

Cameron Smart
Engineering Practice Manager
PO Box 12 241, Wellington 6144
Email: csmart@ipenz.org.nz
Phone: 04 495 1645
Fax: 04 474 8933

COST EFFECTIVE QUALITY: NEXT GENERATION BUILDING CONTROL IN NEW ZEALAND - BUILDING ACT REVIEW

SUBMISSION TO THE DEPARTMENT OF BUILDING AND HOUSING

23 APRIL 2010

INTRODUCTION

This is a joint submission made by the Institution of Professional Engineers New Zealand (IPENZ) and Association of Consulting Engineers New Zealand (ACENZ). Collectively we represent the views of New Zealand's professional engineers. More information regarding IPENZ and ACENZ can be found in Appendix 1.

This submission also has the support of the Timber Design Society, the New Zealand Society on Large Dams, the Society of Fire Protection Engineers, the New Zealand Geotechnical Society, the Structural Engineering Society and the New Zealand Concrete Society.

The Structural Engineering Society has also made a submission of its own, giving more specific technical and policy detail on the structural aspects of buildings. We commend The Structural Engineering Society's work and ask that their submission be read alongside this one.

EXECUTIVE SUMMARY

IPENZ and ACENZ thank the Department of Building and Housing (DBH) for the opportunity to comment on the *“Cost-Effective Quality: Next Generation Building Control in New Zealand”* discussion document.

In this submission IPENZ and ACENZ (we) have identified eight statements or principles we consider are the most critical success factors for a successful building regulatory system. We consider that if these critical success factors are not appropriately addressed in the new regulatory environment problems will persist.

In this submission we have proposed an alternative warranty scheme where a prospective homeowner would purchase insurance and present this to the BCA as part of the Building Consent documentation. This insurance would go with the house and be transferable to subsequent owners for a period of ten years. In the event of a claim, the insurer would arrange remedial work and would pursue other parties through the courts on the basis of proportional liability.

This submission is structured to present our eight critical success factors, followed by our comments in relation to each of the questions raised in the discussion document.

CRITICAL SUCCESS FACTORS

We think the following eight statements or principles are the most critical success factors for a successful building regulatory system. If these are not appropriately addressed in the new regulatory environment problems will persist. We therefore commend these matters to the DBH as more important and stand above the specific answers to the questions.

COMPULSORY UNDERWRITTEN WARRANTY WITH NO OPT OUT

We consider it essential that there be an underwritten warranty scheme for residential building works. Such a scheme must apply to all residential building works and ensure building owners or building contractors cannot opt out of the scheme. Further comments in relation to questions 66 to 72 (which relate to warranties) come later in this submission.

PROPORTIONAL LIABILITY

We strongly recommend the move to proportional liability. We recommend proportional liability be introduced for residential buildings initially, with the long term goal that proportional liability apply to all buildings.

DEVELOPERS REGISTERED AS A CLASS OF LBPs

We recommend there be a requirement that developers be registered as natural persons in a new class of Licensed Building Practitioner (LBP) regardless of the existence of their companies. This would enable developers to be held accountable for poor performance and help keep track of their performance.

CONTRACTS

We consider standard form contracts should be compulsory for most building works, even small jobs. These contracts should be in writing and include obligations on the building owners to undertake ongoing maintenance.

The written contract should be part of the application for building consent where building consent is required.

REQUIREMENT FOR RISK-BASED QUALITY ASSURANCE

We note that with the changes proposed in the discussion document there will be increased reliance on Chartered Professional Engineers, Registered Architects and other professionals. We support this, but consider audits and/or peer reviews undertaken to ensure quality assurance. We consider these audits/peer reviews could be undertaken by the building consent authority, an independent third party, or the

A specific issue for engineers who offer designs is that they need to monitor construction to be able to confirm the design was correctly implemented, as a precursor to the design engineer accepting liability for the design “as built”. This matter should be made more explicit in the Building Act or associated processes; i.e. the designer can specify the level of monitoring necessary to support the certification provided by the designer.

The offer of recommended monitoring could be included as a Schedule to the Producer Statement – PS1 - Design (PS1) and included in a Design Features Report.

We also recommend that when a Building Consent is issued, construction monitoring should, as a consequence, be specifically recognised as a possible condition of that consent.

COMPREHENSIVE LICENSING

It is important that a comprehensive licensing system is in place before requirements for warranties begin. Each important contributing occupational group should be subject to a statutory-backed registration system so any performance issues can be effectively dealt with. Specifically, we recommend the separation of three naturally-different occupational groups in the regulatory system.

- Engineering occupations: Whilst the bulk of structural work is presented by professional engineers, other engineering aspects might be presented quite legitimately by engineering technologists or engineering technicians. These three competence levels are recognised internationally, and are expected to conform to the same ethical standards. A suitable means to provide comprehensive engineering occupational regulation would be to extend the Chartered Professional Engineers of New Zealand Act 2002 to cover multiple competence levels.
- Architectural/design occupations. Like engineering the three groups (architects, architectural designers and architectural draughters) would form a coherent occupational regulation system – this might be achieved by extending the Registered Architects Act 2005.
- Construction occupations: , this group differs from the other two as there is no equivalent culture of occupational self-regulation. Thus the present LBP scheme has no ethical code requirement.

Operational efficiency could be achieved by ensuring underpinning processes for the three registration/licensing systems are made as similar as possible. For example, in all systems, some credit for adhering to best practice international standards might be given provided local knowledge is comprehensively assessed.

Additionally, all three schemes need an effective feedback mechanism registration/licensing authority to investigate and remove or suspend poor performers. There is no explicit mechanism for reporting poor quality work under the present Building Act. Our experience is that a system to ensure Building Consent Authorities [BCAs] report instances of poor work to the relevant registration authority is vital, ACENZ/IPENZ Building Act Review

irrespective of the form of the registers. We therefore strongly recommend that consideration be given to creating an explicit obligation (or at the very least a strong incentive) on BCAs to make reports to allow the licensing/registration scheme to be fully effective.

AMALGAMATION OF BUILDING CONSENT AUTHORITIES

As noted in the discussion document, there is a large number of building consent authorities in New Zealand, which according to reports from our Members, have inconsistent policies and rules. We support the amalgamation towards a national consent authority, and consider a national authority with regional offices would be advantageous. An agency devoted to this could have in-house knowledge and build up significant institutional knowledge over time. It would also help ensure consistency across the country.

DBH ROLE IN CONSUMER EDUCATION AND STANDARDS DEVELOPMENT

We consider the DBH should undertake a stronger role in two areas - consumer education and standards development.

In relation to education, it is vital that consumer education is provided. We recommend that the DBH educate consumers about:

- their responsibilities for periodic inspections and maintenance. Items such as clearing roof gutters and downpipes, clearing drains, replacing sealants, repairing minor defects in the cladding, and repairing leaky taps could be deemed to be the owner's responsibility.
- contracts, including providing a typical standard contract and explaining the terms in it
- the processes for making complaints and disputes resolution
- where to find lists of registered/licensed engineers, architects or constructors.

In relation to developing standards, we think the DBH should take a more proactive role. We consider the DBH should be scoping the required standards, funding the standards required (as they are public good standards) and approving these before they are completed. The current process involves standards being completed and later, the DBH approving these, with the Compliance Documents listing additional or changed requirements. This is not efficient and improving the process would enable a designer to go to a single document, the Standard, rather than having to look at this Standard and the Compliance Documents.

RESPONSES TO QUESTIONS RAISED IN THE DISCUSSION DOCUMENT

PART 1.1: CLARIFYING THE PURPOSE AND PRINCIPLES OF THE BUILDING ACT

- 1. Does the reference to sustainable development in the purpose statement (Building Act 2004 section 3(d)) provide clear and appropriate guidance to those administering the Act? If not, why not?**

We think sustainable development in this context should mean only the efficient use of resources. We would support wording changes to make this more specific.

We also think more thought needs to be given to development in areas of natural hazards: the list in Section 71(3) of the Building Act may need extending.

- 2. Should suitability for purpose be referred to in the purpose statement? If so, how should this be worded?**

No, as this is difficult to do on a one size fits all basis.

- 3. Should other changes be made to the purpose statement? If so, what are they?**

We do not recommend other changes to the purpose statement.

- 4. Do you agree that all of the 16 existing principles (Building Act 2004 section 4) are necessary to guide those administering the Act? If not, which principles do you consider fundamental?**

Section 4(2)(b) of the Building Act requires the prevention or minimisation of harm to human health. This aligns with an engineer's obligation to society to take reasonable steps to safeguard the health and safety of people, so IPENZ regards this as fundamental.

Section 4(2)(m to p) of the Building Act promotes conservation and sustainability. These align with an engineer's obligations to society to have regard to reasonably foreseeable effects on the environment and to have regard for the sustainable management of the environment. As a result, IPENZ also regards them as fundamental, but would support more specific wording than sustainability (see our comments in relation to question 1 above).

Section 4(2)(c) emphasises durability. We consider this should be extended to include robustness. Robustness should be interpreted to mean that the building will not be damaged to an extent disproportionate to the original cause by events like fire, explosion, impact or consequences of human error. This would be consistent with AS/NZS 1170.0 which is cited in the *Building Code*.

- 5. Should other matters be referred to in the principles? If so, what are they?**

We suggest consideration of a site's natural hazards should be a principle. This is important as natural hazards need to be considered in building siting, design and construction and revealed to future owners.

- 6. Do you agree that the purpose and principles should apply to building consent authorities in their administration of all, not just some, of their building control functions? If not, in which circumstances should they be able to make decisions without regard to the purpose and principles?**

We have no response to this question.

- 7. Do you have any other comments on the Building Act's purpose and principles?**

One of our geotechnical engineers comments in detail on the “natural hazards” mentioned in our response to Question 5.

Section 71(1)(a) of the Building Act makes reference to "the land on which the building work is to be carried out" In the context of it being "subject to or is likely to be subject to 1 or more natural hazards" but nowhere in Section 7 Interpretation, is "the land" defined. There are alternative interpretations of “the land”; it could be the building footprint or the property title. This has been a thorn in the side of many developments in the past when considering land stability, with some Territorial Authorities even taking the stance of considering the land to be the title, which might be ridiculous in the case of a 100 hectare farm.

PART 1.2: CLEARER REQUIREMENTS IN, AND IMPROVED ACCESS TO, THE BUILDING CODE AND SUPPORTING INFORMATION

8. Do you agree that some Code performance requirements are ambiguous or unclear?

Yes.

9. If so, what is the impact of this for you?

We are aware that some BCAs require *Building Code* clause B2 Durability to be listed with clause B1 Structure when providing PS1s for Building Consent. This causes disputes between engineering designers and BCAs.

The critical issue is that a design to B1 Structure must satisfy structural performance for a particular design life and likely extreme loading return period. Inherent in the structural design process is consideration of durability for structural elements for the specified design environment. The durability may change due to failure or substitution of elements that are intended to defend against the environment. These failures or substitutions may be not the direct responsibility of the structural designer.

Even if there were an initial maintenance schedule and some exclusion statements, these may not sufficiently limit liability claims on structural engineers. The possibility would exist for such a maintenance schedule and exclusion statements to be insufficiently comprehensive to avoid being set aside by legal arguments.

We recommend there be separation between structure and secondary element performance to avoid this situation. This separation could be achieved by not including B2 on a PS1 for clause B1 Structure.

10. Which Code performance requirements do you think need to be clarified and which would you make top priority for clarification? (Note that work is under way on requirements related to visibility in escape routes and fire safety.)

We have no response to this question.

11. Do you believe that Code performance requirements are well known to those who need to know them? If not, how could they be made better known?

We have no response to this question.

12. Do you have any problems accessing Code performance requirements and supporting information (including Compliance Documents and Standards)? If so, what are the problems and what could be done about them?

No. We are pleased to see the hint “Save Target As” in respect of the Compliance Documents – it is helpful for the larger ones such as C Fire.

13. Do you agree that the label 'Compliance Document' creates an expectation that it must be used? If so, can you suggest a better label for this type of document?

Yes, we agree that an expectation is created. We suggest that the term "Explanatory Document" could be used, with the retention of "Acceptable Solution", "Verification Method", and "Alternative Solution", as these labels are in common use.

14. Do you have any other comments on clarifying Code requirements or improving access to the Code requirements and supporting information?

We have no other comments.

PART 2.1: LOWEST RISK BUILDING WORK EXEMPT FROM CONSENT REQUIREMENTS

15. Do you agree the items or areas of work listed in Attachment 1 are low risk?

We cannot offer useful comment as our Members have differing views and cannot agree. This should be a concern to the DBH.

16. Are there any items or areas of work listed in Attachment 1 that should not be exempt from building consent requirements? If so, which ones (please use identification number/letter when commenting) and why should they be subject to building consent requirements? Are there any limitations or conditions that would address your concerns?

We have some concern with Item J: pipe and cable penetrations through walls. These Items can decrease fire resistance. If the wall is made of expanded polystyrene then penetrations must be carefully detailed to minimise the risk of polystyrene melting or catching fire.

We also have some concern with Item O: plinth for mechanical plant. Firstly, this Item can mean a crane foundation. A crane is not a building, and so is exempt from requiring building consent. Section 4(1)(b) of the Health and Safety in Employment (Pressure Equipment, Cranes, and Passenger Ropeways) Regulations 1999 ("PECPR Regs") indicates that the foundation of a crane is part of the crane, and so is governed by the PECPR Regs.

Secondly, this Item can also mean the foundation for a pressure vessel. If the vessel is part of a building then the Building Act applies, and so do the Health and Safety in Employment Act 1992 and the PECPR Regs.

PECPR Reg 4(1)(b) indicates that the foundations of pressure equipment are part of the equipment, and so are governed by the PECPR Regs. The Approved Code of Practice for Pressure Equipment requires new and altered pressure equipment to be design verified, and design verifiers are now Chartered Professional Engineers (CPEng). Hence, the DBH's suggestion of a design-licensed building practitioner would not necessarily be compliant with the PECPR Regs.

A Member with experience in local government notes that if consents are not required (for example, for re-cladding) then the local authority may not know if a house has been flooded. This information will not then be on the Land Information Memorandum to enable future purchasers of the property to be aware of the flood problem. This is a concern.

17. What other items or areas of work do you think should be added to Schedule 1 of the Act? Why are these low risk?

We have no response to this question.

18. Is there any essential or useful information that is currently gathered through building consent applications that would be unavailable under this proposal?

Information on natural hazards which affects designing and siting buildings may be available through the Regional Council or Territorial Authority, but not in District Plan or under planning rules or controls. If no building consent is required, this information would not then be taken into consideration or sought. This could lead to buildings being placed in river corridors, overflow paths, and ponding areas, with no controls on siting or floor levels. These could also potentially affect the risk to others by diverting floodwater and causing erosion. Therefore, although the building itself may be low risk, the environment acting on the building may be high risk.

19. Do you have any other comments on exemptions for lowest-risk building work?

Lodging detail of work with local authorities after the work is constructed (because no consent was required) does not make sense if hazard information should have been taken into account before the work was constructed.

PART 2.2: A MORE STREAMLINED PROCESS FOR LOW-RISK RESIDENTIAL BUILDING WORK

20. Do you agree that building consent authority oversight and control of a building or building work should be in proportion to the risk and consequences of failure? If not, why not?

Yes, we agree that oversight and control by building consent authorities should be in proportion to the risk and consequences of failure.

21. Do you agree that licensed building practitioners should be able to be relied on to design and construct simple buildings that meet requirements without the level of third-party oversight currently applied? If not, why not?

Yes, subject to earlier clarification re LBPs. To back up this proposal, we believe that processes should be in place to enable the reporting of alleged poor work and then an investigation can be undertaken, followed by disciplinary action if necessary.

We recommend defining simple buildings to be those for which prescriptive designs for elements are available, notably those for which acceptable solutions exist.

22. Do you agree that the proposed streamlined process is adequate to ensure simple buildings are Code compliant? If not, why not?

Yes, the streamlined process seems adequate.

23. Do you have any comment on the indicative steps in Table 1, including the notes to the table?

We recommend that further work be done in relation to the documents mentioned in Step 1. It is unlikely that the designer is a CPEng, which is currently the IPENZ/ACENZ preference for a producer statement signatory. However, such a designer may be an engineering technician or technologist.

In Step 4, the memorandum cannot be Schedule 6 NZS 3910, as this attests to compliance with the contract; nor a Producer Statement – PS4 – Construction Review (“PS4”) as this attests to compliance with the conditions of building consent.

IPENZ Members are strongly against the use of memoranda or certificates mentioned in the current Act alongside Producer Statements. The consensus is that only Producer Statements should be used.

24. Are there any other steps that should be part of a streamlined process for simple, low-risk residential building work?

We have no other steps to suggest.

25. Do you agree that the foundations, framing and insulation, plumbing, drainage, claddings and flashings are critical elements that would still need to be inspected by building consent authorities in a streamlined process? If not, what elements do you think would still need to be inspected?

Yes, we agree that these are critical elements.

26. Do you agree with the criteria for buildings to be covered by the proposed streamlined process for simple, low-risk residential building work? If not, which criteria would you change and why?

We recommend that “simple, low-risk” residential building work be understood to be work covered by NZS 3604 or NZS 4229, which prescribe acceptable solutions.

27. Should the proposed streamlined process apply to buildings covered by a MultiProof approval?

We have no response to this question.

28. Should the proposed streamlined process apply to any other low-risk buildings or building work? If so, how would you define which buildings or building work?

We have no response to this question.

29. Does the proposed process align appropriately with the rules on restricted building work? If not, why not?

We have no response to this question.

30. Do you have any other comments on the proposed streamlined process for simple, low-risk residential building work?

It is possible that if the controls are removed for simple houses, the standard of construction will decrease. Even for a simple house it should be possible for a prospective owner to ask for full BCA inspections, at the prospective owner’s cost.

PART 2.3: A MORE STREAMLINED PROCESS FOR COMPLEX COMMERCIAL BUILDING WORK

31. Do you agree that people commissioning complex commercial buildings and building work are generally better informed and better equipped to hold contractors to account than consumers of residential building work? If not, why not?

Yes, we agree.

32. Do you agree that chartered professional engineers, registered architects and other licensed or certified professionals should be able to be relied on to design and supervise complex building projects that comply with the , without the current level of building consent authority review? If not, why not?

This question does not lend itself to a simple agree or disagree response. What is needed is a risk-based approach. The role of the BCA could be as little as assuming an appropriate risk-based approach has been adopted and applied with appropriate certification lodged with the BCA.

The current building consent review processes use well-recognised design, design review, and construction review processes. On the whole these work well and are within a well-understood framework which is flexible and able to adapt to a wide range of circumstances. We do not believe the process around the building consent issue and code compliance certificate that follows it are significant barriers to commercial building work.

We believe processes should be in place whereby alleged poor work can be reported, investigated, and if necessary disciplinary action taken. We also suggest that a

comprehensive multi-level engineering occupational regulation system (including engineering technologists and technicians) is necessary. We have given a more detailed rationale in our section on Critical Success Factors.

33. Do you agree that the proposed streamlined process for complex building work is adequate to ensure buildings are Code compliant? If not, why not?

A streamlined process must still include review of design and monitoring of construction.

Two situations are common - building without consent and building with consent but with a lack of inspections by the territorial authority/building consent authority. Surely the more serious "crime" is the former, yet those in that category may be "rewarded" with Certificates of Acceptance while those who "committed" the lesser "crime" can be given no such benefit. That appears to be an anomaly in the 2004 Act. So with a building consent and a lack of inspections there is no Certificate of Acceptance available, but a Notice to Fix may be issued to building owners. But to fix what? There may be only one inspection lacking that gives rise to this situation. There could be no precedent for the whole building to be demolished from a Notice to Fix issued on that basis. Often, as well, many instances of a lack of inspections is not that at all, but a lack of supporting records attesting to the inspection having been carried out.

34. Do you have any comment on the indicative steps in Table 2, including the notes to the table?

We generally support Table 2 and its notes and further recommend that:

- (a) There be a separate PS1 for each *Building Code* clause.
- (b) Summaries of calculations for each *Building Code* clause that relies on a Verification Method or an Alternative Solution be supplied. Some engineers go further and suggest full calculations.

35. Are there other building projects with the necessary quality assurance systems in place that could also be subject to the proposed streamlined process for complex commercial buildings?

We consider that industrial buildings that are non-habitable should be subject to the proposed streamlined process.

36. Do you have any other comments on the proposed streamlined process for complex commercial building work?

We have no further comments.

PART 2.4: PUBLIC INFRASTRUCTURE WORKS

37. Do you agree that the building control system provides an appropriate means of ensuring the safety and quality of all public infrastructure works? If not, why not?

We consider that State Highways (and bridges and tunnels in the State Highway network) should be added to the list in Section 9 of the Building Act of what a building does not include. We consider that the New Zealand Transport Agency should be another example of a Network Utility Operator.

Private infrastructure also needs to be controlled. IPENZ has case history of complaints relating to private urban and rural bridges, and is aware of at least one private rural bridge that was the subject of lengthy litigation.

38. Are there some categories of public infrastructure work where other arrangements may more efficiently and effectively ensure safety and quality? If so, what types of works and what sort of arrangements?

There are concerns from dam design engineers that in some instances regional authorities are having independent technical reviews carried out on designs that already include a technical review process. Owners are incurring additional cost as the regional authorities pass on their costs for this work. We consider regional authorities should only be carrying out regulatory reviews rather than full technical reviews.

PART 2.5: STREAMLINED PROCESS FOR REVIEWING FIRE SAFETY OF BUILDING PLANS

- 39. At what point in building design and construction is Fire Service Commission involvement most useful? Please explain why.**
- 40. What weight should be given to Fire Service Commission's advice – for example, should it be treated as consultative input, should following the advice be mandatory, or should the weight given depend on the circumstances? Please explain why.**
- 41. Do you have any other comments on fire safety review of building plans?**

In relation to questions 39 to 41, we support comments provided by the Society of Fire Protection Engineers in their submission.

We support the Society of Fire Protection Engineers' view that the Design Review Unit should be removed. If this is not possible then we consider the Design Review Unit should become part of the national BCA.

PART 2.6: IMPROVED PROCESS FOR BUILDING WARRANTS OF FITNESS

- 42. Do you agree that the administration of the building warrant of fitness and compliance schedule requirements is more complex or costly than necessary? If so, what issues does this cause for you?**

No, our building services engineers consider the present process for "administration of the building warrant of fitness and compliance schedule requirements" is satisfactory. We note that the process may not be clear for people who are not engaged with it on a regular basis.

- 43. Do you agree that there is a lack of clarity about building warrants of fitness and compliance schedules? If so, what is unclear and what issues does this cause for you?**

No, our building services engineers say the clarity is generally satisfactory. However, clarity would be improved by adoption of a nationally prescribed form or format that is adhered to across all the Territorial Authorities. This should include a standard listing of features, and consistent identification or numbering of the features list.

We think there also needs to be a prescription of the acceptable minimum standard of records or documentation of building features. Our structural engineers have emphasised the need for documentation. They consider there should be an obligation on BCAs to hold records of the documentation as the keeping of these records is a public good.

- 44. What changes should be made to the requirements to simplify administration while still ensuring critical systems are maintained and inspected? You may want to comment on the description of specified systems in the regulation, the definition of 'independent qualified person', or any other issues.**

Administration would be assisted by requiring the compliance schedule to list the means of compliance for each feature. The reference might be the acceptable solution (reference and date); a generic solution (verification method, NZS 4121, determinations, product certificates, and energy work certificates, with reference and date), and a

particular Standard (with date of issue); or an alternative solution (solution from first principles with reference and date). It also needs to list the part(s) of the building to which the means of compliance applies.

The present requirement to register individuals with each territorial authority is onerous. A National Register should be adopted, including those who supervise, not necessarily those who perform the work. We believe the system would be much more effective if there were a national register of Independent Qualified Persons from which all BCAs would draw. This might be administered beside the other engineering registers for reasons of efficiency.

45. Do you have any other comments on the building warrant of fitness and compliance schedule requirements?

Building services engineers recommend better records be kept by BCAs of life safety features. The need for integrity of passive fire protection features is poorly understood. Details of all fire/smoke separations need to be clear, readily available, and re-certified as intact on a regular basis.

PART 2.7: MORE EFFICIENT BUILDING CONTROL ADMINISTRATION

46. Do you agree that the number of building consent authorities and the variation in size is causing issues as outlined in Part 2.7? If not, why not?

Yes, we agree the number and variability of building consent authorities is causing issues. Our preference would be that consideration be given to forming a single BCA with regional offices (the same model as the Department of Labour's OSH service). If this is not possible then we support large regional BCAs.

47. Are there any other issues or problems resulting from the current administrative arrangements that have not been identified in this document?

We have no response to this question.

48. Do you see benefits in greater cooperation between building consent authorities, or clustering or consolidation of building control functions? What would be the main benefits?

We consider one of the main benefits would be greater consistency in interpretation.

49. Do you see costs and risks associated with greater cooperation between building consent authorities, or clustering or consolidation of building control functions? What would be the main costs and risks?

We have no response to this question.

50. What, if any, role should the private sector have in the administration of building controls?

We consider arrangements where a regulatory review of Building Consent applications is contracted out to Chartered Professional Engineers or other suitably licensed/registered engineering technologists or technicians (if the work is below professional level) should continue.

51. Which elements of building control require local input and why?

We think the following elements require local input:

- a) foundations and geotechnical work where site-specific knowledge is required
- b) building in high wind zones as this requires site-specific knowledge

- c) building in snow zones as this requires site-specific knowledge
- d) natural hazards require site-specific knowledge.

We think this “local input” could be provided by the regional branch office of the national BCA.

52. Which elements of building control would most benefit from a national approach?

We consider a national approach would ensure consistency of interpretation. For example, Section 45 (1)(c) of the Building Act requires a building consent application to contain or be accompanied by any other information the BCA reasonably requires. We have suggested that it is reasonable to require a Producer Statement, information on the current competence of the designer, and summaries of calculations.

Several Members have provided examples which illustrate difficulties with inconsistent approaches.

53. Do you have any other comments on options for more efficient building control administration?

We have no other comments.

PART 3.1: WELL-INFORMED CONSUMERS

54. Do you agree the Government should do more to inform consumers about their responsibilities and rights in relation to residential building projects? If so, why?

Yes. See comment under Critical Success Factors above.

55. What further information do consumers need?

See comment under Critical Success Factors above.

56. Should the Government publish information on acceptable standards of workmanship for residential building work?

No. We consider that the DBH should be scoping which standards are needed and then the government should fund Standards New Zealand to publish those standards. The DBH should also be approving the standards before they are completed so they can be applied as soon as they are published.

57. Are there other steps that would help consumers commission residential building work knowledgeably and with confidence? If so, what are they?

See our comments below regarding contracts.

58. Do you have any other comments about consumer knowledge and behaviour in relation to residential building work?

We have no other comments.

PART 3.2: IMPROVED CONTRACTING PROCESSES

59. Do you agree that contracting arrangements between consumers and principal building contractors for residential building projects need to be strengthened? If so, why?

Yes. We hear of many disputes between consumers and builders or designers that would have been mitigated if a written contract had existed. “Scope creep” is an example of a problem that causes trouble.

60. Do you agree that all contracts between consumers and principal building contractors for residential building work should have to be in writing and signed by both/all parties? If not, in what circumstances, or for what type of building projects, should written contracts not be required?

We agree written contracts should be required in almost all circumstances, even for small jobs. The written contract should be part of the application for building consent where building consent is required. Organisations like ACENZ could recommend written contracts as an obligation of Membership.

We consider the following are circumstances where a written contract may not be required:

- repairs and maintenance of the “replacing like with like” type
- repairs to fire-damaged residences undertaken and paid for by insurers
- urgent building work to protect life or property
- minor alterations

61. Do you have any comments on the proposed minimum terms for contracts as set out in Part 3.2? Please indicate what, if any, information you would like to see added to or removed from the proposed list.

We have no response to this question.

62. Do you have any comments on the proposed required disclosures for residential building projects? Please indicate whether there is any information you would like to see added to or removed from the proposed list of required disclosures.

We have no response to this question.

63. How should information required to be disclosed be provided?

We have no response to this question.

64. Are there other steps the Government could take to improve contracting practices for residential building projects? If so, please indicate what additional measures should be taken.

We have no response to this question.

65. Do you have any other comments about contracting practices for residential building work?

We have no response to this question.

PART 3.3: DEVELOP MORE EFFECTIVE WARRANTIES

In Section 3.3 of the discussion document the DBH comments that in relation to the current situation there is consumer protection for building work under New Zealand law.

In summary, the legislation is as follows:

(1) The Consumer Guarantees Act 1993. The Consumer Guarantees Act does not apply to buildings and the definition of goods in Section 2 excludes buildings. However, design and construction services are subject to the Consumer Guarantees Act because they fall into the definition of services as “a contract for, or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods.”

The Consumer Guarantees Act can be contracted out if the services are for business purpose, but not in respect of a consumer who acquires such services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(2) The Building Act 2004. Under the Building Act there are implied warranties in Section 397 for building work in relation to “household units”. A ‘household unit’ is defined as a building or group of buildings, or part of a group of buildings that is –

“(a)(i) used, or intended to be used only or mainly for residential purposes: and

(ii) occupied or intended to be occupied, exclusively as the home or residence of not more than 1 household; but

(b) does not include a hostel, boarding house, or other specialised accommodation.”

In Section 398 there is an automatic assignment of the right to take proceedings for breach of the warranties by subsequent owners. Sections 397 and 398 cannot be contracted out of by virtue of Section 396.

(3) The Limitation Act 1950. The time limits that are applicable to the Consumer Guarantees Act and the implied warranties in the Building Act in respect of building work are the same. The applicable time periods are the six year time period under the Limitation Act 1950 and the 10 year-long stop period under Section 393(2) of the Building Act.

What this means is that whilst claims in contract will be generally limited to a period of six years from the date of the cause of action, claims in tort upon discovery of a cause of action or when the cause of action ought to have been discovered will also run for six years, but would be time barred if the proceedings are not issued earlier than 10 years from the date the work was done.

The proposals in Section 3.3 appear to be focused upon changing the warranties in the current legislation and having the building contractor provide increased protection backed up with surety requirements.

The current legislation however, appears more than adequate to place the liabilities where they should properly fall. The problem that has been identified is in relation to property developers or builders who use special purpose companies that are liquidated when the building work has been completed.

66. Do you agree there should be a mandatory warranty for residential building work? Please give reasons.

Yes but this should be an independent regime from the parties involved in the building work. This would mean a warranty contract between the owner and a suitable surety (an insurance underwriter or other suitable funder). It should be a first party cover under which the owner has a right to have the building repaired. It should be transferrable to subsequent owners upon sale of the property.

If the property developer or building contractor or other parties do not honour the warranties under the Building Act, the surety, utilising the subrogation rights with entitlement to the remedies of the owner, may pursue the various negligent parties.

67. Which of the options for warranty listed in Part 3.3 do you prefer? Which do you disagree with? Please comment on:

- length

- cap
- coverage
- loss of deposit and non-completion
- circumstances where the warranty service obligation could be voided
- projects covered.

As discussed under Question 66 we disagree with the options in Part 3.3 and prefer an independent warranty regime. Ideally the length of the warranty should be for 10 years. However, for practical purposes some sureties who may be interested in underwriting such risks may be restricted to a six year period for reasons of reinsurance availability, but may be prepared to offer a renewal on application for a further four year period.

Obviously there should be a cap that relates to each household unit to ensure the risk can be properly contemplated and adequately funded. Whether this should be at a level of \$250,000 or \$500,000 or more depends upon availability of cover and cost.

The coverage that is likely to be available would be for major defects, rather than minor defects, non-critical items and neglect by the owner of any routine maintenance.

Cover for loss of deposits, non-completion and other issues that are a part of the financial considerations are matters that should not be encompassed by a mandatory regime. These are benefits that individual building contractors would be free to offer for themselves on a voluntary basis to customers as a marketing advantage. The principle of *caveat emptor* should apply to such items.

68. Should the building owner be able to renounce the offer of a warranty by a building contractor by signing a notice revoking the warranty?

We consider that a building owner should not be able to renounce the offer of a warranty. This defeats the purpose of a mandatory regime.

69. Should developers be required by law to provide third-party warranty cover?

No, this does not appear to have any merit if there is no adequate surety behind the cover. We consider that there must be an underwriter to the warranty.

70. Should owner-builders, or those who renounce the offer of a warranty, be obliged to:

- disclose on sale of the building that no warranty is offered?
- purchase a third-party warranty on sale of the building?

See Question 68. The warranty should be mandatory and fully transferrable to subsequent owners.

71. Should building contractors upon retiring or winding up their company be required to transfer warranty service obligations to another party:

- with prior notice to affected building owners?
- with prior consent of building owners?

See our response to Question 68. The warranty should be mandatory and we consider there must be a contract between owner and insurer and that it must be fully transferrable to subsequent owners.

The problem that Question 71 raises would not arise if the warranty regime we propose was implemented.

72. Do you have any other comments on warranties?

Yes. If a warranty regime independent of the building contractor is introduced as suggested, thus satisfying the interests of the consumers, this should be coupled with the introduction of proportional liability for residential building work. This would create a fair and equitable situation and avoid the deep pocket syndrome that currently exists.

The sureties' recovery rights could then be exercised only against the negligent parties to the extent that they were causative of the loss.

PART 3.4: SURETY AS A FINANCIAL BACKSTOP FOR WARRANTIES

73. Do you agree that building contractors should have to disclose whether they have surety backing? If not, why not?

No. If an independent warranty regime is implemented, as per our recommendations in response to Questions 66 to 72, we consider that surety will be unnecessary and thus the disclosure of surety will also be unnecessary.

74. Do you agree that building contractors should be obliged by law to have surety backing? If not, why not?

No. We strongly disagree with the obligation to have surety backing. Surety backing would require proprietors of companies to put up their private assets to obtain surety backing. Normally a bank or other surety provider would require counter-indemnities from the individuals concerned.

We think small companies and practices would struggle to obtain surety backing.

Also, if an independent warranty regime is implemented, as per our recommendations in response to Questions 66 to 72, we consider that surety will be unnecessary.

75. What do you see as the benefits and/or costs of mandatory surety? What is your view on when the benefits would outweigh the costs?

We think there will be significant drawbacks (costs) to mandatory surety. As mentioned in our response to Question 74 above, we consider small companies or practices would struggle to obtain surety backing and those companies or practices may be forced out of existence. Also, we believe mandatory surety would defeat the purpose of limited liability companies, as all the private assets of the proprietors of those companies would be tied up in the companies' surety.

76. Do you agree with the proposed list of required disclosures about surety? Is there is any information that should be added or removed?

We have no comment in response to this question – we do not consider surety would be necessary if an independent warranty regime is implemented, as per our recommendations in response to Questions 66 to 72.

77. If surety were to be mandatory, should surety providers be restricted in their ability to pursue other negligent parties such as building consent authorities?

As mentioned previously in this submission, we strongly support the move to proportional liability. If limited liability and a warranty regime were in place then the warranty provider would pursue negligent parties and those parties would be held responsible only for the proportion of loss that they caused.

78. Do you have any other comments on surety?

We have no other comments.

PART 3.5: BETTER ACCESS TO DISPUTE RESOLUTION

79. Do you agree that consumers currently face barriers or problems in resolving disputes with building contractors? If so, why?

Yes. Our experience is that lack of written contracts can lead to unrealistic expectations which cause consumers to lay formal complaints. If the basis of the complaint is money, then we have no jurisdiction and are forced to suggest that the consumer goes to the Small Claims Tribunal.

80. Do you agree that consumers need more information about options for resolving disputes with building contractors? If so, how could this be provided?

Yes. We consider there should be information about the dispute resolution procedures and that this should be provided in contracts.

81. Do you think there are adequate services available to resolve disputes between consumers and building contractors? If not, what other dispute resolution services do you suggest?

No, the services are not adequate. IPENZ often hears of disputes between home owners and building contractors, and deals with complaints when an engineer is involved in the design. The engineer is often a subcontractor to the builder or to the architect so has no contractual relationship with the owner. Dispute resolution then becomes more difficult.

Some Members have drawn our attention to the dispute resolution process in the Construction Contracts Act. The Construction Contracts Act may need reviewing to ensure it is consistent with the proposed changes to the Building Act.

82. What would be the characteristics of an appropriate dispute resolution service?

The service should be low cost and could operate with a set fee. This would enable the service to be more accessible, particularly to homeowners.

83. Do you have any other comments about disputes between homeowners and building contractors?

We are aware of some circumstances where the disputes involve three or more parties, for example homeowner, builder, and engineer; or homeowner, engineer, and BCA. These are more difficult to resolve and are a situation that needs to be recognised.

PART 4: IMPACTS OF IMPROVING BUILDING CONTROL

84. Is it realistic to assume residential consumers, building professionals and tradespeople, and building consent authorities would behave differently if this package of proposals was introduced? Please comment.

We consider that the introduction of the proposals will change behaviour if there is fair placement and bounding of liability, supported by comprehensive occupational regulation in three occupational groups.

85. Have the main benefits of the package of proposals been identified above? If not, what is missing?

We have no response to this question.

86. Which benefits do you expect to be most significant and why?

We have no response to this question.

87. Have the main costs of the package of proposals been identified above and, if not, what is missing?

See our response to Question 89.

88. Which costs do you expect to be most significant and why?

We have no response to this question.

89. What are the main risks associated with the package of proposals?

We consider that there will be significant drawbacks (costs) to mandatory surety. As mentioned in our response to Question 74, we think small companies or practices would struggle to obtain surety backing and those companies or practices may be forced out of existence. Also, we consider mandatory surety would defeat the purpose of limited liability companies as all the private assets of the proprietors of those companies would be tied up in the companies' surety.

This could well mean a reduction in the number of small design companies operating, resulting in reduced competition and choice, to the detriment of New Zealand society.

CONCLUSION

IPENZ and ACENZ appreciate the opportunity to make this submission and are able to provide further clarification if required.

Cameron Smart

Engineering Practice Manager

ABOUT IPENZ

The Institution of Professional Engineers New Zealand (IPENZ) is the lead national professional body representing the engineering profession in New Zealand. It has approximately 11,500 Members; this includes a cross-section from engineering students, practising engineers, and senior Members in positions of responsibility in business. IPENZ is non-aligned and seeks to contribute to the community in matters of national interest giving a learned view on important issues, independent of any commercial interest. (www.ipenz.org.nz)

ABOUT ACENZ

The Association of Consulting Engineers of New Zealand (ACENZ) represents the consulting industry for engineering and related professionals that work in the built and natural environment.

The organisation has more than 190 member firms which represent about \$1.5 billion p.a in combined turnover, and that collectively employ in excess of 9,400 engineers, architects and supporting staff. (www.acenz.org.nz)