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# **Best practice elements of enlightened building control for the third millennium - 2018 and beyond**

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# Best Practice Elements of Enlightened Building Control for the Third Millennium – 2018 and Beyond

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The writer has published a great many articles and delivered a great many papers on the topic of best practice building control locally and abroad. This paper comprises an amalgam of passages from papers that he has presented and the framework is derived from an article that he published at first instance for Sourceable, **15 Keys to Best-Practice Building Regulation**. Hence the reader will discern substantial similarity between that which the writer has previously published and this paper which is by design so; rational being to stay on message and to avoid reinventing the wheel.

# The Management of Building Regulatory Law Reform

Whenever legislation is fashioned or undergoing major reform, the department with carriage of the reform initiative should ensure that there is engagement with independent experts revered for their knowledge of best practice regulation. Equally important is stakeholder consultation which necessitates genuine dialogue with both consumer and industry representatives. Inclusiveness is paramount. Regard should also be had to international best practice and by the same token identification of system failure to ensure that, that which has failed abroad does not find its way on shore.

*Over the past decade, those charged with reforming building law in the antipodes have tended to rely upon internal resources – civil servants employed within the arm of government that is tasked with reforming a Building Act. There is reluctance to resource skill sets from outside the silo of the department for reasons that I am not privy to.*

*[Having participated in building regulatory law reform think tank in the past, the writer can attest to the fact that] the Japanese go about the task in a different way. From what I have observed through my participation in [two Japanese law reform initiatives], those charged with carriage of a law reform initiative [in Japan] tend not to be civil servants sourced from the department. Rather, the department identifies a group of external experts that come under the stewardship of an independent chair, someone who is held in the highest esteem.*

***The reform team has a mandate to review the existing legislation with the view to identifying weaknesses and strengths so that ultimately a set of law reform recommendations can materialise. The first phase of such an endeavour involves extensive and comprehensive international comparative analyses where the researchers study other countries that show case best practice building regulation.<sup>1</sup>***

In the antipodes, in recent times, policymakers have adopted more of a silo approach where those who have been afforded responsibility for law reform have either come from within the civil service or local ranks. This approach is conducive to a more provincial approach to law reform which may be at odds with international best practice and thus may be at odds with the way Japanese building regulatory reformers approach the same sort of task.

# The Foundations and Pillars for Best Practice Building Regulation



In 1996, the writer published a paper that was presented in absentia in Washington at the American Society Fire Protection Engineers Annual Conference. At the time, the writer was the Deputy Executive Director at the Australian Building Codes

Board, and the paper was titled [Holistic Considerations Concerning Performance Based Building Codes](#). The United States at the time was giving consideration to the adoption of performance based building codes, and the thesis of the paper presented written by the writer was that building regulation has to be holistic and technical codes and standards will not generate the desired utilitarian dividend unless there exists a holistic umbrella act of parliament that controls the freedoms that flow from the discretions that are afforded by performance regulation. The introductory cautions the writer submits are equally apposite to today's setting.

***The most critical stage of any major reform initiative is at the beginning, the formative stage. The ground rules will shape the destiny of the initiative. It is at this stage that serious consideration to the underlying philosophical tenets or foundations that will underpin the reform initiative should occur.***

***A reform initiative must be based upon solid philosophical foundations. These foundations have to be readily identifiable and explicable. As long as they are based upon a logical framework, if challenged the system will be capable of being defended within a public policy and legal context.***

*These initial remarks may seem trite but the reformer will always be accosted by reform antagonists who challenge the very need for reform and unless the reformer has sound and clear reasons to justify the initiative the reform will have little chance of reaching any potential.*

*The philosophical tenets also have to survive the rigours of legal scrutiny. The Courts are the ultimate arbiters of semantics and the judiciary will always look for the logic where regulation fails to generate coherent meaning. The question that will be asked is “What was the intention of the legislature?” Sometimes those who have had carriage of the reform initiative (such as public officials, politicians and associated consultants) do not know the answer to this question. This is because the reform may have been driven for reform’s sake, political whim, or as is more often the case, it just wasn’t well thought through. Whatever the reason, failure to establish clear intention can be regarded as tantamount to an abdication of public responsibility.*

*Hence when the public asks, “Why are you doing this?”, the reformer will, with confidence, be able to present a number of well-considered answers.<sup>2</sup>*

# So What Are Some of the Key Features of Best Practice Building Regulation?

## **A Dedicated Building Act**

Better to have dedicated building acts of parliament rather than a 'potpourri' or 'casserole' of different statutes regulating different spheres all merged into one.

Jurisdictions that feature dedicated building acts can be found in New Zealand, Japan, Singapore and the Australian jurisdictions of Victoria and the Northern Territory, where specific Building Acts deal specially with building regulations in a deliberate and effective manner.

## **Strong Building Consent/Occupancy Permit Regime**

Building work should never commence without building permits or building consents. Nor should permits be allowed to be issued until building surveyors are satisfied that plans and specifications comply with building regulations, relevant technical codes and standards, furthermore, occupation of buildings in circumstances where occupancy certificates have not been issued should be illegal and prosecutable.

## **Licensed Officials Only**

Only licensed and suitably qualified building surveyors should be able to grant statutory permits and certificates. The licensing regime must have very strong probity regimes in place to ensure that the building surveyors unerringly embrace the public imperative of safe and habitable buildings.

### **Building Surveyors as Creatures of Statute**



Building surveyors play a crucial role in building control. Their profession should be respected accordingly and they should be given very strong statutory powers regarding inspections and issuing of enforcement and non-compliance notices and orders.

In the mid-nineties, the writer used to be a columnist for the Age newspaper in Victoria, Australia and in an article titled, “Rules That Bind Industry’s Law Enforcers”, the writer stated;

*The courts will ultimately judge a building surveyor's client allegiances in terms of how well the building surveyor has acquitted him/herself to the public, and the fee payer will be of secondary concern.*

*For any practitioner who does not fully understand the nature of the job, their job description is located in the Building Act. It is very much about regulatory compliance and enforcement. Remove this, and there is very little need for the profession.*

*After all, history shows that this is the reason why the profession was created. Failure to realise this will inevitably lead to severe consequences in the light of the very potent punitive arsenal in the Building Act.<sup>3</sup>*



It is troubling that 22 years after the writer made the above observations in a newspaper column, concerns are regularly aired that too many building surveyors put the fee-paying client well ahead of the public. The statement that the building surveyor's job is very much about regulatory compliance and enforcement is still on the money as is the observation that "if building surveyors neglect to follow this professional mantra", then there is indeed, "very little need for the profession". Indeed, if building surveyors neglect their post, fail to regulate and discharge their enforcement obligations, they serve no purpose within the building regulatory ecology.

## **Mandatory Inspection Powers**



There must be mandatory inspection powers, where officials are called upon by Act of parliament to inspect building work and either approve such work or otherwise as appropriate. Absent the establishment of mandatory inspection powers, the inspectorial regime can be too laissez faire and too ad hoc. Light-touch enforcement can be very dangerous and can undermine the ecology of sound building control.

*The probity regimes will ensure that as the buildings are constructed, progress is independently vetted and approved at key legislated inspection junctures. Best practice building control regimes are somewhat cynical as they do not leave things to chance. Inspections must occur regularly and must occur at the most telling times.<sup>4</sup>*

*The building surveyor will discharge these functions ‘without fear or favor’ in that the official will act:-*

- *Impartially*
- *Professionally*
- *Without hesitation*
- *Promptly*
- *In a manner that is immune to the wishes or demands of a client or practitioner where those demands are at odds with the legislation codes and standards*

*The legislation will ensure that there are provisions that dictate that a failure on the part of the building surveyor to discharge his or her statutory duties along the above lines will be grounds for disciplinary censure; such is the vital importance of the discharge of those functions.<sup>4</sup>*

## **Robust Licensing, Investigation and Prosecution Regimes**



### ***Licensing:-***

***A best practice licensing regime will ensure that the legislation establishes a practitioner registration body that will be independent of the building regulatory department to ensure that it operates as an independent body.***

***The licensing body will have the power to both license and remove a license or to put it another way register or deregister. Hence there will be the licensing arm and the disciplinary arm***

### ***The licensing arm will:-***

- ***Establish the qualification and experience criteria for registration***
- ***Resource the regime***
- ***Ensure that the qualification and experience criteria is in accordance with best practice***
- ***Maintain the register of practitioner registration and de-registration***

### ***The Probity arm will have established and will maintain:-***

- ***Investigatory and auditing resources***
- ***Ensure that the resources are responsible and have the degree of elasticity to quickly respond to and investigate complaints***

### ***Some best practice elements of a sound qualification registration regime are***

- ***All actors will have “real” (rather than token qualifications), degrees or diplomas from reputable and rigorous tertiary institutions***
- ***An apprenticeship category that gives the graduate trainee mentored and supervised training for a couple of years to ensure that that which has been learnt can be applied to practice.***
- ***A code of ethics that is taught examined and passed to reinforce the paramount virtues of building structures that suit the public and to ensure that quality of product with the public in mind is always top of mind.***

### **Mandatory Practitioner Auditing**

To ensure their practices are up to standard and devoid of ethical blemish, all licence holders should be required to undergo yearly audits. These should be paid for by the licence holder but the auditors should be accredited by the independent registration bodies. There are plenty of examples of user pays auditor regimes, such as the Law Societies, which offer some of the best user pays independent auditing regimes.

### **Power to Prosecute**

Effective powers must be in place to ensure those responsible for non-compliant work can be prosecuted and emergency repairs can be performed without undue delay. Punishments have to be commensurate with the magnitude to the offence, severe breaches will require severe punishments. One can't have light touch regulation and tokenism.



### **Lifesaving Emergency Powers**



*Enlightened building regulation will evidence notice and order regimes that enable building officials to intervene immediately when danger to life and limb is identified, these powers also 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.<sup>7</sup>*

### **Sustainability of Funding Regimes for Enforcement**

As licencing and probity regimes are expensive to run it is very important that the resourcing of same is immune to the vagaries and rise and fall of economic cycles. Unless regulation is enforced and well-resourced even the most enlightened of building codes can be rendered impotent or benign. It is therefore critical that there are funding mechanisms that subsidise governmental treasury dependence. Significant funding can be generated by:-

- Annual registration fees
- User pays auditing regimes
- Compulsory annual CPD
- Levies albeit nominal on insurance revenue

The Latvian supermarket roof collapse that killed more than a score of people was in part attributed to the disbanding of the National Building Inspectorate. As enforcement and compliance is key the auditing and inspection regimes must be maintained in optimum fashion in perpetuity hence funding for same needs to be such that it is sustainable and recession proof.

***An enforcement regime can only be effective if governments commit very significant resources both financially and in terms of suitable human resources. The allocation of sufficient funding to ensure that the enforcement arm can discharge its enforcement responsibilities effectively is evidence of political dedication to enforcement.***

***In fact, in certain contexts the introduction of legislation that is designed to eliminate recalcitrant behaviour can actually have the opposite effect if the enforcement resources are inadequate. In such circumstances, history has shown that the heinous conduct that statute tries to prevent can increase.***

***The American experiment with prohibition in the 1920s is case in point. In a 1991 paper titled Alcohol Prohibition Was a Failure, author Mark Thornton stated that:***

***“National prohibition of alcohol (1920 -33) – the ‘noble experiment’ – was undertaken to reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and the poor houses and improve health and hygiene in America. The results of the experiment clearly indicate that it was a miserable failure of all counts...although consumption of alcohol fell at the beginning of prohibition it subsequently increased. Alcohol became more dangerous to consume; crime increased and became ‘organized’.”***

*Lisa Dorr, in a paper titled Why Prohibition Failed, stated that:*

*“Even honest officials who did their best to enforce law were hampered at the outset by insufficient funding resources. The initial appropriation for enforcement was a paltry 2.1 million. Six years later, in 1927, the head of the [prohibition enforcement asked for at least 300 million per year to enforce the law effectively and he received only 12 million. Inadequate resources at the federal level were matched by a lack of commitment to the law at the state and local levels. Several states refused to pass state level prohibition laws, which meant that the law enforcement personnel had no authority to enforce federal prohibition laws. Other states passed prohibition laws but refused to allocate state funds to enforce them tying the hands of the state forces.”*

*So what is the take out for the building industry? The Latvian supermarket roof collapse that killed 54 people was, in part, due to the disbanding of the national building inspectorate. The inspectorate was disbanded because of post-GFC austerity measures. Once this state-funded safeguard regime was removed, the holistic elements vital to the sound operation of the regulatory ecology were compromised. Without a well-resourced inspectorial regime, liberties were taken and building regulations were not adhered to, which all led to significant loss of life.*

*The collapse was yet another episode in a year that also included a Brazilian nightclub inferno that killed hundreds and fatal fires in Bangladesh that killed scores of factory workers. Failures in building control holistics and inadequate enforcement, due in part to the underfunding of regulatory agencies seemed to be a common theme among these tragedies.*

*Recently, we had the Grenfell fire, but it also pays to remember the Brazilian night club inferno (233 deaths) and Latvian accounts of woe (54 deaths) for fear of forgetting the serial nature of failed building control induced tragedy. In thus affected countries, the mourning and recriminations were every bit as intense.*

*Too often, reforming regimes introduce legislation that is designed to minimize or deter adverse conduct to little effect. Although the statutes may contain powerful penalty provisions that are designed as deterrents, the statutes prove benign because they are not enforced. They are not enforced because either the policing or the auditing regime is inadequate, and the regime is often inadequate because the budget allocated to maintain the enforcement regime is constrained. The post-GFC austerity measures that cut back government funding in key areas in Latvia and the failure of the prohibition regimes are cases in point.*

*It is ironical that in many Western countries, some of the best funded enforcement departments preside over jurisdictions that concern themselves with parking infringements and driving offences. The reason is that this type of 'vice' raises revenue for government instrumentalities. Anyone who is game enough to allow the car meter to tick over for more than the allotted time will bear testimony to the fact that an attendant will swoop in like a seagull on a chip. In fact, local government bean counters factor into budget forward planning the significant revenue that will be raised by parking over stayers to fund the some of the services of local government.”<sup>5</sup>*

### **Mandatory Insurance**

Insurance, albeit by no means a perfect solution nevertheless provides the only means by which consumers can avail themselves of compensation for compromised construction outcomes. Insurance should never be optional for building practitioners.

### **Clear Liability Sunset Periods**

Limitations regarding time-frames in which legal proceedings for defective building work must be initiated should be clearly set out. Ten years from the day the occupancy permit is issued has merit.

### **Fair Apportionment of Liability**

Liability apportion liability among multiple parties and limit the liability of individual defendants to their judicially assessed share of overall responsibility are sensible and fair.

No one should be made to pay more than the share of the liability for which he or she is responsible.

### **Building Codes**

Building Acts must be supported by strong Building Codes which set out the full gamete of technical requirements and rules. These should inter-operate with the Act in a manner which is perfectly seamless and completely harmonious.



### *Private certification and performance codes*

*When we 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 should have been afforded more vigorous consideration; Japan certainly recognised that purpose built probity regulations had to be promulgated to deal with this capacity. 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.”<sup>6</sup>*



### **A Product Accreditation Body**

*There has to be a national product accreditation body which will assess and determine whether construction product is fit for purpose and suitable for use and sale in the market place. Such a body has to be a national or Federal body as some of its jurisdiction may involve a legislated relationship with customs authorities and border control officials.*

*the test for suitability will be such that any product approved must satisfy rigorous testing to ensure that the product does not and will not cause any harm of whatsoever nature to the end user or the fabric of the building. Case in point would be aluminum composite panels, manufactures intent on exporting ACPs to market would be required by law to seek accreditation form the accreditation body.*

*Once product is approved it will be formally accredited and placed on an accredited product register, products that are not featured on the register will not be capable of being lawfully used.*

*Any business regardless of whether it is an on or offshore manufacture will be required by law to pay one hundred percent of the cost of testing and accreditation.*

***If it becomes evident that an approved product is subsequently found to be defective the accreditation of that product will be revoked and it will be illegal to henceforth use that product.***

***The legislation will provide that regard must be had to such accreditation and it will be an offence for any actor to utilize product that is not accredited.***

***The product accreditation body will in all likelihood need to be a Federal body that is aligned with or collaborates with best practice testing authorities. The federal body will be empowered to approve and accredit testing authorities that will be exclusively empowered to test, approve or reject product applications. The body will also have the power to remove the accreditation of the testing authority if it is established that the testing regimes do not accord with international best practice.***

***An international best practice criteria for testing must be used as globalization and free trade agreements have generated an international market place where exporters of product can expect to any given jurisdiction. Cross jurisdictional harmonization and best practices are thus critical. ACP vertical fire spread is case on point. China, Australia, the UK and the Middle East have all encountered like problems and infernos derived form like product.***<sup>4</sup>

# Conclusion

Six years ago, the writer addressed an international conference hosted by the Australian Association of Building Surveyors titled “[World’s Best Practice Ingredients for Enlightened Building Regulation](#)”. Its conclusion was the same as today’s 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.<sup>7</sup>***

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