



Framework for Reform
Expert Panel's Review of Victoria's
Building System
Submission

June 2021

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Table of contents

<i>Executive summary</i>	4
<i>Introduction</i>	5
<i>Resourcing</i>	5
1. <i>Practitioner registration</i>	6
2. <i>Building approvals</i>	9
3. <i>Regulatory oversight</i>	11
4. <i>Consumer protection</i>	12

Executive summary

Victoria's building regulatory system has failed to adequately protect the community and promote compliant building work. Major changes are needed to address this. Minor shifts, such as increased resourcing for regulators, more proactive disciplinary action, and providing greater clarity on the roles of various parties will not be enough to fix the system.

One critical flaw in the system is the inherent conflict of interest of developers being able to appoint their own building surveyor to certify, inspect, and sign-off buildings. At no point is an independent practitioner, someone who does not rely on developers engaging them for ongoing business, required to take part. This is unacceptable not just for high-rise apartment buildings, but for all buildings. Building owners, tenants, and the public at large are vulnerable to deficient building work. Risks to life and safety and major financial losses can too easily be the result of corners being cut.

This review gives Victoria an opportunity to embed protection for consumers and the public into the fabric of our building regulatory system. The review and any associated reforms should ensure that:

- Stronger regulation is provided for all classes of buildings, while allowing for a risk-based approach that sees additional scrutiny for high-risk and complex buildings.
- Statutory inspections are required to be undertaken by a practitioner independent of the developer.
- The regulatory system enables and supports councils to play a greater role, through both resourcing and improved role clarity.
- Practitioner regulation and building regulation is split between the Victorian Building Authority and the State Building Surveyor respectively
- Responsibilities of other practitioners, including tradespersons and building designers, are clearer.
- Practitioner conduct is actively enforced, with those unwilling to improve their conduct removed from the industry.
- Codes of conduct and a proactive duty is considered to enable regulators to address poor practice before it leads to poor outcomes.
- Roles of various bodies with a regulatory role, and the interactions between them, are clearly defined in legislation.

Introduction

The Municipal Association of Victoria (MAV) welcomes the opportunity to provide a response to the *Framework for Reform* discussion paper released by the independent expert panel looking at Victoria's building system.

The MAV is the peak representative and advocacy body for Victoria's 79 councils. The MAV was formed in 1879 and the *Municipal Association Act 1907* appointed the MAV the official voice of local government in Victoria.

Today, the MAV is a driving and influential force behind a strong and strategically positioned local government sector. Our role is to represent and advocate the interests of local government; raise the sector's profile; ensure its long-term security; facilitate effective networks; support councillors; provide policy and strategic advice, capacity building programs and insurance services to local government.

The panel's discussion paper includes a model for building approvals reform that was proposed by the MAV. This model was developed through a working group of council officers and external expertise. This submission has been further informed through subsequent consultation with councils.

Resourcing

We recognise that the panel is planning to examine resourcing of the system later. While we agree that the fundamentals of the system should be established first, and then methods to resource various responsibilities examined later, there are principles that must be established at the outset. Our support for reforms is predicated on the proper resourcing of councils to fulfil the responsibilities they are assigned.

Councils are already inadequately resourced to undertake their current responsibilities. Rate capping constrains councils' control over their main revenue source. This means councils are not easily able to take on additional responsibilities without shedding existing ones.

A functioning regulatory system is critical to the health and safety of all Victorians. Our view is that the construction industry also benefits from a strong and sustainable regulatory system because it engenders consumer confidence in Victoria's building stock. Regulation of the construction industry should therefore largely be resourced by placing a levy on building activity in some form.

For some functions, such as mandatory inspections or lodgment of documents, a fee for service model could work well. If consumer choice is taken away from the inspection phase, prescribed fee levels would need to be investigated.

For other functions such as proactive or complaint-driven responses to building work a broader resourcing model is needed. We believe that the building levy could serve this purpose well.

There are also different options for how resources should be distributed. We believe resourcing for building control should be hypothecated, both at the state and local level. The state government should not be able to divert funds away from local government, nor should local government be able to use funds provided for building control for other purposes. Hypothecation should include consideration of the degree of impact council building control functions have on on-costs such as insurance premiums, as this may be significant.

One potential model to fund proactive work by local government is that of service agreements. This is a model currently used for tobacco enforcement. Councils are funded by the state government to carry out a specific number of compliance activities. In building control this could be linked to an agreed Municipal Building Control Plan.

1. Practitioner registration

How can accountability across all construction work be improved?

While much focus is placed on the role of the building surveyor, compliance must be first and foremost addressed by those doing the work and those supervising on a day-to-day basis. Building surveyors are on site for a fraction of the time to conduct point-in-time inspections. It is an impossible ask for them to single-handedly address widespread issues of non-compliance in the building industry.

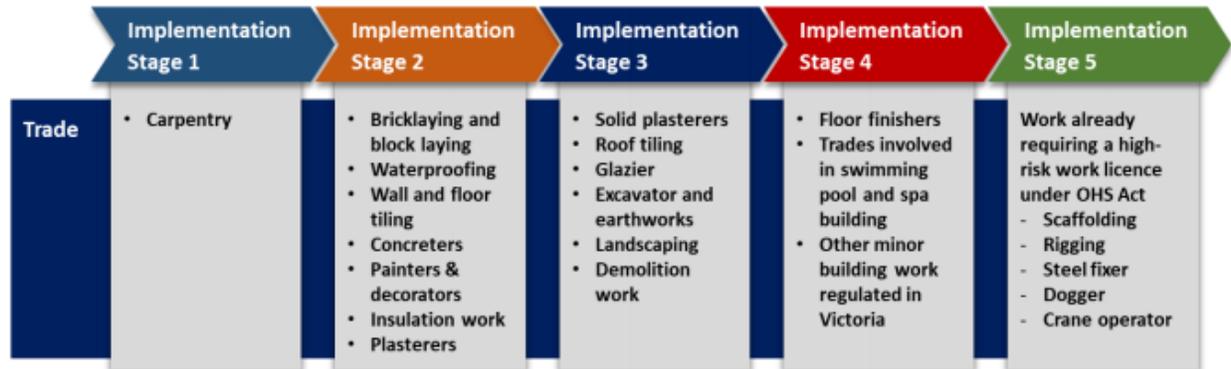
Requiring registration and licensing of trades is necessary to achieve higher standards on worksites. For practitioners with a greater supervision role registration rather than licensing should be required. One potential delineation could be that employee tradespersons require only a licence, whereas the contractor (as is the case currently where a named builder must be registered) or subcontractor must be registered.

Codes of conduct should be developed for all registered and licensed classes of practitioner. For licensed practitioners this should be a relatively simple code with the main purpose being a requirement not to undertake work outside their own capability.

Which currently unregistered practitioners should be considered for registration?

We support the model of registration and licensing proposed by DELWP through consultation on [registration and licensing of building trades](#). For convenience, a summary graphic of DELWP's proposed approach is below.

Figure 2.1 Summary of implementation plan



In consultation with councils, other specific trades were identified as worthy of consideration for registration or licensing including:

- Termite treatment
- Fencing
- Shop fitting

There is also merit in exploring requiring all construction workers to at least be licensed. This would give the regulator avenues for driving improved standards of construction work across the industry. A fallback category of “licensed tradesperson” or similar could be applied to workers not covered by a specific class. Licensing must be a relatively simple and inexpensive process to reflect both the number of workers this would cover, and the lower level of responsibility expected of them compared to registered practitioners.

Design practitioners should also be captured under a registration system. All classes of registration and licensing in the construction industry, including those of design professionals, should be handled by the one regulator.

Do you agree with developing practitioner competence frameworks to support system-wide industry competence?

Competence frameworks would assist practitioners in understanding their obligations under the regulatory system. They should be accompanied by codes of conduct, which would form one of the key elements in approaches to disciplinary action.

Could accreditation by industry bodies or RTOs become part of the practitioner registration and/or licensing process? If so, how can we guarantee the improvement of practitioner standards through such a process?

This could be incorporated into registration and/or licensing. The regulator would need to retain active and ongoing oversight to ensure there is an incentive on these bodies to retain and enforce high standards.

Should the NSW approach (see case study 1) to design practitioners be considered for Victoria?

Responsibilities of design practitioners should be made clearer and be enforced more actively. Requiring design practitioners to certify that their design meets the NCC, including how any performance-based solution complies, should cause these practitioners to take their responsibilities more seriously. In many cases design practitioners will not have the necessary technical knowledge to make this certification and will rely on a consultant building surveyor's expertise. We see this as a benefit as it will better embed an attitude of compliance at early stages of design. Requiring self-certification will also provide regulators with a clear hook to pursue disciplinary action.

Documenting how a performance solution complies with the NCC should be a mandatory part of design documentation in an application permit. This is arguably required by Regulation 24 currently, however practice shows that this has not been sufficient.

What measures could be considered to boost the number of skilled building surveyors and technical experts?

Better promotion of the profession and cadetships within local government are key elements of strengthening the building surveyor workforce.

A better performing building control system would also prove more attractive to retaining and attracting building surveyors. More equitable apportionment of responsibility and liability (and accompanying easing of insurance premiums), recognition of the relative risks each practitioner takes on in the fees charged (through removing some of the incentives to undercut and underdeliver), and an improved culture of compliance across the industry would all make building surveying a much more attractive prospect.

Are there other key issues and possible improvements that the Panel should consider?

A proactive duty, such as that found in occupational health and safety law and, as of July 2021, environment protection law, would be of additional benefit to an active regulator. This would place a duty on persons to take reasonably practicable steps to minimise risks of harm. Such a duty already applies to persons designing buildings for use as workplaces under the *Occupational Health and Safety Act 2004*. Expanding this requirement to the design of all buildings is a logical step. This approach could also be taken to certain other classes of practitioner with a high degree of responsibility such as the relevant building surveyor or named builder (head contractor).

The key benefit of this approach is that it would allow the regulator to respond to poor practice, rather than having to wait for poor outcomes. A "reasonably practicable" test also makes the duty commensurate to a practitioner's resources and capability, and the severity and likelihood of harm occurring.

2. Building approvals

What do you see as the benefits and potential risks of the models described above? In particular, what are the implementation issues which the Panel needs to consider?

The MAV proposed a model which is presented in the discussion paper. This model was developed with a working group of Municipal Building Surveyors, senior council management, and industry experts.

In responding to the discussion paper, we have chosen not to endorse a specific model from those proposed, but rather draw out what we believe are the key elements and outcomes that must be delivered. This has been informed by further consultation with councils, as well as highly constructive discussions with the expert panel and other involved stakeholders.

Independence of inspections

One of the fundamental outcomes of this reform process must be to break the link between developer and building surveyor at the inspection phase.

Having truly independent inspections of building work can assist to pick up problems that arise during certification. Over time, this should not only be an opportunity to address poor certification, but a driver of better practice in the certification phase. Building surveyors would know any deficiencies in certification are likely to be picked up through inspections and potentially lead to disciplinary action. Developers would similarly know deficiencies are more likely to be picked up and need rectification, carrying a cost in time and money. Developers would be incentivised to pick a rigorous building surveyor for certification to ensure the project is not held up by non-compliance detected through inspections.

Having independent inspections should allow developers to continue selecting a building surveyor to certify their plans, while removing much of the risk of that approach.

Inspections to be caused by the MBS

One option for independent inspections is having the relevant Municipal Building Surveyor (MBS) initiate mandatory inspections. The MBS could choose to either have themselves or delegated staff undertake the inspection, or engage a private building surveyor (PBS) to do so.

If this model were adopted there are important details to consider. Assigning an inspection to a PBS should not be a delegation of the MBS's powers. Rather, the MBS should be empowered to rely upon the report of a suitably registered PBS based on that practitioner being registered by the VBA (like the current immunity provided under Section 128 of the Act when relying on a certificate of compliance). If this is not the case, or if delegation of powers were required, every MBS would need to undertake oversight mirroring the VBA to satisfy themselves that the PBS is a suitable person. This would cause the entire system to grind to a halt.

For minor instances of non-compliance, a PBS undertaking these inspections should be able to direct a builder to fix work. For more substantial non-compliance, or where a direction is not followed, the matter must be in the hands of the MBS to enforce.

It would be worthwhile exploring prescribed terms of engagement for PBS assignments to promote consistency and clarity for both councils and PBSs across Victoria.

Final completion

The issuing of an occupancy permit often does not mean the completion of building work, just that the building as it currently stands is fit for occupation. The introduction of a statutory step signifying building completion, accompanied by an inspection, would be a positive step in establishing when a building stops being a building site.

Do you agree that a stronger regulatory framework for building approvals for complex or high-risk building work is needed?

A stronger regulatory framework is needed across the board. While we agree that the level of controls should be graduated with higher risk, the current system does not offer sufficient regulation of any class of building.

Options for complex or high-risk building work could include independent peer review of certification and additional mandatory inspection stages.

Are there any other potential approaches to strengthen accountability across the building approvals process that the Panel should consider?

Once a stronger regulatory framework is established, we will still need proactive and well-resourced regulators to achieve meaningful change.

What other suggestions are there that would remove the potential for conflicts of interests between PBSs and builders, developers or design practitioners?

Building practitioners have responsibilities under the Act and regulations to carry out compliant work. This obligation can conflict with the desire for developers to minimise costs and project timeframes.

Wherever a developer can appoint a practitioner of their choice there will be potential for conflicts of interest to arise. The design of the regulatory framework must account for this and determine where this is acceptable due to the interests of the developer and the public aligning closely enough, or sufficient safeguards being in place.

Is there merit in introducing a ‘clerk of works’ or similar oversight function into the approvals process?

“Clerk of works” and “proof expert” appear to be two independent reforms.

The clerk of works has generally acted as an on-site agent of the developer, designer, or architect, and undertaken a quality assurance role on their behalf. As such we do not believe this should be a mandatory requirement for projects. Focus should instead be on whether there are supporting reforms necessary to support developers voluntarily engaging a clerk of works, for example a specific registration class.

The concept of a proof expert appears to be more of a regulatory role. If appointed independently this could be a valuable addition to high-risk and complex projects such as apartment buildings. Being on-site day-to-day rather than at defined inspection points, this could pick up much of the role that is erroneously considered to be the role of the building surveyor in the current system.

Should the NSW system of requiring the developer to notify the regulator in advance of the issuing of an occupancy permit and associated enforcement measures be considered?

This would be addressed by having the MBS initiate mandatory inspections, including final inspections.

3. Regulatory oversight

What changes to the functions and/or structure of the regulator(s) would improve regulatory outcomes?

Practitioner registration, licensing, and disciplinary action should be handled by the VBA.

Enforcement of building compliance should be handled by building surveyors. Primarily this should be the Municipal Building Surveyor. Call-in powers should exist to allow the State Building Surveyor to take on this role in certain circumstances. The State Building Surveyor should also be able to proactively conduct inspections to audit building work as they see fit.

Importantly, there should not be a situation where two parties have similar responsibilities and powers at the same time. These overlaps exist between private building surveyors, Municipal Building Surveyors, and the VBA in the current system. This has led to each party lacking the resources and/or the expertise to fully carry out its functions, which has in turn led to the handballing of responsibility at the cost of effective building regulation.

There will need to be some element of discretion in the use of call-in powers, however the criteria for exercising this discretion should be made public.

Will improvements to strengthen existing oversight arrangements adequately address the issues relating to regulatory oversight of the building and construction industry?

No. Even if issues with overlapping responsibilities were addressed, the current system would require an unsustainable level of oversight by regulators to be effective. This is due to inherent conflicts of interest and a lack of mechanisms to require better from practitioners from design practitioners to tradespersons.

What are the benefits and risks of establishing an independent Office of the State Building Surveyor?

The State Building Surveyor should be a statutory and independent position. One of the strengths of the existing model is that key decisions lie directly with the Municipal Building Surveyor, rather than through delegation of council powers.

What are your views on the most effective oversight structures for the regulatory functions in construction work, practitioners and consumer protections?

As stated above, there should be a split between a building regulator and a practitioner regulator. It is important that there are clear expectations set out for each of these as well as the interaction between them. This is necessary to be able to promote accountability and assess the functioning of the regulatory system.

Should there be separate regulators for practitioners and for building works?

Yes, as discussed above the VBA should regulate practitioners and the State Building Surveyors and Municipal Building Surveyors should regulate building work.

Should regulation of all design practitioners be brought together under one regulator?

Yes, all practitioners involved in the building industry should be regulated under a single body.

4. Consumer protection

Which of the approaches outlined above would improve the consumer experience most effectively?

The commissioner model proposed, based on the commissioner for residential tenancies, has significant merit. It would provide an advocate for consumers as a whole, rather than just individual cases. It is regrettable that this does not already exist, as such a body would be

invaluable to the current reform process. As suggested, one of the functions of the commissioner could be to establish a consumer reference group or groups.

Improving and better resourcing current consumer advocacy and support services would assist consumers in navigating the dispute resolution system. As recommended by the Panel, this would also be improved by the establishment of a single point of entry for disputes and complaints.

It is unclear how much benefit there would be in embedding consumer protection as an objective of the Building Act without addressing what is expected explicitly through the Act. Consumer protection should certainly be an outcome of a properly functioning regulatory system. However, the building control system must remain primarily a regulatory framework rather than a consumer protection one.

Are there innovative ways to identify systemic issues faced by consumers in building and construction activities?

Comprehensive data on disputes would provide valuable insights alongside inspection data.

How can consumers be better represented in the building system?

As above, a commissioner for building consumers, better support services, and single point of entry would go a long way to improving the representation of consumers.

What kinds of direct consumer feedback mechanisms would work best in the building context?

Proposals of rating systems and similar tools to better share information about practitioners to consumers have some merit.

Consumers should still be able to have confidence in the role of the regulatory system to ensure any registered practitioner has an acceptable base level of competency and conduct, and that where this is breached the consumer will be protected.

Are there other key issues and possible improvements the Panel should consider?

Reforms to the regulatory system should reduce the frequency and severity of issues consumers face. However, no regulatory system is perfect so attention must turn to how to protect consumers when things do go wrong. We support the Panel's recommendation that the Victorian Government explore project-based insurance as a primary method of protecting consumers.

Subsequent owners are arguably more vulnerable to defective building work than the initial owners. They had no opportunity to select practitioners, nor are they made aware of issues that come up through construction. The rights of subsequent owners should be clearly addressed through legislation, rather than the current situation that relies on case law.

Currently the Act states that actions to remedy economic loss as a result of defective building work must be brought within 10 years of the issuing of an occupancy permit (or certificate of final inspection). The issuing of an occupancy permit often does not represent the end of construction work. If an “end of construction” step is recognised in a new building approvals model this may be a better starting point for the 10-year limit.

Consideration should also be given to whether and how to offer protection to building owners affected by latent defects beyond this 10-year limit. The rights to economic claims for damages from practitioners cannot be perpetual, as this would make their ongoing liability unmanageable. It is worth considering whether some form of public relief should be available in a pre-planned way, rather than reactively when political pressure builds to a sufficient degree as has happened with combustible cladding.