

SUBMISSION TO THE INQUIRY INTO THE WEATHERTIGHTNESS OF BUILDINGS IN NEW ZEALAND

Introduction

1. The purpose of this submission is to update the Inquiry on the steps that the Government is taking to address the issues raised by the weathertightness of buildings in New Zealand. I want to also explain how the findings of the Inquiry will be addressed by the Government's review of the Building Act.
2. The Government believes that it is important that all New Zealanders can have confidence in our building industry and in the homes in which we live. That is why the Government is taking action on several fronts to deal with the weathertightness issue. The Government has already taken steps to establish the Weathertight Homes Resolution Service. It has strengthened its monitoring of the Building Industry Authority (BIA), and is currently making decisions on the work necessary for a fundamental review of the building regulatory system.
3. Before describing the steps that Government is taking to renew confidence in the building industry, I want to thank the members of the Inquiry for their efforts in inquiring into:
 - The level of detail to be provided with building consent applications with respect to weathertightness, including flashings, with a view to determining what constitutes a reasonable level of detail.
 - The inspection regime as part of the code compliance certification process, with specific reference to weathertightness aspects, and with a view to developing guidelines to inspection.
 - The split responsibility of building certifiers and territorial authorities with respect to building consents, inspection and code compliance certification, and reports on any issue caused by that split responsibility.
 - The decline in the level of skills in the building sector, with a view to determining the cause for that decline, and to investigating how that decline might be reversed.
 - The health issues that may arise from leaky buildings.
 - Any other matters that the committee may consider appropriate, on the basis of information received.
4. I want to assure members of the Inquiry that the findings of their work will be a major input to the Government's broad review of the Building Act.

Background

5. The Building Act 1991 established a performance-based framework for the regulation of building work in New Zealand. A key element of the framework is the Code, which sets out the performance requirements buildings must achieve in order to comply with the Act.
6. The Act established the BIA, to prepare or approve documents for use in establishing compliance with the provisions of the Code (Approved Documents). These Approved Documents fall into two classes: acceptable solutions and verification methods. Acceptable solutions are prescriptive ways of achieving compliance with the Code. Verification methods are calculations or tests that can be used to establish compliance with the Code. The BIA also approves building certifiers (who perform similar functions to territorial authorities) inspectors in respect of certification and inspection of building work); grants accreditation of building products and processes; determines matters of doubt in relation to building control; and undertakes reviews of the operation of TAs and building certifiers in relation to their functions under the Act.
7. Territorial Authorities enforce compliance with the Code. They do this by receiving, considering and approving or refusing applications for building consents; issuing project information memoranda, code compliance certificates and compliance schedules; and determining whether an application for waiver or modification of the Code or any document for use in establishing compliance with the provisions of the Code (Alternative Solutions) should be granted or refused.
8. The Government announced a review of the Act in the 1999 Budget. The terms of reference for the review were:

To review the operation of the Act and to identify options, both legislative and non-legislative, for improving the effectiveness of the overall building control regime and quality of regulation provided for by the Building Act 1991. The emphasis is on identifying ways in which further innovation and efficiencies can be achieved.

9. Recent attention to weathertightness issues has overshadowed the work of the review. The BIA appointed a Weathertightness Overview Group (Overview Group) in February 2002 to inquire into the weathertightness of buildings. Its terms of reference included consideration of:

Whether failures are attributable to deficiencies in the Building Act, the Building Regulations, or the manner in which these are administered by the Authority or by Territorial Authorities (including the role of Building Certifiers), and whether the purposes of the Act under Section 6 have been properly observed by the Authority.

10. The Overview Group completed its report on these matters in November 2002. It advised that there are features of the Act and Code that are deficient and have contributed to the weathertightness problem. The Group recommended that the review of the Act be widened to address these deficiencies. The Group raised concerns about the compliance role of Territorial Authorities and private certifiers, and the role, structure and resourcing of the BIA.

Government Response

11. The Government accepts the main findings of the Overview Group.
12. Its immediate response to the issues raised by the Overview Group was to provide support to homeowners affected by weathertightness issues. To this end the Government established the Weathertight Homes Resolution Service.
13. The Government has also made decisions to strengthen monitoring of the BIA, and has commissioned the preparatory work necessary to broaden its review of the Building Act. The issues that the review will address, and its relationship to each of the terms of reference of the Inquiry, are described later in this submission.

Establishment of the Weathertight Homes Resolution Service

14. The Weathertight Homes Resolution Service has been established within the Department of Internal Affairs. It provides owners of homes that are (or are suspected of being) leaky buildings with information, and access to speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to those buildings.
15. The legislation necessary to establish the Weathertight Homes Resolution Service was assented to on 26 November 2002. The Weathertight Homes Resolution Services Act 2002 provides for the following matters:
 - Assessment and evaluation of claims in relation to leaky buildings – owners of dwellings concerned that their dwellings may be affected by weathertightness problems can have their claims assessed. Assessors will inspect properties, free of charge to the homeowner, and report on all relevant matters including possible causes and the estimated cost of repairs. The Service will appoint a case manager to handle each case;
 - Mediation of claims – owners of dwellings with eligible claims can choose to access the Service’s mediation service;
 - Compulsory adjudication of claims - owners of dwellings with eligible claims can choose to access the Service’s compulsory adjudication service. Other parties can be compelled to participate in the proceedings.

This service will also be available to those owners who chose mediation, but for whom mediation broke down

16. In addition to providing accessible and affordable assessment, mediation and adjudication services, the WHRS is providing homeowners with access to reliable information on issues related to weathertightness. In October the government set up a toll-free number (0800 116 926) and a website (www.weathertightness.govt.nz) to provide information to people affected by 'leaky building' problems.
17. The toll-free number operates from 8.30am to 7pm Monday to Friday. The number of calls to the 0800 totalled 1,373 as of Wednesday 4 December. By region:
 - 624 (47%) were from the Northern region (Auckland – Whangarei);
 - 145 (11%) were from the Waikato – Bay of Plenty region;
 - 391 (28%) were from the Central region (Napier/Wanganui – Nelson/Blenheim); and
 - 195 (14%) were from the Southern region (Christchurch/West Coast – Invercargill).
18. The Service is now operational. The Department of Internal Affairs has:
 - instituted a regular programme of updates to the Weathertightness website;
 - maintained an 0800 telephone service for people concerned with issues related to weathertightness;
 - established a case management system. So far over 100 applications have been received and logged into the system;
 - appointed an initial intake of assessors and mediators; and
 - commenced the adjudicator selection process.

Strengthened Monitoring of the BIA

19. The Overview Group expressed concern that the BIA has adopted a relatively low-key administrative approach to its functions. For instance, it found that while the BIA has developed processes for disseminating information to industry through its many publications and seminars, it is questionable whether this has adequately addressed issues such as the weathertightness problem. The Overview Group suggested that part of the reason for the BIA's low-key performance may be that there is no government department specifically devoted to building, and that the Department of Internal Affairs has only an arms length involvement. The Overview Group recommended:
 - (a) a review of the role, structure and resourcing of the BIA with a view to enabling it to provide a more comprehensive service to the public and industry; and
 - (b) a reassessment of the scope and implementation of the

functions of the BIA in relation to how the BIA is to achieve the purposes of the Act.

20. The Government accepts the findings of the Overview Group and has already taken action to strengthen oversight of the BIA.
21. It has decided to shift responsibility for the policy and regulatory functions associated with building regulation from the Department of Internal Affairs to the Ministry of Economic Development (MED). This transfer of responsibility has begun, and will take full effect from 1 January 2003.
22. These decisions have already resulted in strengthened oversight of the BIA. MED has appointed an advisory committee to advise on its monitoring arrangements. Members of the advisory committee are Paul Carpinter, Brian Roche and Ian Bond.
23. The objectives of MED's strengthened monitoring are to:
 - maintain a fully functioning BIA while its future roles, functions and structure are being reviewed; and
 - ensure that the BIA takes the actions necessary to address the recommendations of the Overview Group with direct relevance to its current operations and effectiveness.
24. MED is currently working with the Chairperson and Chief Executive of the BIA to consider how: (a) the Government's decisions to review the building regulatory system; and (b) the BIA's response to the Hunn report, can be appropriately reflected in the Statement of Intent of the BIA currently being finalised. It is expected that this document will be completed before the end of this year.
25. The Government is also considering the details of the work programme needed to decide on the future roles, functions, structure and monitoring arrangements necessary for a fully effective BIA, including its relationship to MED's policy functions and whether or not it should continue to operate as a Crown Entity.

Preparatory Work to Review the Building Act

26. The Government has begun a fundamental review of the Building Act. It is the Government's intention that officials will complete this work as soon as possible in 2003. This is to allow the Government to introduce and pass the legislation necessary to restore consumer confidence in the building regulatory system as soon as possible. As noted earlier, this review will be informed by the report of your Inquiry.

27. The Government is currently considering advice from officials on the work needed to fully review the Building Act. This will include consideration of the Act's:
- philosophy;
 - purposes;
 - related objectives;
 - regulatory elements; and
 - institutions.
28. In the Sections below, I would like to describe each of the likely elements of the review, and how each relates to the terms of reference of the Inquiry. First however, I would like to make some general comments on the philosophy, purposes and objectives of the Building Act.

Philosophy of the Building Act

29. The Act is performance-based in that it sets out purposes and objectives and provides for flexibility in how these are to be achieved. Officials have advised that performance-based regulation is not in itself a flawed philosophy, and is superior to the highly prescriptive 'command and control' system that it replaced. It is the prevailing philosophy internationally in the building area, and has the benefit of encouraging innovation.
30. The Overview Group found evidence that the Act has provided real benefits by allowing innovation in design, materials and construction solutions. It also found that the emphasis the Act has given to issues relating to safety, health, fire protection, facilities for disabled persons and energy efficiency has produced good results.
31. In practice, however, the effectiveness of performance-based regulation often relies on prescriptive 'how-to' standards. These provide a backstop if industry participants, such as designers and builders, are unwilling or unable to develop their own approaches to meeting the performance criteria of the Act.
32. The Overview Group's findings suggest that this backstop has not operated effectively in respect of building design and construction. The Government accepts this conclusion.

Purposes of the Building Act

33. The current purposes of the Act are to protect people (their health and safety) and the environment.
34. The Overview Group concluded that the Act does not place sufficient emphasis on the basic human need for shelter and protection from the elements and, as a consequence, weathertightness and durability requirements

have not been given appropriate emphasis throughout the Code and Approved Documents.

35. Building regulation in some overseas jurisdictions includes the specific purpose of protecting the interests of homeowners as consumers of homes. In British Columbia, for example, the purposes of its Homeowners Protection Act include strengthening consumer protection for buyers of new homes and improving the quality of residential construction.
36. The Government has asked officials to consider and advise on an additional purpose to the Building Act to protect the interests of homeowners as consumers of residential dwellings, and to ensure that residential dwellings are fit for purpose.

Related objectives

37. Statements of objectives are useful for guiding how the purposes of building regulation are to be achieved. The emphasis given to particular objectives will impact on both the front-end and longer-term costs associated with buildings.
38. The objectives of current building regulation are not explicitly provided for in legislation, but are clear from a reading of the 1990 report of the Building Industry Commission, the debates in the House as the Bill progressed through its various stages, and from a reading of the Department of Internal Affairs publication 'A Constructive Guide to the Building Act'. They can be summarised as:
 - giving effect to the purposes of the Act;
 - facilitating innovation - through a performance-based framework that allows for flexibility in operation and the use of new technologies and practices; and
 - minimising compliance costs - by not creating unnecessary administrative and other transaction costs.
39. It is the Government's view that these objectives continue to be relevant, but that they have resulted in a relatively heavy weighting on the minimisation of front-end costs. The Government shares the concern of the Overview Group that attempts to hold down the construction and code compliance costs of dwellings have been at the expense of the whole-of-life costs of buildings.

The level of detail to be provided with building consent applications

40. Approved Documents (acceptable solutions and verification methods) and building product accreditations provide the regulatory backstop to ensure that building design and construction meet the requirements of the Code.

41. I have been advised that the ratio of building activities that use Approved Documents to those that employ alternative solutions is thought to be 2:3. Questions have been raised as to whether this balance is right, and whether more emphasis should be given to the use of Approved Documents in particular situations, especially where the risks, consequences and likelihood of failure may be high. In such circumstances Approved Documents can provide greater assurance that the purposes of the Act are being advanced, and that the whole-of-life capital costs of buildings are likely to be minimised. They can also reduce compliance costs for those who wish to make use of them, but are likely to reduce innovation.
42. The Overview Group also found that Territorial Authorities too readily accept BRANZ building product appraisals as evidence of compliance with the Code, with little attention to any caveats contained within the appraisals. BRANZ has no regulatory role under the Act, but has developed a business line in providing building product appraisals for product manufacturers. I am concerned that in the absence of BIA accreditations, Territorial Authorities are relying on BRANZ building product appraisals as providing evidence of compliance with the Code.
43. Approved Documents contain standards for building products and systems. The integrity of the process for producing these standards is important. It is critical that they reflect the purposes of the Act and are not advocated by those who have a vested commercial interest in them.
44. As part of the wider review of the Building Act the Government intends to address these matters. It will seek advice on whether more weight should be given to Approved Documents and in what circumstances. The Inquiry's findings on the level of detail to be provided with building consent applications will be an important input to this work.

The inspection regime as part of the code compliance certification process

45. Territorial Authorities automatically issue building consents when use of acceptable solutions is proposed.
46. When an alternative solution is proposed, Territorial Authorities and building inspectors are required to use any existing verification method and, if no verification method exists, to satisfy themselves on 'reasonable grounds', that the design and building work complies with the requirements of the Code.
47. The Government will be seeking advice on the guidance and direction necessary to Territorial Authorities and building inspectors in carrying out their responsibilities under the Building Act. This will include consideration of both the situations in which approved documents should be available, but also the guidance that is necessary to territorial authorities and building

inspectors to make decisions on 'reasonable grounds' as to whether or not alternative solutions comply with the requirements of the Building Act.

48. The Government will also consider the education required of builders, private certifiers and Territorial Authorities in relation to the Code, Approved Documents and alternative solutions. Section 12 of the Act may need to be amended to clarify the BIA's role in this.
49. The Overview Group raised concern that a large number of houses are not being sufficiently completed, prior to occupation, to be able to receive a code compliance certificate. This can occur for any number of reasons, such as the owner running out of funds or exceeding his or her budget and consequently suspending or terminating the building contract. A major concern is that occupation may occur before a house is safe and sanitary. Building certifiers currently have no power to control this situation other than by referring it back to the Territorial Authorities. Neither can Territorial Authorities readily address the situation. The result is a large number of long term occupied homes without code compliance certificates. There is also evidence of these homes being on sold without code compliance certificates. This matter will be considered in the Government's wider review of the Building Act.

The split responsibility of building certifiers and territorial authorities

50. The allocation of clear accountabilities and responsibilities, together with appropriate checks and sanctions, are critical to the effective performance of the regulatory system. The Government is concerned to ensure that this is the case.
51. The Act provides for the current institutional arrangements and their governance, including the responsibilities of territorial authorities and building certifiers.
52. Territorial Authorities effectively operate as administrative agents of the BIA, which in turn is required to monitor and review their activities and exercise sanctions in cases of poor performance. Territorial Authorities:
 - issue project information memoranda;
 - approve or refuse building consent applications within prescribed time limits;
 - grant or refuse waivers or modifications of the Code;
 - issue code compliance certificates;
 - issue compliance schedules and record building warrants of fitness;
 - enforce the provisions of the Act, the Building Regulations and the New Zealand Building Code; and
 - maintain records of building information and make them available to the public.

53. Some of the functions of Territorial Authorities are also carried out by private certifiers.
54. In considering the allocations of responsibilities between territorial authorities, building certifiers and the BIA, the Government will be seeking to ensure that responsibilities and accountabilities are clear. To this end the findings of the Inquiry will be important to Government decisions. So too will the findings of the previous Building Act review, that considered many submissions on the responsibilities of and relationships between territorial authorities and private building certifiers.
55. The BIA's statutory responsibility to undertake reviews of the operation of territorial authorities and independent building certifiers was considered by the Overview Group. It concluded that, while the reviews of Territorial Authorities and independent building certifiers by the BIA are considered adequate, more rigorous audits would contribute to an improved and more consistent service. This matter will also be considered in the course of the broader review of the Building Act including the audit and review standards that should apply to both territorial authorities and building certifiers.

The decline in the level of skills in the building sector

56. There is no overarching regulation of the professionals and trades involved in the building industry. While there is profession-specific regulation for architects (Architects Act 1963), engineers (Engineers Registration Act 1924 and Chartered Professional Engineers Act 2002), building certifiers (Building Act 1991), and electricians (Electricity Act 1992), there is no regulation for draughtspeople and builders.
57. The findings of the Overview Group suggest that design, inspection, and building can all be criticised for not achieving the overall objective of the Act. It proposed the development of educational and reference documents for building inspectors and certifiers, and exploration of issues in regard to registration of builders and related trades.
58. A decision to introduce a more comprehensive regulatory regime for building professionals would require consideration of:
 - the particular skills needed;
 - the need for, and type of ongoing training;
 - what alternative incentives exist to achieve the objective;
 - costs of regulation;
 - effect on participation in the overall building industry and economy;
 - the implications of the Trans-Tasman Mutual Recognition Arrangement; and
 - transitional timeframes and measures.

59. These matters plus the findings of the Inquiry will all be considered in the Government's review of the Building Act.

The Health Issues that may arise from leaky buildings

60. Health and safety issues may arise when leaks allow the growth of mould and fungi. Both the Occupational Safety and Health service (OSH) and the Ministry of Health have taken steps to:
- Develop knowledge of the issues and potential health implications;
 - Advise workers and the public of any health risks; and
 - Ensure that public health officers and OSH inspectors are equipped to deal with enquiries and provide advice.
61. OSH has written and disseminated a bulletin on the 'Risks to Health from Moulds and other Fungi'. This bulletin has been posted on the Department of Internal Affairs weathertightness website and also on OSH's website. The Ministry of Health has also provided information to the BIA on the health risks to homeowners. This advice has also been posted on the weathertightness website and the Ministry's own website.

Other Matters

Enforcement and dispute resolution

62. Clear accountabilities for roles and functions are essential to the integrity of the system. Legal enforcement provides one means of establishing these accountabilities (and associated liabilities), and also the means by which consumers who suffer damage can seek redress.
63. The Building Act deals with two principal types of liability:
- criminal liability for offences against the Act, which are established by prosecutions brought by Territorial Authorities on behalf of the community as a whole. Such offences are punishable by the Crown. The courts have generally supported the actions taken by Territorial Authorities; and
 - civil liability for certain wrongs done to particular persons. Such offences include breach of contract and tort, particularly negligence. These offences are established by actions for damages, or other remedies brought by the other part to the contract or victim of the tort.
64. Establishing civil liability has proved problematic. The nature of the building industry has evolved to include a multitude of different parties, including builders, other building trades and sub-contractors, developers, architects, draughtspeople, project managers, insurers, building certifiers (individual and corporate), Territorial Authorities, and the BIA. The Overview Group found that this has led to comments such as "no-one takes overall responsibility for

the project any more”. The Government is concerned that in this environment, homeowners with building defects struggle to pinpoint the root cause of their problems and have difficulty identifying the responsible parties. Even when liable parties can be identified, the parties may no longer exist as legal entities. Homeowners can also find the complexity and cost of taking cases to court a barrier to resolution.

65. Means of addressing problems with the current system include:
 - expanding the role of the Weathertight Homes Resolution Service to be a specialist body for enforcing a wider range of building disputes; or
 - third party enforcement; and/or
 - a homeowners protection insurance scheme or compulsory warranty as a backstop.
66. The Government has decided to review the role and placement of the Weathertight Homes Resolution Service beyond 30 June 2003. One option that will be considered is whether to extend the role of the service as a specialist dispute resolution service for all building disputes involving homeowners (and possibly other owners).
67. Compulsory homeowners protection insurance, compulsory building guarantees, and indemnity schemes could all be potential complements to current or modified dispute resolution arrangements.
68. Compulsory homeowners protection insurance was initially proposed as a component of the current regulatory system, but not taken up. Such schemes are a feature of building regulation in a number of overseas jurisdictions including most states of Australia, British Columbia, some US states and the United Kingdom. British Columbia has mandatory home warranty insurance, which, provides for two years against defects in materials and labour, five years against defects in the building envelope (including water penetration defects), and 10 years against structural defects.
69. In practice, these schemes can provide two main benefits. First they can provide some added protection for homeowners who suffer damage as a result of a defectively built house. They do this by providing a safety net for homeowners with building defects, especially in cases where builders or developers cannot be brought to account, possibly because of death, bankruptcy, or in cases of phoenix companies. Second, they can strengthen incentives on builders and property developers to ensure that houses are effectively built. They can do this by requiring builder registration as a precondition of purchase and through risk-rated premiums based on factors such as the builder’s experience, track record and quality control systems.
70. The costs and benefits of such schemes will be considered as part of the Government’s broader review of the Building Act. The Government is aware of a number of risks associated with compulsory homeowner protection insurance. These include the risk of insurer failure, insurers taking an overly

conservative approach and pushing standards up to more than necessary levels, the risk that the insurance market may not have the capacity to deliver such a scheme, and the potential for increased short-term costs of building work resulting from requirements to purchase insurance. All of these risks will be carefully considered in the Government's review.

Information and education

71. Information, to consumers, industry and administrators is critical to the operation of an efficient and effective building construction market. The previous discussion of the Government's interest in adding a consumer protection purpose to the Building Act reflects a view that there are information gaps and asymmetries for homeowners (and possibly for other consumers). The Overview Group observed that the majority of the population knows relatively more about the pitfalls of purchasing a used car than buying a house, and that the used car sector has better regulation in terms of safety and quality performance, ongoing warranty, and consumer protection.
72. Current provisions to address information gaps and asymmetries include:
 - Project Information Memorandums (PIMs) which, the Act requires, must be obtained and paid for by any person wanting to build on a piece of land. They contain information the Territorial Authority has about the land that may have a bearing on the siting and design of the proposed building;
 - Land Information Memorandums (LIMs) are similar to PIMs in content, but differ in purpose. Anyone may acquire a LIM under the Local Government Official Information and Meetings Act 1987. Their role is primarily information provision; and
 - the BIA's role, specified under section 12 of the Act, in disseminating information and providing educational programmes relating to building control matters.
73. The Overview Group has recommended extending the information available in LIMs to include the inspection and maintenance recommendations prescribed by the designer, and the building product or system warranties. This would inform owners of matters that may impact on the long-term quality of their buildings.
74. As part of the broader review of the Building Act, officials will be directed to provide advice on the importance of information and education, and a possible broadening of the BIA's role in respect of both.

BIA role, performance and relationship to the Crown

75. The BIA is a Crown agency for the purposes of the Public Finance Act funded from a levy on building consents collected by TAs, and user charges

for services relating to determinations, accreditations and building certifier approvals. Its specific policy and regulatory functions are to:

- advise the Minister on matters relating to building control;
- approve documents for use in establishing compliance with the provisions of the Code;
- determine matters of doubt or dispute in relation to building control;
- undertake reviews of the operation of territorial authorities and building certifiers in relation to their functions under the Act;
- approve building certifiers;
- grant accreditations of building products and processes;
- disseminate information and provide educational programmes on matters relating to building control; and
- generally take all such steps as may be necessary or desirable to achieve the purposes of the Act.

76. The Overview Group expressed concern that the BIA has adopted a relatively low-key administrative approach to its functions. As set out in paragraph 19 of this submission, it recommended: (a) a review of the role, structure and resourcing of the BIA with a view to enabling it to provide a more comprehensive service to the public and industry; and (b) a reassessment of the scope and implementation of the functions of the BIA in relation to how the BIA is to achieve the purposes of the Act.

77. Options that the Government intends to explore for improving the effectiveness of the BIA include:

- strengthened monitoring arrangements; and/or
- amending the Act to provide greater guidance to the BIA in exercising its roles and functions; and/or
- bringing some or all of the BIA's functions into a government department.

Conclusion

78. I would like to thank the members of the Inquiry for allowing me to present this submission. The Government shares the Inquiry's concern to restore the confidence of New Zealanders as quickly as possible in the building regulatory system.

79. The Government has taken the steps necessary to address the immediate issues arising from the weathertightness issue.

80. The Government's attention is now firmly focused on the work needed to undertake a fundamental review of the Building Act. To this end the Government sees the work of the Inquiry as an important input to its decisions on reform of the Building Act in 2003.

81. I hope to be able to brief the inquiry on the details of this review including how it will address any findings and recommendations resulting from the Parliamentary Inquiry into Weathertightness of Buildings in New Zealand.

Hon George Hawkins
MINISTER OF INTERNAL AFFAIRS