

THE CONSUMER FIGHTBACK: NEW REFURBISHMENT POLICIES FOR NZ RESIDENTIAL BUILDINGS.

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Abstract: From the 12th March 2012, all builders in New Zealand doing certain restricted building work will require to be licensed. The passing of the Building Amendment Bill No 3 in March 2012 enshrines this requirement into the Building Act. The licensing of building practitioners marks a significant retreat from the strong pioneering tradition of self-help building that historically has been a significant element in small-scale construction within New Zealand. This paper will provide a brief history of the controversy surrounding building under performance. It will examine the role proposed for the Licensed Building Practitioner and the role LBP's will play within the building industry. Submissions on the merits of the scheme, made in response to a request for feedback from the Building Act Review signaled in 2009 and the Building Amendment Bill No 3 (in 2011), are examined, evaluated and compared to an industry survey completed six months after the scheme's introduction in March of 2012. The paper supports the view that the transfer of responsibility, of which the LBP 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.

Keywords. Leaking buildings; Building Code Policy; Construction Technology; Licensed Building Practitioner.

1. Introduction

This paper will summarize the policies implemented by the New Zealand Government in response to building industry problems associated with poor quality and leaking buildings that have beset New Zealand since the introduction of the first National Building Act in 1991. It will examine and evaluate the progress of the Licensed Building Practitioner Scheme (LBP), the latest and one of the more significant Government initiatives in their initiatives against the poor quality and leaking building. The LBP Scheme was, until March 2012, a voluntary scheme that enabled builders and trades people with a genuine track record "...to have their skills and knowledge formally recognized, whether they are trade-qualified or not." (Department of Building and Housing (C), 2010). With the schemes implementation in

March 2012 the consequences surrounding licensing tightened, and since that date, persons not licensed are restricted from undertaking and signing off responsibility for certain types of building work, including work associated with the construction of the cladding system, the primary structure, including foundations and framing, and the design of certain types of fire systems in small to medium sized residential apartments.

2. Background

Events leading up to the advent of the Licensed Building Practitioners Scheme in March 2012 can be summarized in broad terms as follows:

- **1991.** The introduction of the National Building Act
- **1996.** A change to the building regulations within the Building Code allowing the use of kiln dried, treatment free *pinus radiata* timber in building construction.
- **1998-2000.** Increased concern expressed by industry professionals regarding the quality of building construction and presence of moisture egress into residential buildings.
- **2001.** The publication of the Auckland House Cladding Survey, a report commissioned by the Building Industry Authority (BIA) to investigate the extent of poor quality and leaking buildings. (Murphy, 2000) The Report surveyed some 287 pre-purchase reports by a private survey firm. Results indicated some 60% of the dwellings inspected let in moisture through the cladding to an unacceptable degree.
- **2002.** The Government acknowledges there is a problem and sets up a commission of inquiry to seek out the causes for this sudden upsurge in building failure. The 2002 report of the Overview Group in Weathertightness (Hunn, 2002) highlights considerable deficiencies in the New Zealand building industry in areas such as contract documentation, trade skills, the quality of new materials and the quality of site supervision.
- **2002.** The Government sets up the Weathertight Homes Resolution Service Act 2002, initiating a framework for mediation and adjudication between owner, builder and other stakeholders to handle the significant increase in complaints over poor quality building.
- **2004.** The 1991 Building Act is rewritten as The Building Act 2004. This new legislation tightens up procedures and policies surrounding the implementation of building controls. Changes included re-introducing timber treatment requirements removed in 1996, upgrading the Acceptable Solution E2 to provide significantly more assistance in what constitutes good, standardized domestic building practice, and changes to Local Council requirements tightening the rules around Building Permit accreditation. The Act also signaled the impending introduction of the Licensed Building Practitioner's Scheme, the main focus of this paper.
- **2009-2011.** The introduction of the Financial Package Amendment Bill. The aim of this legislation was to assist the many New Zealand homeowners considerably disadvantaged financially by the unwitting purchase of leaking

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houses. Government felt bound to act following a report by Price Waterhouse Cooper in 2009 indicating the extent of repairs for poor performing building in New Zealand to be in the order of \$NZ11.3 billion in 2008 financial terms, and that despite lower failure rates since 2006, there was much poor quality building work yet to come to the attention of the authorities. (Price Waterhouse Coopers, 2009).

- **2009.** A further review of the 2004 Building Act is instigated, and the Act amended to allay growing concerns by the Government that parts of the Act were now too cumbersome, too costly to administer and not achieving the outcomes required.
- **2010-2012.** The introduction, from this review, of the Building Act Amendment Bill No 3, cementing in the Licensed Builder Practitioners Scheme and thereby paving the way for Local Councils to withdraw their involvement for certain types of low risk building work, with the transfer of additional responsibility (and risk) to the Licensed Building Practitioner.

3. The licensed building practitioners scheme (LBP)

The background above summarizes briefly the refurbishment policies taken by successive Governments to counter and remedy the systemic failures visited on many buildings constructed between the late 1990s and the present day. These failures were a consequence of rapid change in the building industry. The construction of houses clad in traditional weatherboard and brick, common construction materials in NZ construction up to the 1980s, were reduced as new “face sealed” proprietary rigid sheet cladding systems came onto the market. The upsurge in the use of these “new” cladding materials coincided with other changes in the building industry. The running down of the apprenticeship programme, a rise in the number of apartment buildings under construction and a corresponding move away from traditional fixed price contracts to other forms of construction procurement to meet the rapid growth in this particular corner of the housing sector, all combined to create a period of uncertainty that saw many operators installing new systems and materials into often complex building forms, without the necessary background and training.

These failures were compounded by the move to change the NZ Standard NZ3602 to allow the use of untreated kiln-dried *pinus radiata* into timber house framing. This change, which was subsequently retracted in 2004, had significant and long-term consequences for the NZ building industry. (Murphy, 2003).

The *laissez faire* building practices of the 1990s, when entry to the industry was still possible to anyone capable of using a hammer, also contributed to building failures. The damage caused to the reputation of the industry, aggravated by, but by no means solely due to the presence of unqualified personnel, was evidenced by the financial loss to thousands of

owners from poor performing buildings constructed over that period, and from which many problems still arise.

Against this background, it was understandable how the introduction of a licensing system for building contractors and other participants undertaking certain restricted work was seen by many as a significant part of the reform process. It is a significant step. New Zealand is a young country built on the capability of early immigrants who by necessity had to perform most building work themselves. A tradition of DIY and owner builder culture has been strongly embedded in the building tradition. The introduction of the LBP scheme would severely restrict owner-builder work for most future dwellings

3.1 LICENSED BUILDING PRACTITIONER (LBP) SUBMISSIONS:

A brief summary of stakeholder submissions on the proposed scheme to the Government Department of Building and Housing in 2010 suggested many respondents wanted greater building controls and an effective licensed regime that would achieve it. The building communities view was that quality in building had fallen to an unacceptable low level over the last 15-20 years, and if raising it meant a cultural change in the area of DIY, then so be it.

Whilst the general tone of submissions was in favour of the Scheme, a number of submissions expressed apprehension about the ability of the LBP scheme to deliver improved construction quality in the time allowed. The low quality of present day building consent submissions and on-site supervision was seen as an issue:

Council records confirm that 49% of building consent applications contain defective documentation and ...15% of inspections are not approved due to deficient construction practices on building sites. (DBH (B), 2010, No.363 p.60).

Given this perceived lack of quality, misgivings were expressed at the impending introduction of the scheme in 2012. A considerable number of submissions expressed a desire for a longer transition time. Other submissions were apprehensive the LBP scheme would succeed in eliminating the poor performing contractor. Whilst it may shift the burden of responsibility from Local Authority to site, the problem of quality would persist.

Without any actual rebalancing of responsibility, the behaviors that are currently demonstrated in the industry will not change. Builder LBPS will continue to fail and /or avoid liability by going out of business, or-more concerning-builders will not take up a license at all and exit the industry (RMBF, 2010 p.50).

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Submissions expressed the need for an overarching guarantee of quality amongst the building fraternity, and an instigation of a guarantee scheme that tied quality to contractors after the project was completed

It remains to be seen whether the licensed building practitioner regime will ensure improved quality building work. If the LBP system is not robust and/or a warranty or surety system does not work then the reduction in BCA involvement make the situation worse *for building owners*. There is in fact a risk of a repeat of the leaky building crisis (NZ Law Society, 2010 p53).

There were mixed views on the feasibility of a “reduced role for Building Consent Authorities” as a result of the LBP initiative (this being one of the stated aims of the Government in wanting to review the Act). Apprehensions were expressed over the ability of the LBP to take over the role, and questioned how the BCA could limit its liability under current law.

Yes, limit BCA oversight proportionate to risk, but within a sensible framework aligned to a framework of proportionate liability (Cement and Concrete Association of NZ, 2010 p25).

Until such time as the laws governing liability and precedents are changed, BCAs may be left with liability/a larger than proportionate duty of care despite their legally reduced oversight role. (DBH (B) 2010, p26)

3.2 LBP SUBMISSIONS TO THE THE BUILDING AMENDMENT BILL NO 3.

Stakeholders in the building industry had an additional opportunity to make their views known to the Government with the call for submissions to another set of amendments to the Building Act 2004, this time in the form of the Building Amendment Bill No 3. The Bill, introduced in late November 2010, was the Government’s response to the Building Act review proposed strategies to increase accountability for designers, builders (LBPs) and others including building consent authorities in the “day to day” compliance for building work. It proposed a risk-based consenting regime, whereby the LBPs on certain low risk building categories would have a high degree of autonomy in the certification of buildings under their control –with a corresponding decrease in risk for the Local Council. The Bill also included the provision of a code of ethics for the Licensed Building Practitioner’s regime. Analysis of the submissions to this Bill has been limited to stakeholder interest in the issues directly relating to the Licensed Building Practitioner regime.

The Bill’s intent was to push the Government’s desire to make participants more accountable. However the submissions from the Building Consent Authorities in this regard almost unanimously expressed continued concerns about the quality of the LBP making such a proposal risky, and

suggested, much as they had in the initial Building Act review submissions, continued caution:

...there are in-sufficient 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 staged approach to the proposed changes. (Auckland Council, 2011, p.2)

The risk-based consent process is reliant on competent professionals to undertake the work as well as to limit Council's role in the four different types of consents...with the reduction in Council's involvement there needs to be safeguards to ensure professionals are doing a quality job. (Upper Hutt City Council, 2011, p.2)

Local Councils are understandably nervous. Efforts on the Government's part to lessen liability by the stepped consent process and self certification have come up against the reality of Supreme Court rulings, where, regardless, the overarching of local authority's "duty of care" in the issue of building consents, conducting building work inspections and issuing code compliance certificates has been confirmed. (Upper Hutt City Council, 2011, p.3) Issues such as the introduction of a Code of Ethics as they affected LBPs were less controversial and met with broad agreement.

4. The LBP scheme: have expectations been met?

In the light of the comments made in 2010 to the Governmental Department of Building and Housing, and to the Parliamentary Select Committee (in the case of the Building Amendment Bill) to ascertain the effectiveness of the new legislation, a survey of five building professionals in key Local Council and private building surveying positions were chosen for detailed interview between July and August 2012, some six months after the introduction of the legislation. Questions focused around the effectiveness of the new legislation, with subsequent questioning design to elicit information on the validity of apprehensions made in 2010.

4.1 QUESTION 1.

Have you noticed an improvement in the quality of building consent applications presented since the start of the LBP scheme in March 2012?

All recipients were of the view that the quality of building consent applications had not improved to any extent following the introduction of the Scheme, even though designers were required to be registered and required to sign Memoranda confirming the building consent application, of which their drawings formed the major part, complied with the Building Code.

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No, surprising how many don't understand the LBP scheme...Ignorance about the system [is] across the board. (Interviewee 1, 2012)

One respondent conceded there was some improvement, but at a cost of the Building Consent Authority putting up extra front line staff to ensure projects were "up to speed" prior to processing them.

The Auckland Council [is] still picking up errors that would make the building non compliant. (Interviewee 2, 2012)

The feedback seems to confirm the continued apprehension felt in Local Authority and expressed in the 2010 submissions, that the many document errors persisting in present day applications were an indication accredited LBPs were still lacking the skills necessary to ensure their building consent applications complied with the Building Code.

This apprehension extended to the site, where concerns over the additional bureaucracy and the lack of a site license meant at present all contracting trades had to take responsibility for, and sign off, their portion of the work, leaving the collection of the Producer Statement to the owner, not always the best person to receive such information.

3.2 QUESTION 2

What is your response to the following statement by the Law Society "(that) if the LBP system is not robust and/or a warranty or surety system does not work then the reduction in BCA involvement will make the situation worse for building owners. There is in fact a repeat of the leaking building crisis" (NZ Law Society, 2010)

All respondents agreed with this statement and reiterated that the LBP needed to be made accountable if ever the Local Council was to withdraw from the consent process to any significant degree. "Many builders do not know what the building code is" (Interviewee 1, 2012). Others spoke of additional legislation coming on stream (The Building Amendment No 3 Bill) that would act to cement the obligation to comply fully onto the LBP contractor, is so far as the Local Council would only issue Completion Certificates, and no longer vouch for the quality of work, as is implied at present by them signing off the Code Compliance Certificate. To some the warranty scheme remained a suitable way forward, as it removed the incentive of companies to liquidate as a means to avoid the consequences of poor construction:

[The] LBP in tandem with Companies involved in a warranty scheme would work. This way products, documentation,

construction, all come under the responsibility of the one company. They would have the incentive to get things right, negotiate with [the] insurance company and move forward. (Interviewee 3, 2012).

3.3 QUESTION 3.

From your experience of the LBP's operation to date, do you think this "transfer of responsibility" (from the Local Council) back to the building sector can be achieved?

Responses were more mixed to this question. There was a sense of frustration on the part of some respondents that they were still forced to play a greater part in the implementation of the LBP scheme than should be necessary. "We spend a lot of time educating builders" (Interviewee 4, 2012). The system could work but there was a need for a "...good liability insurance scheme to be set up". (Interviewee 2, 2012).

A view common to several was that the building industry needs someone to rely on. Builders were not capable of it on their own and Governmental Departments, Standards NZ or the Building Research Association of NZ were not interested or capable. "The BCA (Local Council) is the only force left. It will get dragged in anyway" (Interviewee 3, 2012).

There was a sense that in an ideal world this transfer of responsibility from the Local Council back to the people doing the work would on balance be a good thing (not withstanding the remarks above), but that, in the present circumstances, such a move was unlikely to work.

4.0 Conclusion

Feedback from the qualitative research survey of five key building personnel indicates no significant change to date to the quality of building consent application or on site accountability as a result of the introduction of the LBP scheme. Apprehensions expressed about the quality of LBPs in 2010, expressed again in 2011 to the submission process for the Building Amendment Bill, remained valid today, six months after the scheme's introduction. Examples were given of designers not aware of their obligations as licensed practitioners and of the "liability implications for signing the Memoranda" (Interviewee 5, 2012). Building permit applications were still requiring considerable up-front checking on the part of the Local Council staff to achieve compliance. Examples were also given of delays in accreditation of licensed practitioners by the Department of Building and Housing, the managers of the Scheme, and hence presenting Local Councils with dilemmas around eligibility of a contractor to undertake work

All interviewees shared the same desire for the scheme to work as the submitters did in the 2010 and 2011 submissions, even though reservations were expressed about the methods used to achieving the goals. Interviewee 3

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thought the Government was too much “focused on law and beating people into submission” (Interviewee 3, 2012) to solve the problem of poor quality building. As a result Local Councils 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”. (Interview 3, 2012)

It is hoped additional measures promised, particularly issues clarifying the move to proportional liability and for individual warranties for LBPs, as against the joint and several liability regime that operates at present, will complete the legal framework necessary to ensure the self certified, responsibility focused LBP scheme is a success. Education initiatives designed to up-skill the builder and designer to the precise requirements of the Building Code need to be on-going Without these measures the consensus hints the new system will struggle at best, and at worst runs the risk of failure.

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