Compliance notices, stop notices, and the orders regime under the new *Building Safety Act 2022 (UK)*: is this a bridge too far?

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An international approach to an international problem

1. Too often, British lawyers, jurists, legislators, and policymakers facing the pressing needs of the day can overlook the fact that in other parts of the world, legal systems modelled on their own, face, effectively, the same issues and come up with similar as well as different ways to deal with them.

2. And just as it is inefficient to go back to the drawing board every time the same problem emerges, there is a distinct advantage to considering the way that the same problems have been approached in similar legal systems, to build upon that thinking and experience in developing modern solutions here. There are efficiency advantages to not re-inventing the wheel.

3. Australia, with a similar legal system stemming from the same tradition as the UK, notwithstanding its differences and distinct features, regularly studies the ways in which the legislature and courts approach what are effectively the same problems in formulating its approach.

4. As the UK's Supreme Court regularly does, there is no reason that Britain cannot look to the common law world, including jurisdictions such as Australia, for suggestions in how, what are essentially the same problems, are approached. Doing so also has the value of expanding dramatically, the precedent pool from which guidance might be sought.

5. Considering the various means by which the challenges involved with formulating a satisfactory scheme to regulate residential building development gives a stark example for these advantages.

Endemic building defects are a worldwide problem

6. The social, political, and economic impacts of widespread, almost endemic, defects in the residential building stock is a phenomenon facing most developed countries. The dramatic impact of a revelation that so many residential structures carry dangerously combustible façade cladding is really only the tip of an iceberg that includes substandard work and materials and under-capacity of regulatory systems.

7. It's easily forgotten that nearly three years before 2017's *Grenfell Tower* Fire, the aluminium combustible panel (**ACP**) façade cladding on the *Lacrosse Tower* in the middle of Melbourne's premier docklands district had also caught fire.

8. Before and after *Lacrosse*, there were also many instances of ACP fires in high-rise buildings in the Middle East. One of the tragedies emerging from the *Grenfell* fire, was that it took this tragedy for governments and communities to become alert to the issues, far less learning the lessons from them.

9. Since *Grenfell*, there has been so much legislative and administrative activity around the world. All of it, however, is after the fact; and most of it reactive. There is clearly a need for a root-and-branch re-think of building regulation, in order to minimise the chance for the kind of defects seen in the *Grenfell* Tower fire from recurring. That need goes beyond simply

addressing the ACP problem, but should look at, and for, the 'next' phenomenon that will emerge.

The right level of regulation

10. It is clear that whole communities have an interest in the quality of their built environment, including their residential building stock. Residential development not only provides a physical framework for the life of a community, it involves a very significant component of economic activity.

11. It is equally clear that residential development is so complex and complicated that the community cannot leave it, as an activity, entirely to the outcome of market forces.

12. Formulating effective building regulation is hard. It becomes harder when the building activity involves the very public, and very emotive, aspects of residential building development.

13. The difficulties are inherent in the regulatory activity itself, sitting at the cross-roads of public administration with the arcane and often intricate technical issues involved with the building process.

14. Principally, the critical challenge to regulation involves getting the balance right.

    (a) Too much or too tight, and residential building development activity can grind to a halt.

    (b) Too little or too light, and the process goes off the rails and we have large residential buildings either going up in flames, or going down in a cloud of dust & debris.

Comparing the positions in Australia and the UK

15. The fundamental features of the legal framework of residential building development in the UK and in Australia are very similar, namely: a primary emphasis on common law, particularly contract law, supplemented by schemes of legislative regulation - involving statutes and tiers of delegated regulation: by laws, regulations, orders, codes, and so on. Further still, the enforcement of these laws involve a combination of courts with specialist, lower level tribunals.

16. Obviously, despite the similarities of systems and their common origin, there are differences in the detail and direction of the legal systems in the UK and a common-law commonwealth country such as Australia.

17. The common law has the same foundations; the same basic DNA, but has developed in different ways in the UK as well as in Australia.[1]

18. Those differences in common law foundation, as well as the differences in social and political context, are reflected in the legislative structure regulating residential building development. The legislative regulation in each are framed, structured, and worded differently, as well as having different reach.

19. Rather than diminishing the relevance of each to the analysis of the other, these differences can be used to highlight the bases, features, and nuances in each such system. This analysis allows both a deeper, as well as a broader, understanding of the system of common law as well as statute that applies in each jurisdiction. Further, despite the differences, the legislation, in most cases, operate in similar ways and exhibit similar approaches, for example, to statutory

[1] The divergences in the development in the common law from its original British foundation are also seen in the common law as it has manifested in Canada as well as in the United States.

construction of developments. Again, the differences in language assist in analysing perspective, and so on.

20. This underlines the view that a general awareness of what happens in the common law world can be very useful in understanding what is happening in the UK.

Grenfell revealed a broken system

21. In the aftermath of 2017's *Grenfell Tower Fire,* two important inquiries were launched in the UK. The *Grenfell Tower Inquiry*, and Dame Judith Hackett's *Independent Review of Building Regulations & Fire Safety*. What emerged in the course of these inquiries was alarming. There were obviously a range of similar inquiries and reports in other countries in similar circumstances.

22. The Grenfell and the Hackett inquiries, and their reports,[2] make fascinating yet disturbing reading. They revealed an urgent need for a root-and-branch review, and indeed re-think about both the operation of building regulation, as well as raising existential issues in the approach to regulation itself.[3]

23. What then followed was a sense of crisis, pickled in despair that spread throughout the community as well as the building industry – about the extent and the expense of the problem, as well as apprehension about what the government might do.

24. Unfortunately, this crisis fragmented, to a degree, and merged with other, associated issues, to present as a hydra-headed problem. This widespread sense of crisis led to a slew of administrative as well as legislative activity, all designed to patch what was generally recognised to be a broken system.

New legal framework in NSW for building defects

25. Australia is a federation of six States combined with territories. Accordingly, each State operates as its own legal jurisdiction – statute, administration, and courts, with the Federal system lying over the top of all of them – and with its own jurisdiction, executive, and so on.

26. Most regulation of residential development is addressed at a State government level.

27. As is the case in Britain, in New South Wales, regulation of residential development generally relied upon two such statutory schemes – divided roughly into planning on the one hand, and building regulation on the other.

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2 The *Grenfell Tower Inquiry: Phase 1 Report* (October 2019)*:* https://assets.grenfelltowerinquiry.org.uk/GTI%20-%20Phase%201%20full%20report%20-%20volume%201.pdf and *Building a Safer Future: Independent Review of Building Regulations & Fire Safety:* Final Report (May 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707785/Building_a_Safer_Future_-_web.pdf

3 To a large extent, those inquiries involve an approach to this root-and-branch review. Bold and significant strides to this end have been made. However, a reading of these reports suggest that there is much, much further, and deeper to go. It can be said that an even deeper, existential or ontological inquiry is called for.

28. Issues of planning are dealt with by legislation centring on the *Environmental Planning & Assessment Act 1979*[4] (***EPAA***), with regulation of the residential building industry being addressed by the *Home Building Act 1989*[5] (***HBA***). The *HBA* is the current manifestation of legislation enacted in 1972.

29. Similarly to the UK, the *EPAA* regulates development by reference to processes of consents or approvals governed by 'environmental planning instruments' – largely oriented towards the jurisdiction of local councils. That scheme also, significantly, includes provisions for various kinds of certificates[6] – governing the way that work is done, and then certifying completion and so permitting occupation of the development.

30. The *HBA* provides for the licensing of builders wanting to undertake residential building work, with a supporting disciplinary regime. The *HBA* has two significant features relevant to this consideration: it provides a set of Statutory Warranties[7] about residential building work that are automatically implied into every building contract, and it reinforces those warranties with a scheme of Home Warranty Insurance.[8]

31. The context of the Statutory Warranties for high-rise residential buildings is that in almost every case, upon completion of the building it becomes subject to strata title[9], a form of Torrens title by which the land (and building) is subdivided both horizontally and vertically into 'lots', roughly reflecting the internal cubic space of the individual home units, and 'common property' which embraces the rest of the land and building.

32. The common property, involving most of the fabric of the building, where the defects usually are, is 'owned' by an owners corporation, a statutory body corporate comprising the owners of all the lots. In almost every case, the original landowner or the developer cease to have any interest in the land or the building once all the lots are sold. The individual owners of the home units own their units absolutely, and 'own' the common property collectively.

33. Under this arrangement, the unit owners 'own' the building together and can collectively sue the developer, builder, etc. for losses relating to defects in the building.

34. The emphasis in NSW is for losses relating to defective buildings to be addressed by civil action, including legal proceedings, being brought by the current unit owners, through these owners corporations.

35. In most cases, claims for redress relating to building defects are brought in common law claims in contract, tort, as well as in claims in equity. The Statutory Warranties are the usual basis of claim, which are sued upon as breaches of contract.

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4 https://legislation.nsw.gov.au/view/html/inforce/current/act-1979-203

5 https://legislation.nsw.gov.au/view/html/inforce/current/act-1989-147

6 *EPAA* Part 6.

7 Part 2C

8 Part 6.

9 See *Strata Schemes Development Act 2015 (https://legislation.nsw.gov.au/view/html/inforce/current/act-2015-051)* and *Strata Schemes Management Act 2015 (https://legislation.nsw.gov.au/view/html/inforce/current/act-2015-050).*

36. An important feature of the legislative context is the statutory prohibition on conduct, undertaken in 'trade or commerce' that is misleading and/or deceptive.[10]

37. With this very general overview, similarities and differences between the NSW and the UK experience can be identified.

NSW legislative developments

38. The fires in the Lacrosse and Grenfell Towers were not the only startling examples of building defects to affect New South Wales. On Christmas Eve 2018, a high-rise tower at the former Olympic Park precinct in Homebush, Sydney, was found to have serious structural cracking, which led to the immediate evacuation of that building. Hundreds of residents were forced from their homes, with many families having to spend that Christmas living in their cars.

39. A few months later, a high rise apartment block in the Southern Sydney suburb of Mascot was found to have dangerous structural cracks. There were immediate orders to evacuate that apartment block as well. Those residents, cast onto the street overnight, have still not been able to return to their homes.

40. These events led to a raft of statutory regulation: including

    (a) some amendments to the *HBA*, but also

    (b) the enactment of the *Design & Building Practitioners Act 2020*[11] (***DBPA***),

    (c) the *Residential Apartment Buildings (Compliance & Enforcement) Act 2020*[12] (***RABA***),

    (d) the *Building & Development Certifiers Act 2018*[13] (***BDCA***), and

    (e) the *Building Products (Safety) Act 2017*[14] (***BPSA***).

41. Each of these include provisions that are either reflective of, or at least evocative of, similar provisions either in, or finding their way into, UK legislation.

42. Of particular interest, for present purposes in the UK, are the notice and order provisions of the *RABA*.

43. That Act specifically recognises a newly appointed public servant, the NSW Building Commissioner. One of the unique features of the Building Commissioner's appointment is:

    (a) He is not a Commissioner in any sense;, and

    (b) There is no legislative foundation creating or empowering that position.

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10 This prohibition began with the *Trade Practices Act 1974 (Cth)* s 52, but is now found in a number of statutes, the most important of which, for present purposes is the *Australian Consumer Law* s 18, which is simultaneously Commonwealth as well as State law.

11 https://legislation.nsw.gov.au/view/html/inforce/current/act-2020-007

12 https://legislation.nsw.gov.au/view/html/inforce/current/act-2020-009

13 https://legislation.nsw.gov.au/view/html/inforce/current/act-2018-063

14 https://legislation.nsw.gov.au/view/html/inforce/current/act-2017-069

44. There is no 'commission'. The Commissioner was simply appointed on contract, and engaged as a public servant within the Department of Customer Service's Office of Fair Trading. He has no 'office' as such, and no staff. Office space and some staff are allocated to him by the Department. . Apart from express powers provided by the *RABA*, he merely exercises the ordinary powers given to officers of that department.

45. This oddity to the drafting and terminology used reflects both the need for care when reading these types of legislation, as well as the potential for odd terminology to be present in legislation of this sort, including legislation in the UK.

46. The RABA applies only to residential apartment buildings[15], although the definition is very elastic.

47. For those familiar with the extraordinary and wide-reaching features of UK's new *Building Safety Act 2022*, there are elements of the *RABA* that will be very familiar.

48. The NSW *RABA* provides notification protocols and other requirements[16] to accompany the notices, as well as providing a parallel regime for reflecting restriction of the issue of *EPAA occupation certificates* under the *EPAA.*[17] The attention of *RABA* is upon regulating the completion of work on high-rise apartment buildings and hence completion of their sale and occupation by the public. It includes broad powers of investigation and collection of information.[18]

49. The *RABA* provides broad investigatory powers. The limited scope of operation of these provisions, affecting only a certain kind of residential building development, are likely to be quite jarring in the overall legislative / common law context.

50. Of particular interest are the provisions for 'Remedial Actions' in Part 4, 'Rectification of Serious Defects'' in Part 5, and Offences in Part 6.

51. Section 33, Power to Order Rectification relevantly provides:

> **33 Power to order rectification**
>
> (1) The Secretary may give an order under this Part to a developer in relation to building work (a building work rectification order) if the Secretary has a reasonable belief that—
>
> (a) the building work was or is being carried out in a way that could result in a serious defect in a residential apartment building, or
>
> (b) a residential apartment building has a serious defect.
>
> (2) A building work rectification order is an order that requires the developer in relation to building work to carry out building work or refrain from carrying out building work, or cause building work to be carried out or refrained from being carried out, as specified in the order to eliminate, minimise or remediate the serious defect or potential serious defect.

15 *RABA* s 6.
16 *RABA* Part 2
17 *EPAA* Part 6.
18 *RABA* Part 3

52. Failure to comply with such an order is an offence, carrying penalties of $A 330,000 for corporations or $A 110,000 for individuals.

53. The subject of such an order, a 'developer' is also broadly defined as:

> **4 Meaning of "developer"**
>
> For the purposes of this Act, a developer, in relation to building work, means any of the following persons, but does not include any person excluded from this definition by the regulations—
>
> (a) the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out,
>
> (b) if the building work is the erection or construction of a building or part of a building—the owner of the land on which the building work is carried out at the time the building work is carried out,
>
> (c) the principal contractor for the building work within the meaning of the *Environmental Planning and Assessment Act 1979*,
>
> (d) in relation to building work for a strata scheme—the developer of the strata scheme within the meaning of the *Strata Schemes Management Act 2015*,
>
> (e) any other person prescribed by the regulations for the purposes of this definition.

54. Note that a developer does not have to be the owner of the land. Nor is the concept limited by the existence, or terms, of any contractual arrangements. The intention is to hit a developer in substance, meaning that the impact of the legislation cannot be avoided by are carefully constructed chain of contracts.

55. Importantly, the threshold for a sec 33 rectification order, is the 'Secretary's' reasonable belief that the work 'could result' in a serious defect. There does not even have to be a defect in existence. More importantly, the legislation does not set out the degree of possibility, much less probability, that a serious defect might eventuate before the power to issue the order is given.

56. Literally, the phrase 'could result' sets so low a threshold of probability to embrace the remote and even the *de minimis* possibility. The legislation does not indicate whether parliament intended the legislation to reach so far, or so low.

57. Conceptual restraint seems to arise only by reference to concepts such as the definitions of *serious defect* in sec 3(1), being:

> **serious defect**, in relation to a building, means—
>
> (a) a defect in a building element that is attributable to a failure to comply with the performance requirements of the Building Code of Australia, the relevant Australian Standards or the relevant approved plans, or
>
> (b) a defect in a building product or building element that—
>
> (i) is attributable to defective design, defective or faulty workmanship or defective materials, and

(ii) causes or is likely to cause—

(A) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(B) the destruction of the building or any part of the building, or

(C) a threat of collapse of the building or any part of the building, or

(c) a defect of a kind that is prescribed by the regulations as a serious defect, or

(d) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

58. The dramatic language in that definition is of cold comfort. It reflects a statutory formula used throughout the suite of legislation based upon the *HBA,* and in practice, the inclusion of the words 'or part', and 'or any part' in sub-clause (b)(ii) has been construed and applied generously to parts of built structures that do not have any significant, dramatic effect on the structures as a whole.

59. In practice, these kinds of orders can have serious, and dramatic effect, and can lead to injustice. There is neither any constraint, nor any direction, for the orders to be issued to those that either authored the work, are in a position to do it, or have any legal means of visiting the consequences upon the person who was really responsible for the deficiency.

60. In some instances, the orders have been issued to owners corporations, as the owners of the common property, but who have no relationship with the builder or developer, who actually understood the work, and may have no ready funds, and no means of redress against the builder or developer – because of the expiry of limitations provisions for the relevant causes of action.

61. The same goes to the issue of orders to builders or developers, where the author of the defective work, the real villain of the piece, is some contractor or sub-contractor who has long gone with money for the price paid for the work, and, again, where redress might be statute barred.

62. Greater still, the concept of 'defect' is defined functionally. It is not limited to identifying defect by reference to the standards applicable to the work when it was done. Where those standards have changed, work can be identified as being defective by reference to the current standards where it was acceptable by applicable standards at the time.

63. The potential for dramatic effect of these powers has led to a degree of restraint in the way the powers are exercised, and a degree of muted compliance by the industry. The legislation has not really been tested, either by the regulator or by the developers. That could be a reflection of the overlying economic environment – pandemic lockdowns, spectacular examples of defective work, and an overall dullness in economic activity in the area.

64. As the low hanging fruit provided by the really bad examples of building work gets picked off, and regulation moves to the more contentious / arguable areas, and as the economic environment either tightens or frees up, one might expect some more vigorous exploration of the issues posed by this legislation in due course.

65. Investing so much power, with so little by way of criteria and parameters gives rise to real questions going to the rule of law, and the proper bounds of executive power.

66. The *RABA* has the flavour of an emergency, almost martial law type of enactment – designed to meet an urgent immediate need, but clearly one that should be temporary, until / unless supplemented with carefully drawn criteria, guidance, checks & balances to ensure that exercise is kept within proper bounds.

67. Those questions to one side, there is little to suggest that future developments of that nature are in contemplation.

New legislation: the importance of context

68. It is always important to have regard to the context of every piece of legislation. That importance may be emphasised when looking at building development regulation.

69. The powers in the *RABA* sit within a detailed legislative framework, some crucial features of which have been argued and litigated many times in recent years. An example is seen in the detailed Statutory Warranties set out in the *HBA* Part 2C, sec 18B(1).

70. Another example is the *DBPA* enacted at the same time as the *RABA,* which provides a framework for the regulation, certification, and documentation of design, supported by the broadly based statutory duty of care regime set out in *DBPA* Part 4.

71. Whilst these contextual features do not diminish the breadth, or the worrisome features of the *RABA* powers & orders, they ameliorate, to an extent, the impact of those powers on the way that building development is undertaken.

72. The breadth of that regulatory context, for example, suggests that the *RABA* powers should be viewed as last resort powers, or that their impact can be accommodated by other associated rights and obligations.

73. It will be of interest to see how similar kinds of power might be used, and might develop, in a jurisdiction that does not have those similar, critical elements to that context.

Flash briefing on the UK's new *Building Safety Act 2022*

74. The latest UK effort in addressing, or redressing, the epidemic of building defects, particularly those arising from the use of ACP is the recently passed and only very recently assented to: *Building Safety Act 2022 (UK) (**BSA22**).*

75. This *Building Safety Act* makes some very bold strides in the field of building regulation. It suggests that the UK Government is contemplating a more 'rigorous' approach to building regulation than it has in the past. Its explanatory documentation is clearly oriented towards the views expressed in the Hackett Report, as well as those in Grenfell Phase 1.

76. Sadly, it is not a stand-alone Act, which could more easily be accessed, addressed, interpreted, and understood by the community/industry as a whole. The *BSA22* does have some stand-alone elements, but it also involves a co-ordinated series of amendments/ additions to other acts, primarily the *Building Act 1984 (UK) (**BA84**).* Some of these changes involve a dramatic departure from the format, and the current role and operation of the *BA84*.

77. Legislation in this format can be confusing and may well render its essential legislative features inaccessible to the communities and industries that it is principally intended to address.

78. More importantly, so much of the detailed practical shape and operation of the *BSA22,* will involve the way the regulations are framed and structured. It is difficult to assess the 'on the

ground' effects of the *BSA22* without the detail of the regulations – which have not yet been foreshadowed.

79. Even with what we have said above, there is some commendation for the *BSA22*. It will, no doubt, occupy time in analysis and discussion for many years to come.

80. There are, however, some topical features that warrant early attention, namely:

(a) the appointment of a new sheriff, or czar, to police what are described as 'high risk' buildings: the ominously named '*regulator*'[19] who will operate through a commando of *authorised officers*[20] who will operate in conjunction with *registered building inspectors*[21] and *registered building control approvers*.[22]

and

(b) the set of innocuously framed, and yet dramatic sweeping new powers relating to *higher risk buildings*[23] (basically, high rise residential apartments), including the power to issue a range of notices and orders that have dramatic effects.

81. These new provisions will sit within the somewhat awkward context of the common law, as relating to residential buildings[24], and the set of existing statutory and legislative provisions, that with the common law, reflect a less 'aggressive' set of assumptions about how the law should operate in these areas than is seen in the NSW context.

Notices & Orders under the UK's *BSA22*

82. Apart from the need to carefully scrutinise the context of the target statutes in considering and construing the amendments to those Acts effected by *BSA22*, the real depth, breadth, operation, and effect of *BSA22* will only really emerge with the regulations.

83. BSA22 brings in a regime involving a range of notices and orders, including those with similar effect to *remediation orders* under the *RABA*. These include:

(a) Compliance & Stop Notices: *BSA22* s 37 inserting *BA84* sec 35B and 35C;

(b) Compliance Notices: *BSA22* s 98;

(c) Remediation Orders: *BSA22* s 122;

(d) Remediation Contribution Orders: *BSA22* s 123;

(e) Building Liability Orders: *BSA22* s 129;

(f) New Build Home Warranties: *BSA22* s 143; and

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19 Being the *Health &* Safety Executive (*BSA22* s 2(1)).

20 *BSA22* sec 21.

21 *BSA22* s 41 adding *BA84* s 58B.

22 *BSA22* s 41 adding *BA84* s 58N.

23 *BSA22* s 98.

24 There is much to be said for the view that the common law foundation for building law, both in the UK and in Australia, is far outdated and not, currently meeting community needs and expectation.

(g) Cost Contribution Orders*: BSA22* s 151.

84. Most of the interesting and potentially significant features of the *BSA22* are tied to the terms of newly empowered regulations. For example: *BSA22* s 122 Remediation Orders

(1) The Secretary of State may by regulations make provision for and in connection with remediation orders.

85. Given that, in that case, a 'remediation order' is an order requiring a landlord 'to remedy specified relevant defects' which are linked to a 'remediation contribution order' per *BSA22* sec 123 means that the terms of those regulations are likely to be of very great interest.

86. The terms of the Compliance Notices proposed for *BA84* s 35B have eerie similarity to the *RABA* powers in Australia. Proposed sec 35B provides:

35B Compliance notices

(1) The building control authority may give a compliance notice to a person who appears to the authority to have contravened, be contravening or be likely to contravene—

a. relevant provision of building regulations, or

b. a requirement imposed by virtue of such a provision.

(2) A "compliance notice" is—

a. a notice requiring the recipient to take specified steps within a specified period, or

b. a notice requiring the recipient to remedy the contravention or the matters giving rise to it within a specified period.

87. As is the case with the *RABA* s 33 *rectification order* contravention of a *BSA22* Compliance Notice is an offence. Contravention of the Compliance Notice has the potential consequence of imprisonment.

88. Where the Compliance Notice is thought to fall short of its objectives, the new *BA84* s 35C provides for a 'Stop Notice' which is similar to a Compliance Notice but with more serious consequences.

89. The mechanisms and structure of these provisions merits methodical consideration. But not here. The point, and the point of comparison with the *RABA* is in the structure of these provisions.

90. The last century of building and construction law and disputes demonstrates that seemingly simple concepts in law, such as 'what is a defect' or 'what are the requirements specified by the plans and specifications' are not always clear, or obvious or without argument.

91. Almost every case that has gone to trial has gone because different players in the residential building development field have had strong, committed, and quite different views about what was asked for, what was delivered, and who is responsible for the differences between expectation and delivery.

92. One is then left to ask, how is it than one person, effectively a third party stranger to a building project, should be given the power to compel the expenditure of time, money, and resources based solely upon what 'appears' to that authority to have contravened some provision?

93. The question is particularly acute when one considers that the only apparent parameters for the exercise of that power rests upon a similarly vague and self-referential set of understandings about: who should be the proper target of such a notice, what is the criteria for determining whether a particular regulation has been contravened by that person, and how the concept of 'contravened' is to be construed, as well as what are the 'specified steps' to be prescribed – and importantly, who is to pay for it all?

94. The legislation addresses none of these fundamental elements. Elements that underpin the character of the legislation – whether it acts properly justly, and fairly, or whether it operates in an idiosyncratic and arbitrary manner.

95. Curiously, the *BSA22* provides in most cases, appeal from the issue of these orders to a court or tribunal, e.g. in the proposed *BA84 s* 39A. In many cases, this appeal is to the Upper Tribunal. In almost every case, the appeal provisions are as devoid of criteria, guidance, and parameters as the original empowerment provisions.

96. If the appeal has no real directory criteria, and it considers an appeal of an order issued without the framework of any firm directory criteria, one may be inspired to ask: what is the value of such an appeal? The tribunal or court will be left to ask itself, what is wrong with any decision to issue an order, where the body with the power can seemingly reach its own conclusions and to do what it likes?

97. Remember that to issue a Compliance Notice per *BA84* sec 35B, it is not necessary that the subject of the order has actually contravened a regulation. It is sufficient that the authority has formed a view that it appears to the authority that there 'may' have been a contravention or that there is 'likely to be' a contravention.

98. Nor does the new UK legislation properly deal with the contingency that, after the subject of the order has incurred cost and undertaken the work specified in the order, it is found that there was no contravention at all. What if the authority was wrong in the first place? Or what if the authority's interpretation of the regulations is wrong or if it takes some idiosyncratic view?

99. For those situations, the legislation provides cold comfort. Experience in NSW with the *RABA* demonstrates that the cost of complying with such orders, as well as the reputational cost and loss of goodwill, can be very significant. The imposition of such a cost burden, in unjust circumstances, can be fatal for a business.

100. To that extent, merely having provisions for appeal do not solve the immediate problem. Apart from questions about the utility of such an appeal process, outlined above, come the practical questions of how long it will take to have such appeals resolved, what are the cost considerations, what will be the expertise and orientation of the particular appeal bodies that hear the appeal, and what kind of reception will the appellant receive?

101. The availability of the possibility of appeal will not meet the practical needs of the industry, or provide any succour for a sense of injustice arising from the process.

102. Experience suggests that such a sense of unmet, residual injustice felt by classes of parties to these kinds of process can be poisonous to a scheme of building regulation as a whole.

103. The introduction of the *New Build Home Warranties* poses interesting possibilities, and may indicate an intended future direction. Those warranties are nowhere near as significant, or as broadly based as the Statutory Warranties found in the NSW *HBA* Part 2C.

104. The *HBA* Statutory Warranties revolutionised the way that building defect claims are made in NSW. It is very likely, that the warranties found in the *BSA22* may be added to, and expanded upon, in the future. The *New Build Home Warranties* might be the early buds of a future, comprehensive set of warranties similar to those in Australia's most populous state.

The Overall Trend Shown in BSA22

105. In my view, *BSA22* reflects a more rugged, assertive, approach to the regulation of building work, as opposed to building development, than has been characteristic to date.

106. These broad powers to 'order' seem to represent a shift – seen both in Australia and the UK. However, there is a significance to the context.

107. Direct, perhaps even invasive regulation has been a feature of the building scene in NSW since the early 1970s.[25] The robust provisions found in the *RABA* are unsettling, but they arise in the context of a very contentious, and vigorously contested industry. This is a context that is characterised by a public and by industry players who require compulsion, and who are used to asserting their rights in the face of regulators, and each other.

108. Of course, different perceptions and perspectives are different, but one gets a sense that the relationship, to date, between key industry figures, government regulators, and building occupants has been less confrontational in the UK than in Australia, with approaches to regulation reflecting this. It is a surprise to Australian eyes, that building regulation could reasonably involve a voluntarily based insurance and building quality scheme maintained by the building industry itself.

109. The inability of the building industry to effectively self-regulate was the stimulus for the licensing scheme, and the imposition of standard statutory warranties in the *HBA*.

110. The differences in emphasis, for example, are seen in the rigorous, comprehensive *HBA* Part 2C Statutory Warranties implied into every building contract, with any attempt to contract out or to weaken these being void[26], and the *new home warranties* provisions in *BSA22* s 143.

111. NSW experience, in which prescriptions requiring written contracts and written notices are often more aspirational than descriptive, would scarcely be able to maintain a scheme such as in *BSA22* s 143, which seem to mandate the provision, by a developer, of pieces of paper setting out the terms of a *new home build warranty*.

112. And in practice, a promise by the developer that it will, in the future and in 'specified circumstances' return to 'remedy any specified defect' for any 'specified period', where 'specified' means specified in the 'arrangement[27] seems, in the NSW context to be of dubious value – although a lot will depend upon what the Secretary of State requires in future regulations.

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25 With the *Builders Licensing Act 1971 (NSW)* and the pervasive role of the *Trade Practices Act 1974 (Cth).*

26 *HBA* s 18G

27 *BSA22* sec 143(3).

113. At the very least, for example, the warranty is given by the developer, rather than the builder that does the work. And further, the value of any such warranty assumes that the developer, very often a special purpose vehicle in the shape of a straw company will be around for any meaningful period after the development is finished, the properties are sold, and the money either spent or spirited away.

114. It may be the cynic in me speaking, but one is reminded of Samuel Goldwyn's misreported saying: 'a verbal contract isn't worth the paper it's written on'. A written warranty conveyed on a piece of paper by a developer on its way out of the door can be argued to be worth not much more.

What next for BSA22?

115. You may detect a sense of cynicism as to the extent to which these new *BSA22* provisions will do what is needed, and what is expected.

116. This arises largely from a weariness in having to contend with what is arguably a larger and further reaching statutory context in NSW than in the UK, which has not achieved much more, and which has provided its fair share of disappointed expectations.

117. The *HBA*, the principal regulatory vehicle in NSW has seen a substantial legislative amendment on average every 6 months since its current form crystallised in 1989. Each amendment is accompanied by byzantine savings & transitional provisions. In the light of ideal legislative regulatory policy, it is an ongoing mess.

118. The regulation has been so complex and inconsistent, that the Home Warranty Insurance scheme set up to augment the warranties catastrophically failed nearly 10 years ago. It does not cover high rise apartments, where the need for insurance is at its most acute, and its provisions barely make any sense now.

119. The whole scheme of regulation is supposed to be subject to a fundamental, root & branch review, hence the tranches of 'new' augmenting legislation from 2017 to 2020. However, that process seems to have stalled in the light of the other pressures and tensions the world faces now.

120. The real tragedy, both for NSW and for the UK, would be if the momentum and the appetite for an honest, fearless self-appraisal of our regulatory systems leading to real, intelligent reform, is abandoned in the face of the dubious comfort of 'business as usual'.

121. The charms of that comfort is what led to the diminishing of standards to the point that buildings started burning down. It would be both a tragedy, as well as an indictment upon our society, if that lesson had to be learned the hard way again.

A different way forward

122. My review of the NSW legislation has led to a book, soon to be published, setting out a workable approach to building regulation. It is framed from the experience of an advocate, having had to advise and argue for various, sometimes contradictory, views and interests on virtually every point.

123. In short summary, the answer does not lie in any one piece of legislation, or the conferral upon any one person of any amount of power. That is short term thinking. If one is to rely upon the presence of the sheriff to keep order, the town is not safe when the sheriff is indoors, or looking the other way.

124. Whilst having a proactive, empowered regulator, is not a bad thing, I doubt that it is a sound basis upon which to structure a whole system of regulation. History has shown that every proactive, empowered regulator, of every sort, can lose enthusiasm when budgets get redirected, and when governments get distracted.

125. The framework, from the common law perspective in this country, calls for balance. This balance includes matching liability for defects with responsibility, or rather, the ability to avoid them. As well as having that matching enforced, or reinforced, by empowering those that have to bear the real consequences of defective, slip-shod work to be able to visit those consequences upon the authors of that work – the people who had the control (of various sorts), being the ability to avoid those defects, as well as those who profited by those shortcuts being taken.

126. The framework of legal title in high-rise apartment buildings in Australia make this process relatively simple (the emphasis is on 'relatively' because there are traps and footfalls even there). The situation in the UK is not as straight forward, but is clearly not impossible.

127. One of the difficulties thrown up by the common law foundation, emerges from the artificiality and limitation of the availability of common law relief for the tort of negligence for economic loss. The difficulties and limitations with this tort relief cause serious problems, and demonstrate a gap in the law's ability to regulate such a vital activity.

128. That gap restricts the ability of those who are found to be liable for defective work, at law, from directing recovery to those that were principally, and actually, responsible for the problem. The gap involves what I have called a liability 'cul-de-sac', which effects unfairness and injustice, and creates economic waste and imbalance.

129. Recognition of the problem arising from this gap led NSW to enact a statutory duty of care[28] to fill this gap. That statutory fix is too limited, but better than what was there before. The whole issue of the correct scope and role of tort liability for negligence for economic loss for latent building defects remains a standing challenge to the legal profession – to help shape the law to reflect societal expectations.

130. Another shortcoming in the common law context of the *BSA22* lies with the use, and abuse, of the corporate veil. The concept of limited liability companies, and the distinction of the corporation with its shareholders and officers has been a crucial driver for enterprise, and the economic growth that made the modern world.

131. However, equally clearly, it is prone to abuse, leading to sub-optimal social and economic outcomes. To date, no satisfactory mechanism has been devised that recognises when the distinction between the corporation and those behind it is justified, and when it is not.

132. Clearly, the legislature recognised that the corporate veil, in the building regulation context, can be a problem. Various provisions in *BSA22,* including sec 160, accommodate this. But these pin-point answers are no replacement for a reasoned, jurisprudentially sound, solution to the problem.

133. Which leads to the most important pressing issue emerging from the BSA22 – with respect to the broad notice and order powers, but extending to its other elements as well. Namely, it is well and good being able to issue orders, to compel conduct, and even to recover compensation, fines and penalties. This provides some disincentive to sub-standard behaviour but not an overall solution.

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28 *DBPA* s 37.

134. In too many instances, the legislation provides for the *sturm und drang* of its remedies and consequences to be levied against straw or impotent targets, often corporations without the obvious means to give proper redress. The issue is surely to facilitate the consequences of bad work to lead to proper compensation for those that have sustained the losses – and where the measure of that compensation reflects both the measure of the loss and the means of redress.

135. This involves, inevitably, those that directly bear the consequences of defective and sub-standard building work being able to take action that has a reasonable chance of resulting in the provision of the adequate compensation needed to actually rectify the defects.

136. It remains to be seen how the *BSA22* provisions will operate in practice, what the regulations will look like, and how the relevant government authorities approach, and sustain the approach, to enforcement. These are all factors that will indicate the success or failure of this step in the regulatory scheme. And for that, only time will tell.

137. However, what is clear, is that in order for these bold moves and new powers to have any real chance of success, they must be supported by an ongoing programme of real and honest reform. What is needed is reform that looks at all aspects of the process, that identifies what works, and what causes unnecessary hold up and expense, and then having the courage to fix. A lot has been done, but there is clearly a lot more to be done.

138. The answers only partly depend upon the legislature or the government. The legal profession has an important leadership role, but the challenge is one for the whole community.

139. The bold, brave, and innovative steps are a good start, but if the momentum falls away from the groundwork involved in reforming the system to rationally support these innovations, then they may end up as ‘a bridge too far’, and we don’t want another of those!

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