

# BETTER REGULATION OF THE BUILDING INDUSTRY IN NEW ZEALAND



*Discussing the options*

**March 2003**

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## **Foreword**

New Zealanders should have homes that remain safe, sanitary, and durable, with sensible use and maintenance. The experience many New Zealanders have had with weathertightness problems has not only affected them directly but has raised questions about how effective our building laws are in preventing building failures. The Report of the Overview Group on the Weathertightness of Buildings found the majority of New Zealanders know relatively more about the pitfalls of purchasing a used-car than buying a house and the used-car market has better regulation in terms of safety and quality performance, ongoing warranty, and consumer protection<sup>1</sup>.

The building industry is a significant part of New Zealand's economy – residential building alone counts for five per cent of our GDP – and so certainty of quality is important. We need a robust regulatory framework to achieve this. That being said, it is important that we do not lose the opportunity for innovation that the less-prescriptive framework has allowed. It is my view that the pendulum has swung too far one way, and it is my hope that we can restore it to a balanced position.

The Government is committed to improving controls on the design and construction of all buildings. This discussion paper describes a wide range of proposals aimed at achieving this. These proposals have been developed in consultation with stakeholders and experts, and you now have the opportunity to have your say. Your input is essential for a much higher level of competence, professionalism and quality assurance in the building industry.

Some of you are directly affected by buildings that have weathertightness problems. To deal with this immediate problem the Government established the Weathertight Homes Resolution Service. Details of this Service are provided on page 21 of this discussion paper.

I look forward to receiving your ideas on the proposals discussed in this paper.

**Lianne Dalziel**  
Minister of Commerce

March 2003

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<sup>1</sup> Hunn Committee Report pg 11, section 3.

***“ The building industry is a significant part of New Zealand’s economy – residential building alone counts for five per cent of our GDP – and so certainty of quality is important.”***

***“ The Government is committed to improving controls on the design and construction of all buildings.”***

## PURPOSE OF THIS PAPER

The Ministry of Economic Development would like your help in designing a system of controls on the design and construction of buildings. Such a system should make sure that the health and safety of people are protected, and their welfare is safeguarded.

We are building on the foundation of the Building Act 1991. All of the consultation that has been carried out so far by the Overview Group on the Weathertightness of Buildings (the Hunn Committee) indicates that the Building Act 1991 is not fundamentally flawed. Rather, it needs to be strengthened in a number of ways to be effective.

A range of proposals are presented in this discussion paper. These have been developed in collaboration with a number of industry groups and experts. We've also considered issues raised in submissions to the Weathertightness Select Committee. In some areas we have a clear idea of what we would like to do. In other areas it is not clear if we should do anything at all, or there are a number of ways of achieving a particular outcome and we are not clear which way is best. We would like to hear your views in all these areas.

These proposals place emphasis on improving the quality of inputs into the building industry – better guidance on best-practice designs, methods and products, and more capable people. At the same time we are proposing to make it clearer where the responsibility lies for quality and workmanship – with the people actually doing the work – and there will be much more stringent monitoring and enforcement of the Building Code.

Throughout this paper there are a number of questions. These focus on what we think are the most important issues. In addition to these specific questions, keep in mind three overarching questions:

- Will our proposals achieve the purposes of a building control system?
- Will our proposals achieve these purposes in the most cost effective way?
- Will our proposals continue to allow new and innovative building systems and products to reach consumers?

The Ministry of Economic Development has contracted PricewaterhouseCoopers to undertake an independent review of the social and economic impacts of the changes proposed in this paper.

### Overview Group on the Weathertightness of Buildings ("Hunn Committee")

On 18 February 2002, the Building Industry Authority (BIA) appointed a Weathertightness Overview Group to inquire into the weathertightness of buildings in New Zealand.

The Group looked at the nature, extent and effect of the current failure of some buildings to deal with moisture in and through their exterior envelopes. The Group also examined potential contributing causes and whether failures are attributable to deficiencies in the Building Act, the Building Regulations, or in the manner in which these are administered.

The final report of the Overview Group on Weathertightness, commonly called the Hunn Report, was published 28 November 2002. A copy is available on [www.bia.govt.nz](http://www.bia.govt.nz).

### Weathertightness Select Committee

The Government Administration Committee is holding an Inquiry into the weathertightness of buildings in New Zealand, including:

- The level of detail provided with building consent applications;
- The inspection regime as part of the code compliance certification process; and
- The split responsibility of building certifiers and territorial authorities for building consents, inspection and code compliance certification.

For more information, visit [www.clerk.parliament.govt.nz](http://www.clerk.parliament.govt.nz).

## HAVING YOUR SAY

We would like to hear your views on the proposals discussed in this paper.

Throughout the paper you will see some questions. These questions are set out again on a question sheet at the back of this paper, with space for you to write in your views.

Please then send the question sheet with your views to the Ministry of Economic Development by 11 April 2003.

Your submission will become publicly available information. For this reason, you should indicate clearly if your comments are commercially sensitive or if, for some other reason, you consider they should not be disclosed. Any request for non-disclosure will be considered in terms of the Official Information Act 1982.

Submissions can be made by post or hand delivered to:

Building Act Review  
Regulatory and Competition Policy Branch  
Level 9  
Ministry of Economic Development  
33 Bowen St  
PO Box 1473  
Wellington

or by email to:

[buildingreview@med.govt.nz](mailto:buildingreview@med.govt.nz)

or by fax to:

(04) 499 1791

The Ministry will analyse all the submissions and then develop policy recommendations.

For more information on how to make a submission, see page 25.

For more information about the Ministry, or for an electronic version of this paper, visit [www.med.govt.nz](http://www.med.govt.nz)

## EXTENDING THE SCOPE OF THE BUILDING ACT 1991

A purpose of the building control system is to make sure that the health and safety of people are protected and their welfare is safeguarded.

This principle can be likened to the car you drive. Whether your car is a Rolls Royce or a Honda Civic you expect it not only to be safe, but also to be reliable, cope with normal driving conditions and not leak. In other words, you expect it to perform a range of functions in a satisfactory way. What you expect from a building is different to, and in many ways more complex, than what you expect from a car, but the principle is the same.

This principle is reflected in the current Building Code, which sets out the necessary performance characteristics of all buildings – that is, the requirements and standards that all buildings must meet in their day to day use. Those requirements and standards are determined after considering the purpose of the Building Act.

That purpose particularly refers to the need to make sure that buildings are “safe and sanitary and have means of escape from fire”. The Building Act requires other values to be taken into account in the Building Code, such as protection from loss of amenity<sup>2</sup>, protection of adjoining properties from damage and provision of facilities for the disabled. These matters are of particular importance for certain groups.

Those values may not, however, have been given equal importance as the health and safety values.

In particular, the important value of durability – i.e. that a building will continue to meet standard throughout its normal life – is not mentioned in the Building Act.

The Hunn Report focused specifically on housing. It suggested that enough attention may not have been paid to the importance of houses and other dwellings meeting “the basic human need for shelter and protection from the elements”<sup>3</sup>.

This may have been because of the priority given by the Building Act to health and safety issues as opposed to broader concepts such as amenity. It appears these factors may have played a part in causing the weathertightness issue.

**Building Code:** The First Schedule of the Building Regulations 1992 for prescribing the requirements for buildings and the performance criteria with which new building work must comply. Compliance with the Building Code is mandatory.

<sup>2</sup> Amenity means “an attribute of a building which can contribute to the health, physical independence and well-being of the building’s users”. For example, having access to a toilet.

<sup>3</sup> Hunn Committee Report pg 9, section 3.

We think this should be changed.

We propose to clarify and strengthen the directions to the regulator in three ways:

- Include amenity and durability as primary purposes of the Act.
- Review the definition of amenity to ensure it covers the important values that go beyond strict “health and safety” issues.
- Provide in the Building Act that the interests of consumers (defined as occupiers of housing and other dwellings) must be taken into account in the functional requirements and performance criteria of the Building Code, and in the way the Code is administered and enforced. The reason for suggesting this approach is to recognise the special place that houses have in people’s lives.

Plus, at a more specific level, new apartments are being built by converting existing commercial or industrial buildings to residential use. The Act currently says that where a building has had a change in use it should be upgraded but only for certain parts of the Building Code. Provisions for external and internal moisture, airborne and impact sound, ventilation, and energy efficiency are not included. All of these are important for consumer protection. We are considering amending the Act to add that these would also need upgrading when a commercial building is converted.

**Q** | *Do you agree that the Building Act 1991 needs to be amended to increase the importance of amenity and durability in the Building Code particularly for dwellings? If not, why not?*

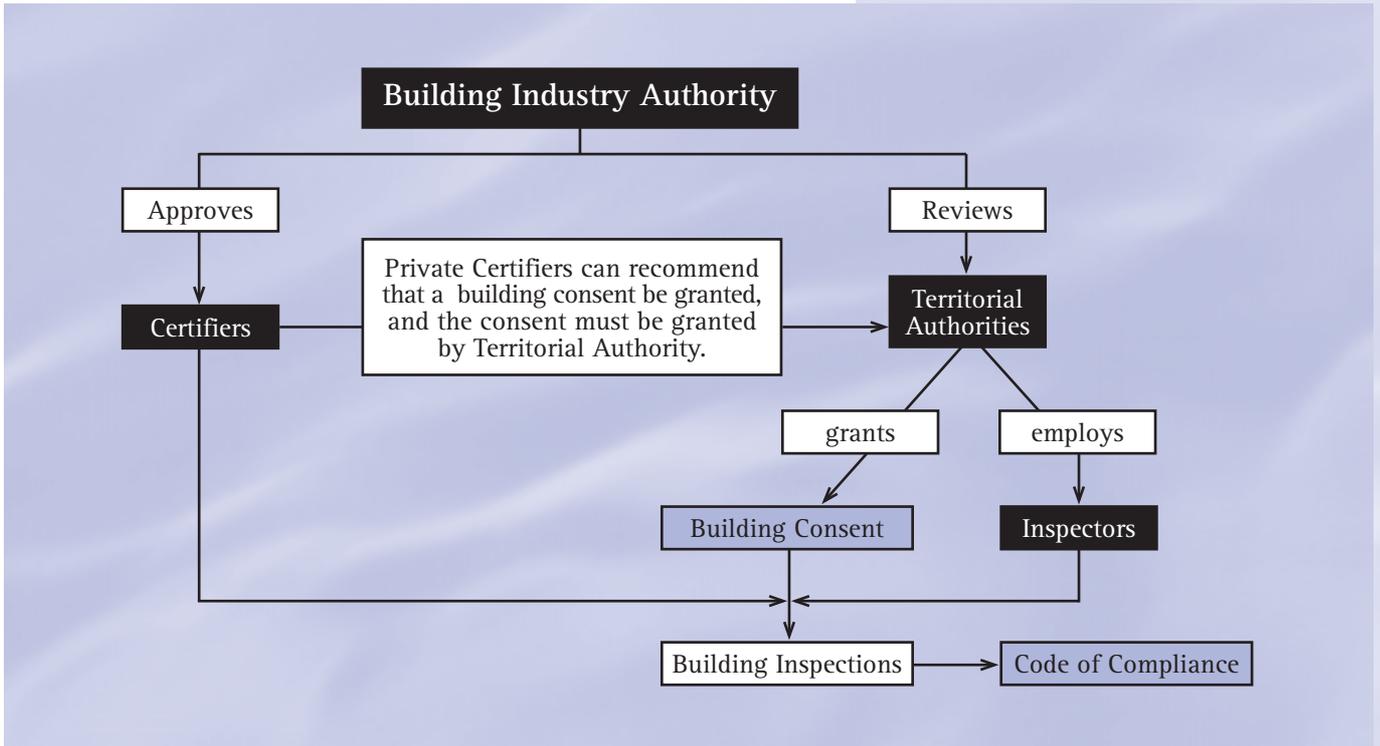
**Q** | *Do you think there are general values beyond health, safety, amenity and durability that should also be considered?*

**Q** | *Do you agree that the Building Act should particularly recognise houses and other dwellings because of the special place they have in people’s lives? If not, why not?*

**Q** | *Do you think that when commercial buildings are converted into apartments they should be upgraded in line with all provisions of the Building Code?*

***We propose to clarify and strengthen the directions to the regulator...***

**FIGURE 1** Building Act Processes

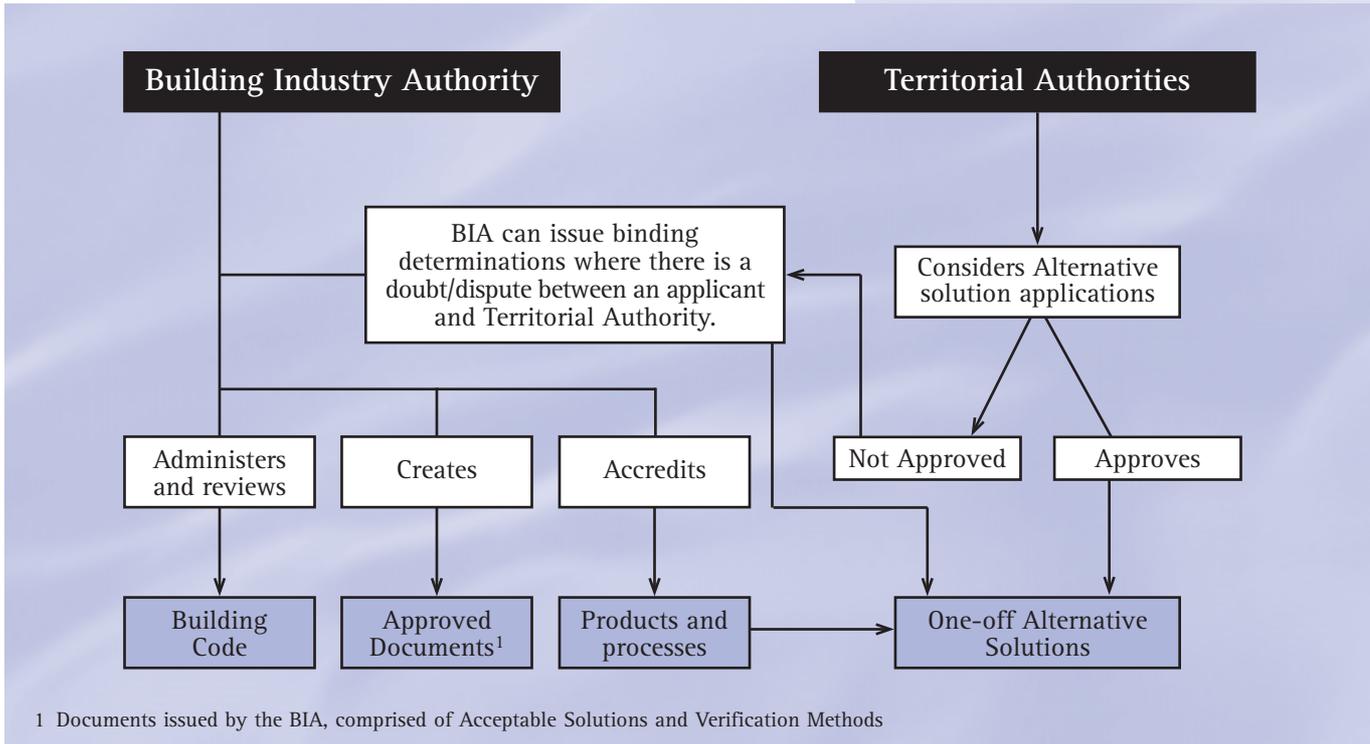


## BETTER DESIGNS, METHODS AND PRODUCTS

The Building Act 1991 has the following key features:

- A Building Code that sets out the performance based standards that buildings must meet;
- Acceptable Solutions – ‘how-to’ guides to building design and construction which, if met, demonstrate compliance with the Building Code. Acceptable Solutions are approved by the Building Industry Authority (BIA);
- Alternative Solutions – a product, method or design which an applicant for a Building Consent claims complies with the Building Code, and which are approved by Territorial Authorities;
- Verification Methods – a calculation or test procedure used to demonstrate compliance with the Building Code. Verification Methods are approved by the Building Industry Authority and published in the Approved Documents; and
- Determinations – in the event that there is a question of doubt, or a dispute between a Territorial Authority and an applicant, either party may ask the BIA to make a Determination as to whether a proposed Alternative Solution complies with the Building Code.

**FIGURE 2** Building Act Functions



Buildings should be built right first time. This system of a performance based Building Code and Acceptable and Alternative Solutions will not achieve that objective if:

- The Building Code does not clearly specify the performance standards that building design and construction must meet to achieve the purposes of the Act;
- There are not enough Acceptable Solutions, and designers and builders have to rely too heavily on Alternative Solutions;
- Acceptable Solutions do not keep pace with emerging building practices and technological change; and
- Alternative Solutions are not given enough scrutiny to make sure they comply with the Code.

There is evidence that there are problems in all of these areas. At the root of the problems is the complexity of building designs, methods of construction and products. This makes it difficult, sometimes even for experts, to accurately assess whether a particular design or construction method, or a particular product, complies with the Code.

We think that building controls can be strengthened in a number of important ways:

- By requiring the Building Code to be as detailed as possible about the performance standards that need to be met. The more specific the Code is, the easier it should be to assess whether a design, construction method or product complies with it.
- By producing many more Acceptable Solutions. Acceptable Solutions go through a rigorous assessment process involving experts, industry and consumers. Not only should these Acceptable Solutions represent acceptable and reasonable practice, but they should also provide important guidelines for building practitioners and training organisations. In this way, they should reduce the costs of complying with the Building Code and improve the capability of the building industry.
- By making Alternative Solutions subject to more rigorous scrutiny. We recognise that there is a risk of stifling innovation if the bar to obtaining an Alternative Solution is set too high. This has to be balanced against the costs that individuals, the economy and society more generally have to bear if the bar is set too low.

To achieve this strengthening of building controls we propose amending the Building Act so:

- The Building Industry Authority (BIA) has to specify the Building Code at a level of detail that makes the assessment of compliance with it more certain;
- The BIA has to develop and maintain a set of Acceptable Solutions that meets the needs of the building industry and the community (which in effect will require consultation with the building industry and community on what their requirements are);
- The BIA has an explicit function to provide advice to Territorial Authorities on Alternative Solutions;
- The BIA has an ability to issue warning notices or bans for designs, building methods or products;
- The BIA can require an Acceptable Solution to be used. The BIA would use this power in limited situations; and
- Territorial Authorities advise the BIA when they approve an Alternative Solution (this will improve the flow of information to the BIA on building practices).

Alternative solutions have been used in granting building consents for what have become common building practices – i.e. practices applied numerous times across the country by many

*We think that building controls can be strengthened in a number of important ways.*

practitioners. We are considering requiring the BIA to develop Acceptable Solutions for such practices.

The BIA is already required to provide Determinations on Alternative Solutions. We expect that Territorial Authorities will want Determinations much more frequently than is the case now, as a check on their own judgement. We will make sure the Act permits this because a set of Determinations will help clarify what is and is not Code compliant.

The process of developing Acceptable Solutions can be expensive and time consuming, and it is a reasonable concern that the system may break down if it is not appropriately funded. The BIA will generally use Standards New Zealand to help produce Acceptable Solutions. The BIA will fund this process, which will mean Acceptable Solutions will be developed faster, by balanced committees reflecting the broad range of interests in the Solution.

*Q | Are there areas of the Building Code that should be more detailed?*

*Q | Do you think there is scope to increase the number of Acceptable Solutions? If so, where?*

*Q | If there were a greater number of Acceptable Solutions, what impact would this have on you?*

*Q | Do you believe that a greater number of Acceptable Solutions would lead to better buildings?*

*Q | Do you think the Building Industry Authority (BIA) should have stronger powers to control the products and building methods used in the building industry?*

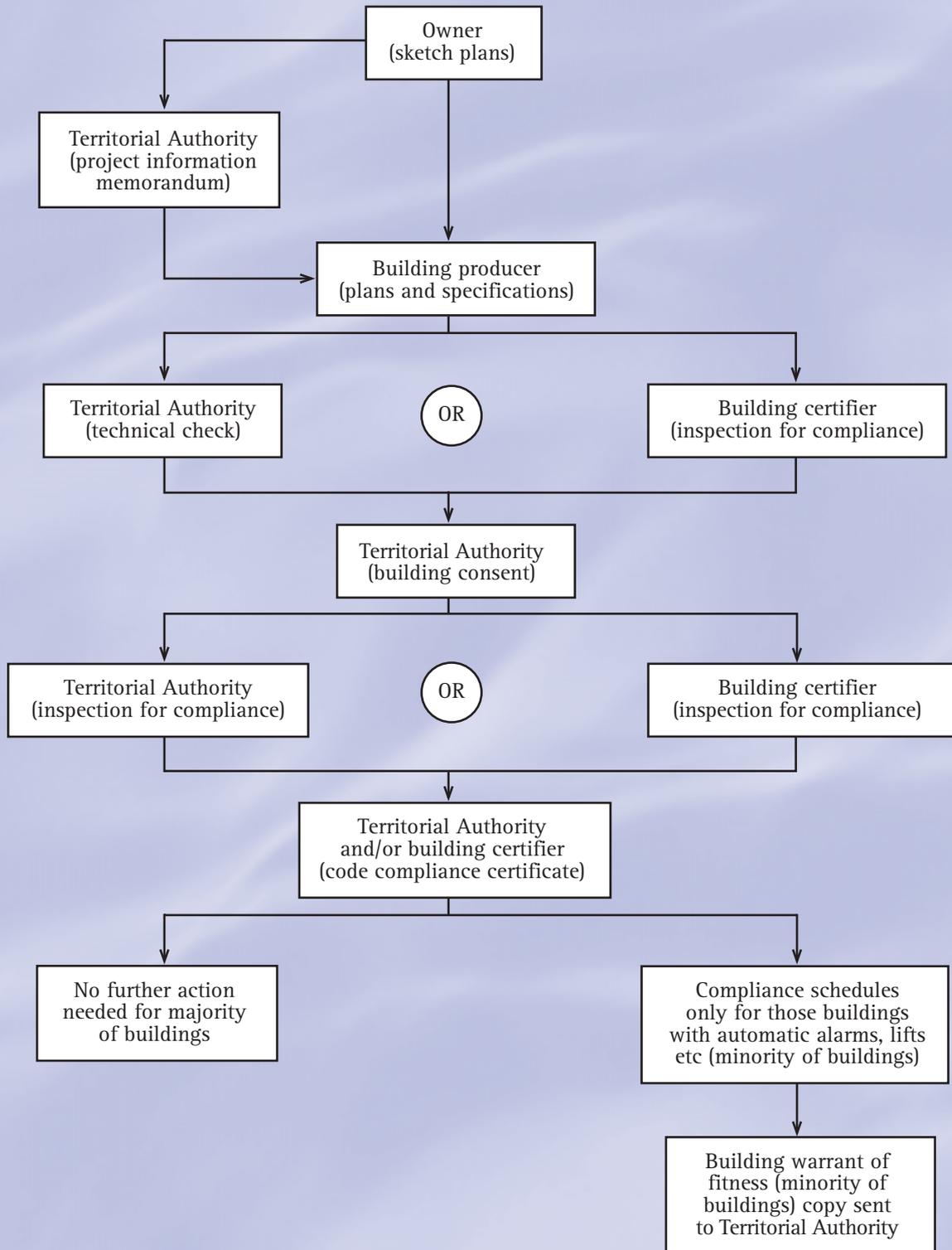
*Q | Under what circumstances, if any, should the BIA be able to ban or restrict use of building methods or products?*

*Q | Under what circumstances, if any, should the BIA be able to require an Acceptable Solution to be used?*

*Q | Will these proposals make it easier or harder to bring good new designs, products and building systems into the market?*

***Standards NZ will have a bigger role in developing Acceptable Solutions.***

FIGURE 3 The Approval Process



## Accrediting Inspectors and Certifiers

Territorial Authorities approve Alternative Solutions, issue Building Consents, inspect buildings during construction, and issue Code Compliance Certificates (which certify that a completed building complies with the Building Code). Private bodies are also approved by the Building Industry Authority (BIA) as building certifiers. Building certifiers are authorised to issue Building Certificates and Code Compliance Certificates.

There are 75 Territorial Authorities, and a number of private bodies have been approved as building certifiers. The initiatives outlined above to strengthen building controls will provide clearer benchmarks and advice on acceptable building practices. This will help Territorial Authorities and building certifiers carry out high quality inspections.

However, the work of Territorial Authorities and building certifiers is complex and challenging. We think there would be a benefit to both these groups, and the building industry and consumers, if, in order to carry out their functions, Territorial Authorities and building certifiers were subject to an independent assessment of their policies, systems and personnel. This independent assessment, which is known as inspection body accreditation, is now quite common in New Zealand and overseas. The accrediting bodies operate in accordance with international standards and their own performance is maintained through review by their overseas counterparts.

We propose that the Building Act be amended so Territorial Authorities, and building certifiers have to be accredited. The accreditation will probably be carried out by internationally recognised accreditation bodies.

**Q** | *Do you think the accreditation proposal will improve the quality of inspection services?*

**Q** | *Do you think the accreditation processes will lead to consistent standards being applied by all Territorial Authorities and building certifiers?*

**Q** | *If you don't think these proposals will lead to improved quality and consistency, what do you think would?*

**Building Certificate:** a formal confirmation by a building certifier that plans and specifications or specific aspects of a building comply with the New Zealand Building Code. Territorial Authorities are obliged to accept such a certificate.

### Accreditation of Inspection Bodies:

Accreditation of inspection bodies is undertaken in accordance with an international standard, ISO/IEC 17020, which sets out general criteria for the operation of various types of bodies performing inspections.

Accreditation involves a full review of the quality manuals used by the inspection body and a detailed assessment of their operation, including witnessing a representative range of building inspection activities undertaken by individuals who certify designs or conduct on-site inspections.

## ***Certifying Products and Processes***

The Building Industry Authority (BIA) can accredit building products and processes. Accredited products and processes are deemed to comply with the Building Code. However, accreditation is not widely used. Instead, when applicants for Building Consents think their application should be accompanied by an authoritative statement that a particular product or process complies with the Code, they will generally seek an appraisal from BRANZ. Territorial Authorities typically accept a BRANZ appraisal as evidence that the product or process is Code compliant.

There are few accreditations or appraisals. Of the thousands of building products on the market, only 12 are accredited and 140 appraised.

The accreditation process is clearly not working as intended. Appraisals are a substitute but, as with inspection bodies, good practice suggests that bodies undertaking appraisals should have their own competence assessed.

We therefore propose that accreditations and appraisals be replaced by a single product certification. This certification process will mean a certifying body will be able to assess if a product is Code compliant. In deciding this, the body will look at the product itself, the installation requirements, and the skills required for correct installation. Certified products will be deemed to comply with the Code but a Territorial Authority will still have to assess if the overall design of the building and application of the product is Code compliant.

The competence of certification bodies will be established through accreditation in much the same way as inspection bodies are accredited. Again, accreditation is likely to be carried out by internationally recognised accreditation bodies. BRANZ has said that it would seek accreditation as a certification body.

We also propose that the BIA is given the power to make certified products be used where certain risks occur.

**Q** | *Would product certification be useful to you?*

**Q** | *Do you think that more building product certification would lead to better quality design and building?*

**BIA Accreditation:** a certificate of accreditation issued by the Building Industry Authority states that a product, system or method meets certain provisions of the New Zealand Building Code.

**BRANZ:** Building Research Association of New Zealand Incorporated. BRANZ is the principal agency for building research in New Zealand. BRANZ operates as two entities – BRANZ Ltd and BRANZ Inc. BRANZ Ltd undertakes Testing/Consulting, Research, Publications and Product Appraisals. BRANZ Ltd gets approximately 40% of its income from BRANZ Inc. The principal income source for BRANZ Inc. is the Building Research Levy.

**Q** | *Do you think the BIA should be able to require that a certified product must be used where certain risks occur?*

**Q** | *Do you think the BIA should be able to ban certain products? If so, what criteria should the BIA apply in making these decisions?*

## **Assessing the Benefits and Costs of Controls**

In deciding on the Building Code, Acceptable Solutions and Verification Methods, the Building Industry Authority (BIA) is currently required to look at the national costs and benefits (including safety, health, and environmental) of any control. It is also required to consult widely.

One of the key findings of the Hunn Committee was that there has been too much emphasis on minimising short term compliance costs, rather than maximising long term benefits.

Requiring the BIA to prepare and publish a Regulatory Impact Analysis (RIA) when making significant changes to the Building Code, or introducing new Acceptable Solutions and Verification Methods, will help make sure standards are set at the right level.

Regulatory Impact Analysis places more emphasis on the effectiveness of regulatory interventions in achieving the purposes of the Building Act – i.e. how well a control will achieve what it is supposed to.

We also think the Act should emphasise that benefits and costs should be based on the whole life of a building. The concept of whole of life costs includes on-going maintenance as well as the initial costs of a building.

**Q** | *Do you think that a requirement to publish a regulatory impact analysis will be enough to make sure the BIA takes all of the benefits and costs into account when creating new regulations?*

**Q** | *Do you agree that the whole life of a building should be taken into account in assessing the benefits and costs of changes to the Building Code, Acceptable Solutions or Verification Methods?*

## **Regulatory Impact Analysis**

A Regulatory Impact Analysis (RIA) requires a clear definition of the problem that the regulation is intended to address, and a systematic analysis of:

- The options for addressing that problem;
- The economic and social benefits and costs of alternative options (including compliance cost).

RIA's are commonly used in both New Zealand and other countries. Further information can be found on [www.med.govt.nz](http://www.med.govt.nz)

## CAPABLE PEOPLE

There is a view in the building industry that both competence and professionalism are dropping. Code compliant building design and construction depends on competent people acting competently and in good faith. Getting it right first time is better and more profitable than getting it wrong and having to rectify mistakes.

Some groups in the building industry currently have statutory backed registration. Some engineers can be registered under the Chartered Professional Engineers Act 2002. Architects are registered under the Architects Act 1963. There are two self-regulatory schemes for builders and building trades. Currently there is no statutory registration scheme for non-architect designers, draughtpersons or builders.

We think that all building professionals should have the opportunity to demonstrate their competence through a registration process. We think that all users of building services should have an easy way of finding out who is competent in the industry through access to a register of competent people. We also think that a registration process will lead to greater professionalism and competence in the industry because underpinning education and training can be used to promote ethical principles as well as skills development.

We propose that a registration system for building practitioners be established. Building practitioners include engineers, architects, other building designers, draughtpersons, project managers, builders and building sub-trades.

There would be three routes to becoming a registered building practitioner:

- Registration as a Chartered Professional Engineer;
- Registration as an Architect;
- Registration by a new Building Practitioners Registration Board (BPRB).

The BPRB would:

- Register building practitioners;
- Test for ongoing competence;
- Maintain a register of building practitioners;
- Set rules for the registration of building practitioners (including competency standards, and registration and appeal provisions); and

*We want capable people so we get it right first time and there is less chance of buildings failing.*

### Example of a building practitioner regime used in Australia

Victoria's regime for the regulation of building practitioners and domestic building contracts:

- Establishes a Building Practitioners Board under the Building Act which registers all building practitioners on an annual basis;
- Requires insurance;
- Building practitioners include Domestic Builders, Commercial Builders, Demolishers, Building Inspectors, Building Surveyors, Draughtpersons, Engineers, Quantity Surveyors, and Temporary Structure Erectors;
- Architects registered with the Architects Registration Board do not need to be registered with the Building Practitioners Board;
- People undertaking domestic building work over A\$5,000 must be registered;
- Owner builders are exempt.

For further information refer to the Victorian Building Commission website [www.buildingcommission.com.au](http://www.buildingcommission.com.au).

- Authorise competent bodies to act on its behalf to register building practitioners, and carry out investigations that could lead to discipline or deregistration. Competence of these bodies could be demonstrated through accreditation.

Authorised bodies could:

- Register building practitioners on behalf of the BPRB;
- Carry out investigations on behalf of the BPRB;
- Contribute to the development of rules.

There are three objectives for a registration regime for building practitioners:

- To provide easily available information to building owners on the competence of suppliers of building services;
- To enable Territorial Authorities to rely on the competence of suppliers of building services;
- To provide the basis of a mandatory regime that requires certain building related activities to be carried out or supervised by registered building practitioners, should one be required.

This system will only work if there is adequate disclosure of who is and is not a registered building practitioner. Information disclosure could be enhanced through:

- Mandatory disclosure by building practitioners to building owners of whether work will be carried out or supervised by a registered building practitioner;
- Mandatory disclosure by building owners to Territorial Authorities of whether work will be carried out or supervised by a registered building practitioner (through the consent process);
- Disclosure on the LIM if building work was not carried out or supervised by a registered building practitioner.

The key judgement is whether registration combined with mandatory disclosure provides sufficient incentives for building practitioners to become registered.

- Because building owners are responsible for making sure the building meets the Building Code, they may be more likely to employ registered building practitioners. Meeting the Code will be easier if registered people are used. It is also possible that the market value of a home built by a registered building practitioner will be higher.

*The key judgement is whether registration combined with mandatory disclosure provides sufficient incentives for building practitioners to become registered.*

- Territorial Authorities are likely to spend more time and effort on assessing consent applications and inspections where unregistered building practitioners are involved, which will increase the costs of building with an unregistered building practitioner (unless they have an established a track record).
- Registration may provide a marketing advantage.

These incentives need to be balanced against:

- Whether owners' know about their obligation to meet the Building Code;
- The potential additional cost in using registered building practitioners.

If these incentives were not considered to be strong enough, accountability for ensuring that only competent people are used could be increased by:

- Placing a statutory obligation on Territorial Authorities to be reasonably satisfied that building practitioners have the relevant skills to carry out the work specified in a building consent application. Registered building practitioners will find it easier to satisfy Territorial Authorities of this obligation. The ability of Territorial Authorities to assess the competency of people, the potential for inconsistency between Territorial Authorities, and the potential for duplication in the roles of different Territorial Authorities and the BPRB in establishing the competency of building practitioners are issues that would need to be considered if this requirement was established.
- Placing an obligation on the applicant for the consent to be reasonably satisfied that building practitioners have the relevant competencies to carry out work specified in the application for a building consent.
- Requiring that the contract between the owner and the developer/contractor include a guarantee by the developer/contractor that the building will comply with the Building Code, and the building practitioners working on the building will have the relevant qualifications and skills to carry out the work specified in the Building Consent application.
- Requiring that a Code Compliance Certificate must be sought from the Territorial Authority within a specified period after the building work is finished. This means that Code compliance can be clearly demonstrated, or non-complying work highlighted.

**Code Compliance Certificate:**

a certificate issued by the Territorial Authority or a building certifier at the completion of building work confirming that the building work complies with the relevant provisions of the Building Code.

Further enhancements of this model could include:

- Requiring every application for a Building Consent to nominate a specific person who will have to make sure the building work is Code compliant, and that building practitioners have the relevant qualifications and skills;
- Requiring all building practitioners to self-certify that the building work that they have undertaken is Code compliant.

Should the incentives based regime not be considered strong enough, a mandatory regime could be implemented through:

- A requirement that only registered building practitioners can carry out or supervise work that requires a Building Consent. For example, the State of Victoria requires all domestic building work over \$5,000 (with some exemptions) to be carried out by a registered building practitioner; or
- The power to make regulations that limit specified work to registered building practitioners with the appropriate qualifications and skills.

On balance, we have a preference for a mandatory regime where work that requires a Building Consent must be carried out or supervised by registered building practitioners.

**Q** | *Should building practitioners be registered?*

**Q** | *If so, which trades or professions should be registered?*

**Q** | *What do you think of the registration proposals in this paper?*

**Q** | *Are there any particular proposals with which you strongly agree or disagree, and why?*

**Q** | *If you are a building practitioner, would you, your colleagues or your employees become registered under the above proposals? If not, why not?*

**Q** | *Do you think registration should be mandatory for work requiring a Building Consent? If not, why not?*

**Q** | *Should Territorial Authorities assess the qualifications and skills of unregistered building practitioners?*

## **Trans-Tasman Mutual Recognition Agreement**

The introduction of a registration regime for building practitioners has implications for New Zealand's relationship with Australia. The Trans-Tasman Mutual Recognition Arrangement (TTMRA) recognises the special relationship between New Zealand and Australia. This means people registered to practise an occupation in one country are, with a few exceptions, entitled to practise an equivalent occupation in the other country without undergoing further testing or examination.

**Q** | *How do you think people who build their own house (owner builders) should be dealt with in a registration regime?*

**Q** | *Are there any other issues for 'owner builders' that should be considered?*

## **IMPROVING INFORMATION**

The effectiveness of regulation depends to a large extent on people understanding what their legal obligations are, and having both the incentive and capability to comply with those obligations. People are more likely to comply with what they understand, and accept, as important and necessary. Information and education contribute to this.

Informed consumers are in a better position to evaluate and demand compliance, or shift their business to providers they have greater confidence in. This means quality improves.

In a complex regulatory system such as the building industry, regulating bodies must develop and maintain their capacity to effectively inform and educate.

An initial assessment suggests key groups who would need information include:

- Building owners;
- Building users;
- Builders and other professionals;
- Building designers;
- Manufacturers of building products;
- Territorial Authorities;
- The Building Industry Authority (BIA).

The challenge is to develop a way to make sure these groups (and any others) have access to relevant and timely information on the building industry in New Zealand. The Building Industry Taskforce (BITF) is developing proposals in this area. Feedback from you will assist the Taskforce in this work.

### **Building Industry Taskforce**

The Building Industry Taskforce was formed at the Building Industry Summit held in October 2002. The Taskforce has been involved in consultation and discussion about the changes proposed in this paper. Its members include a broad range of industry representatives from organisations such as the Master Builders, NZ Institute of Architects, Construction Industry Council and the Consumers Institute.

**Q** | *Who do you think needs to be better informed to ensure that buildings are Building Code compliant?*

**Q** | *What sort of information needs to be provided?*

**Q** | *What sort of strategies should be put in place to make sure that those who need information receive it?*

**Q** | *Who should have responsibility for ensuring that these strategies work?*

**Q** | *What do you think are the most important education gaps in the building industry currently?*

## **PUTTING THINGS RIGHT**

Building design and construction are not risk free activities.

The costs of buildings that fail include:

- Repairing and putting right the damage caused by both structural and non structural failures;
- Legal and other costs involved in holding people accountable;
- Reductions in the value of buildings; and
- Impacts on human health.

While proposals to improve the quality of building and design inputs should reduce these costs to consumers, they will not eliminate them.

When things go wrong and buildings fail, consumers can seek redress through:

- Direct negotiation with building professionals and through mediation provisions sometimes included in building contracts;
- Industry third party dispute resolution and guarantee schemes such as that operated by the Registered Master Builders Federation; and
- The courts (including the Disputes Tribunal for small claims and the Weathertight Homes Resolution Service for claims related to leaky buildings).

***Building design and construction are not risk free activities.***

The weathertightness issue has highlighted the difficulties that consumers can have in gaining access to redress and compensation. This can be the case when:

- Responsibilities for design and building construction work are unclear;
- The costs to consumers of proving fault and gaining redress are too high; and
- Building practitioners and developers cannot be brought to account because of their insolvency, death or disappearance, or because of their use of phoenix companies and trusts to minimise their personal liability.

### ***Mandatory Building Warranty***

A way of clarifying responsibilities and expectations between building practitioners and developers and building owners would be to require a standard warranty in all building design and construction contracts. The warranty provisions in the Australian State of Victoria's Domestic Buildings Contract Act 1995 provide a model of the types of provisions that could be included in a standard contract between a consumer and builder. These are:

- The builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- The builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- The builder warrants that the work will comply with the law including the Building Act and the regulations made under it;
- The builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- The builder warrants that, if the work is intended to make a home suitable for occupation, this will be the case on completion of the work; and
- If the contract states a particular purpose for the work and shows reliance by the owner on the builder's skill and judgement, the builder warrants that the work and any material used will be reasonably fit for that purpose.

*The weathertightness issue has highlighted the difficulties that consumers can have in gaining access to redress and compensation.*

**Q** | *Would mandatory warranties help clarify responsibilities between building owners and building professionals?*

**Q** | *If so, what mandatory provisions should be included in a warranty?*

### **Enhanced Dispute Resolution Procedures**

While a mandatory warranty may help clarify responsibilities and expectations between consumers and building professionals, it will not make it any easier for consumers to gain redress if a building fails.

The Government's recent establishment of the Weathertight Homes Resolution Service is intended to provide an accessible and low cost forum for resolving issues related to weathertightness. Those who meet the Service's entry criteria can have their homes assessed by an independent assessor at no charge. They may then choose to use either mediation or adjudication to resolve their case. The fees for these services have been kept deliberately modest – \$200 for mediation, \$400 for adjudication.

The Construction Contracts Act 2002 also provides a quick and informal means for parties to construction contracts to resolve disputes. The Act gives any party the right to refer a dispute to adjudication (even when the dispute is the subject of proceedings between the same parties in a court or tribunal), allows for the consolidation of disputes and results in a binding but not final decision. The cost of adjudication is directly met by the parties.

**Q** | *Would there be merit in providing for an accessible dispute resolution procedure, based either on an expansion of the Weathertight Homes Resolution Service or the provisions of the Construction Contracts Act for the resolution of all disputes between consumers and building practitioners?*

**Q** | *How should the costs of providing such a service be met?*

### **Weathertight Homes Resolution Service**

The Weathertight Homes Resolution Service has been set up by the Government to help homeowners who own properties that are leaky and the leaking is causing rotting problems. The Service helps owners of affected homes to establish the extent of the water damage and to resolve their problems.

#### **How to Contact Them**

Freepost 173277

Weathertightness Registration Centre  
PO Box 5011

Wellington

Ph: 0800 116 926

Fax: 0800 116 189

## ***When Building Professionals Fail***

There will be some cases when buildings fail and building practitioners cannot be brought to account for the costs. This will usually be because of the death, disappearance or insolvency of a building practitioner or as a result of the use of a phoenix company and trust.

This problem is not unique to the building industry. The Government recently announced its decision to legislate for additional measures to deal with phoenix companies under insolvency law including:

- That criminal penalties be available to the courts where directors are shown to have acted in bad faith to defeat creditors' legitimate interests;
- That legislative provisions based on United Kingdom legislation be enacted to restrict the re-use of the name of a company in insolvent liquidation by a director of that company to prevent abuse of phoenix companies.

**Q** *Given the Government's intention to legislate for additional measures to deal with company insolvency and phoenix companies, does anything else need to be done to deal with these issues specifically within the building industry?*

## ***Insurance, Bonds and Guarantee Funds***

Homeowner warranty insurance, performance bonds and guarantee funds can all be used to protect consumers from the costs of faulty buildings, even when building professionals fail. This is because they are required before building work starts.

### ***Homeowner Warranty Insurance***

Compulsory homeowner warranty insurance is a feature of building regulation in all Australian states. As well as protecting consumers, it can potentially reduce the chances of building failure by creating financial incentives and imposing conditions on building professionals to act competently. However, it does result in additional costs. Further, it does not currently appear viable because of:

- Insurers' lack of confidence in the New Zealand building industry;

***The Government recently announced its decision to legislate for additional measures to deal with phoenix companies...***

- Insurers' recent negative experience in providing homeowner warranty insurance in Australia; and
- Global issues affecting the insurance industry, especially the cost and scarcity of capital for professional indemnity insurance and other high-risk products.

### **Guarantee Fund**

An industry guarantee fund could be established as an alternative to commercial insurance. It could provide for either financial or 'in kind' compensation to consumers who cannot gain redress from building professionals. All building practitioners would be required to pay levies into the fund, probably on a pay as you go basis, and fees would increase or decrease each year to cover past losses or gains. As a result, builders today would bear the costs of yesterday's failures.

### **Bonds**

Another alternative would be to require performance bonds for all building contracts. Performance bonds are a feature of some commercial construction contracts and public works, especially in the USA. They require the building contractor to purchase a bond. An insurance company or other financial institution normally supplies this. It ensures payment to the consumer in certain specified circumstances (usually non-completion or if faults are not repaired within a specified period of time).

Because the financiers of bonds usually require collateral or other conditions, mandatory bonds might restrict the scope of work that smaller building practitioners could undertake, and may increase the economic costs of building construction work, especially over the short term. As with insurance, it is not clear whether the market would currently supply such bonds to all building practitioners nor at what cost.

**Q** | *Should*  
 (a) *home warranty insurance*  
 (b) *a guarantee fund or*  
 (c) *performance bonds*  
 be a mandatory feature of building regulation?

**Q** | *Would the benefits to building owners of any of these alternatives exceed the costs?*

## ENHANCING ENFORCEMENT

Currently, Territorial Authorities have responsibility for enforcing the Building Code. The Building Industry Authority (BIA) has a general power to monitor the Territorial Authorities.

Regulation works best when there is effective monitoring and enforcement. While many people comply with the law because they feel it is the right thing to do, and make a real effort to understand what their legal obligations are, others are influenced by how likely it is that they will get caught, and how big the penalties would be if they were caught and successfully prosecuted.

We think that the Territorial Authorities should retain responsibility for enforcing the Building Code. They are closest to what is actually happening in the building industry at the building site level, and can therefore best monitor compliance.

Territorial Authorities have found the high costs of prosecutions deter them from enforcing the Building Code. To help address this problem, we propose that an infringement notice system be adopted.

We propose that the BIA also be given enforcement powers. The BIA would be likely to use these powers in particular circumstances, rather than duplicate the role of the Territorial Authorities. These circumstances would include:

- Taking a court case to clarify the law in a particular area;
- Making an example of an individual or organisation that persistently or significantly infringes the Building Act.

Monitoring and enforcement by the BIA will also be improved by:

- Its obligation to keep building practices under review;
- Its ability to issue warning notices and bans in relation to building practices.

**Q** | *Would a system of infringement penalties be effective?*

**Q** | *Do you think the BIA should have an enforcement role?*

### **Infringement Notices**

An infringement notice is an automatic fine with limited appeal rights. It is proposed that it will be used for common offences which can be detected accurately and where facts won't be an issue.

These could apply to:

- Doing or permitting building work without a consent;
- Failing to carry out maintenance required by a compliance schedule;
- Failing to display a building warrant of fitness or supporting evidence for it.

## MAKING A SUBMISSION

This discussion paper has been produced to give you an opportunity to tell us what you think.

You are encouraged to make a submission so that a wide range of views is taken into account in the development of policy recommendations.

You can use the question sheet on the next page to make your submission. If you run out of space, continue on a separate piece of paper.

Please remember to fill out the section for your details on the question sheet.

If your views are representing an organisation or group, please state the name of that organisation or group and the position you hold.

Send your submission by 11 April 2003 to:

Building Act Review  
Regulatory and Competition Policy Branch  
Level 9  
Ministry of Economic Development  
33 Bowen St  
PO Box 1473  
Wellington

or by email to:

[buildingreview@med.govt.nz](mailto:buildingreview@med.govt.nz)

or by fax to:

(04) 499 1791

Your submission will become publicly available information. For this reason, you should indicate clearly if your comments are commercially sensitive or if, for some other reason, you consider they should not be disclosed. Any request for non-disclosure will be considered in terms of the Official Information Act 1982.

*Send us your views  
by 11 April 2003*

## NOTES

## QUESTION SHEET

1. Will our proposals achieve the purposes of a building control system?

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2. Will our proposals achieve these purposes in the most cost effective way?

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3. Will our proposals continue to allow new and innovative building systems and products to reach consumers?

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## EXTENDING THE SCOPE OF THE BUILDING ACT 1991

4. Do you agree that the Building Act 1991 needs to be amended to increase the importance of amenity and durability in the Building Code particularly for dwellings? If not, why not?

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5. Do you think there are general values beyond health, safety, amenity and durability that should also be considered?

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6. Do you agree that the Building Act should particularly recognise houses and other dwellings because of the special place they have in people's lives? If not, why not?

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7. Do you think that when commercial buildings are converted into apartments they should be upgraded in line with all provisions of the Building Code?

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## BETTER DESIGNS, METHODS AND PRODUCTS

8. Are there areas of the Building Code that should be more detailed?

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9. Do you think there is scope to increase the number of Acceptable Solutions? If so, where?

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10. If there were a greater number of Acceptable Solutions, what impact would this have on you?

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11. Do you believe that a greater number of Acceptable Solutions would lead to better buildings?

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12. Do you think the Building Industry Authority (BIA) should have stronger powers to control the products and building methods used in the building industry?

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13. Under what circumstances, if any, should the BIA be able to ban or restrict use of building methods or products?

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14. Under what circumstances, if any, should the BIA be able to require an Acceptable Solution to be used?

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15. Will these proposals make it easier or harder to bring good new designs, products and building systems into the market?

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### ***Accrediting Inspectors and Certifiers***

16. Do you think the accreditation proposal will improve the quality of inspection services?

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17. Do you think the accreditation processes will lead to consistent standards being applied by all Territorial Authorities and building certifiers?

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18. If you don't think these proposals will lead to improved quality and consistency, what do you think would?

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### ***Certifying Products and Processes***

19. Would product certification be useful to you?

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20. Do you think that more building product certification would lead to better quality design and building?

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21. Do you think the BIA should be able to require that a certified product must be used where certain risks occur?

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22. Do you think the BIA should be able to ban certain products? If so, what criteria should the BIA apply in making these decisions?

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### ***Assessing the Benefits and Costs of Controls***

23. Do you think that a requirement to publish a regulatory impact analysis will be enough to make sure the BIA takes all of the benefits and costs into account when creating new regulations?

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24. Do you agree that the whole life of a building should be taken into account in assessing the benefits and costs of changes to the Building Code, Acceptable Solutions or Verification Methods?

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### **CAPABLE PEOPLE**

25. Should building practitioners be registered?

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26. If so, which trades or professions should be registered?

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27. What do you think of the registration proposals in this paper?

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28. Are there any particular proposals with which you strongly agree or disagree, and why?

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29. If you are a building practitioner, would you, your colleagues or your employees become registered under the above proposals? If not, why not?

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30. Do you think registration should be mandatory for work requiring a Building Consent?  
If not, why not?

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31. Should Territorial Authorities assess the qualifications and skills of unregistered building practitioners?

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32. How do you think people who build their own house (owner builders) should be dealt with in a registration regime?

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33. Are there any other issues for 'owner builders' that should be considered?

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## **IMPROVING INFORMATION**

34. Who do you think needs to be better informed to ensure that buildings are Building Code compliant?

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35. What sort of information needs to be provided?

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36. What sort of strategies should be put in place to make sure that those who need information receive it?

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37. Who should have responsibility for ensuring that these strategies work?

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38. What do you think are the most important education gaps in the building industry currently?

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## **PUTTING THINGS RIGHT**

### ***Mandatory Building Warranty***

39. Would mandatory warranties help clarify responsibilities between building owners and building professionals?

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40. If so, what mandatory provisions should be included in a warranty?

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### ***Enhanced Dispute Resolution Procedures***

41. Would there be merit in providing for an accessible dispute resolution procedure, based either on an expansion of the Weathertight Homes Resolution Service or the provisions of the Construction Contracts Act for the resolution of all disputes between consumers and building practitioners?

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42. How should the costs of providing such a service be met?

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### ***When Building Professionals Fail***

43. Given the Government's intention to legislate for additional measures to deal with company insolvency and phoenix companies, does anything else need to be done to deal with these issues specifically within the building industry?

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## ***Insurance, Bonds and Guarantee Funds***

### **Homeowner Warranty Insurance, Guarantee Fund, Bonds**

44. Should
- (a) home warranty insurance
  - (b) a guarantee fund or
  - (c) performance bonds
- be a mandatory feature of building regulation?

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45. Would the benefits to building owners of any of these alternatives exceed the costs?

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## **ENHANCING ENFORCEMENT**

46. Would a system of infringement penalties be effective?

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47. Do you think the BIA should have an enforcement role?

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## **PERSONAL DETAILS**

Name

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Address

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Company or Organisation

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Position

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Phone

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Email

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Fax

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## GLOSSARY

Key terms and procedures are set out below with a definition or description.

**ACCEPTABLE SOLUTION:** a prescriptive design solution approved by the Building Industry Authority as a way of complying with the Building Code. Acceptable Solutions are published in the Approved Documents and often quote familiar documents such as New Zealand Standards. They are a means of achieving compliance with the Building Code but they are not the only way to do this.

**ACCREDITATION:** Procedure by which an authoritative body gives formal recognition that a body (laboratory or inspection service or certification body) or a person (signatory) is competent to carry out specific tasks (scope).

**ALTERNATIVE SOLUTION:** a design solution which differs totally or partially from solutions given in the Approved Documents yet complies with the Building Code. These are stand-alone solutions considered and approved on their individual merits by a Territorial Authority or building certifier.

**APPRAISAL:** a certificate or report issued by a person or organisation stating an opinion that a building product, system or method is suitable for some purpose.

**APPROVED DOCUMENTS:** documents issued by the Building Industry Authority (BIA). They comprise Acceptable Solutions and Verification Methods that provide methods of compliance with the Building Code. They are not mandatory – i.e. other methods can be used.

**BIA ACCREDITATION:** a certificate of accreditation issued by the Building Industry Authority stating that a product, system or method meets certain provisions of the New Zealand Building Code. Accreditation has legal status under the Building Act.

**BRANZ:** Building Research Association of New Zealand Incorporated. BRANZ is the principal agency for building research in New Zealand. BRANZ operates as two entities – BRANZ Ltd and BRANZ Inc. BRANZ Ltd undertakes Testing/ Consulting, Research, Publications and Product Appraisals. BRANZ Ltd derives around 40% of its income from BRANZ Inc. for which the principal income source is the Building Research Levy.

**BUILDING CONSENT:** a consent for building work to begin in accordance with the approved plans and specifications. It is issued by the Territorial Authority and includes plumbing and drainage work. It is not a resource consent.

**BUILDING CERTIFIER:** a privately employed person or organisation approved and registered by the Building Industry Authority (BIA) to check plans and specifications, and building work during construction. Owners have the choice of employing building certifiers as alternatives to Territorial Authority officers.

**BUILDING CERTIFICATE:** a formal confirmation by a building certifier that plans and specifications or specific aspects of a building comply with the New Zealand Building Code. Territorial Authorities are obliged to accept such a certificate.

**BUILDING CODE:** The First Schedule of the Building Regulations 1992 for prescribing the requirements for buildings and the performance criteria with which new building work must comply. Compliance with the Building Code is mandatory.

**BUILDING INDUSTRY AUTHORITY (BIA):** An independent Crown entity established in 1992. Its fundamental purpose is to manage New Zealand's building legislation.

**BUILDING WARRANT OF FITNESS:** a document provided annually and signed by the building owner, confirming that compliance schedule requirements have been satisfied.

**CODE COMPLIANCE CERTIFICATE:** a certificate issued by the Territorial Authority or a building certifier at the completion of building work, confirming that the building work under the building consent complies with the relevant provisions of the New Zealand Building Code.

**COMPLIANCE SCHEDULE:** a document issued by the Territorial Authority listing the inspection, maintenance and reporting procedures for certain systems and features in a building (such as lifts, fire alarms, air conditioning ) to ensure their continued safety of operation. (Not required for single residential dwellings.)

**DETERMINATION:** a formal ruling by the Building Industry Authority (BIA) on a doubt or dispute over whether building work complies with the New Zealand Building Code to the required extent.

**FUNCTIONAL REQUIREMENT:** In relation to a building, means those functions which a building is to perform for the purposes of a particular clause in the Building Code.

**INDEPENDENT QUALIFIED PERSON (IQP):** a person or organisation (such as a specialist contracting company) who is accepted by the Territorial Authority as being appropriately qualified to undertake the inspection and maintenance of the compliance schedule feature or system concerned. 'Independent' means having no financial interest in the building.

**LAND INFORMATION MEMORANDUM (LIM):** a report issued by a Territorial Authority containing all the information held by the Territorial Authority relevant to a specific property.

**NOTICE TO RECTIFY:** a notice issued by the Territorial Authority to the owner or contractor. This notice requires any building work not complying with the Building Act or New Zealand Building Code to be corrected. Failure to rectify the defective work could lead to prosecution.

**OCCUPATION CERTIFICATE:** a certificate that the Hunn Report recommends should be issued by a Territorial Authority or building certifier certifying that a building is completed to the extent that it is safe and fit for occupation.

**PERFORMANCE [REQUIREMENT]:** a term in the Building Code used to describe either qualitatively or quantitatively how far the building work must go in meeting the particular Building Code Clause's Objectives and Functional Requirements.

**PHOENIX COMPANIES:** A phoenix company is a company that has been reborn soon after (and in some cases before) its failure. The new company takes on the failed company's business, often using a similar name, the same managers and directors and the same assets.

**PLANS AND SPECIFICATIONS:** the documents according to which building work is proposed to be constructed, altered, demolished or removed. They include proposed procedures for inspection during construction, alteration, demolition or removal.

**PRODUCER STATEMENT:** a statement (e.g. design certificate) confirming that plans, specifications, or completed works for all or a specific part of a building comply with certain technical requirements that will satisfy the Building Code. A producer statement will usually be issued by a recognised specialist (e.g. engineer, architect, appraisal organisation or competent contractor). It is up to the Territorial Authority to decide whether to accept such a statement.

**PROJECT INFORMATION MEMORANDUM (PIM):** a report issued by the Territorial Authority prior to issuing a building consent. It confirms that building work may proceed, subject to any requirements under other legislation other than the Building Act, or notifies that building work may not be done. It also includes information likely to be relevant to the proposed building work – i.e. special features of the land concerned, such as potential erosion, subsidence, slippage, and flooding.

**RESOURCE CONSENT:** a land use consent, issued under the Resource Management Act 1991, by the Territorial Authority for land use not designated a permitted activity in the Territorial Authority's District Plan. For example, locating a building closer to the boundary than is permitted by the District Plan.

**TERRITORIAL AUTHORITY:** a City or District Council. The Territorial Authority enforces the Building Act and Building Regulations in its region. It issues all building authorisations such as building consents and compliance schedules.

**VERIFICATION METHOD:** a calculation or test procedure used to demonstrate compliance with the Building Code. Verification Methods are approved by the Building Industry Authority and published in the Approved Documents.

**WEATHERTIGHTNESS:** the term used to describe the resistance of a building to the weather. Weathertightness is not necessarily waterproofing, but rather ensuring against undue dampness inside buildings and damage to building elements.



