

Master Builders Australia

Submission

to

Productivity Commission

on

Regulatory Impact Analysis: Benchmarking

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CONTENTS

1	Introduction.....	2
2	Purpose of this Submission	2
3	Background	3
4	Regulatory Impact Analysis	3
5	‘Red Tape’, Small Business and Building and Construction	4
6	Building Regulations.....	6
7	Example of the RIA/RIS Process at Work – Energy Efficiency.....	7
8	Example of the RIS Process at Work – Slips, Trips and Falls	9
9	Example of the RIA/RIS Process at Work – Training	10
10	Specific Comments on the PC Issues Paper	11
11	Summary.....	15

1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.
- 1.3 Building and construction is the third largest industry in the Australian economy, with the cumulative task over the next decade estimated to require work done to the value of \$2.4 trillion. The residential and non-residential building sectors combined will require \$1.25 trillion worth of work and the engineering construction sector \$1.15 trillion.
- 1.4 The building and construction industry provides more than 1 million jobs or 9 per cent of the workforce. Growth in the industry is expected to result in an additional 300,000 employees to around 1.3 million by 2021.

2 Purpose of this Submission

- 2.1 The Productivity Commission (PC) is undertaking a study to benchmark the efficiency and quality of Regulatory Impact Analysis (RIA) processes.
- 2.2 In supporting this study, Master Builders welcomes the opportunity to communicate some experiences that we have had in relation to regulation in general, RIA processes and Regulatory Impact Statements (RIS), as well as making specific comments on issues raised in the PC Issues Paper.
- 2.3 Master Builders believes that our submission serves to highlight, from a building and construction industry perspective, shortcomings of the RIA and RIS processes that have come to light in recent years.

3 Background

- 3.1 The PC was asked to undertake a study to benchmark the efficiency and quality of Commonwealth, state and territory, and the Council of Australian Governments (COAG) RIA processes, as at January 2012.
- 3.2 In line with the terms of reference, the PC is to closely examine and assess the efficiency and effectiveness of the key features of the variety of RIA processes that apply across jurisdictions. Comparing processes and identifying leading practice examples should provide a model for reform.
- 3.3 The benchmarking study will contribute to the COAG implementation plan for its ‘regulation making and review’ reform stream in the National Partnership Agreement to Deliver a Seamless National Economy. The focus of the reform stream is on developing and enhancing processes for regulation making and review, with the overarching objective of improving the quality of regulation.
- 3.4 Master Builders, along with many other business and industry-related organisations, has identified a number of concerns and areas for improvement in RIA processes. Particular concerns Master Builders has with the RIA process include:
- lack of rigour in impact analysis;
 - need for more independent scrutiny of RISs;
 - level of exceptions and exemptions under RIA processes; and
 - lack of adequate consultation processes.

4 Regulatory Impact Analysis

- 4.1 RIA is the process of examining the likely impacts of a proposed regulation and a range of alternative options which could meet the government’s policy objectives. RIA requirements are intended to achieve better regulation by supporting:
- Sound analysis. The case for acting in response to a perceived problem, including addressing the fundamental question of whether regulatory action is required, needs to be demonstrated. The analysis should also

outline the desired objective of the response, a range of alternative options to achieve the objective, and an assessment of the impact of each option, and should be informed by effective consultation.

- Informed decision making. To help decision makers understand the implications of options for achieving the government's objectives, they should be informed about the likely impacts of their decision, at the time they are making that decision.
- Transparency. The information on which government regulatory decisions are based should be publicly available.

4.2 Central to the RIA process is the RIS. A RIS is a document prepared by the relevant authority responsible for a regulatory proposal, following consultation with affected parties. It formalises and provides evidence of the key steps taken during the development of the proposal, and includes an assessment of the costs and benefits of each option (although RISs are not required to directly compare options). The RIS must be presented to decision makers so that the decision is informed by a balanced assessment of the best available information.

4.3 After a decision has been made, the RIS needs to be made public. For example, Commonwealth RISs are posted on a central online RIS register maintained by the Office of Best Practice Regulation (OBPR) and, where applicable, tabled in parliament with the enabling legislation (attached to the explanatory material for bills or legislative instruments).

5 'Red Tape', Small Business and Building and Construction

5.1 The current PC study is the latest in a number of Government initiatives designed to better assess regulation and indeed cut the burden of red tape. The initiatives follow on from the landmark Banks Report *Rethinking Regulation*, which identified practical options for alleviating the compliance burden on business from government regulation.

5.2 RIA and the RIS processes now play an important role in trying to minimise the regulatory burden. Master Builders encourages the Government to continue to identify regulation that is unnecessarily burdensome, complex and redundant or duplicates regulation in other jurisdictions. We stress the need

for practical options that can alleviate the red tape burden, particularly on family run and other small businesses, which:

- Tend towards partnerships and sole proprietorships rather than proprietary companies. There are few trusts or incorporated bodies. This means that small business owners tend to be personally liable for business decisions and do not tend to have in-house corporate or legal expertise.
- Generally rely more on debt financing and less on equity, with loans being frequently secured against personal assets, often the family home.
- Are usually run by owner/managers who have invested substantial sums in their businesses and who often do not have the time to strategically manage their businesses as well as day-to-day operations.
- Operate in localised markets and from a single location making them vulnerable to changing market conditions.

5.3 Building and construction is the largest small business sector and small business overall are responsible for around half of national employment and over one-third of domestic product. Ninety-five per cent of all businesses in the building and construction industry employ fewer than five people, while less than one per cent employ 20 or more people.

5.4 Master Builders' business regulation policies focus on the need to reduce the regulatory burden, particularly for small business. Many of the smaller businesses are family run — often a husband and wife partnership, whether incorporated or not — through which, in the main, the husband carries out his particular trade. While Master Builders recognises that, in general, small business will be best served by policies that promote the interests of the business community as a whole, the inherent differences associated with small businesses must also be taken into account.

5.5 Master Builders therefore advocates specific small business policies that:

- Reduce the complexity of the tax system for small business.
- Reduce the compliance costs of regulation.

- Increase the ability to access debt and equity finance.
- Facilitate small business participation in government procurement.
- Level the playing field with regard to small business interaction with big business.

6 Building Regulations

- 6.1 The Building Code of Australia (BCA, now part of the National Construction Code) provides the key regulations for building and construction that apply nationally, apart from State and Territory Variations. Supporting the regulations are relevant Australian Standards referenced by the BCA. Master Builders strongly supports this approach of having national, consistent, cost-effective, minimum acceptable building standards and believes they are important to the economy, the industry and the community.
- 6.2 Master Builders is concerned that the BCA appears to be increasingly seen as the panacea for broader social objectives leading to more and more regulation and consequently increased costs of construction. If nothing else this demonstrates the urgent need for an open and transparent RIS process for considering increased requirements imposed on the ABCB.
- 6.3 Master Builders is concerned that local government continues to further increase the stringency of building regulations without adequate justification or cost-benefit analysis. The Government should work with State, Territory and local governments to change the current system by introducing controls on local government so that it no longer has a free hand to add new regulations and conditions on buildings that inflate costs and hinder development.
- 6.4 The ABCB is currently involved with the development of a new National Construction Code (NCC) which will include building, plumbing, electrical and telecommunication provisions. This was developed under direction from COAG for a combination of building and plumbing requirements for BCA 2011. Master Builders is aware that a new Intergovernmental Agreement (IGA) is being produced under which ABCB operates and the BCA is produced. This has not been made public and should be, to facilitate industry comment. As the BCA is critical to our industry, we believe there should be more transparency surrounding this development.

- 6.5 Master Builders believes that the ABCB should be more transparent in its governance and consult more openly with industry, particularly in the development of RISs.
- 6.6 Good public policy making requires involving those outside government in the policy making process. This includes consulting with those who are the target of the policy, whether they be individuals or groups, families, industry businesses or community organisations.
- 6.7 Master Builders believes that this failure has been detrimental to the work of the ABCB and to industry's expectation of transparency and consultation in the relevant deliberations and arriving at optimal public policy outcomes.

7 Example of the RIA/RIS Process at Work – Energy Efficiency

- 7.1 Since new building replaces only about 2 per cent of the stock each year, Master Builders has strongly recommended that the Government's policy focus should be on retrofitting the nearly \$4 trillion (\$4,000 billion) of the existing stock of buildings to make them more energy efficient and therefore less carbon intensive.
- 7.2 A stronger focus on policies to ensure that existing buildings become more energy efficient is the most effective way of achieving carbon abatement in the short to medium term. The means to achieve this include: education of the public in best practice and direct subsidies or rebates to assist with installation of improved insulation, tinted windows, draught proofing, outside colour alteration, solar hot water and other similar measures.
- 7.3 Master Builders has serious concern regarding the moves by the Council of Australian Governments, through the National Strategy for Energy Efficiency (NSEE), to continually increase the energy efficiency requirements for construction of new buildings without a proper RIS process. The community needs to move beyond increasing stringency on the building shell, particularly for new residential buildings.
- 7.4 Incredibly, the COAG decision - signed off on by first ministers - to move to mandatory 6-star energy efficiency regulations for new residential buildings, was taken well before a RIS was formulated!

- 7.5 In the event, the ABCB commissioned The Centre for International Economics (The CIE) to prepare a Final RIS (December 2009) in accordance with the requirements of “Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies”, endorsed by COAG in 2007, on a “Proposal to Revise the Energy Efficiency Requirements of the Building Code of Australia for New Buildings”.
- 7.6 Evidence from The CIE/ABCB’s Final RIS on mandatory energy efficiency regulations for new residential buildings – the Government’s own cost benefit analysis – is overwhelmingly negative; the community would suffer a very large loss of \$444 million with the move to 6-star requirements. The approach will result in a considerable loss to the community and, at \$888 per tonne of carbon saved, represents an extraordinarily expensive way to reduce emissions by comparison with a broad-based carbon reduction scheme.
- 7.7 The proposals were therefore not a cost effective, complementary policy option relative to the economy-wide costs imposed via the Government’s Clean Energy Scheme now about to be introduced with a starting price of \$23 per tonne of carbon emitted.
- 7.8 The National Buildings Framework (NBF) being developed by the Department of Climate Change and Energy Efficiency needs to acknowledge this work, and not still call for increasing energy efficiency in new buildings.
- 7.9 Evidence produced in a study by The CIE for Master Builders found that increasing mandatory energy efficiency regulation for new homes is subject to the law of diminishing returns: once the 5-star is reached, each additional step up the 10-star scale costs more and gives less in return.
- 7.10 The CIE research confirms that it is simply not cost-effective to mandate any more than a 6-star rating for homes. The research shows moves to 7, 8 and 9-star will be associated with an even greater negative result (from the Government’s own finding of a \$444 million loss), involving rising costs and diminishing benefits as stringency is increased. The cost to the community would likely be in the billions of dollars.

8 Example of the RIS Process at Work – Slips, Trips and Falls

- 8.1 In relation to proposed new provisions to reduce slips, trips and falls in buildings, Master Builders Australia has had serious concern over a number of matters. Master Builders was particularly concerned about the process followed for the introduction of the new provisions.
- 8.2 The process that was followed was far from normal practice. A proposal is generally first raised with the ABCB Building Codes Committee (BCC), followed by a Proposal for Change (PFC) and a Preliminary Impact Assessment (PIA) for consideration by the BCC. Then, as necessary, this would be followed by a RIS for public release and comment, before the proposal was put into a draft BCA.
- 8.3 Master Builders was at a loss to understand why a normal process was not followed, particularly given the contentious nature of the provisions to reduce slips, trips and falls in buildings.
- 8.4 Master Builders understands that a RIS may in fact be put out for public comment later in the process but we believe that this is too late and inappropriate.
- 8.5 It is important that outcomes of the RIS are made aware to all industry stakeholders to allow them to make a more considered comment about the provisions. It is a case of putting the cart before the horse and negates the purpose of the public consultation process.
- 8.6 In respect of the specific details for the proposed provisions for change, Master Builders' greatest concerns were with staircases and balustrades, where the proposed changes are significant and have caused considerable angst in the industry.
- 8.7 Much of the industry's concern and feedback may in part have been alleviated if the normal process of consultation and timely preparation of a RIS had been followed.

9 Example of the RIA/RIS Process at Work – Training

- 9.1 In the area of training and accreditation, Master Builders notes the fact that there are a number of complex and contested reforms, highlighting the potential value of a comprehensive RIS process involving rigorous cost-benefit analysis.
- 9.2 National Occupational Licensing, for example, has the potential to bring benefits from more efficient use of labour, however, harmonisation of licensing rules also brings risks such as ‘gold plating’ of regulation and adjustment costs that may be out of proportion with benefits. These issues need to be fully explored through a timely RIS process.
- 9.3 There is also a concern at present that the National Occupational Licensing policy process often appears quite closed and when a RIS is eventually released it will represent an agreement among governments that has little practical chance of being altered.
- 9.4 Similarly, reform of VET funding is an important public policy measure, but as the experience in Victoria has demonstrated it carries risks as well as benefits. There are competing approaches, strong vested interests and enormous sums of taxpayer money involved. In this context, a transparent setting out of the foreseeable consequences of different reform directions is of central importance.
- 9.5 The same is true of reform of the Australian Apprenticeship system.
- 9.6 A best practice RIS can help articulate the reasoning behind different policy options, highlight where the costs and benefits of those options will fall and provide an opportunity for different perspectives to be brought on the preferred policy option.
- 9.7 To be credible, however, this process has to allow for the genuine prospect of change to (or at least modification of) the preferred option as a result of stakeholder feedback.

10 Specific Comments on the PC Issues Paper

- 10.1 In this section, Master Builders makes some specific comments in relation to the PC Issues Paper.
- 10.2 Box 2 – page 11. There is a need to discuss the problem of regulatory creep across multiple regulation changes, not just in relation to a specific regulation.

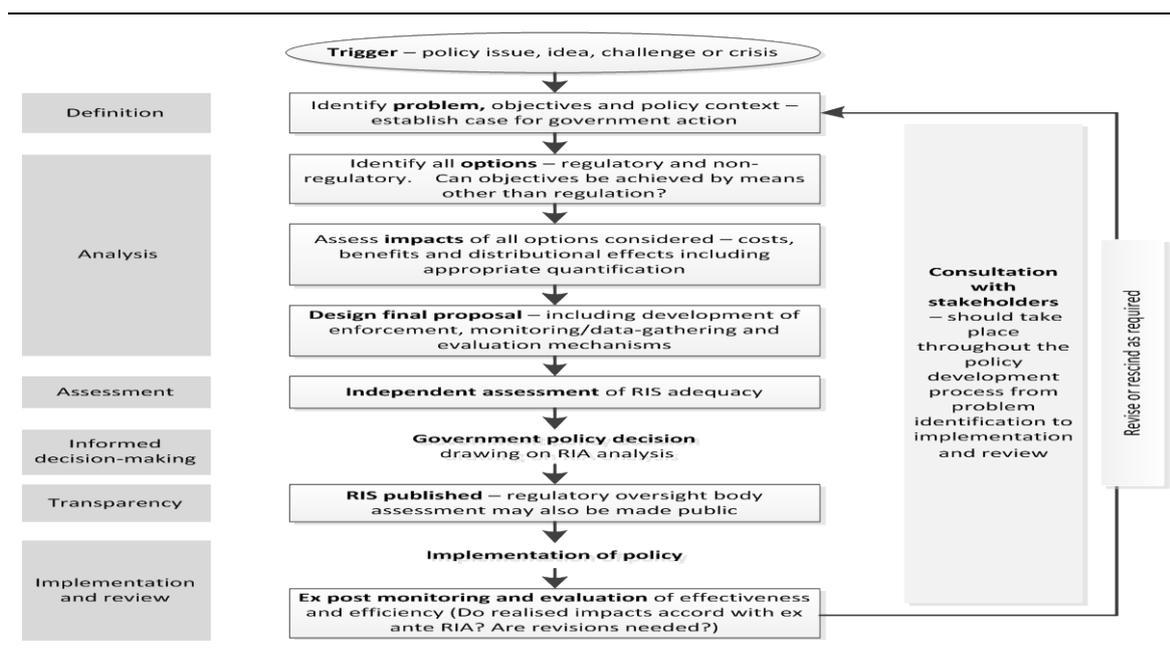
Box 2 Sources of ‘unnecessary’ regulatory burdens

Rethinking Regulation identified five features of regulations that contribute to burdens on business not justified by the intent of the regulation.

- *Excessive coverage, including ‘regulatory creep’* — regulations that appear to influence more activity than originally intended or warranted, or where the reach of regulation impacting on business, including smaller businesses, has become more extensive over time.
- *Regulation that is redundant* — some regulations could have become ineffective or unnecessary as circumstances have changed over time. Other poorly designed regulations might give rise to unintended or perverse outcomes.
- *Excessive reporting or recording requirements* — companies face excessive or unnecessary demands for information from different arms of government. These are rarely coordinated and often duplicative.
- *Variation in definitions and reporting requirements* — this can generate confusion and extra work for businesses than would otherwise be the case.
- *Inconsistent and overlapping regulatory requirements* — regulatory requirements that are inconsistently applied, or overlap with other requirements, either within governments, or across jurisdictions. These sources of burden particularly affect businesses that operate across jurisdictional boundaries.

Source: Regulation Taskforce (2006).

- 10.3 Figure 1, the RIA process page 12. Consultation with stakeholders is limited to consultation RIS (or just RIS) and not through the whole process as illustrated. From Master Builders’ perspective, this is a key bone of contention.



- 10.4 Top page 17: “4. in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that: the **benefits of the restrictions to the community as a whole outweigh the costs**” and “7. **consulting effectively with affected stakeholders at all stages** of the regulatory cycle;
- 10.5 The first point would appear to be at odds with mandatory energy efficiency regulation for new homes RAI. In relation to the second point, we have found examples where consultation at all stages of regulation cycle has not occurred.
- 10.6 Box 5, page 19, “7. Third dot point. Evaluate the impact on small to medium sized enterprises and demonstrate how administrative and compliance costs are minimised.” Master Builders does not believe that all RISs demonstrate how costs of implementation are to be minimised.
- 10.7 Bottom page 21 “Is there evidence of improved regulatory outcomes?” We would say very little, emphasising the importance of ex-post evaluation of regulation in terms of the cost benefit achieved and the need for continuing regulation.
- 10.8 Page 22 “Has RIA contributed to improved transparency and better governance over time?” Transparency and governance can be markedly improved, particularly through better consultation with industry.

- 10.9 Page 27 “Are the processes for granting exemptions from RIA appropriate? To what extent are significant proposals avoiding timely and rigorous scrutiny through the granting of exemptions?” and “Where exemptions are granted, are there requirements for subsequent RIA or post-implementation reviews? Are these requirements appropriate? Are they being satisfied? How could these requirements be improved?” Master Builders believes there is a need for more formalised arrangements including a requirement for a subsequent RIA or ex-post review.
- 10.10 Page 27, bottom “How and when in the decision making cycle are Ministers, or other decision makers, engaging with RISs? Ministers can be involved too late in the RIS process.
- 10.11 Page 28 “To what extent is the preparation of a RIS still being treated as an ‘add on’ task — after a course of action has already been agreed? Master Builders notes the example of the decision to impose 6-star mandatory energy efficiency regulations for new homes, where the COAG decision to proceed was taken before a RIS was even contemplated.
- 10.12 Page 28, bottom “Do agencies responsible for preparing RISs generally have the necessary skills and expertise? If not, why not? No. That is why they often use consultants.
- 10.13 Page 30 “Evaluation and review requirements.” All government RISs should be carried out to the same standard as COAG RISs.
- 10.14 Page 33 “Are there adequate mechanisms in place to ensure accountability and compliance with RIA processes?” and “How can RIA processes be better insulated from political expediency? How can systems avoid the abandoning or bypassing of RIA processes when there are pressing political demands?” The mechanisms need to improve when, for example, the Treasury is one of the worst offenders in terms of RIS processes! Political expediency must be managed better, but we acknowledge that reform in this area is difficult.
- 10.15 Page 34 “Should RIA processes include the power to stop regulatory proposals without an adequate RIS proceeding to the decision maker? If so, should this power be vested in the oversight body or another body?” and “To what extent do agencies conduct reviews of the accuracy of their ex ante RIS estimates? Should such reviews be undertaken routinely?” Yes, an oversight

body such as the OBPR is needed. No decision should be made without an adequate RIS and all agencies should have independent review in terms of the accuracy of RIS estimates and costs used.

10.16 Page 34, bottom “RIA transparency may be broadly considered in terms of: consultation/public involvement in the development of the RIA; communicating information to decision makers; and communicating the information to stakeholders and the community.” Again, adequate and ongoing consultation is vital.

10.17 Page 35, Box 6 – Principles for consultation. We believe that consultation on the RIS process is not carried out as recommended in the principles.

Box 6 Australian Government whole of government principles for consultation

The following best practice consultation principles are to be met by all agencies when developing regulation:

Continuity — Consultation should be continuous, and start early in the policy development process.

Targeting — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes state, territory and local governments, as appropriate, and relevant Australian Government agencies.

Timeliness — Consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

Accessibility — Stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups. Agencies should be aware of the opportunities to consult jointly with other agencies to minimise the burden on stakeholders.

Transparency — Policy agencies need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.

Consistency and flexibility — Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

Evaluation and review — Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective. (Australian Government 2010, p. 44)

10.18 Page 36 “How effective are existing mechanisms for enhancing transparency, such as: consultation processes; publication of draft/final RISs; and publication of compliance information? How can RIA transparency be improved?” and “Is consultation and, where relevant, release of the

consultation RIS occurring early enough in the policy development process?” and “Would publication of the oversight body’s assessment of the adequacy of each RIS create a stronger incentive for agencies to undertake RIA of an appropriate standard?”

- 10.19 Transparency must improve by adequate consultation up to the time of the final decision RIS. Consultation needs to start at problem identification stage, not during the ‘consultation’ RIS. Publication of an assessment re RIS adequacy by an oversight body assessment would be a sensible reform.

11 Summary

- 11.1 Master Builders is vitally interested in assisting Government initiatives designed to better assess regulation and indeed cut the burden of red tape. We remain committed to identifying practical options for alleviating the compliance burden on business from government regulation.
- 11.2 RIA and the RIS process needs to play an even more important role in properly assessing the regulatory burden. Master Builders supports moves to improve RIA and RIS processes with the ultimate aim to reject unnecessarily burdensome, complex and redundant or duplicate regulation.
- 11.3 Master Builders supports the PC benchmarking study into RIA which has the potential to lead to improvements in efficiency and quality of Commonwealth, state and territory, and COAG RIA processes, by highlighting:
- when RIA is required and the factors which must be taken into consideration in analysis
 - the mechanisms in place to ensure accountability and compliance with RIA processes
 - specific evidence of where the RIA process has resulted in improved regulation
 - how and when in the decision-making cycle decision makers engage, and
 - whether there are leading practice examples in RIA that might usefully inform reform consideration by individual jurisdictions.

- 11.4 In this submission, Master Builders has made several points in relation to experiences we have had in relation to regulation in general, RIA and RIS processes, as well as contributing a number of specific comments on various issues raised in the PC Issues Paper.
- 11.5 Master Builders trusts that the submission serves to highlight, from a building and construction industry perspective, a number of shortcomings of the RIA and RIS processes that have come to light in recent years, including:
- lack of rigour in impact analysis
 - need for more independent scrutiny of RISs
 - extent of exceptions and exemptions under RIA processes, and
 - lack of adequate consultation processes.
- 11.6 Master Builders looks forward to providing any further assistance the PC may require as it undertakes the study.
