

## BUILDING SURVEYORS, THE LAW AND THE EIGHT DIFFERENT COUNTRIES OF AUSTRALIA.

Professor Kim Lovegrove, FAIB; Conjoint Professor in Building Regulation and Certification, University of Newcastle and Partner with Trans -Tasman Planning and Construction Law Firm Lovegrove Solicitors, shares his thoughts on the complex state of affairs that confronts building surveyors across Australia's states and territories.

When I was asked to write about building surveyors and the law, The first question I asked was, which law? Whether it be Victorian law, NSW, the ACT law, and so on. And whether it is the law for private certifiers, the law for building surveyors or the law for principal certifying authorities. There is no one law, there are eight different regimes, and eight different Building regulatory Acts of parliament. Some of these Acts concern themselves solely with building regulations such as the Building Acts of the NT and Victoria. Others like the NSW and SA Acts of parliament combine planning regulation with building regulation. Also some regimes like the NT and ACT assume jurisdiction solely over private building surveyors as there are no local government building surveyors in the Territories.

### The eight Sovereign Building Control Jurisdictions of Australia

The next point to make is that there are eight different legal regimes. As an aside, years ago when invited to address the English Forum for Construction Law Reform at a venue in the House of Commons, I was asked to describe the Australian Building legal system. I said think of it in terms of eight different countries, the eight building regulatory countries of Australia and you have an idea of the disparity and paradoxical mix that defines Australian Building Control.

The different statutory regimes have chosen not to call these practitioners 'building surveyors' in all jurisdictions. Yet Lawyers are lawyers throughout the country, and throughout the Western world as are doctors. Alas not so Australia: a building surveyor is a

building surveyor in Victoria but across the border is an 'accredited certifier'. The term 'accredited certifier' is bound to mislead, because the uneducated punter may ponder and pose the question, 'accredited to certify what?' Cars, machinery, safety equipment?

The marked differences in the way in which the law is codified and applied in the eight different countries of Australia is not quarantined to the above. The conflict of interest provisions differ markedly cross jurisdictionally, the relationship between the building surveyor and the planning dynamic likewise differs markedly. Self-certification is permitted in the NT, yet is illegal in the Southern States, as if there is some 'Mason Dixon' line distinguishing the building regimes.

One of the most profound differences concerns the registration systems; some require degrees, some don't. Some jurisdictions like Victoria and the NT require draftspersons, commercial builders and engineers to be registered. Others like NSW only require accredited certifiers/building surveyors and residential builders to be registered. This has a profound impact upon the risk landscape of the respective jurisdictions. In Victoria, insured liability for building failure can be shared amongst builders, engineers, draftspersons and building surveyors. Not so in NSW, where insured liability is only shared amongst the parties mentioned above. By 'insured liability' I mean liability that by law has to be insured.

As for penalties, well, the disparities really start to escalate. In NSW building surveyors - sorry, accredited certifiers - can be fined up to \$120,000

for misdemeanours whereas in Victoria \$11,000 or so is the penalty limit. Accredited Certifiers in NSW also come within the jurisdiction of the Independent Commission Against Corruption (ICAC) as they are defined as public officials, which when all is said and done is true.

Nevertheless, when I was engaged by the NSW government to advise on the establishment of the Part 4 regime of the Environmental Planning and Assessment Act in the late nineties, I impressed upon the reforming civil servants that the aggregate fines that could be handed down needed to be far higher than their 'South of the Border' neighbour. I also recommended that when it came round to appealing decisions concerning building surveyor misdemeanours, the appellate jurisdiction should be the Administrative Decisions Tribunal (VCAT is the equivalent in Victoria) rather than a body such as the Building Appeals Board. Both of these recommendations were acceded to along with a host of other recommendations. Unfortunately however not all, the recommendation that all building practitioners should be registered in a fashion akin to the NT and Victoria was not embraced.

### Building Practitioners in NSW - a very small and 'exclusive' tribe

The consequence of the above is that when it comes round to multi - defendant legal proceedings in NSW, the practitioners that are required to be insured by law is a 'very small tribe', namely the above named accredited certifiers and residential builders. In a regulatory environment where proportionate liability

is not complemented by compulsory insurance, it could be argued that there has been a significant failure in public policy. Particularly from the consumer perspective, consumers can be left bereft of redress when confronted with insolvent defendants. This is particularly the case where the cause of calamity was on account of design failure. Notwithstanding some of the recently identified shortcomings of the Victorian Building Act 1993 by the Auditor General, Victoria and the NT, with their compulsory suite of insured and registered building practitioners, still provide the bench mark in terms of insured accountability.

Back to building surveyors, where the term accredited certifier came from 'God only knows.' Also, one would have thought that the term building surveyor would have sufficed rather than the cumbersome term 'principal certifying authority', which may as well, have been called 'robo cop' such is the semantic tenuousness of the term when correlated with the actual job description.

## A veritable potpourri of dichotomies

So when one looks at building control from a cross-jurisdictional perspective, one can only conclude that there exists a building regulatory dynamic that is a 'veritable potpourri of dichotomies, contradictions and anomalies.' The only saving grace is the Building Code of Australia, produced under the auspices of the Australian Building Codes Board, which to greater degree facilitates harmonised technical regulation. But Australia cannot lay claim to being the home of coherent building control on account of the conflicting regimes operating interstate. It's a far cry from the National Model Building Act push in the early nineties that was aimed at cross-jurisdictional regulatory harmonisation.

One could also conclude that building control in Australia is in somewhat of a transitional state. The Victorian Auditor General was damning in its assessment of building control and private certification last year and this has led to the current Victorian government commendably embarking on regime overhaul. The Victorian Building Act has simply not kept up with the times, it needs some "panel beating".

The penalties for errant conduct have been found wanting. Private certification has also attracted criticism in NSW and the ACT. There are those that opine that there has been a disconnect between private certification and the paramount role of public protection and accountability, and the discretions afforded by a performance based Building Code of Australia have not sat comfortably from a public protection point of view with private certification.

## So what can be done?

Consider going back to the drawing boards folks. The paradoxical creature of Australian Building Control as we know it would be well served by some intelligent and nonpartisan scrutiny, brainstorming, think tanking, call it what you may.

The Nine Governments may wish to consider to whether:

- they want uniformity or some a semblance of harmonisation mindful of the micro - economic benefits; particularly in an environment of economic contraction and construction industry stress
- they want different risk and accountability landscapes localised to the States and Territories
- they are comfortable with multi -practitioner registration regimes in some jurisdictions and not others
- the high costs and additional paper work burdens of having conflicting acts of parliament and registration regimes are sustainable
- the future of the role of the private regulator i.e. the building surveyor (or is it the accredited certifier) is tenable in its current guise
- the marked disparity between the states and territories with regards to penalties is worthwhile.

Let them not all hail 'too late the hero.'

There is little point in crises-driven law reform reaction. If NZ had been less inward focussed about its Avant Garde building control regime in the early nineties, there is little doubt that the multi-billion dollar estimated cost of rectification, flowing from the leaky building syndrome maelstrom, could have been avoided. Tragically the "LSBS" is still "rinsing" through the system with its litany of wrecked lives and homes. It has cost NZ to date and continuing over 20 billion dollars. Needless to say reactive reform always costs more, both in terms of human and economic capital.

What is somewhat intriguing, is that for many years the writer and his colleagues such as Justin Cotton and Stephen Smith, all of whom are lawyers that have been involved in fashioning, interpreting and applying legislation, have aired their nervousness about some of the vagaries of Australian building control as we know it. The retort has been labels such as "Doctor Doom" in the case of the writer. Yet just like in the early nineties when the writer, in writing for an international building magazine published by the CIB identified (much to the chagrin of some of his then fellow All Black tragic countrymen) that something was terribly wrong with the then NZ Building Act (Such writings predated the national leaky building

syndrome calamity in NZ) we have opined that there is a swell of disillusionment with building control in Australia. And even though my fellow partners have quipped that we know the problems and we know the fix - requests for assistance have been parsimoniously deployed.

Maybe it is time to revisit the concepts and motivations behind the Model Building Act and the perfect vehicle to do that would be the ABCB (one of the best models of federal 'cooperatism' in Australia, whose predecessor was the AUBRCC).

As the ABCB is the meeting and convergence point of all of the senior building controllers in the country, they may have a view on the merits of more regulatory harmonisation to complement the powerfully beneficial dividends of the BCA. You may want to raise this with your Board members

Ivan.

On a parting note some quotes from the archives of history are worth rehashing.

"The Model Building Act provides a perfect vehicle for building control legislative reform throughout Australia. Some of the benefits – are reduction in the cost of building, breaking down of barriers between states and territories, freeing up of the Australian Building approval process, providing user friendly and philosophically sound legislation". (The Hon Peter Patmore MHA, Minister for Environment and Planning , Tasmania 1991).

"There can be no doubt that streamlining legislation and regulations in a country as over governed as Australia is long overdue. The work of AUBRCC in this endeavour can only be commended". (Brian Welch, the then CEO of the Building Owners and Managers Association of Australia October 1991)

## Professor Kim Lovegrove

Well-known both locally and internationally in the field of building regulatory law. He had carriage of the National Model Building Act in the early nineties, was the principal legal adviser on the development of the Building Act 1993 (Vic) and the NSW Part 4 reforms of the EPAA in the early nineties. Kim was also a guest of a Japanese Ministerial Forum and the representative of the Federal government of Australia at said forum in the late nineties. The Ministerial Forum had carriage of reviewing Japanese building control. He is also co-author of Managing Micro Economic Reform and numerous other texts on building law. [www.lovegrovescolitors.com.a](http://www.lovegrovescolitors.com.a)

(Ivan refers to Ivan Donaldson, the long-standing, fellow rugby union tragic, and universally liked CEO of the ABCB.)