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Building System Legislative Reform

Local Government New Zealand's submission on Building System
Legislative Reform DRAFT

11 June 2019

We are. LGNZ.

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This final submission was endorsed under delegated authority by Dave Cull, President, Local Government New Zealand (LGNZ).

Key recommendations

1. Without a change to the liability settings, the reform will fall short of what is required, whether or not a mandated guarantee and insurance product is put in place.

Recommendation: Restrict BCA liability for all claims under the Building Act 2004 so that BCA liability is proportionate and restricted to the roles of BCAs in the administration of building consent processes.

2. Roles and responsibilities of the parties, including MBIE and BCAs, in the building system are unclear.

MBIE's role in providing leadership centrally must be strengthened. MBIE must provide greater technical leadership and support to BCAs in support of their administration of building regulatory duties including judgments on Building Code compliance. Such a role should include increased leadership on technical expertise and advice; providing a central clearing house to the sector for good practice in innovative areas; more guidance, standards and acceptable solutions, and more support to the whole sector for upskilling and capability building. Duplication of responsibility, where individual BCAs are expected to rule on Acceptable Solutions and the suitability of building products and systems is prone to error and risk because BCAs will lack resource.

The role of the BCA, relative to that of designers and builders, needs to also be made clear in law – so that it is clear that building designers and practitioners are accountable to owners for the quality of their building work and that BCAs are accountable to the central regulator for their administration of building regulatory requirements (not quality assurance of building work).

Recommendation: Clarify in law roles and responsibilities of the parties in the building system, to ensure that it is clear that building designers and practitioners are accountable to consumers for the quality of building work

3. Aspects of the current system are inefficient. For example, each individual BCA is required to assess and approve new products coming to the market. This function needs to be centralised and a central register maintained

Recommendation: Some functions should be done centrally such as product approval and maintaining a central register of approved products and building methods.

Introduction

Thank you for the opportunity to submit on the Building System Legislative Reform proposals. We are pleased the proposals address some of the matters the sector has raised as concerns for some time. LGNZ's agrees with MBIE's systemic approach in addressing five key areas of building activity, but vehemently disagrees with not proposing a change to risk and liability settings, an issue that we consider the Achilles heel of the building system in New Zealand. It should

be noted that we view the proposals as a package, and in our view they do not go far enough.

At the outset, the roles of the different parties in the system needs to be clearly articulated and confirmed. In LGNZ's view, the Building Consent Authority's (BCA's) role is to administer regulatory requirements (to issue building consents, code of compliance certification etc.) and to ensure accountability of the various parties in the system, and MBIE's role is to provide technical leadership (including acceptable solutions, verification methods etc.). Broadly, LGNZ wants to see a system that incentivises all parties to perform their roles properly. To this end, the role and duty of care of BCAs to building owners needs to be limited and clarified in law.

LGNZ is concerned that over the past three decades the courts have extended local government's duty of care in administration of building regulatory requirements, first to homeowners and now to commercial owners in ways not anticipated by Parliament. . The courts have interpreted the role of BCAs as being one of quality assurance with a related duty of care to owners. This is unprecedented for a regulator in New Zealand, is unreasonable, weakens the accountability of building designers and practitioners to owners and results in a risk averse approach to administration of building regulatory requirements that is odds with the desire of consecutive governments to make this process more administratively efficient. Because the law has been allowed to develop in the way that it has over the past three decades, it is now necessary for government and parliament to clarify the law through legislative amendment.

LGNZ submits that this duty of care, along with the liability settings is at odds with the aim of the current reform, namely asking BCAs to "take the handbrake off." In LGNZ's view this is impossible with the existing risk and liability framework and with the lack of leadership from the Government. There are various functions that should be carried out centrally so the system runs more efficiently.

BCAs function in an increasingly complex, changing and challenging building environment. The building sector as a whole is operating in an evolving environment with new technology, new products, new building methods and changing building types. Without a strong presence of central government through leadership and fit-for-purpose regulation, councils in their role as regulators are burdened by a broad and complex set of associated issues, the complexity of which they are not adequately equipped to address or manage.

For example, the Building Act puts the onus on each individual BCA to ascertain whether new building products meet building code performance criteria. Each BCA is required to undertake its own product research and assessment to determine compliance. It is inefficient for each BCA to individually make a call on new products, and can result in discrepancies across BCAs. A central agency should be charged with assessing new products and maintaining a national product register.

We have considered the proposals put forward in the discussion document and provided our feedback as per below.

Risk and Liability

LGNZ's view is that aggrieved homeowners are currently poorly served by a flawed system that requires them to have to resort to a court process to seek redress and remedy relating to building defects.

LGNZ supports a better approach to the resolution of building disputes and defects based on a standard guarantee and compulsory insurance. As part of the design of compulsory insurance, it is critical that attention be given to the underpinning liability framework and rights of insurers to pursue legal action against negligent parties.

LGNZ does not support maintaining the current liability settings for BCAs (whether or not a mandated guarantee and insurance product is put in place). Instead, LGNZ wants change so that full accountability for defects in building design and building work sit with those responsible for the work, so that accountability and incentives for sector performance are improved. . As long as councils face a disproportionate exposure to legal claims relating to building defects, councils have few – if any – incentives to "take the handbrake off". This is entirely reasonable, given that it is ratepayers ultimately must fund any legal redress. As such, LGNZ strongly supports clarification of BCA roles in the administering of regulatory

requirements and a corresponding change to proportionate liability for all claims under the Building Act 2004. In our view, this appropriately reflects the BCA's role in the building system.

Just to be clear, LGNZ's view is that councils should be accountable for performing their regulatory roles and functions, not for the faults and poor practices of others in the system.

LGNZ's view is also that, as a minimum, any "duty of care" by BCAs should be ring-fenced to residential and not extend to commercial, recognising that parties in the commercial building sector are sophisticated entities more than capable of putting their own protections in place to manage their risk.

Guarantee and insurance products

MBIE supports MBIE's proposal that builders be required to offer homeowner a guarantee and insurance product before starting work on a new home, or significant alteration. In the event that a homeowner chooses not to take up the offer of insurance, the homeowner should be clearly warned of the consequences of such a decision in the event of a building defect that the building is unable to fix. Such a choice should also be required on the LIM, for the information of any future purchaser of the property

If the homeowner elects to take up the product, s/he would be the 'policy holder' and would be able to transfer the insurance to new owners in the event that a home is sold. MBIE proposes that the product would be in place for 10 years once the work is completed.

LGNZ appreciates that the proposals for a guarantee and insurance product are at an early stage and amongst other matters, MBIE is yet to test the market for such a product, or decide how the product would apply to mixed use buildings.

LGNZ's support for compulsory insurance is conditional on necessary changes to the current liability framework and restrictions on the ability of insurers to progress claims against BCAs. Unless this happens, the introduction of guarantee and insurance products, will not necessarily have any favourable impact on the incidence of common law liability for BCAs and others for building defects. In the absence of specific statutory provisions to the contrary, insurers would have the rights of subrogation to bring proceedings against BCAs and other participants in the building process.

It is accepted that insurers may not always exercise their rights of subrogation, but LGNZ nevertheless considers this approach would not deliver any demonstrably better outcome for BCAs than the current status quo, and would not contribute to a more efficient consenting process and lower transaction costs (in the absence of a statutory modification on rights of subrogation).

In our view, if guarantee and insurance products are to be a key part of the framework, they must be mandatory. A secondary benefit of a mandatory scheme is that it would quickly establish a market of sufficient scale, giving insurers the confidence to invest in product development.

LGNZ also holds the position that an approach to insurance, similar to that of ACC should be explored. Such a centrally administered approach would likely have advantages and benefits over an approach based on competing insurers. It would mitigate risks of cherry picking and un-insurability. Under such an approach, insurance could be offered and paid for at the time building consents are issued or through levies on building companies and practitioners.

LGNZ is also of the view that any insurance cover should be standardised, so that it is clear to homeowners what is included, and with appropriate market conduct and prudential regulation to ensure the fairness and sustainability of the market

Liability Settings

Local authorities carry out functions for the Building Act 2004 without any ability to opt out of their role or limit their liability.

Since 2003, local authorities have been on record as advocating for a change from joint and several liability to proportionate liability in respect of BCA liability claims.

LGNZ agrees with the Law Commission's view¹ that "an essential test is which rule or combination of measures is most likely to produce results that are efficient, and fair to and between the parties" when considering the issue of proportionate as opposed to joint and several liability. LGNZ however differs from the Law Commission in terms of its conclusions to retain joint and several liability in its [2012 Issues Paper](#).

Producing results that are fair

BCAs continue to be exposed to a disproportionate share of liability for Building Act claims under the doctrine of joint and several liability. There are a number of reasons for this, all of which are well known. However, before beginning, we wish to be explicit about two points; the first is that we are unaware of any other circumstance where a regulator is the last (and sometimes only) source of redress when a product or workmanship is found deficient. Second, when councils are the "last resort" for liability claims, the "council" does not pay, but rather those living in the council's jurisdiction pay through rates. We are also unaware of any other situation where the costs for poor quality workmanship, products or outcomes created by others are socialised among local residents.

The present joint and several liability regime disadvantages local authorities as they cannot take the same measures as other participants in the building process to avoid or limit their accountability, and often suffer the financial consequences of being the "last man standing". This shifts an unequal burden to ratepayers and the community generally.

The Discussion Paper cites that between 2008 and 2018, BCAs paid around \$332 million to cover the costs of defects incurred by other participants who were unavailable to pay their share of the claims.

LGNZ accepts that plaintiffs will, under proportional liability, be unable to fully recover costs when those responsible for building quality problems have become insolvent or cannot be found. LGNZ does not however consider that it is fair on the wider community, and ratepayers, to pay the whole of the claim as currently occurs under the joint and several liability, instead we support compulsory insurance.

The unfairness of the current system is compounded by the ability of the other participants to limit their liability. Private sector parties have the ability to wind up contracting entities on a regular basis and/or let companies go into liquidation rather than recapitalise them to meet claims. This creates a significant moral hazard, where the building sector can – and does – shift its financial risk onto the public. This should be remedied through amendments to the Building Act 2004. Doing so will contribute to a more accountable sector with resulting improvements to quality and performance for building owners.

There is also considerable scope for better educate consumers about the risks in the building sector to help them make more informed decisions when purchasing building work. MBIE's 2018 research found that homeowners have limited understanding of the risks they face when commissioning building work, and low awareness of the tools they can use to manage their risk. MBIE's proposed insurance and guarantee product would assist in that regard in terms of drawing liability/consideration to their attention.

Producing results that are efficient

BCAs have a regulatory administrative role in the building process.

MBIE notes in the Discussion Paper that it has heard concerns that joint and several liability leads to risk averse consenting. LGNZ supports those concerns. Without legislative change, BCAs are likely to continue to take a sensibly cautious approach in both issuing consents, conducting inspections, and issuing certificates, which slows the building process down.

LGNZ's view is that if participants are encouraged to improve their practice, this would be a positive outcome, even if it did result in some additional costs because of more risk averse and robust behaviours.

It is accepted that in this situation homeowners would not be fully protected against loss, at least in the absence of a guarantee and insurance product, but they have the option of taking up insurance even if the product is not legislated for.

¹ Law Commission Issues Paper 32 *Review of Joint and Several Liability* (November 2012) at 9.24

A limitation on liability may well have some impact on insurers, but in LGNZ's view this is an appropriate trade off even if results in higher insurance costs.

In addition, there is little justification in suggesting that homeowners would find it hard to establish how each defendant contributed to the losses. A court could still make appropriate findings on the percentage of liability to be attributed to BCAs, if the LGNZ proposal on proportionate liability.

LGNZ relies on efficiency and fairness arguments to support proportionate liability on the part of BCAs. There are likely to be benefits in terms of making building owners more conscious of the need for rigour in undertaking their own roles and responsibilities and the identification of risks.

It is possible that transaction costs may increase for some or all of the other participants in the building process, but that should appropriately result in homeowners giving greater thought and undertaking more thorough due diligence when undertaking a building project.

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Building products and methods

Proposals	LGNZ position
<p>Widen the purpose of the Building Act Widen the purpose of the Building Act to include the regulation of building products and building methods.</p>	Support expanding the purpose of the Building Act to include the regulation of building products and methods and their use.
<p>Clearly define 'building product' and 'building method' Include the following definitions in the Building Act:</p> <ul style="list-style-type: none"> • A 'building product' is any component or system that could be reasonably expected to be incorporated into building work. A system is a set of at least two components supplied and intended to be used together to be incorporated into building work. • A 'building method' is a specific way of using a product or system in building work. 	<p>More work is required in relation to proposed definitions of building products and building methods and building systems, particularly given modern methods of construction and the importation of overseas products.</p> <p>Minimum information requirements must be expanded e.g. to include statements as to whether a product meets the Building Code. Information should also be provided in a standardised format.</p>
<p>Set minimum standards for information about building products and require manufacturers and suppliers to supply that information Product manufacturers and suppliers (including importers) must provide information about building products that is publicly accessible.</p> <p>Set minimum information requirements for building products (through regulations).</p>	<p>Provide for Producer Statements in the Act, and for BCAs to be able to rely on these.</p> <p>Clarity is needed regarding whose responsibility it is to enforce the provision of information. LGNZ is of the view that such requirements should be administered centrally.</p>
<p>Clarify the responsibilities of manufacturers, suppliers, designers and builders for building products and building methods</p> <ul style="list-style-type: none"> • Create an explicit responsibility on manufacturers and suppliers to ensure that a building product is fit for its intended purpose. • Clarify that builders cannot use a different building product or building method to the product or method specified in the building consent without an appropriate variation to the consent. • Clarify the responsibilities of builders and designers to ensure that the building products and methods specified or used will result in building work that complies with the building code. 	Does not, on its own, remove the need for every council to do their own assessment and approval process. This is significant as it is enormously time consuming and costly for councils. LGNZ recommends that the system is centrally administered, and that legislation clearly set out responsibilities on manufacturers, suppliers, designers and builders for products and building methods. In undertaking their regulatory roles BCA's should be able to rely on responsible persons
<p>Give MBIE the power to compel information to support an investigation For building products and methods, provide MBIE's chief executive with the power to require a</p>	Support

<p>person, by written notice, to provide information, product documents or both if:</p> <ul style="list-style-type: none"> • The chief executive has cause to consider issuing a warning or ban under section 26 of the Building Act • The information is necessary to make that decision • The information to inform this decision is not readily or publicly accessible. Provide MBIE with the ability to share that information with other regulators. 	
<p>Strengthen MBIE’s role as the product certification owner and regulator</p> <ul style="list-style-type: none"> • Allow for regulations to set requirements on product certification bodies and for the accreditation and registration of product certification bodies. • Allow for regulations to set out the process and requirements for registering a product certificate. • Allow MBIE to set rules for the interactions between participants in the product certification schemes. • Provide MBIE with the powers needed to administer the registers of product certification bodies and product certificates. 	<p>Generally, support</p> <p>Should also require a mandatory national product register to be managed by an independent Crown entity – this is not provided for in this consultation.</p> <p>Alternatively make CodeMark mandatory</p> <p>Require use of certified products in restricted building work</p>
<p>Enable a regulatory framework for MMC, including off-site manufacture</p> <p>Amend the Building Act to enable a regulatory framework that would future-proof the building regulatory system for MMC. Features of this framework include:</p> <ul style="list-style-type: none"> • Enabling a manufacturer certification scheme for repeatable manufacture processes used to produce building work. • Clarifying what roles and responsibilities for MMC will be when the new framework is in place. • Minimising duplication of effort by: – not requiring two consents for the same building work – considering whether to require BCAs to accept each other’s consents and Code Compliance Certificates. 	<p>Support but clarify what the role of the BCA is in this system. If the BCA is unable to verify the components used in manufacture, the BCA should not be liable in the event of failure, provided it notes this issue.</p> <p>LGNZ’s preference is for an ISO type approach to the certification of factory built buildings and components, administered by the central regulator or a specialist certification agency, that a BCA can rely upon in determining Code compliance</p> <p>If a BCA is required to accept another council’s consents and Code Compliance Certificates, a review and determination of potential liability issues must be outlined.</p>

Occupational regulation

<p>A broader definition of Restricted Building Work (RBW) will help manage risk Broaden the definition of RBW to include more complex non-residential building work</p>	<p>Support further analysis and broadening of the definition to include more complex non-residential building work.</p>
<p>Higher competence requirements will increase confidence in the LBP scheme</p> <ul style="list-style-type: none"> • Raise the technical competence standard for LBPs to enter and remain in the LBP scheme. • Introduce a tiered licensing system for LBPs to establish a progression pathway, including a specific licence for supervision. • Simplify the licence class categories. • Introduce behavioural competence requirements for LBPs. 	<p>Support proposed changes, but believe the proposals could go further.</p> <p>Since the 2004 amendments the local government sector has stepped up, accreditation levels by BCAs are very high; other parties have not done so.</p> <p>More work is needed to address the lack of skills, training and ethics of LBPs.</p> <p>All LBPs should have a common understanding of the NZ Building Code and an in-depth understanding of their specific area of practice.</p> <p>A broader and deeper evaluation of the license scheme is needed.</p> <p>LBPs are not being held to account. For example, there are councils issuing many RFIs for a project and essentially being used as the peer reviewer by the applicant.</p> <p>The complaints process requires streamlining. More specifically, the process for a LBP is very onerous and there is no simple way to provide feedback.</p>
<p>A new voluntary certification scheme for all engineers Establish a new voluntary certification scheme that provides assurance of an engineer’s professionalism and general competence and phase out CPEng.</p>	<p>In general, support this proposal. Clarity is needed about the role of central government. We support an expanded conversation about the roles of existing organisations that could manage such a scheme.</p> <p>BCA confidence in engineers and designers, and the assessments process, is critical to streamlining processing and review times and reliance on participants fulfilling professional obligations.</p> <p>A list of engineers with their accredited capabilities is needed and made available for BCAs.</p> <p>Consider strengthening Engineering NZ’s certification process; having a mandatory building code exam; reintroducing the fit and proper person test.</p> <p>Building Act should provide for Producer Statements from certified engineers that BCAs can rely on when determining the Code compliance of building work</p>

<p>Restrictions on medium-to-high complexity engineering work in the building sector will help reduce life safety risks</p> <p>Restrict who can carry out or supervise safety-critical structural, geotechnical and fire safety engineering work within the building sector. This would cover all medium-to-high complexity work and be triggered by factors such as building size, use and location.</p>	<p>Support – those accredited with certain capabilities should only be able to work on certain complex engineering works.</p>
<p>Licensing would regulate who can do restricted engineering work</p> <p>Establish a new licensing scheme to regulate who can carry out or supervise engineering work that has been restricted.</p> <p>An independent regulator would administer the licensing and certification schemes. The regulator would be directly accountable to the Minister for Building and Construction. Engineering New Zealand staff would carry out some of the functions for the regulator initially. MBIE would provide oversight and monitor the performance of the regulator in carrying out its functions. An independent decision-maker would make decisions on whether there has been a disciplinary breach and impose sanctions.</p>	<p>Support</p> <p>Building Act should provide for Producer Statements from certified engineers that BCAs can rely on when determining the Code compliance of building work</p>
<p>Repeal specific sanitary plumbing exemptions for householders in specified areas and for rural districts</p> <p>Repeal the current sanitary plumbing exemptions for householders in specified areas and for rural districts, including the current Gazette notices for districts made under the Plumbers, Gasfitters and Drainlayers Act 1976.</p>	<p>Support.</p> <p>Consistency throughout New Zealand ensures transparency and reduces sanitary and other risks.</p>
<p>Repeal the exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision</p> <p>Repeal the exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision.</p>	<p>Support provided timing and a transition period.</p>

Risk and liability

<p>Require guarantee and insurance products Require a guarantee and insurance product to be in place for all residential new builds and significant alterations. Homeowners would have the choice to actively opt out of having a guarantee and insurance product.</p>	Do not support the proposal as it stands (reference previous comments at section XX)
<p>Leave the liability settings for BCAs unchanged Leave the liability settings for BCAs unchanged</p>	Do not support the proposal as it stands (reference previous comments at section XX).

Building levy

<p>Reduce the rate of the building levy Reduce the rate of the building levy from \$2.01 to \$1.50.</p>	<p>Do not support. The levy needs to be used in support of increased technical leadership and support for BCAs and the sector, increased regulatory stewardship, and potentially for administering, regulating professional certifications, building products and other leadership roles.</p> <p>Stewardship activities should be further defined to include authorisation to use the levy on such areas as national investigations of building and construction practices and products.</p> <p>MBIE's role should include increased leadership on technical expertise; providing a clearing house for good practice in innovative areas; more guidance, standards and acceptable solutions, more support for upskilling the whole sector.</p> <p>Use some of the levy to set up a Crown entity to manage a national product register.</p>
<p>Standardise the threshold for the building levy Standardise the threshold for the building levy at \$20,444</p>	Support
<p>Amend the Building Act to enable MBIE's chief executive to spend the levy on for purposes related to broader stewardship responsibilities in the building sector Amend the Building Act's provisions to enable the chief executive to spend the levy on activities related to stewardship responsibilities in the building sector.</p>	<p>Support levy being used for stewardship of the system</p> <p>The levy should be used for review of the Building Code – this is long overdue</p>

Offences, penalties and public notification

<p>Increase the maximum financial penalties Increase the maximum financial penalties for all persons under the Building Act.</p>	Support increasing maximum financial penalties and introducing higher penalties and introducing higher penalties for organisations
<p>Set the maximums differently for individuals and organisations Set the maximum penalties differently for individuals and organisations</p>	
<p>Extend the time period for charges to be laid Extend the time relevant enforcement agencies have to lay a charge under the Building Act, from six months to 12 months (section 378 of the Building Act).</p>	Support
<p>Modify the definition of ‘publicly notify’ in the Building Act Modify the definition of ‘publicly notify’ in section 7 of the Building Act to remove the requirement to publish in daily newspapers circulating in each of the cities of Auckland, Hamilton, Wellington, Christchurch, and Dunedin. Public notification will still be required in a more modern form that is future proofed and publicly accessible.</p>	Support

Conclusion

In summary, LGNZ considers the proposals are a step in the right direction but they will fail to make the changes needed. The following need to be addressed:

- The settings for liability should be changed to proportionate; if homeowner guarantee products are to be part of the package they should be compulsory
- MBIE should provide more leadership and support centrally, including a role in assessing and certifying products and methods and maintaining a central register. This will make the system more efficient.
- The Building Levy should not be reduced and it should be used for stewardship of the building system

Thank you for the opportunity to comment on this discussion document.