



## **BUILDING AMENDMENT BILL (No 4) 2011**

### **SUBMISSIONS FOR LOCAL GOVERNMENT AND ENVIRONMENTAL SELECT COMMITTEE BY THE NEW ZEALAND INSTITUTE OF ARCHITECTS INCORPORATED**

#### **Introduction**

- 1 The New Zealand Institute of Architects Incorporated (NZIA) is a professional organisation representing 2830 members which includes 90% of Registered Architects in New Zealand.
- 2 NZIA wishes to make a submission to the Local Government and Environment Select Committee in relation to the Building Amendment Bill (No 4). NZIA has consulted widely with our membership in the preparation of this submission.
- 3 **We would appreciate the opportunity to appear before the Select Committee to discuss this submission.**

#### **Summary**

- 4 NZIA agrees with the general intent of the Building Amendment Bill (No 4) 2011. We don't want to be heard in relation to clauses 1 to 43 or 45 to 66 of the Bill.
- 5 Our submission is directed to Part 4A of the Bill. Whilst we broadly support the thrust of Part 4A, which is to provide consumers with rights and remedies in relation to residential building work, we consider some amendments are required to Part 4A.
- 6 In summary NZIA's submission breaks down into three areas:
  - (1) General comments on the Building Act review and the need to ensure that the whole package of reform is implemented.
  - (2) Amending section 362B to make it clear that Part 4A warranties do not apply to provision of professional services.
  - (3) Clarifying the scope of the pre contract information, the matters/terms to be included in a residential building contract and the remedies for breach of the warranties.

#### **Building Act Review**

- 7 We think it important to see this Bill in the context of all the proposed reforms of the Building Act. The review that led to this Bill contained a number of reforms, not included in the Bill, affecting the building industry. There were a number of fundamental proposals and changes that together were intended to lay the foundation for a more robust system of building control and better outcomes, for in particular, homeowners. Many of these proposals were interdependent, relying on each other and on other, wider, initiatives in the building sector.

## 8 Some of these planks of reform included:

*Joint and several liability*

- (a) NZIA supported the shift to proportional liability, in tandem with the implementation of a warranty and surety scheme. The move to proportional liability is a key reform that would significantly decrease the undue burden placed on all parties when damages awarded against them significantly outweigh their level of involvement with the project. The current law has led to risk-averse behaviour that increased construction costs and decreased efficiency.

*Surety Scheme*

- (b) The second key proposal NZIA supported was a robust solvent surety scheme to back any statutory warranties. We also recognised that a number of the other proposals would be required to make any mandatory warranty and surety scheme effective.

*National Building Consent Authority*

- (c) In order to encourage consistency of decision making and increase the level of expertise within Building Consent Authorities (BCAs), we supported the implementation of a National BCA system.

9 The other proposals (brought through in the No 3 Bill) included a decrease in over-reliance on BCAs, and a balancing of the roles of other parties including owners, builders and designers. Additionally, it was intended that the Licensed Building Practitioner scheme would help to increase the overall talent pool, encouraging proficiency and raising the overall standard of construction in New Zealand.

10 Most importantly the review rightly identified that homeowners can be left without an effective remedy where legally responsible parties are not financially able to pay damages. Hence the suggestion of a surety scheme.

11 The current Bill is only a part of the overall reform package. We consider that without the support of these other planks of reform, the Building Act amendments are not achieving the overall and laudable goals of the Building Act review. Where some of the pieces are implemented, such as this Bill which brings in the mandatory warranties, but not a surety/compulsory insurance scheme, the goals of the Building Act review are not being achieved.

**Section 362B**

12 We recommend amending 362B to make it clear that the part 4A warranties do not apply to providers of professional services. We understand that to be the intent of the Bill and for good reason, namely that the Consumer Guarantees Act warranties, the supply of services, sections 28 to 31, applies to Architects. It would be an unnecessary duplication and will lead to confusion if the warranties under Part 4A were also to apply to Architects services.

13 However 362B defines a residential building contract as a contract “under which one person agrees with another person to do building work”. Because the definition of building work under the Act, section 7, includes design, there could be confusion created so we suggest an amendment to 362B to make it clear that Part 4A does not apply to Architects services.

14 We recommend that the phrase “to do building work” be removed from section 362B and instead the phrase “to physically demolish, construct, alter the household unit” be incorporated. So the section would read as follows:

**“Section 362B Meaning of residential building contract**

In this Part, unless the context otherwise requires, residential **building contract** means a contract under which one person (the **building contractor**) agrees with another person (the **client**) to physically demolish, construct or alter a household unit.”

### **Residential Building Contract: Terms/Warranties/Remedies**

- 15 It is important that Architects (and other construction professionals) and most importantly consumers understand the scope of residential building contracts as it will apply to builders. We think there are some clarifications needed to the legislation to effectively compliment the equivalent provisions in the Consumer Guarantees Act, which relate to the supply of goods but which do not apply to buildings.

#### ***Information/Checklist;***

##### *Sections 362D and 362E;*

- 16 We support the need for the provision of pre contact information and a checklist, and written contracts with prescribed information, terms and conditions.
- 17 But the DBH needs to clarify what exactly is going to be the prescribed information/checklist to be supplied pre contract under section 362D and what are to be the minimum requirements for residential building contracts under section 362E. None of that information has been made available yet and there are key issues which need to be addressed by various industry players in relation to the same.
- 18 We think it important that the industry has input into what will be included in that information and checklist. Construction work by its nature is, other than in the most simple of cases, complex work. As a minimum we think there should be fair provisions dealing with, the scope/cost of the project, time for completion, GST, how and when payment is to be made by the client, and how any variations and extras to the contract are to be dealt with, and any dispute resolution procedures.
- 19 NZIA understands that it's likely that builders will have to disclose their insurance arrangements, which NZIA supports. But we consider, as we have said above, that a compulsory surety/insurance scheme should be implemented. This would avoid what has been a common problem in the leaky building litigation of building contractors who are insolvent or otherwise unable to pay damages.
- 20 We also recommend that section 362E be amended so that the minimum requirements apply to all contracts irrespective of their value. That would provide uniformity and consistency across the sector and enable consumers to have comfort that irrespective of the value of the building contract minimum contractual terms will apply.

#### ***Remedies for Breach of the Warranties;***

##### *Sections 362L and 362M*

- 21 We recommend amending section 362L by removing the reference to cancelling the contract. We can see no basis for allowing a client to cancel the contract simply for a case of breach of warranty where the same can be remedied.
- 22 Similarly, in relation to 362M we can see no basis for allowing cancellation where a breach of warranty cannot be remedied. The usual remedy at law is for damages in that event. Many alleged breaches of warranties which can't be remedied may be minor in scope and/or value (work that is covered up for example). Allowing cancellation seems to be out of all proportion to the remedy necessary to right that wrong. There may also be other significant parts of the contract that need to remain in force (the right to require producer statements, payment of outstanding sums which are not related to the breach of warranty, liquidated damages) and which will not survive if the contract is cancelled.
- 23 We recommend removing from sections 362L(2)(b) and 362M(2)(b) the words "cancel the contract in accordance with **section 362O**".

*Section 362O*

- 24 We recommend amending section 362O. We consider that section 362O(1)(b) introduces confusion. It is not clear what is meant by this subsection. It seems to suggest that the client will only communicate an intention to cancel the contract.
- 25 We recommend the words in 362O(1)(b) “the client’s intention to cancel the contract” should be removed and replaced with “that the contract is cancelled”.
- 26 We also consider that the notice should be in writing, given the serious consequences that follow from cancellation.
- 27 We recommend amending section 362O(2) to read
- (2) Subject to **subsection 3** the cancellation must be in writing, but it is not necessary to use any particular form of writing, so long as the cancellation is made clear.”

*Section 362P*

- 28 We recommend clarifying under section 362P that it is only the building work carried out by the building contractor or for which it has legal responsibility under the contract, that has to be rectified, not any defective building work. At the moment the way section 362P(1)(a) and (b) read together, it could be interpreted that if building work is carried out by a building contractor then it must remedy any defective building work notified.
- 29 We recommend that section 362P(1)(b) have the words added “the building work carried out by the building contractor or for which it has legal responsibility under the contract is defective; and”.
- 30 Section 362P(3) places the onus on the building contractor to prove that the building work is not defective. We don’t think this fair or reasonable. We consider section 362P (3) reverses the onus at law that is currently with the claimant, namely to prove on balance that building work is defective. Subsection 3 runs contrary to long established principle that a claimant should prove that the work is defective before being entitled to a remedy.
- 31 We recommend section 362P (3) is removed.

*Section 362Q*

- 32 Section 362Q requires the building contractor to prove that the cause of the defect was one or more of the matters referred to in subsection 1. Currently all the builder has to do is point to evidence to refute the claim that the builder’s work did not cause damage. This is changing the onus of proof and should be amended.
- 33 We recommend adding a subsection 3 to section 362Q as follows

“(3) Nothing in this section removes the onus on the client to prove that the building work is defective under **section 362G to 362P**”.

***Information to be provided on completion****Section 362R*

- 34 It is not clear what writing or information is to be prescribed by regulation or must be provided under section 362R. The DBH should clarify. Is this intended to be additional to the obligations under section 88 of the Act, namely the memorandum required on completion or restricted building work.

**Penal Provisions**

- 35 We have a general concern that there are a number of penal provisions in Part 4A. We don't consider there is any evidence that suggests that making a breach of these types of activities punishable by fine will improve the behaviour of contractors.
- 36 In particular we recommend removing the fine provisions for entry into a contract without complying with the minimum requirements under 362E. This is particularly unnecessary given that under 362F the minimum requirements are implied into all residential building contracts in any event.

**Conclusion**

- 37 NZIA welcomes the Bill so far as it requires warranties and minimum requirements for building contracts.
- 38 However NZIA is concerned that the other measures that were to be implemented as part of the building package and in particular the proportionate liability and surety/insurance schemes simply appear not to be being progressed with any speed or indeed in the case of the surety scheme appear unlikely to proceed. On their own the changes under this Bill will not provide better outcomes for consumers.
- 39 NZIA recommends clarification to Part 4A as it relates to the minimum requirements post contract and intra contract and in relation to the remedies available for breach of the warranties. We are also opposed to the imposition of fines which we think will do nothing to enhance the behaviour of contractors in the residential building market.
- 40 Finally we agree that the warranties should not apply to Architects but recommend a clarification to ensure that the intention of the Bill is brought through into the Act.

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