

18 June 2021

Building System Performance
Building, Resources and Markets
Ministry of Business, Innovation and Employment
PO Box 1473
Te Whanganui-a-Tara Wellington

Emailed to: building@mbie.govt.nz

Dear Madam/Sir,

ICNZ submission on the Building Amendment Bill proposals for regulations

Thank you for the opportunity to submit on the Building Amendment Bill proposals for regulations discussion document (**the discussion document**).

ICNZ represents general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property, and directors and officers insurance).

Please contact Jane Brown (jane@icnz.org.nz or 04 495 8008) if you have any questions on our submission or require further information.

Submission

ICNZ is supportive of there being efforts made to lift the efficiency and quality of building work and provide fairer outcomes if things go wrong during the building process. For insurers, building and construction issues lead to countless claims under product liability, professional indemnity and public liability policies and historically, this has been an area where severe losses have been incurred. The leaky building crisis of the 90s and early 2000s is still fresh in insurers' minds, with some claims still ongoing, so we are appreciative of efforts made to minimise the construction of yet more defective buildings, as must the building owners who have had to endure many years of additional costs, remediation works, and litigation.

We note that there appears to be a gradual move away from the language of the 1991 Building Act, which required insurance for "any insurable civil liability"¹ (although the Building Act 2004 still specifies insurance requirements), to the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill (**the Bill**) and these proposals, where there is

¹ Section 51(3)(c).

instead a requirement for “adequate means to cover any civil liability that may arise”.² Since the initial consultation on Building System Legislative Reform in 2019, there has also been a move away from a proposed guarantee and insurance product regime, which we assume is at least partly due to a lack of insurer appetite for this type of business. While the insurance industry supports these changes, some concern remains that insurance will still be expected to be available for all parties involved in the design, manufacturing, consenting, and building process, and for all building projects. Nor does ICNZ want to see a repeat of the situation which occurred in the early 2000s where some homeowners affected by the leaky building crisis were left without recourse for compensation following the introduction of a private certification scheme. When faulty work came to light and homeowners took action, they found that certifiers only held limited insurance, or had wound up, and as the legislation required territorial authorities to accept code compliance certificates from private certifiers, they could not be held liable. In one case which went to the Court of Appeal, the courts ruled that the Building Industry Authority, which held the responsibility for approving certifiers under the scheme, did not owe a duty of care to homeowners.³ The risk still remains now that following a loss, certain parties have the ability to disappear to avoid liability, and attention then turns to the building consent authority, which, as a statutory body, does not have the ability to avoid such liability and are subject to joint and several liability. For parties who are victim of defective products or workmanship, this becomes yet more complicated in relation to modular components where building consent authorities cannot be liable under the legislation where they have relied on a manufacturer’s certificate. A question then arises of who is left to pursue for the wrongdoing.

Finally, we take this opportunity to emphasise that proposals such as these can only ever be as successful as the regulator makes them. To that end, we stress the importance of making sure that MBIE is properly resourced to provide strict oversight of all participants in the building sector and their respective obligations. While the Bill and proposals in the discussion document are encouraging, they will not have the intended effect on the building system unless they are applied strictly and enforced by a well-resourced and proactive regulator.

In the rest of our submission below, we make some brief comments on the proposals relating to building product information, the modular component manufacturer certification scheme and product certification scheme.

Building product information requirements

ICNZ has advocated for the mandated provision of better information about building products since our [submission](#) on the initial Building System Legislative Reform discussion document in 2019. We therefore agree that the proposals in Part Two of the discussion paper will help to clarify who is responsible for products used in building work and enable those who choose and use building products to opt for those that will enable them to carry out their work effectively and in a way that is compliant with the Building Code. Better information should also streamline the consenting process for building consent authorities and minimise the number of requests needed for additional information.

Although the proposals about building product information will no doubt be useful, as suggested in our submission, ICNZ still believes that MBIE could go even further and require the creation of a

² For example, Proposal 18 in Part Three of the Discussion Document, and clauses 267A(1)(b), 272N(1)(b), 272Y(1)(b), and 402(1)(tb)(iii)(A) of the Bill.

³ *The Attorney General v Body Corporate No. 200200 & Ors* CA CA30/05 1 December 2005.

‘Products Supplied Register’ for each building site. A register would help to improve the traceability and accountability of the parties who supplied the products used during a build. While the proposal to provide a minimum set of information for all building products is a positive one, it could be enhanced by requiring labelling standards for the products themselves. This would prevent the problem where materials are delivered to a building site, unwrapped and partially used, stored, and then when reused, cannot be identified in order to view the product information that accompanies them. While this issue could be largely mitigated by effective management of building supplies, it could also be eliminated if the actual products were required to be labelled. ICNZ takes the view that MBIE should give further consideration to a Products Supplied Register and product labelling requirements and would be happy to discuss further how such initiatives might be designed.

Modular component manufacturer certification scheme

The modular component manufacturer scheme can be seen as a positive for consumers. Building elements are increasingly being manufactured offsite and offshore, meaning reduced cost and improved construction programmes. There are obvious areas where modular components could provide cost and simplicity benefits, such as bathroom and kitchen modules for aged care facilities. We appreciate however, that modular components can currently create difficulties and concerns, for the building authorities required to consent buildings where they have been used in particular, and insurers, when things go wrong. The regulations must therefore be structured in such a way that provides sufficient protections for consumers, as well as others involved in the process.

We believe that MBIE should also be mindful of the possibility that an MCM will be an offshore entity, the MCMCB who certified the MCM is an offshore entity, and the sufficient means to satisfy the test for adequate cover for any civil liabilities is via an offshore entity (for example, an overseas insurer). We question whether this sort of arrangement should provide customers in Aotearoa New Zealand with sufficient comfort that they are adequately protected, should something go awry in relation to the modular component(s) of their building. Without proper regulation, oversight, and certification to Aotearoa New Zealand standards, it is not difficult to foresee a situation where modular components are faulty and issues arise. For example, ICNZ is aware of faulty plumbing (although, in this example, not necessarily imported from an offshore MCM) in high rise apartments which has resulted in very large insurance claims, and which could easily happen again.

While insurance is not explicitly set out as a requirement under the proposals, it is included as one of the items that will be considered when assessing whether a MCM has adequate means to cover any civil liabilities. As already stated earlier in the submission, there is a concern that insurance will become the default expectation for meeting the assessment, when it is possible that cover will not be available for all entities. We would encourage MBIE to draft guidance on how the assessment under Proposal 18 of Part Three would be carried out, and what weightings would be given to the factors included on page 69 of the discussion document.

Product certification scheme

ICNZ is pleased to see the proposed strengthening of the product certification scheme, as we agree that there is low confidence in the current scheme, as MBIE observes on page 89 of the discussion document. We also believe that this is the area which presents the greatest opportunity to provide both consumers and insurers confidence in the building products that are being used in Aotearoa New Zealand. While we support the proposals in this space, the other key area for improvement should be the extent and quality of product testing that is carried out. ICNZ has heard anecdotally of testing which does not provide confidence that products are subject to a level of testing that would

come close to real-life conditions, and which consequently creates false confidence in the suitability and capability of a product. Although we appreciate that there would be costs involved, ICNZ believes that all products should be subject to thorough and rigorous testing. We recommend, as part of the Proposals, that MBIE consider what could be done to enhance and expand the current level of product testing.

While perhaps being outside the scope of this particular review, a restriction of certifying that products comply with the Building Code, is the narrow purpose of the Code itself. The Building Code's primary function is to safeguard people, with the preservation of property being a secondary consideration. While life safety is of great importance, so too is ensuring that only minimal damage occurs to a building so that it can be serviceable as soon as possible after an unexpected event. This is important from the point of economic continuity.

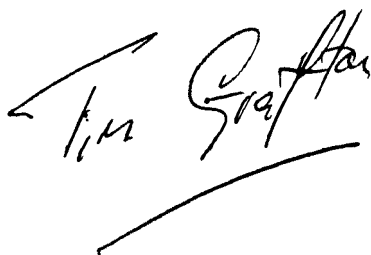
When insurers are considering product suitability, they will look at them from a material damage perspective, which is higher than the life safety perspective required by the Building Code as it requires safer, longer-lasting materials. For example, the Building Code requires egress routes to have a minimum fire rating to ensure that the occupants of a building can escape in the event of a fire. In certain circumstances, insurers would not consider this to be a sufficient timeframe in order to get FENZ onsite and to respond to the incident. In our view, there should be more emphasis placed on preservation of property, which will not only help to reduce the cost of physical damage, but in turn, increase the standards for life safety.

Conclusion

ICNZ is confident that these reforms will work towards creating a more robust building regime that engenders confidence in all those involved in its operation, and look forward to engagement on the next tranche of the Building System Legislative Review.

Thank you again for the opportunity to submit on the discussion document. If you have any questions, please contact our Legal Counsel on (04) 475 8008 or by emailing jane@icnz.org.nz.

Yours sincerely,



Tim Grafton
Chief Executive



Jane Brown
Legal Counsel