World's Best Practice Ingredients for Building Regulation

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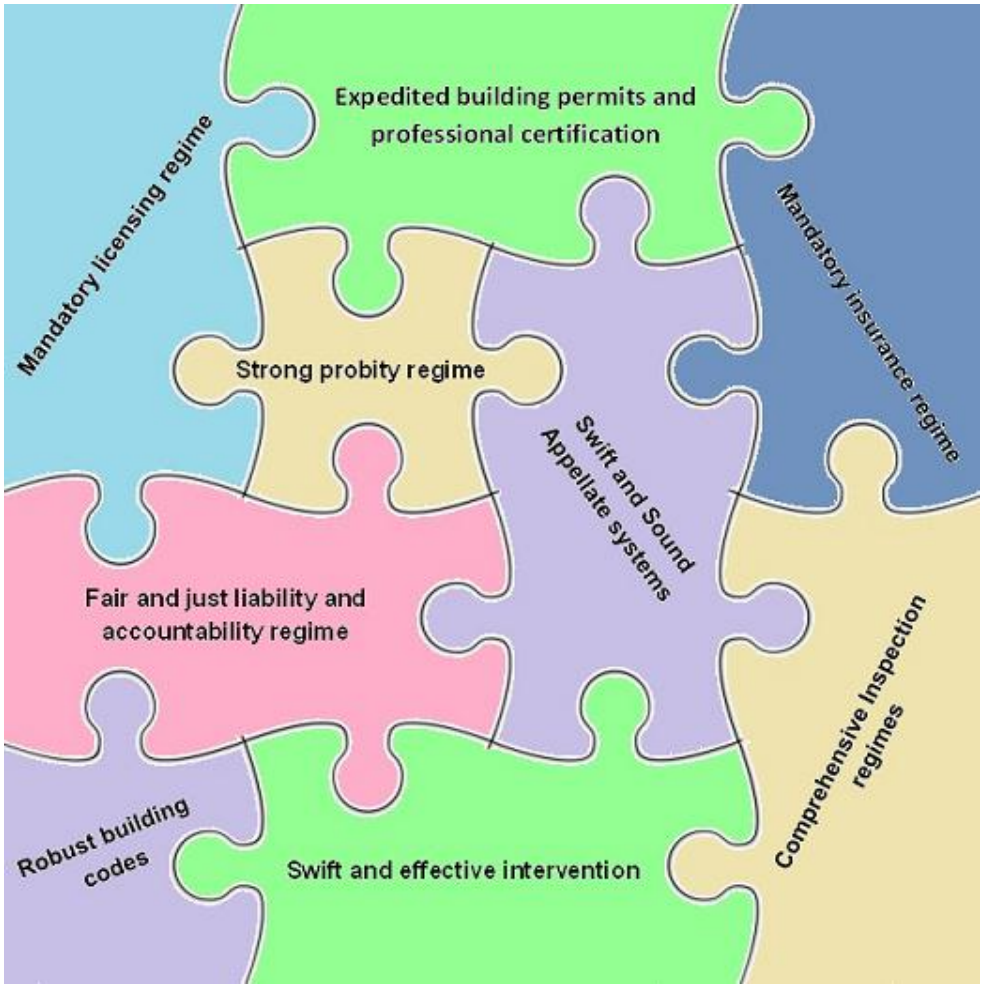

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1. Introduction

In recent decades there have been some spectacular failures in building regulatory systems. The leaky building syndrome in NZ being one such instance where problematic building regulation in the nineties led to billions of dollars being devoted to rectification of a nationwide construction malaise. Other countries have introduced performance based building codes that some critics say may have compromised the quality and safety of buildings. In parallel has been the proliferation of privatized building approval processes which some say precipitated a more blasé approach to building control. Yet other jurisdictions such as Singapore have showcased innovation, holistic progression and advances in building control.

This paper will extrapolate the key ingredients that define the paramount ingredients of building regulation with the view to identifying the constituent elements of a World's Best Practice Model Building Act.

2. Key maxims for building regulation

Any enlightened and benchmarked Building Act will embrace the following key philosophical foundations:

- Regulation that maximizes the construction of safe buildings ie buildings that minimize the possibility of injury or death to occupants or visitors.
- Regulation that enables the construction process to proceed efficiently and swiftly without the compromising of the construction integrity of the "as built" product.
- Regulation that demands the involvement of skilled practitioners and craftsmen and by the same token generates clear accountabilities and consumer safety nets - where there is construction failure or practitioner negligence / recalcitrance.
- Swift, efficient and well considered dispute resolution processes
- The licensing and disciplinary oversight of the principal actors in the construction process.
- Professional accountability for neglect, act, errors and omissions that cause harm to life, limb or property.

Enlightened building control systems comprise building approval regimes which consist of the following elements:

- The issue of building permits/consents that are forthcoming once the building official is satisfied that the design documentation complies with the governing Acts of parliament and the relevant codes and standards.

- Mandatory inspection regimes where inspections are undertaken by appropriately qualified statutory building officials.

- Upon conclusion of construction the issue of completion certificates by building officials once satisfied that the built product is fit for occupation.

- Building officials who are appropriately qualified, experienced and licensed, mindful of the paramount significance of this statutory office.

- The building official need not be a local government building official but equally can be a private sector official. But regardless of whether the official is of the local government or of the private sector persuasion, they must be professionals and the remuneration model for payment for the services/functions needs to be carefully considered.

Experience has suggested that building officials in light of their unique statutory enforcement and consumer protection role should not be remunerated on a competitive free-market model. There should be regulation that prescribes a "remuneration floor" below which the building official cannot "undercut". The fee structures should be set by the regulator and "CPI`d" annually to ensure that the building approval responsibilities are discharged in a manner that is commensurate with the real cost of performing the statutory function.

Absent such a regime then building officials, be they private or local government building surveyors or other professionals of like persuasion can find themselves in a fee cannibalization dynamic. The net effect is that not enough is being charged for this critical statutory function, which in turn can compromise the integrity of the inspection and probity process and the as-built product. Fee cannibalization has become common practice in Australia amongst the building surveying profession, which has led to the taking of shortcuts and insufficient devoting of time to vital functions, such as inspection.

3. Mandatory licensing regime

A mandatory licensing and registration regime that operates to ensure that principal actors in the construction dynamic are qualified, experienced and capable of delivering quality construction outcomes.

Just like many professions such as the medical profession or the legal profession all building professionals should be licensed and registered. The criteria for licensing must be purpose specific qualifications and experience with the coupling of mandatory insurance and the subordination of the individual to a statutory government controlled licensing and overarching probity regime.

The licensing regime must of course have appropriate penalty and punitive powers such as fines, powers of suspension and where there is corruption reference to criminal

investigatory bodies. The magnitude of the penalties must be such that they act as potent deterrents aimed at disincentivising recalcitrants from engaging in conduct that peers of good repute would find unconscionable.

In any building regulatory regime the principal actors involved in the construction dynamic have to be identified and licensed, and the very least should include:

- Building officials – Building surveyors and inspectors
- Engineers
- Architects
- Draftsmen
- Plumbers
- Electricians
- Builders
- Draftspersons
- Planners

It is also considered that there should be mandatory continuing professional development (CPD) annual courses, as a prerequisite to the annual renewal of one's license to practice. The more skilful the practitioner, the less the possibility of compromise to the as-built product; compulsory CPD augers well for up skilling. In the legal fraternity in many Australian jurisdictions lawyers have to attend annual compulsory professional development seminars as a prerequisite for ongoing registration.

A licensing regime must also display powers that enable recalcitrants to be dismissed from the practitioner fraternity to ensure that the consumer is protected, the regard for the profession is not sullied and the above objectives of the legislation are able to gain full expression.

Such a regime to reiterate must have a licensing oversight body comprising appropriately qualified and experienced disciplinary arbiters who can adjudicate over issues of professional misconduct. Such bodies should as part of the "decision making mix" include lawyers possessing the skills to ensure that natural justice is applied, legal precedents are followed and the public is protected.

The regulator must have a sound auditing and investigatory regime to ensure that problematic practices can be investigated and prosecuted if need be. There should also be sufficient human resourcing to ensure that regular random auditing can apply with a view to identifying errant practices that may not ordinarily come to the fore.

4. Fair and just liability and accountability regime

A fair and just liability and accountability regime that ensures that fault and responsibility for construction failure attaches to the party(s) that occasioned the failure.

Enlightened regulation will comprise liability laws that give voice to sound and fair allocation of liability. This ensures that whoever is responsible for a construction failure can be identified and held accountable. It also ensures that plaintiffs can avail themselves of redress and remedy and moreover that the innocents are not attributed liabilities that should not be visited upon them.

Proportionate liability is the appropriate liability doctrine but it should not be implemented without the vital compliment of **mandatory insurance** and the **compulsory registration** of all principal construction actors.

In Australia for instance the only jurisdictions that comprise this "holistic trifecta" are Victoria and the Northern Territory where builders, engineers, architects, building surveyors, building inspectors, draftspersons and plumbers all have to be insured and registered. These jurisdictions of course provide the best accountability and consumer protection regimes in Australia on account of the fact that they have embraced this "vital trifecta". NZ on the other hand still applies the doctrine of joint and several liability which ensures that those with deep pockets such as local government assume the liabilities of impecunious codefendants.

There also needs to be a clear commencement date for the initiation of legal proceedings and a clear statutory period whereupon a plaintiff or third party can look for legal redress. Certainty on both counts is required both as to the initiation date and the liability duration date. The limitation period should start upon the issue of a construction completion certificate by the building official whereupon litigants are afforded the opportunity to seek legal redress for a period of and not greater than 10 years hence. This is known as a "10 year liability cap", as for example in the Victorian Building Act. French and Napoleon code based liability regimes embrace these clarity tenets as do many Australian jurisdictions.

The NZ Building Act does not. The limitation period is triggered by the identification of acts or errors. This requires contentious evidence that can rarely ever be conclusive as to the trigger date for the beginning of the limitation period.

5. Mandatory insurance regime

A mandatory insurance regime that ensures that all principal actors involved in the construction dynamic are insured so that members of the public and institutional users are protected.

Mandatory PI regimes that insure against practitioner negligence are critical to enlightened and world's best practice building regulation. The public and the consumers need to know that they can be financially compensated for construction failures that are occasioned by the negligence of building practitioners. This is not a novel proposition, car drivers, lawyers, doctors and the like in many Western countries have to be insured to ensure that misfortune that is occasioned by their neglect, that is misfortune that generates economic loss, can be made good.

It is from a policy point of view undesirable to introduce proportionate liability regimes without the critical compliment of compulsory insurance. It is not the sort of paradigm that lends itself to optional insurance regimes because insurance premiums are expensive and absent compulsory insurance regimes recalcitrants can wind up their businesses and alight with relative immunity.

Examples of compulsory insurance regimes that evidence the above mentioned "trifecta" are the Antipodian jurisdictions of Victoria and the Northern Territory in Australia.

6. Expedited building permits and Professional certification

A building approval system that is conducive to expedited building permits absent any compromising of the inspection and probity process is of course preferred.

Such a system enables private and local government building officials to compete with one another for building approval work. With competition comes swifter project turnaround service.

Performance regulation is also vital to innovative construction design and construction techniques. Hence performance building codes of the likes of those found in Australia and New Zealand are worthy of consideration. These technical codes provide designers with the opportunity of producing innovative construction design and solutions through means other than the prescriptive route, provided the designer can satisfy the statutory decision maker that the designs comply with the provisions of the technical code (based on their performance characteristics).

One issue of contention however that exists in many Australian jurisdictions is that the building officials/building surveyors who are all "natural persons" can sanction alternative solutions or performance based design scenarios that do not comply with the prescriptive pathways of the Building Code of Australia. It is the writer`s strongest contention that design scenarios that do not comply with the prescriptive provisions of building codes should be subjected to independent peer review comprising peers that are totally removed from the building project, rather than investing that power in the natural person building surveyor.

The current system where private and local government building surveyors in many parts of the antipodes can sanction non-prescriptive design scenarios i.e. alternative solutions is very problematic and is conducive to the lowering of construction integrity because too much responsibility and construction wisdom is vested with the natural person.

Accordingly enlightened building control evidences a harmonious marriage and connectivity between the umbrella Act of Parliament and the technical codes and standards that the regulations call up. The Building Act, the Building Code and the regulatory standards must seamlessly coexist to ensure that there is a comfortable holistic matrix.

7. Swift and effective intervention

Statutory powers that enable swift and effective intervention to prevent danger to life and limb. Enlightened building regulation will evidence notice and order regimes that enable building officials to intervene immediately when imminent danger to life and limb is identified. These powers need to be complimented by mechanisms that compel access, co-operation and the deployment of additional resources that can be brought to bear to remove the hazard. The compliments of prosecutorial remedies need also to be brought into the equation along with powers that enable regulators to recoup costs involved in such pursuit.

8. Comprehensive Inspection regimes

Best practice building regulation should contain comprehensive and mandatory inspection regimes. Inspections should occur at critical or key construction junctions, such as concrete pour or foundation stage, frame stage in the case of housing and final inspections upon completion. The inspections should be carried out by independent persons, preferably building surveyors or building officials. It is critical that they are independent and well qualified for the task and of a moral calibre that is ill-disposed to expedience or compromise. A number of Australian jurisdictions such as NSW, Victoria and the NT have mandatory inspection regimes that are undertaken by building surveyors.

9. Dispute Resolution

Best practice dispute resolution theatres are cost effective, swift and are tailored for the resolution of building disputes. Decision makers should be legally qualified to minimise any miscarriage of justice. For those of limited means, expense and logistical impediments tend to work against arbitration as one has to pay for arbitration and arbitration prevents the consolidation of multiparty building disputes. In a number of

Australian jurisdictions arbitration has been statutorily ousted from the residential building dispute resolution arena because of a not uncommon view that the cost of retention of arbitrators is prohibitive.

Although over the last decade there has been a proliferation of tribunals, be skeptical about any contention that tribunals in themselves possess any inherently compelling virtue when compared with Courts. They are appealing to the economic rationalists as tribunal members receive half the remuneration of the Bench and by and large are untenured appointees with a far less attractive superannuation package than the judiciary. This point is made because the virtues of tribunals as dispute resolution mediums are not more compelling than Courts of law. It is often a question of fiscal constraints which do not always partner up with best practice dispute resolution.

The higher Courts of law have tended to attract the finest legal minds and in all likelihood will continue to do so. Traditionally I have gleaned that many clientele have preferred Court determinations to those of tribunals, save for where the arbiters are members of the Bench, reason being they harbour less fear of jurisprudential anomaly when a judicially inspired decision is handed down.

The critical thing is that regardless of whether the theatre is a court or a tribunal, the forum has to be well resourced, must contain dedicated building lists that unlike arbitration allow for the consolidation of multiparty disputes. Decision makers who specialise in the resolution of building disputes provide additional ballast.

The most progressive dispute resolution theatres also make mediation mandatory at the earliest possible juncture to maximise the opportunity for early cost effective settlements. Mediation has to be hardwired into the dispute resolution matrix.

There is increasing controversy concerning the power of expert witnesses to fashion the destiny of disputation outcomes. Recently the Bench has voiced increasing dismay at the tendency of a tad too many expert witnesses to inflate plaintiff's claims and trivialise the case against defendants. The accusation of hired guns either exaggerating rectification costs or conversely underestimating rectification costs and there by contributing to the escalation of the altercation rather than cost effective early settlement is gaining notoriety. It is a real problem and a best practise paradigm has to deal with and manage this. Progressive dispute resolution systems remove the partisan elements of sometimes client influence expert leanings and require that the parties appoint and jointly remunerate experts from court or tribunal nominated panels. This way the expert is a servant of the court rather than a servant of a litigant, captive to his/her or its financial predilections.

10. Swift and Sound Appellate systems for building consent matters

Decisions that are handed down by decision makers be they building officials, disciplinary bodies or other decision makers at first instance need to be capable of appellate jurisdiction oversight. It is the author's strongest contention that all jurisdictions should have a majority of legally qualified arbiters presiding over them to ensure that due process and legal rigors that adhere to precedents handed down by courts of higher jurisdiction are followed. The fashion of lay-member quasi-judicial decision making is less than ideal as there is a greater risk of injustice being perpetrated along with flawed decision making; furthermore appellate jurisdictions provide persuasive precedents.

11. Conclusion

Best practice building regulation is akin to a holistic jigsaw puzzle. All components of the puzzle have to be incorporated to generate a cohesive best practice regulatory landscape. If any component of the puzzle is lacking, it can generate dysfunctional regulation and dysfunctional outcome. Holistic regulation also needs to be assembled by very experienced micro economic law reformers. Ideally such a team will include appropriately experienced lawyers, technically skilled personnel and economists experienced in law reform.

Some lessons learnt after having observed the Australian National Model Building Act based reforms in operation over the last twenty years

When we established the reform team in the early 90s to generate a National Model Building Act for Australia our brief was to generate a template based upon world's best practice devoid of political interference. The reform team comprised a blend of policy, legal and technical operatives who effectively went "offline" for 12 months to focus exclusively on the development of best practice building regulation.

Many of the concepts that found their way into the Model Act were imported from abroad, not the least of which being 10 year limitation of actions regulations from France and proportionate liability from certain US and European jurisdictions. We engaged in international bench marking and world's best practice research. The key word that defined

the fabric or essence of the Model Building Act was the word “holistic”. The reforms have in substance withstood the test of time.

Over the last 20 years certain jurisdictions in Australia and NZ have introduced legislation or amending legislation that has tinkered with the holistic puzzle and this has somewhat diluted the optimum design of regulation. Some of these changes may have been hard to avoid on account of the hardening resolve of the insurance sector to the underwriting of some of the most utilitarian insurance regimes. Unfortunately the interrelationship of insurance and building regulation gives governments less freedom than they would like if they are intent on keeping insures in the dynamic so any dilution to reiterate may have been driven by unavoidable pragmatism.

Nevertheless the following would be considered the key lessons learnt over the last 20 years with regards to the recent evolution of building control in Australia and New Zealand;

1. Private certification

Those of us charged with the development of the NMBA in the early nineties and the establishment of private certification assumed that private certifiers would be able to operate professionally in a free market environment where they would be permitted to compete with building surveyors and building officials for building approval work. This has not appeared to be the case in all instances as some private certifiers have been known to cannibalize their competitors by way of fee cutting, thus compromising their ability to inspect properly and assess design proposals soundly. There is a compelling case to argue that building officials, council and private alike should operate in an environment where a regulated fee floor is established to ensure that the underpricing of this critical statutory function is arrested.

It has also become evident that the auditing of building officials by some state regulators has been reactive or complaints driven rather than random. This may be in part due to human resource constraints. A solely complaints driven auditing regime is problematic because by the time the source of the complaint has come to the attention of the state regulator, it may be too late. The damage could have been done rather than having been averted. If one compares this with the legal profession, solicitors in the state of many jurisdictions are audited at least twice a year and one of those audits must occur without notice at any time. It is the random, without notice audit that has proved to be the most diagnostic, because recalcitrant patterns can be detected before harm is occasioned. Random auditing should be adopted as a probity protocol in best practitioner licensing regimes because to be frank, recalcitrant practitioners can do far more damage to life and limb than lawyers.

2. Private certification and performance codes

When our reform team fashioned the provisions that made up the National Model Building Act a performance based building code was not within the realms of

contemplation at that time. Said code came into being in the mid-90s. This being the case we gave no consideration to the operational relationship between private certification and performance based building codes.

In the mid-nineties when performance building regulation was introduced some of us were thus surprised that private building surveyors were given the power to sanction alternative solutions under the Australian Building Code in some of the states and territories. In hindsight this paradigm shift coinciding with the juxtaposition of the BCA and private certification could have been afforded more consideration and by all accounts is being reconsidered in some jurisdictions currently.

After having observed the system in operation for a number of years I have formed the view that alternative solutions should only be sanctioned by peers that are isolated from the project and are truly independent of the project and the contracting parties. Currently, absent such independence there exists the opportunity for expedient individuals to "hand pick" building surveyors and practitioners that are open to compromise or expediency.

3. Enforcement resources

With regards to the eradication or the minimization of questionable practices legislation can only be enforced if there exist the human resources to "army" enforcement. Building officialdom, regardless it`s jurisdiction or its geographical location, be it third world or first world, will only be able to fully optimize enforcement and inspection regimes if there are adequate mechanisms for the funding of a critical mass of enforcement personnel . Governments must recognise this and would be well advised to embrace legal fraternity enforcement systems where the practitioners have to pay for their audits as a price of doing business. There is nothing to suggest that a similar system could not be introduced into the building industry.

4. Probity and integrity consideration

There has been adverse publicity in recent times with respect to one Australian jurisdiction in particular, namely Victoria, that cumulated in an ombudsman`s investigation and report. Although no evidence of criminal corruption was forthcoming the ombudsman found that there was evidence of conflicts of interest, instances of bureaucratic largess and a less than ideal enforcement and building control ethos in the Building Commission.

Interestingly the legislation in itself was not found to be deficient; the issue was more about cultural management and the development or lack of development of a sound regulatory cultural ethos. It appeared that the Building Commission lost sight of its paramount role, its *raison d'etre* if you will, i.e. building control and the maintenance of the highest standards of building regulatory management.

There may be mileage in something akin to the establishment of integrity officers who would have the ability to review from time to time the practices of building regulators to ensure that regulators at all times maintain their preoccupation with best practice building control. It is the old cliché "who polices the police men". This question requires more consideration in many jurisdictions round the planet as it is one thing to have best practice regulation, but if the enforcement culture and personnel lack the appropriate disposition or ethos then the best application of the legislation can be constrained. The Brazilian fire inferno concerning the many youths that lost their lives in the nightclub fire calamity gave further "oxygen" to this issue.

Furthermore it is well established that one of the main reasons that the prohibition era of the early 20th century in the USA failed to culminate in significantly reduced consumption of alcohol was the fact that governments did not expand their budgets to employ a critical mass of law enforcers. One can have the best legislation on the planet, but if the implementation of it is not well resourced it will not deliver best practice dividend. Ironically the introduction of prohibition legislation absent an army of law enforcers led to the proliferation of brutal classes of beer barons, violence and alcohol inspired carnage in cities such as Chicago.

The need for experienced law reformers to be afforded some carriage of microeconomic reforms and law reform initiatives

In recent years in some jurisdictions internal civil servants have been burdened with exclusive carriage of major law reform initiatives. They are typically well meaning, diligent and enthusiastic. Fault can never be taken with their work ethic or their contemporary vocational knowledge but many lack any microeconomic or law reform pedigree so the task is terribly challenging and despite best endeavours not always successful. I knew the people who fashioned the building regulations in NZ in the nineties, they were good and competent people but the regulations that they fashioned were found to be in the fullness of time wanting.

Those charged with the immense responsibility that is part and parcel of law reform need to appreciate that law reform often entails microeconomic reform and major paradigm shifts. Law reforms that are not sufficiently well thought through can culminate in system failure and negative economic and public impacts. Experienced and effective law reformers are not easy to locate, yet their office is of critical import and any legislature would find their deployment useful as they can bring impartial and seasoned critical and comparative insight to the task.

From Left to Right: Professor Brian Meacham, Hiroki Sunohara, Wataru Gojo PhD, Professor Kim Lovegrove, Professor Yossy Hirano, Tomiyoshi Ogawa, Yoshihiro Iwata PhD

In my experience the country that approaches the task of law reform most astutely is Japan. They take their time, they assemble a team

of preeminent persons that is often chaired by someone outside the fold of government and they embark upon exhaustive international and cross-jurisdictional comparative analyses. They identify international experts and they invite them and involve them in very rigorous and vigorous think tanks. Further, their preoccupation is very much focussed on identifying that which has failed and why it failed rather than a myopic preoccupation with innovation and the obsession with the new and the untested. The Japanese approach to law reform in my view is the blue print for holistic and rigours microeconomic law reform and we have much to learn from them.

Reformers need to recognise that when a bureaucracy takes it upon itself to staff law reform through internal resources unintended consequences can ensue. For instance an employee civil servant may find it harder to speak candidly to a Minister about a "pet reform" that the Minister may be enamored with for fear of there being career limiting repercussions. An external microeconomic reformer may be less reticent about candid assessment and exchange, which may auger better for the policy reform in the long run.

Experienced law reformers also understand the intricate sometimes labyrinthine process of law reform. Furthermore they are, like those that I have encountered in Japan, trained in the interrogation of new concepts and the art of critical and dispassionate appraisal. The ability to identify and deploy such people in the writer`s view is most important for any jurisdiction that is intent on developing best practice and holistic building regulation.

Lovegrove Solicitors Law reform division can also be accessed by clicking here.

Other useful papers by Professor Kim Lovegrove FAIB.

- The Building Act 1993 - Recommended Amendments & Suggestions for the "How to Fix the Building Act Seminar"
- Holistic Considerations Concerning Performance Based Building Codes
- Model Building Act – the Regulatory Template that Re-shaped Modern Day Building Control – 20 years on
- Six Ways to Fix Private Certification in Australia
- Building Surveying Fees And The Race To The Bottom
- Building Deaths In 2013 Are Assuming a Serial Dimension
- Mediation Pros and Cons
- Arbitration Explained Along with its Strengths & Weaknesses
- Tribunals Explained along with their Strengths and Weaknesses