NEW ZEALAND INSTITUTE OF ARCHITECTS INCORPORATED

Review of the Building Act 2004
Submission to the Department of Building and Housing
by the New Zealand Institute of Architects Incorporated

Introduction

The New Zealand Institute of Architects Incorporated (NZIA) is a professional organization representing a membership of over 2830 which includes some 90% of Registered Architects in New Zealand.
The NZIA wishes to make a submission to the Department of Building and Housing (DBH) in relation to the Review of the Building Act 2004 (Act) announced by the Hon Maurice Williamson, Minister for Building and Construction on 27 August 2009.

This submission is based on the Building Act Review Discussion document, Cost-Effective Quality: Next Generation Building Controls in New Zealand, February 2010.

Building Act Review

We have consulted widely with NZIA members in assembling our Building Act Review Submission. Some members provided a general overview of their priorities for amending the Act. A group looked at the sections of questions within areas of their expertise with responses reviewed by the wider group.

The following is a list of critical points, some of which have been covered in more depth in the questionnaire and others of which fall outside the scope of the review document.

Key Points:

- **Joint & Several Liability has to end as it is inequitable and open to exploitation.** Alternatives are Construction Industry only Proportional Liability or Contract Agreed Liability which we understand is being currently reviewed in the UK. This need not run counter to legal principles applying to non-building projects. Correcting this is inter-dependent with the Warranty and Surety Scheme.

- **We need a Warranties and Surety Scheme.** Projects need to be insured on a project by project basis and in a way that does not rely on the continued solvency of the parties in the contract. Buildings are prototypes with a higher risk of failure than that of mass produced products. Such a scheme would ensure that failures can be corrected with responsibilities sorted out later. This should also cover negligent liability to subsequent owners.

- **Construction Standards need to be well funded.** This is so that they can be regularly reviewed and priced so that those that need to use them have ready access to them.

- **BRANZ needs to be well funded.** This is to ensure that evolving building systems are well researched.

- **DBH needs to work more closely with Standards NZ, BRANZ and other research bodies**. This is to ensure that our Building Code continues to be evidence based and backed by up to date Standards.

- **There needs to be a National BCA.** Consistency across BCA's can be corrected by the proposed centralised BCA with a more direct dispute resolution path especially for alternative designs. Local government should be removed from their building compliance control role and local BCA offices of the national agency used. This will also correct a perceived gap in BCA competency. Because of work load and complexity, BCA's find it difficult to process both residential and complex buildings especially with the single overseeing official approach. This can be corrected by placing more emphasis on self certification and peer review as a way of demonstrating compliance, better access to specialists within the BCA, and increasing the required qualifications for officers.

- **There needs to be more reliance placed on Building Design Professionals**. All projects with a registered design professional as the lead consultant should be able to use a streamlined Building Consent process.

- **Concurrent review of the Construction Contracts Act.** The review of the Building Act should also include a review of the Construction Contracts Act as it is this Act that should establish the legal framework for construction contracts.

- **Mandatory Contract Terms.** Contracts for building work, whether written or informal, should be required to meet mandatory minimum terms. This will ensure that parties are protected where they have not got and would not be expected to have an in depth knowledge of contractual requirements or risks.

- **Project Responsibilities need to be clearly set out.** At each stage of every project it should be clear who is responsible for each task. During construction this would require a nominated person to have overall responsibility for performance in accordance with compliance standards and contract requirements.

- **Classes, not types, for Project Complexity.** Projects are more clearly separable into just Simple and Complex classes with different compliance pathways for each. Complex housing is just as challenging as complex commercial while many commercial developments such as warehouses have simple building compliance considerations.

- **Clear Peer Review Process.** Architects should be able to peer review the clauses of the Building Code that they are responsible for such as E2 Weathertightness except where a Façade Engineer has been engaged as the primary designer.

- **Clarity for signing off construction as NZBC compliant.** There is often disagreement on site over whether systems meet NZBC requirements. It needs to be clarified that the Consenting Officer takes the lead and the Building Inspector checks the Construction

against the Building Consent Documents with any apparent non-compliance outside these documents being referred back to the Consenting Officer. There also needs to be a quick, efficient and cost effective process for resolving any continuing disagreement.

1.1 CLARIFYING THE PURPOSE AND PRINCIPLES OF THE BUILDING ACT

1 Reference to sustainable development in the purpose statement (Building Act 2004 section 3(d):

No, it does not provide clear and appropriate guidance and it needs to be clearly defined.

No matter how sustainable development is defined there will always be conflicting interpretations. The Act should define which sustainable development provisions are important to make it easier for those interpreting it. Because Sustainability of buildings, their performance and their materials are looked at in so many different ways, clearer definition of these broader areas needs to be incorporated. The key issues of:

a) energy efficiency of buildings (low energy use);
b) low carbon impact and reduction of waste (from the construction process and from high maintenance materials);
c) embodied energy in materials and best use of finite resources;

are at times contradictory.

Through an extended process of developing clear working tools for the building industry, these issues are well known. The NZIA recommends a close working relationship with the NZGBC in clarifying any confusion in the terminology used in the Act.

2 Suitability for purpose in the purpose statement:

The required performance of buildings should be risk appropriate to the purpose(s) that the building is intended to fulfil. Where the risks are high there needs to be a higher bar for compliance than where the risks are low.

Suitability for (or "fit for") purpose is a catch all term typically used when a failure occurs and a clear apportionment of cause is difficult to find. It is open to interpretation. The Act should steer clear of such broad and misleading terminology and be very clear on what is suitable.

3 Changes to the purpose statement:

No Comment.

4 The 16 existing principles (Building Act 2004 section 4):

Some NZIA members believe that the 35 Objectives of each of the Building Code clauses should be made part of the Act, but these are subject to change with time. Others believe that the underlying principles of the Act are clearly detailed so that the development of Building Regulation and controls can be benchmarked back to these principles.

5 Should other matters to be referred to in the principles?

Yes

Competency of those involved in the design, review, construction, final certification and maintenance of buildings needs to be a clear principle with clarity around competency and training appropriate to dealing with differing levels of complexity.

There is a need for proper maintenance of critical building elements to ensure they do not degrade through time.

Much of the design for childhood facilities such as preschools does not adequately take children's size and dexterity into account. This sometimes leads to poor design based on an adult sized code.

It is important that people undertaking both building design work and construction are appropriately qualified and for more complex work, registered.

6 Do you agree that the purpose and principles should apply to building consent authorities in their administration of all of their building control functions?

Yes, we agree that they should apply but there needs to be guidance on how to handle contradictory requirements.

7 Other comments on the Building Act's purpose and principles:

The purpose of the Building Act and the regulations are to control building where the absence of regulation would result in:

a) disparities in quality;
b) avoidable life/injury risk; and or
c) loss of wellbeing.

It should also address infrastructure costs and conservation of resources. It needs to do this openly so that the Act can be amended to keep up with increasing knowledge and changes in the supply and demand of resources. The principles should set out objectives that address these issues.

The Act needs to be clear about its relationship with other associated Acts which set out clear responsibilities, such as the Construction Contracts Act and the Registered Architects Act.

The Act should encourage the attainment of competent skill levels and acknowledge competency as being the single most important factor determining quality (above regulation). Policy concerning all LBP's needs to have this as a key principle.

1.2 CLEARER REQUIREMENTS IN THE BUILDING CODE

8 Are some Code performance requirements ambiguous or unclear?

Yes. There is a difficulty in defining some requirements clearly which must be corrected in order to have an effective and well understood process. Wellbeing in particular is difficult to quantify as it has many aspects. It is an aspiration and perhaps we can only ask for evidence that these issues have been considered and given adequate weight in the design. Even a quantifiable parametric such as temperature does not adequately quantify thermal comfort which is also dependant on activity, age, health, adaptation, clothing, length of exposure, air movement, humidity, radiative surfaces, previous exposure and food intake.

Any code provision needs to balance both the cost benefit when compared with other provisions and the nature of the risks resulting from a lesser or no provision

9 Impact of this for members

Time:
The biggest impact results from the nationwide skill shortage in BCA consenting personnel. Current personnel often lack understanding of the performance requirements and this lack results in huge project expense while the BCA grapples with issues and seeks clarification. It is clear that, with more options available, consenting times will continue to increase unless the staff dealing with these issues have a thorough understanding through requisite education.

Lack of consistency across different BCA's:
The current system results in poor consistency of decision making in the consent process as each BCA (and each person within that BCA) places a differential emphasis on each potential issue. When alternative solutions are proffered often little value is placed by the BCA on appropriate precedent.

Unclear design responsibility:
Architects, as well-trained professional designers, face the everyday prospect of their work being reviewed and sometimes unnecessarily and questionably altered by less skilled personnel at the BCA. This results in unclear design responsibility.

There need to be performance parameters for engineering based design but these should not be mandatory unless there is a very clear relationship between the objective and the parameter. The objectives need to be mandatory while the performance criteria should guide of how the criteria can be shown to be met. This needs to be clear in the legal framework so that gaps in the performance criteria cannot be exploited [by BCA's] nor become onerous such as where they are required by the code but fail to provide overall benefit. As architects we prefer to be able to argue on first principles that a design meets or does not meet a code performance requirement. Such a system will take time to develop and we are happy to work with the DBH on this. Under this pathway the BCA would not be required to fully comprehend the nature of the design solution but only to ensure that the QA process has been followed.

10 Code performance requirements to be clarified:

Accessibility: This is based currently on NZS 4121 and does not adequately address all disabilities or even current thinking. Either all of NZS 4121 should be captured by the NZBC or Standards should be funded for a full review of NZS 4121 with wide balance and consultation, particularly from the design side.

Safety from falling: The AS is too prescriptive without having adequate safety parameters. One example is the 1m height determinant for balustrading; a fall from 500 onto concrete probably has a higher risk of severe injury than a 2m fall onto soft grass. The likelihood of falling also needs to be included. In a private home, occupants are unlikely to fall from a well lit generous-width open sided stair. On decks the view can be more important than edge safety and so some sort of soft fall or nets are a better response than glass screens.

H1 insulation requirements do not correlate to thermal comfort and there are other means of achieving this such as solar gains and thermal storage that are not currently part of the performance requirement metric (BPI). Attempting to minimize energy use by requiring only insulation is neither resource nor cost efficient. There needs to be better modelling that takes all parameters into account.

Performance requirements should relate to risk and expected accident rates. A facility of high use by unfamiliar users needs a high level of safety, while a facility with a few familiar and able users needs a low level of safety. Shifting the money from low risk to high will give better outcomes.

E2 needs regular and thorough review. As with the note on accessibility, it needs to work in parallel with a number of well written Standards. It also has to set strong guidelines to deal with new materials and be informed by the leaky building issue for which there is currently no clear channel to bring together information about common and problematic issues and their potential solutions.

11 Are Code performance requirements well known to those who need to know them?

No, more extensive metrics should be provided for the code clauses where this is appropriate, but this should be as guidance to achieving the clause objectives rather than a mandatory requirement.

There is a general lack of knowledge and skill at TA level.

12 Problems accessing Code performance requirements and supporting information:

None.

13 Does the label 'Compliance Document' create an expectation that it must be used?

Yes. We suggest "Approved Document" is a more descriptive label.

14 Other comments on clarifying Code requirements or improving access:

Standards which are primary Compliance Documents such as NZS 3604 and NZS 4121, should be made freely available and funded through taxes and building levies, perhaps to a similar revenue level to that currently achieved by Standards New Zealand.

2.1 LOWEST RISK BUILDING WORK EXEMPT FROM CONSENT REQUIREMENTS

15 Are the items or areas of work listed in Attachment 1 low risk?

Yes.

16 Items or areas of work that should not be exempt from building consent requirements:

Item C. There needs to be design guidance provided which should be followed. There is for instance no area or door height requirements in the NZBC so there should be some rules that should be followed if there is neither designer nor BCA involved. These could be a separate document similar to the Simple Home Guide.

Marquees and tent structures should be exempt if designed by engineer and limited to defined wind speeds and areas, and configuration has a supporting escape plan for fire

17 Items or areas of work that should be added to Schedule 1 of the Act:

Huts up to 5m2 with no floor further than 3m from the ground and soft fall.

18 Essential or useful information that would be unavailable under this proposal:

Planning information relating to site coverage, permeable/ impermeable areas, maximum height, etc and architectural style pertaining to character zones.

19 Other comments on exemptions for lowest-risk building work

Exempt structures may still need recording for planning purposes, and storage of documents with TA's.

2.2 STREAMLINED PROCESS FOR LOW RISK RESIDENTIAL BUILDING WORK

20 Building consent authority oversight and control of a building or building work, proportion of the risk and consequences of failure:

There is a need for a better understanding of those risks and consequences of failure, and how they might relate to individual projects.

21 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?

Yes, as long as there is a robust warranty or surety scheme to back that work and/or a process that highlights the lack of third party oversight to future buyers and allows for full building surveys to be carried out as part of an agreement to purchase which may provide such a warranty/insurance as part of that survey.

22 Is the proposed streamlined process adequate to ensure simple buildings are Code compliant?

Within the level of risks involved, yes. Most buildings have some non critical code deficits and this is acceptable.

23 Comments on the indicative steps in Table 1:

This is fine but should exclude risky building products and material interfaces. In other words the palette of materials for simple buildings should be limited to those that have been verified and with details verified to all other materials in that palette.

24 Other steps that should be part of a streamlined process for simple, low-risk residential building work:

No comment.

25 Are foundations, framing and insulation, plumbing, drainage, claddings and flashings are critical elements that would still need to be inspected?

No, these should only be audited where inspection can be done after the fact such as for cladding or for insulation using, say, infrared cameras, otherwise there still needs to be an independent inspection regime. The BCA should be notified at the potential inspection points and then may either choose to inspect at random or where there is a higher risk of non-compliance. Inspections would still be able to be requested if desired. The stick for randomly inspected systems would be that if a critical fault was found in an audit, past uninspected projects would also be audited as part of a QA process and faults rectified on those past projects also. Overall this will save costs.

26 Criteria for buildings to be covered by the proposed streamlined process for simple, low-risk residential building work?

Yes, we agree with the criteria.

27 Should the proposed streamlined process apply to buildings covered by a MultiProof approval?

Yes

28 Should the proposed streamlined process apply to any other low-risk buildings or building work?

An assessment could be made as to whether low risk building work might also include work at the next level down in competency. Level 2 LBP's may be permitted to do Level 1 LBP work under the streamlined process, similarly for Level 3 LBP's doing Level 2 work.

29 Does the proposed process align appropriately with the rules on restricted building work?

These do need to be aligned but perhaps not directly as above.

30 Other comments on the proposed streamlined process for simple, low-risk residential building work:

The success of the streamlined process is very skills dependent on an industry which has a skill shortage. For it to work the qualifications of the LBP's would need to be more stringent than what is currently being proposed.

2.3 STREAMLINED PROCESS FOR COMPLEX COMMERCIAL BUILDING WORK

31 Are people commissioning complex commercial buildings and building work generally better informed?

Yes, generally, but there may be exceptions such as developers commissioning and not allowing site involvement by consultants. In general, educated clients will pay for contract observation/ administration.

32 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?

Yes, but a random audit process should be allowed for.

33 Do you agree that the proposed streamlined process for complex building work is adequate to ensure buildings are Code compliant?

Yes.

34 Comment on the indicative steps in Table 2:

Steps 2 & 3: How will the BCA establish that the QA systems are in place and operating? Is this by auditing the LBP's.?

Step 4: Who is the site-licensed building practitioner? This seems to be a job with a broader scope than either the architect or the main contractor or would the main contractor get a producer statement from the designer to cover this based on the designer's site observation? The issue is whether the main contractor should be expected to fully understand an alternative solution that is being used as a means of compliance and whether they are qualified to sign it off. The alternative might be an appropriately skilled clerk of works but for complex building work the Architect must be engaged to observe the work and submit the memorandum.

35 Other building projects that could also be subject to the proposed streamlined process for complex commercial buildings:

Yes. These would include civic buildings, institutional activities such as education (both schools and tertiary) and health buildings, scientific research facilities and government departmental buildings

36 Other comments on the proposed streamlined process for complex commercial building work:

These changes should ensure that variations can be made during construction without code verification delays. They should also allow for implicit staging so that only compliance systems still being reviewed (and follow on effects) are withheld from the consent, so that other work can proceed.

There seems to be a high degree of scrutiny of standard building code clauses while the majority of the risk in these projects is fit for purpose and the specific requirements for these project types. These aspects are often peer reviewed on commercially driven projects but perhaps not on public projects. These aspects should be given similar weighting in any QA system so that we are not placing too much money into checking one area of risks compared with another. A poorly performing building can be fully NZBC compliant.

Many complex projects are best managed through lean construction practices/collaborative working arrangements and integrated BIM modelling fits well with a looser view of roles within the project. These place responsibilities for design and construction when best suited within the project team and collectively sharing the risk/benefits from this. Low risk QA processes would be completely internal and various aspects of this process may fall on different partners across the team.

2.4 PUBLIC INFRASTRUCTURE WORKS

37 Does the building control system provides an appropriate means of ensuring the safety and quality of all public infrastructure works?

As commented on in relation to the above, the streamlined process seems to be appropriate with specific guidelines for tunnels and bridges. These are best peer reviewed as an integral part of the QA process rather than the BCA taking this responsibility. With a centralised BCA system then there may be enough of this work nationwide for there to be sufficient expertise within house. Perhaps the best approach is that the BCA would collaborate in the development of a QA system by the project team for each specific project on complex infrastructure works.

38 Categories of public infrastructure work where other arrangements may more efficiently and effectively ensure safety and quality:

Very complex one-off projects may be best handled by the BCA auditing a QA system by the project team and then ensuring that that QA system is carried out without necessarily ever formally inspecting the work themselves.

2.5 STREAMLINED PROCESS FOR REVIEWING FIRE SAFETY

39 When is Fire Service Commission involvement most useful?

The Fire Service MUST be involved early in the design process to avoid costly rework and to allow for a direct dialogue between the Fire Service and the designer. This approach is often used but without the certainty of a sign off of principles by the commission/DRU itself. Early involvement with the FSC would be most beneficial.

40 What weight should be given to Fire Service Commission's advice?

The Fire Service requirements are only one aspect of the design and there needs to be flexibility in the process and some clear performance requirements and approved documents that allow designs to be uniformly and fairly checked and alternative solutions developed where appropriate. We note the DBH intentions to further review these documents. There also needs to be a determination process similar to the DBH process for the NZBC. A specific fire fighting clause needs to be developed in the building code and approved/compliance documents developed to coincide with the performance requirements. This would include provisions for Fire Evacuation.

41 Other comments on fire safety review of building plans:

Fire Fighting Safety is a valid principle of the Building Act. Therefore there needs to be clear guidance on how best to achieve fire fighter safety or conversely clear guidance on what not to do.

2.6 IMPROVED PROCESS FOR BUILDING WARRANTS OF FITNESS

42 Do you agree that the administration of the building warrant of fitness and compliance schedule requirements is more complex or costly than necessary?

No comment.

43 Do you agree that there is a lack of clarity about building warrants of fitness and compliance schedules?

No.

44 Changes that should be made to the requirements to simplify administration while still ensuring critical systems are maintained and inspected:

We agree with what is proposed. Though some critical systems could be self administered by the building owner via checklists and signoff such as fire extinguishers, ensuring that they are tagged and within their service life. Others such as vertical transportation are complex and require an IQP to check.

45 Other comments on the building warrant of fitness and compliance schedule requirements:

None.

2.7 BUILDING CONTROL ADMINISTRATION

46 Do you agree that the number of building consent authorities and the variation in size is causing issues as outlined in Part 2.7?

Yes.

47 Other issues or problems resulting from the current administrative arrangements that have not been identified in this document:

We support a single national BCA to administer all Building Consents but operating through regional offices. Otherwise there will continue to be inconsistencies of service. The regional offices can take account of local conditions while the national office would ensure a consistent approach to interpretation of requirements and the processing of alternative solutions.

48 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?

Yes.

Benefits would include:

a) more expertise in specific building types and code clauses;
b) better internal CPD for front line staff;
c) better pay and conditions to attract more qualified and experienced senior staff outside of the TA pay scales; and
d) less duplication of specific expertise for one-off building types such as stadia.

49 Costs and risks associated with greater cooperation between building consent authorities:

These include:

a) potential loss of local knowledge;

b) continuing requirement for high numbers of local frontline staff who are removed from the administrators; and
c) change management required to reduce stress on staff which may lead to an initial loss of expertise.

50 Role of the private sector in the administration of building controls:

Peer Review, but possibly ways for private agencies to locally act for a national BCA. Anecdotally there were fewer technical issues for private agencies acting under BA1991 than there were for TA's.

51 Elements of building control that require local input:

Local geotechnical knowledge, wind maps, corrosion maps, understanding of abilities and risks (trust) with various consultants and contractors; Local access to historic BC data.

52 Elements of building control that would most benefit from a national approach:

- Accessibility requirements
- Assessment of alternative solutions
- Library of alternative solutions
- Acceptable products and their certification,
- Quick settlement of disputes between the BCA and the designer
- Ability to use precedence of determinations
- Standardized computer system to track the consent process and electronically lodge drawings

53 Other comments on options for more efficient building control administration?

None.

3.1 WELL-INFORMED CONSUMERS

54 Government informing residential consumers: responsibilities and rights:

The government does have a role in informing participants in the construction industry, but this need not be limited to the responsibilities and rights in relation to residential building projects.

To the extent that the Act is concerned with health and safety objectives, it is hard to see why there should be any regulatory distinction between residential versus commercial construction.

There should be a clear distinction between the rights and responsibilities arising:
(a) in relation to meeting social objectives; and
(b) in respect of contracts for projects.

In respect of social objectives, education will reduce both the costs of meeting compliance and of managing non-compliance where they are required for the interests of the wider community.

In respect of contracts, education will reduce the economic cost of unproductive and unsatisfactory work: poor performance, disputes, management overheads, and associated relationships.

We recognise that education alone may be insufficient and therefore we support regulations which would clarify performance standards and establish minimum mandatory benchmarks

Legislation exists to provide benchmarks and standards, whereas education is about gaining understanding and awareness. The Building Act should confine itself to setting the benchmarks. Education to attain those standards is a separate task to be addressed by the DBH.

55 What information do consumers need?

The information is already widely available from consumer's organisations, the DBH, and local Councils. However, the message that really needs to be made is that poor and/or uninformed decision-making will precipitate poor performance and in the long run the indirect costs may become significant:

- There is a relationship between cost and performance
- Inadequate contract terms increase the costs of rectifying poor outcomes
- Unskilled practitioners will deliver poor work unless properly instructed and monitored
- Risk is part of doing business
- Accountability is part of decision-making and work performance.

56 Should the government publish standards for acceptable work?

Yes.

There are two issues in relation to what is "acceptable":

(a) compliance with health and safety; and
(b) compliance with "quality".

The Building Act should focus on compliance with the health and safety standards.

Minimum benchmarks for performance will facilitate the resolution of disputes. They could be produced by bodies such as BRANZ or Standards NZ, but would be better as regulations.

There will always be a balancing of cost versus quality, and legislation needs to recognise that as a choice according the priorities of each project. We consider that these issues may be better addressed in a review of the Construction Contracts Act.

57 How can consumers knowledgeably commission building work?

Consumers contribute to poor outcomes by:

- considering knowledgeable advice as unnecessary or extravagant;
- making project decisions on the basis of subjective priorities;
- failing to use adequate contract terms;
- failing to prioritise quality benchmarks against short-term costs;
- lack of understanding of project complexities;
- unnecessarily intervening in due process;
- adopting a "combative" stance when things are not going well;
- inadequately allowing for risk;

- avoiding taking responsibility for their decisions;
- failing to differentiate between construction costs and project costs;
- using highly manufactured items as performance benchmarks; and or
- neglecting necessary maintenance.

Additionally, in “labour-only” contracts where the owner is the main contractor:

- they may not have the skills and resources to manage the contract;
- they may not accept that in removing the contractor’s margin for “profit and risk” they may make some savings, but do not reduce the risk; and or
- they may fail to define the respective roles of tradespersons and owner.

Consumer education needs to address each of those issues.

58 Consumer knowledge and behaviour:

Ideally, the consumer needs to have the required information before initiating a building project. Reliable and timely delivery of that information is logistically difficult.

The DBH website probably offers the most promising option.

The only effective “gateway” at which knowledge can be delivered to the consumer (whether they seek it or not) is when a Building Consent is sought. The DBH – not the local authority - should be issuing educative material with each Building Consent.

As a backup to inadequate consumer (or tradesperson’s) knowledge, the Building Act and the Construction Contracts Act should together provide a minimum mandatory basis for undertaking building work, whether it requires a Building Consent or not.

3.2 IMPROVED CONTRACTING PRACTICES

Each of the responses below is applicable to a review of the Building Act, or for consideration in a review of the Construction Contracts Act.

59 Do contracting arrangements need to be strengthened?

The market has several standard contracts published by neutral bodies, several by industry associations, and a multiplicity of provider-specific contracts. In respect of the last two, consumer protection provisions may be inadequate.

It is appropriate that legislation should provide some consumer protection.

Legislation should require building contracts to have mandatory terms which, in the absence of a written contract, are implied “default terms”.

Legislation should require that building contracts do not have terms which defeat or counter the mandatory terms.

Any mandatory terms of contract must be at a minimum, so as to accommodate the variety of project circumstances.

The Construction Contracts Act establishes the minimum criteria for a construction contract, and describes the rights to and the provisions for making payment claims, how they are to

be processed, and how disputes are resolved. The matters in dispute can be anything directly associated with the project.

It would be appropriate to conduct a review of the Construction Contracts Act to consider whether the provisions above are adequate to define "default terms of contract" for building work. A useful strategy might be as follows:

(a) the current CCA provisions (and perhaps some others – including additional ones where set out in section 3.2 of the BA04 discussion document) become mandatory minimum requirements;
(b) further provisions shall also apply by default, unless they are specifically opted out;
(c) further optional provisions are available to be incorporated in whole or in part; and
(d) consideration be given to whether the provisions should be in the CCA or the Building Act

Suitable terms could be sourced from existing "neutral" sources such as NZ Standards and the NZIA. Alternatively, suitable publications by these providers could be cited as a "means of compliance".

60 Should contracts be in writing?

No. It is neither necessary nor practicable.

Of course it is preferable, but there is no way of forcing people to put things in writing.

Legislating that a contract does not exist unless it is in writing is not only contrary to law, but impracticable; it will merely precipitate disputes which then involve a higher legal input to resolve.

The Construction Contracts Act already recognises oral – or "informal" – contracts, and mandates minimum terms.

61 Additional minimum terms of contracts:

The following items should be covered in addition to those set out in the discussion document:

(a) all the implied terms of contracts that are currently in the Building Act at sections 396 to 399;
(b) disclosure by the contractor of the issues covered by sections 3.3 and 3.4 of the BA04 discussion document;
(c) all the terms and conditions currently set out in the Construction Contracts Act;
(d) legal description of the site and production of a certificate of title;
(e) requirements for the principal to provide security for payment;
(f) obligations on all parties to the contract to notify changes in legal status;
(g) status of the contract if a Building Consent required, and not uplifted;
(h) the method by which changes to the scope of work are instructed and costed;
(i) monetary allowances: what they apply to, how they are instructed and costed;
(j) terms under which parts of the work may be subcontracted;
(k) terms under which the principal may delegate authority;
(l) whether or not the contractor is an LBP (and whether that is required);
(m) responsibility for care of the works during construction (eg insurances);
(n) the processes and preconditions for occupation;
(o) provisions (eg retentions) such that post-occupancy work is done;
(p) the processes and preconditions for completion of the contract; and

(q) provisions for the contractor to apply for a CCC (or a release from the obligations in respect of one) if the owner fails to apply for one in a reasonable time.

Note that it is NOT necessary (as per the discussion document) to outline the processes for dispute resolution, as that is already catered for by the Construction Contracts Act.

Where building work has been undertaken by a developer or an owner-builder, and any of the above terms are likely to affect a subsequent owner, then they should become implied terms enduring despite transfer of title.

In so far as they are applicable, all the minimum terms of contract shall apply equally to subcontracts.

62 Extent of disclosures:

In relation to trade qualifications:

(a) It is impractical to list the qualifications of everyone on site.
(b) Building Consent application forms already routinely seek the identity and qualifications of key trades, and it is proper that vetting be done at that point.
(c) The issue of a Building Consent (where it is required) should be a prerequisite for commencement of a contract to enter into force.
(d) A CCC will not be issued by the BCA unless the work is undertaken by qualified personnel and in an appropriate manner.
(e) The issue of a CCC would normally be a prerequisite for full payment. (see, however, our suggestions under Q61 above)

In relation to the proposed checklist:

(f) This will only be of use if it is a standard form being part of legislation or regulations. Otherwise there will be unacceptable variations in the usefulness of checklists from project to project.
(g) A checklist will not be necessary if the minimum terms of contract are expressed clearly.
(h) An alternative might be that the minimum terms of contract are written in a checklist format, with provision to add specific project requirements. However, this is undesirable because of the likelihood of introducing a conflict with a specific form of contract applicable to the project.

Inclusion of details of previous disputes – whether over warranty provisions or otherwise – is not acceptable.

(i) Such disputes are normally confidential, and this is an important aspect of dispute resolution.
(j) The description of a dispute by one side only is only likely to present one side of the dispute
(k) Disputes are a natural part of the construction process, and do not necessarily reflect the suitability of a contractor for subsequent work.
(l) A significant proportion of construction disputes in residential projects are initiated by the principal because of unreasonable expectations and/or unfamiliarity with the process. These disputes may not be a reflection of the contractor's performance.
(m) If the contractor is unsuitable, that is an issue to be addressed by the Licensed Building Practitioners Board.

Disclosures by the principal are equally required:

(n) The legal identity of the principal
(o) The legal interest held by the principal in the property on which the work is being undertaken
(p) The relationships between the principal and the person in control of the work
(q) The role of any designers and project managers during the construction phase
(r) Funding the project: extent, suitability, availability and processes for release.
(s) Known circumstances which may give rise to loss arising from failure in contract performance, and estimates of same.

63 How to provide disclosures:

In writing.

It is not practicable to assert that a contract commitment does not exist in the absence of disclosure. Where inadequate disclosure is made, it must be applied against that party.

64 Other steps by Government:

Review the Building Act in conjunction with a review of the Construction Contracts Act

3.3 DEVELOP MORE EFFECTIVE WARRANTIES

66 Mandatory Warranty?

Yes.

A voluntary warranty provision is commercially impracticable.

The warranty should be a contract between the owner and the surety, independent of the building provider.

Where work is being undertaken as a DIY project in the absence of a contractor, a warranty must still be required in order to protect future owners, and to circumvent arrangements devised to avoid a warranty.

67 Provisions of a warranty:

The minimum warranty provisions must be mandatory and uniform. The ability to vary the terms should be limited to additions only.

Voluntary warranty terms will not provide certainty for the owner, nor a consistent level of protection between projects. They may also raise the prospect of uninformed contractors creating terms which are unduly onerous, dependent on unacceptable preconditions, contrary to law, or unenforceable.

It is unlikely that the “average” contractor has the time or resources to prepare a warranty tailored to his circumstances and/or those of the project; nor an “average” principal to review it.

Additionally, significant public costs and resources would be necessary to monitor compliance with such a provision. Further costs and resources would arise for the "average" principal to seek enforcement.

This is not seen to be a disadvantage to established warranty schemes in the market: they can still add benefits to maintain a "point of difference" for marketing purposes.

The length of the warranty:

The current contract exposure is for 6 years, and a warranty should be related to that period.

To avoid dispute over when the time begins to run, we suggest that the period commences from when a CCC is issued. If an owner has not applied for a CCC within a reasonable time, the time should run from when the contract work (or applicable part of it) is completed to the extent that it can reasonably be used for its intended purpose.

Where the work is a DIY project and a contract is not in force, time should run from when the work (or applicable part of it) is completed to the extent that it can reasonably be used for its intended purpose.

Where projects are staged, then it will be necessary for a milestone to be established in respect of each stage.

The cap on the warranty:

The warranty should be for half the value of the building work up to a maximum of $250,000 GST included.

There is an expectation that the cost of the warranty will vary with the cost of the works. The lower level of cap is so that sureties can offer cover at reasonable cost.

Coverage:

The warranties should be restricted to "fitness for purpose". On that basis the listed provisions are sensible, except for the issues of time for completion and the calculation of provisional sums both of which are contractual issues wherein there are remedies under the mandatory dispute resolution provisions of the Construction Contracts Act.

Loss of deposit:

This is a contractual issue wherein there are remedies under the mandatory dispute resolution provisions of the Construction Contracts Act.

Voided in some circumstances:

Agree as suggested.

Another reason to void the warranty may be a breach of contract by the principal in relation to meeting payments properly due. However, this would have to be couched in terms which did not allow the contractor to void the warranty on a strict basis, but required additional safeguards focussed on maintaining the warranty cover.

Types of projects

Agree limited to residential projects, but that need not be limited to new work only. It could equally apply to alteration work so long as the extent of the work covered is (or can be) defined.

68 Able to renounce?

No.

(This answer is the only logical consequence of the answer to Q66)

In relation to the owner-builder, a warranty would still be required.

69 Developer's warranties:

Whatever the methodology, the continued viability of the warranty must be based on a contract between the owner and the surety and independent of the building provider.

The contractor and the consumer should be in no better nor worse situation regardless of the mode of delivery of the project. There may be a commercial arrangement between the developer and the contractor in respect of obligations arising from the warranty.

These comments apply equally in respect of an owner-builder, wherein a subsequent consumer should be entitled to protection.

70 Disclosure on sale:

Not applicable if a warranty is mandatory.

71 Transfer of warranty on business closure:

The continued viability of the warranty must be independent of the commercial circumstances of the building provider.

72. Other comments:

Transfer on sale

Every warranty (including as applicable to an owner-builder) must transfer with sale and pass with a change of title.

Change of use

A potential problem arises if the warranty is in respect of a residential property which then has a change of use – say, to commercial – in part or in the whole. There may even be a possibility that the use then changes back to residential. We have no suggestions in that regard.

Subcontractors

A difficulty is how to apportion warranty obligations to subcontractors as distinct from main contractors. If it is the main contractor who offers the warranty, the scheme design needs to recognise that some 60% of most housing work may be undertaken by subcontractors, and

that the surety and the main contractor should have the opportunity to hold them accountable to the same extent as he is held accountable to the principal.

A similar issue might be considered in respect of design services.

Security for payment

It is unreasonable to impose a warranty requirement on contractors without a similar obligation on the principal.

Just as every contract requires a warranty and stipulates the performance requirements of the contractor, so should it also impose similar obligations on the principal.

To some extent the Construction Contracts Act addresses this issue. However, if the principal is to demand warranties from the contractor, then the contractor is entitled to security of payment for work done.

Accordingly, the review needs to consider how that security would be managed. Suitable terms are set out in NZS 3915 at rule 3.2, but it is suggested that they be simplified in order to be incorporated into the minimum contract terms.

3.4 SURETY AS A BACKSTOP FOR WARRANTIES

73 Contractors disclose surety?

The proposition that individual contractors should supply a surety in order to reinforce a mandatory warranty has no merit. It is impracticable to monitor and would require significant public resources for an investigation and enforcement regime.

74 Mandatory surety?

Yes, it must be mandatory for a surety to be in place, and the continued viability of the warranty must be independent of the commercial circumstances of the building provider. To argue otherwise is to put the validity of warranty provisions at the mercy of the contractor's goodwill, co-operation, commercial viability, and continued existence as the same legal entity.

75 Cost-benefit of mandatory surety:

The matter is not the cost-benefit of the surety, but the cost-benefit of the warranty. The surety is merely a mechanism for making warranty provisions operational.

If the cost of the risks is spread over a wide base, the incidence of costs will be on a similar basis to ordinary house insurance: the premium paid is a fraction of the replacement cost, no individual can stump up the replacement cost, but by pooling the premiums there is a sum available to meet the occasional loss.

These economies of scale will not arise if individual contractors arrange individual warranties.

The requirement for a surety will mean a consolidation of individual risks into an asset base capable of supporting the resources to:

- process transactions on a knowledgeable and commercial basis;
- use risk balancing and volume offsets to reduce costs;

- offset costs by developing an investment fund;
- provide cost-effective dispute resolution;
- provide certainty for the claimant that the resources are available to rectify failures; and
- provide consistency in resolutions.

Sureties are likely to promote upskilling, standard QMS processes, and performance benchmarks in order to reduce their exposure. The resultant improvement in industry performance is consistent with the objectives of the Building Act review.

76 Disclosures about sureties:

The required disclosures and operational criteria should be consistent with those required in insurance legislation, but simplified to reflect the restricted area of risk involved in building failures.

The discussion document appears to assume that individual contractors will be involved with individual sureties. For the same reason as in Q73 above, that is not a preferred option. Accordingly, neither the principal nor the contractor needs to be provided with disclosures by the sureties.

Acceptance of a suitable surety is a matter to be undertaken by an independent entity, and the disclosures will need to satisfy that entity.

77 Ability of sureties to claim against parties:

It will be a commercial reality that sureties must be able to recover from liable parties in order to offset their losses.

It is also a matter of public policy interest that they should do so, because it is only through such an action that accountability can be seen to have been effected. In the absence of accountability for actions taken, there is no incentive to drive upskilling, defect reduction, and due care in the industry.

There is no logical reason why sureties should be limited in those from whom they could seek recovery. However, certain parties could be deemed to have indemnity in respect of each and every claim in return for a prior contribution made on a "global" basis.

78 Other comments on sureties:

The following scheme is suggested in order to address each of the issues identified above:

In respect of each project being all or part of a Building Consent and
- where an LBP is required to undertake building work, or
- in which an LPB undertakes building work, or
- in which an owner-builder is undertaking work which would otherwise require an LBP:

the following shall apply:

(a) mandatory minimum terms of contract shall apply;
(b) a mandatory warranty shall form part of the contract terms (or undertakings required of an owner-builder);
(c) the benefits of the warranty shall pass with the transfer of title;
(d) performance of the warranty shall be underwritten by a surety;

(e) the surety shall be approved by a designated government body;
(f) the surety shall be funded (in part) by a lump sum payable by the principal and which is levied according to the value of the work and payable (to the BCA as agent) at the time of applying for the Building Consent;
(g) the surety shall be funded (in part) by a lump sum payable by the BCA and which is levied on a "per unit" basis which reflects the historic risk profile in that area for the items covered by the warranty, and which is payable (to the surety) at the time the Building Consent is uplifted;
(h) the surety shall be funded (in part) by a lump sum payable by the Government and which is levied on a "per unit" basis and payable (to the surety) at yearly rests in advance based on the previous year's total warranty claims;
(i) the principal shall be entitled to a claim under the warranty for costs attributable to the failure of contractor performance or failure of work carried out under a contract for building work;
(j) the costs shall include all investigations, design work, building work, consents and approvals, legal and expert attendances, relocation and temporary costs, other costs directly attributable to remediation, and GST. They shall not include payment to the principal, damages for distress, loss in value, nor other matters which are not a direct expense;
(k) for each and every claim on the warranty, the claimant (presumably the principal) shall meet the first $X irrespective of the value of the loss;
(l) for each and every claim on the warranty, the contractor (including the case where the contractor is the principal) shall meet the next $Y irrespective of the value of the loss;
(m) for each and every claim on the warranty, the surety shall meet the remaining costs to a maximum value of $250,000 less the sums paid by the claimant and the contractor;
(n) the principal shall co-operate with the surety as required to mitigate the costs;
(o) the surety shall have the right to recovery (as if they were the principal) from any and all relevant parties, including the principal, but except for the BCA and the Government. The recovery shall be limited to the extent of costs (as defined by (j)) disbursed by the surety; and
(p) the contractor shall have the right of recovery from any and all relevant parties, including the principal, but except for the BCA and the Government. The recovery shall be limited to $Y in the aggregate.

It is suggested that the selection of a surety be on a similar basis to the Kiwisaver scheme. That is, several commercial entities are approved by the government to be default suppliers, and others may be alternative suppliers. Upon application for a Building Consent, either the principal nominates an alternative supplier, or gets randomly assigned to a default provider.

Each of the default suppliers would need to provide at least the mandatory minimum cover at the same unit fee, but all suppliers could provide additional benefits and if necessary charge a premium for them.

3.5 BETTER ACCESS TO DISPUTE RESOLUTION

These issues should also be considered as part of a separate and concurrent review of the Construction Contracts Act.

79 Do consumers have problems resolving disputes?

There is no need to differentiate between consumers and non-consumers in the consideration of how disputes are resolved. The overall processes should be the same to

avoid confusion and jurisdictional problems. However, the level of sophistication of the dispute resolution process should reflect the complexities of the project.

In setting mandatory provisions, it should be assumed that the project complexity is low, and the participants relatively uninformed: the provisions must therefore be clear, simple, and unambiguous.

Where there is no formal contract, a lack of knowledge of the procedures in the Construction Contracts Act typically means the parties resort to lawyers..

Where contracts contain specific dispute resolution procedures, problems arise because the parties are unwilling to commit the necessary resources to the process. Usually if a skilled professional (architect, mediator, adjudicator, arbitrator) or experienced contractor is involved the process is more productive.

There is a need to address disputes at the lowest possible level, before they escalate to harden positions and consume resources. This is best addressed by the parties recognising at the outset that the dispute resolution provisions in the contract are the single most important aspect therein, instead of ignoring them until a problem arises.

Participants (especially consumers) need to understand that disputes are a usual and almost unavoidable part of the building process, and then they need to make the necessary arrangements to deal with them.

Solving this issue is primarily about educating those about to enter into contracts.

80 How to provide more information?

Form 1 of the Construction Contracts Act is a good outline of process. Something similar could be provided to simply and comprehensively address dispute resolution.

The DBH should produce information for issue with the Building Consent so that both the contractor and the principal are aware of the dispute resolution provisions.

81 Do adequate Dispute Resolution provisions exist?

Yes they do, in the form of:

- the Disputes Tribunal for low value claims;
- Mediation/adjudication/arbitration by private providers for higher value claims;
- Provisions in standard form contracts for dispute resolution: mediation, conciliation, adjudication and arbitration;
- Mandatory adjudication processes in the Construction Contracts Act applicable to all building contracts whether formalised or not; and
- By the provision for the processes in the CCA to run concurrently and in parallel with the dispute procedures in the contract.

It is considered that the CCA should be made clearer in respect of the application to non monetary issues, and that it should not differentiate between residential and other contracts.

There have been problems where an “appeal” from a CCA adjudication has had to be brought in Court, with attendant delays and costs. Similarly where mediation settlements have come unstuck. Most standard contracts provide for arbitration as a final step in

resolving a dispute, and that would deal with the issue. However, arbitration does not provide the opportunity to involve third parties, whereas Court proceedings do.

A possible solution would be to recognise that arbitration is preferable (to court action) as a backstop to adjudication, but maybe could be by consensual reference.

High value claims may be mediated on the basis that it is usual that both parties are knowledgeable and well represented, and can then make a sensible commercial decision. There is presently no apparent shortage of suitable mediators.

In building contracts administered by an architect or engineer, those persons are usually the first step in resolving actual or potential disputes. If they are not involved, the parties could appoint an independent person (a "Disputes Review Board") before the dispute crystallises.

We do not favour this as a mandatory option because:

- there is no "policing" of such provisions;
- the appointee may be seen to be a default and/or undesirable "stooge" by one party; and
- extending the provision to all contracts introduces problems of scale, wherein there are not enough suitable persons available, and/or the fees to remain "on standby" for a small project are unduly onerous.

82 Characteristics of an appropriate dispute resolution service:

Building contract claims can be complex, and reliant on technical advice. The Disputes Tribunal may wish to appoint specialist referees and to reconsider the dollar value of claims to be dealt with. Most of the costs of such a service are borne by the taxpayer.

For low value claims, the mediation model which requires the parties to agree on an outcome is not appropriate: the time and skills necessary are not commensurate with the sums in dispute. Accordingly the process should be that if the parties cannot agree on a preliminary (or time limited) basis, then the referee decides the matter. This is consistent with Disputes Tribunal processes and adjudication under the Construction Contracts Act.

Where building disputes are taken to Court, there are already provisions to refer it to a referee, or to use specialist input to assist the legal process.

Generally, the current NZ model is that building disputes:

- are resolved on a confidential basis;
- use an inquisitorial process;
- can have procedures tailored to the dispute;
- are run by persons knowledgeable in the industry; and
- have costs paid for by the participants.

In other countries there are Construction Courts, where building disputes:

- are resolved in a public forum;
- use an adversarial process;
- cannot have procedures tailored to the dispute ;
- are run by the legal profession; and
- have costs mostly paid for by the taxpayer.

Subject to possible extension of the existing Disputes Tribunal scheme as above, the industry appears to be well served by private sector dispute resolution providers, and there does not seem to be any reason to supplant them with a Construction Court.

83 Other comments about disputes:

The Construction Contracts Act

The Building Act is not the place to be considering provisions for dispute resolution. The Construction Contracts Act establishes the legal framework for undertaking construction work, and already provides for minimum mandatory (and/or implied) contract terms, opt-out provisions, the regulation of bespoke contract terms, and dispute resolution. Although there are reasons to review and change that Act, it should continue to be the place where such items are dealt with.

Proportional Liability

All potential respondents are concerned at the prospect that they may have to pay for the problems created by others. This situation is caused by the current law of joint and several liability, wherein the claimant is entitled to recover the damages without regard to who contributes to the payment of them.

This has four basic effects:

(q) there is a lack of accountability in the industry: consciously or not, there is a diminution of incentive to perform to the required standard if there is no penalty for default. A related issue is that some of those in the industry resort to business structures arranged specifically to avoid the prospect of having to face up to their performance failures;
(r) the burden of bearing the damages is all too often allocated according to the ability to fund them, rather than responsibility for incurring them. This has put enormous pressures on insurers and territorial authorities, with a result that those costs are passed on to unrelated persons in a trickle-down effect;
(s) it has created a very risk-averse approach by those (including BCA's) who may unavoidably have to fund the damages, and this attitude is reflected in demands on others (in particular the designers) to adopt a belt and braces approach with unnecessarily high costs to all involved. There has been a related uncoupling of risk versus effect; and
(t) those commissioning a building project have insufficient incentive to price in the risks, and can adopt a "lowest quote" contractor without having to consider whether that contractor is solvent enough to make good performance shortcomings. A related issue is that the contractors have insufficient incentive to upskill or resource their business as necessary to improve performance levels.

If each trade or service provider is obligated to provide a warranty in respect of the work they have each undertaken, then proportional liability may be achieved by default. This would make both client and service providers manage their own individual exposure to risk, encourage an environment of best practice, and focus upon quality outcomes.

If proportional liability is not able to be implemented in place of joint and several liability, then the warranty provisions are only likely to perpetuate the "deep pocket syndrome" that currently plagues the industry.

Because the Construction Contracts Act is created around the special needs of the building industry, it would seem that it could be arranged so that a plaintiff may recover damages on the basis of causation.

The warranty/surety suggestions above allow the surety to recover from those responsible and solvent, but to bear the risks of the shortfalls. On that basis, there is no need to pursue parties on the basis of joint and several liability.

Therefore the abandonment of joint and several liability could be specific to the building industry, and need not run counter to legal principles applying to non-building projects.

4.1 THE IMPACTS OF IMPROVING BUILDING CONTROL

84 Is it realistic to assume residential consumers, building professionals and tradespeople, and building consent authorities would behave differently if this package of proposals was introduced?

This question tries to predict the future. Yes, it is realistic to assume that the above groups would behave differently if the proposals are introduced.

85 Have the main benefits of the package of proposals been identified?

The benefits will only be apparent some time after the Act is adopted, the liability and warranty schemes are in place and LBP's are operating.

86 Which benefits do you expect to be most significant?

Peer review and removal of BCA's from larger commercial projects to speed up consent and building process.
Liability apportioned to relative involvement of the various parties
If BRANZ and SNZ can work effectively alongside with DBH, there will be reliable consistent free technical advice for the building industry.

87 Have the main costs of the package of proposals been identified above?

It is premature to identify potential costs before the proposals and final structures are determined.

88 Which costs do you expect to be most significant?

It is premature to identify potential costs before the proposals and final structures are determined.

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

The main risks include:

- the warranty system not being underwritten;
- high cost of warranty system, (as determined by the insurance industry) making it unaffordable for consumers;
- lack of knowledge by consumers about surety backing the warranty;
- BCA's protecting their patch and resisting a regional focus; and
- lack of public record of exempt work (under appendix).