



SUMMARY OF THE BUILDING PERFORMANCE REGULATORY SYSTEM ASSESSMENT

Context

1. MBIE has primary responsibility for designing and overseeing a large number of regulatory systems. MBIE has identified 19 different regulatory systems it is responsible for. A regulatory system includes the rules, institutions, skilled workforce, practices and understandings that combine to make regulation of an activity or sector effective.
2. The State Sector Act was amended in 2013 to make it clear that Departmental Chief Executives have regulatory stewardship responsibilities. Taking a stewardship approach requires Chief Executives to look beyond their direct statutory responsibilities to the capability and resilience of the regulatory system over time, including the other agencies that form part of the system as well as MBIE.
3. The principal reason that MBIE has developed a regulatory systems programme is to discharge these stewardship responsibilities well. MBIE is also very aware that the regulatory systems it is responsible for include three where major failures have occurred in NZ- building (leaky buildings), financial markets (finance companies) and health and safety at work (Pike River) and this history emphasises the importance of continuous monitoring and improvement of regulatory systems. Looking systematically across different regulatory systems also enables MBIE to transfer learning and innovation from one system to others more readily.
4. One of the tools MBIE is using to be an effective steward of its regulatory systems is a periodic assessment of each system. These assessments are a snapshot rather than an in depth analysis. The assessments check how the system is working now rather than what the rules should be (ie they are not policy reviews), and they look to identify the main areas of focus for MBIE's attention over the short-term, rather than be more in depth analyses of the strengths and weaknesses of an institution (ie they are not Performance Improvement Framework reviews).
5. The building performance system is complex because of the number of agencies that have regulatory or quasi regulatory functions within the system. There are 66 building consent authorities, six agencies involved in the occupational regulation of system participants, and a number of agencies with accreditation and certification functions. The Ministry of Business Innovation and Employment (MBIE) has both policy and regulatory functions. Annex 1 contains a summary of the agencies with regulatory roles in the system.

The Assessment Process

6. The assessment of the building performance regulatory system began in late 2014. The first response was in early 2015, which included initiating the ongoing follow-up actions.
7. The initial assessment was undertaken between 22 September and 1 October 2014 by a panel comprising a Policy General Manager, a Policy Director and a Director, Legal. The panel conducted a series of workshops and interviews:



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- a. Three workshops were held with MBIE staff. One with MBIE 4th tier managers and two with staff performing a range of functions across the system. There was also a workshop involving both MBIE employees and representatives of the Building Practitioners Board and the Electrical Workers Registration Board.
 - b. Interviews were held with the following MBIE staff:
 - Andrew Crisp, Deputy Chief Executive, Building, Resources & Markets (BMR), (formerly known as Infrastructure and Resource Markets or IRM), and Greg Patchell, Deputy Chief Executive, Market Services as joint system owners.
 - Chris Bunny, Adrian Regnault and Sanjai Raj as the General Managers with responsibilities in the system.
 - Adrienne Meikle and Alan Galloway because of their roles in relation to weathertightness.
 - Chrissie Little, the Project director in charge of the National Building Consent project, and two other external contractors who are working on that project.
 - Mark Steel and Peter Mumford who were involved in the development of the Building Act 2004.
 - c. The panel also met briefly with representatives of the MBIE legal team.
8. A number of external parties were interviewed. These included representatives from Auckland Council, Christchurch City Council, and from the Waikato cluster of councils, the New Zealand Fire Service, International Accreditation New Zealand (IANZ), Building Research Association of New Zealand (BRANZ), Standards NZ, Institution of Professional Engineers New Zealand (IPENZ), the Architects Registration Board, the Plumbers Gasfitters and Drainlayers Board, as well as representatives from the Master Builders Association.
 9. Regulatory systems assessments are conducted over a very short timeframe and are necessarily limited in their scope. However, the information obtained from workshops and interviews was cross-checked against information obtained in other workshops and interviews and overall there appeared to be a broad agreement amongst most system participants about the main strengths and weaknesses of the building performance regulatory system.

The Key Findings

10. The panel's report noted that the complexity of the building regulatory system creates significant challenges that do not exist within simpler systems, particularly in relation to the monitoring of the system and gathering information about its performance. In addition, there have been two major crises in the last decade (the leaky homes crisis and the Canterbury earthquakes) that have compounded these difficulties and have deflected focus from the day to day operation of the system.
11. Since its establishment MBIE has made progress. It has undertaken a substantial programme of work aimed at improving the building consent system and has identified a framework and some of the building blocks required for a long-term system strategy. It



has also established an 'occupational regulatory shop' that has a vision of becoming a centre of regulatory excellence.

12. The panel considers there also remain a number of problems in the Building Regulatory System that the current initiatives will not fully address. These drive inefficiencies in the system and impede the system from fully achieving its objectives. In particular:
- MBIE is not yet the strong central regulator that was contemplated in the system design
 - The system is not well monitored and information flows are poor
 - Workforce capability issues are undermining performance of the system
 - Incomplete incentives in the system are potentially driving poor performance, in particular, the way the liability rules play out in practice. These incentives need to be aligned with system objectives
 - There is a lack of clarity about elements of the system design, particularly the roles and responsibilities of system participants.
13. The panel acknowledges that MBIE's resources are constrained and the teams working in the building performance regulatory system already have very challenging work programmes, large parts involving non-discretionary work. Nevertheless the panel considers unless resources can be found and deployed to the address these issues it will be difficult to achieve meaningful improvements in the system.

Summary of the System Owner Response

14. In early 2015 the two deputy chief executives responded to the report. They welcomed the panel's report, accepted the findings in principle and provided an update on the next steps. In particular, they noted that MBIE needs to:
- Become a smart regulator
 - Clarify the system's objectives, particularly around productivity and economic efficiency. This will address fundamental questions about the purpose of the Building Act in terms of the priority given to life safety in relation to other objectives listed in the purpose statement (e.g. environmental sustainability, and the extent to which economic efficiency and productivity should be seen as objectives)
 - Establish a long-term strategy and support work programme that aligns the responsibilities of system participants with accountabilities to ensure the incentives that operate within the system are aligned with the intended outcomes
 - Establish feedback loops and intelligence analysis capability to ensure the appropriate information is collected, analysed and disseminated throughout the system on an ongoing basis
 - Develop and implement a workforce capability strategy, including the development of a sector side occupational regulation framework.



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15. MBIE already has a number of initiatives underway that will go some way to addressing the panel's findings, including:
- Work on improving the function of the building consenting system under the auspices of the Consenting Excellence Programme (previously known as the National Building Consent system)
 - Identification of priority building standards to receive levy funding and lower the cost to practitioners accessing those standards essential to the use of the Building code via an online portal. The portal will provide access to the Code, standards, guidance and related BRANZ publications and appraisals
 - A review of the product assurance framework.
16. Further work was also commissioned, including:
- a. Work to address the fundamental questions about the relative priority to be given to the various purposes of the Building Act and the extent to which economic efficiency and productivity should be seen as system objectives
 - b. Development of a sector-wide occupational regulation framework, and a workforce strategy
 - c. Development and promulgation of a long-term work programme (including a rolling Building Code review)
 - d. Establishment of a performance monitoring / intelligence function.
17. A Governance Group comprised of senior managers and chaired by the Andrew Crisp was established to oversee the work following the regulatory review assessment.

Recent Actions

18. Since the report, MBIE has implemented a number of actions to improve its and the building regulatory system's performance, including:
- Commissioning and receiving a report on the purpose of the Act. The report noted that the Act has been amended regularly and there was a balance to be struck between certainty and constantly changing the law. It noted that much could be achieved without proposing another law change and, on balance, it was recommended to focus on what could be achieved without another law change
 - While MBIE had mechanisms for collecting information and data on the performance of the whole system, the establishment of the Sector Trends and Innovation (ST&I) Team enabled a more structured approach to be implemented. The ST&I Team enables stronger intelligence functions that will facilitate the exchange of information on the performance of the building regulatory system and will provide information that creates the ability to target interventions. The Team has been working closely with the BCAs to ensure and enable it to deliver on expectations.
 - In December 2014 the Government responded to the Law Commission Report, *Liability of Multiple Defendants*. That report recommended the liability of Building Consent Authorities be capped. The Commission also recommended



exploring the feasibility of, and implementing, a residential building guarantee scheme. Such a scheme could potentially provide protection for consumers if caps were introduced. The Ministry is expected to provide further advice to the Minister of Building and Housing in early 2016.

- Work on the appropriate framework for occupational regulation within the building sector has progressed and advice is expected to be delivered to the Minister in early 2016.

19. MBIE has committed to a work programme that strengthens its (and other key participants) understanding of the building regulatory system, to ensure all are clear on roles and responsibilities within the system, and create a stronger framework for allocating priorities amongst a large number of competing issues. An output from this work will be a regulatory charter.



Annex 1 - Descriptions of the agencies with regulatory roles in the building performance system

1. MBIE is the central regulator and has a broad range of statutory functions. These include:
 - Responsibility for administration of the Building Act, regulations and the Building Code
 - The development of acceptable solutions and verification methods¹
 - Registering BCAs and monitoring both BCAs and TAs
 - Reporting annually on new building technologies, the provision of guidance on the Building Act and the Building Code
 - Disseminating information and guidance on matters relating to building control
 - Fixing and reviewing the building levy, making determinations about whether particular matters comply with the Building Code and other matters relating to building consents², and a backstop enforcement role
 - Responsibility for the policy relating to the occupational regulation of participants within the system and employs the Registrars of the Building Practitioners Board and of the Electrical Workers Registration Board
 - The appointment of a Building Advisory panel, being a panel of experts, to provide advice on the performance of certain of its functions and on the need for changes in the law.
2. Standards NZ is responsible for the development of building standards³. Many of these are incorporated by reference into acceptable solutions developed by MBIE.
3. The TAs are responsible for developing and implementing policies relating to dangerous, affected, earthquake prone⁴ and insanitary buildings. They also have powers to take action where dangerous earthquake prone or insanitary buildings are identified within their areas. TAs also administer the annual building warrant of fitness scheme.
4. The BCAs are responsible for issuing building consents and carrying out building inspections. There are currently 66 BCAs.
5. The New Zealand Fire Service provides advice to BCAs on the fire safety aspects of consent applications.
6. MBIE has appointed IANZ to accredit BCAs. As part of its function IANZ carries out regular audits of the BCAs.

¹ These are standard setting functions. An acceptable solution is deemed to comply with the Building Code.

² This is a quasi-judicial role aimed at resolving disputes between BCAs and consent applicants or holders. MBIE also has power to make a determination on its own motion. Determinations provide precedents that can be relied on by other participants in the system.

³ The Standards and Accreditation Bill would bring this function into MBIE.

⁴ The Building (Earthquake Prone Buildings) Amendment Bill 2013 would remove the policy making function from Territorial Authorities and give the responsibility to MBIE. This Bill is likely to be reinstated at the first session of the 51st Parliament.



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7. There are a number of agencies involved in the occupational regulation of participants in the system. This includes the Building Practitioners Board, the Architects Registration Board, the Institute of Professional Engineers (which performs the functions of the Registration Authority), the Engineering Associates Board, the Plumbers Gasfitters and Drainlayers Board and the Electricity Workers Registration Board. Energy Safety (now WorkSafe NZ) also has a role in developing regulations and investigating the safety aspects of electrical work and gas fitting.
 8. BRANZ, which does not have statutory functions under the Building Act, provides product appraisals. This is necessary because of the low number of products that have been certified under the product certification scheme. It also carries out research on building matters that is funded by the Building Research Levy Act 1969.
 9. Other participants in the system include owners, owner builders, designers, builders and product manufacturers and suppliers who have statutory responsibilities under the Building Act 2004, as well as the various trades people (such as electricians, plumbers, roofers and painters) involved in building work.
 10. The Minister responsible for the system is the Minister for Building and Housing, although it also touches on a number of other portfolios including Energy, Workplace Health and Safety, and Finance and Economic Development.