HIA Submission to the Productivity Commission Inquiry into Reform of Building Regulation

April 2004

TERMS OF REFERENCE OF THE PRODUCTIVITY COMMISSION STUDY

The Productivity Commission has been requested to undertake a research study examining the contribution that national building regulatory reform under the auspices of the Australian Building Codes Board (ABCB) has made to the productivity of the building and construction industry and its impact on economic efficiency in Australia as well as the potential that such reform has to make further gains. Specifically, the Commission is to:

1. Investigate progress in building regulatory reform in the building and construction sector since 1994 and the need and scope for further regulatory reform post-2005, including:

a) whether the Inter Government Agreement on building regulation reform of 1994, as revised, is achieving its objectives;
b) whether the Inter Government Agreement is producing gains for the industry and maximising net benefits for the Australian economy;
c) whether the Inter Government Agreement is providing efficiency and cost effectiveness in meeting community expectations for health, safety and amenity in the design, construction and use of buildings through nationally consistent building codes, standards and regulatory systems;
d) the need for on-going national co-ordination of the Building Code and related reforms; and
e) the effectiveness of the Government's current role in building regulatory reform.

2. If it is found that further work in this area is appropriate post-2005, report on:

a) the Australian Government's role in future building regulatory reform;
b) whether the objectives of the Inter Government Agreement adequately address the need for future reform; and
c) whether the ABCB or alternative models would be more efficient and effective in delivering the reforms.

3. Make recommendations based on the findings.

In undertaking the study, the Commission is to consult widely with interested parties comprising the Australian Government, State and Territory agencies, relevant industry bodies and practitioners including:

- Australian Building Codes Board
- Australian Government - Department of Finance and Administration
- Australian Government - Department of Prime Minister and Cabinet
- Housing Industry Association
- Master Builders Association
- Australian Construction Industry Forum
- Australian Council of Sustainable Energy
- Alternative Technology Association
- Australia and New Zealand Solar Energy Society
- Urban Ecology Australia
- Royal Australian Institute of Architects
- Institute of Engineers Australia
- Australian Institute of Building
- Australian Institute of Building Surveyors
- Building Designers Association of Australia
- Property Council Australia

SUMMARY OF HIA COMMENTS ON THE SPECIFIC TERMS OF REFERENCE

1. Investigate progress in building regulatory reform in the building and construction sector since 1994 and the need and scope for further regulatory reform post-2005, including:

a) whether the Inter Government Agreement on building regulation reform of 1994, as revised, is achieving its objectives;

HIA comment
HIA consider that the IGA is not achieving its objectives and that a new agreement should be instituted. The new agreement should establish an organisation that has legislative powers to effectively fulfil the objectives of the IGA.

b) whether the Inter Government Agreement is producing gains for the industry and maximising net benefits for the Australian economy,

HIA comment
The current IGA has produced significant gains for the building industry. However, the composition of the Board has evolved and the effectiveness of the IGA has been eroded, resulting in a down-ward slide in efficiency that must be reversed.

c) whether the Inter Government Agreement is providing efficiency and cost effectiveness in meeting community expectations for health, safety and amenity in the design, construction and use of buildings through nationally consistent building codes, standards and regulatory systems;

HIA comment
The Intergovernment Agreement should be reviewed for it no longer provides a suitable operating structure for the development and implementation of nationally consistent building regulations.

d) the need for on-going national co-ordination of the Building Code and related reforms;

HIA comment
In 2000, the Laver report[4] included the following statement:

It is crucial for all governments to remain committed to the ABCB. Any reduction in commitment from governments, and the Commonwealth in particular, could result in the ABCB's demise. If this were allowed to occur, the loss to the building industry and the nation as a whole would be significant, not only in terms of future progress, but also of the benefits gained to date. A lack of forward momentum would result in rapid regression to the previous inefficient and fragmented approaches to regulation.

The importance of the ABCB is further accentuated by the apparent diminishing role of some governments in servicing the building and construction industry. Government provided advisory services on the BCA are being phased out in many cases, and this role is increasingly becoming the responsibility of the ABCB.

HIA consider that the perspective expressed in this statement is more relevant to to-days regulatory regime than it was some four years ago. The continued downsizing of State and Territory bureaucracies responsible for overseeing individual administrations regulatory systems, and their consequential reliance on the operation of the ABCB, has entrenched the need for a national body to develop and maintain regulatory provisions.

(e) the effectiveness of the Government's current role in building regulatory reform.

HIA comment
The Australian government has provided substantial support to building regulation reform and it is essential that it continue to do so. The scope of reform implemented to-date would not have been possible without the government's leadership and efforts to unite the States and Territories.

2. If it is found that further work in this area is appropriate post-2005, report on:

a) the Australian Government's role in future building regulatory reform;

HIA comment
The Australian government must continue to cultivate cooperation between the States and Territories, for it is evident that the current level of commitment of some governments/ bureaucracies needs to be renewed.

Without the leadership of the Australian Government it is likely that significant regulatory reform achieved to-date will be progressively unravelled by State and Territory jurisdictions due a loss of focus on a national agenda.

b) whether the objectives of the Inter Government Agreement adequately address the need for future reform;

HIA comment
The wording of the objectives is considered to be sufficiently broad to facilitate the immediate needs of the community and the building industry. A suite of principles should be developed to underpin the objectives by identifying processes to be used to achieve the required outcomes.

c) whether the ABCB or alternative models would be more efficient and effective in delivering the reforms.

HIA comment
The existing IGA and ABCB structure are not capable of producing national consistency in building regulations. An alternative model has been proposed.

HIA SUBMISSION TO THE PRODUCTIVITY COMMISSION

Introduction

The HIA welcomes the Productivity Commission (Commission) research study into the contribution of regulatory reform undertaken under the auspices of the Australian Building Codes Board (ABCB) to the current and future productivity of the building and construction industry and its impact on economic efficiency in Australia.

HIA also welcomes the opportunity to lodge this submission to the Commission on the activities and operation of the ABCB. To facilitate comprehension of our submission, it has been formatted in a manner consistent with the structure of the Commissions Issues Paper[1] released In March 2004. In essence, our comments are a direct response to each of the individual issues listed in the Issues Paper.

1 THE STUDY

1.1 Background to this study

(i) Have reviews of the regulation of the building and construction industry asked the right questions and identified the areas most in need of reform?

HIA comment
HIA would suggest that there has only been one significant review of the regulation of the building and construction industry conducted in the past 15 years. This review was undertaken by the Building Regulation Review Taskforce (BRRT), established through a Special Premiers Conference in 1989. The Chairperson of the BRRT was an industry practitioner and members of the BRRT were representatives of a variety of regulatory authorities and industry practitioners.

The review process adopted by the BRRT allowed significant input from industry and various regulatory authorities of the day and it was generally considered that the review was conducted in an open and transparent manner.

The BRRT lodged its report[2] with the federal government in 1991 and made over 30 recommendations, which were considered to be reasonably comprehensive and appropriate for the immediate reform of the existing regulatory system. Some significant recommendations in the report were not effectively implemented and consequently, the potential impact of the review was stifled.

(ii) Has adequate follow up occurred to ensure accepted recommendations were adopted and assessed ex-post for their effectiveness?

HIA comment
While the recommendations of the BRRT report were considered to be reasonably comprehensive, not all were subsequently adopted. In some instances, the potential for them to become effective was limited simply because they required co-operation between the States and Territories in order to be implemented.

Consequently, some critical recommendations, such as the development of a national administrative regulatory framework, have not been achieved; although there were attempts made in the early 1990's to have a Model Building Act[5] implemented through co-operative adoption by the States and Territories.

Further comment on this document is provided in Section 5.1.2, issue (ii), of this submission.

Some recommendations of the BRRT subsequently formed the basis of significant reforms in the regulatory system, particularly the establishment of the Australian Building Codes Board and the subsequent development and implementation of performance based building regulations.

Implementation of a majority of the reforms recommended by the BRTT would have produced a more effective regulatory system than that which is presently imposed upon the building industry.

Unfortunately, there does not appear to be subsequent documentation produced that identifies actions arising from the full suite of BRRT recommendations, although there has been a subsequent review of the effectiveness of the Australian Building Codes Board (ABCB).

In 2000, Laver[4], et al, conducted a review of the ABCB and a resultant report made 17 recommendations relating to a variety of matters including;

- the operation of the ABCB,
- the content of the Building Code of Australia (BCA)
- education on the BCA, and
- future research activities.

Some of the Laver recommendations have been acted upon. As was the case with the 1991 BRRT report, there does not appear to be subsequent documentation produced that identifies actions arising from implementation of the full suite of Laver recommendations.

The lack of subsequent reporting on actions arising from these previous reviews is extremely disappointing to the industry. The conduct of a review into building regulation processes should be seen as a breath of fresh air to industry, although due to the limited actions that arise from these reviews, industry remains sceptical of their validity.

1.2 Scope of this study

(i) The Commission welcomes comments from interested parties on the intended scope of this study.

HIA comments:
HIA considers that that the terms of reference to which the Commission is required to report are sufficient to initiate significant reform of the structure and operation of the Australian Building Codes Board and the current level of diversity in the respective State and Territory regulatory systems.

We sincerely hope that the Commission takes this opportunity to foster the Australian building industry and allow it to achieve levels of efficiency that will remain dormant until national consistency in regulatory requirements is fully implemented.

2 THE COMMISSION'S APPROACH

The terms of reference require an assessment of: whether the objectives of the IGA on building regulation reform are being met (see section 2.1 below); the impacts of the reform program on the productivity of the industry (see section 2.2); and the efficiency of the economy (see section 2.3).

2.1 Meeting the IGA objectives

(i) Is the mission statement of the ABCB the appropriate one for the intergovernmental body responsible for reform of building regulation?

HIA comments:
The current mission statement may have been appropriate at the time the ABCB was established in 1994. As with most "frameworks" in which the needs of the community are supposedly reflected, it is likely that the mission statement is now in need of review. Based on the extent of reform that is currently taking place within local government areas, where regulatory requirements are being modified in a relatively ad hoc manner, it is evident that community expectations are changing.

There are emerging regulatory trends, particularly relating to issues such as sustainable construction, which encompass numerous components of design and construction such as energy efficiency, water conservation, storm water management, materials selection, and adaptable designs. The need for regulation of these design components must be determined in forums that can facilitate a nationally consistent approach to regulatory matters. Where regulation is determined to be essential, appropriate provisions must be contained within the Building Code of Australia.

It should be remembered that the consolidation of building regulations was a primary objective of the IGA under which the Board was established and it is the responsibility of the Board "*to ensure consistency of approach and to encourage consolidation into the BCA of all mandatory requirements affecting buildings*". In this context, if it is uncertain that the Boards existing mission statement is able to facilitate fulfilment of this key objective, it must be revised.

(ii) 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?

HIA comment:
Historically, mandatory building regulations have only reflected minimum standards necessary to ensure that the public is safe when exposed to a built environment, their physical health is not exposed to undue risk and that minium levels of amenity are provided.

Until the recent introduction of energy efficiency provisions and modifications to sound insulation provisions, the foundations upon which Australia's technical building regulations have been developed have remained relatively unchanged.

As mentioned above under issue (i), perceived changes in "community expectations" are predominantly being reflected through changes to local government regulatory regimes. Recent inclusions to BCA provisions relating to energy efficiency and sound insulation have primarily been derived from delayed reactions to local government trends. HIA is of the view that the ABCB does not have suitable mechanisms in place to enable it to adjudicate on community expectations.

It is also considered that community expectations may well differ from those reflected within the BCA for certain regulatory issues, such as the scope of property protection inherent within a building designed in accordance with the BCA. Similarly, a simple issue such as the scope of sanitary facilities to be provided for public visitors to a hospital is considered to differ to those of the community. These differences do not necessarily indicate that the BCA does not provide adequate levels of health safety and amenity; it may simply indicate that community expectations differ to the standards established by the BCA.

In this context, it could be argued that there is a fundamental dichotomy within the stated goals of the BCA, specifically in relation to the BCA provisions reflecting acceptable standards "*for the benefit of the community*", which some may consider to be a reflection of "community expectations". It is also intended that the provisions of the BCA "*extend no further than is necessary in the public interest*", ie the BCA establishes minimum regulatory standards to the degree necessary to satisfy the public interest. Is this standard what the community wants, or is it what the ABCB considers sufficient?

The ABCB does endeavour to obtain community feedback, which may reflect community expectations, through consultative processes incorporated into the development of new regulatory provisions. In this context, it could be argued that the community has the ability to provide comment in regard to proposed changes to the BCA and therefore new regulatory provisions should reflect community expectations if all comments are addressed. It is considered that this simplistic process, while being open and transparent, is not an appropriate mechanism upon which future regulatory regimes should be founded and that a more comprehensive formal assessment of community expectations should be undertaken on a periodic basis.

(iii) 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?

HIA comments:
References to the term amenity have caused confusion within industry for some time and there may be significant benefit to it being interpreted more narrowly in order to provide focus.

Currently, the BCA includes issues such as waterproofing, damp-proofing, sanitary facilities, room sizes, light and ventilation and sound insulation. The regulation of these issues can be related back to the other fundamental issues of health or safety. For example, waterproofing and damp-proofing concerns are related to health of occupants and structural performance of building elements, i.e. a safety issue.

The regulation of room sizes is actually limited to ceiling heights and is a reflection of health concerns, as is light and ventilation. The need for regulation of sound insulation is questionable and while it could be argued that it is related to health of building occupants, it can also be argued that it should be left to market forces to meet community expectations and not be included within the BCA. Evidence of the effective operation of market forces in the provision of sound insulation is reflected in the fact that many existing residential developments have been constructed to higher standards than those historically contained within the BCA. In essence, developers were responding to market forces well before the ABCB increased the minimum standards of the BCA.

In this context, a narrower definition of amenity may well be of benefit to the development of future provisions with the fundamental scope of the BCA.

(iv) 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?

HIA comments:
The need for national consistency in building regulations relates to the structure of building regulation systems, the scope and operation of administrative processes and the scope of essential technical requirements. The extent of regulation should extend no further than that essential to achieve minimum standards of building occupant health and safety in a cost-effective manner. As mentioned in the Commissions Issue Paper[1], to-date, efforts to implement national consistency across all three elements of regulatory systems have been most effective in the development of technical requirements. Other areas of regulation have been not been satisfactorily addressed.

The need for national consistency in building regulation can be related to the achievement of many objectives, which may be set by either the regulators or industry. The main regulatory objective is to ensure that adequate standards of health and safety are provided to building occupants. While regulators set this objective, it must be implemented by industry. Consequently, in order for regulations to be of benefit to the community as intended, the industry must produce outcomes that incorporate all applicable regulations within a cost-effective product that the community can afford.

In the building industry, regulatory requirements influence nearly all facets of development including;

- site selection,
- relationship of the building with adjacent sites,
- site coverage ratios,
- location of the building on the site,
- height of the building,
- external configuration,
- internal design,
- construction materials,
- approvals processes,
- certification of design,
- construction processes,
- project management processes,
- inspections during construction,
- certification of construction,
- occupation of completed buildings,
- ongoing maintenance of buildings, and
- demolition of existing buildings

The principles underlying the production of buildings are similar to other forms of production, in that efficiencies may be derived from standardisation of process and minimising design variations during the manufacture of the product. The application of these principles is, in part, responsible for the current levels of efficiency inherent within the project home market. It will be near impossible for the industry to become more efficient and continue to maintain cost-effective built products while building regulation systems differ from State to State. In the past few years, the need for consistency in regulation has become even more critical as local government areas within individual States continue to produce their own regulatory regimes without regard to legislation that would appear to prohibit such action.

Consequently, the extent of variation in design and construction requirements that is currently imposed on our industry has made it extremely difficult for further efficiencies in production to be achieved.

Inconsistency in building regulations has a significant cost impact and the community is forced to pay a premium to compensate for the inefficiencies that multiple regulatory regimes produce.

In essence, in order for the industry to cost-effectively transform regulatory requirements into built product, mandatory requirements must be consistent between the plethora of regulatory regimes within which we must operate.

In support of this position, reference is made to a report commissioned by the ABCB in 2002 on the rationale, both economic and non-economic, for adopting a national administrative framework to improve the regulatory environment for BCA delivery. The Allen Consulting Group conducted the study and subsequently reported that estimated savings to industry arising from the implementation of a national framework would be in the vicinity of $400 million a year. The report stated[5] in part that:

"Harmonising reform of building control administration provides benefits in two interrelated ways:

- *it provides a framework for all jurisdictions to move towards agreed best practice arrangements; and*

- *it reduces the costs associated with excessive inconsistent regulation which hinders cross-jurisdictional operations – the current differences between jurisdictions' regulatory systems have been described by industry sources as causing confusion, with resultant time delays and cost penalties when obtaining approvals. This level of complexity results in inefficiencies and creates uncertainty for stakeholders. With many sectors of the industry, including private practitioner regulatory authorities, operating across jurisdictional borders the differences in building regulatory systems have become more noticeable and less tolerable."*

Specific comment on the development of a Model Building Act to assist the achievement of national administrative provisions is provided in Section 5.1.2, issue (ii), of this submission.

(v) How can more progress be made in adopting uniform administrative legislation?

HIA comments:
HIA has provided comment on this issue under Section 5.1.2, issue (ii) as these two issues are considered to be similar in content.

(vi) 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?

HIA comments:
As mentioned previously in Section 2.1, issue (ii), it may be argued that building regulations should not necessarily be developed on the basis of a need to meet community expectations, particularly if those expectations are such that the consequential cost of development would become prohibitive.

Mandatory regulations should only reflect a minimum standard that is essential for all members of the community. In the event that individual members of the community wish to have buildings constructed to higher standards, they are able to voluntarily incorporate their specific requirements into the design and construction process. When this process is operating effectively, there is no need for mandatory minimum standards to be modified to address the needs of a specific community, such as a specific local government area. Accordingly, some State and Territory governments have introduced legislation that prohibits local authorities from requiring higher standards on any design and construction matter that is addressed within the BCA. Unfortunately, such legislation does not prevent this outcome from occurring.

When a regulatory document such as the BCA specifies mandatory minimum standards it is essential that the community understand its role and the characteristics/quality of the building it will produce. If the community does not have an appreciation of the standards and the quality of product that the BCA establishes, it is likely that some members of the community will have higher expectations than can be provided by the BCA and conflict will arise. Consumer education on the role and standards inherent within the BCA is important.

(vii) Why are some differences in regulation intractable?

HIA comments:
"Intractable differences" were issues that had more opportunity to be justifiable when mandatory building regulations were prescriptive in nature. With the introduction of the performance based BCA in 1996, the flexibility that the BCA facilitates has nullified substantive argument for variations. Unfortunately, political interference is a principle cause of differences in our regulatory systems and this will remain unchallenged while the current IGA is in operation.

Western Australia has been a recent example of a State's commitment to national uniformity in that it has no variations to the BCA. Additionally, the government is presently reviewing it primary and secondary building administration legislation in conjunction with the provisions of model building legislation. The outcome of these processes will position this State as a forerunner in endeavours to facilitate national consistency.

As mentioned previously, political will is the panacea for some State/Territory allergic reactions to national consistency in building regulations.

(viii) What quantitative and qualitative indicators would facilitate assessing performance against some or all of the ten objectives of the ABCB?

HIA comments:
The Laver report[4] in 2000 endeavoured to assess the performance of the ABCB against eight primary objectives of the IGA and did so from information gleaned from independent survey and interviews with stakeholders. In doing so it became evident that the ABCB had undertaken a variety of activities under respective objectives of the IGA and in many instances the ABCB was commended for its work. In all instances stakeholders considered that there was further work to be done in order for objectives to be met.

HIA consider that the outcome of the Laver report remains valid some 4 years later. In essence, since 2000 the ABCB has undertaken further tasks and has achieved further outcomes, although its effectiveness is being severely limited by the constraints of the current IGA and the lack of commitment by some States/Territories. In particular, the structure of the ABCB and consequently, the membership of the Board, do not allow the ABCB to be an effective vehicle to drive regulatory reform. Proposals to overcome these significant constraints are offered in Section 3.1 of this submission.

Additionally, some State/Territory jurisdictions continue to frustrate the operations of the ABCB and the likely reasons for this have been presented in Section 5.1.2 of this submission.

2.2 Productivity

(i) ***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?***

HIA comments

The two most relevant definitions of productivity with regard to the building industry are: multifactor productivity (MFP), accounting for increases in gross value added relative to increases in both labour and capital inputs; and the related measure of gross product per hour worked for which there exists a measure for the construction sector. The last MFP growth cycle measured was for the period 1993-94 to 1998-99. Over this period MFP grew at an annual average rate of 1.8 per cent compared to an annual average rate of 1.1 per cent over the 1964-1968 to 1998-99 period. Australia's productivity performance over the last decade has actually exceeded that of the United States.

Given the very significant share of the Australian economy accounted for by the building sector it is reasonable to assume that enhanced flexibility in the building sector brought about through building regulation reform was a contributor to Australia's relatively strong aggregate productivity performance. Modest technological advances and general industrial relations reform in Australia that have impacted all sectors are also likely contributors to productivity growth in the building sector.

Looking at gross product per hour worked in the construction sector it is clear that significant gains have been achieved. Over the period 1986-87 to 2002-03, annual growth in this measure averaged 1.0 per cent. Over the 1990's the average annual growth rate was 1.4 per cent. When only the most recent five year period up to 2002-03 is examined the average growth rate is 1.9 per cent. As noted below, sustained growth in the industry requires sustained productivity growth in order to allow for higher future growth, output, and consumption. The profile for gross product per hour worked for the construction sector suggests that this is occurring.

Additionally, KPMG[7] Consulting Pty Limited was appointed as part of a review of the ABCB to assess the impact of five major initiatives introduced by the Board, being:

- performance based BCA
- economic evaluation system of building regulatory proposals
- private certification
- liability reform
- national product certification

As the report[6] is referenced in the Commissions Issues Paper[1], the specific outcomes of the report will not be reproduced in this submission. The KPMG report established that these specific initiatives produced significant benefits to the community and the building industry.

2.3 Efficiency of the economy

(i) 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?

HIA comment
HIA considers that the wording of the objectives is sufficiently board to facilitate the immediate needs of the community and the building industry. A suite of principles should be developed to underpin the objectives by identifying processes to be used to achieve the required outcomes.

By way of example, Objective 2 requires, in part, that regulations be based on minimum least cost solutions. This statement read in isolation is fairly broad. The application of this objective is underpinned by the need for the ABCB to develop regulations in accordance with appropriate documentation, such as; *A Best Practice Framework for Considering Business Regulation*[8] and *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*[10]*.* The processes described within these documents provide the basis upon which the BCA is to be developed and disclosure of this information would reinforce the transparency that is needed in the development of mandatory regulations.

(ii) ***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.***

HIA comment

Effectiveness
In assessing the effectiveness of the ABCB and the reform undertaken over the last ten years the appropriate definition of effectiveness relates to how successful the ABCB has been in implementing changes that have provided a net benefit to the end-users of premises, while at the same time constraining the cost increases on builders related to changes to building requirements.

Quantification of the extent to which this occurs is, however, difficult. Quantification of the benefits to end users from reform and acceptable levels of compliance to this reform is, by definition, difficult to establish.

Productivity
Productivity in this instance should be considered as the growth of output per person in the building industry. The benefit of productivity growth in terms of better cost efficiency is not a static concept. Rather sustained growth in the industry requires sustained productivity growth in order to allow for higher future growth, output, and consumption.

Efficiency

The efficiency of the ABCB and reforms undertaken needs to be considered from several different perspectives, including that the level of efficiency cannot be looked at in isolation, but rather should be considered in tandem with equity considerations. As a starting point, economic efficiency represents the lowest cost production method. Allocative efficiency relates to the question of whether the most is being obtained from the scarce resources available. This narrower concept also needs to be considered within the context of equity in regard to whether the distribution of resources is fair or not. Production efficiency relates to whether or not for a given amount of other services, the ABCB is 'producing' the maximum possible quantity of the last service given the resources available. Once again this final efficiency framework cannot be divorced from equity considerations in so far as consideration is also required of the combination of services that end-users most want.

3 INSTITUTIONAL ARRANGEMENTS

(i) 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?

HIA comment

Historically, the fundamental process involved in the development of a nationally focused reform agenda has been the implementation of an IGA that establishes a cooperative relationship between the Australian Government and the various governments charged with responsibility of day-to-day administration of building regulation. The propriety of IGA's to facilitate such arrangements has been well established, however the scope of social/community responsibilities held by State and Territory governments has evolved rapidly over the past few years. New social issues are emerging and governments have been reacting to these issues on behalf of their communities. The level of awareness of emerging issues varies significantly between individual communities and individual jurisdictions, resulting in a totally uncoordinated approach to the extent, and content, of regulation that is implemented by respective governments.

Over the past several years, the building industry has witnessed the emergence of many new regulations through local government regimes rather than through State regimes, or national regimes such as the Australian Building Codes Board. This trend has the potential to produce in excess of 700 variations of building regulations in Australia. State governments have endeavoured to reduce the impact of this practice by introducing legislation that prohibits local government from implementing regulations beyond the scope of the BCA. In the case of emerging issues, existing regulation will not exist and therefore local government is empowered regulate as necessary.

The most relevant recent example of this trend commenced several years ago and arose from the general community's growing awareness of the potential impact of excessive greenhouse gas emissions. In response, local governments began to regulate the design and construction of housing to require energy efficient outcomes. Some State and Territory governments also introduced a variety of regulatory requirements. The regulation of energy efficiency had proliferated before the ABCB began its undertakings to introduce energy efficiency provisions into the Building Code of Australia. By the time these provisions were introduced in January 2003, many governments had regulations in place and were reluctant to change their regimes and this unfortunate outcome remains in place to-day.

Consequently, in this rapidly evolving regulatory environment it is essential that Australia has a representative organisation that is given responsibility for the national development and co-ordination of building regulation. This organisation must operate in manner that allows it to be responsive to the needs of member governments, and in return member governments must be responsive to the need for national coordination of building regulation.

The development of a new IGA that is capable of producing an organisation that can fulfil the needs of member governments is required. The organisation that is established by a new IGA should not be based simply on a cooperative arrangement between the Australian Government and Sate and territory governments.

The IGA should facilitate the establishment of an organisation with legislative responsibilities and functions and it should strengthen State and Territory governments' commitment to the implementation of nationally consistent building regulations.

There are several examples of such commitments being made national consistency in industry regulations, including the establishment of the;

- *Australian Securities and Investments Commission*, which enforces and regulates company and financial services laws to protect consumers, investors and creditors.

- *Australian Prudential Regulation Authority*, the prudential regulator of banks, insurance companies and superannuation funds, credit unions, building societies and friendly societies,

- *National Transport Commission*, established to progress regulatory and operational reform for road, rail and inter-modal transport in order to deliver and sustain uniform or nationally consistent outcomes, and

- *Food Standards Australia and New Zealand*, responsible for developing food standards with advice from other government agencies, input from stakeholders and food regulatory policies endorsed by the Australia and New Zealand Food Regulation Ministerial Council.

The structure and operational procedures of the national organisations formed to undertake these functions should be assessed in regard to their potential to be applicable to the national coordination of building regulation.

Further comment on potential organisational models is presented in Section 3.1, issue (iii) of this submission.

(ii) 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?

HIA comment
State and Territory regulatory regimes differ across Australia and in this context the following general comments are offered as potentially being nationally applicable

Separate building and planning regulatory regimes have worked in relative harmony in the past, although there has traditionally been an indistinct boundary to each disciplines respective territory. In recent times there has been a trend for local governments to place their own “building” regulations into local planning schemes.

It is considered that the main reason for this trend is that local governments are generally more able to rapidly respond to emerging issues, perceived community needs or local political agendas. When some local governments identify an emerging planning related issue that needs to be regulated they are empowered to implement local planning regulations provided the proposals are consistent with their overall local planning scheme. As there is presently no “National Planning Code”, this independent action, while being a concern for local or State based industry, does not cause significant national problems.

When some local governments identify a building related issue that needs to be regulated they are still likely to implement local regulations even though there is a national building code in the BCA.

As they are generally not able to apply conditions to building approvals to require more than the requirements of the BCA, they will place the new regulations in planning schemes and apply their requirements as conditions of development consent. In essence, they will use their planning schemes to apply building regulations to developments.

The main reason for this approach appears to be that local governments feel the requirements of the BCA are not sufficient when applied to specific developments. Additionally, they feel that State governments and/or the ABCB do not respond to their concerns in sufficient time to satisfy local political agendas and therefore; they are forced to act independently.

A recent example of this trend to act independently is the future regulation of sustainable construction, which is currently the subject of a plethora of local government, State/Territory government and Australian government reviews, draft regulations or current regulations. The HIA has urged the ABCB to show leadership on this issue and asked several State and Territory governments to seek to coordinate their efforts toward the development of a national approach to future regulation. The ABCB has still not decided what it should do about the subject and consequently, it is now the most significant regulatory issue that the building industry is expected to face in the immediate future.

In regard to the Commission's question about delineation between planning and building regulation, there appears to be general acceptance among regulators and industry that any regulation relating to the design and construction of buildings should be contained within the BCA. This approach is consistent with objective (vii) of the current IGA, which requires the ABCB to "encourage" the consolidation of building regulations into the BCA. It is considered that a new IGA should strengthen this objective.

(iii) 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?

HIA comment
HIA would contend that local councils should not be empowered to impose additional requirements above those contained in the BCA.

While the BCA is a nationally adopted building code, no regulatory document can be sufficiently comprehensive to cover all possible building designs and in this context it is expected that the BCA will continue to be improved over time. Consequently, there may be specific designs offered for building approval that are beyond the scope of the BCA and an approval authority may not support the proposal. In some instances, the authority may simply refuse the application and allow the applicant the right of appeal. It would be more appropriate if the approval authority could refer the proposal to a higher jurisdiction for peer review of their concerns and to possibly be granted concurrence to condition the application to require more than the BCA.

State governments must legislate to prevent local governments from imposing additional building requirements for all issues regulated through the BCA. HIA understands that this is presently the case in some jurisdictions; however the level of enforcement of the legislation appears to vary significantly.

3.1 The Australian Building Codes Board

(i) Are ABCB funding and charging arrangements appropriate?

HIA comment
The ability of the ABCB to function appropriately will obviously be significantly influenced by its resources. It will also be influenced by the procedures and processes under which it is required to operate.

HIA considers the current IGA does not facilitate an appropriate structure or operating procedures for the ABCB to achieve its objectives and therefore; it is inappropriate to comment on the existing funding and charging arrangements. It is quite possible that a restructured organisation operating in a more flexible procedural environment may well be able to be more effective and efficient under the current funding and charging arrangements.

(ii) Is the ABCB structure and membership appropriate for achieving its objectives?

HIA comment

HIA consider the current structure of the ABCB is inappropriate and does not facilitate achievement of its objectives and has proposed a restructure of the organisation in consideration of the model presented under issue (iii) below.

In regard to the Commission's question – *is the membership of the Board appropriate to achieving its objectives*, HIA considers that the composition of the current Board is a prime reason the ABCB has not effectively functioned under the current IGA. Membership of the Board is determined in accordance with the IGA, which was developed in a regulatory environment in which States and Territories predominantly maintained separate Building and Planning legislative regimes. In this environment, the respective heads of government bureaucracies responsible for their jurisdiction's building regulation regimes became members of the Board, and subsequently contributed to the development of national consistency in building regulations.

During the 1990's there was a trend for State governments to integrate building and planning regimes into one bureaucratic portfolio and in most instances, planning administrators headed the joint bureaucracy. These administrators did not necessarily have the required level of understanding of the operation of the building industry, or the likely influence of regulatory reform on the industry.

Consequently, State/Territory regard for the current IGA has been significantly diminished.

The evolution of membership on the Board is a key concern to industry and must be addressed in order for the objectives of the IGA to be achieved. The Board must become a peak body within the building industry with membership held by highly qualified practitioners who are respected by their peers.

Revamping the membership of the Board by requiring the States and Territories to be represented by practitioners who are held in high regard within the industry, irrespective of whether they are public or private practitioners, would facilitate the effective operation of the ABCB. Consequently, the deliberations of the Board would become more effective, and while not guaranteeing specific outcomes, would generally escalate the potential achievement of the objectives of the IGA, particularly national consistency.

(iv) Are there other institutional models that would improve the effectiveness of national reform?

HIA comment

There are several other institutional models that HIA consider would improve the effectiveness of national regulatory reform including the;

- *Australian Securities and Investments Commission*, which enforces and regulates company and financial services laws to protect consumers, investors and creditors.
- *Australian Prudential Regulation Authority*, the prudential regulator of banks, insurance companies and superannuation funds, credit unions, building societies and friendly societies,

- *National Transport Commission*, established to progress regulatory and operational reform for road, rail and inter-modal transport in order to deliver and sustain uniform or nationally consistent outcomes, and

- *Food Standards Australia and New Zealand*, responsible for developing food standards with advice from other government agencies, input from stakeholders and food regulatory policies endorsed by the Australia and New Zealand Food Regulation Ministerial Council.

Of these four, it is considered that a similar structure and operation to Food Standards Australia New Zealand (FSANZ) would be most appropriate. Details of structure, procedures and operation of FSANZ can be perused on the following web-site:
http://www.foodstandards.gov.au/aboutus/background.cfm

FSANZ is a statutory authority operating under the Food Standards Australia New Zealand Act 1991. The Act provides a focus for cooperation between governments, industry and the community to establish and maintain uniform food regulation in Australia and New Zealand.

Australian food standards are harmonised as a result of an Inter Government Agreement between the Commonwealth of Australia and the States and Territories. Under this agreement, the States and Territories adopt, without variation, Food Standards which have been approved by the Australia New Zealand Food Standards Council (ANZFSC) which is the Ministerial Council representing all jurisdictions, including New Zealand.

The purpose of the 1991 FSANZ agreement was to consolidate responsibility for developing food standards in one specialist agency and to ensure the consistency of food standards across all States and Territories, which continue to have primary responsibility for enforcing food laws. It is understood that these arrangements continue to apply successfully. Some of the major benefits of this model are that the States and Territories agreed to adopt regulations produced by the national body, without variation, while the States and Territories retain the responsibility for the administration and enforcement of national regulations.

Another benefit of the FSANZ model is that it has been acceptable to New Zealand, which may have long-term benefits for Australia in the development of international consistency between the two nations.

For the purposes of this submission, the new agency is referred to as the Australian Building Standards Commission (ABSC)

Details of **the structure** of the FSANZ organisation can be perused on the following web-site: http://www.foodsecretariat.health.gov.au/pdf/model.pdf

The FSANZ structure has the following basic characteristics:

A Ministerial Council - comprises respective Ministers from all Australian States and Territories, the Australian Government, and New Zealand as well as other Ministers from related portfolios where these have been nominated by their jurisdictions. The Commonwealth Chairs the Council, which meets once a year.

A Board – There are twelve members of the Board drawn from specialist areas. The Board meets at least five times a year and it can also convene through teleconferences to discuss urgent issues. Outcomes of Board meetings are published.

Advisory Groups and Committees – there are currently three main committees advising the Ministerial Council or assisting the Board.

(i) Food Regulation Standing Committee (FRSC)
FRSC comprises heads of Departments for which the respective members of the Ministerial Council have responsibility, as well as the Australian Local Government Association. The Standing Committee will provide advice to the Ministerial Council on the development of policy relating to regulations. FRSC is chaired by the Secretary of the Commonwealth Department of Health and Ageing and meets at least twice a year.

(ii) Development and Implementation Sub Committee (DISC)
DISC comprises heads of the appropriate Australian (Commonwealth and State/Territory) and New Zealand inspection and enforcement agencies. Local government is also represented through the Australian Local Government Association.

DISC is responsible for developing and implementation of policy and oversees the development and implementation of a consistent approach across jurisdictions to enforcing regulation and standards

(iii) Technical Advisory Group (TAG)
TAG is a technical advisory group of Senior Officers from the jurisdictions. TAG provides technical advice to assist in the development of standards and assists in the coordination, surveillance and uniform interpretation and enforcement of Codes.

The **operating procedures** for FSANZ can be perused on the following web-site:
http://www.foodsecretariat.health.gov.au/pdf/operating.htm

The application of the FSANZ structural model to a future model for the ABCB could produce the following structure:

A Ministerial Council – comprising respective Ministers from all Australian States and Territories, the Australian Government, and New Zealand. The Commonwealth would Chair the Council, which would meet once a year.

The role of the Council would be to develop broad policy agenda and regulatory priorities.

A Board – comprising twelve eminent representatives of the building industry. The Board would be Chaired by a Commissioner who would be appointed by the Ministerial Council. The Board would meet four times a year.

The role of the Council would be to oversee the effective operation of the Commission and facilitate the Councils agenda. The Board would also be responsible for the approval of new regulations to be incorporated into State and Territory regulatory systems and the Building Code of Australia.

A Building Regulations Standing Committee – comprising representatives of State and Territory bureaucracies responsible for the administration of building regulations.

The role of the Committee would be to provide advice to the Ministerial Council on policy relating to building regulations and to provide advice to the Board on the propriety of draft regulations.

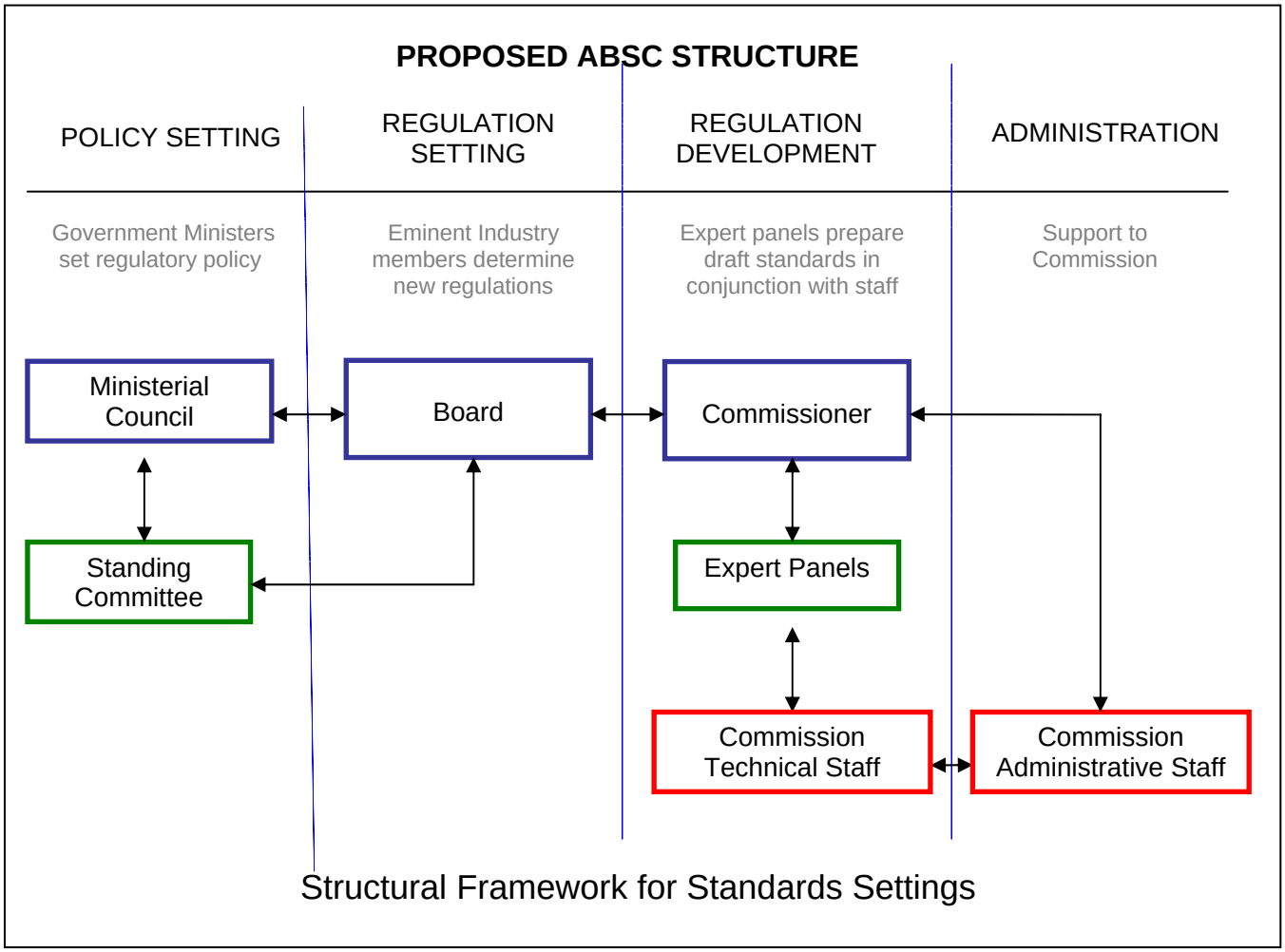
A Commission - comprising a Commissioner, Commission staff and Expert panels

The role of the Commission would be to develop building regulations to fulfil the Councils agenda.

- **Commission staff** – the role of staff would be similar to the role of ABCB staff
- **Expert Panels** – would comprise experts in their respective fields called together on a needs be basis to develop draft building regulations for specific issues. Experts could be drawn from private practice, public practice or specialist organisations.

Please refer to **Figure 1** for a graphic outline of the proposed structure of a future organisation that, for the purposes of this submission, has been called the *Australian Building Standards Commission*.

Figure 1.



Structural Framework for Standards Settings

(iv) How important is the direct involvement of the Australian Government in achieving national reform to building regulation?

HIA comment
The Australian government must continue to cultivate cooperation between the States and Territories, for it is evident that the current level of commitment of some governments/ bureaucracies needs to be renewed.

Without the leadership of the Australian Government it is likely that significant regulatory reform achieved to-date will be progressively unravelled by State and Territory jurisdictions due a loss of focus on a national agenda.

(v) Should the ABCB be more independent?

HIA comment
HIA consider that the ABCB should be an independent body supported on a legislative platform similar to the model presented under issue (iii) above.

3.2 Code-making processes

(i) Do the processes by which standards are made, ensure that standards contained in the Code are well based?

HIA comment
SAI have had a long relationship with the ABCB and its predecessor, the Australian Uniform Building Regulations Coordinating Council (AUBRCC). This relationship has at times been strained as the two organisations have a number of converging interests, and also have some diverging interests. Consequently, the processes adopted by Standards Australia International (SAI) have been the subject of debate for many years and the level of debate has recently intensified as SAI has become more focussed on commercial operations.

In response to the specific issue raised by the Commission, it is considered that the operational processes adopted by SAI, i.e. both internal and external processes, need to be significantly improved. For the purposes of this submission, internal process are taken to be those Committee based adopted by SAI to produce standards, and external processes are those adopted in order to gain public comment on draft documents,

In an endeavour to ensure that appropriate procedures were adopted in regard to the development of documents referenced in the BCA, the ABCB produced a Protocol[9] that is applicable to any organisation that wishes to produce reference documents. In essence, the Protocol specifies procedures for the various stages of document development and also the principles to be applied to the preparation and drafting of documents. It would be fair to state that the need to produce a Protocol arose from concerns in regard to the processes being used to prepare reference documents and the degree of frustration experienced by the ABCB.

HIA has also experienced frustration with SAI processes over the years and the basis of our concerns will often vary between specific SAI projects.

A general summary of our concerns would include the following issues;

- The composition of SAI project committees – SAI processes for document development do not ensure that the most appropriate personnel are appointed to standards writing committees. The reason for this is that committee representation is voluntary and members must meet all costs involved in attending meetings. While many highly qualified personnel contribute significant effort to this process, it is sometimes the case that committee members are those that have the money or the time to attend. This outcome is inappropriate when the importance of expert contribution to the standards writing process is considered.

  Additionally, committee membership will often include representatives who have a commercial interest in the outcome of the project. Consequently, conflict is inevitable in such circumstances.

- Conflict between committee members in regard to the development of "best practice" documents rather than "minimum standard" documents as necessary for adoption in the BCA. When this issue has been raised at committees it is often the case the some members do not care if the document is not adopted in the BCA because they consider it will become defacto law in either case once it is published.

- Committees are often unable to justify changes to existing standards and are based on information or data that is not relevant to the proposed change. This outcome is in conflict with the ABCB Protocol which states, in part, *Referenced documents are to be produced, revised or amended only when there is a 'clearly demonstrated need', a principle contained in the Council of Australian Governments (COAG) - Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*[10]*.*

  In the recent past, HIA has unfortunately had to oppose the further development of three draft standards on the basis that there has not been "*a clearly demonstrated need*" for the proposed changes.

- SAI do not prepare appropriate impact assessments of changes to existing standards. This outcome may well be consistent with the content of the ABCB Protocol, which states, in part, that; *A proposed new or revised referenced document may be subjected to a Regulation Impact Statement (RIS) under the COAG Agreement. The proposer may be required to supply information regarding the impacts of the proposed document on the community, in terms of costs and benefits, as input to the RIS process.*

  The use of the word "may" in this statement produces uncertainty of outcomes.

  The wording of the MOU between the ABCB and the SAI (http://www.abcb.gov.au/documents/abcb_office/abcb-sa_mou_nov2003.pdf) is equally uncertain in its outcomes as it uses the terms "where appropriate" and if necessary" in Sections 4 and 5 respectively.

- If SAI is to be considered to be standards setting body then it should be bound to comply with the principles applied to other standards setting bodies as contained in the COAG document *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies.*

- The ABCB Protocol establishes timeframes for the submission of comments on draft documents and these must be observed by SAI.

- New BCA adopted standards must be made available at the same time as new regulations produced by the ABCB. There has been a recent example of a new adopted standard only becoming available two weeks before it is to become a means of complying with the BCA, even though the amended regulation has been available for some time.

- Most importantly, the application of the Trade Practices Act is also mentioned in this section of our submission although it is not directly related to SAI process. Rather, it is related to various judiciaries' interpretation of the application of Australian Standards, which is indirectly generated through SAI.

  One of the fundamental purposes of building regulations is to specify mandatory minimum requirements for the design and construction of buildings. A platform upon which building regulations has been developed is that compliance with regulations provides certainty of outcome.

  This fundamental principle is being eroded by the application of the Trade Practices Act in that the building industry no longer knows what documentation it must comply with in order to meet their obligations to a client. Historically, compliance with the applicable regulatory regime and specified contractual matters provided certainty, but no longer is this the case. Decisions of various judiciaries are requiring the industry to comply with undefined documentation, particularly Australian Standards, even though these documents are not included within the BCA or contacts. Consequently, the industry finds itself in a position whereby it is exposed to constant uncertainty as to what is legally required to be done.

  In this context, it could be interpreted that the industry must comply with every Australian Standard that could potentially be found by the judiciary to be related to a specific project. This is an inappropriate outcome that should be remedied and HIA would greatly appreciate the Commission addressing this issue in its deliberations.

(ii) Would greater alignment with standards from other countries be desirable?

HIA comment
A determination of an appropriate scope of alignment with standards should be made in consideration of the economic policy of government, the benefits that would derived from an alignment and the ability of the Australian market to accommodate change. This is not a simple question to answer.

Standardisation can be beneficial, however the degree of benefit to specific groups will depend on the benchmark used to establish the standard.

In this context, the organisation responsible for future regulation of the industry in Australia would be the most appropriate organisation to determine the benefit of standardisation to the industry. For the purposes of this submission, that organisation would be the proposed Australian Building Standards Commission.

(iii) Are the level and type of consultations by the Board and its advisory committees appropriate and transparent in order to fulfil ABCB objective 5?

HIA comment
The level and type of consultation undertaken by the current Board is generally transparent. It is the prolonged process of consultation during the development of regulations that is seen as being one of the primary hurdles to efficient process.

In essence, code development should be undertaken by expert panels comprising individuals who are expert in the respective field of design and construction being addressed, together with experts in code writing. This procedure has the potential to reduce inapt input to the initial drafting process, but still allows all individuals and organisations the subsequent ability to offer comment.

It is essential that current practices are revised in order to allow the ABCB to be more responsive to the regulatory needs of the States and Territories; otherwise the States and territories will act independently and undermine national consistency.

(iv) 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?

HIA comment
HIA consider that there are adequate mechanisms in place for anyone to offer comment on ABCB regulatory proposals.

(iv) Are there other consultation strategies that would facilitate greater transparency for stakeholders?

HIA comment
HIA is of the view that greater transparency is not required. If there are concerns that the current mechanisms are not transparent, we would respectively propose that there may be a need for greater education on current mechanisms, rather than a need for greater transparency.

(v) Does the ABCB have the necessary representation to determine what meets community expectations for health, safety and amenity?

HIA comment
HIA is of the view that the ABCB does not suitable mechanisms in place to enable it to adjudicate on community expectations. Please see specific comments provided in Section 2.1 under issue (ii).

(vi) 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?

HIA comment
The advantages and disadvantages of any form of decision-making process can be debated. It would not be appropriate to impose a predetermined decision-making process on an organisation and such processes are best between members of the particular organisation.

HIA representatives sit on a number of SAI project committees and we understand that, when necessary, SAI also use a majority-voting rule being; 80% of committee members must vote on a proposed action and there must be 57% of votes in favour of that action for it to proceed. If this relationship is fulfilled than action is taken.

(vii) ***Do the different approaches across the jurisdictions in implementing changes to the BCA inappropriately erode achieving national consistency? Is there a better approach?***

HIA comment
The processes used by the States and Territories to implement the BCA are usually determined in consultation with the respective governments Parliamentary Counsel.

Those States that refer to a specific version or amendment of the BCA in legislation may do so because they hold concerns that they will not have "control" over there own regulations if they refer to the BCA, as amended from time to time. This later reference allows automatic adoption of the most recent amendment. This action does not have significant influence on national consistency unless the specific State does not amend its current legislation in time for the latest amendment to be adopted at the same time as it is automatically adopted in other States.

The best approach is to simply adopt it by reference as; *"The Building Code of Australia, produced by the Australian Building Standards Commission, as amended from time to time."*

3.3 Evaluation of the costs and benefits of reform proposals

(i) 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?

HIA comment
HIA understand that any change to the BCA must be justified, i.e. in accordance with COAG documentation; there must be a clearly demonstrated need for change. It is not clear when an RIS is required to be undertaken and therefore we are uncertain as to whether or not it is working effectively.

From past practices, it is our experience that there are changes made to the BCA when an RIS has not been prepared, particularly in regard to the adoption of Australian Standards.

It is understood that the fundamental purpose of an RIS cost-benefit analysis is to demonstrate the relationship between a proposed regulation and the cost of compliance with that regulation. It is assumed that only those proposals that demonstrate a positive benefit are adopted.

Consequently, there is an obvious need to assess the cost of compliance with all issues associated with building regulations, such as the cost of compliance with administrative processes and the cost of compliance with proposed technical (BCA) provisions.

RIS must be comprehensive in regard to the considerations addressed in the documents and the value estimates of both costs and predicted benefits. As with any document that contains information and data, there is scope for variation in content that could sway an outcome. Consequently, RIS produced for regulatory change must be reviewed by independent experts and in this context it is understood that all RIS produced by the ABCB in relation to proposed regulations are reviewed by the Office of Regulation Review. If this not the case, the adoption of this principle should be addressed.

In all instances, additional requirements of the BCA will impose additional costs directly attributed to design and construction issues. Some regulatory changes also impose additional costs for assessment of compliance. The recent introduction of energy efficiency provisions in the BCA provides a good example.

Due to the complexity of the requirements, some local authorities are not undertaking a technical assessment of designs and instead are requiring the applicant to obtain an independent computer based assessment, which can cost in the vicinity $300.00. In these instances, if the local authority was to decrease their building application fees by the same amount, there would be no additional cost, however as this outcome is highly unlikely to occur, the additional cost of demonstrating compliance must be addressed.

The trend for approval authorities to require independent assessments to demonstrate compliance with the BCA applies to many components of design and construction and the practice is becoming more common as a means of risk sharing in the event of litigation.

The cost of compliance with the technical provisions of the BCA is not the only relevant issue that needs to be addressed. Currently, there is no need for States and Territories to develop RIS for mandatory administrative provisions and this situation is of significant concern to industry. As an example, recent changes were made to legislation in NSW to require mandatory inspections, and certification of inspections, in multi-unit residential buildings. Arising from these changes, additional costs will not only be incurred due to the cost of arranging and undertaking inspections, but also due to changes to project scheduling and management practices.

A more critical issue is that it was subsequently realised that there will not be a sufficient number of accredited certifiers to undertake the scope of required inspections. While this is a significant issue in itself, it is great concern to industry that this proposal was developed without any RIS process in regard to costs and the real likelihood that the increased inspection regime will not produce any benefits to the community.

In addition to these concerns, RIS do not appear to address issues such as the availability of materials or components of construction that will need to be used in order to comply with new proposals. As an example, changes to BCA energy efficiency provisions included the use of certain types of fans, however when the provisions were introduced, these fans were not available in all parts of Australia and industry was faced with a situation where compliance could not be achieved.

In consideration of the above material, HIA propose that RIS should be prepared for all changes to regulatory regimes (other than editorial amendments) and must address the cost of;

- compliance with BCA technical regulations,
- demonstrating compliance with BCA technical regulations, and
- compliance with administrative provisions.

(ii) 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?

HIA comment

The tendency for local governments to include building regulations within planning schemes is a significant concern as planning legislation is not subjected to the same degree of regulatory scrutiny as the BCA, particularly in regard to regulatory impact. In the case of the BCA, the IGA requires new regulation to be subjected to a regulatory impact assessment in order to ensure that governments do not introduce regulation for regulation sake and that regulations are cost beneficial. Without this safeguard the cost of buildings can rise significantly without commensurate benefit to individual building owners, or the general community, being achieved.

It is understood that the Office of Regulation Review is aware of the different standards of scrutiny between building and planning regulations and that cost-benefit regulatory processes applying to planning schemes are to be reviewed.

A recent example of this problem relates to the design and construction of new dwellings so that they are “adaptable” for future use. HIA recently commented on a proposal released for comment by a Sydney metropolitan council that set out proposed requirements for new dwellings in its local area. This proposal was of great concern to HIA for a number of reasons, primarily because the scope of the proposal must be addressed through the BCA.

Also of great concern, the document contained no evidence that the council had prepared it in accordance with proper regulatory procedures, such as those contained in the COAG document *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*[10]*.*

Consequently, it did not indicate that any formal cost-benefit analysis had been undertaken. HIA has written to the ORR seeking their view on the need for local government to apply proper procedures to the development of regulations and we are currently awaiting a reply.

4 ASSESSING THE CODE

4.1 Code objectives

(i) Is the BCA effectively achieving the various components of the ABCB's objectives, such as those listed above? (Objectives 1, 2, 6 and 8)

HIA comment
As discussed in the Commission's Issues paper, the BCA is only one vehicle through which the ABCB can achieve its objectives. Many of the objectives can only be achieved through the cooperative actions of the States and Territories, and the ABCB can only encourage national consistency, for it not achieve it through its own actions.

In general, the BCA is a significant benefit to industry as it provides a performance- based platform upon which national consistency in technical regulation can be achieved.

Consequently, it is considered to be an appropriate vehicle for the achievement of Objective 1 with regard to the introduction of performance-based standards and to allow the use of efficient building practices.

In regard to Objective 2, HIA has previously mentioned our concerns that SAI documents are not necessarily prepared on the basis of regulating minimum standards and that there appears to be a trend toward "best practice" creeping into draft documents.

The BCA appears to be achieving Objectives 6 and 8 as required by the IGA.

(ii) ***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)?***

HIA comment
HIA are of the view that the objectives expressed in the IGA do not conflict. As discussed previously in Section 2.3, issue (I), we consider that a suite of principles should be developed to underpin the objectives by identifying processes to be used to achieve the required outcomes.

In regard to the achievement of Objective 3, deregulation is taken to be a term to describe regulatory policy that promotes a review of existing regulation with the aim of identifying regulations that can withdrawn. If this interpretation is correct, HIA is not aware of any projects where this policy has been applied.

If Objective 3 simply means that it is ABCB policy to only regulate where absolutely necessary, it is suggested that compliance COAG policy documents would require this and therefore the Objective is redundant.

(iii) Are 'minimum acceptable' standards and the pursuit of least cost solutions compatible with maximising net benefits to the community?

HIA comment
This issue was partly discussed in Section 2.1 relating to community expectations and HIA offered the view that there is regulatory dichotomy in the goals of the BCA. Specifically, there is the relationship between the need to establish minimum standards in regulations, and the need to achieve acceptable standards for the benefit of the community. These two desirable outcomes are considered to be in conflict.

The most important goal for the BCA should be that it develops regulations in accordance with the COAG document *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*[10]. The processes described within this document should achieve the most appropriate outcome and therefore, by inference, be acceptable to the community.

The community can always voluntarily seek more individually appropriate outcomes than those established by regulation; however individual requirements should not be imposed on the general community.

4.2 Coverage of the Code

4.2.1 Building access for people with disabilities

(i) ***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?***

HIA comment

Efficiency
Neither allocative nor productive efficiency will be near to being fully achieved under the proposed Premises Standard. That is not to say that such efficiency conditions would be met under an alternative proposal either, but it is difficult to determine the relative efficiency merits of the Premises Standard in the absence of specification of building access requirements. Several pertinent points can, however, be made regarding the efficiency of the Premises Standard in its own right.

The low compliance with regard to DDA requirements together with the high transaction costs involved in the complaint process suggest that the level of efficiency has been running well below the optimum. Moves to improve compliance may lead to efficiency gains, although the difficulty inherent in accurately measuring the additional commercial costs incurred from this compliance makes quantification of these potential efficiency gains difficult to achieve. Modest gains in efficiency, at best, are the most likely outcome.

Effectiveness
The issue of the rate of compliance is crucial as a means of measuring the effectiveness of any reform undertaken as it appears to be the only viable measurement available. This basis of measurement suggests that the effectiveness of the existing system has not been especially high given the very low level of compliance.

To this end, the establishment of a detailed codification of the DDA's general duty of non-discrimination should act to improve compliance. Hence a higher degree of success and therefore effectiveness should be forthcoming. From the perspective of the builder, if part of the lack of compliance relates to the commercial cost of this compliance being too high, this situation will not change with greater enforcement, but will potentially add significantly to the cost of building.

The difficulty inherent in conducting a heavily quantified cost - benefit analysis makes it very difficult to determine the magnitude of any potential improvement in effectiveness.

(ii) ***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?***

HIA comment
The most significant benefit of this new proposal is that it will provide an acceptable "deemed-to-satisfy" means developing an appropriate building design and therefore: provide the certainty that industry has been seeking. All buildings will be required to comply with the document in order to be "exempt" from potential litigation under the DDA.

This outcome is not consistent with the BCA, which is a performance-based document that allows alternative solutions to be prepared and to be approved by an approval authority. Under the Premises Standard proposal, if an alternative solution is prepared it must be "approved" by an appointed expert panel. This in itself is not an overly burdensome issue, however even thought he designer has their alternative solution approved by the expert panel, that designer, or applicant for approval, is still exposed to litigation under the DDA because the "approved" design does not comply with the "deemed-to-satisfy" solution. This process will stifle innovation and is totally inconsistent with performance-based design principles and should be reviewed.

4.2.2 Energy efficiency

(i) ***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?***

HIA comment
In consideration of the torturous path that the BCA energy efficiency provisions have taken to arrive in their proper place, it would almost be inappropriate to be critical of their content.

Energy efficiency provisions are a significant, albeit delayed, inclusion in the BCA and following some initial teething problems, it appears that practitioners do not have major concerns with the application of the requirements, other than the deemed-to-satisfy provisions for northern Australia.

Accordingly, the performance-based approach of the current provisions is considered to be an effective mechanism for regulation.

4.2.3 Fire safety

(i) ***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?***

HIA comment
HIA consider that there is a conflict between the BCA and Fire Brigades legislation and that this conflict has the potential to limit the effective operation of performance based design. For the purposes of this submission reference is made to NSW legislation.

In New South Wales, administrative provisions are predominantly contained with the Environmental Planning and Assessment ACT 1979 and the Environmental Planning and Assessment Regulations 2000. Under this legislation, the NSW Fire Brigades are referenced as an organisation involved in the approval of certain alternative solutions, particularly those relating to fire safety. This requirement is considered reasonable for alternative solutions relating to equipment used by Brigades for fire fighting purposes. The scope of alternative solutions in which the Brigades are involved is more extensive, and this creates significant problems for building designers and certifying authorities. The main reason for these problems is the conflict between the wording of the legislation under which the Brigades operate, and the performance requirements of the BCA.

Section 11, clause 1 of the Fire Brigades Act 1989, states; *When there is an alarm of fire, a fire brigade must despite anything to the contrary in any Act, proceed with all speed to the fire and try by all possible means to extinguish it and save any lives and property that are in danger.*

This provision places legislative responsibility on Brigade officers to save any lives and property that are in danger and it is this generic reference to *property* that introduces conflict with the BCA.

In contrast to the Brigades legislation, the expressed goals of the BCA are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community. These goals are applied so that the BCA extends no further than is necessary in the public interest, is cost effective, easily understood and is not needlessly onerous in its application.

In this context, property protection is not an expressed goal of the BCA. However, there are certain performance requirements of the code that require designers to consider *other property* in the development of alternative solutions.

Other property is defined in the code and means all or any of the following-

(a) any building on the same or an adjoining allotment: and
(b) any adjoining allotment: and
(c) a road.

These forms of *other property* may need protection arising from structural, fire or drainage considerations.

The purpose of including a “road” as a component of other property is that a road is considered to be a safe place for the purposes of occupant evacuation.

Therefore, a road may need to be protected for the purposes of achieving “safety”, which is a goal of the BCA.

In essence, if a fire occurred in a building designed to comply with the BCA and all building occupants, ie those in the building at the time of the outbreak of fire, were safely evacuated, and the building was subsequently destroyed without damage to adjoining property, the goals of the BCA would have been achieved.

Such an outcome would not be consistent with the requirements of NSW Fire Brigades’ legislation, and therein lies the dilemma, i.e. that NSW has a building control system that instigates conflict between building designers, certifying authorities and the Fire Brigades. The main cause of this conflict is that the BCA allows alternative solutions to be developed, which must be approved by a certifying authority; however the alternative solutions can’t be approved until the Brigades have considered them and made a recommendation. Because of the wording of their legislation, the Brigades are not comfortable with approving alternative solutions, which may comply with the BCA; however it is obvious that in the event of a fire the building could be destroyed.

Additionally, due to the conflict in legislation, alternative solutions that may present unacceptable occupational health and safety outcomes for Brigades personnel, or unacceptable environmental outcomes, may not be endorsed even though these issues are not related to compliance with the BCA. Consequently, the Brigades may not accept complying alternative solutions and the design flexibility allowed by the performance based BCA is being stifled by a legislative conflict in the operation of a regulatory approval system.

This conflict has been evident for many years and although specific reasons for this are unclear, there are certain ancillary issues that could be used as pointers to the government's apparent reluctance to resolve the issue.

It is understood that the activities of the NSW Fire Brigade are financially supported by an insurance premium levy that provides approximately 75% of operational funding. Consequently, there is little incentive for the government to possibly incur the wrath of insurance companies by changing legislation to allow the approval of designs that facilitate the likely destruction of a building, albeit this is a legitimate outcome under the BCA. It is also not in the government's interests to change the BCA to return to the prescriptive design of buildings, as this would incur the wrath of the building industry. Therefore, it appears that the government is either unaware of this conflict, or is inclined to leave the existing legislative in conflict. Consequently, through the routine operation of the current approval process the regulatory authorities have a mechanism that allows the pre-BCA prescriptive regime to operate by default resulting in some legitimate performance based designs not being approved.

Anecdotal evidence has been provided that certain fire-engineering designers in Sydney are not considering the deletion of fire sprinkler systems from buildings, even though safe designs complying with the BCA can be justified, simply because these will not be supported by the Brigades. Consequently, the cost-efficiencies that a performance based BCA can deliver are unable to be achieved under the current NSW approval system.

While the contribution of the Fire Brigades to the achievement of life safety and the protection of property is unquestionable, the operation of an approval process that stifles flexible design and innovation without compromise to the expressed requirements of building regulations is fundamentally flawed.

The Commissions Issues Paper asks the question; how can this conflict be resolved?
As is the case with several other regulatory issues that the industry faces, there is no simple answer and political motivation is needed to address this issue. A possible option would be to have those alternative solutions that are currently required to be referred to the Brigades, to be peer reviewed by a panel that included representatives of the Brigades as well as other appropriate industry practitioners. Under this proposal, while the Brigades could contribute to the assessment of an alternative solution, the proposal could not be dismissed on their view alone.

4.2.4 Sustainable construction

(i) ***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?***

HIA comment
In essence, sustainable construction is the product of design concepts that can be applied to future buildings in order to maintain a sustainable balance between environmental, social and economic values for current and future generations.

At present, the application of sustainable construction concepts is limited to those that will assist in sustaining a suitable environment for current and future generations.

The need to adopt a sustainable approach to future construction arises from government and community concerns related to the use of potentially limited natural resources and a growing volume of greenhouse gas emissions.

There are a number of factors related to the design and construction of buildings that impact upon the sustainable performance of buildings, including:

- energy efficiency (usually taken to mean the thermal performance of a building envelope)
- water conservation measures
- stormwater management
- waste minimisation, recycling/re-use and resource management
- choice of building materials
- Indoor Air Quality
- noise attenuation
- accessibility of buildings
- adaptability of buildings
- durability of buildings
- household features (e.g. appliances)
- urban salinity prevention, and
- building maintenance

While the BCA now contains provisions for energy efficiency, not all States and Territories have elected to adopt the provisions.

Many of the other design factors listed above are currently being regulated, or are proposed to be regulated, under local government planning schemes. This uncoordinated approach to the future regulation of sustainable construction is seen by the building industry as the most significant regulatory issue that will be faced in the immediate future. It is essential that the national coordination of this issue become a priority of the COAG.

The scope of regulation being developed throughout Australia differs between regulatory authorities; however there appears to be a consensus that energy efficiency and water conservation are the two most important issues to be addressed. In NSW local governments are currently developing new regulations for adaptable housing as this is seen by some to a significant local community issue

4.2.5 Maintenance of buildings

(i) ***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?***

HIA comment
The release of a performance based building code in 1996 simply formalised a process that had been in place for many years, ie the development of building designs (alternative solutions) that did not comply with standardised design recipes.

For decades, designers had been developing alternative solutions to the prescriptive regulations of their day, however as these designs were real alternative solutions; local authorities did not have the power to approve them. Most State/Territory jurisdictions had formal processes by which these alternative solutions could be approved, such as through Victoria's Board of Referees, or the NSW Land and Environment Court.

In this context, the release of the performance-based BCA facilitated the development of alternative solutions as part of normal design process, rather than have them sit outside a prescriptive regulatory system.

The act of formalising existing practice was seen by some practitioners as opening the "gates of hell" and that performance-based regulation would allow almost any proposed design to be approved. This predicted outcome was certainly not the case; however, as with any form of innovation, performance-based design has its critics, particularly from those who do not appreciate the efficiencies that can be implemented without compromise to primary objectives.

In this context, alternative solutions are no different to a building designed strictly in accordance with the deemed-to-satisfy provisions of the BCA in that components of design upon which the performance of the building relies, must be maintained throughout the life of the building.

For example, a building required by the BCA deemed-to-satisfy provisions (DTS) to be fitted with a fire sprinkler system must have that system maintained. Similarly, an alternative solution that incorporates a fire sprinkler system must have that system maintained. There is no difference whether the design is DTS or an alternative solution.

Mandatory maintenance procedures should be administrative provisions as they relate to administrative processes that need to be undertaken throughout the life of the building and accordingly, do not belong in the BCA. Rather, these provisions should be part of the national administrative framework that has been discussed throughout this submission.

4.2.6 Other areas

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

HIA comment
HIA is of the view that any existing regulation relating to do the design and construction of buildings should be contained within the BCA. This view was also expressed in regard to the Commission's question regarding delineation between building and planning regimes. The ultimate goal of the ABSC should be the consolidation of all building related deregulation, as outlined in the Laver report, pp 18 which referred to plumbing and electrical regulations.

An example of this policy is reflected in the Tasmanian Appendix to the BCA in which it is evident that the government has endeavoured to consolidate a significant component of the State's building regulations. Where consolidation cannot be effectively or viably achieved in the immediate future, cross references to other regulations should be contained within the BCA in a manner similar to that adopted by the Victorian government in their Appendix to the BCA.

5 DELIVERING OUTCOMES

5.1 Implementing the Code

5.1.1 Accessibility of the Code

(i) 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?

HIA comment
HIA consider that the BCA is a mandatory legislative document and should be available free of charge via electronic access in the same manner that other legislation is available. Hard copy versions of the BCA should also be available, however it would be reasonable these to be sold.

HIA is aware that sales of the BCA currently form a significant component of funding for the ABCB and therefore this issue will need to be considered in the context of future funding arrangements for a new national organisation.

Mandatory referenced documents should also be available free of charge via electronic access. It would be reasonable for optional referenced documents, such as the majority of SAI referenced standards, to be sold.

(ii) What activities or strategies could improve accessibility to the Code?

HIA comment
See comments on issue (I) above.

5.1.2 Administration and enforcement

(i) 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?

HIA comment
As discussed under Section 2.1, issue (iv) relating to the adoption of consistent administrative provisions, some jurisdictions have a degree of consistency within their provisions at present. In general, it would be reasonable to say that significant differences exist between the eight State/Territory administrations. The cost of these inconsistencies was estimated in the Allen report[6] that estimated savings to industry arising from the implementation of a national framework would be in the vicinity of $400 million a year.

(ii) 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?

HIA comment
Previous efforts to nurture national consistency in administrative regulations, such as the development of the Model Building Act, have had limited success. Documented reasons for this outcome are not readily evident. Anecdotal evidence would suggest that there are a number of reasons. Some of these are outlined below, although their relevance to individual States and Territories may vary.

Building control legislation is comprehensive, complex and inter-related with ancillary legislation. Consequently, large-scale changes to legislation are not readily achieved. At the time the Model Building Act was being developed, some jurisdictions were concurrently undertaking reviews of their existing legislation and had already expended significant resources on the development of new processes and procedures which had been approved by respective governments. In this context, it is always unlikely that these jurisdictions would be prepared to abandon their substantial endeavours and recommence a legislative review based on the proposals within the Model Act. Other jurisdictions were proposing major reviews and were prepared to implement model provisions where-ever practicable. While these two scenarios represented opposite ends of possible review processes, some jurisdictions have undertaken periodic reviews of specific components of their legislative packages and have adopted components of the Model Act on a needs be basis.

Consequently, adoption of the Model Act always had a limited potential for concurrent systematic reform, however it has proven to be a significant document in the evolution of Australia's building control systems.

The most significant deficiency in the current State/Territory based regulatory system is the political will to become unified in our approach to the regulation of the building industry. Apathy toward the need to unite our industry is difficult to comprehend when it is considered that the States and Territories have chosen to do so in other areas of industry. The national regulation of the financial industry, the prudential industry, road transport and food standards are examples where successful national outcomes have been achieved. It is therefore difficult to understand why there is an element of indifference displayed by some governments when proposals are made to implement national consistency in the building industry.

National consistency in building regulations has been reported on many occasions to have the potential to introduce significant savings to the community and yet governments will not pursue these benefits on behalf of their constituents. This is an unacceptable attitude to these significant reform proposals.

In regard to the propriety of having nationally consistent regulatory systems, Laver[4], pp 14, reported that;

"The inconsistency in the administration of regulations was the most common problem raised in the Review and needs to be addressed ***as a matter of urgency****. (*Authors emphasis*). Similar concerns were highlighted in the April 1999 Technical Review. There would be considerable support for the development of a more consistent approach to administrative regulations, particularly in the areas relating to the adoption of the BCA, private certification, accreditation of building practitioners, and liability reforms."*

Laver subsequently made reference to the need for national consistency in administrative provisions as the "number one" recommendation in his report, stating that;
"The ABCB further develop a framework and guidelines specifically addressing nationwide uniform administration of building regulations, and this be formally submitted to the Ministers responsible for Building Regulations with a request that all regulatory conduct within their administrations be consistent with this framework."

This fundamental recommendation has still not been fulfilled despite the establishment of an ABCB project steering committee several years ago. The Commissions Issues Paper[1] asks the question – what can be done about this? HIA considers that the composition of the Board is a prime reason the ABCB has not fulfilled it's objective of developing a national administrative framework. Detailed comment on this issue is presented in Section 3. issue (ii), of this submission.

In the broader context of achieving national uniformity across both technical and administrative components of regulatory systems, HIA consider that the current Intergovernment Agreement should be reviewed for it does not provide a suitable operating structure for the development of nationally consistent building regulations. Specific comment on the proposed restructure of the ABCB is provided in Section 3.1, issue (ii), of this submission.

(iii) 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?

HIA comment

The effectiveness of inspections and compliance checks will depend on the expertise of the individuals undertaking the inspection. In some jurisdictions inspections are mandatory, and in some, the principal certifying authority determines the need for inspections. The basis of this difference can be political, however it should relate to the complexity of the specific project and the best judge of the scope of an inspection regime should be the person who will be responsible for signing off the completed construction.

Many large volume builders have comprehensive inspection and compliance checking regimes that may well be more comprehensive than a mandatory regime incorporated within legislation. This form of self-regulation has been demonstrated to work well in the past and should be retained.

For the purpose of clarity, a relevant extract from Section 3.3 of this submission is reiterated below.

Currently, there is no need for States and Territories to develop RIS for mandatory administrative provisions and this situation is of significant concern to industry. As an example, recent changes were made to legislation in NSW to require mandatory inspections, and certification of inspections, in multi-unit residential buildings. Arising from these changes, additional costs will not only be incurred due to the cost of arranging and undertaking inspections, but also due to changes to project scheduling and management practices.

However, one of the most critical issues is that it was subsequently realised that there will not be a sufficient number of accredited certifiers to undertake the scope of required inspections. While this is a significant issue in itself, it is great concern to industry that this proposal was developed without any RIS process in regard to costs and the real likelihood that the increased inspection regime will not produce any benefits to the community.

(iv) Are there problems with dispute resolution processes and, if so, what are the main causes?

HIA comment

Dispute resolution processes vary between jurisdictions and each would have particular qualities. The basis of the dispute determines the legal procedures to be followed and there may be a number of procedures available to litigants.

The majority of issues in which HIA members would be involved in dispute resolution would relate to claims for payment for services provided, or claims relating to perceived defects. From the content of the Commissions Paper, it is doubtful that it is this scope of dispute resolution that is to be reviewed

(v) Has private certification reduced clarity over allocating responsibility when addressing complaints?

HIA comment
Legislation addressing the activities of private certifiers varies between jurisdictions and therefore responsibilities and consequential outcomes of complaints or dispute resolution may vary.

(vi) Would the establishment of a Building Appeals Board address existing weaknesses or would other mechanisms be more effective?

HIA comment
HIA members would generally not be involved in the operation of such dispute resolution process; however the general principle of resolving disputes on the basis of technical merit rather than legal assessment does appeal.

5.2 Reforming the risk and liability landscape

5.2.1 Liability reforms

(i) ***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?***

HIA comment
To answer this question appropriately HIA consider it would be necessary to do a comparative study of the relevant legislation in each jurisdiction.

(ii) ***What are the insurance requirements?***

HIA comment
See answer to issue (i) above

(iii) ***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?***

HIA comment
Liability reforms and insurance requirements should be reviewed in conjunction with insurance providers. Mandatory insurance requirements will be of little benefit to clients if practitioners cannot gain insurance cover and such an outcome will simply lead to a deficiency of practitioners. By way of example, an integral component of past liability reforms was a requirement in some jurisdictions for accredited certifiers to carry a ten year run-off cover to protect building owners.

Certifiers found it difficult to gain this form of mandatory insurance cover and subsequent changes to legislation have been necessary.

Past predictions by industry observers that the insurance industry would drive reform of regulatory processes are proving to have merit

(iv) ***Are there other mechanisms available to implement an efficient allocation of risk and liability across the building industry*****?**

HIA comment
HIA offers no specific comment on the availability of other mechanisms.

5.2.2 Certification of buildings

(i) ***What has been the role of the ABCB in introducing private certification?***

HIA comment
Private certification was a component of the administrative provisions of most State and Territories well before the establishment of the ABCB. In this context, while the ABCB has initiated a project on the development of a national administrative framework, it has little to do with the introduction of private certification.

(ii) ***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?***

HIA comment
To answer this question appropriately HIA consider it would be necessary to do a comparative study of the relevant legislation in each jurisdiction.

Brief comment is made that the roles and requirements are different in NSW in that private certifiers have to have qualifications and experience assessed by an accredited organisation. Public certifiers do not need to have qualifications or experience.

Work on this issue has been undertaken by the ABCB – see web-site;
http://www.abcb.gov.au/documents/accreditation/accred_survey_june02.pdf

(iii) ***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?***

HIA comment
HIA consider that the introduction of private certification has brought significant benefits to the building industry. Benefits primarily result from time savings related to processing applications for Building Permits/Construction Certificates and the delivery of client services such as periodic inspections and the issue of certificates.

The relationship between the certifier and the person paying for their services should be no different to the provision of any professional service.

It should be noted that NSW has recently introduced legislation prohibiting certifiers to be engaged directly by a builder unless the builder is also the owner of the land upon which the certified building is to be constructed.

(iv) ***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?***

HIA comment
HIA is not in an appropriate position to comment on this issue.

(v) ***What other issues need to be addressed by the Board with regard to certification?***

HIA comment
Work on this issue has been undertaken by the ABCB – see web-site;
http://www.abcb.gov.au/documents/accreditation/accred_survey_june02.pdf

5.3 Awareness and research

(i) ***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?***

HIA comment
The actions of the ABCB in raising awareness of the BCA have been commendable, however while many practitioners may be aware that the document exists, there remains a significant number who do not access the document on a regular basis. This outcome creates problems within the industry because regular amendment of the BCA means that the working knowledge of many practitioners can quickly fall behind current requirements. The need to promote the regular use of the BCA remains an issue to be resolved and an appropriate strategy will need to involve industry associations and practitioner institutions working in conjunction with the ABCB.

Regular publications produced by the ABCB are of significant to practitioners who receive and read them. HIA is uncertain of the scope of their distribution or the general level of industry awareness or usage of these publications and therefore their contribution to the reform process is unknown.

(ii) ***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?***

HIA comment
The ABCB has endeavoured to implement training programs developed and delivered form the benefit of the industry. As mentioned in our comments on issue (i) above, it would be reasonable to assume that, as with any regulated industry, there would still be a number of practitioners who do not use the BCA. Some see the BCA as a design tool rather than a design and construction tool and simply choose to construct from design and specification documentation prepared by others.

In this context, the benefits of performance based regulations will be reduced if there is a reliance on the incorporation of alternative solutions at the design stage of development rather than at both the design and the constructing stages.

Consideration should be given to the development of a strategy to raise the profile of the BCA within the industry in order to maximise the benefits and cost efficiencies of performance based design. This strategy must include consideration/review of current approval processes for anecdotal evidence indicates that some clients and practitioners no longer bother with the development of alternative solutions as it is too hard to gain approval alternative solutions. Consequently, an education strategy will not yield benefits unless the industry is provided with an efficient system of approvals.

The strategy should also address the scope of building regulation education included within tertiary education programs provided through TAFE or University courses.

Consideration should also be given to an assessment of the benefits face to face delivery of education programs being undertaken through industry associations rather than the ABCB.

(iii) ***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?***

HIA comment

The ABCB has endeavoured to operate an efficient research program. The areas of research addressed to-date are generally considered to have been relevant to the further development of the BCA. The ABCB research program is required to address a comprehensive agenda and must include projects on the further development of the BCA, the development of national administrative processes and research on the validity of existing technical regulations. This latter area of research is one that has become most important with the introduction of performance based building regulations because the BCA has two separate methods of compliance; i.e. comply with the deemed-to-satisfy provisions, or develop an alternative solution that complies with the mandatory performance requirements.

At present, building designers often test which of the two processes will be most readily complied with and there is no assurance that the two processes will produce designs with equal characteristics, or equally achieve the goals of the BCA. This outcome arises from the process of development of the performance-based BCA, particularly the assumption that all deemed-to-satisfy provisions meet the performance requirements of the BCA. Such an assumption needed to be made at the time in order to expeditiously develop the new code; however it is now appropriate that this assumption be validated by reviewing the code and rectifying irregular relationships between deemed-to-satisfy provisions and performance requirements.

(iv) ***Is the research being well managed and conducted cost effectively? Is the ABCB the appropriate body to conduct and coordinate such research?***

HIA comment

HIA is not in a position to offer comment on this issue.

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4. *Review of the Australian Building Codes Board* – Laver, et al. February 2000. http://www.abcb.gov.au/documents/abcb_office/abcbreview_feb02.pdf

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6. *Harmonisation of Building Control Administration, Costs and Benefits of the National Administrative Framework,* The Allen Consulting Group, December 2002, page vii.

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