



Submission on Building Act Review Discussion Document Cost-effective quality: next generation building control in New Zealand

Part 1.1 Clarifying the purposes and principles of the Building Act

Q1 Does the reference to sustainable development in the purpose statement (Building Act 2004 section 3(d)) provide clear and appropriate guidance to those administering the Act? If not, why not?

The use of this term in the Building Act is unclear in terms of its relationship with concepts of sustainability in the Resource Management Act (RMA). Clarification would help – is it about the use of sustainable products in buildings or is it about buildings themselves, or some other concept? Whatever the concept, it needs to operate as a guiding principle for those in administering the Act rather than be a fundamental purpose of the Act.

Q2 Should suitability for purpose be referred to in the purpose statement? If so, how should this be worded?

Buildings and building work/services do need to be suitable for their purpose, but to a certain extent the Consumer Guarantees Act 1993 covers this requirement. Some of the principles in s4, for example, the importance of the role of houses in peoples' lives and concerning durability of buildings for their intended use, seem to recognise suitability for purpose of buildings without the need for this to be a "purpose" of the Act.

Q3 Should other changes be made to the purpose statement? If so, what are they?

No.

Q4 Do you agree that all of the 16 existing principles (Building Act 2004 section 4) are necessary to guide those administering the Act? If not, which principles do you consider fundamental?

The principles are all relevant to buildings and building work in different ways and degrees, and will also be important at different times. This means it is difficult to describe any of the principles as more fundamental than another. Section 4 also only requires that the principles be taken into account "*that are relevant to the performance of functions or duties imposed*". It may be useful for those who have to apply the principles if they are grouped according to their "theme", to make it easier in any particular situation which principles are likely to be relevant.

Q5 Should other matters be referred to in the principles? If so, what are they?

It is important that those designing or carrying out building work have the appropriate skills for the level of building work they are designing or constructing. This may be a useful principle to include, depending on any expansion in relation to when the principles must be applied.

Q6 Do you agree that the purpose and principles should apply to building consent authorities in their administration of all, not just some, of their building control functions? If not, in which circumstances should they be able to make decisions without regard to the purpose and principles?

The purpose and principles do not currently apply at all to building consent authorities, only to territorial authorities carrying out some of their functions. Those bodies carrying out building control functions should not have to apply or consider purposes and principles of the Act as it could only serve to slow down those processes unnecessarily. Building control functions largely concern whether there is compliance with the Building Code; the purposes and principles of the Act should already have “fed” into that document, and any compliance documents or other documents giving guidance on the Code.

Q7 Do you have any other comments on the Building Act’s purpose and principles?

No.

Part 1.2: Clearer requirements in, and improved access to, the Building Code and supporting information

Q8 Do you agree that some Code performance requirements are ambiguous or unclear?

Parts of the Building Code need to be updated, and clarity improved, extending beyond the performance requirements. In particular, part A of the Building Code has had minimal amendment since the Building Act 2004 came into force and many of the defined terms conflict with those in the Act. For example, the definition in the Act of “means of escape from fire” includes active protection features (such as fire alarms and sprinkler systems), but those things are not included in the clause A2 definition of “escape route”. This in turn has an effect on the application of clause C of the Code.

The classified uses are also unclear, particularly the “uses” of buildings contained in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

The durability performance requirement, limit on application that provides B2.3.1 applies “from the time of issue of the applicable code compliance certificate”, needs amendment. This will reduce the number of determinations on this issue being dealt with by the Department and is also necessary in light

of more work becoming exempt from needing a building consent (and therefore no code compliance certificate will ever be issued) but building elements still need to meet durability requirements.

The use of the term “design occupancy” in clause D is unclear - clause D1.3.4(c) is inconsistent with NZS 4121 (a compliance document) and C/AS1 also has occupant densities that can be different for different types of building that may still come within the same “use” under the Regulations.

Work is still required on the relationship between the Building Act/Building Code requirements covering fencing of swimming pools and the Fencing of Swimming Pools Act 1987. The comments of Randerson J in *Waitakere CC v Hickman* 1/10/04, HC Auckland CIV-2003-404-7266 have still not been fully addressed:

“...a comparison of the separate provisions of the Building Code and the Schedule to the [Fencing of Swimming Pools Act 1987] reveals a most unsatisfactory inconsistency between the two...”

Q9 If so, what is the impact of this for you?

For lawyers, difficulty with legal interpretation of requirements for clients.

Q10 Which Code performance requirements do you think need to be clarified and which would you make top priority for clarification? (Note that work is under way on requirements related to visibility in escape routes and fire safety.)

See comments above for question 8. All the matters of clarification above are important, but the lack of clarity between the Building Code and the Fencing of Swimming Pools Act 1987 is the longest standing issue, as it was also a problem under the former Building Act.

Q11 Do you believe that Code performance requirements are well known to those who need to know them? If not, how could they be made better known?

N/A

Q12 Do you have any problems accessing Code performance requirements and supporting information (including Compliance Documents and Standards)? If so, what are the problems and what could be done about them?

The documents themselves are easily accessible on the internet. The layout of the documents could be changed as suggested, but this should be as an additional way of viewing them, not to replace the current layout.

Q13 Do you agree that the label 'Compliance Document' creates an expectation that it must be used? If so, can you suggest a better label for this type of document?

Agree.

Q14 Do you have any other comments on clarifying Code requirements or improving access to the Code requirements and supporting information?

No.

Part 2.1: Lowest risk building work exempt from consent requirements

Q15 Do you agree the items or areas of work listed in Attachment 1 are low risk?

N/A

Q16 Are there any items or areas of work listed in Attachment 1 that should not be exempt from building consent requirements? If so, which ones (please use identification number/letter when commenting) and why should they be subject to building consent requirements? Are there any limitations or conditions that would address your concerns?

N/A

Q17 What other items or areas of work do you think should be added to Schedule 1 of the Act? Why are these low risk?

By way of a general comment – before any more items are added to Schedule 1 there should be a clear definition for “low risk” and a clear process for identifying how that requirement will be met. In the push to streamline processes there is a risk that too much work will no longer need consent, and will not be subject to appropriate checks and balances (particularly if it is exempt work that a licensed building practitioner will not be doing).

Q18 Is there any essential or useful information that is currently gathered through building consent applications that would be unavailable under this proposal?

For building owners it is important to have a history of building work completed on a building, particularly where a professional has been involved. This is useful for maintenance reasons, but also if there is a need to take steps in relation to defective work. Any streamlined system should ensure that the current “history” of building work will not be any less complete.

Q19 Do you have any other comments on exemptions for lowest-risk building work?

There appears to be a gap in the suggested streamlined system relating to work that does not have to be done by a licensed building practitioner (LBP) and is not in the proposed exempt list, or is in that list but is only exempt if an LBP does the work. Will this work still follow the usual building consent process or can it be streamlined in some way?

The suggested system appears to be creating two streams of exempt work that will fall under schedule 1 – work which is only exempt if an LBP does the work, and other work. If an LBP is to do the work then it would seem that a system similar to the complex commercial building work should be used, or an even simpler system, instead of creating a second type of exempt work. The LBP should be required to lodge with the BCA, at the end of the work, plans relating to the work and a certificate confirming that the work has been done in accordance with the Code similar to that required in section 88 for restricted building work. Either a corresponding section or an amendment to section 88 would facilitate this suggestion.

Part 2.2: A more streamlined process for low-risk residential building work

Q20 Do you agree that building consent authority oversight and control of a building or building work should be in proportion to the risk and consequences of failure? If not, why not?

Yes, so long as protections for consumers are retained to an acceptable level. The reduction of BCA involvement will remove a significant area of protection for consumers that will not necessarily be compensated by the involvement of LBPs and sureties, etc.

Q21 Do you agree that licensed building practitioners should be able to be relied on to design and construct simple buildings that meet Building Code requirements without the level of third-party oversight currently applied? If not, why not?

Yes, provided the licensing system is robust. We are aware that there is a lack of skill and knowledge in the building industry that has arisen due to a number of factors, including the absence of an effective apprentice training system at certain times. Complete or partial failure of the licensing system will jeopardise the success of the proposed streamlining system. Heavy reliance on LBPs will not necessarily require a marked step up in qualifications or skills. If, as appears likely, most existing practitioners will obtain LPB status in the various categories, there is a concern that memoranda and certificates issued by some of those practitioners under steps 1 and 4 of the proposed streamlined process will not be reliable.

There is concern at the risk to consumers that may arise from the reduction of BCA involvement in the process, and resultant reduction in BCA liability in the event of non compliance or defect, that will require effective warranty and surety systems to overcome.

Q22 Do you agree that the proposed streamlined process is adequate to ensure simple buildings are Code compliant? If not, why not?

If the licensing system is effective in providing only skilled builders and designers with licenses, and licensed building practitioners are required to carry out the work then simple buildings should be Code compliant. There is a concern that this will not be the case by allowing more work to be exempt from requiring a building consent, if it is also work carried out by the owner, or an unlicensed builder.

Q23 Do you have any comment on the indicative steps in Table 1, including the notes to the table?

Step 3: Minimal inspections by the BCA will assist in speeding up the process, but clarity is necessary over whether the Council is limited only to the aspect they are inspecting. It is unclear what will happen if the inspector notices another non-compliant feature while inspecting, or has concerns about whether the designer's memorandum is correct in certifying code compliance. Refer to the comment on Step 4 below, which also applies to inspections by the BCA.

Step 4: This step refers to compliance with the Building Code but the current Act wording requires compliance with the building consent. Compliance with the Code is likely to be more appropriate in this revised process, but it will need to be clear that it is compliance with the Code at the time work started/the consent was issued.

Q24 Are there any other steps that should be part of a streamlined process for simple, low-risk residential building work?

No.

Q25 Do you agree that the foundations, framing and insulation, plumbing, drainage, claddings and flashings are critical elements that would still need to be inspected by building consent authorities in a streamlined process? If not, what elements do you think would still need to be inspected?

N/A

Q26 Do you agree with the criteria for buildings to be covered by the proposed streamlined process for simple, low-risk residential building work? If not, which criteria would you change and why?

They seem appropriate, but the process will rely on an effective licensing system, the Code being clear and unambiguous, and the warranties being adopted.

Q27 Should the proposed streamlined process apply to buildings covered by a MultiProof approval?
This system should be left at present to see if it works as proposed. It could be added to any new streamlined process at a later date relatively simply if this were provided for in the Act.

Buildings that fall within the Multiproof procedure will be constructed by a variety of building contractors in different places and under different conditions, and overseen by different BCAs. The streamlined process will need to make allowances for this.

Q28 Should the proposed streamlined process apply to any other low-risk buildings or building work? If so, how would you define which buildings or building work?

See comments for question 17.

Q29 Does the proposed process align appropriately with the rules on restricted building work? If not, why not?

They appear to, but there are no regulations yet concerning restricted building work.

Q30 Do you have any other comments on the proposed streamlined process for simple, low-risk residential building work?

No.

Part 2.3: A more streamlined process for complex commercial building work

Q31 Do you agree that people commissioning complex commercial buildings and building work are generally better informed and better equipped to hold contractors to account than consumers of residential building work? If not, why not?

Yes, but it will be necessary to identify clearly what work is included within the complex commercial building work category. For example, whether multi unit residential or part residential and part commercial will be covered, as it is likely that carrying out a building project for such a building would be no different than a project for a large hotel or office block building.

Q32 Do you agree that chartered professional engineers, registered architects and other licensed or certified professionals should be able to be relied on to design and supervise complex building projects that comply with the Building Code, without the current level of building consent authority review? If not, why not?

Yes, although we consider that the input of BCAs can be valuable in providing an objective sounding board on certain aspects of building design and construction. Developers and their consultants are subject to commercial pressures, and the removal of an objective third party in the form of BCAs may increase the risk of non-compliance. A requirement for peer review of at least structural aspects of the design at Stage 1 of the streamlined process and a memorandum from the peer reviewer could perhaps be adopted.

Developers of complex commercial building work will welcome the speed of the proposed streamlined process, but architects and engineers and their insurers may be wary of the proposed system.

Q33 Do you agree that the proposed streamlined process for complex building work is adequate to ensure buildings are Code compliant? If not, why not?

Architects, engineers and other professionals should have the required expertise and financial backing, and adequate insurance to protect the developers and owners/occupiers of complex commercial buildings. However, we are aware of a number of examples of current litigation on substantial multi-level concrete construction buildings where well-respected contractors, designers and engineers have been involved and with normal BCA involvement. This has not avoided substantial defects appearing in those buildings. Reducing the BCA's regulatory oversight of complex building work will not reduce the occurrence of such defects. These examples call for improved BCA oversight.

Q34 Do you have any comment on the indicative steps in Table 2, including the notes to the table?

There is no mention of the payment of building levies, which should not be required given the minimal involvement of the BCA.

Q35 Are there other building projects with the necessary quality assurance systems in place that could also be subject to the proposed streamlined process for complex commercial buildings?

No. We cannot comment on the appropriateness of other building projects being subject to the process until the scope of the term "complex commercial building work" is clearly defined.

Q36 Do you have any other comments on the proposed streamlined process for complex commercial building work?

No.

Part 2.4: Public Infrastructure Works

Q37 Do you agree that the building control system provides an appropriate means of ensuring the safety and quality of all public infrastructure works? If not, why not?

A process such as that for complex commercial buildings could also be used for this infrastructure, if that was considered necessary. However, a completely “self-contained” system may be all that is required.

Q38 Are there some categories of public infrastructure work where other arrangements may more efficiently and effectively ensure safety and quality? If so, what types of works and what sort of arrangements?

N/A

Part 2.5: Streamlined process for reviewing fire safety of building plans

Q39 At what point in building design and construction is Fire Service Commission involvement most useful? Please explain why.

Involvement before filing a building consent application is preferable to holding up the building consent process, but any review should not hold up a project at any stage.

Q40 What weight should be given to Fire Service Commission’s advice – for example, should it be treated as consultative input, should following the advice be mandatory, or should the weight given depend on the circumstances? Please explain why.

Mandatory, as at present. What would assist is for clarity as to the differences in interpretations of the building code requirements as between consent applicants and the FSC.

Q41 Do you have any other comments on fire safety review of building plans?

No.

Part 2.6: Improved process for building warrants of fitness

Q42 Do you agree that the administration of the building warrant of fitness and compliance schedule requirements is more complex or costly than necessary? If so, what issues does this cause for you?

The building compliance schedule and WOF process works adequately. There are instances of abuse of the system by building owners, and although such abuse may expose tenants or occupiers or visitors to some risk, the defaulting owner is himself exposed to risk of prosecution and financial cost.

Q43 Do you agree that there is a lack of clarity about building warrants of fitness and compliance schedules? If so, what is unclear and what issues does this cause for you?

Yes, there is a lack of clarity in some areas, but overall the system operates adequately.

Q44 What changes should be made to the requirements to simplify administration while still ensuring critical systems are maintained and inspected? You may want to comment on the description of specified systems in the regulation, the definition of 'independent qualified person', or any other issues.

N/A

Q45 Do you have any other comments on the building warrant of fitness and compliance schedule requirements?

No.

Part 2.7: More efficient building control administration

Q46 Do you agree that the number of building consent authorities and the variation in size is causing issues as outlined in Part 2.7? If not, why not?

The smaller BCAs do struggle with some of their functions, and there is inconsistency in decision-making (although that is not necessarily the result of numbers and variation in size, but could result from a lack of national direction and guidance).

Q47 Are there any other issues or problems resulting from the current administrative arrangements that have not been identified in this document?

We are not aware of any other issues.

Q48 Do you see benefits in greater cooperation between building consent authorities, or clustering or consolidation of building control functions? What would be the main benefits?

It could be expected that with a smaller number of authorities or clusters, that are better resourced, there would be both economic and efficiency gains.

Q49 Do you see costs and risks associated with greater cooperation between building consent authorities, or clustering or consolidation of building control functions? What would be the main costs and risks?

Clustering or consolidation means that “group” would deal with a greater number of consents and other functions. There would be a need to ensure that processes did not slow down or become more cumbersome because of this larger body dealing with it.

Q50 What, if any, role should the private sector have in the administration of building controls?

None – the private building certifier regime in the Building Act 1991 did not work, and there appeared to be a lot of failures in that sector. If building control functions are to become less, so that only the more complex, high risk work will have oversight from a building control administrator, then it is appropriate to keep that in the public arena rather than allow the private sector to be involved again. It will also be difficult for a private certifier to obtain sufficient/appropriate insurance, which is evidenced by the fact there are currently no private BCAs.

Q51 Which elements of building control require local input and why?

Local BCAs have knowledge of the local environment and sites for building work, as well as knowing the building practitioners. While a building project is underway there is a need for local oversight through inspections at crucial points and for the final inspection of building work.

Q52 Which elements of building control would most benefit from a national approach?

Approval of designs and plans, similar to the process being used for the new multiproof system. This would result in greater consistency across the country and provide a better process for the approval of innovative designs. The local BCA may still need to be involved to confirm that the proposed building site is suitable for the particular design.

Q53 Do you have any other comments on options for more efficient building control administration?

The proposals in this document will likely lead to improvements in the way BCAs carry out their functions. Improvements are also happening already as a result of the BCA accreditation process.

Rather than make a large number of changes at once, it would be appropriate to make incremental changes and to assess the effect of those changes before requiring further changes in the area of building control administration.

Part 3.1: Well informed consumers

Q 54 Do you agree that the Government should do more to inform consumers about their responsibilities and rights in relation to residential building projects? If so, why?

Yes, there is more that could be done to give consumers the ability to be better informed. Residential building projects affect the health and wellbeing of their occupants, and home ownership is New Zealand's primary form of investment. The consent and construction processes are controlled by legislation beyond the scope of most consumers. Better informing consumers as to their responsibilities and rights, coupled with other initiatives proposed in the review, should be promoted.

Q55 What further information do consumers need?

When consumers are considering entering into a construction contract, they should be given a simple standard form written 'warning' that construction is a highly technical area, together with details of where to find existing publicly available relevant information (for example, the Department of Building and Housing), and a suggestion that, if the contract is of significant value or importance to them, they consider obtaining specialist independent advice before proceeding. Amendments could be made to s397 (implied warranties) to provide for this, and also to provide that consumers be given a copy of, or be made aware of, the implied warranties. If written contracts are to be required (as proposed in the review and discussed below), the warranties should become express terms of these contracts and no longer "implied".

Q56 Should the Government publish information on acceptable standards of workmanship for residential building work?

Yes. However, consideration will be required as to how this information is presented. If it is merely a reference guide to appropriate New Zealand or Australian standards, while useful as a technical tool, it will have little practical benefit for consumers who do not have a technical background.

Q57 Are there other steps that would help consumers commission residential building knowledgeably and with confidence? If so, what are they?

See below.

Q58 Do you have any other comments about consumer knowledge and behaviour in relation to residential building work?

The residential building market for new buildings is relatively mature and sophisticated. This is evidenced by the well-known franchised residential building operators in New Zealand. Each has their own standard form contracts. Industry organisations (such as the NZ Master Builders Federation) also have their own standard form contracts. However, these invariably favour the builder, particularly in terms of payment, hand over and security clauses, such as agreements to mortgage. Consumers are heavily reliant on the builder's knowledge and their contracts.

The residential building market for renovations is less well organised, and consumers are less informed. Standard form contracts are not generally focused on remedial or renovation work.

Part 3.2: Improved contracting practices

Q59 Do you agree that contract arrangements between consumers and principal building contractors for residential building projects need to be strengthened? If so, why?

Yes. Certainty of outcome of the contracted services is important. The standards applicable to materials and workmanship, delivery, payment and dispute resolution need to be strengthened. The majority of residential building contracts currently in use are produced by the building industry, and favour the builder.

Q60 Do you agree that all contracts between consumers and principal building contractors for residential building work should have to be in writing and signed by both/all parties? If not, in what circumstances, or for what type of building projects, should written contracts not be required?

Yes, subject to a materiality threshold (for example, where the proposed work will affect the weathertightness of a building envelope, or the overall structural integrity of a building, or in any event where the contract price is to exceed some appropriate monetary threshold). It is recommended that a requirement for contracts to be in writing be coupled with a suite of approved forms of contract. This could be achieved through Standards New Zealand. In this way different types of work, such as new home construction, major and minor works (new or renovation) could be addressed. The latter two categories could be differentiated by the quantum of the work involved (say less than \$10,000 for minor works). The review records that of the 56,000 homes the subject of building consents in 2009, some 60% were for renovations.

Currently the Construction Contracts Act 2002 (CCA) covers both oral and written construction contracts. This would need to be amended in relation to ‘residential construction contracts’ (defined in s5), but the status quo should apply to commercial construction contracts. Parties to commercial construction contracts are able to protect themselves adequately. This has been confirmed in a series of recent High Court and Court of Appeal decisions regarding councils’ duty of care in regard to leaky buildings.

The question posed is regarding ‘principal building contractors’. Consumers engaging various trades, rather than a single head contractor, still need the same protection afforded by mandatory written contracts. This could be addressed in the suite of approved contracts.

Q61 Do you have any comments on the proposed minimum terms for contracts as set out in Part 3.2? Please indicate what, if any, information you would like to see added to or removed from the proposed list.

The default provisions in ss15-18 of the CCA should also be added. These should apply in the event that the construction contract fails to provide for one or all of them (which should not arise if there is a standard form residential construction contract). However, minimum terms covering matters such as how to value variations, when payment claims are to be submitted, when and how the consumer is to answer those payment claims, and a due date for payment, are essential.

In addition, the following issues should be minimum contracts terms:

- responsibility for obtaining building consent and compliance with statutes, regulations and bylaws;
- licence to enter and use the site;
- care of the works and site, and protection of person and property;
- identification, protection and repair of underground and above ground utilities;
- obtaining of regulatory inspections and code compliance certificate;
- suspension of work;
- indemnities;
- insurance (contract works, materials, public liability, professional indemnity-design);
- 'completion';
- maintenance/defects periods;
- dispute resolution (including mediation, adjudication, arbitration);
- frustration and default;
- consumers' maintenance obligations (so as not to breach any warranties).

Written contracts could also provide for a 'cooling off' period, before the works begin, and during which consumers could decide to terminate the contract for any reason. This would enable consumers to take independent advice even after having signed the contract (as consumers frequently seek to do after having signed agreements to purchase real estate). There are examples of statutory 'cooling off' periods, including s27 of the Credit and Consumer Finance Act 2003.

Q62 Do you have any comments on the proposed required disclosures for residential building projects? Please indicate whether there is any information you would like to see added to or removed from the proposed list of required disclosures.

No.

Q63 How should information required to be disclosed be provided?

As early as possible, and in writing in a standard form. This information should accompany any quotation/estimate/tender so that it forms part of the consumer's decision making process prior to entering a contract.

Q64 Are there other steps the Government could take to improve contracting practices for residential building projects? If so, please indicate what additional measures should be taken.

Refer to answer to next question.

Q65 Do you have any comments about contracting practices for residential building work?

If there is to be a requirement for written contracts for some building works there needs to be appropriate methods for enforcing this requirement and penalties for non-compliance. The obligation should be on the builder rather than the consumer. One method of ensuring written contracts are entered into may be to link the requirement to use written contracts with the licensed building practitioner requirements (for example, before becoming licensed the practitioner would need to show an understanding about contracts and when to use them, as well as an understanding of the CCA). An LBP who does not use written contracts when required could then be subject to the disciplinary procedures in Part 4 of the Act. However, for non-LBPs, there would need to be other methods of enforcement and penalties.

Part 3.3: Develop more effective warranties

Q66 Do you agree there should be a mandatory warranty for residential building work? Please give reasons.

Yes, and there are already mandatory warranties in ss397-399 of the Act. For clarity these should be fully set out in all written residential construction contracts.

Q67 Which of the options for warranty listed in Part 3.3 do you prefer? Which do you disagree with?

- *Length*

Required. It is not difficult to differentiate between building elements that are critical and those that are non-critical. Such differentiation exists in the Building Code in defining the durability of building elements (B2.3.1) (but please refer to our comments about the "start" of any durability periods above, under question 8) . Consistent with B2.3.1 (c), non-critical elements should be 5 years. However, it would be unrealistic for critical elements to use the 50 year period (B2.3.1(a)). Instead the 10 year long stop period should apply (s 393, BA04).

- *Cap*

Not required. Capping the statutory warranty either to the contracted value of building work or a fixed amount could disadvantage many consumers. Even in these recessionary times there has not been a corresponding drop in labour costs, let alone material costs. Accordingly, it will always cost more to repair a building in the future than it would when it was built. The difficulty with a fixed amount is determining an amount that will not disadvantage any consumers. An uncapped warranty has not caused any problems to date.

- *Coverage*

Required. However, ‘suitability of the premises for habitation’ seems unnecessary when the first bullet point requires compliance with BA04 and the Building Code. Both adequately cover this.

It is unclear why there should be a warranty for calculation of claims for provisional sums, other than to ensure the figures recorded are a fair estimate of the final cost. This could be addressed in the written contract.

There is not a warranty to fix defects (later referred to as the ‘warranty service obligation’). This should be included as a separate warranty item.

- *Loss of deposit and non-completion*

Required.

- *Circumstances where the warrant service obligation could be voided*

It is not unreasonable to require that the service obligation warranty be subject to fair wear and tear, and ordinary maintenance obligations of the owner. It would be unreasonable for the builder to be bound by a statutory warranty that far exceeds that of the manufacturer, for example a particular exterior cladding, where the consumer had not maintained the cladding as per the manufacturer’s specifications.

This does highlight the need for contracts to contain a term requiring the builder to inform the consumer fully of those maintenance obligations. There are a few examples of builders and developers that provide consumers with a comprehensive package of manufacturer’s specifications/maintenance requirements for both appliances and building materials. This should be standard practice.

Notwithstanding a lack of maintenance this should not automatically void the warranties. It would be incumbent on the builder to establish that the lack of maintenance was the cause of the failure, and not its own building work/materials.

- *Projects covered*

As noted above, from the Review figures 60% of the 56,000 homes the subject of building consent in 2009 were for renovations. There is no practical reason why the warranties should be limited to new residential dwellings only. Our recommendation is that it should be for all building works. It is also our recommendation that the warranties should be for building work even if it does not require a building consent. Such work is still required to be completed in accordance with the Building Act (s17).

Similarly, there is no reason why a monetary threshold should be imposed.

- *Other issues*

It has been suggested that the statutory warranty could be assigned to the building, so that subsequent owners have the same rights and obligations as the original owner. This is recommended.

Q68 Should the building owner be able to renounce the offer of a warranty by a building contractor by signing a notice revoking the warranty?

No. There is a real risk that a builder with its own standard form contract will as a matter of course require the warranties to be removed. The consumer may not understand the effect of this deletion or simply not be in a position to restart the tender process with a new builder. Such a clause could easily be misused by a builder or developer.

The mandatory application of all warranties (as presently in the BA04) provides certainty for all consumers and builders.

Q69 Should developers be required by law to provide third-party warranty cover?

The issue regarding liquidity of developers, use of special purposes companies, is the same issue faced with incorporated builders and owner-builders. All three are already subject to the mandatory warranties in the Building Act (s396). Developers also have a non-delegable common law duty of care to subsequent owners.

The real issue, which should apply to developers, builders and owner-builders, is the need for a surety as a financial backstop, as covered in section 3.4 below. Singling out developers would then be

unnecessary. Also, the primary party responsible for compliance with the Building Act/Code is the builder.

Any statutory obligation that developers always provide third party warranty cover would be unduly inflexible. Provided consumers are adequately informed of the risks of not obtaining third party warranty cover, they ought to be entitled to choose to accept those risks rather than pay to remove them.

Q70 Should owner-builders, or those who renounce the offer of a warranty, be obliged to:

- *disclose on sale of the building that no warranty is offered?*
- *purchase a third-party warranty on sale of the building?*

In the event that building warranties were not mandatory (which we do not suggest), then it should be an obligation on the sale of the property for disclosure that no warranty was offered. This should also be recorded on the property file held by the building consent authority (in the event of the work requiring a consent) so as to appear on the LIM report.

This question implies that owner-builders are not obliged to provide a warranty. Owner-builders are caught by s396 and the mandatory warranties in ss397-399. As recommended above, there should be no differentiation between builders and owner-builders when it comes to providing warranties. Consideration should be given to requiring disclosure, where there are warranties, of whether they are backed by any third party and, if so, the name of that third party and details of any limitations on that third party's liability.

Q71 Should the building contractors upon retiring or winding up their company be required to transfer service obligations to another party:

- *with prior notice to affected building owners??*
- *with prior consent of building owners?*

A third party would only take on such balance of the warranty obligation for an appropriate fee. For this to work in the event of an individual builder's death would require his/her estate to pay that fee. As for a company placed in liquidation, it cannot be expected that the liquidator become liable for that fee.

However, this does raise a serious issue, to ensure a process in either of the above situations that the balance of the warranty service obligation is honoured. The simplest arrangement is for a surety backing to the warranty.

In that situation, on the retiring or winding up of the builder, notice should be given to the affected building owner, but consent should not be required. This is because the surety should be disclosed as part of the disclosure obligations at tender time and recorded in the building contract.

Q72 Do you have any other comments on warranties?

No.

Part 3.4: Surety as a financial backstop for warranties

Q73 Do you agree that building contractors should have to disclose whether they have surety backing? If not, why not?

Yes. This should be a factor in the decision of the consumer as to whether to enter into a contract with a builder contractor.

Q74 Do you agree that building contractors should be obliged by law to have surety backing? If not, why not?

Yes, if the proposal to reduce, and in respect of low risk buildings remove, BCA inspections proceeds. This would place an overly heavy reliance on builders and LBPs to self regulate their building standards and compliance. Also for the reasons noted above regarding the retirement or liquidation of builder (and developers).

It is therefore critical to the success of the proposed changes to the Building Act that all warranties are backed by a surety of some standing.

Q75 What do you see as the benefits and/or costs of mandatory surety? What is your view on when the benefits would outweigh the costs?

The benefits of a surety system are covered above. Those benefits may appear to be outweighed by the costs where the surety fee, as a percentage of the contract price, becomes too great. This will be felt most with lower value building works.

However, as with any 'insurance' type cost, in the event that the surety is called upon to finish a new home or rectify defects, that initial cost will pale in comparison to the financial and emotional costs of dealing with defects in the family home. The leaky home crisis has more than highlighted this.

Consumers will benefit from surety providers own assessment of the builder. In setting their fee surety providers will assess the performance of the builder. This will introduce another level of quality control in the building industry. This will present its own challenges for builders.

Q76 Do you agree with the proposed list of required disclosures about surety? Is there any information that should be added or removed?

Yes.

Q77 If surety was to be mandatory, should surety providers be restricted in their ability to pursue other negligent parties such as building consent authorities?

No. Surety providers should have the same rights to pursue other negligent parties, especially BCAs, as is the present law. The direct result of such limitation will increase the surety fee and therefore increase the cost to the consumer. On current judicial determinations of BCA liabilities it is generally accepted that they are liable for around 20%, but where the developer and builder are no longer ‘alive’, the BCA meets the full sum awarded to the plaintiff (for which the BCA is a joint tortfeasor). It is quite feasible, as with insurance companies now declining to cover for leaky building defects, that removing this right could see surety providers unwilling to provide that service.

The comments on the current law position of joint and several liability for building defects commonly found between builders, developers and BCAs are identified on page 7 of the discussion document, and include:

The fact that in negligence cases related to leaky buildings where liability is apportioned between several parties, the payment of damages (financial compensation) must be shared by the parties. Where some of the parties cannot pay their share, the cost of damages must be carried by those who can pay, and in practice this means that the ‘deep pockets’ of local authorities, as the parent organisations of building consent authorities, are covering much of the cost. This reliance on building consent authorities is out of balance with their actual ability to influence building quality through documentation and inspection, and their capacity to do so without considerable cost. It has had the consequence of imposing higher-than-necessary costs.

Although there is no express suggestion in the review that joint and several liability be reduced or completely removed for BCAs, if this was to be a result of the review, it would be a significant change in the law in New Zealand. If this occurred, consumers would be vulnerable to little or nil recover for the failure of a builder or developer in the event of their insolvency.

It is not appropriate to be dealing with such a critical legal issue in the context of this review. A move to proportional liability should be addressed in a separate specific review on which submissions from a wider audience than those just in the building industry should contribute.

Q78 Do you have any other comments on surety?

No.

Part 3.5: Better access to dispute resolution

Q79 Do you agree that consumers currently face barriers or problems in resolving disputes with building contracts? If so, why?

Yes. Construction disputes are a specialised type of dispute, notwithstanding their essential founding in contract. This has been recognised in the UK where a separate technology and construction court operates. It is also one of the reasons why nearly every standard form construction contract contains an arbitration agreement (clause) and in most common law jurisdictions there is legislation dealing with arbitral proceedings.

Another barrier to consumers is cost. Proceedings in arbitration and in court for claims less than \$50,000, and in some instances less than \$100,000, become a marginal exercise once expert and legal costs have been expended. The current delays in the courts are also a deterrent. It is yet to be seen whether the new District Courts Rules procedures will materially reduce delays.

Q80 Do you agree that consumers need more information about options for resolving disputes with building contractors? If so, how could this be provided?

Yes, but this could be resolved by the suggestions below.

Q81 Do you think there are adequate services available to resolves disputes between consumers and building contractors? If not, what other dispute resolution services do you suggest?

Refer answers above.

There has been little improvement of late in the resourcing of District and High Courts to overcome the long delays for hearing time. To add another division to either forum to deal solely with building disputes is unlikely to receive judicial or political support.

The experience with the Weathertight Homes Resolution Service and the Weathertight Homes Tribunal would strongly suggest against setting up a specialist tribunal for building disputes. This is unnecessary given the effective and efficient system currently running under the CCA.

The CCA already provides for 'residential construction contracts' (s5) and for dispute resolution through the fast-track adjudication procedures (Part 3, ss25 – 71). There is one authorised nominating authority that already provides a low value claim fixed-fee adjudication process for claims under \$10,000 and claims under \$50,000.

There are, however, impediments to the CCA as currently drafted in that, principally for the protection of the consumer, adjudication determinations of residential construction contracts are effectively unenforceable. This can be easily remedied by amending various provisions of the CCA, primarily by deleting s10 (and s58(2)).

Consumers would need to be given standard form information about the adjudication procedures before entering into a construction contract.

Q82 What would be the characteristics of an appropriate dispute resolution service?

As per the adjudication model under the CCA.

Q83 Do you have any other comments about disputes between homeowners and building contractors?

The definition of dispute (s5) in the CCA would need to clarify that it also covers disputes in relation to warranties (implied or solely within the BA04). It would also be in the consumer's interest to include disputes with sureties, especially in the event of the retiring or winding up of the builder, be included in the disputes referable to an adjudicator.

Part 4: Impacts of improving building control

Q84 Is it realistic to assume residential consumers, building professional and tradespersons, and building consent authorities would behave differently if this package of proposals was introduced?

Please comment

Yes, to the extent that changes to the law changes behaviour either directly, or indirectly (by shifting the 'balance of power' more towards consumers).

However, the consequences of reducing regulatory control by BCAs in the building process have been graphically seen in the leaky building crisis. The lack of accountability for the certification of new

products (principally monolithic cladding and untreated timber), the delegation of inspection roles to independent inspectors (thereby relieving the BCA from liability for negligent acts of the inspectors, but without any liability to ensure they performed properly or maintained professional indemnity insurance) and the relaxation in the form of the Building Code (in 1992), all contributed to this crisis.

The proposal to reduce further the inspection services of BCAs and the possibility of removing joint and several liability for BCAs will not ensure builders improve the quality of their work or compliance with the building code. It remains to be seen whether the licensed building practitioner regime will ensure improved quality building work. If it does not improve (the LBP system is not robust) and/or a warranty or surety system does not work then the reduction in BCA involvement in building processes may make the situation worse for building owners.

There is in fact a risk of a repeat of the leaky building crisis.

Q85 Have the main benefits of the package of proposals been identified above and, if not, what is missing?

Individually the benefits of each proposal have been recognised, and these comments on the Review make recommendations for improvements to each proposal that will enhance those benefits. However, it is not clear that sufficient recognition has been given to the importance of the package as a whole; there is a need for each proposal to work if there is to be any improvement overall in the building control system. If any one of the proposals does not come to fruition then that may result in an imbalance in the proposed new system. For example, reduced involvement of BCAs must be balanced by a system that ensures the work of building practitioners improves and if it doesn't, there is a sufficient backstop.

Q86 Which benefits do you expect to be most significant and why?

The most significant benefits for BCAs are a substantial reduction in inspection services and more importantly in avoiding current and future liability for building defects.

For consumers, written residential construction contracts with minimum terms, coupled with mandatory warranties and sureties, and dispute resolution through the CCA.

For reputable builders and developers, perhaps a levelling of the playing field between them and their competitors.

The reasons have been addressed above.

Q87 Have the main costs of the package of proposals been identified above? If not, what is missing?

No. The costs for providing a surety for the warranties and the costs to consumers if proportional liability for building defects is introduced [this could have an effect for other “players” not just BCAs, particularly in building cases where a BCA is not one of the defendants].

Q88 Which costs do you expect to be the most significant and why?

The costs of third party warranty support/sureties.

Q89 What are the main risks associated with the package of proposals?

First, maintaining the current focus on reducing the involvement of BCAs while assuming builders will improve their standards of workmanship and compliance. This coupled with the possible introduction of proportionate liability would see a repeat of the leaky building crisis.

Second, the package currently does not go far enough in relation to warranties and a surety scheme. All the proposals, including those recommended herein, need to be implemented as a cohesive package for it to work.

This leads to the final risk – the ability of the DBH to effect the proposals. This is raised given the length of time taken already to implement an essential component of this and earlier reviews – the licensed building practitioners scheme.

John Marshall QC
President
23 April 2010