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Consenting and Practitioners Policy  
Building System Performance  
Ministry of Business, Innovation & Employment

[building@mbie.govt.nz](mailto:building@mbie.govt.nz); [amy.strawbridge@mbie.govt.nz](mailto:amy.strawbridge@mbie.govt.nz)

### **Testing proposals for regulations to support an opt-in self-certification scheme for entire simple residential dwellings**

Thank you for the opportunity to provide a submission on the Ministry of Business, Innovation & Employment's (MBIE) targeted consultation 'Testing proposals for regulations to support an opt-in self-certification scheme for entire simple residential dwellings'.

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### **Comments on the consultation process**

We acknowledge the Government's focus on increasing the supply of affordable homes and on improving efficiency and competition in the building system and its ambition to amend building system regulation at pace. We appreciate being included in this targeted consultation.

However, we note that the upcoming amendments to the Building Act 2004 to introduce an opt-in self-certification scheme for simple residential dwellings and to introduce proportionate liability have not yet been published. This makes it more difficult to comment on the proposals for regulations to support these changes as we do not have the full context.

We appreciate you agreeing to an extension of time to respond to this consultation. However, we do note the short timeframe within which stakeholders have been asked to comment has materially limited our ability to engage and provide meaningful feedback on the consultation and our feedback is necessarily high-level. We would be happy to expand on any of the issues we have raised in our submission if officials or the Minister require further information.

We also note the targeted nature of the consultation. We question the appropriateness of a targeted consultation given the potential impact that the proposals may have on homeowners.

Finally, we note that this is one of many proposals for change affecting the building regulatory system. These proposals have been consulted on separately. This has made it difficult to assess and comment on the cumulative impacts of the various proposed changes for the building sector and for insurance. In particular, we note that the consultation paper does not explain the interaction between the proposals for regulations to support a self-certification scheme for simple residential buildings and the Government's decision to introduce proportionate liability under the Building Act 2004.

### **General comments on the proposal to introduce an opt-in self-certification scheme for entire simple residential dwellings**

The Government proposes to remove the Building Consent Authority's (BCA) inspection role where a builder has opted-in to the self-certification scheme. Any third-party inspection process will inevitably have trade-offs, but the existing system has largely performed in the objective of preventing the systemic construction failures such as we saw from the "leaky building" era, and various construction failures such as those being experienced in Australia.

We agree with MBIE's overall assessment that if building companies are to be permitted to self-certify then robust eligibility requirements will be necessary to ensure safe, quality and Building Code compliant building work and to protect homeowners. It will also be necessary for the ongoing adherence to those requirements by building companies authorised to self-certify to be carefully monitored by MBIE and to consider how MBIE would respond should a building company get into trouble.

As acknowledged in the consultation paper, the introduction of a self-certification scheme will remove the BCA's responsibility to check the building for Building Code compliance. This potentially increases the risk of non-compliance and faulty work. Faulty work may not be detected until well after a job is completed. If an issue does arise, the homeowner or a subsequent purchaser will not have recourse to the BCA. If by the time any defects emerge the building company is financially struggling or insolvent, it is likely that the homeowner will bear any loss. To safeguard homeowners, it will be critical that building companies who self-certify have and maintain adequate means to stand by their work and cover any civil liability.

MBIE needs to consider what would happen should a self-certifying building company get into financial trouble or otherwise cease to operate. Recent history has shown a number of examples of building companies getting into financial trouble and leaving sub-contractors and other creditors out of pocket.

There will clearly be a need for consumer education around the introduction of self-certification for building companies and the Government's wider reforms of building system regulation.

If the homeowner chooses to use a self-certifying building company, it will be important that appropriate consumer protections are developed (e.g. disclosure, standard contractual terms) so that homeowners and later purchasers understand that the BCA has not carried out inspections, the homeowner will not have any right to seek redress from the BCA, and the homeowner's only means of recourse shall be from the building company itself.

We consider that the homeowner should retain the right to arrange their own sign off by the BCA, or perhaps to use a third-party inspection process.

We recommend that any house which has been built using self-certification should have this recorded on the Land Information Memorandum (LIM) so that future purchasers are aware of this fact, and of whom the liable party is for seeking redress for defects.

We understand that MBIE is separately working on developing a mandatory home warranty scheme to support the Government's decision to change liability under the Building Act 2004 from joint and several to proportionate. Home warranty insurance is not a product currently offered by any members of ICNZ. We understand that the proposed home warranty scheme will **not** be mandatory for self-certifying building companies, who will instead be required to meet an adequate means test. Again, appropriate consumer protections will need to be developed to ensure that homeowners and later purchasers understand this distinction.

Finally, for completeness sake we note that the homeowner's home insurance will generally exclude cover for loss or expense resulting from faulty workmanship.

Our responses to consultation questions are set out below.

#### **Definition of a Simple Residential Dwelling**

**1. Do you agree with the scope we are proposing to capture with the definition? If not, why not and what would you change? (e.g. should certain building elements be specifically excluded such as internal gutters, parapets).**

We generally agree with the proposed definition of a simple residential dwelling. However, any design that includes internal guttering, parapets, chimneys or anything that increases the opportunity for rainwater ingress into the home through roof modifications should be excluded from the definition of a simple residential dwelling. Internal guttering, parapets, chimneys etc are all modifications to a standard ('simple') housing design which can lead to serious water ingress issues if not implemented correctly.

**2. Should the scope also include single story duplex house builds with a weathertightness score no greater than 12 and an intertenancy fire wall in the garage(s)? Please explain your reasoning.**

We consider that duplexes, with the appropriate level of weathertightness and intertenancy fire walls, are the same risk as a standalone house and could therefore be included within the definition of a simple residential dwelling on the condition that a Licensed Building Practitioner (LBP) will issue a PS3 and PS4 (Producer Statements) for the construction and review of the intertenancy fire wall, including any service penetrations. Note that fire walls are typically proprietary systems with specific criteria to be applied in their construction. Additionally, any penetrations through a fire wall to accommodate services must also be correctly fire stopped using a proprietary system. These must be installed correctly to achieve the required fire resistance rating.

**3. Are the right factors considered in creating the definition? Does what we are proposing adequately consider all the factors? If not, why not?**

We generally agree with the proposed definition.

**4. Does the proposed scope of the definition achieve a reasonable balance between risk mitigation and scheme viability? If not, why not?**

We generally agree with the proposed definition.

**5. For house builders, how many houses that you built in 2024 would be within the scope we are proposing the definition capture?**

This question does not apply to ICNZ.

### **Eligibility requirements**

We support the introduction of robust eligibility requirements. We note that a number of large home building brands may operate through franchisees or contractors. In assessing whether the eligibility requirements are met, it will be important that MBIE has a clear understanding of which company the homeowner has a contract with/ will have recourse against should any issues arise. It will also be necessary for it to be transparent to homebuyers and others exactly which building companies have been authorised to self-certify their work.

There should be a process for regular reassessment of self-certifying building companies. The system cannot be 'set and forget'. There needs to be a period for regular review and recertification.

### **Fit and Proper Test**

**6. Do you agree with the proposed criteria for this test? If not, why not? Are there any additional criteria that you think should be included?**

We note that some building companies may be set up for certain large-scale projects / developments or for short durations of time, say 3-4 years. It would not be appropriate for MBIE to allow a company to self-certify if there is evidence that the company does not intend to continue trading in the long term. Noting that non-compliant work may not be detected until well after a job is completed, MBIE needs to be confident that the building company is likely to continue to exist in the longer term to address any issues with workmanship. Regard must also be had to what would happen should an entity go out of business or simply choose to cease to be a builder.

**7. Should this test also be applied to directors who are not involved in the day-to-day management of the entity?**

Directors control the company, set its strategy and influence its culture and decision-making. They also play an important role in ensuring a company complies with its legal and regulatory obligations and remains solvent. Therefore, the fit and proper person assessment should extend to all directors of the company.

We understand that "phoenix companies" are an issue in the building industry. Extending the test to all directors may assist to prevent a "phoenix company" from registering as a participant.

### **Adequate Means Assessment**

#### **8. Do you agree with the proposed approach and criteria for assessing if an entity has adequate means? If not, why not and what would you change?**

It is essential that participants in the self-certification scheme should be required to have adequate means to cover any potential civil liability. We agree with the statement in the consultation paper that this requirement is necessary to protect homeowners. MBIE proposes a broad approach to assessing whether a potential participant meets this requirement.

The consultation paper proposes that "held insurance" would be one of a range of elements considered. However, we note that insurance may not be readily available or necessarily provide comprehensive cover.

With the exception of dedicated home warranty insurance, which we understand is currently offered by one specialist insurance company in New Zealand, there is no existing insurance product that is specifically designed to address this kind of exposure.

Insurers recall the negative experience they had in the early 2000s insuring independent building certifiers. The insurance market for independent buildings certifiers collapsed when issues arose from the leaking building crisis with policy claim and legal expense limits being exhausted quickly, and additional top up cover not being available.

Professional indemnity insurance may be available for the design element of the build, but not necessarily the construction element.

It will be essential when assessing the adequate means requirement that MBIE understands the scope and limitations of any insurance product or other product that contributes to that requirement. We note that any contract of professional indemnity insurance would be subject to policy terms and conditions, and would not cover all potential civil claims, for example deliberate and wilful acts.

We also understand that most home guarantees currently available in the market limit cover for workmanship and materials to 2 years with only structural defects and weather tightness covered after that (up to 10 years in total).

We therefore consider that it is important that, as proposed in the consultation paper, there is flexibility around how participants can demonstrate that they meet the adequate means requirement on an initial and on-going basis, recognising the challenges with this given the extent of any future costs will be unknown.

Finally, we note that as the building company's resources will not necessarily be tied to any particular house build, the adequate means assessment will have to be designed to provide sufficient protection across numerous properties.

**10. Do you see any aspects of the proposed approach acting as a barrier for potential applicants to the scheme? If yes, why?**

If only large building companies are allowed to access the scheme, this may create barriers to entry for smaller building companies to establish themselves. These barriers could be in the form of cost advantage through reduced inspections, homeowners not fully understanding the trade-offs in quality and liability between self-certification and BCA certification, and incorrect perceptions about builders "not being trusted" to self-certify.

**Process and System Requirements**

**11. Do you agree with these requirements? If not, why not?**

We generally agree with the proposed process and systems requirements. As discussed above, ongoing oversight will be important.

We have the following comments on the requirements set out on page 6 of the consultation paper.

*Good record keeping*

We note that 10 years is no longer a long enough time for records to be held. The recent decision in *Beca Carter Hollings & Ferner v Wellington City Council* means that as a minimum there is a need for records to be held for 12 years.

The homeowner, subsequent purchasers and insurer should have a right to inspect records held by the building company relating to a particular property.

*Proper staffing*

It should be clear that the certifying entity can only certify buildings that they have contracted to build i.e. they should not provide that service to a third party – it must relate to an entity that they control. Certification, design and build should be aligned.

Inspection processes should be undertaken by a qualified staff member who has not undertaken the work themselves.

We note that restricted building work is often performed only under the supervision of the LBP, as opposed to the LBP themselves. In the context of self-certification, there must be increased requirements around such supervised work as essentially the self-certifying building company is the sole quality check. Remote supervision must be specifically excluded under self-certification. Direct supervision must be used for critical activities.

*Proper reporting*

The consultation paper proposes that there should be processes in place to ensure that MBIE is notified of changes that could affect registration.

This reporting requirement should include changes to the entity's ownership. The reporting requirement should also include a requirement that the self-certifying building company should notify MBIE, homeowners and possibly others, i.e. insurers, should they decide to wind up.

**12. What specific information do you think should be required to determine whether an entity has adequate quality assurance processes to self-certify their work, and why?**

It should be mandatory that entity provides documentary proof of the process and system capabilities (as proposed in the consultation paper) as part of the application process.

**13. What specific requirements would demonstrate an entity has adequate business and administration systems in place to support self-certification, and why?**

We generally agree with the requirements set out on page 6 of the consultation paper but see our comments under question 11 above

**14. For home builders, would you need to improve or update your business processes to meet these requirements? If yes, at what cost?**

This question does not apply to ICNZ.

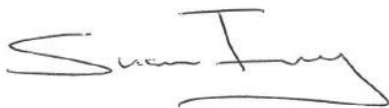
**15. For home builders, considering the eligibility criteria and proposed scope for the simple residential dwelling definition, how likely are you to seek to become registered to self-certify?**

This question does not apply to ICNZ.

**16. Do you have any other general comments you wish to make?**

No further comment.

Ngā mihi,

A handwritten signature in dark ink, appearing to read 'Susan Ivory', with a stylized flourish at the end.

Susan Ivory  
Regulatory Affairs Manager  
Insurance Council of New Zealand