

Regulatory Impact Statement

Building Act Review: ensuring compliance with the consumer protection measures in the building and construction sector

Agency Disclosure Statement

Building Act review: Compliance with consumer protection measures

This Regulatory Impact Assessment (RIA) has been prepared by the Department of Building and Housing.

It considers options and analysis for enforcing consumer protection measures agreed to by Cabinet [CAB Min (10) 27/10 refers].

The critical success factor for enforcement of consumer protection measures is whether the proposed approach acts as a sufficient deterrent to enhance behaviour in respect of consumer protection. In this regard enforcement is one element of a wider compliance system that is currently being considered.

The Department is confident that the proposed package will be beneficial overall, even though there is some uncertainty about scale and timing of the net benefits.

An additional success factor is whether the proposed approach to enforcement is a fair, cost effective and appropriate response to enforcing obligations. A generic approach to enforcement has been adopted in respect of offences, responsibilities for prosecutions and penalties. Without an understanding of proposed approach to operationalising enforcement provisions or possible volumes of complaints it is difficult to predict what the impact of the system will be.

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Status quo and problem definition

- 1 Cabinet has agreed [CAB Min (10) 27/10 refers] that the Building Act 2004 should be amended to provide for a range of consumer protection measures.
- 2 The proposals agreed by Cabinet did not include provisions for ensuring compliance with these measures. The question presents whether they should be enforced or not. Ultimately to not provide for enforcement would likely not result in

the desired behavioural change. Therefore, the status quo is not considered a viable option.

Objectives

- 3 The compliance measures aim to provide:
- Sufficient incentive for the market and individuals to comply with consumer protection obligations
 - adequate powers to appropriately hold building contractors to account for unintentional and intentional, one-off and ongoing non-compliance
 - a fair and cost efficient system of enforcement
 - consistency with similar offences in other legislation.

Regulatory impact analysis

Option 1 – providing for infringement offences

- 4 The proposed approach to enforcement is consistent with the Legislation Advisory Committee's Guidelines and offences and penalties that currently exist in the Building Act 2004.

Is it necessary to create an offence?

- 5 In order to gain the desired behavioural change it is necessary to provide an appropriate set of offences and penalties to incentivise compliance.

Is the offence an infringement, summary or indictable offence?

- 6 It is proposed the offences be infringement offences for all but non-compliance with disclosure obligations. It is considered that the criminal record that would result from a successful summary or criminal conviction is too harsh a penalty given the level of offending.
- 7 Provision for a summary offence relating to non-disclosure is already made in section 369 of the Building Act 2004.
- 8 A critical success factor is whether infringement penalties will provide sufficient incentive and whether these penalties will be visible enough to the market. It is acknowledged that setting infringement offences will require the Department to have strong sector networks and be active in promoting its enforcement activities through these networks.
- 9 It is also notable that section 21 of the Summary Proceedings Act provides an avenue to undertake a more visible summary prosecution in respect of serious and systemic offenders. Such a prosecution will not result in a criminal record but will provide a visible means of incentivising behavioural change.

Has an appropriate range and level of penalty been determined?

- 10 It is proposed to set the penalty for non-compliance in regulations. It is envisaged that the penalty will be within the range of \$500 to \$2,000. This is consistent with other infringement fines set in regulations under the Building Act 2004.

11 It is considered the current \$5,000 penalty specified in section 369 is insufficient to act as a sufficient incentive to disclose. It is proposed to increase this penalty to \$20,000. The disclosure statement is the vehicle by which consumers will identify past poor performance, such as disputes or penalties for non-compliance. This information is critical to enabling consumers to make informed decisions regarding who they want to be their principal building contractor.

12 The penalties are in line with others specified in the Building Act 2004.

What are the costs of this system?

13 The costs associated with these offences and penalties fall predominantly on individual practitioners and government. The costs include:

- one-off costs to the Department associated with establishing an enforcement function. These costs are dependant on the approach the Department adopts to operationalising enforcement provisions.
- ongoing costs to the Department of identifying non-compliance and issuing subsequent infringement notices or undertaking prosecutions against serious and systemic offenders. These costs are dependant on the approach the Department adopts to operationalising enforcement provisions. It is also dependant on the volume of complaints the Department receives and the level of serious and systemic non-compliance observed.
- costs to the justice sector associated with collecting infringement fines. The justice sector already has well established procedures for collections. It is likely the increase in these activities resulting from new infringement offences will be marginal and will not have a substantial impact on costs faced by the justice sector.
- costs to the individual practitioner for payment of infringement fines in instances of less serious non-compliance or defending charges laid in respect of serious and systemic non-compliance.

Option 2 – linking penalties to licensing of building practitioners

14 Consideration was given to linking consumer protection obligations to licensing of building practitioners. This is not the preferred approach.

15 The purpose of occupational licensing is to protect consumers' physical wellbeing by ensuring the individual doing the work is competent and therefore reducing the risk of unsafe buildings. The primary purpose of consumer protection measures is to protect consumers' financial wellbeing. Given the different purposes of the two regimes it is not considered appropriate to link licensing to occupational licensing.

16 In addition, consumer protection obligations have been placed on the building contractor. This person will likely be a company director. In the case of large companies this person may not be the one who does the work. As licensing is concerned with who did the work it maybe difficult to link non-compliance with consumer protection obligations to the person who did the work. For smaller companies (one-man-bands) it may be easier to establish this link.

17 In addition, enabling the Board to take subsequent disciplinary action would impose additional administration and discipline costs on the Board. Given the Board is

funded via levying licensed building practitioners it is considered that the additional costs, and disincentives these costs would provide to builders becoming licensed, outweigh the benefits.

Consultation

18 Consultation has been undertaken with the following government agencies:

The Treasury, the Ministry of Economic Development, the Ministry of Consumer Affairs, the Department of Internal Affairs, the Ministry of Justice, the Commerce Commission, the Securities Commission

Conclusions and recommendations

19 It is recommended that the:

- Bill should provide for infringement offences in respect of consumer protection obligations
- penalty for non-compliance should be set in regulations and will come within a range of \$500 to \$2,000
- existing offence relating to non-disclosure (section 369 of the Building Act 2004) should be amended to increase the penalty from \$5,000 to \$20,000
- the Chief Executive of the Department of Building and Housing be specified in the Bill as being responsible for issuing infringement notices
- Bill should not provide for the Building Practitioners Board to consider a penalty for non-compliance with consumer protection obligations as a means for taking disciplinary action against a licensed building practitioner.

Implementation

20 The Department is currently considering an implementation strategy and ongoing enforcement strategy for the Bill as a whole.

21 Development of an approach to the ongoing enforcement of consumer protection measures will include:

- a "least cost" approach to discovering cases of non-compliance with the consumer protection measures
- work with sector leaders to encourage industry self-regulation as far as possible (so that good performers assist, and encourage, others to meet their legal obligations and identify poor performers).

Monitoring, evaluation and review

22 The Department of Building and Housing is currently developing a strategy for monitoring outcomes following implementation of the suite of Building Act review changes.