9 Building regulations and affordability

Key points

- The regulatory framework can affect the cost of building or renovating a house by imposing standards that exceed what well-informed consumers would otherwise choose. It is important that the regulatory process identify the costs, risks and benefits of adopting changes to building standards to ensure effective and efficient outcomes.
- The costs arising from slow and uncertain administration of building regulations and inspection services can be substantial and are largely passed on to home buyers. They deserve greater attention from building regulatory authorities.
- Many inquiry participants raised concerns about quality, timeliness, cost and consistency in their interactions with the building control system. Relationships between building practitioners and building consent authorities were poor in some areas. These tensions are likely to impede the effectiveness of the regulatory system.
- Local authorities administering building regulation face challenges in acquiring, retaining and supporting the necessary technology, skills and judgements to perform their role to a high standard.
- Achieving greater scale and better use of available technology, to ensure faster dissemination of information, greater consistency and quality, and faster processing of residential building consenting and inspection services, is both feasible and desirable.
- The development of rapid and effective feedback mechanisms which enable emerging deficiencies in building practice to be identified, diagnosed and remedied promptly is required to improve the performance-based regulatory system.
- A lack of clear pathways by which alternative solutions can become acceptable solutions may be creating a barrier that impedes cost-reducing or quality-enhancing innovations becoming mainstream practice.
- Building Consent Authorities face strong incentives to be risk averse, especially given the liabilities they have incurred in the wake of leaky homes. Reforms are being implemented that will reallocate risk among the parties to building work. The evaluation of the reforms should focus not only on whether they are effective in addressing the problem but also on the costs imposed by the new requirements.
- There is little quantitative or qualitative information on the quality of the New Zealand housing stock. Such information would provide a source of data for policy development and monitoring purposes which is currently missing.

Regulation has a bearing on the quality and cost of residential building in New Zealand and, as a result, on housing affordability. It is important that regulation is effective in achieving its objectives, while not imposing unnecessary costs, impeding innovation or creating unnecessary barriers to efficiency. This inquiry has been conducted at a time when regulatory reforms are being implemented to improve the quality of building work (Box 9.1). This chapter considers whether there is further scope to improve the effectiveness and efficiency of building regulation beyond the reforms already envisaged.

The chapter describes the rationale for building regulation and describes the regulatory framework. It outlines the ways in which building regulations can increase the cost of housing and it considers the scope for improving the quality of regulatory decision-making and for reducing the costs of administration and compliance. The chapter also looks at two important issues that impact on the cost and quality of residential

building – the allocation of risk between builders, designers and Building Consent Authorities (BCAs), and the extent to which the regulatory environment encourages successful innovation and responds to failures in building materials and designs.

Based on the Commission's findings, the final section makes a partial assessment of the quality of New Zealand's building regulation against key criteria for good regulatory practice.

9.1 Why have building regulation?

Information asymmetry and consumer protection

Most home owners engage with builders infrequently, when they are building or renovating their home, and are not well informed about how to assess the quality of the work, and how building design and construction may reduce the impacts of earthquakes, fires or water ingress. They typically have little knowledge of the construction process, or of how to assess the quality of workmanship, particularly since faults are often hidden within the building and may not become evident for some years. The bespoke nature of much home building in New Zealand makes it more difficult for consumers to compare the building work being done for them with the work done for others.

What is noticeable in the residential construction industry is the comparative absence of 'brand risk'. Large companies in other industries are very protective of their brand, which provides a strong incentive for quality control. They will also take rapid steps to recall a product or correct a problem for fear of damaging their brand reputation. For example, motor vehicle manufacturers move swiftly to recall vehicles with defects because of the risk to brand. Unlike the motor vehicle industry though, New Zealand has only a few residential construction firms of any scale with a recognisable brand and because house construction is much more bespoke than standardised, there are not the opportunities for production-line quality control.

Building in New Zealand involves extensive subcontracting arrangements, so the lead building contractor has the key relationship with the consumer. Consumers have very little leverage when there are problems with the work done by subcontractors, other than through the lead contractor.

Consumers may also not be in a position to assess the financial strength of builders, and building companies may not be around many years into the future to remedy any faults. It can be difficult and costly for home owners to hold building practitioners to account once building work is paid for, particularly given the high level of firm turnover within the building and construction industry (Chapter 10).

Market institutions have developed to reduce these problems: for example, architects or other specialists can project manage building work for consumers; industry associations can provide advice about the quality of builders; companies or industry associations can provide warranties;[108] insurance can limit consumers' exposure; and there are dispute resolution processes. But consumers may find it prohibitively expensive to rely on project managers or dispute resolution processes, or to enforce implicit or explicit warranties, and insurance is not always available. The case for regulation is based on an assessment that market solutions that correct for information asymmetries or protect consumers are not sufficient and that regulation can improve market outcomes.

Balancing the costs, risks and benefits of building regulation

Building regulation was introduced in New Zealand following the 1931 Napier earthquake and resulting fires.[109] The building control system has undergone many changes since that time and includes, for example, performance standards around durability, waterproofing and insulation that have added to the quality, and the cost, of housing.

[108] Two builders' associations (Registered Master Builders Federation of New Zealand (RMBF) and Certified Builders Association of New Zealand (CBANZ)) offer financial guarantees of building work. Both provide cover for non-completion of work and for latent defects (with some limitations and exclusions, including time limits). For both associations, the original building contractor has the primary obligation for repairing any damage, and the guarantor has a secondary obligation.

[109] The ability to escape from a building in the event of fire is still enshrined in the legislation today.

In 1992, the Building Act was overhauled to encourage the use of new innovations in building design, materials and methods of construction. The new performance-based approach to building regulation was subsequently pared back in the Building Act 2004 as a result of leaky homes.[110] Further changes are now being implemented to provide greater consumer protection and improve the quality of building work (box 9.1).

Box 9.1 **Reforms to building regulation**

The package of reforms to building regulation, some of which have been implemented and some of which are still under consideration, include:

- changes to the Building Act to clarify the roles and accountabilities for building work and Building Code compliance between designers, builders, building owners and BCAs;
- new legislative provisions to enable consumers to better hold building contractors to account;
- a Licensed Building Practitioner (LBP) scheme to improve skills in the industry;
- work which is critical to the integrity of a building to be carried out by a LBP;
- for a building consent, the building design must be done by a licensed designer, registered architect or chartered professional engineer;
- written contracts for work over a prescribed minimum price, which identify the lead building contractor and make clear the work contracted for;
- a requirement for disclosure about what surety backing the building practitioner has available to meet the implicit warranties in the Building Act;
- provision of more information and guidance to home owners to help them understand and manage the risks associated with building work and the guarantee products and services available in the building sector;
- a risk-based approach to building consents to ensure that the amount of checking and inspection required is matched to the complexity of the work, and the skills and the capabilities of the people doing the work.

Sources: Department of Building and Housing, Building Act Review discussion document, 2010; Department of Building and Housing, sub. 55, p. 31; and Office of the Minister of Building and Construction, Building Act Review: Regulation of guarantee products and services Cabinet paper.

The Canterbury earthquakes and the cost of repairs has led some to question whether the Building Code should be amended to make buildings more resistant to damage or more easily repaired after an earthquake event.

> One of the founding principles of the current Building Code is to protect life safety as far as possible, but it is less concerned with damage to buildings. One of the broad philosophical questions to be reviewed is whether New Zealand as a society wishes to review this approach. New design techniques are being researched to reduce damage in the event of earthquake, but these are still in their infancy. However, even current conventional design techniques can be employed in ways that will be more resistant to damage, but possibly at the expense of some utility in the buildings, and greater construction cost. (Batchelar et al, 2012).

[110] In 2002 problems with leaking and rotting became evident in houses that were constructed in a 'Mediterranean style' using monolithic cladding. The new type of design relied on careful construction to avoid rain water, driven by wind, penetrating the outer envelope. If water gets in, it needs to get out again otherwise it leads to rotting framing, and because the rot occurs inside the walls it can be some time before problems are detected.

Building regulation inevitably comes under the spotlight when there are traumatic events. The case for changing regulation, however, must always be made by careful consideration of the risks, costs and benefits.

As Standards New Zealand (sub. DR146, p. 3) notes: "How and where the balance … is struck between the level of risk acceptable by the community, and the costs associated with raising mandatory building standards, materially impact on the issue of housing affordability".

9.2 The regulatory framework for residential building

The Building Act 2004

In New Zealand, residential building is controlled by the Building Act 2004. The Act (section 3) provides for the setting of performance standards for buildings, to ensure that:

- people who use buildings can do so safely and without endangering their health;
- buildings have attributes that contribute to the health, physical independence, and well-being of the people who use them;
- people who use a building can escape from the building if it is on fire;
- buildings are designed, constructed, and able to be used in ways that promote sustainable development.

The Building Code, Building Consent Authorities and building consents

Section 40 of the Building Act requires that buildings cannot be constructed, altered, demolished, or removed without a building consent from a Building Consent Authority (BCA), and section 17 requires that all building work must comply with the Building Code. The Building Code is a schedule to the Building Regulations[111] and prescribes the functional requirements for buildings and the performance criteria with which they must comply.

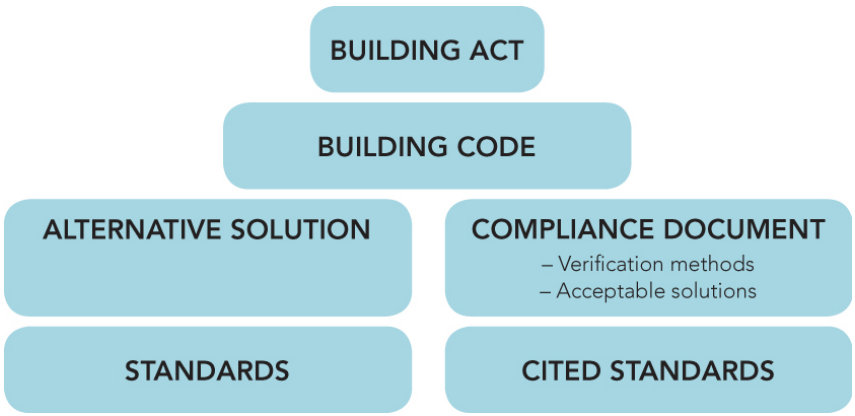
The Building Act 2004 provides for BCAs to be accredited and registered to provide services for processing/granting building consents, inspecting building work and issuing code compliance certificates (section 12 (1)). Currently, all territorial authorities are accredited and registered BCAs. Private organisations can apply to be accredited/registered, but the requirements for registration are difficult for private organisations to meet. There are no private BCAs operating in New Zealand currently. There are some council-owned organisations that have been accredited as BCAs and they carry out some of the tasks of a BCA under contract to the relevant territorial authority, but only the territorial authority BCA can issue building consents and code compliance certificates.

Complying with the Building Code

The Building Code sets a default minimum standard for buildings, which can be exceeded. Builders can comply with the Building Code in either of two ways – prescribed 'acceptable' solutions or innovative 'alternative' solutions – as illustrated in Figure 9.1. Box 9.2 describes how the system operates.

[111] The Building Code is a schedule to the old Building Regulations 1992. The only part of the 1992 regulations continuing in force is Schedule 1 which contains the Building Code.

Figure 9.1 Building blocks of the regulatory framework



Source: Standards New Zealand

Box 9.2 How the system works

- The Building Code prescribes functional requirements for buildings and the performance criteria that buildings must comply with in their intended use.
- Compliance documents include verification methods, which are methods of demonstrating compliance with the Code, and acceptable solutions which, if followed, will achieve compliance with the Code.
- Acceptable Solutions are prescriptive guidelines outlining what works for what purpose, whereas Verification Methods outline the testing necessary to meet the Building Code.
- If building designs comply with a compliance document (verification methods or acceptable solutions) then the building must be approved by the BCA.
- If the Licensed Building Practitioner (designer, architect, engineer) does not want to use a compliance document, then the onus is on them to prove that their alternative solution meets the Building Code and to prove to the BCA that their approach is satisfactory. For example, one method might be to get the approach tested by a building research and testing company such as The Building and Research Association of New Zealand (BRANZ).
- The Building Act allows for Standards to be incorporated by reference into compliance documents. Around 230 of the approximately 650 Building and Construction Standards are currently cited in compliance documents. Other Standards can be used as a part of establishing alternative solutions. Under the product certification scheme run by the Department of Building and Housing, a product with a certificate is deemed to comply and it must be accepted by BCAs if it is used under the right conditions.

Source: Standards New Zealand, Department of Building and Housing.

9.3 In what ways can building regulations increase the cost of housing?

The regulatory framework can affect the cost of building[112] or renovating a house in six main ways.

1. Imposing standards that buildings must meet with respect, for example, to durability and safety, which exceed levels that well-informed consumers would otherwise choose. This is very difficult to estimate. BRANZ has estimated that increases in changes related to the Building Code, together with new

[112] In addition to the building regulations covered in this chapter, there are also territorial authority regulations covering the management of building sites, such as builders refuse, noise and hours of operation, and site fencing. These regulations also add to building costs, but are not considered here.

occupational health and safety requirements, accounted for almost 30% of the increase in the nominal costs of building a 'modal' house between 2002 and 2011 (sub. 40, p. 4).

> Material and labour cost increases included building code changes related to clause B1, B2 and E2 changes affecting foundations, framing and wraps/seals. (BRANZ, sub. 40, p. 4)

BRANZ estimates, for example, that window costs were increased by around $3000 by the introduction of double glazing as a means to meet new thermal efficiency standards (BRANZ, sub. 40, p. 4), although it is not clear to what extent home buyers might have chosen double glazing in the absence of regulation. Additional costs were also generated by the regulatory response to leaky homes, which included requirements for drainage cavities, treated timber and waterproofing at openings (Page, 2008, p.16).

A study of building regulations in Victoria, Australia, surveyed a sample of industry practitioners about the costs of regulatory compliance. Where possible, the survey sought estimates of the incremental compliance costs imposed by regulation – that is, the additional cost imposed above the costs that would be incurred if there were no housing construction regulation. Given the conceptual difficulties of determining the counterfactual, the extent to which the respondents' estimates reflected incremental costs varies. However, the report concluded that meeting standards adds at least 4% to the cost of an 'average house' in that state (Victorian Competition and Efficiency Commission 2005a, pp.21–24 and their appendix C).

2. There are costs in administering the regulatory framework, some of which are passed on to home buyers. BCAs process around 80,000 building consents each year, with most processed by the larger metropolitan authorities. Table 9.1 provides the Commission's estimates of the building consent charges of five territorial authorities. The variability in these figures is partly due to local conditions and different charging methods – for example, the adoption of a single consent fee by some BCAs. A survey of 55 territorial authorities reported by the Department of Building and Housing in 2008 shows that the consent process has become more costly over time. Between 2000/01 and 2006/07, consent fees for a small house increased from $920 to $1,759, while fees for a larger house increased from $1,005 to $1,760 (Department of Building and Housing, 2008, p.9).

Table 9.1 Breakdown of 2011/12 building consent charges by selected territorial authorities

	Auckland	Tauranga	Hamilton	Wellington	Dunedin
Consent lodgement and processing	$1,234.00	$1,119.70	NA	$995.00	NA
Inspections and CCC	$1,190.00	$1,554.60	NA	$1,482.50	NA
Single consent fee	NA	NA	$3,568.00	NA	$4,610.00
PIM	$190.00	$401.00	$200.00	NA	$816.00
Levies	$831.76	$800.83	$772.08	$780.81	$769.02
Total	$3,445.76	$3,876.13	$4,540.08	$3,258.31	$6,195.02

Source: Productivity Commission analysis of selected territorial authority fee schedules

Notes:

1. Data assumes a single 'small' (<145m2) house, and uses average $/m2 by region to estimate dwelling value, in determining which charges apply.
2. 'Levies' (the Building Research Levy and the Building Levy) refers to the BRANZ and the Department of Building and Housing levies applied to all building works above $20,000, and collected by councils on their behalf. They are not strictly a building consent charge.
3. CCC stands for Certificate of Code Compliance.
4. PIM stands for Project Information Memorandum. A PIM report provides information known to the territorial authority which is relevant to the building proposal, particularly about the site.

3. Inconsistent or slow enforcement of regulatory requirements can delay project completion or otherwise increase project costs. The Registered Master Builders Federation commented that:

> Not only are regulatory costs greater but the amount of time now required to meet these controls has increased markedly. Far more detailed plans, delays with inspections and longer from concept to consent approval. (sub. 16, p.12)

4. Regulation can affect the incentives to innovate with new materials or processes. In 1991 New Zealand introduced a performance-based approach to building regulation, after years of largely prescriptive controls. Performance-based standards provide more opportunities for innovation whilst prescriptive standards can stifle innovation. The issue is whether the acceptable solution/alternative solution approach for meeting the Building Code, in its conception and implementation, encourages innovations that reduce costs and/or improve quality. There are also questions about how successful innovations that improve quality or reduce costs can become mainstream practice, and how information about deficiencies in materials, designs or building practice can be disseminated quickly.

5. Regulation can influence how risks are shared between different parties – home owners, architects and engineers, builders and subcontractors, material suppliers and regulatory agencies. Risks are best managed by those who have the ability to control them, have the right incentives to make the best decisions, or take steps to prevent problems. When risks are not allocated by those who are best placed to deal with them, quality is compromised and costs increase.

6. The structure of the building consenting and inspection service can influence costs. Small BCAs may suffer from diseconomies of scale or be unable to take advantage of efficiency-enhancing technology, adding to the costs of administering building regulations. Costs cannot be challenged if there is limited contestability in the market for consenting and inspection services – for example, if it is too difficult for private organisations to become registered BCAs, or if home owners are unable to use or discouraged from using the services of a registered BCA outside their local area.

9.4 Are housing standards set at the right level?

Housing standards that are designed to prevent injury and save lives or to keep us dry and warm, or to make our homes more durable or thermal-efficient are not costless. Given that regulations impose obligations, the process through which these obligations are determined matters.

> The question of whether the benefits of extensive regulation of building outweigh related costs is vital to the inquiry and warrants further examination. (Local Government Forum, sub. DR108, p. 4)

Changes to the Building Code go through a regulatory review process, which is intended to ensure they are providing the desired benefits without excessive cost. Building Code updates require a Regulatory Impact Statement (RIS) and statutory regulations are tabled with the Regulations Review Committee.

The RIS process plays a particularly important role in ensuring that building regulation is set at the right level.

> While quantifying the regulatory impacts can be challenging, we believe it should be incumbent on the regulator to demonstrate that benefits of regulation actually outweigh costs, and exactly why regulatory intervention is warranted. (Standards New Zealand, sub. DR146, p. 3)

However, Standards New Zealand comments that "in our experience, there is a high degree of variability in terms of quality and robustness of RIS work completed for building regulation" (sub. DR146, p. 3).

The Treasury Regulatory Quality Team is responsible for the RIS process. It has a role in providing guidance for agencies and building regulatory capability. It has a medium-term focus on engaging with agencies that are responsible for the regulation of leading sectors, and where there are specific 'active issues'. These include building weather tightness and earthquake resistance (Release of 2011 Treasury Briefings to Incoming Ministers: Regulatory Quality, pp.6-7)

The Commission considers that the Treasury, as the overall monitor of regulatory quality and processes, and the Department of Building and Housing, as the regulator responsible for the performance of its regulatory functions, should review the quality and robustness of RIS work for changes to the Building Code. Such a review would focus on ensuring that the process undertaken to identify the costs, risks and benefits of adopting changes to the Building Code are consistent with best practice.

R9.1 Treasury Regulatory Quality Team in consultation with the Department of Building and Housing review the quality and robustness of the Department's RIS process for changes to the Building Code.

While individual changes to the Building Code are subject to a RIS process, the *cumulative* impact of changes to the Building Code could be imposing greater costs than is justified by the overall benefits. While this can be difficult to assess, it should be kept in mind as part of the review of the RIS process, and in any future system review of the impact of building regulation in New Zealand.

9.5 Is there scope to expedite the building consent process?

While around 83% of building consents are issued within statutory timeframes, the Department of Building and Housing submission notes "a widespread perception among builders and developers that timeframes are not always met [and time is] wasted in arranging inspections and waiting for building officials to complete inspections before work can proceed." (sub. 55, p. 34)

BCAs must process applications for a building consent within 20 working days of being lodged. They can, however, request further information, which effectively 'stops the clock' until the information is received. There have been suggestions that BCAs request extra information not because they need it to assess the application, but to give them more time to process the information they already have.

While the evidence about unnecessary costs caused by 'stop the clock' arrangements is patchy, the Commission considers that it is worth exploring options to improve the situation. There are several options.

- The 'stop the clock' provision could be abolished.
- 'Stop the clock' opportunities, seeking additional information could be limited.[113]
- BCAs could be required to collect data on the number of occasions on which they 'stop the clock', along with their reasons for doing so, perhaps with the addition of random audit by the Department of Building and Housing.
- The Department of Building and Housing could publish the total time taken between receiving applications and finally granting consents for each BCA, and the number of occasions where each BCA has used the 'stop the clock' provision.[114]

The inquiry has not generated enough evidence to justify abolishing or curtailing the opportunities for BCAs to 'stop the clock'. BCAs may have good reasons for requesting more information and time. The Department of Building and Housing considers that comparing BCA performance would be relatively meaningless, as it would not take into account the quality of applications received, or differences in the complexity of applications (sub. DR140, p.3). The Commission does consider, however, that BCAs should report on the number of occasions that they use the 'stop the clock' provision and their reasons for doing so, and the total time taken between receiving applications and granting consents. This would provide an evidence base to analyse the underlying issues. Auditing a sample of BCAs would help reveal whether there is excessive use of the 'stop the clock' provision. An audit would also take account of the quality of applications.

[113] The Resource Management Act 1991 (RMA) limits the times the processing 'clock' can be stopped for further information requests and when s37A can be used to extend timeframes.

[114] Under the Accreditation of Building Consent Authorities Regulations 2006.

R9.2

- The Department of Building and Housing publish, for each BCA, the total time taken between receiving applications and finally granting consents, and the number of occasions where each BCA has used the 'stop the clock' provision.
- The Department of Building and Housing audit the 'stop the clock' information from a sample of BCAs.

Better management of the overall building consent process would also help expedite matters. Saltburn Limited reported that although they do not experience significant delays in the building consent process, they have to "manage it carefully every step of the way" (sub. 7, p. 5).

Carrus Corporation outlines several practical actions that territorial local authority BCAs could take (sub. DR69, p.1):

- A project manager could be appointed by the council to co-ordinate various divisions within the council when there is a major subdivision or building development.
- An online job monitoring system would enable the applicant to check on the status of a consent (this would also provide some accountability).
- Use email as a means of communication rather than letters.
- Rate building companies according to the quality of the information they provide in applications. Those with an A grade would have their application fast-tracked.

These suggest that a more customer-oriented approach is necessary in BCAs interactions with building practitioners while acknowledging the importance of good consent applications.

R9.3

BCAs adopt a customer-focussed approach in their interaction with building practitioners. They should take practical actions that would expedite the building consent process and improve their communication with building practitioners going through the consenting process.

9.6 Is there scope to improve the allocation of risk under the Building Act?

Regulation can influence how risks are shared between different parties – home owners, architects and engineers, builders and subcontractors, material suppliers and regulatory agencies.

> Residential consumers and building consent authorities bear the brunt of the risk associated with building work that fails to perform, despite having the least control over the quality of that work. Building practitioners on the other hand are able to manage and mitigate risks through the quality of their work … while building consent authorities face high risk they do not realise any benefits from risk-taking within the context of a building project, thus creating incentives for building consent authorities to be risk averse. (Department of Building and Housing, sub. 55, p. 32)

Civil action for damages

Building Consent Authorities issue compliance certificates, which verify that the building work complies with the Building Code. If the building is subsequently found to be defective, the home owner can take a civil action against parties for damages. Under tort law, a party can be held liable if there is a duty of care to the claimant; the failure to take care caused the damage; the damage caused the loss to the client; and the loss was foreseeable. All of these links need to be established for a claim to be upheld. Such a claim was upheld in a case against Invercargill City Council (*Invercargill City Council v Hamlin 1994*), which established the precedent for claims against BCAs by home owners with leaky building syndrome.

Joint and several liability

The risk faced by BCAs is compounded by the rule of joint and several liability, which potentially exposes them to the full costs of remediation where building work is subsequently found to be defective. Under joint and several liability, the plaintiff may collect from all or any one of the liable parties until the judgment is paid in full. If any of the liable parties do not have enough money or assets to pay an equal share of the award, the others must make up the difference. The issue for territorial authority BCAs is that because they have the power to levy rates, they have 'deep pockets', relative to other parties, to meet claims for defective buildings, while the typically small firms in the building industry do not. As a result, BCAs effectively become 'the last man standing'.

To manage or mitigate their exposures, BCAs may become risk averse in their treatment of building consents:

- Inquiry participants commented that BCAs may require more information, take more time in their deliberations and increase the number of inspections, all of which increase costs.

> It is apparent to us that the regulators of building consents in local authorities have become very risk averse in the wake of the leaky buildings fiasco and that they pay little regard to the costs of compliance and delay which they impose on builders and consumers. (The Salvation Army, sub. 59, p.4)
>
> Building consent authorities take an unduly risk-averse approach in regulatory decision making, which has resulted in an increase in compliance costs (e.g. documentation requirements, number of inspections etc.) and over-regulation of low-risk building work. (Department of Building and Housing, sub. 55, p.33)

- In addition, inspection processes have become more rigorous, with the average number of house inspections increasing from seven in 2000/01 to eleven in 2006/07 (Department of Building and Housing, 2008, p. 29). These additional inspections add costs not just in terms of the fees charged[115] but also in terms of time costs and additional staff to facilitate the inspection process.

- Estimates from the Registered Master Builders Federation suggest that costs such as the need for more drawing details (typically from 10 pages in 2002 to 30 pages in 2007), more office and on-site staff to facilitate the consenting process and additional inspections, and a higher risk margin to allow for building consent time delays have increased total construction costs by approximately 10% (Registered Master Builders, cited in Page, 2008, p.16).

Submissions have highlighted the increased costs associated with the risk faced by BCAs. It is therefore not surprising that BCAs take a conservative approach.

> We are puzzled by the implication that it is somehow inappropriate for local authorities to be risk averse. Local authorities owe a fiduciary obligation to their residents and ratepayers. Surely anything other than a risk averse approach would be open to the accusation of irresponsibility, especially when the local authority has often been left as 'the last man standing' for civil claims. (Society of Local Government Managers, sub. 53, p. 5)

The Department of Building and Housing notes in its submission that "while building consent authorities face high risk they do not realise any benefits from risk-taking within the context of a building project" (sub. 55, p.32), and "current regulatory settings are based on a low tolerance for risk and a strong emphasis on the role of government in protecting home owners from risks of building defects and failures" (sub. 55, p.33).

The Government is making changes that will reallocate risks between industry participants. They include reforms designed to protect consumers and make them more aware and improve the skills of building practitioners. From mid-2012, a risk-based approach to building consents will be introduced to ensure that the amount of checking and inspection required by BCAs is matched to the complexity of the work, and the skills and the capabilities of the people doing the work (Department of Building and Housing, 2011a).

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[115] For example, Christchurch City Council charges a minimum fixed fee of $122 per building inspection, while Wellington City Council charges an hourly rate of $150 (Christchurch City Council, 2011; Wellington City Council, 2011).

The Commission considers that, if successfully implemented, stepped consenting could simplify the consent process and help to reduce costs and improve affordability. However, while BCAs have a duty of care in respect of residential home owners for building defects and the rule of joint and several liability remains,[116] they have strong incentives to be excessively risk averse in their approach to building consents, especially given the liabilities they have faced in the wake of the leaky homes experience. Such risk aversion imposes costs on the purchasers of new homes in terms of compliance costs and barriers to innovation in design, materials and construction techniques.

The Law Commission has been asked to undertake a more general review of joint and several liability following a review of the application of joint and several liability to the building and construction sector by Buddle Findlay and Sapere Research Group (2011). The Buddle Findlay and Sapere report looked at the impact of joint and several liability on the behaviour of parties in the events leading up to the leaky building episode. The report considered the rule to be fair to home owners and did not recommend a change in the liability rule; however, the report did note that joint and several liability is not well aligned to industry practices. It may exacerbate industry features such as informal contracting, the structure of the industry (lots of small operators, the large number of parties involved in any building project), and the complex and bespoke nature of residential building in New Zealand (Buddle Findlay and Sapere Research Group 2011, p.4).

R9.4 The Law Commission should consider in its review of joint and several liability the interaction between liability rules and the structure of industries and industry practices, and the impact of joint and several liability on the incentives faced by regulators.

Contracts

Another important component of the reform package is the introduction of mandatory written contracts for all residential building work and a requirement for builders to disclose information about their skills, qualifications, licensing status, track record, financial back-up or insurance and dispute history. An update from the Department of Building and Housing in July indicated that the threshold for contracts would be set at $20,000 (Department of Building and Housing 2011b). While an amendment to the Building Act provides for contracts, it does not specify the threshold above which they will be required. This will be specified in the relevant regulations. While the threshold should be based on analysis of factors such as the transaction costs involved in writing contracts and their benefits in enhanced consumer protection and the clarification of responsibilities, the $20,000 threshold originally considered is a significant outlay for consumers and seems a sensible starting point for the analysis.

Behavioural changes

It is difficult to know the extent to which the proposed reforms will affect the behaviour of BCAs, building practitioners and consumers. Behavioural changes, for example home owners using the information available to them to understand and manage the risks associated with building work, can take some time to become established.

The Department of Building and Housing's monitoring and evaluation programme is establishing baselines against which the impacts of the reforms can be assessed. The evaluation of the reforms on the allocation of risks between parties to building work will be ongoing.

Notwithstanding the difficulties in measuring the extent of behavioural changes as a result of the reforms and the time it takes for behaviour changes to become fully embedded, the Commission recommends that five years after introduction would be appropriate timeframe in which to report on behavioural changes.

[116] Even with the introduction of mandatory contracts for work over a specified sum, civil claims can still be made. As before, a BCA can be held liable in a civil claim if there is a duty of care to the client; the failure to take care caused the damage; the damage caused the loss to the client; and the loss was foreseeable.