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# Lovegrove Solicitors

Alternatives Solutions for  
Building Surveyors, Fire Regulations and other such matters -  
Performance in Action

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By Jonathan Miller and Kim Lovegrove



***Jonathan Miller, Solicitor with Lovegrove Solicitors: “The new Regulations challenge the flexibility assumptions in the Building Code of Australia.”***

## **Chapter 1:**

### **CHANGES IN THE WIND**

As the reader will already know the BCA is a document that is aimed at providing a uniform Australian code for the construction of buildings. This uniformity, however, provides for flexibility in the construction and design of housing so long as it meets performance requirements. This article seeks to reconcile the goals of flexibility of the Building Code of Australia and recent changes to the Victorian Building Regulations.

These legislative moves appear to foreshadow a return to prescriptive building regulations where the matter of fire safety is involved. To this extent the changes may engender more

safety and certainty but they will also undermine the inherent flexibility in the BCA which ironically may be a good thing.

#### **Government Aims**

The approach by Australian State Governments is to adopt a performance based Building Code, which is consistent throughout Australia. A performance based Building Code is a relatively new concept. BCA 1996, the predecessor of the current BCA was largely modeled along the lines of the NZ Building Code. It has also been exported from Australia to other countries around the world including Papua New Guinea.

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#### **The BCA Goals**

The Australian Building Codes Board states that the aims of the BCA are: “...to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future. These goals are applied so that the BCA extends no further than is necessary in the public interest, are cost effective, easily understood, and are not needlessly onerous in its application.”<sup>1</sup>

<sup>1</sup> Building Code of Australia 2005

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## Performance Requirements

The BCA contains technical provisions for the design and construction of buildings and other structures, covering such matters as structure, **fire resistance**, access and egress, services and equipment, and certain aspects of health and amenity. The Building Surveyor may use either a design that meets:

- Deemed to satisfy requirements, or;
- Performance requirements or;
- A mixture of the two.

## Benefits of Performance based regulations:

Barry Schaffer manager of the CSIRO Appraisals and manager of World Organization of Building Officials (WOBO) presented a paper to the WOBO 5<sup>th</sup> world congress in 2000.<sup>2</sup> In this paper he praised the role of performance regulations in their ability to work for sustainability. Designs are often copied from Europe and North America, without having regard to Australian conditions. The effect of this is inefficiency of materials used and energy resources in the day-to-day use of the buildings whether they be industrial commercial or residential. He put forward the view that that the use of flexible performance based regulations is preferable to prescriptive requirements that would lead to the better use of technology and advances in the protection of the environment.

<sup>2</sup> CSIRO Website

## What does this Flexibility Mean?

This flexibility gives the Building surveyor the ability to fulfill the requirements of the Building Code, providing the most suitable building solution to his or her client. This however means that the Building Surveyor may be put under pressure to achieve building design that is driven by thrift rather than safety concerns.

## Fire Safety and Performance

Fire safety is a matter that concerns the community as a whole. The responsibility is however borne by those who are charged with approving safety measures. It is in the interest of a community to ensure that those who determine fire safety are adequately trained and qualified. Matti Kokkala, VTT Building Technology, Finland,<sup>3</sup> states that: "...performance based fire Codes do not work without a sufficient number of educated fire safety engineers: the designs done by amateurs cannot be considered reliable..."

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## Alternative Fire Safety Solutions

In Victoria, the Building Surveyor may not approve an alternative solution for fire safety under the BCA unless specific additional qualifications are held. The Building Surveyor must hold

<sup>3</sup> In a paper from a paper from a Conference on Concepts of a Performance Based system for the USA Lovegrove on Building Control p.2-15 Lawpress Melbourne 1997

either the Graduate Certificate in Performance Based Building and Fire Codes from Victoria University of Technology or a qualification that the Building Practitioners Board considers is equivalent. Otherwise the Building Surveyor must defer to an expert who is qualified or a report from the Chief Officer of the Metropolitan Fire Brigade.

relevant building surveyor must not issue a building permit unless, inter alia, he or she is satisfied that the building work complies with the Act. Under section 44 of the Act, the Relevant Building Surveyor must not issue an occupancy permit unless the building to which the permit applies is suitable for occupation. These provisions sheet home a high degree of autonomy and responsibility.

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### **The Role of the Building Surveyor**

The role of the Building Surveyor is one of heavy responsibility when it comes to alternative designs under the Building Code. Section 24 of the Victorian *Building Act* provides that a

Judicial consideration of the role of the Building Surveyor has in a number of cases affirmed that this role is the paramount decision maker in the design process.

Examples of this are a Building Appeals Board determination in a case in December 2003. This case involved the **Victoria Gardens** shopping centre car park where the Relevant Building Surveyor allowed an alternative design that did not provide for sprinklers. This was followed by a media release of the chair of the Board, Anne Keddie, saying:

“The Building Code of Australia is performance based and one way of meeting performance is by adopting the prescriptive deemed to satisfy provisions of the BCA. Another way to meet the provisions is by adopting an alternative solution, as occurred in this instance”.

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**Toomey v. Scolaro’s Concrete  
Constructions Pty Ltd (in liq.) & Ors**<sup>4</sup>

This case dealt with the issue of negligence with regard to compliance with the Building Code of Australia. The role of the Relevant Building Surveyor was in question as to responsibility for designs and approval for occupation. The Judge stated that:

*“The surveyor has full authority to ensure compliance with the code.”, and “...it is beyond doubt that a surveyor charged with statutory and contractual responsibility for examining plans for compliance, and being will paid to do so, is being called on to apply an expertise which condescends to examine the minutiae of plans, so as to detect error, and*

<sup>4</sup> (No 2) [2001] VSC 279 (17 August 2001)

*ambiguity which might reasonably produce error by those who will subsequently rely on those plans.”*

### **New Building Regulations**

New regulations for the Building Act came into force on 14 June 2005. These regulations have a sunset clause, which takes them out of operation on 13 June 2006. The character of the Regulations is much the same as the previous regulations; however they contain a number of new requirements for fire safety. These include compulsory installation of Sprinkler systems, and hard-wired smoke detectors in certain types of residential and temporary residential buildings have been included. This appears to be a move towards prescriptive building regulations and a move away from the flexibility of the Building Code of Australia.

### **Sprinkler Systems**

It would therefore appear to be a matter of policy that provision is made for the installation of Sprinklers and hard wired smoke alarms in certain buildings including Backpackers Hostels, Bed and Breakfasts, Aged Care facilities, Lodging Houses and other establishments providing shared accommodation. The change in building regulations in Victoria appear to foreshadow that community standards are moving away from performance when it comes to fire protection in public buildings.



## Media Release

On Friday 10 June 2005 the Victorian Minister for Planning, Rob Hulls, was quoted in a media release titled New Smoke Alarm And Sprinkler System Regulations For Accommodation Buildings as saying “These new regulations will undoubtedly provide greater occupant and building safety in these facilities.”<sup>5</sup> These changes were largely to give effect to fire safety in temporary residential buildings and aged care facilities. These changes appear, however, to go against the grain of a flexible performance based system.

## Why the Changes?

It appears to be settled in Australia at present that the Building Surveyor under the Building Code is the paramount decision-maker. So why the changes to the Building Regulations if

only qualified experts can make decisions to change ‘deemed to satisfy’ Fire Safety Provisions?

It would seem that Fire safety is of too great an import, such that it will less and less be subject to the disputed opinions of experts to make rulings on what complies with the Performance Requirements of the BCA. One of the below named writers, Kim Lovegrove, Managing Partner Lovegrove Solicitors, has identified that there is a weakness in the alternative solution system envisaged by the BCA. This is that where there is an opinion to be given, experts will disagree.<sup>6</sup> Further there is the problem that these experts are, under the BCA, engaged by the property owner or developer.<sup>7</sup> This may lead to what are less than arms length decisions for designs, which are geared toward profitability and cost cutting.



<sup>5</sup> Building Commission Website Media Release 10 June 2005

<sup>6</sup> The Australian 30 September 2004

<sup>7</sup> *ibid*

## Chapter 2:



*Kim Lovegrove, Principal of Lovegrove Solicitors: "It is a decision of great import to the interpretation of the flexibility that is engendered by the spirit of the BCA."*

### **AFFIRMATION OF PERFORMANCE IN ACTION**

#### ***A Victorian Building Appeals Board Decision on Point***

In Chapter 1 we discussed what appears to be a more prescriptive future for the Building Code of Australia. In this chapter we bring to the attention a recent Determination of the Building Appeals Board. This decision confirms what we have long known to be the position of the Building Surveyor in the design process of buildings. This should be contrasted to the changes made by the Victorian Parliament as outlined in Chapter 1.

On 19 August 2005 the Building Appeals Board handed down a Determination of great relevance to the

Building Surveyor who seeks to endorse an alternative design which relates to Fire Regulations and the deletion of Sprinklers. Lovegrove Solicitors represented the owner of the building in which Sprinklers were deleted in favour of a smoke detection system and other fire protection measures.

#### **The Facts**

This Hearing was conducted over two days and required careful deliberations from the Building Appeals Board. This appeal was brought against the Metropolitan Fire Brigade's decision under Building Regulation 9.3 (a) (ii) to refuse consent for the installation. This regulation, as we contended did not provide power for the Brigade to refuse consent.

It is a decision of great import to the interpretation of the flexibility that is engendered by the spirit of the BCA.

To illustrate the importance of this decision it must be noted that the development involved the construction of a warehouse. The purpose of the warehouse was to store paper reels for use in an adjacent factory. It was the Brigades position that the building did not provide for a level of safety that was required.

The Permit Application for this building involved an alternative design solution prepared by a Fire Safety Engineer and approved by the RBS.

#### **Building Professionals Board**

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## Observations of the Board

The Board noted *“that the fire safety engineer and the RBS are experienced and competent professionals held in high regard in their field of expertise”*.

*“The board noted that the RBS met the criteria set down under regulation 1.8 (1) and is qualified to determine that an alternative solution complies with a fire performance regulation of the BCA.”*

The contention was raised that the Chief Officer was acting beyond power requiring additional fire safety measures in the building when the role of the Chief Officer is limited to Regulation 9.3(a)(ii). The Board explicitly noted that the Chief Officer cannot consider Fire Safety measures not listed in this section. Deletion of Sprinklers is a matter considered under Regulation 2.2 of the Building Regulations.

The Building Appeals Board made findings which are indicative of the circumstances that were important in this decision. These are as follows:

1. *“...the design and approval of the facility was technically robust and complied with the requirements of the BCA.”*
2. The Building and Contents insurer was fully aware of the deletion of a sprinkler fire prevention system.
3. The Building Act does not contemplate either occupational Health and Safety legislation or the Melbourne Metropolitan Fire Brigades Act.

4. *“...the methodology, concepts and data used to verify the proposed design...complied with the BCA and was in accordance with sound professional practice.”*

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5. The Board was satisfied that the alternative solutions provided additional life safety measures and tenable access to and from the building in the event of the Fire for a greater period of time than that created by the Fire Engineered Solution
6. *“The Board notes that both the Fire Safety Engineer and Relevant Building Surveyor are experienced and competent professionals held in high regard in their fields of expertise.”*

The significance of the finding is that it reinforces the paramount role of the RBS. In light of more prescriptive Fire regs being introduced it enshrines the status and paramount role of expert opinion as the board noted the pre-eminence of the professionals and the regard with which they were held. Perhaps this is a complete vindication of the opinion of Matti Kokkola as noted in Chapter 1: “...performance based fire Codes do not work without a

sufficient number of educated fire safety engineers: the designs done by amateurs cannot be considered reliable...”

### **Property Protection**

***“The Board further notes that the BCA does not currently provide for property protection in relation to fire damage...”***

This decision puts to rest any notion of property protection as it states clearly that the BCA is not about Property Protection. When one applies an alternative solution, there is a rigour that is set out and it is incumbent on the RBS to conform to that Rigour and if this is undertaken, it will be highly persuasive.

The importance and the ramification of the decision are as follows:

1. It provides a basis and an adjudication on how alternative solutions are to be applied.
2. It recognises the flexibilities afforded under the BCA and affords weight to the deployment of technical experts and fire engineers who are considered to be experts.
3. In so doing it takes cognisance of the gravitas associated with alternative solutions and the rigour that is necessary to justify the deployment of an alternative solution.

We keenly await further developments to the Performance Based Building Regime as they occur and the 13 June 2006 sunset clause on the interim Victorian Building Regulations.

***Kim Lovegrove is the lawyer who worked on the reforms to the Building Act 1993 and Part 4 Reforms of the Environment Planning and Assessment Act NSW 1979 and also a previous Deputy Executive Director Australian Building Codes Board. Kim Lovegrove is Managing Partner at Lovegrove Solicitors.***

***Jonathan is a Solicitor with Lovegrove Solicitors. Jonathan has experience in litigation involving the Building Code of Australia and Fire Regulations and performance regulations in action.***