

Better Building Blueprint: Build it right first time

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INTRODUCTION

This paper covers new proposed changes under the Building Amendment Bill (No 3) and the Building Amendment Bill (No 4) detailing the *Better Building Blueprint: Build it right first time* scheme. It will particularly cover the following issues of industry accountability, mandatory contracts (warranties, remedies and disputes) and the new disclosure requirements around financial surety.

This paper consists of four parts. The first part will cover the circumstantial and legislative background to the materialisation of the two bills and then follow the significant goal of Parliament to hold builders, designers and consultants more accountable through various practical and legal methods. The third part will examine the requirement of mandatory written contracts that is expected to come into place for building work over \$20,000.00 and the implications of warranties, remedies and disputes that will be introduced hand in hand. The last part will review the requirement for disclosure on those doing building works to declare financial surety and other information.

1. PART I BACKGROUND

1.1 Reality of the Industry

Research carried out by the Department of Building and Housing in 2010 found that among a sample of consumers who had engaged significant building work in 2005 (valued at \$50,000 requiring building consent) 31% had disagreements with their building contractor and 19% had a major dispute. These major disputes consisted of timelines not being met (37%), non-completion of the project (33%), non-compliance or defective work (56%) and poor workmanship (55% (bearing in mind there is more than one element in a dispute).

It is an understatement to affirm that the building and construction sector play an important role in the New Zealand economy. Unfortunately the building and construction sector currently accounts for 4.2% of the GDP (down from around 5% prior to the recession). It currently employs around 230,000 people (or 12% of all those employed in New Zealand) and is worth \$18 billion to the New Zealand economy per year.

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Further to public consultation and analysis, the DBH has also revealed that there are gaps in the knowledge of designers and builders and their understanding of the minimum requirements set out in the Building Code. It was found that designers, builders, consumers and building consent authorities were not always clear on who was accountable for meeting Building Code requirements. For instance, many designers believed that they should be able to rely on builders to construct their designs to meet Building Code requirements without the designer needing to specify all of the necessary detail. At the same time, it was found that many builders did not believe they needed to know relevant Building Code provisions. Both believed they could rely on building consent authorities to identify and correct inadequacies in their work. Accordingly the Minister for Building and Construction, Maurice Williamson (Williamson) found this reliance on building consent authorities to provide quality assurance and to essentially underwrite the quality of residential building work, to be critical in requiring designers and builders to accept accountability for the quality of their work. It also demonstrated the limitations on the ability of consumers to hold building practitioners and tradespeople accountable for the quality of their work.

1.2 Legislative Background

(a) Legislative History

New Zealand infamously faces trouble with weathertightness of its buildings. The Hunn Report on leaky homes in 2002 found that the deregulation of the building industry by the National Government in the 1990s represented a major systemic breakdown across the whole industry. The 1991 legislation deregulated the sector to the point where consumers found themselves with very few protections under the law. This has resulted in a leaky building disaster which will inevitably guarantee financial and emotional stress on many New Zealanders for decades to come costing what was previously said to be \$11 billion, but PricewaterhouseCoopers has recently placed it closer to \$23 billion (which is about the cost of the health and education budgets for a year put together). Consequently, most reforms have been pro-consumer in an attempt to address the wounds caused by the 1991 Act and the leaky building crisis has therefore influenced so many of the law reforms.

The Building Act 2004 was seen to be too tight, heavy and prescriptive. Furthermore, the proposed changes under the Building Amendment Bill (No 3) (first introduced under the Legislation (Incorporation by Reference) Bill on 12 April 2005) were met with extreme condemnation. It was said to be “a diabolical mess”, “sticking plaster on top of the sticking plaster on top of the festering wound”, “a dog’s breakfast” and a confusing product of nine Ministers who had previously held the role of Minister for Building and Construction. Members of Parliament had to be constrained as they questioned why 21 significant changes to the Building Act were to be reviewed under urgency merely 13 days after the Building Act 2004 came into force. The Bill was severely criticised with one recurring point for example about not permitting the great Kiwi tradition of “Do it Yourself” (DIY) work (which is expected to be included Bill No 4). Changes then followed as amended in 2005, 2007, 2008 and 2009 which were further incorporated into regulations.

Between February and April 2010, the Department of Building and Housing managed a significant process of public consultation. A series of meetings were held across the country to discuss options for reform. These meetings were attended by over 1,000 people spanning building professions and trades, consumers and local authorities. 381 written submissions were received and

considered. More than 500 people have attended a series of meetings around the country to discuss the proposals. As a result, the first official reading of the Building Amendment Bill (No 3) took place on 9 December 2010 and it was accepted with a higher degree of respect and approval. The better attempt at balancing accountability in professions and the responsibility through the Licensed Building Practitioners scheme was commended along with the provision for DIYs, better disclosure, risk based consent, cost-effective solutions and enabling consumers to make better-informed decisions. The Building Amendment Bill (No 4) is yet to be released.

Various other pieces of legislation have currently been amended including the Plumbers, Gasfitters and Drainlayers Act 2006 with significant changes in effect from 1 April 2010. Changes to key Building Code documents that deal with building structure took effect on 1 August 2011. Auckland Council published a notification stating that further changes are to be expected after 1 November 2011 in an attempt to simplify district plans and standards and consolidate this into one consistent regime (previously seven district and city council building authorities). Over 850 forms previously used by councils will be reduced to around 100 simplified forms used consistently across the region and application costs are meant to be reduced.

(b) Building Amendment Bill (No 3)

This Bill proposes and includes:

- (i) enhanced accountability under the Licensed Building Practitioners scheme;
- (ii) the introduction of a code of ethics for Licensed Building Practitioners;
- (iii) risk-based consenting (streamlining the process and putting further liability on Licensed Building Practitioners);
- (iv) an owner / builder exemption under restricted building work on owner-builder exemption under restricted building work (to allow for DIYs);
- (v) enhancements and further clarification to the building warrant of fitness regime; and
- (vi) other minor technical amendments.

Submissions for this bill have closed and this legislation is expected to pass this year.

(c) Building Amendment Bill (No 4)

This Bill was approved by Cabinet on 2 August 2010 and is expected to be out later this year. It is said to propose and include:

- (i) mandatory written contracts for all building work over \$20,000.00;
- (ii) a provision which requires builders to disclose information (for example details about their skills, qualifications, licensing status, track record, financial back-up or insurance and dispute history);
- (iii) new general remedies (and existing warranties) which apply for ten years; and
- (iv) a requirement for builders to fix any defects in their work within 12 months.

The legislation is being drafted and it is anticipated that the Bill will be introduced later this year.

The reform reinforces the attempt to lift the productivity of the construction sector and attempt to add to the country's GDP which has a proposed target of a 20 percent improvement in productivity by 2012 (this will result in a 2 percent increase in GDP).

1.3 Examples of Proposed Schemes

(a) MultiProof

MultiProof is an example of a method to make the building consent process easier and faster for volume builders and those who replicate building designs more than 10 times over two years. MultiProof regulations have been broadened to accommodate a wider range of building designs. MultiProof is said to provide certainty of delivery for a volume builder's customers with proportionate values. Builders are seeing the potential of this as a competitive advantage and several applications have already been approved to volume builders in Christchurch and Palmerston North. Minister Williamson has stated that MultiProof means that processing times will reduce from approximately 20 working days to about three and average cost savings of the consent process has been said to be about \$1,350.00 (with small buildings saving \$2,800.00 on consent fees). This proposal is said to have been introduced to "cut red tape and costs, not corners".

Williamson has said that "MultiProof is one of the first of the Government's *Better Building Blueprint* initiatives to take effect, demonstrating our commitment to ensuring the building regulatory environment meets the needs of the sector... This initiative streamlines the consenting process and will save time and money for consumers and builders without compromising quality." This seems somewhat optimistic as it will be heavily reliant on other legislative changes effectively coming into force especially the proposals around accountability.

(b) Simple House Acceptable Solutions

Another example is *Simple House Acceptable Solutions* which provides a framework for architects, designers and builders to develop affordable, innovative and easily consentable homes without compromising safety or quality. This is expected to assist architects, designers, and builders in developing innovative and affordable houses that comply with the New Zealand Building Code. Simple Houses can be built anywhere in New Zealand. They are adaptable, layouts can easily be changed to suit owners' needs and the house reoriented to capitalise on sun and privacy.

The Minister has commended this scheme stating that "for the first time all the information needed to design a simple house, including compliance requirements and building standards, has been brought together in one place." However the introduction of this scheme which is part of the *Better Building Blueprint* reforms will mean that it will be reliant, to some extent, on the rest of the reforms taking place.

2. PART II: ACCOUNTABILITY

2.1 Background

As stated above, accountability in the building and construction industry was ostensibly imperative. The Building Act will be amended (under the No 3 Bill) so that it is clearer to builders, designers, building consent authorities and consumers exactly who will be accountable for what. The main driver for these amendments derived from an unduly heavy reliance on building consent authorities to identify and correct inadequacies in building design and construction.

Research showed that local authorities were contributing on average 40-70% of costs involved in the weathertightness crisis settlements (PricewaterhouseCoopers report to Department of Building and Housing, *Weathertightness Estimating the cost* July 2009) and it was apparent that homeowners were finding it difficult to practically recover from those responsible for the damage. There are copious numbers of decisions made by judges, Weathertight Homes Tribunal members, mediators, arbitrators, disputes tribunal referees, construction contract adjudicators clearly showing who is liable for the defective building work. However the real resounding question is recoverability and enforceability. It is about time this question was answered for the countless victims of the building industry.

Minister Williamson stated that the “goal is to achieve a more efficient and productive sector that stands behind the quality of its work... a sector that has the necessary skills and capability to ‘build it right first time’ and that takes pride in its work”. The Minister proposed accountability in the residential construction sector to:

- (a) assist consumers to make informed choices in purchasing building work;
- (b) assist consumers to hold building contractors to account in practice;
- (c) ensure any defective building work is identified, reported and repaired as quickly as possible;
- (d) increase the number of consumers who obtain some financial compensation, when work is defective and a building contractor defaults on obligations to remedy the problem; and
- (e) assist subsequent owners to hold building contractors to account (and make a claim against any guarantee or insurance which has been purchased for the building).

The amendments to the Act will make it clear that:

- (f) designers are accountable for ensuring that their plans, specifications and advice will meet the requirements of the Building Code;
- (g) builders are accountable for building to any approved plans and specifications, or if there are no approved plans or specifications then they are accountable for meeting the requirements of the Building Code;
- (h) owners of building work are accountable for getting any necessary approvals. If they change the plans or specifications, or do the building work themselves, then they are accountable for meeting the requirements of the Building Code; and
- (i) building consent authorities are accountable for checking that others are doing their part - including checking plans and specifications for Building Code compliance, checking at any prescribed inspection points that work is done in accordance with the plans and specifications, approving any critical variations and certifying that the work has been completed in accordance with the consent.

2.2 Licensed Building Practitioners

Occupational licensing will be a key to accountability. This is seen as crucial as it has been too easy for too long for any builder to pick up some tools and call himself/herself a builder. The Licensed Building Practitioners (“LBP”) scheme was initiated in 2007, but there was no real push for this to occur. However, now regulations will mean unlicensed practitioners will be excluded from some work from March 2012 which has bolstered the licensing practice. The LBP has just hit a target of 10,000 issued licences. Since the earthquake in Christchurch, nearly 1100 builders, designers and tradespeople have been licensed, or have applications in progress in Canterbury. That represents a huge boost from the 165 or so that were licensed before the earthquakes.

As of July 2010, seven licence classes exist including:

- (a) Design
- (b) Site
- (c) Bricklaying and Blocklaying
- (d) Carpentry
- (e) External Plastering
- (f) Foundations
- (g) Roofing

Licensing will confirm a practitioner’s level of expertise. Their responsibility and accountability will become clearer as they can only undertake work they are licensed to do. They will be independently assessed as competent and will be accountable to an independent Board (Building Practitioners Board) and anyone is able to make a complaint against them. Building Practitioners Board can approve rules to scheme; respond to complaints; hear appeals and report to the Minister. However hearings are inquisitorial and although the Board may impose penalties, they will have no power to impose remedies in favour of the complainant.

There have been various attempts by the DBH to make this scheme more accessible with further streamlining for design and building practitioners taking effect on 1 April 2010 making it faster, easier and cheaper for them to become licensed. A new on-line service has allowed LBPs to register their skills and expertise on the internet. We have all met experienced builders who have confirmed that this application process was easy and accessible taking only a few hours to complete and obtain (perhaps too easy?).

It is anticipated that around 20,000 people will be licensed once the scheme is fully implemented. However this is doubtful considering the multiple updates on the government websites confirming the registration numbers registered have continually fallen short of the forecasts that had preceded these announcements. However, it is thought that as some critical works become restricted on 1 March 2012, this will be a huge factor for those who are still unlicensed to comply as all restricted building work will have to be carried out or supervised by a licensed building practitioner.

Restricted building work will apply to:

- (h) design and construction of foundations and framing of houses and small-medium apartment buildings;
- (i) design and construction of roofing and cladding of houses and small-medium sized apartment buildings; and
- (j) design of active fire alarm systems in small-medium sized apartments.

There are proposals for additional continuous professional development which has proved successful for many industries including lawyers, doctors, accountants, immigration advisors, real estate agents, public officials and others. It will not be overly burdensome and will be expected to benefit the builders and practitioners. Over time, the focus on education and training will increase. From 2015 it is proposed that licensing will be qualifications-based (compared to the competency scheme in place now). At present competent builders and tradespeople with a good track record can have their skills and knowledge formally recognised, whether they are trade-qualified or not. A number of people without formal trade qualifications have already been assessed as competent and have their licences. Re-licensing at the end of the year will provide another opportunity to check competence, profile and maintain public confidence. This competence coupled with accountability is expected to rebuild consumer confidence.

This scheme will not only improve the competence of the building practitioners, but it has been said to rebuild the confidence of consumers in the building industry. Williamson has stated that “Once you’re an LBP, you become part of the LBP brand, that mark of quality that shows the sector and your clients that you are competent in your field. It’s something you can be proud of.” The Minister has further confirmed that his “goal is to ensure the public are confident that licensed building practitioners are competent, and that homes and buildings are designed and built right first time.”

However an issue arises from what some consider to be an inherent flaw in the governmental wish to have as many tradespeople licensed as possible as quickly as possible. Practical steps making it “easier” for tradespeople to become licensed raises questions as to whether there is merit in the license or whether it is political appeasement to display on paper a prayer of comfort for those who are sceptical about the competency of tradespeople in New Zealand. This interim regime of competency based licenses until the qualifications based licenses comes into effect in 2015 may cause complications if tradespeople are simply being deemed on paper as being competent and able given that much of the other reform uses the competency through LBP scheme as the foundation for the reform.

2.3 Risk Based Consent

There are new proposals based on risk based consenting under the Builders Amendment Bill (No 3). The corollary of this will be no building consent requirements for a broader range of low-risk work and limited checks and inspections for low risk or simple residential work by a LBP. This effectively means that more accountability and responsibility is placed on LBP’s and less on the territorial authorities by reducing council checks and inspections of low risk building work. This proposal will effectively reduce compliance costs, eliminate unnecessary inspections by council and place the responsibility on the people who actually commit to and undertake the works. Consistent with this approach are the changes to Code Compliance Certificates, as authorities will instead issue Consent Completion Certificates.

Building works will be classed into four categories whereby:

- (a) Lowest-risk building work would not need a consent.
- (b) Low-risk building work (such as a simple, one-storey house) would go through a quicker and simpler consenting process with fewer council inspections and more reliance on the skills of licensed building practitioners to get it right first time.

- (c) High-risk, more complex houses would continue to go through the current approval and inspection process.
- (d) Complex, major commercial building work would go through a simpler process than it currently does, recognising the experience and skills of those involved and that commercial contracts for major projects include quality control.

This is in contrast to the current “one-size-fits-all-standard” scenario. However this will only work once we have quality assurance and public faith in the quality of the building work being done by LBPs. There is also an owner-builder exemption from the restricted building work regime which does not fit the general objective and goals of the proposed legislative changes, but can be explained by our national identity and culture of being a DIY nation, the absence of which will trouble many (certainly current members of Parliament). However, this concession has necessitated ensuring to ensure that this exemption is not misused by unlicensed builders from flying under the radar by passing themselves off as DIYs and the bill therefore includes provisions of qualifying DIYs from doing such works only if they have an interest in the property and further limiting working on more than one home within any three year period.

This risk based consenting process may well be commendable, but only in conjunction with the LBP scheme coming into proper effect with proper regulations limiting and restricting appropriate works to LBPs. However, unless practical and legal financial surety can be assured from such tradespeople, such shifting of accountability and responsibility may well be futile as the frustrating predicament of recoverability for homeowners will subsist.

2.4 Joint & Several Liability

This is an area of law that is yet to be precisely captured in the legislative reform. The current framework involving joint and several liability in negligence cases in the building and construction sector is proving to be more and more unreasonable. Under the joint and several doctrine, all of the parties who contribute to any given building defect through their negligence are jointly and severally liable to the plaintiff for the costs of the defect. When more than one party has contributed to the defect, the costs are initially apportioned between parties on the basis of each party’s allocation of fault. In the event that one or more of the negligent parties is unable to meet its share of the costs, these costs are shared between those who can pay. The practical upshot of this is local authorities often carry a disproportionate amount of the total cost of achieving settlement simply due to the ‘deep pocket’ theory or due to the fact that they are the last man standing as the other fellow defendants have become insolvent or missing in action.

The following issues were identified:

- (a) Particular parties with deep pockets, such as local authorities who have strong capital positions and the power to rate, should not be liable, on an ongoing basis, for costs in excess of their apportioned share of the fault.
- (b) It is impacting on the availability and cost of professional indemnity insurance, because a person with professional indemnity insurance can become a ‘deep pocket’ in the event that other parties have ceased to trade. This is a problem for professionals and others who consider this form of insurance critical to managing their accountability.
- (c) It is reinforcing incentives for building professionals and trades people to structure their affairs and operate in ways that minimise their exposure

through, for instance, the use of project specific companies, or by limiting the scope of their involvement in building work. This is generally detrimental for consumers.

- (d) It is contributing to defensive and risk adverse behaviour by local authorities that is resulting in them seeking more detail on plans, making more inspections, and contributing to greater compliance costs than are necessary.

However proposed changes to the joint and several concept will be a major change in the New Zealand legal landscape and would require further consideration of the various implications that will arise from any changes. Many submissions were received requesting legal change away from this formation for reasons including:

- (e) building professionals and trades people seeking to protect themselves through measures such as limited liability companies and a reluctance to take on some types of work; and
- (f) risk averse behaviour by local authorities that is resulting in more inspections and greater-than-necessary compliance costs.

The risks involved in converting to a potential **proportionate liability scheme** would involve the potential outcome of making homeowners more vulnerable if one party is unable to pay leaving the homeowner out of pocket and it would not resolve the uncollectable damages problem. Another resolution may be to make contractors insurance mandatory; however this could merely shift the burden from the homeowner to the insurer. There is no easy answer and the Minister therefore confirmed that as this would be a major change in New Zealand law, prudence would be required to ensure the best resolution was applied and we believe there has been no proposed change to the proposed structure yet.

3. PART III: WRITTEN CONTRACTS

3.1 Background

There have been delays to the introduction of the Building Amendment Bill (No 4) which is expected to occur some time later this year due to the Christchurch earthquakes. This Bill is expected to contain a proposal to have mandatory written contracts, something that was overlooked in the Building Act 2004. The Minister in his review of the Building Act on 21 July 2010 recommended to the Committee to have mandatory written contracts between building contractors and consumers for all projects above \$10,000.00 in price. However the DBH have made many publications stating that the figure is expected to be \$20,000.00, most likely in an attempt to make this practically workable for the time being.

In any case, the fundamental basis of the mandatory contractual requirement was to ensure that accountabilities are clear, supported by information disclosure, clearer obligations and new legal remedies. Every contract will have to include the already-existing warranties in the Building Act that require building work to be fit for purpose, meet the Building Code and be undertaken with reasonable care and skill (among other requirements). The builder will then be solely responsible for the proper completion of the works including that of its subcontractors and sub consultants. The homeowner will effectively have a single point of contact that is responsible for the completion of the project. However, this could naturally mean further legal battles prior to the commencement of works between professionals to align, assign and apportion liability, which at any rate will be better than a legal fight

after the fact. Plans and specifications completed by architects will mean they will be responsible for designs in contrast to designs taken by builders which will burden the builder with risk and responsibility.

Many people believe that as many legal claims against tradespeople for defective workmanship are based in the tort of negligence, implied provisions in building contracts are often not needed. However this requirement was not only a method to impose legal liability on tradespeople, but a way for consumers to become more informed and aware of what they were contracting for. Many construction disputes tend to arise due to conflicting expectations of parties. We have found that even with written contracts, it has been imperative to ensure the clients understand the implications of all the clauses in a construction contract which are often 300 pages in length. This can be difficult as the majority of the New Zealand population rarely commission building work and have limited knowledge of risk management. It can be relatively easy to confirm the scope of works through verbal discussions on what is to be included and what is not and this often becomes contentious if not managed at the outset.

Despite many legal claims against tradespeople being founded on torts, having contractual obligations and remedies would make it clearer and easier for all parties involved. A written contract would (ideally) clearly set out the commitments and obligations of each party, the risks attached, warranties provided and dispute resolution methods if applicable. Research indicates consumers who had carried out building work in 2005 found that in the absence of comprehensive contracts, disputes were more likely to arise and resolving them satisfactorily (in a cost efficient way) was more difficult. Submissions were received recommending mandatory contracts and there is value in having this included in Bill No 4. This is also intended to encourage builders to 'build right first time' because they will be clearly accountable for fixing their own mistakes, at their own cost. However, we believe the original \$10,000.00 limit proposed by the Minister may have been more ideal.

3.2 Mandatory Contents

Under the new Bill, the construction contracts will have to include:

- (a) agreement to repair, replace or compensate for defects within 12 months of completion (provided there has not been misuse or negligent damage);
- (b) warranties contained in the current legislation;
- (c) the process that will be followed if a dispute arises;
- (d) details of what, if any surety or insurance backing is available to cover the cost of fixing any problems (to be discussed in Part IV); and
- (e) information before the contract is signed about the skills, qualifications and license status of those who will do the work and any publicly-available information about any disputes (for example the results of any court judgments).

However, prudent lawyers should also examine in detail for example the exact scope of works (properly documented); liquidated damages; performance bonds/contractor's bond in lieu of retentions; warranties in addition to the legislative ones; practical completion date and final completion date; defects liability period (and recommend the client to prepare a list of defects for completion by the builder before releasing any retentions or bonds); provisional sums; contingency sums; construction programme (including critical path); bonus for early completion; appointment of an arbitrator; insurance and so on.

3.3 Warranties / Remedies / Disputes

Building work is already covered by implied warranties that apply for up to 10 years, but the Act will be amended to include even stronger obligations on the building contractor to “put things right” under Building Amendment Bill (No 4) in respect of general remedies and defects that are notified by the consumer during the first 12 months following completion. This has nevertheless been criticized by the Labour party in the first reading of the Building Amendment Bill (No 3) on 9 December 2010 where Phil Twyford questioned:

“why the Government has opted for the much more light-handed approach of requiring home warranties to be made available to homeowners. The builder is required to have a home warranty scheme in their back pocket to offer it to homeowners at the point of purchase. A much more comprehensive approach would be to make home warranties mandatory and to back that up with a fidelity fund. I think that is the option that most people in the industry recognise would solve the problem.”

The Bill focuses on a defects period during the first 12 months after completion of a building whereby the building contractor will be expected to remedy any defects as a matter of routine. The builder must repair defective work or replace faulty materials on an “on call, no questions asked” basis and the onus will be on the contractor to fix the defect, or prove the request was unreasonable, rather than on the consumer. There will be reciprocal obligations on consumers to avoid misuse or negligent damage and carry out reasonable maintenance and there will therefore be a mandatory provision of builders in favour of consumers, on completion of a project of details of any significant building maintenance requirements and of any significant product warranties. This defect liability period will be binding on developers and owner builders when selling their property and be accompanied by mandatory disclosure by homeowners to the local authorities on completion of a project, identifying who the builder, developer or owner-builder was.

This is because buildings and building work are not like other goods and services (such as appliances) because:

- (a) where building work is defective, the best outcome for all parties is achieved when the defects are identified, reported to the building contractor and then repaired as quickly as possible;
- (b) the condition of a damaged building can deteriorate over time and this can lead to escalating repair costs;
- (c) some types of damage can give rise to health or safety risks; and
- (d) litigation and disputes are more likely, the longer a matter (relating to defective building work) is left unaddressed.

The weathertightness crisis has made it clear that early detection and repair of defective building work is critically important. The purpose of establishing a 12-month defect repair period is to:

- (e) help to ensure that poor performing building contractors, who are not willing to stand behind their work, do not have a competitive advantage;
- (f) motivate building contractors to “build right first time”;
- (g) give consumers a strong incentive to identify any problems, and alert the building contractor, without delay; and
- (h) at the same time, consumers will get more information about what maintenance they need to carry out.

However, the Building Act is silent on how any breaches of the implied warranties should be remedied. The Minister has recommended and proposed amendments to the Acts to introduce a set of general remedies to reflect and codify the existing common law and provide remedies that would be available for up to 10 years to match the length of the warranties and include:

- (i) the repair of defects by the building contractor or a substitute builder;
- (j) the replacement of defective building elements; and
- (k) the provision of compensation where replacement or repair is not possible.

This 12 months defect repair period raises many questions including the potential opening of floodgates of disputes to what should and should not be considered a defect and a reasonable request. It is unclear how this will be dealt with except for a clear onus on the building contractor to prove that the request is unreasonable. However if this building contractor refuses to remedy the defect in want of proof or resolution, then it seems that there will be major issues in enforceability and a potential surge of dispute tribunal cases that will stem from this issue. The Building Practitioners Board may have a role to play, but as it is an inquisitorial body under the Building Practitioners Complaints and (Disciplinary Procedures) Regulations 2008 it will not have powers to impose remedies or decisions.

The current dispute resolution methods available to homeowners are the Disputes Tribunal (up to \$15,000.00 or \$20,000.00 when agreed), Private Mediation, Construction Contracts Act Adjudicator, Weathertight Homes Resolution Service, the District Court, the High Court and the further Financial Assurance Package now on offer (which we will not comment on as this is another beast altogether). Research on consumers previously found that around half of major disputes took months or years to resolve (and a quarter had not been resolved after five years). Most consumers were not aware of existing services such as the Dispute Tribunal and most tried to resolve the disputes themselves through direct negotiation with the building contractor. The Minister therefore recommended the mandatory contract to include a mandatory clause outlining the process for disputes and options with associated costs, and Bill No 4 is said to contain mandatory adjudication of disputes under the Construction Contracts Act 2002. Furthermore mandatory pre-contract checklists are to be provided by builders to consumers, prompting the consumer to ask important questions and thereby generally raising public awareness of material considerations.

4. PART IV: DISCLOSURE & FINANCIAL SUPPORT

4.1 Background

In the first reading of the Building Amendment Bill (No 4), Phil Twyford (Labour) stated that:

“Reflected in the bill is an attempt to better balance the spread of accountability and responsibility across the different players in the industry... accountability has not been aligned with levels of responsibility, and that is what we need. If we want to drive behaviour change in the industry, accountability has to be aligned with responsibility... This is a major change to the regulatory regime that has not been discussed publicly by the Government. It puts a huge amount of responsibility and liability on to designers and architects, and I wonder whether that is a sensible apportionment of accountability and whether the unforeseen consequences of that might undermine the objectives of this bill.”

It is apparent that this proposed alignment of accountability and responsibility needs a practical solution where the liability (if emerged) can be met as otherwise, the fundamental and inevitable, resonant issue of recoverability will subsist. If this issue is not properly addressed then it could make the accountability scheme somewhat futile. The talks of “ensuring” that the tradespeople “build it right the first time” should not become a joke and could do so unless there is financial surety and clear consequences if the building is not in fact built right the first time.

While falling short of requiring insurance as a mandatory requirement, the Bill now includes a mandatory requirement on builders for pre-contract disclosure detailing skills, qualifications and licensing status, their dispute history, offer of surety or insurance backing for their work, information on company, including trading history. This disclosure requirement will no doubt indicate whether financial surety is available. This is intended to increase the demand for, and supply of surety products and services in the market over time. However we believe that this will raise costs of building works in the meantime and subsequent questions and political pressure will eventually lead to legislative requirements for builders to hold insurance and disclose such details to their clients much like lawyers. The current proposal seems like a half-way-house to hold in place for the time being, an essential part of the *Better Building Blueprint* which will fail if there was no financial surety element to the launch.

In an attempt to help raise consumer awareness, the DBH have placed on their website a number of consumer assistance documents. One of which includes the outline of risks of early payment which reduces the leverage that consumers will have in pressuring the contractor to meet agreed quality of works and completion dates. However there is almost an excess of documents and information on this website, which though commendable, will mean that many lay people get lost. Perhaps another recommendation could have been disclosure information recommending that the consumers to obtain legal advice on the construction process and contracts. However we believe that through the mandatory requirement of written contracts, it will become natural for consumers to obtain legal advice on such contracts and hopefully the consumers will be properly advised and make informed decisions as it is important for consumers to be properly aware of their obligations and rights.