



Building Amendment Bill (No 3) 2010
Submission to the Local Government and Environment Select Committee
by the New Zealand Institute of Architects Incorporated

Introduction

The New Zealand Institute of Architects Incorporated (NZIA) is a professional organization representing a membership of over 2830 which includes some 90% of Registered Architects in New Zealand.

The NZIA wishes to make a Submission to the Local Government and Environment Select Committee in relation to the Building Amendment Bill (No 3). We have also consulted widely with our membership in the preparation of this Submission.

We would appreciate the opportunity to appear before the Select Committee to discuss this Submission.

Introduction

- 1 In summary, we agree with the general intent of the Building Amendment Bill (No 3) 2010 (**the Bill**). However, we recommend amending ss 14D and 14E in clause 10 of the Bill as follows:
 - (a) In s 14D, replacing “*will result in*”, with “*is of a reasonable standard, sufficient to result in*”;
 - (b) In s 14E(b), removing “*not covered by a building consent*”.
- 2 While we generally support the provisions relating to BCAs, in s 14F and others, this is a major shift in the accountability of BCAs, which has been part of the construction liability landscape for well over 30 years. If the Bill is enacted as drafted then there remains risk for the consumer, in particular owners of residential dwellings, that if builders, designers and other parties are left unable to pay, the consumer may be left high and dry.
- 3 We support changes to BCA responsibilities on the proviso that the other proposed reforms (as outlined in paragraph 5); including in particular a mandatory surety scheme, remain to protect the consumers. If these proposed reforms are not implemented to protect the consumer, then the responsibility of BCAs should remain as is.

Building Act Review

- 4 The Building Act Review that led to this Bill contained a number of reforms, not included in the Bill, affecting the building industry. There were a number of fundamental and interlinking changes, “planks of reform”, that together were to lay the foundation for a more robust system of building control. Many of these proposals are interdependent, relying on each other and on other, wider, initiatives in the building sector, such as the Licensed Building Practitioner scheme.
- 5 Some of these planks of reform included:

Joint and several liability

 - (a) We supported the shift to proportional liability, in tandem with the implementation of a warranty and surety scheme. The move to proportional

liability is a key reform that would significantly decrease the undue burden placed on all parties when damages awarded against them significantly outweigh their level of involvement with the project. The current law has led to risk-averse behaviour that increased construction costs and decreased efficiency. If proportionate liability was brought in for domestic dwellings only, it would most likely decrease costs without any reduction in the quality of service.

Warranty and surety scheme

- (b) The second key proposal we supported was a robust mandatory warranty scheme coupled with a solvent surety to back those warranties. We also recognised that a number of the other proposals would be dependent on, or would require, the mandatory warranty and surety scheme to be effective. We especially support the introduction of such a scheme as a correlative to any change to the joint and several liability scheme as mentioned above.

National Building Consent Authority

- (c) In order to encourage consistency of decision making and increase the level of expertise within Building Consent Authorities (BCAs), we supported the implementation of a National BCA system, and applaud the development that is occurring towards that end.
- 6 The intent was that there would also be a decrease in over-reliance on BCAs, and a balancing of the roles of other parties including owners, builders and designers. Additionally, it was intended that the Licensed Building Practitioner scheme would help to increase the overall talent pool, encouraging proficiency and raising the overall standard of construction in New Zealand.
- 7 The current Bill is only a constituent part of the overall reform package, and we note that without the support of these supporting planks of reform, the Building Act Review does not achieve its goal. Where one of the interdependent piece is implemented without the others, such as a warranty and surety scheme or proportionate liability, the goals of the Building Act Review are in our Submission not likely to be achieved.
- 8 The Bill's explanatory note set out the purpose of the amendments. In particular, the Bill was intended:
- (a) To more clearly signal the accountabilities of participants involved in building design and construction
- (b) To provide a stepped risk-based approach to how building consent and inspection requirements are administered so that the role of the building consent authorities at each step is aligned with the risk involved

Clause 10

- 9 We agree with the general intent of this clause, namely to clarify responsibilities under the Act, but we consider ss 14D and 14E need amending for the following reasons:

Section 14D – Responsibilities of designer

- 10 We consider this clause, in its current form, should be amended because:
- (a) This clause is inconsistent with clause 5 of the Bill.
- (b) This clause does not provide clarity as to the obligation placed on a designer.
- (c) This clause is inconsistent with the practical process of construction work.
- (d) This clause is inconsistent with the intent of the Bill and the Building Act Review.

(a) Inconsistent with clause 5 of the Bill

- 11 Section 4(2)(q), as stated in clause 5 of the Bill, amends the principles to be applied in performing functions or duties, or exercising powers under the Act, by adding a new paragraph outlining the accountabilities of the parties under the Act. Subsection 4(2)(q)(ii) states that “designers are... accountable for their role in ensuring that... plans and specifications are *sufficient to result* in building work that (if built to those plans and specifications) complies with the Building Code”.
- 12 This is fundamentally different from the obligation under s 14D which states that “a designer is responsible for ensuring that the plans and specifications and the advice *will result in* the building work... complying with the Building Code”.
- 13 We note that in s 14A(a) the responsibilities under the section are not a definitive or inclusive statement, and in (b) that they are for guidance only and that in the event of conflict with other sections, those other sections shall prevail. We are not clear what was intended by this section. Our concern is that sections 14B to 14F are effectively meant to be declaratory of the parties’ responsibilities notwithstanding the fact that it is said to be “for guidance only”. This only serves to muddy the waters, leading in our submission to a lack of clarity as to the obligations placed on the designer.

(b) Does not provide clarity as to the obligation placed on a designer

- 14 One of the key goals of the Bill, according to the explanatory note, is to “more clearly signal the accountabilities of participants involved in building design and construction.” We agree with this goal, but in light of the following difficulties, the inconsistency with s 4(2)(q) and the lack of guidance as to appropriate detail, we do not believe that the goal is achieved.
- 15 The effect of the phrase “will result in” is to change the focus of the designer’s obligation. The focus is moved from the adequacy of plans and specifications for Code compliance, something under the designer’s complete control, to the actual resultant building work being Code compliant, something that the designer never has complete control over. On a building project it is ultimately the builder who has to decide how to construct what the designer has drawn or specified.
- 16 There is no indication in the Bill as to the detail that will ensure that plans and specifications that, if followed, “will result” in compliant building work. This is being left up to the designer. (The definition of plans and specifications remains unchanged from the current Building Act.) In practice, it will be impossible to provide a level of detail that would meet the certainty of “will result”.
- 17 In our submission the proposed definition leaves a potential gap, where the plans and specifications may meet the technical requirements for consent – complying with the Building Code – but the resulting building work does not comply. Where the building work is deficient, but the work technically complies with the consented plans and specifications, s 14D places the responsibility on the designer, even if the plans and specifications produced by the designer complied and were given consent. This is even though a designer has no ultimate control over the conduct of the building work.
- 18 The phrase “will result in” requires a level of certainty that is unachievable in practice. In our submission because of the performance (as opposed to prescriptive) nature of the Code it would be better to define designer responsibility by reference to a reasonable standard. Otherwise it leaves the designer with the uncertainty of not knowing what level of detail in the plans, specifications and advice is required in order to fulfil their obligations. This could result in plans and specifications requiring an absurd level of detail, and likely will mean increased costs as designers are forced to be overly cautious in their approach.

(c) Inconsistent with the practical process of construction work

- 19 Section 14D mandates that a designer's obligation will be to ensure that the building work carried out "will result in" compliance with the Building Code, on the assumption that the work is carried out in accordance with those plans and specifications. The section defines the role with reference to plans, specifications and advice but imposes an obligation to ensure that the resultant building works will comply with the Act, not just the plans and specifications produced by the designer.
- 20 In our view, the section does not properly recognise the designer's role in the building process and their level of control over the actual building work. At a fundamental level, the designer cannot control "how" to construct the design. That is the role of the builder or contractor. By contrast, the designer's role is essentially about "what" to build. This important distinction is described in *Hudson's Building and Engineering Contracts*, as follows:¹
- "The [designer's] duty is to design permanent work which, once in place, will best satisfy his client's requirements... In consequence, the [designer's] principal area of expertise lies in giving effect to his client's amenity requirements by producing the most suitable permanent work... The contractor's expertise, on the other hand, lies in the "how" or method, as opposed to the "what" or final result, of construction; that is, in the design, selection and organisation of temporary works and the various possible working methods required to bring the permanent work to completion... in this area, the contractor's expertise can reasonably be expected to exceed that of the [designer]."
- 21 In taking the s 14D approach, the designer's role of controlling the "what" to build, giving effect to the client's requirements by designing an appropriate work, is conflated with the "how" of building, bringing the work to physical completion through exercise of building expertise, which is the building contractor's role and expertise.
- 22 The process of construction is one that brings together the skills of a number of different parties. The architects and engineers, the builders and other contractors, and the BCAs all have a role to play in the construction process. In order to construct quality, cost efficient buildings, the best of each of these parties is required.
- 23 Where the other parties disproportionately rely on each other's responsibilities instead of their own, their incentives to produce quality work are diminished. The effects of such disproportionality have been seen already, with the over-reliance on BCAs leading to local authorities bearing a large proportion of the cost of the leaky home crisis, despite their limited control over the actual process of construction.

(d) Inconsistent with the intent of the Bill and the Building Act Review

- 24 This clause, as currently drafted, sets a performance standard that cannot be achieved in practice by designers and is likely to reduce the quality of construction work, because the builder does not have to accept that their work must comply with the Code.
- 25 The Building Act Review aimed, among other goals, at decreasing compliance costs and risk-averse behaviours, but not at the expense of quality. The extent of plans and specifications that a designer must produce in order to comply with s 14D is uncertain. It is foreseeable that, even with a reasonable level of detail to the plans, specifications and advice, this may not comply with designer responsibilities under the section. With such uncertainty, there is a risk of increased costs, increased time, and over-cautiousness that is not conducive to innovation in the sector, nor to cost-effective quality. Increased costs and time frames will be passed on to the consumer, as will potential increases in professional liability premiums.

¹ Duncan Wallace QC *Hudson's Building and Engineering Contracts* (11th ed, Sweet & Maxwell, London, 1995) at [1.295].

Recommendations

- 26 We recommend amending s 14D by removing the phrase “*will result in*”, and replacing it with “*is of a reasonable standard, sufficient to result in*”, as follows:

14D Responsibilities of designer

A person who prepares and gives advice on the preparation of plans and specifications in relation to a building consent (**a designer**) is responsible for ensuring that the plans and specifications and the advice *is of a reasonable standard, sufficient to result in* the building work carried out under the consent complying with the Building Code, assuming that the building work is carried out in accordance with those plans and specifications and that advice.

- 27 This amendment clarifies the designer’s obligations, whilst not abrogating the overall responsibility for their work. The “reasonable standard” test is the long-recognised test at law for competence in all areas of professional practice. The amendment aligns the designer’s legal responsibilities with the current law both in New Zealand and in other common law countries such as Australia, the United Kingdom and Canada. This amendment will also bring the section in line with s 4(2)(q)(ii), creating a cohesive accountability structure which informs the parties of their respective obligations, as is the intent of the Bill.

Section 14E – Responsibilities of builder

- 28 We consider this clause should be amended because:

- (a) This clause is inconsistent with clause 4 of the Bill.
- (b) This clause does not provide clarity as to the obligation placed on a builder.
- (c) This clause is inconsistent with the practical process of construction work.
- (d) This clause is inconsistent with the intent of the Bill and the Building Act Review.

(a) This clause is inconsistent with clause 4 of the Bill.

- 29 This clause is inconsistent with the new purpose section in clause 4, which includes, at s 3(b) promoting “the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code.

- 30 In s 14E(a), a builder is not required to ensure that the building complies with the Building Code. Because of the builder’s control over “how” to build, this could mean that while the builder has technically followed the plans and specifications, as is their obligation under s 14E(a), the building still may not comply. This does not ensure that the work complies with the Building Code, nor does it promote the accountability of builders.

(b) This clause does not provide clarity as to the obligation placed on a builder.

- 31 In s 14E(b), there is ambiguity in the interpretation of “not covered”. Covered could be given a wide or a strict interpretation. The section may mean (a) the builder must ensure that work completely outside of the plans and specifications is Code compliant, or it may relate to (b) work partially covered, or (c) to work that is not required to be detailed on the plans and specifications for a consent.

- 32 This ambiguity leads to confusion between the roles of the designer and the builder, and it does not achieve the intent of the Bill in clarifying accountabilities of the various parties.

(c) This clause is inconsistent with the practical process of construction work.

- 33 As with s 14D, s 14E is not consistent with the practical process of construction work, confusing and diluting the responsibility of builders, who have ultimate control of the

actual building work. This obligation is not consistent with the role of the builder and of the designer (as mentioned in paragraph 19).

(d) This clause is inconsistent with the intent of the Bill and the Building Act Review.

- 34 This clause is inconsistent with the intent of the Building Act Review, and with the purposes of the Bill, as mentioned earlier. The clause does not promote accountability, and, in our view, the dilution of builder responsibility will lead to a decrease in knowledge and skill. This is inconsistent with the aims of the wider Building Act Review, and in particular the licensed building practitioner scheme.

Recommendations

- 35 We recommend amending s 14E(b) by removing the phrase “*not covered by a building consent*”. This will result in 14E(b) reading:

14E Responsibilities of builder

A builder, and any other person who carries out building work, is responsible for—

(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates and:

(b) ensuring that building work complies with the Building Code.

- 36 This will also bring the builder’s obligations in line with s 17 of the Building Act 2004, which requires that all building work complies with the Code, whether or not a building consent is required in respect of that building work.

Section 14F – Responsibilities of building consent authority

- 37 We consider that, in the situation that no mandatory warranty and surety scheme is enacted, this clause should be amended to reflect the responsibility of BCAs to ensure that building work is Code compliant.

Conclusion

- 38 The Bill reallocates and defines responsibilities as between designers, builders and BCAs, but does not address the provisions for proportional liability, consumer protection warranties and a national framework for building consent processing. Without the concurrent implementation of these further changes, our view is that the key objectives of the Building Act Review will not be met.
- 39 The Bill fails to recognise the complementary but separate roles of the designer and builder. In particular, s 14D appears to require the designer to be accountable for both the preparation of plans and specifications, and the execution of building work. This is not a practical proposition, and would require industry-wide reorganisation, along with substantial impacts on costs and project complexity. However, we agree that it is useful to define the responsibilities as between designers, builders and BCAs. Our comments, and proposed changes, are focused on fulfilling the purpose of allocating responsibilities appropriately, to ensure that the designer designs to the Code, the builder builds to the Code, and the BCA signs off to the Code.