

ARE AUSTRALIA'S CITIES OUTGROWING ITS CONSTRUCTION LEGISLATION?

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This article examines the way in which legislative regulation seeks to enhance consumer protection in relation to the procurement of residential construction work. Its focus is upon reforms to the statutory regime for such protection in Victoria which were enacted during 2016–17. These reforms are primarily directed towards reducing the incidence of defective work through the tightening of 'quality assurance' provisions, such as ensuring that work is carried out by qualified practitioners, and of 'safety net' measures such as conciliation processes to avoid the escalation of disputes. The article analyses these reforms by reference to identified problems relating to defective residential construction work. These range from high-profile incidents such as the 2014 cladding-related fire at the Lacrosse Apartments in Melbourne (and the fire, with similar causes yet tragically more disastrous consequences, at the Grenfell Tower in London in 2017), through to more mundane — yet, frequently occurring — problems such as poor workmanship and behaviours. The article concludes that the Victorian reforms are clearly directed towards many of these identified problems. It cautions, however, that the success of the reforms in contributing to an effective consumer protection regime may be limited because other factors contributing to the widespread incidence of defects remain unaddressed. These factors include gaps such as the non-prescriptive nature of many of the regulatory requirements, and the limited capacity of project participants to assimilate the detailed requirements of the regime, and for regulators to enforce it.

I INTRODUCTION AND OUTLINE

Australia has, according to its national anthem, 'boundless plains to share'. Yet, it also has one of the most highly urbanised populations in the world: close to 80 per cent of the nation's population is clustered around its major cities, and around half live in Sydney, Brisbane and Melbourne.¹ In the first decades of the

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1 Department of Infrastructure and Regional Development (Cth), 'State of Australian Cities 2014–2015: Progress in Australian Regions' (Report, Department of Infrastructure and Regional Development (Cth), 2015) 14.

21st century, high-rise apartment buildings have surpassed the office buildings which dominated the skylines of previous decades: as at March 2018, the Q1 tower on the Gold Coast held the title not only for Australia's tallest building but also was the sixth-tallest residential building in the world.²

The seemingly inexorable rise of such structures has created challenges for the ingenuity of developers and builders, and for their commercial and technical teams. It has also put significant pressure on many areas of legal regulation, including planning, ownership structures (primarily, forms of strata title), infrastructure, and protection of the safety and economic interests of the owners and occupiers of these dwellings. The last of these is the subject of this article.

The article opens (Part II) with a summary of the legal, social and commercial context of residential building regulation. Part III provides a survey of decided cases from Victoria in 2014, illustrating the types of issues which adversely affect the interests of owners and occupiers of dwellings, from potentially life-threatening failures of fire-proofing through to more frequently occurring instances of defective work which nonetheless cause significant distress and expense.

The heart of the article (Part IV) is an examination of the reform programs which currently are underway in New South Wales, Queensland and Victoria. It focuses on the amendments to the Victorian *Building Act 1993* (Vic) ('BA') and *Domestic Building Contracts Act 1995* (Vic) ('DBCAs') by way of the *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic) ('2016 Amending Act') and *Building Amendment (Enforcement and Other Measures) Act 2017* (Vic) ('2017 Amending Act').³

Part V then assesses the likelihood that these Victorian reforms will succeed in striking an appropriate balance between commercial and consumer interests in this fraught yet essential intersection point between construction and its law. The article concludes that, whilst the recent Victorian reforms are valuable for their increased emphasis on compliance, dispute avoidance and provision of information, there is an inherent risk that they may, to an extent, be counterproductive.

The primary reason for this is a function of their complexity and detail. For example, because parties to residential construction projects, whether builders or owners, tend to have very little interest in formal legal processes unless their relationship has irrevocably broken down, such parties may in fact be ignorant of their requirements until — inadvertently or otherwise — they are caught up in the regulatory net.

Thus, a danger lurks within a sophisticated legislative scheme such as that now in place in Victoria that parties to residential construction projects will see

2 Council on Tall Buildings and Urban Habitat, *Q1 Tower*, The Skyscraper Centre <<https://skyscrapercenter.com/building/q1-tower/399>>; <<https://www.worldatlas.com/articles/the-tallest-residential-buildings-in-the-world.html>>.

3 The amending Acts are coming into force progressively during 2016–19. For the purpose of the analysis in this article, however, it is assumed that, unless otherwise noted, the amending Acts will have come fully into force.

the scheme — regardless of its merits — as being an unwanted impediment to ‘getting on with the job’. This leads to the concern that the burden of compliance will ultimately be passed to regulators which may be inadequately resourced to monitor the regulations, or returned to consumers through builders passing on their costs by way of increased building fees (or, if they are unwilling or unable to pass them on, reducing the quality of their work).

II THE LEGAL, SOCIAL AND CULTURAL CONTEXT OF RESIDENTIAL CONSTRUCTION REGULATION

A *The Home Front: A Hidden Battleground?*

Arriving in a city for the first time by air, the first sight to greet a visitor as their aircraft descends is a sea of roofs. Landing in Melbourne, for example, the waves in that sea are a swell of red and grey terracotta tiles,⁴ flecked with occasional coloured steel, slate or concrete. In addition to completed and occupied dwellings, the aircraft will pass over houses and apartment buildings in various stages of construction: some 232 865 dwellings were approved to commence building in Australia during the 2016 calendar year.⁵

Whilst these dwellings may appear serene and stable to the aerial observer, conflict lurks beneath many of those roofs and half-finished trusses. This angst typically is ventilated around kitchen tables, or in social or tabloid media. It is exemplified by a comment by user ‘KingClifton’ on the ‘Whirlpool’ online forum for home building:

The industry is treating people like rubbish, because they can. They know there’s a constant supply of customers lining up to build, and they know that consumer law is so weak that they can get away with murder. Of half the serious flaws with our house (poor tiling, scratched windows, damaged joinery) even our local Consumer Affairs people admitted this is now par-for-the-course and not much we can do, short of taking [the] builder to court.⁶

KingClifton’s experience is by no means an isolated example. The Australian Consumer Survey for 2016, based on 5408 responses, found that 17 per cent of Australian consumers had reported a problem in relation to the building, renovation, repair or maintenance of their home.⁷ The authors extrapolated from this that the

4 The quintessential nature of this image was reflected in red tiles being chosen for the roofs of the House of Representatives and Senate in Australia’s Federal Parliament building in Canberra: Parliamentary Education Office, *A Place for the Parliament* <<http://www.peo.gov.au/learning/closer-look/australias-parliament-house/a-place-for-the-parliament.html>>.

5 Extrapolated from Australian Bureau of Statistics, *8731.0 — Building Approvals, Australia, Dec 2016* (2 February 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8731.0Dec%202016>> Table 6: not seasonally adjusted.

6 KingClifton, ‘Never Never Never Build Another Home’ on *Whirlpool* (12 July 2011), <<http://forums.whirlpool.net.au/archive/1736398>>.

7 Treasury (Cth) and EY Sweeney, ‘Australian Consumer Survey 2016’ (Survey, Treasury (Cth), 18 May 2016) 39, 101.

average direct cost of such issues to each member of the Australian adult population was \$61.43 per year,⁸ or more than \$1 billion in total across the country.

That said, with more than 200 000 dwellings being built in Australia each year, and millions of others already in existence, it is unsurprising that residential construction defects are not only frequent, but also diverse in their nature, causes and consequences.

B The Regulatory Challenge of Diversity

As a starting point, there is wide scope in what is understood to constitute a 'defect' in the construction context. As Dorte and Sharkey observed, '[a] defect is a falling short. ... [T]he very concept is relative to the standard from which it is deficient'.⁹ In turn, the same physical outcome may, or may not, be a 'defect' depending on its context: for example, a crack in a concrete slab of less than 2 mm is generally regarded by the *Guide to Standards and Tolerances* as not being defective,¹⁰ yet likely would be regarded as an unacceptable eyesore by the owner of a home with polished concrete floors.¹¹

There is, likewise, a great diversity of experience and expertise among the parties to residential construction work. For example, whilst some 'builders' in this context are sophisticated multi-national companies, the vast bulk of contractor parties are sole practitioners or small businesses which lack capacity to absorb detailed regulatory requirements and are vulnerable to financial distress if a project fails.¹² Similarly, the range of 'home owner' entities ranges from thinly capitalised individuals through to internationally operating developers. The process of identification becomes even more complicated when the transferable nature of home ownership and occupation is taken into account: it is very often the case that the person who regards the dwelling as their 'home' never had a relationship — contractual or otherwise — with the developer or builder. This could be, for example, because they purchased the dwelling from the original (or subsequent) owner, or are a tenant.

This diversity of participants' interests and experiences — and the challenges this brings to the framing of external regulation by legislation — is recognised by policy-makers. As summarised in the *Regulatory Impact Statement* for the 2017

8 Ibid 64.

9 Westlaw AU, *Building and Construction Contracts in Australia* (accessed 26 May 2017) [11.10.1].

10 Victorian Building Authority, *Guide to Standards and Tolerances 2015* (2015), 24 [2.10] <http://www.vba.vic.gov.au/___data/assets/pdf_file/0020/29063/Guide-to-Standards-and-Tolerances-2015.pdf>. This *Guide* is published as a 'convenient reference to the minimum technical standards and quality of work' (at 9) but explicitly notes that it does not override other legal requirements, including the parties' contract (at 10).

11 For an example of the homeowners being awarded substantial damages — \$32 847.36 — to rectify a polished concrete floor, in a home with a build price of nearly \$2 million, that the Tribunal regarded as 'disappointing and not of a standard that one might reasonably expect', see *Stellar Constructions Pty Ltd v Ferguson* [2013] VCAT 2159 (20 December 2013) [82] (Member Farrelly).

12 See, eg, Senate Economics References Committee, Parliament of Australia, *'I Just Want to be Paid': Insolvency in the Australian Construction Industry* (2015) 12.

revision of the Victorian building regulations, for example, ‘[m]any of the harms associated with the building industry reflect classic problems with competitive markets in which consumers are poorly placed to make well-informed decisions’.¹³

Thus, residential construction provides a deeply embedded challenge in legal regulation because it makes it difficult to identify, in the abstract, which types of parties are likely to be ‘vulnerable’ and therefore the justifiable subject of protective intervention by the law.

The challenge is particularly fraught given the social and commercial imperative — especially acute in recent years — to increase the stock of affordable housing.¹⁴ This exacerbates the risk inherent in the delivery of construction projects by organisations which are motivated primarily by securing a monetary profit: where external regulation aimed at improving the quality of workmanship and materials requires developers and builders to expend time and cost, it may reasonably be expected that they will factor that cost in to the amount charged to consumers. In turn, if competitive tensions make it economically unviable for developers and builders to pass on those impacts, they naturally will look to other options for maintaining their anticipated margins, including by minimising the quality of workmanship and materials delivered in the dwelling. This tendency is at the heart of many of the defective work cases which are discussed in Part III.

C The Lacrosse and Grenfell Fires: A Complex Web of Responsibility

A final matter by way of introduction is the diversity of consequences which can flow from similar types of defects. This was illustrated by two multi-level apartment building fires in mid-2017: those at the Grenfell Tower in London on 14 June 2017 and at the Torch Tower in Dubai on 4 August 2017. The rapid spread of initially small fires was substantially fuelled by a similar route: combustible aluminium cladding which had been installed on the façade of each building. The outcomes were, however, starkly different: in the London fire, 71 people died; in the Dubai fire (similarly to the experience with the Lacrosse Building fire in Melbourne), all 475 occupants were safely evacuated.¹⁵

13 Department of Environment, Land, Water and Planning (Vic), *Regulatory Impact Statement: Building Regulations 2017, Part A: Background and Proposed Approach* (May 2017) Engage Victoria 17 <https://engage.vic.gov.au/application/files/4414/9500/5191/RIS_-_Part_A.pdf>.

14 See, eg, Victorian Government, *Homes for Victorians: Affordability, Access and Choice* (2017) <https://www.vic.gov.au/system/user_files/Documents/housing/FINAL%20PDF%20DTF046_Q_housing01.pdf>.

15 See, eg, Ashleigh Stewart, ‘Dubai’s Torch Tower Residents Move Back in to Their Apartments’, *The National* (online), 8 August 2017 <<https://www.thenational.ae/uae/dubai-s-torch-tower-residents-move-back-in-to-their-apartments-1.617851>>; London Metropolitan Police, ‘Number of Victims of the Grenfell Tower Fire Formally Identified’ (Press release, 16 November 2017). Another resident, who had suffered severe burns in the Grenfell fire, died in hospital in February 2018: Thomas Burrows, ‘Woman Who Escaped from the 19th Floor of Grenfell Tower Dies After Spending Seven Months Fighting for Her Life in Hospital with Agonising Burns’ *Daily Mail* (London) 1 March 2018 <<http://www.dailymail.co.uk/news/article-5446237/Woman-escaped-19th-floor-Grenfell-Tower-dies.html>>. The Grenfell and Lacrosse fires are further discussed in Part III(B) below.

Whilst investigations into both fires are continuing (notably, in respect of the Grenfell Fire, the Grenfell Tower Inquiry and the Independent Review of Building Regulations and Fire Safety chaired, respectively, by Sir Martin Moore-Bick and Dame Judith Hackitt),¹⁶ it seems clear that key factors in the reduced survival rate for the Grenfell fire included the lack of sprinkler systems, difficulty in access for firefighters, confusion over evacuation instructions and — when occupants did seek to leave the building — inadequate exit routes.

There has been a multitude of reactions to the Grenfell fire, ranging from the raw grief of those who have lost friends and family, through to calls for prosecution of those involved in the chain of decisions which led to the tower being a latent trap for its occupants.¹⁷ In Australia, the fire has given added impetus to the reforms discussed in Part IV as well as audits and reviews of the use of cladding materials at state and federal levels which were initiated following the Lacrosse and Grenfell fires. These reviews include the Senate Economics References Committee into Non-Conforming Building Products and the Victorian Cladding Taskforce.¹⁸

Such reactions are to be expected in the light of such a disaster. What seems remarkable, however, is the broader reflection on the role of regulation which has emerged in its wake, with some commentators calling for a reversal of the trend, manifest in recent decades in the UK, Australia and beyond, towards reduced state intervention into the ability of the market to deliver efficient outcomes. For example, *The New York Times* characterised the Grenfell fire as symptomatic of

a gross failure of government oversight, a refusal to heed warnings from inside Britain and around the world and a drive by successive governments from both major political parties to free businesses from the burden of safety regulations. Promising to cut “red tape,” business-friendly politicians evidently judged that cost concerns outweighed the risks of allowing flammable materials to be used in facades.¹⁹

There seems, therefore, to be a growing realisation that it is too simplistic a reaction to seek to blame a small number of individuals for a disastrous outcome like the Grenfell fire. Rather, dozens if not hundreds of people contributed to the tragedy. Among others, those directly involved potentially include (depending

16 See, eg, Matthew Bell, “‘How is that Even Possible?’ Raising Construction Regulation from the Ashes of Grenfell Tower” (Paper No 208, Society of Construction Law, London, 8 May 2018) <<https://www.scl.org.uk/papers/raising-construction-regulation-grenfell>>.

17 See, eg, Vikram Dodd and Harriet Sherwood, ‘Grenfell Council “May Have Committed Corporate Manslaughter” — Met Police’, *The Guardian* (online), 28 July 2017 <<https://www.theguardian.com/uk-news/2017/jul/27/met-says-grenfell-council-may-have-committed-corporate-manslaughter>>.

18 The interim reports of these bodies were delivered in late 2017: Senate Economics References Committee, Parliament of Australia, *Non-Conforming Building Products: Interim Report: Aluminium Composite Cladding* (2017); Victorian Cladding Taskforce, *Victorian Cladding Taskforce: Interim Report* (Report, Department of Environment, Land, Water and Planning (Vic), November 2017) <https://www.planning.vic.gov.au/__data/assets/pdf_file/0012/110316/Victorian-Cladding-Taskforce-Interim-Report-November-2017.pdf>.

19 David D Kirkpatrick, Danny Hakim and James Glanz, ‘Why Grenfell Tower Burned: Regulators Put Cost Before Safety’, *The New York Times* (online), 24 June 2017 <<https://www.nytimes.com/2017/06/24/world/europe/grenfell-tower-london-fire.html>>. For a more general contemporary critique of the erosion of the public sector, see Polly Toynbee and David Walker, *Dismembered: How the Attack on the State Harms Us All* (Guardian Faber Publishing, 2017).

upon the findings of the ongoing investigations) the manufacturers of the building products used, the cladding installation company and its workers, inspectors who failed to detect that the cladding had this catastrophic potential in this setting, and others. Indirectly, though, responsibility also rests with those framing and enforcing regulations at departmental and local council level, and, ultimately, the broader community which demanded cost savings in the delivery of public services which may have influenced decisions such as not to retrofit sprinkler systems when the building was being refurbished.²⁰

As will be seen in Part IV, the regulatory approach in Victoria has largely focused upon the specification and strengthening of individual legal responsibility. As the discussion in this Part II has sought to illustrate, however, such an approach may only provide a partially appropriate response to the complex matrix of causes leading to residential construction defects, especially where those measures are inadequately supported by enforcement measures.

III 2014 IN VICTORIA: A GLIMPSE OF THE DIVERSITY OF RESIDENTIAL CONSTRUCTION

A Overview

In an attempt to give a sense of the multi-faceted diversity described in Part II — and, the legal issues which underpin it — the following sections provide a snapshot of residential construction defects. This is done by way of a survey of legal cases and other developments of relevance to residential construction law in Victoria during 2014. No such survey can purport to be wholly representative: a primary reason for this is that so few residential construction cases reach a binding ruling in state-based courts and tribunals. In 2014, for example, approximately 2000 applications were made to the Victorian Civil and Administrative Tribunal (‘VCAT’) for resolution of claims relating to residential construction work (VCAT

20 See, eg, Sarah Knapton, ‘Grenfell Tower Refurbishment Used Cheaper Cladding and Tenants Accused Builders of Shoddy Workmanship’, *The Telegraph* (online), 16 June 2017 <<http://www.telegraph.co.uk/news/2017/06/16/grenfell-tower-refurbishment-used-cheaper-cladding-tenants-accused/>>. The article cites an estimate that such retrofitting would have added two per cent to the cost of the building: this appears consistent with a pilot project undertaken in Sheffield which found that the cost of retrofitting sprinklers in similar buildings was £1150 per flat: Steve Seaber, ‘Safer High-Rise Living: The Callow Mount Sprinkler Retrofit Project’ (Case Study, British Automatic Fire Sprinkler Association, 2012) 40.

has primary carriage of such cases in Victoria),²¹ resulting in around 20 published determinations.²²

Nonetheless, the 2014 snapshot does provide useful insights. It confirms, in particular, that a multitude of risks are at play in the execution of residential construction projects, ranging from the physical to the behavioural, and that these risks can — depending on how they crystallise — lead to conflicts or disputes.²³ It also illustrates, specifically, that:

- as was foreshadowed above, cost and quality are constantly in tension in residential construction, especially on projects for mass-produced dwellings such as housing estates and apartments (*Hooper*, *Softley*, *Lacrosse fire*);²⁴
- ‘cutting corners’ by deploying cheaper materials or under-qualified labourers, or not taking the time to do a small part of the job properly, can lead to defects with wide-ranging consequences (*Lacrosse fire*, *Hurdle*, *Kounelis*);²⁵
- thus, in order for quality assurance systems to meet their goal of eliminating avoidable defects, they need to be implemented rigorously by every person involved in the design and construction process, and at every stage of that process (*Lacrosse fire*);
- not every fault or imperfection is a defect which the law will require to be rectified (*Kounelis*),²⁶ nor will every type of bad behaviour result in a remedy; however, there are a range of legal sanctions which can be deployed against behaviour at the contumelious end of the spectrum (*Lin*);²⁷ and

21 *DBCAs* s 57.

22 Analysis undertaken by the author by reviewing cases published at AustLII, *Victorian Civil and Administrative Tribunal* <<http://www.austlii.edu.au/cgi-bin/viewtoc/au/cases/vic/VCAT/2014/>>. The estimate of 2000 was extrapolated from: Victorian Civil and Administrative Tribunal, *Annual Report: 2013/14* (Report, Victorian Civil and Administrative Tribunal, 2014) 19, 23; Victorian Civil and Administrative Tribunal, *2014–15 Annual Report* (Report, Victorian Civil and Administrative Tribunal, 2015) 31–2. It can, however, only be approximate because VCAT does not publish specific figures on the number of residential building cases. VCAT reports on an Australian financial year basis: a total of 2563 cases were initiated based on the *DBCAs* in FY13–14 and 2455 in FY14–15 across VCAT’s Building and Property (incorporating, from that year, Domestic Building) and Civil Claims Lists. It is also plausible that residential building cases could be initiated under other legislation and therefore might, for example, be counted amongst the 6000-odd cases listed under the *Australian Consumer Law and Fair Trading Act 2012* (Vic). That having been said, as Senior Member Walker observed (*Roberts v Chung* [2014] VCAT 142 (17 February 2014) [19]), it is unusual for a residential building claim not to involve reliance upon statutory warranties under the *DBCAs* or *BA*. Indeed, of the 1253 applications initiated during FY13–14 in the Domestic Building List, 1233 were under the *DBCAs* (Victorian Civil and Administrative Tribunal, *Annual Report: 2013/14* (Report, Victorian Civil and Administrative Tribunal, 2014) 23).

23 See generally Paula Gerber and Brennan Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths, 2013) ch 1.

24 *Hooper v Metricon Homes Pty Ltd* [2014] VCAT 277 (18 March 2014) (*‘Hooper’*); *Softley v Metricon Homes Pty Ltd* [2014] VCAT 1502 (11 December 2014) (*‘Softley’*).

25 *Hurdle v Commerford* [2014] VCAT 282 (19 March 2014) (*‘Hurdle’*); *Kounelis v Ross Horton Homes Pty Ltd* [2014] VCAT 319 (25 March 2014) (*‘Kounelis’*).

26 *Kounelis* [2014] VCAT 319 (25 March 2014).

27 *Lin v P & T Constructions (Vic) Pty Ltd* [2014] VCAT 1125 (10 September 2014) (*‘Lin’*).

- the warranty and (extended) limitations periods available under Victorian legislation do meaningfully enhance the protections given to owners and occupiers at common law (*Brookfield Multiplex, Hooper, Softley, White*).²⁸

Underpinning the cases is the reality that residential construction cases almost inevitably require a detailed forensic inquiry in order to establish the applicable factual matrix underpinning legal liability. This can, of itself, result in cases running for many sitting days and involving reams of documentation.²⁹ In 1984, Brooking J decried the ‘melancholy chronicle’ which had brought the dispute in *SMK Cabinets v Hili Modern Electrics Pty Ltd* (on a contract worth \$2190) before his Honour.³⁰ As the cases from 2014 indicate, the efficient dispatch of disputes over residential construction defects — even those where a very small amount of money is in issue — continues to be a significant challenge more than three decades later.³¹

B Combustible Wall Cladding: Lacrosse Building

Some 30 months before the disaster at the Grenfell Tower,³² at around 1:30 am on the morning of 25 November 2014, an occupant of an apartment on the eighth floor of the Lacrosse Building in Melbourne’s Docklands precinct left his bed to investigate a smell of smoke. Having checked that the gas stove in the kitchen was off, he returned to bed.

It almost certainly was the case, however, that a fire was then smouldering on his balcony, started by a discarded cigarette. In little more than an hour, the fire had travelled up the side of the building, via ‘Alucobest’ aluminium composite panels (‘ACPs’) used as wall cladding, and also fuelled by clothes racks and other materials stored on the balconies. It spread down to level 6 and up to level 21 of the building, in a vertical line. The Metropolitan Fire Brigade committed 122 personnel and more than 20 appliances to the fire, and sprinkler systems within the building worked better than their specifications required. All occupants of the building — some 460 in total — were safely evacuated.³³

28 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185 (‘*Brookfield Multiplex*’); *Hooper* [2014] VCAT 277 (18 March 2014); *Softley* [2014] VCAT 1502 (11 December 2014); *White v Noble* [2014] VCAT 413 (11 April 2014) (‘*White*’).

29 Justice David Byrne, ‘The Future of Litigation of Construction Law Disputes’ (2007) 23 *Building and Construction Law Journal* 398, 399.

30 [1984] VR 391, 392–3 (Starke and Kaye JJ agreed: at 401).

31 For example, *Lee v Creative Lifestyles Homes Pty Ltd* [2015] VCAT 511 (23 April 2015), a case involving the owner’s claim in respect of dozens of relatively minor alleged defects, ran for more than two weeks in late 2014 and was the subject of an 848-paragraph ruling, in which the owner ultimately was awarded \$71 688 (her claim was for \$178 061) on account of proven defects.

32 See above Part II(C).

33 Compiled from: Metropolitan Fire Brigade, *Post Incident Analysis Report: Lacrosse Docklands* (Report, Metropolitan Fire Brigade, 2015) 4, 11, 13; Giuseppe Genco, *Lacrosse Building Fire: 673 La Trobe Street, Docklands on 25 November 2014* (Report, City of Melbourne, 2015) 2, 12–13; Victorian Building Authority, *VBA External Wall Cladding Audit: Report* (Report, Victorian Building Authority, 17 February 2016); Lawrence Reddaway, ‘Lacrosse Docklands Fire — Lessons to be Re-Learned?’ (2015) 50 *Building Dispute Practitioners Society News* 10.

Whilst catastrophe was averted on that morning, the fire caused significant fallout for a number of individuals and organisations involved in the construction process, and for Victorian building regulation more generally. The Melbourne City Council issued an Emergency Order, including the cordoning off of fire-affected apartments.³⁴ By 2017, it was reported that claims in VCAT by the apartment owners against the builder exceeded \$15 million.³⁵ A Building Appeals Board ruling had confirmed³⁶ that the Alucobest cladding was non-compliant with the 'deemed to satisfy' provisions of the *Building Code of Australia* ('*Building Code*')³⁷ and 'created a significant and unacceptable risk to occupants and, if there were a fire, a corresponding risk to fire and emergency services'.³⁸

Individual building practitioners involved with the design and construction of the Lacrosse Building also faced disciplinary sanctions. By mid-2016, the relevant Building Surveyor, architect, fire safety engineer and registered builder had all been referred to the Building Practitioners Board or Architects Registration Board by the Victorian Building Authority ('VBA'). The Authority alleged that they had 'breached the [BA] and Building Regulations and failed to carry out their work in a competent manner and to a professional standard'.³⁹

C Slab Heave: Hooper v Metricon Homes Pty Ltd; Softley v Metricon Homes Pty Ltd

The Australian dream of home ownership is prominently depicted in a large wire sculpture of a double-storey brick veneer house at the junction of two of Melbourne's busiest motorways, the Princes Freeway and Western Ring Road. These houses typically stand upon the foundation of a waffle slab. As described by Judge McNamara and Member Cameron in VCAT,

[t]he ordinary form of a waffle slab ... includes extensive 'formed voids' ... [which] entails a lesser use of concrete and the costs of excavation and possible complications and additional expense arising from encountering isolated rocks during excavation are substantially minimised. The waffle slab, therefore, has become very popular as an economical foundation solution in areas of highly reactive soil ...⁴⁰

34 Genco, above n 33, 14.

35 Aisha Dow, 'Combustible Cladding to be Stripped off Lacrosse Docklands Tower', *The Age* (online), 17 January 2017 <<http://www.theage.com.au/victoria/combustible-cladding-to-be-stripped-off-lacrosse-docklands-tower-20170116-gtslej.html>>.

36 This had already been found by, amongst others, the City of Melbourne's Municipal Building Surveyor: Genco, above n 33, 15.

37 See also Part IV(B) below.

38 *Banagh v Municipal Building Surveyor, City of Melbourne* (Unreported, Building Appeals Board (Vic), Chairperson Lodge, Members Graham and Woolcock, 16 January 2017) [27].

39 Victorian Building Authority, 'More Lacrosse Building Practitioners to Face Disciplinary Action' (Media Release, 29 June 2016).

40 *Softley* [2014] VCAT 1502 (11 December 2014) [37].

By 2014, the owners and occupiers of many of those new homes — on one estimate, 4300 homes across three outer-Melbourne municipalities⁴¹ — were suffering the effects of ‘slab heave’. In the case of a house built by Metricon Homes Pty Ltd in Tarneit, west of Melbourne, in 2007, the slab deflected by around 80 mm.⁴² The result of this, as described by Senior Member Walker in relation to a house owned by the Hoopers, was that,⁴³

[i]nstead of a house erected upon a sound foundation the Owner has a house on an inadequate foundation that is still moving 7 years after the slab was poured. Walls are leaning[,] doors and windows have jammed, substantial cracks have opened and structural parts of the House are separating. Any repair of the obvious damage will be temporary because the movements are continuing.

Some 30 km to the north-west of Tarneit, in the suburb of Melton West, Mr and Mrs Softley faced similar problems with their house, which also had been built by Metricon on a waffle slab.⁴⁴ The Softleys claimed that a 71 mm differential movement in the slab had resulted in significant issues including cracking in walls and floors, and internal walls lifting off the floor and separating from the ceiling.

The Softleys’ cause of action against Metricon was in breach of contract. The relevant terms were constituted by the express terms of the contract between Metricon and the Softleys, the implied warranties under s 8 of the *DBCAs* (which themselves incorporated breaches of the *Building Code*) and the ‘Metricon 25 Year Structural Guarantee’. The alleged breaches included that the design was for a less reactive soil than existed at the site, that scoria was placed as fill under the slab and that there was inadequate drainage.⁴⁵ The Hoopers’ claim against Metricon was in similar terms, especially as to the reliance upon the s 8 warranties.⁴⁶

In both the *Hooper* and *Softley* cases, the owners were awarded damages which included the cost of demolition and reconstruction.⁴⁷ As may be expected, this component of the award substantially exceeded the initial price paid by the

41 Rowan Gregory and Frank Van der Woude, ‘Australian Standard AS2870 — Residential Slabs and Footings: Time for Change’ (2015) 51 *Building Dispute Practitioners Society News* 13, 13; Simon Johanson, ‘Thousands of Suburban Home Owners Facing Financial Ruin’, *The Age* (online), 8 June 2014 <<http://www.theage.com.au/victoria/thousands-of-suburban-home-owners-facing-financial-ruin-20140607-39q4z.html>>.

42 *Hooper* [2014] VCAT 277 (18 March 2014) [63] (as at 2013, one expert found the deflection to be 86 mm and another 75 mm).

43 *Ibid* [222].

44 As to both of these cases, see generally T J Margetts, ‘Domestic Demolition’ (2015) 51 *Building Dispute Practitioners Society News* 7.

45 *Softley* [2014] VCAT 1502 (11 December 2014) [26]–[28].

46 *Hooper* [2014] VCAT 277 (18 March 2014) [130].

47 *Ibid* [244]; *Softley* [2014] VCAT 1502 (11 December 2014) [104]. The analysis leading to this result was based on cases including *Bellgrove v Eldridge* (1954) 90 CLR 613 and *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; see generally Matthew Bell, ‘After *Tabcorp*, for Whom Does the *Bellgrove Toll*? Cementing the Expectation Measure as the ‘Ruling Principle’ for Calculation of Contract Damages’ (2009) 33 *Melbourne University Law Review* 684.

owners to Metricon.⁴⁸ The Hoopers were also awarded damages for loss of rental during the demolition and reconstruction, and also whilst the house was subject to the defects (though, this aspect was reduced for a failure to mitigate as Senior Member Walker was satisfied that the house, not being actually dangerous, ought to have been lettable, albeit at a lower rental).⁴⁹

Metricon appealed the VCAT findings in the Supreme Court of Victoria (*Hooper*)⁵⁰ and Victorian Court of Appeal (*Softley*),⁵¹ primarily as to the quantum of damages awarded. After extensive consideration by each Court, those appeals were dismissed.

D Leaky Windows: *White v Noble*

A case involving leaking windows in a house on Phillip Island demonstrated how the implied warranties regime in the *DBCA* can be a potent tool for owner claimants.⁵²

The upshot was that the second owner of a home which was completed in 2003 was able to recover \$85 195 in damages from the builder,⁵³ in an action commenced in 2013, for water damage caused by windows which were installed by the builder in contravention of the warranties implied by the *DBCA* into the original building contract. There are three key elements to this result:

- the builder's liability in breach of contract, generated by the windows being 'inadequately flashed and poorly installed', was a breach of the implied warranties in s 8 of the *DBCA*;⁵⁴
- the subsequent owner was able to recover on those warranties, even though she lacked privity of contract with the builder at common law, via s 9 of the *DBCA*;⁵⁵ and

48 The original contract price was not disclosed in *Hooper* [2014] VCAT 277 (18 March 2014). In *Softley* [2014] VCAT 1502 (11 December 2014), the contract price was noted to be \$200 140; the Tribunal left the damages award to be agreed between the parties but one consultant priced the work around \$250 000 (at [3], [104]).

49 *Hooper* [2014] VCAT 277 (18 March 2014) [241].

50 *Metricon Homes Pty Ltd v Hooper* [2015] VSC 110 (26 March 2015).

51 *Metricon Homes Pty Ltd v Softley* (2016) 49 VR 746. For commentary on the detailed discussion in that case of the basis for appeals from VCAT to the Supreme Court, see Katie Miller and Brittany Myers, 'It's Appealing' *Law Institute Journal* (Melbourne) 1 May 2017, 40. In *Metricon Homes Pty Ltd v Great Lakes Insurance SE* [2017] VSC 749, Hargrave J considered the extent to which Metricon's liability in relation to claims of this type was covered by relevant insurance.

52 *White* [2014] VCAT 413 (11 April 2014).

53 This sum included a discount of \$17 500 on the builder's total liability because the owner had recovered that amount in a settlement with the building surveyor who had certified the home for occupation despite the relevant defects: *ibid* [146].

54 *Ibid* [51]. The specific warranty breached is not identified in the ruling but Member Farrelly referred to the 'good and suitable' requirement for materials in s 8(b) of the *DBCA*: *White* [2014] VCAT 413 (11 April 2014) [50].

55 *White* [2014] VCAT 413 (11 April 2014) [17].

- the action was able to be commenced well after the usual six-year limitation period in contract had expired, due to Member Farrelly's willingness to interpret the limitation period in respect of 'building actions' in s 134 of the *BA* so as to extend to 10 years after the issue of the occupancy certificate, limitations which might otherwise apply in contract or tort.⁵⁶

E *Leaking Spa: Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288*

In *Brookfield Multiplex*,⁵⁷ the High Court of Australia handed down a judgment which has subsequently come to be regarded as 'a most formidable, and quite possibly insurmountable obstacle'⁵⁸ to a finding that a duty of care is owed by builders in negligence for pure economic loss to owners and occupiers of the types of apartment buildings (often, incorporating commercial and retail uses) which are sprouting like mushrooms around Australia's cities.

The Court overturned a judgment of the NSW Court of Appeal,⁵⁹ which had provided apartment owners, via their Owners Corporation, with a cause of action against the builder for defective work in the common areas of a multi-use building in Chatswood, NSW, including a leak from the spa into the function rooms below.⁶⁰ The Court of Appeal had found that the builder owed a duty of care in negligence to the body corporate for economic loss resulting from latent defects in common property which were structural, posed a danger to persons or property or made the apartments uninhabitable.⁶¹

The High Court held, by contrast, that no such duty applies generally in negligence. Factors taken into account by the Court in reaching this finding included that the proper vehicle for protection of owners in this context should be by way of extension,⁶² to apartment buildings' common areas, of the legislative warranties for residential construction (including those in s 8 of the *DBCA* as discussed above).⁶³

56 Ibid [41]. Whilst there was some uncertainty about the operation of s 134 at the time this ruling was handed down, later in 2014 the Victorian Court of Appeal confirmed an interpretation which was consistent with Member Farrelly's view: *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [No 1]* (2014) 48 VR 558.

57 (2014) 254 CLR 185; see generally Matthew Bell and Wayne Jovic, 'Negligence Claims by Subsequent Building Owners: Did the Life of *Bryan* End Too Soon?' (2017) 41 *Melbourne University Law Review* 1.

58 *Owners — Strata Plan 80647 v WFI Insurance Ltd* (2015) 299 FLR 77, 90 [59] (Darke J).

59 *Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

60 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 (10 October 2012) [65].

61 *Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479, 510 [129] (Basten JA), 511 [133] (Macfarlan JA), 512–13 [142]–[144] (Leeming JA).

62 It was common ground in the case that the warranties under the *Home Building Act 1989* (NSW) did not apply to the common property or to lots within the building used as serviced apartments: *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 (10 October 2012) [8].

63 *Brookfield Multiplex* (2014) 254 CLR 185, 230 (Crennan, Bell and Keane JJ), 245 (Gageler J).

The working assumption,⁶⁴ therefore, is that it is now highly unlikely that such a duty will arise outside of a narrow band of cases whereby, in the characterisation of Gageler J,

the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care.⁶⁵

F Shoddy Work: Hurdle v Commerford

In January 2014, what appears from the ruling to have been a straightforward case of careless work by a tradesperson came before VCAT in relation to concreting at a house in Mill Park.⁶⁶ The owners accepted a quote of \$9800 to lay concrete at the rear of their house. In the days before the pour, the owners paid a total of \$5000 into the concreter's bank account at his request, to 'pay some of his workers'.⁶⁷ Also at his request, they gave their credit card number to a concrete supplier and authorised a debit of \$850; Hurdle later found that, in fact, \$1600 worth of concrete had been debited to his card.⁶⁸

The concreting itself was poorly done. It was not level, was not sealed, and lacked drainage and the saw cuts necessary to accommodate expansion after curing.⁶⁹ During the site view for the hearing, the concreter gave implausible explanations for his work, including that the water could drain along the saw cuts when he eventually put them in.⁷⁰

Senior Member Walker agreed with the owners that the work was 'quite unsatisfactory and will need to be replaced'.⁷¹ He noted that the owners had obtained quotes to pull up and re-lay the concrete ranging from \$7040 to \$9790, 'but the extent of the work included in these quotations is unclear'.⁷² He ordered that the concreter repay to the owners the \$6600 they had paid as 'the work and materials he has supplied are worthless',⁷³ but otherwise did not comment on the legal basis for ordering this measure of damages.⁷⁴

64 For an analysis of recent case law supporting this view, see Bell and Jovic, above n 57, pt III.

65 *Brookfield Multiplex* (2014) 254 CLR 185, 245.

66 *Hurdle* [2014] VCAT 282 (19 March 2014).

67 *Ibid* [5]–[6].

68 *Ibid* [7].

69 *Ibid* [9]–[12]; see, eg, G F Blackledge, *Concrete Practice* (British Cement Association, 3rd ed, 2002) 36.

70 *Hurdle* [2014] VCAT 282 (19 March 2014) [18].

71 *Ibid* [21].

72 *Ibid* [22].

73 *Ibid* [23].

74 It is not, however, unusual for VCAT decisions not to include detailed reasoning on specific points.

G *Unpainted Surfaces: Kounelis v Ross Horton Homes Pty Ltd*

In mid-2005, Kostadina Kounelis and her husband commenced building a house in Brighton. Despite this being a period within the same long drought that was affecting the Hoopers' and Softleys' homes to the west, significant rain fell during the spring-time phase of construction at their home.⁷⁵ After completion, Kounelis compiled several lists of defects, the most significant of which related to timber windows. By the time the case came before VCAT, some eight years after completion of the home, parts of the windows had been affected by rot, requiring the replacement of 18 sashes at a cost of \$15 000.⁷⁶

The question before VCAT was the cause of the damage to the windows. The builder pleaded that the window supplier was negligent in manufacturing the windows and that they were not fit for purpose and not of merchantable quality.⁷⁷ The owner and window supplier (which was joined to the proceedings by the builder) ascribed the problems to the builder's failure to promptly paint the windows after delivering them to site.⁷⁸ After reviewing extensive (and conflicting) expert evidence, Senior Member Walker leaned towards the latter argument, finding that the builder's failure to paint the windows for several months after delivery (even then, the paint coverage was patchy) was the cause of the failure of the windows.⁷⁹

Senior Member Walker also awarded rectification costs to the owner in respect of various other proven defects. He drew the line, however, at allowing a claim for an alleged blemish within a polished stone fireplace which he was unable to see during the on-site inspection for the hearing, observing that

[b]uilding work is to be done in compliance with the statutory warranties which require a reasonable standard of workmanship. ... An alleged cosmetic defect that cannot be seen, even by someone looking for it, is not a defect.⁸⁰

H *Builder's 'Deceitful Conduct': Lin v P & T Constructions (Vic) Pty Ltd*

In 2014, Ms Lin Lin and her husband Dr Jun Keat Chan commenced proceedings in VCAT in respect of landscaping work at their house in Burwood. They were substantially successful in their action:⁸¹ on a contract for \$65 000, the builder,

75 *Kounelis* [2014] VCAT 319 (25 March 2014) [57].

76 *Ibid* [67], [121]. In the final order, the rectification award was increased by the builder's margin (40 per cent), a preliminaries fee and GST: at [140].

77 *Ibid* [70].

78 *Ibid* [78].

79 *Ibid* [96].

80 *Ibid* [117].

81 'Substantially' is used here because Judge Jenkins awarded damages essentially to place the applicants in the position they were when their contract was entered into, rather than meeting their expectation measure: *Lin* [2014] VCAT 1125 (10 September 2014) [95].

Mr Wenbiao Lin, and his company were ordered to refund to the applicants the \$32 500 they had paid, and to pay to them rectification costs totalling \$15 565, exemplary damages of \$5000 and the costs of the applicants on an indemnity basis.⁸²

The actions of the builder leading to this liability were summarised by Judge Jenkins as ‘having, by a number of misrepresentations, procured a contract for which he was ill-equipped to perform’.⁸³ They included:

- false representations to the applicants about his experience, registration and insurance coverage;
- ‘concocting’ correspondence (including a photo with ‘approved’ stamped on it, attached to an email purporting to be from a building inspector) with the intent of deceiving them that a building permit had been approved;
- deliberately misrepresenting to the Tribunal his level of English;
- performing defective building work; and
- taking his tools and walking off the job.⁸⁴

Judge Jenkins found that these actions constituted, variously, breaches of contract,⁸⁵ misleading and deceptive conduct under s 18 of the *Australian Consumer Law* (‘ACL’),⁸⁶ and repudiation.⁸⁷

It is, however, apparent from the ruling that, had the applicants not brought the action, they would not have recovered from the builder. They would, therefore, have been left out of pocket (both to the builder and in complying with a demolition order in respect of a defective retaining wall)⁸⁸ without anything of value to show for their expenditure. This is because Mr Lin approached the hearing on the basis that he ‘contested all of the material facts and allegations made against him and his company’.⁸⁹ He only made concessions (which, ultimately, included agreeing that he had done a poor job and was willing to repay the amount received and the cost of reinstatement)⁹⁰ in the face of an overwhelming case against him. Even then, he maintained positions despite ‘strong circumstantial evidence to the contrary’, including denying that he had attempted to take opportunistic advantage of Dr Chan having mistakenly signed a permit application as ‘builder’ rather than ‘owner’.⁹¹

82 Ibid [80], [115], [126]; *Lin v P & T Constructions (Vic) Pty Ltd* [2014] VCAT 1619 (19 December 2014) [22].

83 *Lin* [2014] VCAT 1125 (10 September 2014) [73].

84 Ibid [47]–[52], [62], [127].

85 Ibid [81]. The exact breaches (including whether a distinction was drawn by VCAT between the defective work and repudiation) were not identified.

86 Ibid [106]. The ACL is sch 2 to the *Competition and Consumer Act 2010* (Cth).

87 Ibid [77].

88 Ibid [63].

89 Ibid [6].

90 Ibid [9].

91 Ibid 45; *Lin v P & T Constructions (Vic) Pty Ltd* [2014] VCAT 1619 (19 December 2014) [13].

Even in the hearing, Mr Lin's behaviour was reported to be disingenuous. On the second day, he asked the Tribunal for an indulgence to directly apologise to the Applicant, Ms Lin, in Mandarin Chinese. However,

[d]uring the course of Mr Lin's purported apology, the Applicant appeared increasingly distressed. Subsequently, the interpreter who had been called to assist the Applicant, gave evidence to the effect that while Mr Lin commenced to express an apology, he quickly reverted to a criticism of the Applicant's behaviour: complaining about what she did wrong; what she should have done; and essentially blaming her for the fact that this matter has ended up at the Tribunal for determination.⁹²

This was regarded by the Tribunal as 'further aggravating behaviour' for the purpose of its finding that exemplary damages were appropriate.⁹³ Moreover, Judge Jenkins ultimately was satisfied that the builder's 'elaborate and prolonged deceitful conduct in trying to defend an otherwise hopeless case' constituted the exceptional circumstances necessary for a costs award against him on an indemnity basis.⁹⁴

IV REGULATORY REFORM IN 2016-17

A *The Existing Legislative Regimes in Australia*

Professor Philip Britton and Julian Bailey have characterised Australia as having 'a fully trained lifesaving patrol on hand' for the protection of residential building work consumers who get out of their depth, compared to the mere 'plank in a shipwreck' offered by the English *Defective Premises Act 1972*.⁹⁵ Notwithstanding the criticisms set out below, there does remain much to be said for this view. The Australian regime includes a range of measures, specific to residential construction, deployed across the gamut from contract formation to dispute resolution.

The statutes regulating residential construction specifically have been enacted by the states and territories, there being no directly-relevant head of power for

92 *Lin* [2014] VCAT 1125 (10 September 2014) [124].

93 *Ibid* [125].

94 *Lin v P & T Constructions (Vic) Pty Ltd* [2014] VCAT 1619 (19 December 2014) [21]: the relevant power to award costs, and criteria, are in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.

95 Philip Britton and Julian Bailey, 'New Homes and Consumer Rights: England and Australia Compared' (2011) 3 *International Journal of Law in the Built Environment* 269, 271; see also Julian Bailey, *Construction Law* (Informa Law, 2nd ed, 2016) vol III, 1462–6; Philip Britton, "'Make the Developer Get the Job Right": Remedies for Defects in Residential Construction' (Paper No D154, Society of Construction Law, March 2013) <<https://www.scl.org.uk/papers/make-developer-get-job-right-remedies-defects-residential-construction>>; Philip Britton, 'Judicial Remedies for Construction Defects: Common Law, Equity or Statute?' (Paper No 200, Society of Construction Law, May 2016) <<https://www.scl.org.uk/papers/judicial-remedies-construction-defects-common-law-equity-or-statute>>.

federal law-making under the *Australian Constitution*.⁹⁶ The states and territories have, however, agreed with the Commonwealth to adopt a largely-uniform scheme applying to business behaviours more generally, which is set out in the *ACL*.⁹⁷ Of primary relevance to defective residential construction work are the provisions of the *ACL* which deal with unfair contract terms,⁹⁸ consumer guarantees,⁹⁹ and prohibited behaviours such as misleading and deceptive¹⁰⁰ or unconscionable conduct.¹⁰¹

All of the states and territories have construction-specific legislation which share, to varying extents, the intent of the Victorian *DBCAs*.¹⁰² However, the application of this legislation is far from consistent,¹⁰³ resulting in it being misleading to speak of an 'Australian' approach to residential building regulation without a recognition of the differences in detail across the states and territories.¹⁰⁴

B Impetus for Reform

State-based regulators have for many years been alive to the need for ongoing reform to the various legislative schemes. During 2017 and early 2018, significant reforms were being implemented or in the pipeline, including the following:

- In NSW, the defects bond scheme under pt 11 of the *Strata Schemes Management Act 2015* (NSW) was implemented, applying to contracts entered into after 1 January 2018. This requires developers of residential strata scheme properties not already covered by the NSW Home Building Compensation Fund (primarily, those over three storeys) to lodge with NSW Fair Trading a bond for two per cent of the purchase price of the building. The bond is kept for two years after completion of the building to cover the cost of defects which arise during that time.

96 These heads are found in ss 51 and 52 of the *Australian Constitution*.

97 This is set out in Sch 2 to the *Competition and Consumer Act 2010* (Cth) ('*ACL*').

98 *ACL* pt 2-3.

99 *ACL* pt 3-2 div 1.

100 *ACL* pt 2-1 (primarily, s 18(1)).

101 *ACL* pt 2-2.

102 The statutes of primary relevance in the other states and territories are: *Building Act 2004* (ACT); *Home Building Act 1989* (NSW); *Building Act 1993* (NT); *Queensland Building and Construction Commission Act 1991* (Qld) ('*QBCC Act*'); *Building Work Contractors Act 1995* (SA); *Residential Building Work Contracts and Dispute Resolution Act 2016* (Tas); *Home Building Contracts Act 1991* (WA). Bailey, above n 95, vol III, ch 19 provides a useful survey of their relevant provisions. See also Britton and Bailey, above n 95, 276–87; Britton, "Make the Developer Get the Job Right", above n 95, 16–19.

103 Bailey, above n 95 provides an outline of each of the Australian states' and territories' regulatory regimes at 1466–507 (Victoria at 1479–87), as well as a brief discussion of the unfair contract terms provisions of the *ACL* at 1508.

104 Further specific examples of disparity are discussed in Matthew Bell and Ravindu Goonawardene, 'Monetary Value: The "Least Worst" Proxy for Vulnerability in Regulation of Construction Contracting?' (2013) 29 *Building and Construction Law* 465, 467.

- During the early part of 2017, the Queensland Government ran a consultation on its proposed Queensland Building Plan.¹⁰⁵ As part of an integrated strategy of reforms to laws affecting the built environment, the government proposed changes to aspects including residential construction warranties, certification, non-conforming products and licensing.
- Already in force in Queensland is the *Building and Construction Legislation (Non-Conforming Building Products — Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld). This amended the *QBCC Act* and other legislation with the aim of making all participants in the construction supply chain responsible for avoiding the use of non-conforming building products. This has been done by imposing a ‘primary duty’ that ‘[e]ach person in the chain of responsibility for a building product must, so far as reasonably practicable, ensure that the product is not a non-conforming building product for an intended use’.¹⁰⁶ Additional specific duties are imposed upon particular participants (designers, manufacturers, installers and so forth) and breaches of these duties and various other matters attract significant fines.¹⁰⁷

The recent Victorian reforms had their genesis in the Victorian Auditor-General’s 2011 report into building certification.¹⁰⁸ This found that 96 per cent of the permits examined by the inquiry did not comply with minimum statutory building and safety standards, the building control system in Victoria depended ‘heavily on “trust”’ and, in sum, the Victorian Building Commission could not ‘demonstrate that the building permit system is working effectively’.¹⁰⁹ These findings led to the demise of the Commission (replaced in 2013 by the VBA)¹¹⁰ and the Building Legislation Amendment Bill 2014 (Vic).

The 2014 Bill stalled with the change of government in Victoria on 29 November 2014. However, many of its provisions were resurrected in the *2016 Amending Act*, the direct impetus for which was a further report by the Auditor-General in 2015, ‘Victoria’s Consumer Protection Framework for Building Construction’.¹¹¹ That report cited many examples of problems with residential building work, similar to the types of issues outlined in the 2014 survey in Part III above. It concluded that, in practice, the state’s regulatory regime did not possess the critical features of an ‘effective consumer protection framework for building construction’.¹¹²

105 Department of Housing and Public Works, ‘Queensland Building Plan: A Discussion Paper for Industry and Consumers’ (Discussion Paper, Department of Housing and Public Works, 2016).

106 *QBCC Act* s 74AF, as inserted by *Building and Construction Legislation (Non-Conforming Building Products — Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld) s 11.

107 These penalties are discussed in Bell, “‘How is that Even Possible?’”, above n 16.

108 Victorian Auditor-General, ‘Compliance with Building Permits’ (Report No 2011–12:17, Victorian Auditor-General’s Office, 7 December 2011).

109 *Ibid* viii.

110 Primarily via the *Building and Planning Legislation Amendment (Governance and Other Matters) Act 2013* (Vic) ss 4, 16.

111 Victorian Auditor-General, ‘Victoria’s Consumer Protection Framework for Building Construction’ (Report No 2014–15:32, Victorian Auditor-General’s Office, 28 May 2015).

112 *Ibid* ix. These features are discussed in Part V(A).

That Auditor-General's report on the consumer protection framework was published in mid-2015. During that year, there was detailed investigation into, and consideration of, the lessons which could be learned from the Lacrosse fire (see Part III(B)) above). That fire sparked general concern about the efficacy of the building controls regime. Aside from the use of the combustible cladding, the building incorporated a number of fire-related 'alternative solutions' which had been approved under the *Building Code*, including removal of external sprinkler protections, increased travel distance to exits and — of particular relevance given that many of the smoke alarms within apartments had been 'disengaged, covered or disconnected'¹¹³ — replacement of the Early Warning Intercommunication System ('EWIS') by occupant warning systems.¹¹⁴

The Municipal Building Surveyor for the City of Melbourne observed that the use of such alternatives 'is becoming increasingly common'.¹¹⁵ He also noted that, at the time of the fire, many apartments were being occupied by 6–8 people even though they (and the fire systems) had been designed for half that number.¹¹⁶ Stating that the 'objective of current building legislation ... is to keep people safe and to regulate minimum building standards',¹¹⁷ the Surveyor commented that the 'spread of the fire in this incident brings into question the ability of building legislation, including the regulatory process, to minimise the impact of such an event'.¹¹⁸ He found, further, that the regulations 'are not suited to dealing with large, complex and existing buildings and how we are using these buildings today'.¹¹⁹

By way of example of such unsuitability, Lawrence Reddaway has noted that the process of serving 'show cause' notices for the Lacrosse fire became 'a logistical marathon' because many of the owners of those apartments are owned by companies or otherwise not easy to locate.¹²⁰ The Victorian Minister for Planning, Richard Wynne, similarly noted that officers faced difficulties in gaining access to apartments in the building to check for suitability for occupation and other safety issues.¹²¹

In October 2016, a further shock to the Victorian regulatory system came with the demolition of one of the oldest buildings in Melbourne, the Carlton Inn (also known as the Corkman Hotel).¹²² As of early 2018, the circumstances of that demolition, and its legality or otherwise, remained under investigation and

113 Genco, above n 33, 13. There were reports that most residents were alerted to the danger by the sirens in the street rather than internal alarms: Reddaway, above n 33, 11.

114 Genco, above n 33, 11.

115 Ibid.

116 Ibid 16.

117 Ibid 2.

118 Ibid.

119 Ibid 21.

120 Reddaway, above n 33, 12.

121 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4828 (Richard Wynne).

122 For summaries, see, eg, Henry Hamilton Lindsay, 'An Ode to the Corkman Pub and a Call to Action', *De Minimis* (Melbourne), 19 October 2016, 1.

before the courts.¹²³ What is known, however, is that the episode caused great consternation amongst the pub's erstwhile customers, local and state politicians, and students at the neighbouring Melbourne Law School. It was cited by Minister Wynne in his Second Reading Speech for the Bill for the *2017 Amending Act*¹²⁴ in support of his view that 'the current offences in the Building Act, which provide for fines alone, are not a sufficient deterrent for people in the business of building who knowingly do the wrong thing'.¹²⁵

C The Victorian Reforms of 2016–17: Overview

Victoria's *2016 Amending Act* and *2017 Amending Act* are complex vehicles, seeking to respond to an impetus for reform at both the macro level (the policy-based framework reassessment by the Auditor-General) and micro level (specific, high-profile instances such as the Lacrosse Building and Corkman Hotel). The areas of reform in the two Acts which are of primary relevance to residential building defects include:

- increases in (and harmonisation of) a number of penalties applying to contraventions of the *DBCA* and *BA* (discussed in Part IV(D) below);
- provision for 'assessment' of residential building disputes (Part IV(E)); and
- a process of conciliation preliminary to referral to VCAT (Part IV(F)).

In addition, the following aspects of the reforms are worthy of note in this context:

- Increasing (with effect from 1 August 2017) from \$5000 to \$10 000 the threshold above which a 'Domestic Building Contract' will be regarded as a 'Major Domestic Building Contract'.¹²⁶
- Builders no longer being allowed to appoint Private Building Surveyors on behalf of Owners in relation to Domestic Building Work.¹²⁷
- The range of interests in respect of a Building or Building Work, which disqualify a Private Building Surveyor (or their Related Persons)¹²⁸ from carrying out functions as a Private Building Surveyor in relation to that

123 See, eg, Duncan Wallace, 'An Update on the Corkman', *De Minimis* (Melbourne), 21 March 2017, 1–2; Ed Gardiner, 'Corkman Pub Demolition May Prove Very Costly', *Herald Sun* (online) 16 March 2018 <<http://www.heraldsun.com.au/news/victoria/developers-plead-guilty-to-illegally-demolishing-corkman-pub/news-story/>>.

124 Building Amendment (Enforcement and Other Measures) Bill 2016 (Vic).

125 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4827 (Richard Wynne).

126 *DBCA* s 3(1) (definition of 'major domestic building contract'); *Domestic Building Contracts Regulations 2017* (Vic) regs 4(3), 6. In this Part IV, capitalised terms have the meaning given to them in the relevant legislation.

127 *BA* ss 78(1A), (1B).

128 This is widely defined in *BA* s 79(4) to include, as applicable: the Private Building Surveyor's employer and employees; if the Private Building Surveyor is a member of a partnership, their partners; and, if the Private Building Surveyor is a director of a body corporate, their body corporate and its other directors and related bodies corporate.

Building or Building Work, have been expanded, including a general disqualification based upon conflicts of interest.¹²⁹

- Tightening of the administrative regime to ensure that work (other than that carried out by Owner-Builders, which is subject to a separate regime)¹³⁰ is actually carried out by a registered builder, primarily through increasing the onus on the Building Surveyor to monitor compliance by:
 - not issuing a building permit in respect of work under a Major Domestic Building Contract unless the builder has the necessary registration and is the builder who entered into the contract; moreover, if the value of the work exceeds \$16 000,¹³¹ the surveyor needs to check that the name of the builder in the contract and on the certificate of insurance is identical,¹³² and
 - updating the name of the Builder on the permit (and notifying the VBA and relevant municipal council accordingly) if the Owner informs the surveyor that the Builder has been replaced.¹³³
- Attempts to remove ambiguities as to obligations, including clarifying that the Building Surveyor ‘must cause the work to be inspected in person’,¹³⁴ and that the surveyor can only allow others to make an inspection on their behalf if the person is appropriately registered.¹³⁵
- Expansion of the ‘fit and proper person’ requirements for registration of Building Practitioners, and their extension not only to individual practitioners¹³⁶ but also to all directors of bodies corporate,¹³⁷ and all members of a partnership,¹³⁸ so registered. These can be failed for a wide range of behaviours including:
 - as ‘personal probity requirements’, during the past 10 years.¹³⁹
 - convictions for fraud, dishonesty, drug trafficking or violence offences punishable by imprisonment for six months or more;
 - being ‘convicted ... of an offence under any law regulating building work or building practitioners’;

129 *BA* s 79; see especially at sub-s (1A).

130 See, primarily, *BA* pt 3 div 3, pt 13 div 1A.

131 The threshold for such insurance was set by Minister for Planning (Vic), ‘*Building Act 1993* — Domestic Building Insurance Ministerial Order’ in Victoria, *Victoria Government Gazette*, No G22, 29 May 2014, 1014, 1014.

132 *BA* ss 24A(1), 24B(4), as amended by *2017 Amending Act* s 22; *BA* pt 3 div 3, as amended by *2017 Amending Act* ss 61–2. The VBA then checks the information and issues, or refuses to issue, the permit under the new *BA* pt 3 div 3.

133 *BA* ss 25 AB, 25AC, 25AD, as inserted by *2017 Amending Act* s 23. The surveyor’s obligation is, however, expressed permissively (‘may change’) rather than being mandatory.

134 *BA* s 34, as amended by *2017 Amending Act* s 25(1).

135 *BA* s 35B.

136 *BA* ss 171(1)(a), (d), as amended by *2017 Amending Act* s 7.

137 *BA* s 171A(2), as inserted by *2017 Amending Act* s 7.

138 *BA* ss 171(1)(d), 171C(2), as amended by *2017 Amending Act* s 7.

139 *BA* ss 171D(a)–(c), as inserted by *2017 Amending Act* s 7.

- being de-registered;
- being convicted or found guilty of certain offences against various Commonwealth and Victorian consumer laws; or
- non-compliance with an order of a court or VCAT in relation to the *BA*, *DBCA* or their Regulations;
- as ‘financial probity requirements’, a history of insolvency, inability to obtain insurance, or undischarged debts (including unpaid adjudicated amounts under the *Building and Construction Industry Security of Payment Act 2002* (Vic));¹⁴⁰ and
- as ‘excluded person[s]’, being oneself (or an associate) disqualified from registration or, during the past two years, refused registration due to having provided false or misleading information.¹⁴¹
- Expansion of the information provision requirements in relation to compliance with the legislative scheme, including:
 - requiring the Builder to provide a ‘contract information statement’ to the Owner before entering into the contract.¹⁴² This is a two-page document in plain language which provides a summary of the provisions of the *DBCA*, covering matters such as inspections, appointment of a building surveyor, warranties and the processes for variations. It also provides advice to Owners, including that:
 - they should make sure they have enough time to read the contract, and consider obtaining independent legal advice;
 - they should beware of ‘an extremely low quote compared to other builders — this may indicate a risk that the quality of the job may be compromised, that the builder may not fully understand what is required or may not be properly registered or insured’; and
 - ‘[m]any disputes can be avoided when there is good communication’ between the Owner and the Builder; and
 - requiring the Building Surveyor to use an approved checklist in submitting a Building Permit application to the VBA.¹⁴³
- Expansion of the powers (and obligations) of Building Surveyors, the VBA and its inspectors¹⁴⁴ to order the correction of non-compliant Building Work.¹⁴⁵

140 *BA* s 171E, as inserted by *2017 Amending Act* s 7.

141 *BA* s 171F, as inserted by *2017 Amending Act* s 7.

142 This statement has been published by Consumer Affairs Victoria as its *Domestic Building Consumer Guide*: Consumer Affairs Victoria, *Domestic Building Consumer Guide* (1 August 2017) <<https://www.consumer.vic.gov.au/buildingguide>>; *DBCA* s 29A.

143 *BA* ss 30A, 30B. The current version of this checklist is available via Victorian Building Authority, *Approved Checklist* (1 July 2016) <http://www.vba.vic.gov.au/_data/assets/pdf_file/0010/44668/Section-30A-checklist-LATEST-1-JULY-2016.pdf>.

144 See new *BA* pt 12 div 2 sub-div 2A, as inserted by *2017 Amending Act* s 40.

145 *BA* pt 4 div 2.

- Expansion of the power of Municipal Building Surveyors to make emergency orders arising from danger to life or property, including closing down, and requiring people to vacate, buildings and places of public entertainment,¹⁴⁶ and to make specific orders about failures to maintain emergency installations and equipment,¹⁴⁷ coupled with commensurately-expanded inspection powers of completed buildings and information-gathering and entry powers.¹⁴⁸
- Requirements for Registered Building Practitioners to include their registration number on any advertisement or written statement offering to carry out Domestic Building Work.¹⁴⁹
- Explicit engagement with behavioural aspects, through the provision for codes of conduct for Building Practitioners to be approved by the VBA,¹⁵⁰ failure to comply with which could be grounds for disciplinary action.¹⁵¹
- Expansion of the types of disciplinary action which can be taken against Registered Building Practitioners (now by the VBA, which has taken over the role formerly served by the Building Practitioners Board), and the grounds for such action.¹⁵²

D Penalties

The *BA* and *DBCAs* have for many years included a range of civil penalties in respect of offences. In the latest round of amendments, these have been markedly expanded in their scope and the severity of their sanctions. Across the Acts, the penalty provisions have been split between those applying to natural persons (individuals), and those applying to bodies corporate (generally, five times the rate applying to individuals).¹⁵³

In addition, many penalties have been increased to 500 'penalty units' ('PU') and 2500 PU for bodies corporate.¹⁵⁴ This high level of penalty previously only

146 Ibid pt 8 div 1.

147 Ibid s 106(ba).

148 Ibid pt 4 div 1, pt 13 div 2, as amended by *2017 Amending Act* s 46.

149 *BA* s 169H, as inserted by *2017 Amending Act* s 7.

150 *BA* pt 11 div 2.

151 Ibid s 179(1)(b). As at 1 March 2018, no such codes had been approved, but the VBA had published a draft protocol for how these codes are to be drafted by industry associations. This indicates there will be an emphasis on reputation of the profession, behaviours aligned with 'highest professional standards', adopting 'a cooperative, conciliatory approach to dispute resolution', treating clients with courtesy and so forth: Victorian Building Authority, *Codes of Conduct: VBA Protocol for Drafting and Approval (Draft)* (November 2016), 11–13 <http://www.vba.vic.gov.au/__data/assets/pdf_file/0003/50583/Code-of-Conduct-Protocol_DRAFT.pdf>.

152 *BA* pt 11 div 3.

153 Under *BA* s 170, as amended by *2017 Amending Act* s 7, natural persons and bodies corporate may apply for registration as Building Practitioners.

154 Under Victorian Acts, the maximum amount payable by way of fines is set by reference to PU under the *Monetary Units Act 2004* (Vic). For the 2017–18 financial year, one PU was \$158.57: Treasurer (Vic), 'Monetary Units Act 2004 — Notice under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' in Victoria, *Victoria Government Gazette*, No G13, 30 March 2017, 541, 541.

applied to a few, particularly serious requirements, including those relating to Building Practitioners being covered by the required insurance,¹⁵⁵ and behaviour akin to bribery of Registered Building Practitioners.¹⁵⁶ The contraventions at the 500/2500 PU level now include:

- carrying out Building Work without a Building Permit having been issued and being in force;¹⁵⁷
- carrying out Building Work under a Major Domestic Building Contract unless they are a registered Builder (or in partnership with, employee or subcontractor of a registered Builder);¹⁵⁸
- as an Owner of Land,¹⁵⁹ or Building Practitioner or Architect,¹⁶⁰ failing to ensure that a Building Permit has been issued and is in force for Building Work;¹⁶¹
- carrying out Building Work not in accordance with the *BA*, Building Regulations and the relevant Building Permit;¹⁶² or, as the Builder named in the Building Permit, failing to ensure that the work is carried out in accordance with those requirements;¹⁶³
- a Building Surveyor issuing a Building Permit without the VBA having issued a permit number for that permit,¹⁶⁴ or acting as a Private Building Surveyor where they were or it was directly or indirectly involved in relation to the preparation of the design of the building;¹⁶⁵
- when not appropriately registered:
 - a Builder entering into a Major Domestic Building Contract;¹⁶⁶

155 *BA* ss 136–7.

156 *Ibid* s 245.

157 *Ibid* s 16(1).

158 *BA* s 169F, as inserted by *2017 Amending Act* s 7.

159 *BA* s 16(3). Under *BA* s 16(5), however, this obligation does not apply to Owners who have engaged a Building Practitioner or Architect to carry out the Building Work.

160 *Ibid* s 16(4).

161 Under the new *BA* s 16A, as inserted by *2017 Amending Act* s 21, however, it is not an offence if the Building Permit is suspended, the accused did not (and could not reasonably be expected to) know that it had been suspended and the accused is not an Architect or Building Practitioner engaged to carry out the relevant Building Work.

162 *Ibid* s 16(2).

163 *BA* s 16(4A), as inserted by *2017 Amending Act* s 20(2).

164 *BA* s 23A(1), as inserted by *2017 Amending Act* s 62. The matters which the surveyor needs to check before issuing a permit have also been expanded, under s 24A.

165 *BA* s 79.

166 *DBCAs* s 29, as amended by *2017 Amending Act* s 101.

- a person accepting an appointment,¹⁶⁷ or carrying out work as, a Building Surveyor;¹⁶⁸ or
- a person carrying out work as a Building Inspector;¹⁶⁹
- a Builder not complying (or failing to ensure that its employees and subcontractors comply) with a written direction to fix Building Work within the period specified in the direction;¹⁷⁰
- falsely representing oneself as being:
 - registered in a particular category or class of Building Practitioner,¹⁷¹ Building Surveyor,¹⁷² or Building Inspector;¹⁷³ or
 - authorised to carry out Domestic Building Work under a Major Domestic Building Contract.¹⁷⁴

Perhaps the most significant penalty-related reform is the Corkman Hotel-driven introduction of indictable offences under *BA* s 16B.¹⁷⁵ Each of the new indictable offences renders any ‘person [who is] in the business of building’ (defined to include ‘a person who is in the business of managing or arranging the carrying out [B]uilding [W]ork’)¹⁷⁶ liable to:

- in the case of natural persons, a fine of 600 PU, imprisonment for five years, or both; or
- in the case of bodies corporate, 3000 PU.

The offences are to carry out Building Work:

- for which a Building Permit is required, knowing that a Building Permit is required and that such a permit is not in force;¹⁷⁷ or
- knowing that the work is not being carried out in accordance with the *BA*, Building Regulations or Building Permit.¹⁷⁸

167 *BA* s 78A, as inserted by *2017 Amending Act* s 28. Under the new s 80A, as inserted by *2017 Amending Act* s 6, bodies corporate which accept an appointment as a Private Building Surveyor are subject to a fine of 1200 PU if they fail to ensure that an appropriately registered director or employee of that firm carries out the work; a separate fine of the same amount applies to a failure to notify that appointment to the council.

168 *BA* s 169D, as inserted by *2017 Amending Act* s 7.

169 *BA* s 169E, as inserted by *2017 Amending Act* s 7.

170 *BA* s 37H, as amended by *2017 Amending Act* s 17. The regime for such directions is set out at pt 4 div 2.

171 *BA* s 169, as amended by *2017 Amending Act* s 7.

172 *BA* s 169B, as inserted by *2017 Amending Act* s 7.

173 *BA* s 169C, as inserted by *2017 Amending Act* s 7.

174 *BA* s 169A, as amended by *2017 Amending Act* s 7.

175 See above Part IV(B).

176 *BA* s 16B(6), as amended by *2017 Amending Act* s 7. The definition in this sub-section does not completely correspond with the relevant wording in the text of s 16B, as it does not include the words ‘who is’.

177 *BA* s 16B(1).

178 See *Ibid* s 16B(3).

There is provision for exemptions in relation to certain types of Building Work to be made by regulation.¹⁷⁹

Furthermore, the limitation period for proceedings to be brought in respect of offences under the *BA* (generally, to be brought by the VBA)¹⁸⁰ has changed from the previously applicable three years to being the later of three years, or two years after the alleged offence came to the attention of the relevant enforcement body or VBA (with a 10-year long-stop).¹⁸¹

E Assessment

Part 4 of the *DBCA* sets up a system of dispute resolution preliminary to VCAT proceedings. The primary function of Assessors under this regime is to assess whether Domestic Building Work is defective or incomplete.¹⁸² Assessors are appointed by the Chief Dispute Resolution Officer ('CDRO') and may be architects, Building Practitioners, or others as prescribed.¹⁸³

The CDRO may refer a matter to an Assessor directly,¹⁸⁴ or upon the request of a party to a Domestic Building Work Dispute which has either been rejected by the CDRO or unresolved by conciliation.¹⁸⁵ The Assessor's powers of investigation include a right to reasonable access to the site,¹⁸⁶ opening up and examination of the work,¹⁸⁷ access to documents,¹⁸⁸ the conduct of tests, and obtaining of relevant expert advice.¹⁸⁹ '[P]erson[s]' (ie wider than just the parties) are subject to a fine of 60 PU if they refuse or fail to comply with a requirement of an '[A]ssessor', or 'hinder or obstruct an [A]ssessor'.¹⁹⁰

The outcome of the Assessor's examination is a report to the parties and the CDRO,¹⁹¹ crucially, it must note whether the work is defective or incomplete.¹⁹² If it is, the report *must* specify the defective or incomplete work and *may* specify the causes and recommend a rectification method (or note that the Assessor believes it is so defective that it is inappropriate for the Builder to rectify or complete it).¹⁹³

179 Ibid s 16B(5). As at 1 March 2018, no such exemptions had been made by regulation.

180 Ibid s 241(3).

181 Ibid s 241(7)–(8).

182 *DBCA* s 48A(a).

183 Ibid s 48(1).

184 Ibid s 48B.

185 Ibid s 48C. The latter applies where an Assessor was not already appointed by the CDRO in relation to the dispute.

186 Ibid s 48D.

187 Ibid s 48E.

188 Ibid s 48F.

189 Ibid s 48J.

190 Ibid s 48I. There is an exception to these requirements if the person has a reasonable excuse, which may include that required actions, other than the production of documents, would tend to incriminate the person (at s 48H).

191 Ibid s 48O.

192 The report is under *DBCA* s 48P if the work is found not defective or incomplete, and s 48Q if it is.

193 Ibid s 48Q.

If the Assessor is of the opinion that there has been a contravention of the *BA* or its Regulations, the Assessor must provide a copy to the VBA, which may then refer the alleged contravention to the relevant municipal council and Building Surveyor.¹⁹⁴

Assessors may also be directed by the CDRO to examine domestic building work to confirm whether a Dispute Resolution Order ('DRO') has been complied with,¹⁹⁵ and must be so directed where an Owner gives the CDRO notice that a Builder has failed to rectify or complete work in accordance with a DRO.¹⁹⁶

F Conciliation

From 1 July 2017,¹⁹⁷ parties cannot apply to VCAT¹⁹⁸ or a Court¹⁹⁹ (other than for injunctions in each case), in relation to a 'Domestic Building Work Dispute' ('DBWD'), without having exhausted the procedures set out in the Act for 'conciliation' (these procedures may, however, lead to certification that the dispute is unsuitable for, or has not been resolved by, conciliation — see below).²⁰⁰

A DBWD is a 'Domestic Building Dispute' ('DBD') between Owners and Builders (or Building Practitioners), subcontractors or architects in relation to a 'Domestic Building Work Matter', being 'any matter relating to a [D]omestic [B]uilding [C]ontract' or the carrying out of [D]omestic [B]uilding [W]ork', including alleged breaches of the *DBCAs* s 8 warranties, or failures to maintain the standard or quality specified in the contract, to complete the work (including within the times specified) or to pay money for work performed.²⁰¹

For the purpose of this article, DBDs relevantly include disputes:²⁰²

- 'in relation to a [D]omestic [B]uilding [C]ontract or the carrying out of [D]omestic [B]uilding [W]ork', between:
 - Owners and Builders (or Building Practitioners),²⁰³ subcontractors or architects; or
 - Builders and other builders, subcontractors and insurers; or

194 Ibid s 48R.

195 Ibid s 49P.

196 Ibid ss 49R, 49S.

197 *2016 Amending Act* s 2.

198 Ibid s 56.

199 Ibid s 57A.

200 Whilst this is the apparent intent, there is potential inconsistency in the drafting of the Act, as one of the grounds for rejection of a referral to conciliation is that 'all issues arising out of the dispute have been or are the subject of proceedings before VCAT or a court' (ibid s 45C(3)(e)).

201 Ibid s 44.

202 Ibid s 54.

203 This is defined under *BA* s 3(1) (definition of 'building practitioner') to include a range of building professionals, including builders, building surveyors and engineers, but not architects.

- in relation to design, between Owners or Builders, and architects and registered designers.

The essential elements and processes of this conciliation scheme are as follows:

- Referral of a DBWD, by a party to that dispute, to the CDRO,²⁰⁴ who then decides whether to accept the dispute for conciliation.²⁰⁵
- If it is accepted, conciliation of the DBWD by a Conciliation Officer ('CO').²⁰⁶
- If conciliation resolves the dispute, the CO is to 'prepare a written record' of the agreed terms for resolution, including actions (and timeframes for such action) to be taken by each party.²⁰⁷
- The CDRO may issue a stop work order pending resolution of the dispute,²⁰⁸ and is empowered to issue a Dispute Resolution Order ('DRO') in certain circumstances (including where there has been a breach of a *DBCA* s 8 warranty) where the parties have not resolved their dispute.²⁰⁹ The core actions which can be required under a DRO are:²¹⁰
 - (by either party) payment of money, either directly to the other party or into the Domestic Building Dispute Resolution Victoria Trust Fund ('Fund');²¹¹
 - (by a Builder)²¹² rectification or completion of work and rectification of damage; and
 - (by the Owner) compliance with specified conditions, including payment of money.

Beneath this high-level summary of the essential elements, it does need to be noted that the conciliation regime is detailed and lengthy, running to more than 60 pages. Much of it is procedural in nature and therefore of marginal direct relevance to the scope of this article. That said, there are a number of aspects worthy of note in this context:

- The limitation period for referral of DBWDs to the CDRO mirrors (with some modification) that under *BA* s 134: by default, 10 years after issue of the occupancy certificate in relation to the relevant Domestic Building Work.²¹³

204 See also above Part IV(E). The CDRO is appointed by the Director (of Consumer Affairs) under *DBCA* s 52C. The CDRO, Conciliation Officers appointed under *DBCA* s 52E (see below) and Assessors together comprise 'Domestic Building Dispute Resolution Victoria' (at s 52A).

205 *Ibid* pt 4 div 2.

206 *Ibid* pt 4 div 3.

207 *Ibid* s 46F.

208 *Ibid* pt 4 div 4.

209 *Ibid* pt 4 div 6.

210 *Ibid* ss 49B–49C.

211 This Fund is established under *DBCA* pt 4 div 8. Amounts are paid out of it when the Director of Consumer Affairs is satisfied that the relevant DRO has been complied with (at s 49G).

212 See discussion below: apparently, this need not be the Builder which originally undertook the work.

213 *DBCA* s 45(3). Like *BA* s 134, this anticipates that an occupancy certificate might not be issued, allowing for the issue of a certificate of final inspection to be a fall-back trigger.

- In making the initial assessment of whether a referred DBWD should proceed to conciliation, the appointed CO needs to assess several criteria, including whether 'at least one of the parties ... appears willing to participate in conciliation in good faith'.²¹⁴ The CO then makes a recommendation to the CDRO who may assess the dispute as not being suitable for conciliation if one or more listed criteria apply. These include there being no reasonable likelihood of the dispute being settled by conciliation or that the referral is frivolous, vexatious or not made in good faith.²¹⁵
- Whilst the party which referred the DBWD to the CDRO may seek to withdraw the referral whilst the process is in train, the CDRO may refuse to accept the withdrawal for reasons including that the CDRO considers that the dispute indicates a contravention of the *DBCA*, *BA* or the Regulations made under them.²¹⁶
- Evidence of what occurs during the conciliation (other than reports by Assessors²¹⁷ and findings in DROs based on those reports)²¹⁸ is generally not admissible in evidence in proceedings before VCAT or a court. However, this is subject to various exceptions, including for the purpose of disciplinary proceedings in relation to contraventions of the legislation.²¹⁹ The requirement that COs and Assessors not (at pain of a fine of 60 PU) disclose any information obtained in carrying out their functions is subject to similar exceptions.²²⁰
- There is an element of coercion towards participation in the conciliation process. This is deployed in relation to the cost of tests and expert advice obtained by Assessors, and issuance of DROs. Generally, no costs are payable²²¹ unless a party has requested that the Assessor carry out the investigation under *DBCA* s 48C, in which case the requesting party is liable for such cost (but has the right to disagree with the test or advice being obtained, in which case the Assessor may decide not to obtain it).²²² However, the costs are to be paid by a party to the DBWD if it has been given notice of a conciliation conference, has failed to participate in the conference, and a DRO is issued against the party because the building work was defective or incomplete.²²³ Similarly, the CDRO may take into account the conduct of the parties during any conciliation in deciding whether to issue a DRO.²²⁴

214 *DBCA* s 45A(c). Matters which might be taken into account in relation to good faith include a refusal by the Owner to allow an Assessor access to the site: at s 48D(3)(c), (4).

215 *Ibid* s 45C.

216 *Ibid* s 45G(3).

217 Under *ibid* ss 48O, 48T.

218 *Ibid* s 49D(3).

219 *Ibid* s 46C(3)(b).

220 *Ibid* s 52I.

221 *Ibid* s 48J(3).

222 *Ibid* ss 48L, 48M, 48N.

223 *Ibid* s 48K. The Builder is also to pay the Assessor's costs of examining whether the Builder has breached a DRO under s 49S (see above n 196 and accompanying text): at s 49U(6).

224 *Ibid* s 49A(1)(b).

- A DRO may be issued to a builder, other than the Builder under the contract, requiring that other builder to undertake the rectification or completion work (or, if it is not itself appropriately registered under the *BA*, to procure an appropriately-registered builder to do so).²²⁵ The DRO may require this work to be done at the original Builder's expense, so long as the DRO includes a finding that the work carried out by the original Builder 'is so defective that it would not be appropriate' to allow that Builder to rectify or complete it.²²⁶
- If the CDRO determines that a party, required to take action under an agreement following a successful conciliation, has failed to take it within the time required, 'the record of agreement ceases to have effect'.²²⁷ The Owner is also given the right to terminate the contract for failure by the Builder to comply with a DRO, subject to compliance with the process in *DBCA* s 49W;²²⁸ the Builder has similar rights of termination in s 49X.
- The Director (of Consumer Affairs Victoria) is able to 'institute proceedings on behalf of' Owners or 'defend proceedings brought against' them where the Director is satisfied that the Owner has a good cause of action or defence and it is in the public interest to do so.²²⁹
- As noted above, DBWDs cannot (with some exceptions) be heard by VCAT unless the CDRO issues a certificate that the dispute was not suitable for, or was not resolved by, conciliation.²³⁰ That said, VCAT has a supervisory role in relation to the conciliation process, with express rights granted to parties to DBWDs to apply for review of:
 - failures by the CDRO to issue a certificate that the DBWD is not suitable for conciliation,²³¹ or had not been resolved by conciliation;²³²
 - a decision to pay money out of the Fund;²³³
 - a decision to issue or amend a DRO;²³⁴ and
 - a breach of a DRO notice issued by the CDRO under *DBCA* s 49U.²³⁵

225 This is the combined effect of *ibid* ss 49B(1), (5) and its definition of 'Builder' (which has no nexus to the contract between the parties): at s 3 (definition of 'builder').

226 *Ibid* s 48Q(5).

227 *Ibid* s 46H.

228 Whilst the Owner is then released from further performance of the contract (*ibid* s 49W(2)), the Builder is entitled to a 'reasonable price' (not exceeding the amount it could have recovered under the contract) for the work carried out prior to termination: at ss 49W(3)–(4).

229 *Ibid* s 50.

230 *Ibid* s 56(1). These certificates are issued under, respectively, ss 45F, 46E.

231 *Ibid* s 45F(5).

232 *Ibid* s 46E(5).

233 *Ibid* ss 49G(4), 65; see above n 211.

234 *Ibid* s 63.

235 *Ibid* ss 49U(3), 66.

V ARE THE VICTORIAN REFORMS LIKELY TO SUCCEED?

A *Lofty Aspirations*

As a result of the 2016–17 amendments, the Victorian *Building Act* and *Domestic Building Contracts Act* now run to more than 150 000 words. When combined with the proposed Building Regulations 2017 (Vic),²³⁶ they comprise more than 1100 pages. If placed end to end, these pages would stretch higher than Victoria's highest building, the Eureka Tower (or, for that matter, the Australia 108 project which is soon to usurp this title).

Thus, at least in a purely physical sense, the direct answer to the question posed by the title of this article is that it is Australia's *construction legislation* which is outgrowing its *cities*, rather than the other way around. Indeed, the scope and complexity of the Victorian regime indicates an aspiration to being nothing less than a comprehensive code of residential construction law, from contract formation through to dispute management.²³⁷

That being said, the question remains whether this extensive regime, which is in many respects highly interventionist vis-à-vis parties' freedom to frame their residential projects as they wish, represents an effective model of regulation. 'Effectiveness' was explicitly the touchstone for the Victorian reforms, with Minister Wynne noting that the *2017 Amending Act* aimed to provide 'greater regulatory powers in areas where they are needed, so that regulation can be targeted and the VBA is supported to be a more effective regulator'.²³⁸

How, though, can 'effectiveness' appropriately be assessed in this context? This article proposes that it may be framed by reference to factors leading to defective residential construction work which have credibly been identified as being within the control of the parties, and therefore able to be managed by them (as opposed to certain factors in construction, such as force majeure events, which are unable economically to be controlled).²³⁹

An example of such a framework was put forward in the Victorian Auditor-General's 2015 report which was discussed in Part IV(B) above. It proposed the following critical factors for an effective consumer protection framework in construction:²⁴⁰

236 See above n 179.

237 As an example of the level of detail anticipated in the regime, *BA* s 236(7) prohibits defacement of a notice placed in a public place in relation to compliance with a building order: contravention attracts the 500/2500 PU level penalty noted in Part IV(D) above. See also above Part IV(F) as to the highly detailed conciliation regime.

238 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4829 (Richard Wynne).

239 Risk allocation and management is a perennially debated mainstay of construction law discourse, with seminal considerations including Max Abrahamson, 'Risk Management' [1983] *International Construction Law Review* 241.

240 Victorian Auditor-General, 'Victoria's Consumer Protection Framework for Building Construction', above n 111, ix (numbering added).

1. Consumers and building practitioners should be aware of and have access to clear, comprehensive and timely information and advice on their rights and obligations.
2. Rigorous registration, monitoring and disciplinary processes should ensure that only qualified, competent and suitable practitioners are allowed to operate.
3. Independent, consistent and thorough monitoring of compliance with building standards and codes should enable the early identification and addressing of defects.
4. Dispute handling processes should be easily navigable, low cost, simple and timely, and should achieve binding and enforceable resolutions.
5. Consumers should have recourse to appropriate insurance which protects them in circumstances where they cannot otherwise achieve a timely and effective resolution of building defects and issues.

The discussion in Part IV(B) above foreshadowed both that it was the Auditor-General's 2015 report which provided much of the impetus for the 2016–17 reforms in Victoria, and that many of the issues canvassed in that report were similar to those encountered in the survey of cases in Part III. Hence, it is submitted that these five criteria provide a suitable lens through which to assess the likelihood that the current reforms will appropriately address the concerns identified in relation to residential construction defects.

The following section provides such an assessment, using the numbering set out above.

B Assessment Vis-à-Vis the Auditor-General's Criteria

1 Information Provision

The *Regulatory Impact Statement* for the 2017 Victorian Building Regulations highlighted that consumers in the residential construction sphere 'typically represent a vast population that can potentially suffer from imperfect or asymmetric information with regard to the buildings they occupy'.²⁴¹ The need for all parties to the construction process to be informed of their rights and obligations has been a mainstay of regulatory intervention in this area for many years, with notable manifestations including the checklists and warnings as to price changes required under the *DBCAs*.²⁴²

The VBA and Consumer Affairs Victoria are, likewise, evidently well-cognisant of this need, having substantially expanded the suite of information and forms on their respective websites in recent years. These include a searchable register of information on practitioners who have had disciplinary proceedings brought against them in Victoria (which the VBA is required to publish under *BA s 175D*,

²⁴¹ Department of Environment, Land, Water and Planning (Vic), above n 13, 17.

²⁴² See, primarily, *DBCAs* ss 15, 22, 24, 28, 30–1, 33, 35.

as inserted by *2017 Amending Act s 7*), the checklist for Building Surveyors mentioned in Part IV(C) and a 35-page guide for Owner-Builders.²⁴³

The checklist and guide appear to be helpful and clearly presented. However, the current form of the register is an example of how the response in practice to policy directives risks defeating their objectives. It is presented as a spreadsheet in PDF format, in very small type size, making its searchability far from user-friendly.

2 Registration, Monitoring and Disciplinary Processes

The heightened registration requirements and enforcement processes (including significant broadening and increasing of penalties) are clearly aimed at ensuring that unsuitable building practitioners are excluded from the system.²⁴⁴ Whilst it is difficult to definitively assess the degree of correlation between the behaviour of such persons and the incidence of defects, it does seem clear that some individuals have been responsible for a disproportionately high number of defects-related issues. For example, the Building Surveyor who faced disciplinary action from the VBA for his role on the Lacrosse Building project²⁴⁵ also was reported to have been the Building Surveyor on a project in Mount Waverley where the retaining wall collapsed, causing significant delay and property damage to neighbouring homes,²⁴⁶ and for the Travelodge Hotel in Melbourne's Docklands, which also reportedly involved the use of combustible cladding.²⁴⁷

These measures may indeed be expected to give consumers greater confidence that they will be provided with an outcome which avoids defects when they engage a registered practitioner. There is always a risk, however, that reputable and skilled building practitioners might inadvertently fall foul of these requirements, either because they are ignorant of their extensive detail or because they are unable reasonably to bear the cost of compliance.

For example, whilst the quality assurance benefits of ensuring that an appropriately registered builder is engaged for each Major Domestic Building Contract (see Part IV(C)) may appear self-evident, it does need to be borne in mind that obtaining the relevant certification takes builders 'off the tools' at significant cost

243 Victorian Building Authority, *Owner-Builder Information & Study Guide* (August 2017) <http://www.vba.vic.gov.au/__data/assets/pdf_file/0004/48019/Owner-Builder-Study-Guide.pdf>.

244 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4825 (Richard Wynne).

245 Victorian Building Authority, 'Lacrosse Building Surveyor to Face Disciplinary Action' (Media Release, 23 March 2016).

246 Larissa Ham and Allison Worrall, 'Building Team behind Mount Waverley Pit Collapse Face Disciplinary Action', *The Age* (online), 29 April 2016 <<http://www.theage.com.au/victoria/building-team-behind-mount-waverley-pit-collapse-face-disciplinary-action-20160429-goi428.html>>. The structural engineer for the project, and his company, received fines in the County Court on 23 March 2018: Adam Cooper and Clay Lucas, 'Engineer Fined \$480,000 over Mount Waverley Building Site Collapse', *The Age* (online), 23 March 2018 <<https://www.theage.com.au/politics/victoria/engineer-fined-480-000-over-mount-waverley-building-site-pit-collapse-20180323-p4z5yw.html>>.

247 Aisha Dow, 'Deadly Combustible Cladding Found on Melbourne Hotel', *The Age* (online), 4 June 2017 <<http://www.theage.com.au/victoria/deadly-combustible-cladding-found-on-melbourne-hotel-20170602-gwjf7f.html>>.

to their businesses. The Housing Industry Association advises, for instance, that its Certificate IV in Building and Construction — which is primarily directed towards understanding the business-related aspects of projects, such as contracts, planning and estimation, rather than technical skills — takes between six to 12 months to complete, involving 26–7 days of face-to-face training.²⁴⁸

Thus, it seems plausible that the enhanced registration requirements may cause otherwise competent builders to give up their own small businesses and instead work under the umbrella of a larger firm that holds the registration. This would be a counterproductive result from a competition point of view, emphasising the need for the rigorous monitoring of the impacts of the reforms which has been foreshadowed by the Victorian Government.²⁴⁹

3 Compliance Monitoring

At the general level, the more rigorous (and independent) inspection and certification processes could have made it more likely that non-conformances, such as the inadequate foundations of the Metricon homes, and Alucobest cladding at the Lacrosse Building, might have been detected before they impacted in the catastrophic manner that they did. More specifically, if their builder had taken notice of the new prohibition against falsely holding himself out as being authorised to carry out residential work,²⁵⁰ Ms Lin and Dr Chan may have avoided engaging him and the significant problems which followed that engagement.²⁵¹

That being said, as an observation which is generally applicable to the 2016–17 reforms and is especially acute in relation to the monitoring requirements, the reforms place very heavy reliance on the capacity of the VBA to administer the relevant provisions. They require the VBA — which has only been in existence since 2013, following the demise of the Building Commission²⁵² — simultaneously to operate administrative, educative, investigatory and disciplinary arms. It can be imagined, for example, that the process of investigating whether a Building Practitioner falls foul of one of the many grounds for being an ‘excluded person’²⁵³ of itself would substantially increase the VBA’s workload, especially bearing in mind that there are currently more than 20 000 such practitioners.²⁵⁴

The VBA is funded primarily through levies of 0.064 cents in every dollar of the cost of building work exceeding \$10 000 for which building permits are required.²⁵⁵ In the 2014–15 financial year, these levies resulted in incomes for

248 See Housing Industry Association, *Residential Building Certificate IV* <<https://hia.com.au/Training/Qualifications/BuildingCertIV>>.

249 Department of Environment, Land, Water and Planning (Vic), above n 13, [4.1.1]–[4.1.3].

250 *BA* s 169A, as amended by *2017 Amending Act* s 7.

251 See above Part III(H).

252 See above Part IV(B).

253 See above Part IV(C).

254 As at 30 June 2015, 21 779: Victorian Building Authority, ‘Annual Report 2014–15’ (Report, Victorian Building Authority, 2015) 15.

255 *BA* s 205G; see generally, *BA* pt 12 div 2 sub-div 3.

the VBA totalling \$26.7 million out of its total income of \$51.0 million.²⁵⁶ This seems a relatively modest budget compared to other regulatory bodies which have an active consumer focus — the Australian Competition and Consumer Commission, for example, received \$167.4 million in revenue from government in 2014–15²⁵⁷ — raising concerns about the VBA's capacity to meet its expanded remit.

That said, the Victorian Government is clearly alive to the need for the VBA to be adequately resourced. In the *2017 Amending Act*, the VBA's powers have been substantially expanded, including the ability to recover a levy (and, potentially, a penalty levy and its costs) in respect of work carried out without, or in contravention of, a Building Permit under ss 16(1) and 16B (see above).²⁵⁸ The Government has also flagged its intention to review the VBA's fee structure in 2018–19 in the light of implementation of the current reforms.²⁵⁹

4 *Dispute Handling*

Time will tell whether the fourth key element on the Auditor-General's list — especially, its promotion of pathways to 'binding and enforceable resolutions' — will be enhanced by the reforms in respect of conciliation (see Part IV(F)). The perspectives of scholars who have observed how commercial communities interact with legal structures likewise suggest that regulators should tread carefully in the compulsory imposition of alternative/appropriate dispute resolution processes. As summarised by one of the leading proponents of these studies, Stewart Macaulay, they indicate that

[o]ther-than-legal sanctions channel business behaviour in most cases ... Those who depart from acceptable practices risk losing a relationship or position within the group of traders ... Even where lawyers prepare elaborate contract documents, often the business people who carry out the transaction follow conventional practices rather than reading the written contract.²⁶⁰

A credible argument can be made that residential builders and owners likewise tend to prefer to make bargains informally and enforce them by means such as reputation-based sanctions. Whilst few empirical studies have been undertaken in respect of the way parties to residential construction (or, for that matter, commercial construction) interact with formal legal norms,²⁶¹ many anecdotal

256 Victorian Building Authority, 'Annual Report 2014–15', above n 254, 17.

257 Australian Competition and Consumer Commission and Australian Energy Regulator, 'Annual Report 2014–15' (Report, Australian Competition and Consumer Commission and Australian Energy Regulator, 2 October 2015) 7.

258 *BA* pt 12 div 2 sub-div 4B.

259 Department of Environment, Land, Water and Planning (Vic), above n 13, 48.

260 Stewart Macaulay, John Kidwell and William Whitford, *Contracts: Law in Action* (LexisNexis Matthew Bender, 2nd ed, 2003) vol 1, 483.

261 But see Richard Lewis, 'Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' (1982) 9 *Journal of Law and Society* 153.

observations can be found along the lines that ‘legal issues are ... no more than the backdrop to negotiations’.²⁶²

The complexity of the conciliation process, as drafted, is to a certain extent inevitable given the need to consider aspects across a spectrum from the need to comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic)²⁶³ to ensuring — as noted above — that parties only come to the process if they are ready to deal with each other in good faith.²⁶⁴ However, in the light of construction participants’ preferences for dispute resolution which they choose themselves, rather than having them imposed upon them, making conciliation a meaningful dispute avoidance process will require skilled and forthright navigation by officers of Domestic Building Dispute Resolution Victoria (‘DBDRV’), the parties and their advisers. Otherwise, the risk is that it may be seen as merely a speed-hump on the road to a binding ruling by VCAT rather than a viable alternative pathway leading to dispute resolution.

5 Insurance

The inadequacy of the existing regime — especially because of its ‘DDI’ basis (that is, recovery under the policy is contingent upon the Builder having died, disappeared or become insolvent)²⁶⁵ — has long been recognised.²⁶⁶ The 2016–17 reforms did little to address these shortcomings directly.

C Conclusion

Britton’s and Bailey’s admiring view of the Australian residential construction regulatory system as a nimble and responsive lifeguard was noted above.²⁶⁷ The 2016–17 amendments to the Victorian scheme have added potent weaponry to that lifeguard’s vessel, such as increased sanctions and the ability for an owner to have another builder rectify work.²⁶⁸ The risk, however, is that the added bulk of these reforms might turn the lifeboat into a lumbering, dreadnought class

262 Britton, “‘Make the Developer Get the Job Right’”, above n 95, 9. See, similarly, the discussion by Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart Publishing, 2013) 251–5 of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Productions)* [2010] 1 WLR 753.

263 See the statement of compatibility with that Act for the *2017 Amending Act*: Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4819–25 (Richard Wynne).

264 See the discussion of the coercive powers in Part IV(F). For a detailed explanation of the need for such a positive attitude in approaching issue (or dispute) resolution processes, see Gerber and Ong, above n 23, 226–8.

265 Victoria, *Victoria Government Gazette*, No S 98, 23 May 2003, cl 8(3). This was amended by Minister for Planning, ‘*Building Act 1993 — Domestic Building Insurance Ministerial Order*’ in Victoria, *Victoria Government Gazette*, No G 22, 29 May 2014, 1014, 1014 to provide for limited additional triggers, including where the VBA makes a rectification order in certain circumstances.

266 See, eg, Daniel Graham, *Domestic Building Insurance: The Story of the Worst Insurance Product in Australia* (24 February 2016) Choice <<https://www.choice.com.au/money/insurance/home-and-contents/articles/domestic-building-insurance#states>>.

267 Britton and Bailey, above n 95, 271; see above Part IV(A).

268 See above, respectively, Parts IV(D) and IV(F).

battleship which is of limited practical utility to vulnerable consumers and building practitioners.

As the analysis in Part V(B) sought to demonstrate, this generalised risk of regulatory over-reach is manifest in a number of subsidiary risks, including that competent building practitioners may inadvertently be caught in the net, and that the VBA (and, for that matter, DBDRV) may not be adequately resourced to discharge its expanded responsibilities. Generally speaking, however, the assessment in that section is that these risks have been appropriately anticipated within the regulatory regime.

That being said, a number of significant gaps continue to exist within the regulatory safety-blanket of residential construction regulation in Victoria. These include:

- the *DBCAs* (and its statutory warranties) not applying to single-trade work (including electrical work, glazing, insulating, painting, plastering and plumbing) not subcontracted by a Builder;²⁶⁹
- the performance-based nature of the *Building Code* and the risk that — as happened on the Lacrosse Building and potentially many other projects — an ‘alternative solution’ might be allowed, placing the safety of occupants at unacceptable risk.²⁷⁰ Whilst this is primarily a matter for the Australian Building Codes Board as the national standards-setting organisation (and, it should be acknowledged that Board has made significant inroads into addressing deficiencies in respect of fire-proofing in the light of the Lacrosse and Grenfell fires),²⁷¹ it remains an open and ongoing question for state-based regulators whether the *Building Code* provides an appropriate balance between public safety and fostering of innovation;
- various other loopholes, such as the ability for the Chief Officer of the relevant fire brigade to consent to a variation of the requirements of the *Building Code* where they are ‘satisfied that a satisfactory degree of fire safety is achieved’;²⁷² and
- the insurance regime: as noted above,²⁷³ the current reforms have done little to address the inherent limitations of the current system; as summarised by the Victorian Auditor-General, it ‘provides only limited protection for consumers,

269 *Domestic Building Contracts Regulations 2007* (Vic) reg 6.

270 See above Part IV(B).

271 Notably, by way of the Australian Building Codes Board, ‘National Construction Code 2016: Volume One Amendment 1’, an out-of-cycle amendment to the National Code directed primarily at fire safety in high-rise buildings, which was adopted on 12 March 2018.

272 This was in reg 309(2) of the *Building Regulations 2006* (Vic). In the light of the Lacrosse Fire, the Metropolitan Fire Brigade itself recommended removal of this power (Metropolitan Fire and Emergency Services Board, ‘Fire & Building Safety: The MFB’s Proposals for Reform of the Building Regulatory Regime’ (Report, Metropolitan Fire and Emergency Services Board, 12 November 2015) 40) yet it remains in reg 309(2) of the *Building Interim Regulations 2017* (Vic).

273 See above Part V(B)(5).

is significantly more costly for builders and consumers than it needs to be and is widely misunderstood'.²⁷⁴

Ultimately, the success of the recent reforms in Victoria (and, that of reforms being contemplated and implemented in other states and territories) will be judged by a simple test. This is whether they increase confidence that the fundamental goal of parties to the construction process will be realised. That goal is nothing more (nor less) than that the builder will produce a dwelling which is safe for occupants and otherwise meets the owner's reasonable expectations, and that the owner will pay the builder a fair price for its work.

274 Victorian Auditor-General, 'Victoria's Consumer Protection Framework for Building Construction', above n 111, 61.