



**Victorian
Municipal Building
Surveyors Group^{INC}**
Safety • Integrity • Advocacy

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Resort



Building Regulations Future Directions

Presentation by Tsigereda Lovegrove, construction and planning lawyer and practice manager Lovegrove & Cotton lawyers – secretary of IBQC dispute resolution coalition.

Building Regulations - Future Directions and Opportunities For Reform

When enacted in 1993, the Victorian Building Act was held as being revolutionary and one of the most holistic sets of building regulatory regimes in the world.

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 based 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.”

Building Regulations - Future Directions and Opportunities For Reform

This was due to its inclusions of:

- A privatised alternative for building permit delivery.
- A clear limitation period for the initiation of legal proceedings.
- Proportionate liability replacing joint and several liability.
 - By the turn of the millennium the application of proportionate liability had extended well beyond the purview of building regulation in Australia, so the proportionate liability provisions were pioneering within a historical context.
- Compulsory insurance for key actors. Note that it has only been very recently that NSW has gone down this track.
- A centralised building practitioner registration system where key actors were and still are required to be registered.

How does the Building Act, once heralded as being internationally best practice stack up now?

It still is competitive in a number of respects, but not in others as things have moved on.

Adj Professor Kim Lovegrove, who was retained by the Victorian Government as instructing officer to parliamentary counsel and a key advisor on the development of the Act contends that there are some elements that are demonstrative of international good practice.

Kim, when he has been deployed by the World Bank as a senior law reform adviser to reforming various jurisdictions, uses the following Victorian Building Act cornerstones as demonstrative of good practice.

1. Mandatory insurance of key actors

Insurance may not be a cure all, but it is often better than the alternative of no insurance. Still, most countries do not require key building practitioners to be insured by law.

This means that consumers have no protection in circumstances where there is an insolvency of a key actor.

There are those that are advocates of proportionate liability; in large part because it ensures that the 'insurers of last resort' such as local government, are not left carrying the can if there are co-defendant insolvencies.

In Australia, proportionate liability first found expression in the National Model Building Act in the early nineties and local government predictably was a huge supporter.

Both Kim and I are firmly of the view that proportionate liability should not be introduced without compulsory insurance.

2. Building Practitioners Registration

When the Act was promulgated there existed the statutory body called the Building Practitioners Board. The functions of this body have now been subsumed by the VBA.

Other jurisdictions like NSW, the NT and New Zealand have maintained their practitioner registration boards. Some advocates look to these bodies as exemplars.

Reason being, they are able to avail themselves of external individuals that are nominated on account of the esteem that peers of good repute afford them. Further this system can bring a multi-skilled set of eyes to the task.

Additionally for jurisdictions that have financial constraints, the fact that the members are not full-time members of staff but rather part time and gainfully employed in other sectors, facilitates sustainable affordability of key actors.

The migration of the registration regime to the VBA is still good practice but may not best encompass the terms of a model which holds up as being an exemplar for reforming jurisdictions. But for those jurisdictions that wish to keep registration totally in house it is worthy of consideration.

3. Compulsory Insurance

The Victorian system is good practice but falls short of the world's best practice.

France holds this title, where there is entrenched 10-year liability coverage for many key actors that has been around since 1979.

3. Compulsory Insurance

Camelot ended round about the beginning of the 3rd millennium.

Victoria was best practice until the turn of the century when 'long tail' run off cover was jettisoned in this state along with the rest of the country as the insurers were no longer prepared to underwrite 'long tail' cover.

The 'Camelot cover' provided that once practitioners ceased to practice the run-off cover policy kicked in and there was indemnification for past acts, errors and omissions for the balance of the 10-year limitation period.



4. Mandatory inspections – good practice but not best practice



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Victoria to its credit does have a mandatory inspection regime, unlike the likes of WA that lacks a robust mandatory inspection regime.

But it is a one size fits all approach. Regardless of whether the building has a high potential consequence building or a low potential consequence building there are 5 mandatories.

Potential consequence is an International Building Quality Centre (IBQC) term which refers to the risks to life and limb should there be compromised construction outcomes

This means that currently in Victoria, whether the building permit is for a warehouse, shed, or an 80-story building, there are always five mandatory inspections for all.

Best practice calibrates the number of mandatory inspections with the risk weighted classification of the building code.

For risk weighted codified building classifications the European EN standard is best practice, and the International Building Quality Centre will shortly publish a best practice risk classification set of guidelines that calibrate inspections with the risk profile of the building.

The Draft IBQC Building Inspection and Building Classification Guidelines.

The following slides demonstrate the current proposed draft of the IBQC 'Building Inspection and Classification Guidelines.'

The first slide demonstrates a building classification methodology in relation to a building's risk consequence. The example given is a building of medium potential consequence.

The second proposes a mandatory inspection regime for a building of medium potential consequence, detailing the number and sequence of inspections for a building of that classification.



Draft Potential Consequence Building Classification Definitions – Medium Potential Consequence

Medium Potential Consequence

Buildings of higher societal and community benefit and other structures, which require increased performance due to the levels of risk towards human life, economic, social or environmental loss elevated by larger numbers of people congregating, vulnerable populations, or occupants with other risk factors.

- Includes apartments, hotels and other residential buildings up to 18 metres in height from the lowest ground level to the topmost floor, intended for not more than 250 occupants, provided there are mandatory automatic fire sprinklers to be installed under another part of the relevant building code.
- Commercial and industrial buildings that accommodate greater than 250 people congregating in one area.
- Schools, childcare and daycare facilities with a capacity greater than 250 people and exceed more than one storey in height.
- Tertiary or adult education facilities greater than 500 people.
- Any health care facilities that house people who require special care on account of disability, without emergency or surgery facilities, to a capacity of no greater than 50 residents.
- Any assisted living facilities that house semi-permanent or permanent elderly people, provided there are mandatory automatic fire sprinklers to be installed.

Draft Correlated Mandatory Inspection and Regime for Buildings of Medium Potential Consequence

Medium Potential Consequence

1. Building official reviews plans issued by competent persons and issues building permit.

2. Building official inspects footings. Structural engineer inspects and certifies footings and foundations prior to building official approval.

3. Building official inspects frame upon completion. Structural engineer inspects and certifies frame prior to building official approval.

4. At key commissioning stages competent persons will inspect and certify compliance with all the relevant provisions of the jurisdictions' codes and standards. This includes:

- fire safety.
- mechanical and air conditioning.
- electrical.
- plumbing and drainage.

5. Upon notification of completion by the client, the building official will organise joint inspection(s), including for mandatory waterproofing, with the principal contractor, the principal, the project designer and all other competent persons. The building official will, after having regard to the above inspections, not issue an occupancy permit until satisfied that the work is compliant with the jurisdictions' codes and standards.

It is emphasised that the above IBQC tables are still at drafting stage, as the instrument still has to get the ratification of the IBQC board, that Kim chairs.

Areas Worthy of Reform



Private certification

Areas worthy of reform

Private certification is not common internationally. It was tried in NZ but concluded in 2008 as the insurability of the profession came to an abrupt halt. This also coincided with legacy issues of the leaky building syndrome.

It is not recommended for emerging economies as there is an assumption, that there will be very robust and holistic probity controls to underpin the regime that can be challenging in an emerging economy setting.

Areas worthy of reform



Private certification

Some contend the Victorian regime currently falls short of best practice private certification, saying there should be required mandatory annual auditing of building surveyors:

- Look to the lawyer auditing regime in Victoria, England and Wales where lawyers that operate trust accounts have to be annually audited. In the case of Victoria this is done by an external examiner.
- This system is funded on a 'users pay' basis as the lawyers must pay for the cost of the auditors. This generates a critical mass of auditors at no cost to government.

Kim participated in a law reform think tank hosted by the Japanese government in the late nineties. At the time he was the deputy executive director of the Australian Building Codes Board and represented the ABCB and the federal Government with regards to the provision of advice to the Japanese government on Australian building regulation ecology. The Japanese government had close regard to the Victorian private certification system.

Areas worthy of reform



Private certification

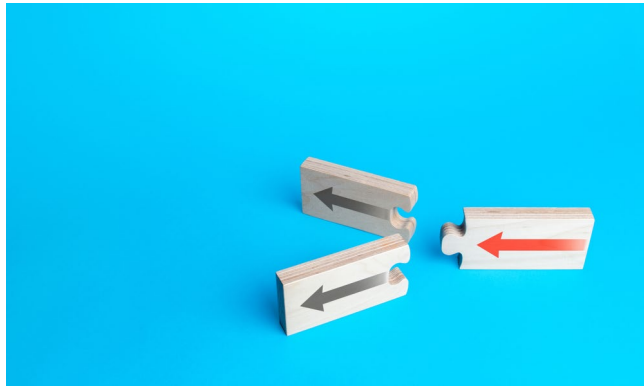
For best practice look to Japan; where interestingly private certification was introduced to provide a critical mass of inspectors as it was found that in post seismic building collapses a higher incidence of inspection led to a lower rate of compromised outcomes.

Japan had regard to the Australian private certification system in the late nineties and improved the model. Kim was informed by some senior Japanese civil servants that the same auditing process became mandatory, when he attended one of the think tanks.

Private certification has attracted no controversy in Japan, note however that high rise residential buildings require the sign of the relevant government ministry.

Performance sanctions

Areas worthy of reform



It has been said that the power to approve performance solutions should be removed from private building surveyors.

Kim contends that performance sanctions should be carried out by an independent peer review body of the likes of the Building Appeals Board in Victoria.

This was indeed the case as some of you will remember when the predecessor of the BAB, the Referees Board, was still operational.

If you wanted a modification to the deemed to satisfy provisions you had to apply to the Referees Board.

The Australian Building Codes Board could redesign the National Construction Code to become a risk-based building classification system.

Areas worthy of reform



The NCC is currently not a risk-based building code.

The ABCB could also have regard to the IBQC guidelines once these guidelines are finalised and approved by the IBQC board.

A risk based mandatory inspection regime can then be promulgated

Areas worthy of reform



The mandatory auditing system would then be amended to calibrate the number, type and sequence of inspections with the potential consequence classification of a revised NCC.

A joint final inspection protocol

Areas worthy of reform

Kim states that the best final inspection protocol he has encountered was when he was working with the World Bank on advising Chinese governments on best practice approaches to the design of building regulations.

He was made familiar with the joint inspection protocol. Once a major project is completed the building official conducts a final inspection regime with the key construction actors ie:

- The contractor
- Quality assurance engineers
- Project designer
- Property owner

A joint final inspection protocol

And they all jointly inspect and review the outcomes. Once the official is satisfied that all is well s/he will issue an occupancy permit.

Areas worthy
of reform

A joint final inspection protocol

Areas worthy of reform



- The World bank team were given a guided tour of the Shanghai Tower and were informed that 18 months transpired between the initial joint inspection and the final inspection which culminated in the issue of the occupancy permit.
- The above protocol will be part of the IBQC guidelines protocol once published. A draft of this is on the following slide:

The proposed draft of the joint final inspection protocol High Potential Consequence category

High Potential Consequence

5. Upon notification of completion by the client, the building official will organise joint inspection(s), including for mandatory waterproofing, with the principal contractor, the principal, the project designer and all other competent persons.

The building official will, after having regard to the above inspections and the independent third-party review, not issue an occupancy permit until satisfied that the work is compliant with the jurisdictions' codes and standards.

Sourced from the draft IBQC publication "IBQC Building Inspection and Building Classification Guidelines".

Conclusion

Law reform in a dynamic process. The IBQC is at the forefront of the development of guidelines for countries and States wanting to develop international best practice building regulations.

Any jurisdiction that is intent on achieving these measures should give consideration to said guidelines:

[IBQC Principles for Good Practice Building Regulation](#)

[IBQC Good Practice Guidelines for Low Income Countries](#)

[Good Practice Building Inspector Guidelines for Emerging Economies](#)

[IBQC – Good Practice Guidelines for the Development of Construction Dispute Resolution Tribunals and Decision-Making Institutions](#)

[Building Product Performance Part 2 – Good Practice Regulatory Framework](#)

[Kim Lovegrove FireNZ presentation 2023: “How to inoculate the design of building regulation from failure”](#)

[Kim Lovegrove FireNZ presentation 2023: “What in International best practice Building Act looks like – Key learnings from 30 years experience in law reform”](#)

