strengthen their own vested interests. The organisers of the standardisation forums need to do more to demand and guarantee that good regulatory practices are taught to and expected of all committee members, particularly volunteers.

Perhaps a better model for development of some standards in Australia is to utilise a small number of highly skilled and paid professional officers rather than numerous volunteers. However there are risks to regulatory quality in such an approach, as we have seen with the BCA and appropriate checks and balances would need to be installed to increase the probability of good results. One good `check' would be for those persons would be to avoid prescriptive provision. The ultimate `check and balance' would be for Regulators to suggest considering that information - but not mandating its exclusive use. Information emanating from such a standardisation model should be promoted in the same way that, for example, a text book for sale from a leading university professor or industry association might be treated.

3.2b Would greater alignment with standards from other countries be desirable? **Yes.**

Harmony with international technical standards and practice for both buildings and plant is essential particularly for products that can be traded globally. Most lifts and escalators installed in Australia nowadays are manufactured according to international standards (not Australian standards) and wholly imported.

Many other 'non-plant' issues such as provision of access for disabled persons have already been considered by international bodies representing a far greater number of disabled persons than in Australia. There is valuable information to be gained from those

international sources. There is little or no evidence to indicate that the ABCB has seriously considered international standards in the recent Premises Standard.

There are even international standards that apply to the practice of standard and code writing and risk management, for example ISO Guide 51 "Safety Aspects - Guidelines for their inclusion in standards." We recommend that the ABCB not only reference more international technical standards, we suggest that they also utilise the various international and local code writing and risk management standards.

The ABCB maintain a Protocol that requires referenced material to conform to certain principles. This document appears to be aimed mainly at Australian Standards committees but it also applies to international standards. It is possible that the terms of the ABCB Protocol can create reason or obstacles, even excuses, for not referencing international standards. Perhaps the ABCB and State governments do not feel they have enough control over international standards and therefore they do not trust them and avoid referencing them?

Within the Australian elevator industry, regulators fear of the unknown and concerns about what industry might be able to `get away with' were substantial impediments to the uptake of international standards. The regulators fears in relation to international standards are also sometimes aided and abetted by the vested interests seeking to maintain status quo and traditional tick-and-flick inspection businesses.

Perhaps there is an additional way forward to encouraging use of international standards. For example, many countries require certain products that are used internationally to have a `certificate of conformity' that are issued by an independent certifier (eg; lifts). Those certificates can give purchasers and regulators in other countries greater confidence that the product fulfils certain agreed quality and safety criteria.

Information, such as international or Australian standards are also `products' that can be used within many nations. Since those `information products' can effect the quality of life and safety within many nations, and since it can do so in a very broad and powerful way, it also makes good sense that those `information products' have certificates of conformity too! The criteria by which such information could be assessed and ultimately certified would be set by international organizations concerned with good regulation and capable of checking it; for example the OECD or the UN.

If a national standard or an international standard or any other document (including another nations legislation) can obtain a certificate of conformity to internationally accepted good regulation guidelines then there would be little reason for an Australian government to object to using or allowing its use by industry.

Such a scheme would probably gain momentum more rapidly if with the aid of `certificates of conformity for information', industry was allowed in some way to have greater say, or even full autonomy, in the decisions about which information to use to regulate itself.

We recognise that such as scheme could have impracticalities unless there was already a large stock of standards and information with certificates of conformity. The above propositions may be applicable in the longer term. Under some OHS plant regulations

industry already has a large degree of autonomy to choose the information that it wishes to use. Certificates of conformity for information are not part of those processes. Any scheme of certificates of conformity should not be used to hinder industry, i.e. industry should not be prevented from using information because it does not have a certificate. Rather, any such scheme would have benefit when certificates can be used to compel governments to stop preventing industry from using certified foreign information; which they commonly do by mandating the use of specific (usually local) information and thereby excluding all other.

3.2c Are the level and type of consultations by the Board and its advisory committees appropriate and transparent (in order to fulfil the ABCB's objective 5)? Are there adequate mechanisms for interested parties not directly represented on the ABCB or its advisory committees to provide input into the development and reform of building regulations? Are there other consultation strategies that would facilitate greater transparency for stakeholders? Does the ABCB have the necessary representation to determine what meets community expectations for health, safety and amenity?

Transparency
While the ABCB maintains a web site that allows access to many documents there are some problems with the level of transparency.

The ABCB does not make freely available submissions made to it and comments to proposed regulation. It can not readily be determined what information has contributed to a regulatory outcome. It is important that such information is made more public so that the broader community has opportunity to support to it or refute it prior to and well after publication. In contrast; for example the Productivity Commission publishes many submissions made to it on an internet site for all to see.

By way of example we can outline an important ant instance of inadequate transparency. We understand that the ABCB commissioned broad research into wheelchair usage. The ABCB informed the AEA on 7 Feb 02 that proposed lift car dimensional requirements would be based on the research to be carried out and that the AEA would be advised of the results when completed. The lift dimensions that were finally published in the draft Premises Standard in February 2004 are unreasonable and can not be substantiated by any scientific and credible evidence. Meanwhile the research report commissioned has not seen the light of day and the ABCB will not provide copies of it.

Notification
The ABCB maintains a web site and provides a subscriber notification service. Our experience is that the subscriber notification system does not work because email notifications are not forthcoming. Even after complaining and checking with the website administrator notifications are not forthcoming. All too often we learn of ABCB developments and new information via a `grapevine' or even by accident and by then it is too late to instigate effective actions. Interested parties should also be able to register interest in a particular new research topic (as we can do with the Productivity Commission) however the ABCB do not appear to have any facility for this. If it exists, we have not seen it.

It is not good that the ABCB retained $3.7million in spare cash instead of getting their internet and email notification systems working properly.

3.2d ***What are the advantages and disadvantages*** *of* ***the majority voting rule used by the Board and its Committees versus the consensus based approach used by the Standards Australia technical committees?***

It appears that ABCB committees are invariably structured to ensure that industry groups can never vote to overrule the governments. Therefore substantial objections by a few in industry can be more easily ignored.

Governments have a very substantial voting weight in many Australian Standards committees (eg. ME4). But the crucial difference to ABCB committees is that industry representation is quite broad and their voting weight is approximately equal to the governments. Take the Australian Standards ME4 lift committee as a typical example; the total number of people on main committee is 20 and greater numbers are represented in sub-committee and working group levels. This appears to be a larger number than that represented on the BAPC. Certainly the number of industry members in that ME4 committee is much broader than appears to be the case on the ABCB or the BAPC. Nevertheless voting weight seems less critical within Australian Standards because there is a tendency to work on the standard in order to achieve unanimous decisions. If a unanimous decision or a near unanimous decision without sustained objection can not be reached then the standard is published as an `interim' standard to denote incomplete consensus. As far as we understand the ABCB does not have this degree of flexibility to aid greater consensus.

It seems that there is a recent trend for the ABCB to use their alternate publication capacity as a way of gaining stronger influence within Australian Standards committees. The plumbing area is worth noting in particular.

3.2e Do the different approaches across the jurisdictions in implementing changes to the BCA inappropriately erode achieving national consistency? Is there a better approach?

Is the regulation impact analysis system for changes to the BCA working effectively? In particular, has there been adequate cost benefit analysis *of proposals and evaluation* ***of alternatives when considering changes to the Code?***

Should there be greater accountability for changes to building regulation through the actions of Local Governments? Should more be done to ensure that these changes are justified and subjected to adequate analysis of costs and benefits?

4.1 Assessing the Code - Code Objectives

4.1 ***a Is the BCA effectively achieving the various components*** *of* ***the ABCB's objectives, such as those listed above?***

The BCA Deemed to Satisfy Requirements are too complex.

Good regulatory practice suggests that regulations are drafted in plain English language and are easy to understand. While BCA provisions generally use plain English, some BCA deemed to satisfy requirements are convoluted and not easy to understand. Some examples; When do lift doors require a fire rating and when not? What were the fire rating requirements in relation to machine room less lifts before C2.12 changed? Even a very recent ABCB draft proposal to the AEA regarding changes to lift access was very unclear.

The **BCA** performance provisions are too brief and the deemed to satisfy provisions are too specific, too complicated and too limiting. The **BCA** performance provisions could be expanded on by greater inclusion of risk information making many of the deemed to satisfy requirements un-necessary. Dependence on deemed to satisfy requirements can be lessened by changing their status to be more like "Codes of Practice" or guidance material rather than compliance rules.

Furthermore the structure of BCA deemed to satisfy requirements appear to be overly `trade' based and that structure could be constraining greater implementation of a more holistic and beneficial approach to building design. For example; there is a section for lifts and some might be inclined to think that this section contains all that needs to be known about lifts, however such an assumption would be wrong. This trade based structure is probably a hangover from the previous State building regulations that the **BCA** grew from.

Are the BCA Performance Based Provisions really a facade?
Substantial effort goes into maintaining and applying the deemed to satisfy provisions yet seemingly little change occurs in relation to performance based provisions in order to make them more broadly usable instead of DTS. Based on recent draft regulation there appears to be a presumption towards prescription rather than performance based regulation.

Compliance to DTS provisions is the primary method to demonstrate compliance. Is industry really utilising the performance provisions in a substantial way?

The BCA's role in the total regulatory system not clearly placed in perspective The BCA itself can cause there to be a tendency to cause building designers to focus on the **BCA** requirements alone rather than other legislation like Occupational Health and Safety Regulations documents referenced by it.

There is a need to properly balance OHS safety needs, particularly access and fall risks, with things like saving space and rentable floor area for building owners.

Consistency claims
Climate is not constrained by State boundaries and there is little reason why climate extremes can not be catered for within the spectrum of a well structured national regulation. We therefore doubt the notion that climate variation is a valid reason for State based variation. More likely, it is that the national prescriptive regulation is poorly structured and the States are forced to demand State based variations in order to get the specific regulation that they believe they need.

4. lb Do some of the components of the ABCB's objectives conflict? To what extent do the various components contribute to the objective *of promoting deregulation (objective 3)?*

4.Ic Are `minimum acceptable' standards and the pursuit of least cost solutions compatible with maximising net benefits to the community?

The use of minimum standards is traditional principle that is simple to state and simple to understand. It is acceptable to our industry as long as minimums are not treated as the beall and end-all. It can have benefits in relation to industries with relatively low risk management skill levels. When an industry has a greater risk management capability, greater flexibility will be possible and it will be demanded. We believe that there are fundamental flaws in the pursuit of "minimum acceptable" standards for all industries. This type of minimum parameter criteria appears to be an unfortunate result of an over reliance on compliance to deemed to satisfy command and control prescription.

Many persons within the community will simply rely on the thinking of the regulator and design and construct in order to comply with the minimum figures. Unfortunately in letting the regulator do the thinking they will be less likely to consider the issues in a broader context. In some applications a `minimum' criteria will be excessive and in other applications an even greater provision would be beneficial.

An advantage of specifying minimum compliance parameters is that most will deliver the minimum and a disadvantage is that many will follow the prescribed requirement with little thought. Many persons could be forgiven for presuming that the ABCB have `worked it all out' and that `more' is wasteful. Some might even see it as their duty to push the rules to the limits. Very few will deliver any more. However it is apparent that sometimes governments (and society) would prefer that industry provide more of some parameter than they can command through regulation. We accept that it can be desirable for industry to provide more of the `important parameters' and less of the other, but how do you get people in industry to look away from the prescription and recognise the `important parameters' and voluntarily provide more of it?

An example that highlights this is access provisions for disabled persons. Several years ago the ABCB introduced a range of disabled access provisions and over the years the provisions have increased and now the Premises Standard indicates that they will increase again. And since the proposed wheelchair access provisions will cater for only 90% (i.e. omit 10%) the ABCB will probably have to revisit the issue in a few years time and prescribe new technical requirements. An owner installing a building feature today only to find in a few years that it does not comply with next years rules would rightly be very upset. If only they had a way of better comprehending the true technical and economic requirements now so that all the future series of building code updates would be irrelevant or refutable! We believe that way is to be found within risk management.

We expect that building sustainability could be an example of another area where technical regulation can only advance as fast as the politics allow and where excessive reliance on prescription will damage the quality of the regulatory result and detracting from potential improvements to society.

Command and control styled prescription of minimums not only fails to urge an industry to innovate, it can stifle it when it does occur.

Regulators and inspectors also need to recognise that the best solution can not always be obtained through definition of minimum parameters. They need to recognise that the best solution is somewhere in a spectrum of multi-dimensional parameters, some of which have nothing to do with the building fabric and of which the regulator has no hope of properly assessing for each and every different building and circumstance.

Regulators like the ABCB need to do more to promote industries to think for themselves in order that they can utilise economics to maximise the `important stuff and minimise the other. The regulators need to get better at defining the outcomes and the risks in a way that industry can make informed and good choices about where they need to be in the solution spectrum.

4.2 Assessing the Code - Coverage of the Code

4.2a Is the proposed Premises Standard (and associated revisions to the BCA) the most efficient and effective means of meeting building access requirements under the DDA?

No. Some observations follow:

The "Council of Australian Governments (COAG) Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-setting Bodies" outlines several key requirements that should apply to promote good regulatory practices. We believe that the ABCB did not properly implement some of the COAG guidelines and accordingly the quality of draft regulatory outcome has suffered. Some of the areas are outlined as follows:

- Cost-benefit analysis within an RIS is a critically important technique for ensuring that the worth of proposed regulations can be substantiated. The cost - benefit analysis with in the Premises Standard RIS is seriously flawed and it can even be argued that it is misleading. It also relies too much on "qualitative" assessments of cost and benefits. The impact of the proposed regulation in Australia would be enormous and we believe the level of detail in the RIS is not commensurate with the impact of the proposed regulation. COAG principles further indicate that an RIS should be able to demonstrate that the benefits of the regulation should outweigh the costs. The RIS does not do that and the quantifiable benefits fall well short of the costs which are furthermore understated. *(We contend that COAG principles should prefer that an RIS identify the maximum benefit to cost scenarios and in the least that they identify break-even benefit to cost scenarios)*

- Risk Analysis is identified as an important means for developing and supporting the need for any regulation *(which we strongly endorse)*. The Premises Standard and its Regulatory Impact Statement completely failed to address and utilise this primary COAG technique.

• The COAG guidelines state that wherever possible, regulatory measures and standards should be compatible with relevant international or internationally accepted standards or practices in order to minimise impediments to trade. The Premises Standard has failed to properly consider this COAG guideline because international standards have largely been ignored. There is certainly no reference to major International Standards in any of the available Premises Standard documentation. If they were considered and rejected, then the RIS should have stated that and explained why. More generally, the fact that the BCA references very few international standards indicates that there is a strong preference to use the local standards or apply a `DIY' approach. One reason perhaps being that the ABCB has little or no influence on foreign standards.

- Good regulation guidelines promote a presumption against increased regulation. The BCA was founded on the need to consolidate a range of incongruous State regulations and a rapid cycle of regulatory change was beneficial in that process. However now there is a risk that the ABCB's annual update cycle, which appears to be relatively rapid in legislative terms, could engender a culture that eschews the presumption against increased regulation. The growth in BCA prescription and the great efforts toward maintaining existing prescription could indicate that the risk is a reality.

- COAG guidelines require RIS's to "state the problem" that is requiring government action. We believe the problem statement in the Premises Standard RIS is inadequate because it fails to relate to root physical, social, safety, economic or business problems. It instead states the problem in terms of the apparent problems relating to two existing regulations, namely the DDA and the BCA. In essence the problem statement is written to substantiate the output regulation and prescription. Further it cites "inconsistencies" but evidence of the "inconsistencies" are not precisely spelled out anywhere. It could be noteworthy that in the RIS, the "objectives" of the solution precede statement of the "problem". The cart is before the horse for those two groups of text and that could be a subtle indicator that the same problem applies within the development processes.

- Public consultation is recommended by COAG as a key ingredient to ensure good regulatory outcomes. While broad public consultation regarding the detail has occurred after publication of the draft regulation, not enough has occurred before it. This is important because markets begin to move to comply even with draft regulation out of fear of future non-compliance and this is definitely so when decisions can have expensive consequences, as they do in the building industry. Publication of a draft regulation can cause it to become a self fulfilling prophecy. Unproductive outcomes are likely when even draft regulations are poorly conceived (partly due to inadequate consultation) and published.

- Representation on the ABCB's subcommittee, the Building Access Policy Committee (BAPC) appears to be imbalanced because there is not enough broad industry representation and too much representation by special interest groups and government bodies likely to be aligned with those groups. For example; it is not clear that small property owners, that would be hit hardest by the regulation, are represented. A large commercial property ownership organization is represented

on the BAPC however large commercial properties that already have large facilities and large lifts would not be greatly affected by the proposed regulation. Can that organization represent small commercial and private property owners adequately in this forum? Since small property owners are likely to be severely affected by the regulation it makes sense that they have greater representation. It is feared that the representative structure has allowed the BAPC to propose regulation that gives narrow and marginal benefits to a few at great expense to the broader community and even extreme expense to many.

- Transparency: There is inadequate transparency in the ABCB processes, particularly prior to publication of draft proposals. For example; compare to the Productivity Commission where submissions and recommendation are posted on a public website. One valuable aspect of that is that it allows interested parties to provide valuable rebuttal to others submissions.

- One outcome of good transparency can simply be to increase the predictability of the regulatory environment for business. While the ABCB might list the future general regulatory plans, we have found in this circumstance that the devil is in the detail and at this time the future regulatory environment in relation to the BCA is not predictable.

- COAG principles outline "The threshold question: Is government intervention required?" The premises standard RIS does not adequately answer that question, particularly in relation to any defined "market failure" criteria. It appears that there was a presumption that regulation is going to occur, and the RIS was written to substantiate the action.

- Do the ABCB have policies and mechanisms to monitor and evaluate the outcomes and effectiveness of their regulation? Or do they adopt a `set and forget' approach. If a Regulation is not working well are there mechanism that proactively drive its removal or modification? Is such a mechanism even possible when the BCA is so large and complex? We are concerned that once a rule gets into the BCA it is largely un-removable.

- Impacts to sustainability. It is understood that the federal and State governments are driving to improve environmental sustainability and as a result, RIS should cover this topic. The ABCB RIS failed to consider the effects to environmental sustainability in the draft regulations. Several proposals in the draft would certainly be counter to government and international sustainability desires as they would cause large increases in material and energy consumption.

It is further noted from Office of Regulatory Review (ORR) reports that they recently singled out the ABCB as one government institution that was forced by the ORR to implement major changes to its proposed regulation because of substantial noncompliances in the accompanying RIS. That information coupled with more intimate knowledge of the recent Premises Standard and its RIS gives the impression that there are substantial cultural and procedural problems within the ABCB that would prevent the ABCB from producing effective and efficient regulatory outcomes.

It is claimed by those involved in the development of recent BCA disabled requirements (including the Attorney General, the ABCB and HREOC) that the main reason that the BCA needs to be updated is that there are "many inconsistencies" between it and the DDA. This claim seems to be applied as a broad sweeping statement used to push aside objections to their plans. However no organisation has identified precisely what those inconsistencies are and linked them to the BCA development process for public access. The two major government institutions involved in the regulatory process, the ABCB and the Attorney general do not substantiate the specifics of this claim and therefore provide no capability for the public to challenge or confirm it.

There is much effort being applied to defining what buildings must do to suit persons with disabilities but there appears to be insufficient effort being applied to define what it is that various persons with disabilities can and can't do. If building designers, owners and certifiers were better able to accurately comprehend the capabilities of persons with a variety of disabilities they would better be able to cater for their needs in a more holistic, flexible and economic way. Until greater focus is placed on properly defining the relative capabilities of persons with disabilities, the way forward will be restricted to prescription of building features and that will surely entail tough stakeholder negotiations, even more demanding Regulatory Impact Statements and inefficient and non-inclusive solutions. The COAG principles mention that one valid reason for government intervention is a `market failure' due to lack of information, or because information is imperfect or too costly to be worthwhile gathering. Our proposal here that a government body should provide this information seems to fit this definition well.

Some examples:
There are no statistics (particularly credible statistics) available regarding the size and number of wheelchairs and scooters and the like.

Representative organizations of persons with mental disabilities claim that infrastructure has greatly improved for persons with `visible disabilities', but little or nothing has occurred to improve the situation for persons with `hidden disabilities'. The reason may partly be that the rest of society is not well educated in these matters and can not readily comprehend the restricted capabilities of persons with various `hidden disabilities'. The Attorney General has pushed the DDA into society to help persons with disabilities but they have not done enough to gather, consolidate and make available information to the public (and building designers in particular) to define their relative capabilities. It appears they are now leaning on the ABCB to sort out the problem.

There is insufficient official or otherwise concise publicly available information about the needs and capabilities of persons with disabilities.

The Access Code to the Premises Standard is based on the premise of increasing building accessibility from a so-called "80 percentile" level to a "90 percentile" level for persons with disabilities (i.e. wheelchair users). Therefore from the outset the ABCB are preparing legislation that would make legal the exclusion of up to 10% of these people. This is in itself contrary to the aims of the DDA and therefore regulation based on it can not provide "certainty" against DDA non conformance and that furthermore casts doubt onto the quality of processes at the ABCB.

There seems to be a growing trend for the ABCB to take prescriptive details away from various Australian Standards and insert them into the BCA. The advantage of doing that is that the ABCB gains greater control on the imposition of technical requirements when they are no longer subject to the Australian Standards consensus building process. Another benefit could be that ABCB status could be raised by increasing the amount of key "regulation" controlled by the ABCB. This observation was clarified by the minutes of the Washington D.C. IRCC meeting of 6 November 2003 where it is minuted: *"ABCB have adopted a more strategic approach to the development of reference documents, and public policy will be removed from Standards and placed into the Building Code"* It also mentions in the IRCC minutes that the ABCB were developing a reference document for sprinkler systems which will meet the performance levels required by the Building Code. This is presumably a tactic to influence the relevant Australian Standards Committee or make them irrelevant. These strategies & tactics gives us concern that ABCB is adopting a dangerous culture based on an attitude that "we are the boss and we will decide what is right and wrong".

Our opinion is that it is desirable that the ABCB incorporate certain building design principles so that building designers can better access the detail at an appropriate stage, however it is undesirable that the ABCB forcibly absorb technical requirements from various standards and inculcate them into regulation to drive an agenda. We are not sure wether various high level government policy makers agree with that. However one thing that can be interpreted from that trend is that the ABCB place a high priority on command and control style deemed to satisfy regulation, causing the regulation to grow rather than reduce and we are confident that regulatory overseers agree that that is not a good sign.

4.2b Is the Administrative Protocol likely to be effective in ensuring that decisions are consistent with the DDA and in minimising the need to resort to DDA disputes processes? Will it provide greater certainty and consistency in determining unjustifiable hardship? Are there better ways of achieving these objectives?

A process that relies on the judgement of various persons that are likely not to have expert knowledge of our industry does not have enough certainty for the lift industry and we do not expect to utilise the Protocol. We do not place much faith in the process for property developers either.

4.2c To what extent should energy-efficiency objectives be addressed in the Code? Is variability by climatic zone, rather than by jurisdiction, the appropriate way to cater for differences across Australia? Is it more effective and efficient to use performance or prescriptive based standards to achieve energy-efficiency objectives?

4.2d Is there a conflict** of **objectives between the BCA and the** fire **authorities' regulation in the States and Territories? If so, how could this be resolved?

4.2e** As **well as energy efficiency, what other aspects** of **building design, construction and use could potentially be subject to sustainability considerations? What is the most

useful definition of sustainability? Is there community consensus over what is a desirable level of sustainability for buildings?

4.2f Does the existence of performance-based regulation tend to transfer the costs from the construction to the maintenance of buildings? Does it increase the need for maintenance provisions to be included in the Code?

4.2g Are there any other possible areas (that may not be listed above) that could be incorporated appropriately into the ***BCA?***

5.1 Delivering outcomes - Implementing the Code

5.1a Is it appropriate to charge for access to the Code? How does this impact on the transparency and accessibility of the Code? Are any changes warranted in the way in which charges are calculated?

Federal, State and local legislation is generally freely available to all via the internet. In a similar way, at least the high level BCA objectives and performance based requirements should be freely available to all via the internet - without fee charge. As an additional measure, consideration could be given to providing internet access to the deemed to satisfy information free of charge too.

5. lb What activities or strategies could improve accessibility to the Code?

Perhaps consolidate the BCA performance requirements down to concise document and add increased capability for the community to utilise them. That document could further be made available through SAI Global with the price subsidised by the government.

Furthermore a summary of the high level BCA performance requirements could be made available on the various websites that specialise in listing federal and State legislation.

5.Ic What is the nature and extent of differences in the administration of building regulation across the States and Territories? What are the costs of non-uniformity in administration of the Building Code?

5.1d Why have not all the States and Territories adopted the model building legislation? Is it appropriate to have a nationally consistent administrative framework? What would it take for regulatory systems to be consistent?

5. le How effective are these compliance checks? Do they impose necessary or unnecessary costs and delays? Have delays improved or worsened recently? What improvements could be made?

5.1f Are there problems with dispute resolution processes and, if so, what are the main causes?

5.1g Has private certification reduced clarity over allocating responsibility when addressing complaints?

5.1h Would the establishment of a Building Appeals Board address existing weaknesses or would other mechanisms be more effective?

5.2 Delivering outcomes - Reforming the risk and liability landscape

5.2a What are the main differences across States and Territories with respect to the allocation of risk and BCA compliance responsibility for building practitioners (designers, certifiers, builders, etc)? How significant are they? What are the insurance requirements?

5.2b What has been the impact of changes to liability arrangements and what remains to be addressed? What has been the role of the ABCB in the reforms?

5.2c Are there other mechanisms available to implement an efficient allocation of risk and liability across the building industry?

5.2d What has been the role of the ABCB in introducing private certification?

5.2e What is the role of private certifiers across States and Territories? What requirements must they meet in each State and Territory in order to practise? Do these roles and requirements differ from local government certifiers?

5.2f What have been the benefits and costs of private certification? What is the risk of conflicts of interest (such as when the builder or developer pays the certifier) or improper conduct of certifiers under current arrangements? What alternative arrangements might reduce this risk?

5.2g Are certifiers adequately trained to perform their jobs? What has been the impact of the ABCB's competency standards and framework for building surveyors/certifiers?

5.2h What other issues need to be addressed by the Board with regard to certification?

Product Certification can be a hollow promise. Many when they seek certification are seeking absolution - to be able to blame others if something goes wrong. There is no reduction of liability by third party review, only greater confidence for consumers and producers. Certification can also be a barrier to market entry and can be abused.

5.3 Delivering outcomes - Awareness and research

5.3a Have these strategies been effective in raising awareness and usage of the Building Code? Do they contribute to transparency in the reform process? Are there other strategies and initiatives that might be more effective?

5.3b Are current education and training strategies adequately equipping building practitioners to operate efficiently and effectively in the performance-based environment? Is training on changes to the Code effective? Is there adequate input from industry, academics and regulators on the competencies to be attained? Is the level and quality of training adequate to maintain expertise in the industry? Do these strategies compare well with international best practice?

We believe that the education and training strategies are not adequately equipping practitioners to operate efficiently and effectively in a performance-based environment.

There is large body of DTS prescription and a lot of momentum associated with it. There is also strong opposition to performance based methods from the influential who in many cases still desire absolution as their risk management technique. While education and other support is needed to enable practitioners to properly utilise performance based regulation, even greater levels of education and support are necessary to overcome DTS inertia and resistance to performance based methods. Affirmative action is needed to alter traditional attitudes and improve our institutional arrangements

While the BCA DTS provisions are very detailed, prescriptive and growing, the performance based provisions do not go into enough detail to make them more usable. Many performance based provisions use the vague term *"to the degree necessary"* and that in itself indicates that the performance based provisions are inadequately detailed. It is also known that the Institution of Engineers have concerns with this subjective and potentially harmful term. (Ref: SFS/ CIBSE/ AIRAH &AMCA Technical Presentation 'TO THE DEGREE NECESSARY! 25 Feb 04).

At the ABCB conference in the Gold Coast in September 2003, the ABCB provided education opportunities mainly in relation to new DTS provisions, however not enough emphasis was placed on training that would better enable the use of performance based provisions.

Also refer also to comments regarding education inadequacies under `Poor Regulation Practices with Standardisation Committees' in section 3.2a.

An example of an international performance based practice that may demonstrate a way forward for Australia is the **European Union Lift Directives 95/16/EC -** 29 June 1995 which can be viewed at:
http://www.europa.eu.int/comm/enterprise/mechan_equipment/lifts/dir95-16.htm.

Some of the key features of the lift directives are listed as follows;

- It is intended to remove technical barriers to trade - caused by national standards and regulations
- It is intended to improve safety
- It define essential health and safety requirements - as opposed to prescriptive design requirements
- Outlines conformity assessment procedures
- Requires conformity markings
- Provides transitional arrangements
- Defines risks in relation to lifts
- Imposes fair trade requirements onto governments of member states
- Advises EU states as to how to deal with other states alleged restrictive regulation and standards
- Advises states how to deal with alleged dangerous plant
- Requires states to notify the bodies authorised to assess conformity
- Requires states to give precise reasons for preventing a lift from being used and inform the party concerned of legal remedies available
- Gives a deadline for states to legislate implementation of the directive.
- Specifies final inspection procedures
- Outlines requirements for quality assurance by the manufacturer

Transitional arrangements mentioned above might seem relatively unimportant, however we contend that it is very important because many people and organizations have difficulty dealing with the coexistence of old and new regulations that might conflict. Some with vested interests can even exacerbate `the difficulties' in order to prevent or delay the onset of the new regulation.

Presently in Australia, safety in and around lifts and escalators in buildings is governed by several regulations; State OHS Plant Regulations, State Building Regulations, the BCA, State electrical regulations, fire services regulations to name a few. The multitude of regulations can cause difficulty and inefficiency but worse, it can lead to safety oversight - as exampled by falls into voids surrounding escalators. History seems to be the reason that State OHS plant regulations govern the safety requirements for lifts and escalator technology, but is OHS regulation really the best place for that governance?

We believe it was necessary and good that State OHS regulations, based on the National Standard for Plant, governed the safety of lift and escalator technology over the last decade. That is because the core principles of that legislation required comprehension of hazards and risks and their control. Those philosophies are well understood within our industry and implanted into our culture. However it now seems incongruous that the safety of equipment used in places like factories and open spaces etc, is governed by the same rules that govern the safety of equipment used in finished commercial and residential buildings. We can even report absurd situations stemming from that; for example in Western Australia a lift installed in a commercial buildings is governed by the State OHS regulations, but the same kind of lift installed next door in a residential building is not.

While the BCA allows for performance based methodologies it does not do enough to make the performance based provisions workable. That is probably partly a result of not doing enough to demand widespread hazard identification and risk assessment within the broad building industry as a core design principle.

The ABCB should consider referencing the Lift Directives within the BCA. And the ABCB should consider introducing Robens style occupational health and safety regulation principles to the BCA.

Inclusion of the EU Lift Directives within the BCA would help to better consolidate the governance of safety in buildings, particularly associated with lifts and escalators. Furthermore it would provide a good example of tried and proven performance based regulation that has foundations in hazard identification and risk assessment and that is designed to overcome regulatory restrictions that tend to come with multiple jurisdictions.

Incorporating the Lift Directives into the BCA could be seen as paving the way for States to transfer governance of lift and escalators from OHS regulations to the BCA. Some might argue that the BCA should not incorporate regulation that could parallel or conflict with existing State OHS Regulation until the OHS regulations are re-written to remove lifts and escalators. That might be an ideal way to go for some reasons but on balance we do not see it as essential and in many ways attempting to align their release would be undesirable. Attempting to coordinate the revision and release of several State regulations and a BCA amendment to avoid overlap would be complex and would likely create undue delay. It could even be impossible to achieve.

5.3c ***Are the ABCB research areas appropriate? Are resources allocated appropriately? Is the research being used to develop the most appropriate and cost effective Code solutions? What benefits have the Board's research delivered?***

We believe too much research is mis-directed towards maintenance and expansion of deemed to satisfy prescription and not enough research is aimed at making the performance requirements more workable. And not enough research is aimed at clarifying the spectrum of risk for buildings.

Here is an example of a poor ABCB research outcome:

The ABCB commissioned Hunarch Consulting to carry out a research project regarding building access for wheelchairs and the like. We were told by the ABCB in February 2004 that the body of work is not available because it is not complete and therefore it was not incorporated into the draft Premises Standard Access Code provisions. However we understand that the research was completed but was buried within the ABCB, presumably because people on the BAPC did not like its recommendations. Information that is freely available on the Hunarch web site indicates that there are serious flaws in prior research and that casts substantial doubt onto the validity of technical standards used as a basis for codification of access provision for disabled. Therefore the Hunarch research would be important.

However when we compare disabled access building design provisions from international sources we can see that a key principle employed overseas is **mutual obligation** whereby building access provisions are specified subject to wheelchairs conforming to an international design standard. That mutual obligation principle is expected to provide maximum certainty and economy for all. In contrast, Australian building design provisions for disabled access do not incorporate that key principle. Instead there seems to be a presumption that wheelchairs can take any form whatsoever and that buildings will simply need to accommodate them (at whatever cost). The ABCB's failure to utilise mutual obligation as a key principle means that the definition of wheelchair demographics that needed to be considered is very wide and unclear. Therefore the above mentioned research was seen to be necessary to clarify those demographics.

If the ABCB and the BAPC had better utilised international resources and first put greater care into defining the problem and stating their principles, then that research project may well have never become necessary or in the least its scope may have been greatly reduced. A lot of time and money could have saved.

It is worth noting here that one of the most striking flaws of the federal Disability Discrimination Act is that it does not adequately address mutual obligation principles. One of the few obligations imposed on persons, including those with disabilities, is that those with infectious diseases shall not infect others. In contrast, the Transport Standard that was formed under the DDA imposes some twenty odd mutual obligation conditions onto all persons, particularly persons with disabilities.

5.3d Is the research being well managed and conducted cost effectively? Is the ABCB the appropriate body to conduct and coordinate such research?