

Royal Commission: Roles and Responsibilities



Royal Commission hearing 11 and 12 September

- Dr Peter Mumford; Director, Economic Development Group
- David Kelly; Director Canterbury Rebuild and Recovery, Building and Housing Group



Efficiency of the current Building Regulatory Framework and recommendations for improvement

- Interface between the regulatory and the Standards system
 - 2004 Building controls reform
 - Compliance documents
 - New Zealand Standards
 - Summing up



2004 Building controls reform

- The objectives of 2004 reforms included:
 - Establishing the central building regulator with clear functions and associated powers, e.g.
 - approving authoritative documents (compliance and guidance documents),
 - Issuing of bans and warnings,
 - mandating compliance documents, and issuing determinations (including a new 'call in' power).
 - Reducing the need for consenting authorities to make complex decisions, as a result of a combination of measures, including :
 - an expectation that the Building Code would contain more specific and measurable performance requirements, e.g.
 - a larger suite of compliance documents and an enhanced product certification regime, and
 - more proactive use of determinations.
 - Improving the capability of consenting authorities to take decisions through the accreditation process;
 - Improving the capability within the building sector through the licensed building practitioners regime.



Compliance documents

- While Compliance Documents were provided for in the 1991 building control regime (known as Acceptable Solutions and Verification Methods), they were given increased emphasis in the 2004 regime as a key mechanism for providing greater certainty in a performance-based system.
- The effect of a compliance document is that compliance with it is deemed to be compliance with the code. It thus confers an important right and protection.
- With respect to Compliance Documents the regulator must:
 - Take into account the purpose of the Building Act (s3).
 - Take into account the principles of the Building Act (s4).
 - Carry out Regulatory Impact Assessment-type exercise (s29). This involves the regulator in identifying options and assessing them by considering, among other things, costs and benefits.
 - Notify the proposal, and give “persons” an opportunity to make submissions (s29).



NZ Standards

- NZ Standards have traditionally formed an important part of the building control regime, although the 1991 reforms were in part intended to reduce dependence on consensus based standards (Building Industry Commission, 1990: 51-52).
- The regulator may contract Standards New Zealand to produce documents for the purposes of the building control regime, but is under no obligation to do so (ref. early 1990's government decision on funding of the Standards Council).
- The regulator may incorporate Standards by reference into Compliance Documents. The Building Act does not give Standards any binding legal authority unless they are incorporated in a legal instrument such as regulations. (They may, however, serve as evidence of sound professional practice, and can be relevant in proceedings for negligence).



NZ Standards continued

- However, the regulator remains responsible for the finished product; they are the “issuer” of the Compliance Document, and the final arbiter of what goes in it, and in this regard:
 - The regulator must be sure that the content of the Compliance Document is not inconsistent with the requirements of the Building Act.
 - While the regulator must be satisfied with the whole document, it will doubtless rely on the expertise of others for various elements of it. But the regulator may very properly wish to retain close control over “policy elements”, and is entitled to do so.
 - The Regulatory Impact Assessment-type exercise prescribed in s29 must be undertaken in all cases, unless the effect of the document is “minor”, or there is urgency.



Summing Up interface, regulatory framework and NZ Standards

- NZ Standards are documents produced by an authoritative body following internationally recognised policies and procedures for the production of standards, and have traditionally formed an important part of the building control regime.
- However, in situations where NZ Standards become a formal part of the building control regime through incorporation by reference the regulator must exercise effective control.
- In addition:
 - The regulator may wish to, and probably should, retain close control over the 'policy elements', in NZ Standards that are incorporated by reference.
 - The regulator may contract Standards New Zealand to produce technical documents, but is under no obligation to do so.
- We expect that NZ Standards will continue to play an important role in the building control regime, as technical 'how to' documents



Building Regulatory System

- Agree with the Royal Commission not a systemic issue with the current building regulatory framework
- There are opportunities for improvement
- The Building Act sets out the roles and responsibilities
- Roles and responsibilities are not however well understood across the sector
- This is an issue that is being addressed with further clarification of the roles by way of the Building Amendment Bill
- It will require further communication and education



System and leadership role

- The Ministry is committed to exercising its leadership role
- The Ministry is the regulator and in exercising that role must have regard to both cost and benefits and show transparency in decision making
- We have a significant work programme arising from the recommendations of the Royal Commission
- We will carefully prioritise and choose the most cost effective way of working to achieve the right outcomes



Our role as a regulator

- The Ministry is the regulator for the building and construction sector and has taken a leadership role in a number of areas:
 - We have evidenced leadership across the sector in the implementation of the Building Act over the last seven years
 - Securing buy in and ensuring that the regulatory framework was fit for purpose
 - Leading the review of the Building Act
 - Progressing those reforms
 - Extensive sector engagement
 - Strong leadership in the Canterbury setting
 - Identification of critical issues for resolution for example the need to provide greater clarity in the Fire Code clause of the Building Code
 - Identification of areas where the building control system can be more efficient for example introducing multiple use approvals
 - Sector education and information



Building Act review

- The Building Act review 2009 found that the regulatory system was not broken
- This reached the conclusion that the regulatory framework was not broken but there were opportunities for improvement in terms of cost reduction and effectiveness
 - there are problems ensuring responsibility sits in the right place
 - there are weaknesses in consumer protection
 - the system is out of balance with undue reliance on building consent authorities
 - change in culture and behaviour across the system is needed.
- A reform programme is in place to address these issues



The benefits of the merger into the Ministry of Business Innovation and Employment

- The merger of the Department with the Ministry will be of benefit by
 - Focussing on supporting an effective business environment which can deliver quality homes and buildings through a sector which has the right skills and information
 - Establishing a critical mass of policy and regulatory expertise
 - Bringing together key parts of the government system including relevant Crown entities e.g. IANZ and Standards Council under the same umbrella
 - Greater capacity to provide advice, information and education
 - Strong focus on business and market effectiveness which will be important driver for the sector



Standards and work of the regulator

- Standards are a key part of the tool kit
- The Ministry will continue to work with Standards to ensure that critical standards and parts of standards are updated
- We will be talking with Standards about their approach
- The critical issues for the Ministry are timeliness, quality and accessibility for the public preferably at no cost
- Volunteers may be an option for some matters particularly industry standards as in fact the “volunteers” are paid for by industry
- For critical strategically important Standards it will be important to have appropriate experts even if they have to be paid experts



Standards and the Building Code

- Using Standards in a targeted way does not mean that we are departing from more work on clarification and updating of the Building Code clauses
- The Ministry is committed to improving the clarity and accessibility of the Code as it has recently done in respect of the fire clause
- As the regulator the Ministry has the oversight to ensure the integration of code performance requirements with any acceptable solutions or verification methods which may include industry documents and/or Standards
- We need to find the right balance between performance based code and the use of standards to support verification methods and acceptable solutions.
- Priority areas for updating Standards have been identified and confirmed



Standards and the Building Code

- Verification methods and the Acceptable solutions need to be approved by the regulator
- Professor Burrows has considered provided advice on the role of the regulator and responsibility under the Building Act 2004
- We also need to recognise the skills sets in the sector and their capacity to exercise judgement, the less the capacity the more potentially the need for prescription
- The Ministry will fund from the Building Levy the work required to update priority standards and parts of Standards



National Policy Statement as explanation for the Building Act

- We see no role for a national policy statement to set policy direction
- Policy direction is set in the Building Act and Building Code
- Policy decisions are made by government
- Legislative change decisions are made in Parliament
- We see no role for a system level national policy document and think it would confuse rather than clarify



National Policy Statement

- The Ministry will happily publish the work programme once confirmed
- We did this for the Building Act reform programme
- The final decision maker on the work programme is the Minister through the accountability document regime including the output agreement.
- Funding is limited and we will have to ensure that it is tightly targeted to the right things
- Funding is from the Building Levy and its use is specified in the Building Act



Chief Engineer and Chief Architect

- High level technical leadership and advice to the Ministry and through guidance to the sector
- Develop a critical understanding of future and current trends
- An expectation that they are authoritative and have credibility with the sector
- Roles are both strategic and technical
- They need to be technically expert but also need to see beyond the presenting problem and see construction issues in context and the strategic direction needed to secure the right outcome for NZ
- Both roles have continued in the new MBIE structure



Chief Engineer and Architect influencing the sector

- Both roles have extensive sector networks
- They both spend more time out of the office than in
- They have strong relationships
- The Chief Engineer is supported by an engineering advisory group (paid to have input, help prioritise and contribute expertise)



Issues and Trends identified and communicated

- Issues and trends are reported through a regular risk report
- Data on key indicators is reported regularly internally to the Ministry
- Data on matters which present risk such as weathertight claims are reported regularly
- The Ministry has a website and various targeted newsletters through which trends, information and advice is communicated
- This is supplemented by training and education
- The managers are all out with the sector at least once a week and sector issues are reported back and addressed.
- We are represented at all the key conferences and collect insights there which depending on risk are communicated up.



Will this change with MBIE

- No not yet
- A greater research and reporting capacity/capability will assist in the development of more systematic reporting of key indicators from the sector
- The merger will bring access to the employment and skills data, as well as the immigration patterns and issues that they may present for skills e.g. is an English engineer as capable at seismic design as a NZ engineer



Alternative solution to an Acceptable solution

- Because of the vast range of specific reasons for an Alternative Solution, it is unlikely that alternative solutions per se will become Acceptable Solutions.
- However, Acceptable Solutions are reviewed (from time to time) to check that they are still appropriate and reflect changes in conventional practice.
- The drivers for changes to Acceptable Solutions (and Verification Methods) include amendments to the Building Code, proposals from practitioners (BCAs, designers, builders), amendments to Standards referenced, “good ideas” from practitioners, analysis of queries dealt with by Building Standards.
- Shortcomings in the Acceptable Solutions or Verification Methods that are regularly presented as alternative solutions are also a driver for change to the Acceptable Solution or Verification Method



Alternative solution to an Acceptable solution

- A true alternative solution (i.e. specific design not following a Verification Method) is likely to be relatively rare and be complicated and therefore very unlikely to find its way into an Acceptable Solution
- The Building Act sets out the process for the revision of compliance document including the requirements for consultation
- The Ministry is proposing that acceptable solutions be developed where appropriate by building type or class, done this for the simple house and will move on from there to medium density apartments



Building Advisory Panel

- The Chief Executive appointed the Panel
- The members of the panel have covered a range of disciplines and organisations relevant to the building and construction industry
- There have been changes in the composition of the panel over time
- There has been active discussion of critical issues relating to the building and construction industry
- Panel members have brought their insights to the table on such as the guidance for repairs for weathertightness and the Building Act reform programme
- The Chief Executive must consider the panel's advice but is not bound by it
- It has been a useful vehicle for gathering sector intelligence which has then informed the approach to content and implementation (one example was we were alerted to the need to train designers and building practitioners to effect safe weathertight repairs)



How are the views of CIC and BRANZ considered by the panel

- The Chief Executive and relevant Deputy Chief Executives have historically met with CIC and BRANZ
- CIC and BRANZ are key stakeholders
- People are appointed to the panel as individuals not representatives of bodies
- This is to ensure that the input is free and frank and not driven by a collective view established elsewhere
- To maintain the confidentiality of discussion a representative situation would not work as the representative would have to report back
- The Chief Executive needs to hear it like it is and also get input to their thinking
- The Chief Executive needs to be able to put their perspective and that can and sometimes does include the political context.



Building Advisory Panel decisions

- This is not a decision making body
- It is an Advisory body
- The application of the output of the discussion is a matter for the Chief Executive
- The Chief Executive is obliged to consider the panel's input but is not bound by it



Powers to ban products and make determinations in practice

- The Chief Executive has never issued a product ban
- The Chief Executive has made two Chief Executive determinations
- One related to the issue of whether part of a building can be earthquake prone and confirmed that to be the case so that territorial authorities can require strengthening under s 124.
- The other related to the height of a balustrade which was subject of a Coroner enquiry and the exercise of dangerous building powers where the CE found that the Council concerned correctly applied its powers.
- All other Determinations have been brought by parties to the issues usually a BCA and or an owner



Regulations to support risk based consenting

- The new commercial consenting process in the Building Act (part of the risk based consenting initiative) relies on quality assurance, the details will be set in regulation to bring this into force
- Pilots are underway in Christchurch and Auckland
- As we learn from these we will design the regulatory framework to meet the needs identified in the pilot
- It is important to note that risk based consenting will only be introduced when the sector is ready
- The potential for the national consenting system or centres of expertise to be established may also mitigate any risks revealed in the pilots



Has BCA accreditation improved the consenting process

- There has been a considerable improvement in the management of the consenting process for all consenting including complex commercial buildings
- There is buy-in in the sector to risk based consenting although it needs the regulatory framework
- BCA and developers want it to be successful
- The question of consistency of decision making remains an issue which comes through the group home builders feedback
- The question of consistency of decision making is less of an issue for complex commercial and public buildings as they are rarely copies of others, all prototypes.

