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Legal Bulletin

"Model Building Act – the Regulatory Template that Re-shaped Modern Day Building Control – 20 years on"

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In 1990 the Australian Uniform Building Regulatory Co-ordinating Council (AUBRCC) commissioned a consultancy to generate a National Model Building Act. This model template was designed to be a model piece of legislation that could be called up by the eight states and territories to facilitate best practice building regulation and uniform or harmonised building regulation.

In the words of Doctor Anthony Lavers, a British international construction law expert, *"Nothing so radical and so holistic in concept has ever been undertaken in a major jurisdiction..."(*taken from paper "Protection of Real Estate Developers and Users Against Economic Loss Arising from Defects in Construction", 2000.)

The then Chair of AUBRCC was Lyall Dix, the Director of Building Control Victoria. The consultancy team that was appointed to assume carriage of this consultancy was headed up by the author of this article, Kim Lovegrove. The reform team comprised the author as project director, two other lawyers, Charles Morgan and Peter Reid, and a very close cooperation with Mr Dix and some policy officers of the then Victorian Division of Building Control.

The Rationale for the Project and the Problems with Building Regulation in the early nineties

1. National Microeconomic Reform

The Special Premiers Conference, a coalition of the nine governments, that was established by Australian Prime Minister Bob Hawke was intent on driving national microeconomic reform and where possible uniform inter-jurisdictional regulation. The reason being: to cut the cost of government, increase national efficiency and reduce costs emanating from conflicting regulation.

The NMBA was one of the projects that came within its "radar" as it was identified that conflicting and contradictory building regulations were costing the country hundreds of millions of dollars annually.

To quote the Brian Welch, (who is now the CEO of the MBA and was at the time the CEO of the Building Owners Managers Association) as stated on the back page of the Model Building Legislation Commentary publication,

"There can be no doubt that streamlining legislation and regulation in a country as over governed as Australia is long overdue"

2. Liability Conundrums and Concerns

"The liability reforms would also benefit municipal associations and local authorities which were the recipients of grossly inequitable litigious assault." The Age Newspaper Wednesday October 1991

Local government in particular, or as plaintiff lawyers affectionately refer to them "insurers of last resort", were buckling under the burden of the joint and several liability doctrine. Frequently joined as co defendants in building actions, councils were often first choice defendants as they became de facto underwriters of the liability of impecunious co-defendants in multi party proceedings. The cost was identified as being an unfair burden on local

government and something had to be done about it. At the time plaintiffs had six years to initiate legal proceedings for building disputes. The problem was, six years from when? From when the damage occurred or from when the damage was discernable? The limitation period start date was not clear at law, with the consequence that legal proceedings were being issued in an ambiguously long time after a building was built. The term "infinity plus six" was coined to illustrate the uncertainty. Consensus was that this area of law was very problematic.

3. Delays in building permit issue

The building industry at the time was concerned about the delays in the issue of building permits as the delays held up projects and caused negative economic collateral. We were charged with the task of identifying a way to speed up the building approval process.

The Aims of the Project

- To develop the world's best practice model of building regulation
- To reform construction liability laws/regimes
- To establish the most efficient appeal mechanisms and building control mechanism for expeditious resolution of building permit matters.
- To establish a privatised alternative to local government to the issuing of building permit – private certification.

The Methodology

a) The first phase was comparative regulatory synopsis. The publication The Primary Building Acts of Australia a Comparative Study provided a synopsis of the then eight disparate building regulatory systems in Australia.

b) The next publication and research project summarised the building permit and building control dispute resolution systems in the eight jurisdictions. This culminated in the publication of the book The Primary Building Acts of Australia Dispute Resolution Systems and Options.

c) We needed to analyse the best way of generating model legislation that could be promulgated as law. We engaged the Comparative Constitutional Studies Centre of Melbourne University to prepare a report that we published called Constitutional Options for Uniform legislation.

d) comparative analysis was then carried out by our team on world best practice regulatory regimes to identify:

- Best practice insurance laws
- Best practice liability laws
- Best practice private certification regimes
- Best practice compliance and probity regulations
- Best practice registration systems

We analysed on and offshore regimes including:

- The UK
- France
- Certain US and Canadian jurisdictions
- NZ
- All Australian states and territories

We then summarised the research and generated a report that culminated in the publication titled Model Building Act Legislative Aims and Options.

e) Consultation

Juxtaposed and running in parallel with the research, Mr Dix and the author embarked upon a massive interstate consultation process. Be it addressing trade associations, state and territory building controllers and civil servants; be it addressing national or state and territory conferences on the reform proposals, the consultation process was exhaustive, exhausting and comprehensive. Peak representative bodies were briefed and consulted with; local government, the MBAs, the HIAs, the then BOMA (predecessor of the property council), the Institute of Engineers, the AIBS; to name a few.

Some seven research books totalling 27,000 were printed, published and distributed by AUBRCC throughout the nation at no cost to the key stake holders along with every council in Australia.

f) Questionnaire and Feed back

After the key stake holders had considered the Legislative Aims and Options book, they filled out questionnaires that had been dispatched

throughout the country seeking reform preferences. The reform team then sifted through the stake holder feedback forms and synthesised reform preferences.

Industry stakeholders and local government representatives volunteered certain key preferences:

Ten Year Liability Capping

A clear start date for the initiation and conclusion of legal proceedings being ten years from the issue of a construction permit. Ten years hence, the ability to initiate legal proceedings for economic loss or damages occasioned by problematic building work was "guillotined". The use of the word guillotine is metaphorically poignant as we imported this idea from French based legal systems dating back to the Napoleonic code and the concept of *liabilitie decennial.*

Proportionate Liability

Building practitioners, representative bodies and local government all "sang the same tune" that joint several liability (JSL) as a liability apportionment and allocation doctrine should be replaced. The consensus was that JSL should be replaced with the legal doctrine, proportionate liability. This is the doctrine where in multi defendant legal proceedings, no defendant would be held liable for any more than his, her or it's contribution of responsibility for the building ailment or malaise.

Private Certification

In the early 90's, one could only obtain a building permit and occupancy permit and related building approval inspections through local government. Industry and consumer feedback revealed that the building approval process monopoly enjoyed by local government slowed down optimum speed regarding the issuing of building approvals.

Consensus was such that a privatised regime for the building approval process be introduced to enable private building surveyors to compete with local government for the issue of statutory building approvals. This was identified as a very important micro-economic reform.

Further, it was identified that a stringent compliance regime be introduced to "police" the private certification community, whereby state regulatory bodies would register and oversee private certifiers to ensure that they discharged their statutory obligations to the public. The phrase "deregulation with safeguards" was poignantly coined.

Compulsory Insurance For Principal Actors

It was identified that the removal of the application of JSL and the replacement of this paramount liability doctrine with proportionate liability without the compliment of compulsory insurance could be problematic. Consumer advocates correctly, if not anxiously, opined that if joint several liability was removed and key co-defendants were not insured, then consumers could be met with "men of straw" defendants who would simply wind their companies up when confronted with judicial judgement. Net result, consumers would be in the invidious position of only receiving a mere percentage of that which had been found judicially owing to them. In the case of JSL the solvent defendant would have been compelled to pay the consumer for the financial liabilities of his, her or its insolvent co-defendants.

It was thus resolved that key building practitioner players of the likes of builders, engineers, building surveyors, building inspectors, architects should all be required to be registered with a central registration body and insured by law.

Compulsory Registration System

It was resolved that the above categories of registrant should be required to be registered by a central government body and insured.

One stop shop dispute resolution for building approval disagreements

It was resolved that any disputes or appeals to do with the issue of building approvals would be referred to an Appeals Board comprising reputable and prominent industry peers. The peers would preside over informal hearings and hand down prompt and practical decisions.

The stakeholder preferences were conveyed to the AUBRCC and the inter-jurisdictional building controllers that comprised the AUBRCC then conveyed this information to their governments and Ministers. It was resolved that the stakeholder preferences would be endorsed which culminated in the move to regulatory creation.

The Regulatory Drafting Process

Once the building controllers from the eight state and territory governments agreed in principle with the key reform tenets it was resolved that the

author would write to the relevant building control ministers to seek their permission to communicate with the Standing Committee of Attorney's General ("SCAG"). This was, in due course forthcoming whereupon the author had to write to the nine Attorney's General to secure an official imprimatur for the deployment of the inter-jurisdictional Chief Parliamentary Counsels Committee. Again, fortuitously, this inter-jurisdictional imprimatur was forthcoming.

It was then incumbent upon the author as the project director to formally write to the CPCC to nominate a parliamentary counsel to draft a Model Building Act.

The CPCC did indeed, after some consultation with certain members of the committee, elect Dennis Murphy QC (Head of the offices of Parliamentary Counsel NSW) to utilise the resources of his august offices to draft the Model Act.

Once this sanction was forthcoming, we then had to, and by "we" I mean some policy officers employed by the then Victorian Division of Building Control (under the stewardship of Mr Lyall Dix), prepared the drafting instructions for parliamentary counsel.

Drafting Instructions

A set of drafting instructions is a document that is prepared by policy officers and the instructing officer to parliamentary counsel to encapsulate instructions and explanations to parliamentary counsel to assist them with preparing or drafting legislation. A number of drafts are usually honed with a great deal of consultation between the instructing officers before the legislative instrument is perfected.

Within about 14 months of the beginning of this national micro economic reform initiative, the Model Act materialised. About 5,000 copies of the book, The Model Building Legislation for Consideration by the States and Territories – Legislative Commentary, were published and distributed throughout the nation to key stakeholders.

What then Happened?

The Model Building Act, sadly according to some, did not become a uniform national act of parliament. Rather, the key tenets below were picked up in substance by the most Australian jurisdictions over the next ten years.

The key tenets to reiterate where the introduction of:

- proportionate liability and a ten year liability limitation period
- private certification of building approvals
- An expedited building approval dispute resolution system
- Compulsory registration and insurance of building practitioners

The Northern Territory

This was the first jurisdiction to substantially promulgate Model Building Act reforms. The then Building Controller for the NT, Mr Bob Wallis, encouraged the NT to adopt the large majority of Model Building Act provisions. Indeed, the NT Building Act that was proclaimed in the early 90s would prove to be the "truest disciple" of the Model Building Act. The following was introduced:

- a totally privatised system of building approval with no involvement of local government
- proportionate liability and ten year liability capping
- compulsory registration of building practitioners with a government registration body
- compulsory insurance
- Building approval dispute resolution systems that were very true to the Model Building Act template.

The next jurisdiction to follow suit was Victoria.

Victorian Building Act 1993

Initially Mr Dix was instructing officer to parliamentary counsel, when he moved to Sydney the author assumed this function. Although the Bill was first floated by the Hon Andrew Mc Cutcheon when the Labour party held office, bipartisan support ensured that when the Liberal Party came into power, the Hon Robert MacLellan carried the Act and introduced it to Parliament.

This act, although considerably more expansive than either the NT Act or the Model Building Act in like vein established proportionate liability and ten year liability capping. A Building Practitioners Board that currently registers in excess of 24,000 registered building practitioners was established. A privatised approach to the issue of building permits was established where private building surveyors went into competition with council building surveyors for the issue of building permits.

Other jurisdictions subsequently picked up a great many of the Model Building Act reform pillars; namely South Australia, Queensland and the ACT.

The ACT, like the NT, introduced a building approval process where there was no involvement of local government and private certifiers carried out the entirety of building approval functions. Likewise, building practitioners came within the jurisdiction of government controlled registration bodies. To varying degrees these jurisdictions adopted the liability reforms but not with identical wording.

NSW

In the late 90s, the author was engaged by the NSW government to advise on reforms to the Environmental Planning and Assessment Act (EPAA). The author in his consultancy recommended that both ten year liability capping and proportionate liability be introduced. He recommended that a system of private certification be established to encourage competition between local government and the private sector to expedite building approvals.

Most of the author's recommendations were acceded to save for the fact that to this day only private building surveyors and more recently (very recently) councils have been required to be registered to come within the jurisdiction of the Building Professions Board.

Additional recommendations were that all key building practitioners should be registered with the central governmental registration body. This recommendation was not taken on board. A private sector body oversaw the initial establishment of private certification in NSW and it is a matter of historical fact that the private sector watch dog was not able to get long term traction. In due course the role was consumed and assumed by government under the auspices of the Building Professions Board NSW. The latter is indeed proving sustainable.

Further, unlike Victoria and the NT where builders, engineers, building surveyors, and in the case of Victoria, draftspersons, were required to be registered/accredited, the registration pool was limited to NSW building surveyors and their local government counterparts.

Tasmania early in the third millennium radically reformed its building legislation and unashamedly took cognisance of many of the tenets of the Model Building Act. More recently, West Australia has conducted a major overhaul of it's building regulatory regime but without speaking with any authority on point it appears that this new act of parliament would not be considered a "close relation" of the Model Building Act.

What was so Pioneering about the Model Building Act?

It was the first legislation that introduced proportionate liability in the Antipodes and to that extent was many years ahead of the wholesale tort reform movement that occurred to Wrongs and Tort Acts early in the third millennium. The author once remembers bumping into a past Victorian Chief Parliamentary Counsel, Mr John Finnamore QC in a Bourke St tram and the learned gentleman quipped that he never thought he would see these types of reforms in the 20th century.

The Model Building Act was the key reform if not seminal regulatory instrument and catalyst for private certification.

In the Model Building Legislation - Legislative Commentary, the Honourable David Smith, the then Minister for Local Government Western Australia, stated, and I quote, *"The Model Building Act will aim to encourage these savings by deregulating different elements in the system... will... cap liability at a definite time – this will result in quantifiable risk, lower premiums and the return to favour of professional indemnity cover. It will also reduce local authority liability exposure."*

Indeed, liability has been capped and PI has returned to favour and under any criteria local authority exposure has been reduced.

Doctor Anthony Lavers, an international expert on building regulation a then Doctor at Oxford Brookes University Oxford in a paper titled, "Protection of Real Estate Developers and Users Against Economic Loss Arising from Defects in Construction" at a Pacific Rim Real Estate conference in 2000 had this to say about the model act base reforms:

"THE AUSTRALIAN REFORMS

Australia undoubtedly presents the best examples of system reform in a common law country, Nothing so radical and so holistic in concept has ever been undertaken in a major jurisdiction as the legislative reforms in the States of Victoria and New South Wales, now being followed to differing extents in other Australian states. At least 5 principal benefits can be identified even from this author's outline knowledge of the legislation, when compared with traditional liability/litigation based systems which the Australian States previously shared with the U.K.

a) *Limitation. The ten year duration of liability could be regarded by producers as worse than the Limitation of Actions Act six year period. However, there is much solace in having a definitive start and end to the period of risk exposure of the producer and this certainty may be seen as a fair exchange for the additional four years. From the point of view of consumers, the extension is very welcome; the evidence before the Australian Uniform Building Regulations Co-ordinating Council (Lovegrove, 1991) was that this would increase the percentage of post-construction defects detected from some 80% (within 6 years of error) to some 98% (within 10 years of error).*

b) *Proportionate liability. The doctrine of joint and several liability is deeply embedded in the common law and it has caused difficulties in U.K. reform (see below). The Victorian and NSW legislatures have cut through the problem by enacting proportionate liability; so that the respective parties to the project only bear a maximum of financial liability based upon their contribution to the work. In the U.K., the objection has been two-fold: that this allocation of percentages is arbitrary or even impossible and that it leaves clients/plaintiffs less protected than before. The answers which can be made to these objections are that courts routinely allocate percentages of responsibility in contributory negligence cases and that the notional reduction of protection can be compensated for through greater certainty of recovery, including insurance protection.*

c) *Mandatory insurance. One of the most interesting innovations in the Australian reforms has been to require all 'building practitioners' to carry compulsory insurance cover. Mandatory insurance sometimes has negative connotations for practitioners. This author conducted simple attitude studies in Singapore and in Malaysia in 1996 and found resistance to the idea of compulsion. The U.K. Latham reforms (see below) have been partly stalled on this point. The French system's mandatory requirements are considered below.*

d) *Registration of building practitioners. To make possible the enforcement of mandatory insurance, all practitioners have to be registered. While many countries have long required architects and professional engineers to be registered, extending this to contractors is less common. Contractor registration does exist in some states of the US and also in Singapore, although the Australian States have gone further than the latter, where little use is actually made of the registration system. The idea of contractors being insured against post-construction defects would be novel in most, although not all, systems, (see France below).*

e) *Dispute resolution. As was emphasised earlier in this paper, this is one of the most heavily criticised aspects of the traditional liability/ litigation based systems, by both consumers and producers. The jurisdictions of the Building Appeals Board and the Domestic Building Tribunal respectively represent a serious attempt to take construction disputes out of the court system and locate them where they can be resolved using non-confrontational techniques where possible (there is jurisdiction to use ADR), by tribunals with knowledge of construction (giving confidence to the parties and legitimacy to the decisions) and without excessive delay or cost. (Watts, 1998)."* (Page 10-12).

So did the Model Building Act reshape Modern Day Building Control?

Dr Lavers observed that "nothing so radical and so holistic in concept has ever been undertaken in a major jurisdiction as the legislative reforms in the states of Victoria and NSW".

This observation comes from an international expert with a strong academic and legal pedigree in comparative analysis of international construction laws and legal regimes. Doctor Lavers would also qualify as a truly independent umpire who was able to proffer an opinion devoid of any agenda or bias. The combination of his academic credentials and an impartial disposition make his observations compelling.

The NMBA was indeed radical and was designed to be holistic. Holistic in the sense that the liability regimes complimented by compulsory insurance, coupled with a privatized alternative to building approval that came under the watchful eye of government compliance bodies generated:-

- A robust consumer protection regime
- Fair and accountability based liability regimes
- An expedited building approval system

Acts like the Northern Territory and the Victorian Building Act have stood the test of time. Both Acts were proclaimed in the early nineties and have not encountered any material legislative amendment. This bears testimony to governmental and public

satisfaction with the legislation. After all, if Acts of parliament don't work or if aspects of them are found wanting the people through the legislature insist on amendment.

As an aside, the other day the author was asked whether there could indeed be uniform legislation in Australia. The author said highly unlikely. Although Australia is one country in the geographical sense, as there are eight different state and territory governments, with eight different Acts of parliament regulating building control, Australia is not, for fear of sounding simplistic, one "legal country or legislature" rather it could be construed as eight separate "legal countries". This being the case there are very well established parliamentary and legislative chorales that structurally make it exceptionally difficult to augment uniform legislation. If an Act of parliament is not uniform from an inter-jurisdictional perspective, regulatory uniformity for better or for worse will be "a tall order".

Although the NMBA did not achieve uniform legislation there is little doubt that it generated far more philosophical and "legal doctrine" uniformity in Australia. Ironically the regulatory parlance is an area where there is much divergence. Be it a professional who is called a building surveyor in one jurisdiction or someone who is called a principal certifying authority in another jurisdiction or a NSW construction certificate that is called a building permit in another jurisdiction, the language with respect to the same mechanisms differs.

Nevertheless, to answer the question posed in the preceding title, the answer would have to be an unqualified yes.

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