

Sustainable Refurbishment: New Policy initiatives for New Zealand's Leaking Buildings.

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Key words: Building Legislation. Leaking buildings. Construction Technology

Field of Interest: Legal, Economics and Financial Policies

Topic of Interest: Private Economic Support Measures

Paper Focus: General Framework.

Paper Content Classification: Practical

Abstract:

Faulty constructed and leaking buildings as a result of construction practices in the 1990s and 2000s are costing New Zealand billions of dollars in damage in lost production and repair. To improve the poor quality of building construction, the NZ Government over the last 10 years has implemented a range of legal and financial policies. The Building Amendment Bill No 3 is one such piece of legislation and the latest to be passed by the NZ Parliament on the matter.

The legislation is set to further change building and construction regulations here in New Zealand in that it will put in place a code of ethics for the newly implemented Licensed Building Practitioner scheme, a scheme that requires all builders constructing certain types of work to be licensed. It will introduce "risk based" consenting process for low risk building work, placing more accountability and responsibility on designers, building owners and builders to build correctly, and move responsibility (and liability) away from where it largely resides at the moment, on the shoulders of the Local Council (Territorial Authority).

This paper will provide a brief history of the controversy surrounding building under performance here in New Zealand. It will analyse the submissions to the Parliamentary Select Committee overseeing the legislation from the various stakeholders within the industry and evaluate the contribution it will make in the long road back to quality building. The paper supports the view that the transfer of responsibility, of which this Building Amendment bill is a part, runs the risk of failure unless legislative and educational systems supporting the intended role have had time to coalesce and prove their effectiveness.

1. Introduction

The Building Amendment Bill (No 3) and its subsequent enactment as the Building Amendment Bill 2012 forms a part of a long line of other legislation enacted to counter the poor performance of the NZ building industry following the introduction of the performance based NZ Building Act in 1991. The self-regulatory nature of this Act combined with other factors, such as the rapid introduction of new building materials and systems –some with dubious durability capability, changes to timber durability requirements, poor quality construction methods, inappropriate design, lax documentation and supervision all combined to create many more defective buildings than had been the case in the past. In 2001, a report by the author [1] that surveyed some 287 pre-purchase reports indicated some 60% of the dwellings inspected let in moisture through the cladding to an unacceptable degree. Whilst buildings in New Zealand had always leaked to some degree (NZ is a coastal climate and capable of extreme climate variation), what was different and new and picked up by the survey was the significant percentage increase in cladding systems allowing moisture penetration into buildings in the period following the introduction of the Building Act in 1991.

2. Government Legislative Initiatives

The evidence provided by the report, and ongoing concern expressed by prominent members of the building community was such that the Government could not ignore the issue. In 2002 it set up an inquiry into the causes of building failure in NZ. The Overview Group on Weathertightness of Buildings (Hunn report) identified several reasons for poor performance, in particular

- Inadequacy in the Building Code and Approved Documents
- Insufficient checking at building consent stage.
- Inadequacy of building products, materials and components including evaluation of their suitability of fitness of purpose. [2]

The public reaction to the Hunn Report was such that Government felt compelled to put into place additional procedures designed to restore public confidence in the building industry. Since the publication of the report, it has reviewed the Building Act 1991 and replaced it with the Building Act (2004). It has set up an adjudication and mediation strategies to resolve the many disputes relating to leaky homes, introduced a financial package to support homeowners undertaking repairs, and made building contractors agree to become licensed (LBPs) in order to undertake certain types of restricted work.

3. The Building Amendment Bill (No 3).

The main focus of the legislation was to “Signal more clearly accountabilities for designers, builders, building owners and building consent authorities in the day-to-day compliance for building work.” [3]

3.1 The Submission Process and Responses

Submissions came from the many Territorial Authorities, City and District Councils making up the patchwork of Local Governance in New Zealand. The breakdown of submissions is illustrated in Figure 1.

Grouping	No.of Submissions
Territorial Authorities (TAs)	24
Building Organisations and Statuary Bodies	29
Designers (Architects/Designers/Engineers)	11
Building Contractors	2
Private individuals	1

Figure 1: Submission Analysis: Building Amendment Bill (No 3).

3.2 Territorial Authority Submissions:

3.2.1 Accountability Issues.

Whilst most TAs were generally supportive of the intent and aims of the Bill, an analysis of submissions to the Parliamentary Select Committee suggest considerable apprehensions about the readiness of the building community to take up the challenge posed by the new initiatives. The Upper Hutt City Council spoke for many Territorial Authorities when it questioned the feasibility of making individual stakeholders more accountable for their actions when the insurance and liability regime works against it. The issues associated with “leaking buildings” has put the operational procedures (or the lack of them) of the Territorial Authorities to the forefront. In many cases they have been found wanting. Legal redress by individuals under the present law of “joint and several liability” has resulted in the TA (and hence the taxpayer) bearing the brunt of the costs for any successful litigation, out of proportion to the degree of fault, simply because they were the stakeholder with money and could not liquidate their assets to avoid responsibility.

For this reason the TAs were keen to promote other forms of insurance, viz. “proportionate liability”. In this regime the injured party would receive “only the proportionate compensation directly attributed to that person responsible for the damage.” This of course, whilst it would limit damages to those parties with deep pockets and “still standing,” such as the Territorial Authority, would also mean the consumer would have to bear more of the costs of repair for any of the other parties who have gone out of business or

otherwise escaped the legal net, and against whom proportionate blame was due. Suggestions to remedy this scenario included the need for a warranty system for all building professionals, and in particular for the Licensed Building Practitioners, and to put in place educational systems to improve the quality and “the obligations and responsibilities of the professionals involved in building work.” A mandatory warranty scheme would “encourage building practitioners to ‘get it right’ first time and fix defects.” [4]

Building Consent Authority submitters were almost unanimous in their desire to have this current system of liability changed and were critical in their submissions of this bill’s failure to categorically do so.

3.2.2 Stepped Consenting.

The intent of this aspect of the legislation is to enable Contractors, or as they are now called, Licensed Building Practitioners (LBP), to take complete responsibility for the construction of certain low risk building types (eg single storey dwellings) without having go through the building consent process. Most TAs were supportive of the development of “a more streamlined and targeted building regulatory system” as long as building quality was not compromised. Some were critical of the fact “low risk” and “simple residential” were not defined and wanted to reserve judgement until the regulations clarifying the definition of these categories had been clarified. Clarification was also sought regarding TAs liabilities for these new low risk initiatives.

The apprehension for many Territorial Authorities is they feel the quality of the builders (LBPs) that will carry out the work is suspect and that indeed, building performance will continued to be compromised, resulting in more of the same defective work that has cost the country so much to date. The Auckland Council’s stance in this regard is moderate and summarizes the feelings of many Territorial Authority submitters:

...there is a concern that there are insufficient highly qualified and experienced builders and designers in the New Zealand market who are prepared to take on the responsibility of managing their own work without third party review. The Council encourages a gradual and stages approach to the proposed changes. [5]

Councils were concerned that at the time of their submissions much of the finer points of the legislation had not been clarified, due to the fact that the supporting regulations for the Bill had not at the time of the submission process been finalised. The Tauranga City Council spoke for many when it expressed its concern at the lack of detail in this regard.

The Council is extremely concerned that so much of the Bill leaves much of the detail around the types of consent, etc, to be made by regulations. [6]

Examples are given around the lack of detail over what will in fact be defined as “low-risk building work” that the TAs will be responsible for approving. Most Territorial Authorities are extremely sensitive to issues of liability, and are apprehensive that a lack of definition in this regard will open the door to new liabilities at a time when they are struggling to cope with present demands.

3.3 Submissions from Building Organisations.

A significant number of diverse building organisations, such as Registered Master Builders Federation of New Zealand (RMBF), Standards NZ, NZ Historic Places Trust and others also presented a variety of submissions to the Parliamentary Select Committee.

Those closely related to building, such as the Registered Master Builders Federation (RMBF), were supportive of a clarification of responsibilities and the risk-based, or “stepped” consenting process that the Bill potentially afforded. However they too had issues with the timing. They too wanted liability reform (ie a change from the “joint and several” legal framework to that of “proportional liability”) to be in place prior to any changes in responsibility to the individual building stakeholders taking place. Until such “critical aspects” were put in place the RMBF indicated it was reluctant to support the Building Amendment Bill.

The RMBF submission sought to highlight the role faulty cladding systems have played in the “leaking building” scenario, by suggesting product manufacturer’s ability to limit their liability for faulty materials to the cost of replacement (ie excluding consequential damage) be specifically prohibited in this legislation.

A product manufacturer who manufactures a building product and gives advice and/or prepares technical data, plans and specifications in respect of that product is responsible for ensuring that the product will, if installed and maintained in accordance with the advice, technical data, plans and specifications provided perform as required by, and achieve its intended life as required by, the Building Code. [7]

This brought a predictable response in a counter submission from the Building Industry Federation, an industry group representing supply merchants, manufacturers and others, with a claim that “..more often than not it [the lack

of product performance] was more of a people problem..[and] there is enough legislation and regulation in place already.” [8].

The exchange highlights the tensions that still exist between different factions of the building industry over the considerable angst caused by poor performing cladding systems in New Zealand and the ongoing perception that the manufacturers of these cladding systems have to date escaped the harsh consequences of material failure that building owners have had to face up to.

3.4 Submissions From Designers:

A small body of Designers, Architects and Engineers took the opportunity to offer submissions on the bill. Some had issue with the new definition of the designer’s role, which required the designer to produce drawings and specifications that “will result in’ the proposed building being Code compliant, thereby implying that the designer has control over the means and quality of construction required to achieve this end. Not so, suggest the submissions. This should be the responsibility of the Builder.

Others had concern, similar to the majority of Territorial Authority and RMBF submissions, about the lack of any concrete move to “proportional liability” regime. A comparison was made of the moves central government and Territorial Authorities had instigated to limit their liability, notably through the 10 year limitation period and the adoption of The Weathertight Homes Resolution Service (Financial Assistance Package) Amendment Bill –a voluntary opt-in measure for home owners which provided some Government monetary support but which limited Territorial Authority monetary exposure to 25% of the repair cost. This option was not available to designers, who “are often exposed to the severe risk of joint and several tort liability in building dispute litigation.” Often in these instances, particularly where mediation is involved, “the niceties of the judicial system are often absent ...and commercial bargaining-unrelated to fault, will drive settlement.” [9]

Others in the industry interviewed separately suggest that the whole approach to minimizing risk, particularly risk to the Territorial Authority, is at the heart of the problem of responsible building. The Government was “focused on law and beating people into submission” to solve the problem of poor quality building. As a result Territorial Authorities were now “demanding and pedantic “ in their request for information, because [understandably] their own liability issues have demanded this approach. The result is designers now spend a lot of time providing information on “things that are not necessary”. [10]

The solution suggested by this and other submitters, along with that of the NZ Institute of Architects, is to move to proportional liability, in tandem with a mandatory building performance warranty 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 behaviours that increased construction costs and decreased efficiency...[11]

If these initiatives are not enacted to protect the consumer, suggest the NZ Institute of Architects, then “the responsibilities of the BCAs [Territorial Authorities] should remain as is” and the proposed changes to the legislation should not proceed. [12]

3.5 Submissions from Building Constructors:

Only one submission was received by the Parliamentary Committee from a Building Contractor (Hawkins Construction). The lack of representation in this area by the building companies could indicate a certain fatigue with the ongoing submission process. Hawkin’s submission, whilst generally supportive of the bill was, like the building service organizations, critical of the lack of details surrounding the role and use of Producer Statements by BCAs and the lack of clarity regarding the testing of LBP competencies, items promised for clarification in the forthcoming regulations. The lack of these Regulations renders it “..not possible to determine the efficacy of the Amendment Bill..” [13]

4. Conclusion

The analysis of Parliamentary submissions indicated The Building Amendment Bill No 3 has the general support of the industry, but with qualifications. Apprehensions exist about the responsibilities of the designer and the poor quality of Licensed Building Practitioners (particularly as perceived by the Territorial Authorities) and their ability to take on the responsibilities necessary for even “low risk” self certification. The failure of the Bill to consider changes to the law as it applies to liability is another significant drawback to the effectiveness of the legislation. The establishment of a Code of Ethics for LPBs and legislation to clarify Warrant of Fitness requirements for buildings were non contentious and met with general approval.

Whilst some of these measures outlined in this Building Amendment Act 2012 will assist in accountability for future construction, none of the legislation has been of particular assistance to the owners of the many defective buildings already leaking, and who have, in spite of these initiatives, have been left largely to fend for themselves; their only recourse being litigation through the courts or mediation through the Weathertight Homes Tribunal. In either case, the outcome continues to be unsatisfactory to the owner and to the wider New Zealand community.

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