

# **World's Best Practice Ingredients For Enlightened Building Regulation**

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## **Key maxims for building regulation.**

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

- Regulation that maximizes the opportunity for safe buildings, that is: buildings that remove 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

## **The key legislative ingredients of an enlightened building control system.**

- An efficient and vigilant building approval statutory regime.
- A mandatory licensing regime that operates to ensure that principal actors in the construction dynamic are qualified, experienced and capable of delivering quality construction outcomes.
- A licensing regime that enables recalcitrants to be dismissed from the practitioner family to ensure that the consumer is protected, the reputation of the profession is not sullied and the above objectives of the legislation are not compromised.
- 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.
- 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.
- A building approval system that is conducive to expedited building permits, absent the casualty of construction failure.
- Statutory powers that enable swift and effective intervention to prevent dangers to life and limb and damage to property.
- Appellate systems that guarantee high quality decision making to ensure that construction conflicts and disputes are resolved expeditiously and soundly absent prohibitive dispute resolution costs.

### **An efficient and vigilant building approval statutory regime.**

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

- The issue of building permits that are forthcoming once the building official is satisfied that the design documentation complies with the governing Act of parliament and the relevant codes and standards.
- A mandatory building inspection regime where inspections are undertaken by an appropriately qualified statutory building official.
- Upon conclusion of construction the issue of a completion certificate by a statutory appointed building official who is satisfied that the as-built product is fit for occupation.
- The building official must be appropriately qualified, experienced and licensed, such is the paramount significance of his or her office under an enlightened building control regime.
- 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 the remuneration model for payment for the services/functions needs to be carefully considered. 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, find themselves in a fee cannibalisation 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 as-built product.

### **A mandatory licensing 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 be it the law, be it the medical profession or other “lofty offices”, all building professionals should be licensed and registered. The criteria for licensing of course must be purpose specific qualifications and experience with the coupling of mandatory insurance and the subordination of oneself to a statutory government controlled licensing 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.

In any building regulatory regime the principal actors involved in the construction dynamic have to be identified and licensed, and at 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 annual courses, as a prerequisite to the annual renewal of one's license to practice. The more skillful the practitioner, the less the possibility of compromise to the as-built product; compulsory CPD augers well for up skilling.

**A licensing regime that enables recalcitrants to be dismissed from the practitioner family to ensure that the consumer is protected, the regard for the profession is not sullied and the above objectives of the legislation are not compromised.**

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 resourcing to ensure that regular random auditing can apply with a view to identifying errant practices that may not ordinarily come to the fore.

**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 considered 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".

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 reprieve 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 based liability regimes embrace these clarity tenets as do many Australian jurisdictions.

**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 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 jurisdictions of Victoria and the Northern Territory in Australia.

**A building approval system that is conducive to expedited building permits absent the casualty of construction failure.**

Such a system enables private and local government building officials to compete with one another for building approval work. With competition comes higher levels of swift project turnaround service but as pointed out earlier the competition should not be based upon fee competitiveness as the vital work of a building official does not lend itself to “fee cannibalization”. Hence the intrusive hand of the regulator should be called upon to impose “fee level floors”.

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 big problem 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 likes 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 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.

**Statutory powers that enable swift and effective intervention to prevent dangers to life and limb.**

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.

**Appellate systems that guarantee high quality decision making to ensure that construction conflicts and disputes are resolved expeditiously and soundly absent prohibitive dispute resolution costs.**

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.