

## **Regulatory Impact Statement – Owner Builder Exemption**

### **Executive summary**

The Building Act 2004 provides for regulations to prescribe types of building work (restricted building work<sup>1</sup>) that must be carried out or supervised by a licensed building practitioner (LBP). These regulations can not come into force before 30 November 2010. An exemption from the restricted building work requirements is proposed to be provided for owner builders. The proposed exemption will enable owner builders to do any restricted building work they wish to on their homes (or use a family member or friend), but also protect future owners in the event of building failure. Without the exemption, owner builders would be required to engage a licensed building practitioner to carry out restricted building work which would impose costs they do not currently face. The costs of the exemption are minimal and are outweighed by the benefits.

### **Adequacy statement**

1. The Department of Building and Housing confirms that the principles of the Code of Good Regulatory Practice and the regulatory impact analysis requirements, including the consultation requirements, have been complied with.
2. The Department of Building and Housing considers this Regulatory impact statement is adequate. The draft statement was circulated with the Cabinet paper for departmental consultation.
3. The Regulatory Impact Analysis Team with the Treasury has reviewed this regulatory impact statement and considers that it contains the required information, and accurately reflects the analysis undertaken in relation to the proposal.

### **Status quo and Problem**

4. New Zealand has a long “DIY” tradition of people doing building work on their own homes and not using professional builders. At present owner builders (and indeed any person doing building work) can carry out any building work provided they obtain the necessary building consent for the work (where this is required). Minor renovation work like painting and building a low deck is exempt from the requirement for a building consent. However, once restricted building work regulations come into force, 30 November 2010 at the earliest, the DIY tradition will not be able to continue in its current form as all restricted building work will be required to be carried out or supervised by a licensed building practitioner (LBP). At a minimum, this will require owner builders to have any restricted building work they do supervised by a LBP.
5. While restricted building work is yet to be defined in detail<sup>2</sup> it will be a subset of all building design and construction work. It will be work critical to the integrity of a building and, due to its complexity and importance, should only be done by a recognised competent person. The LBP scheme was established (in November

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<sup>1</sup> Restricted building work is yet to be defined in detail, but it will be work that is critical to the integrity of a building such as its structure and envelope.

<sup>2</sup> An Order in Council is required to do this.

2007) to provide for the necessary recognition of competence to do restricted building work.

6. There is little history of problems with building work done by owner builders. Generally this is because they recognise the limits of their skills and get professionals to help when needed. Owner builders also have incentives to do quality work as they are doing it for themselves. The costs of requiring every owner builder, in every case, to employ LBPs to either carry out or supervise restricted building work are likely to outweigh any benefit in ensuring the work is done competently. It may even create a perverse incentive for owner builders to avoid building regulation entirely by not applying for building consents for their work (which they are currently required to do for major building work).

### **Objectives**

7. To provide an exemption from the restricted building work regime under the Building Act 2004 for owner builders that:
  - enables owner builders to do restricted building work on their own homes, or use a friend or family member to do such work on their behalf, and
  - ensures the interests of future owners of the home are protected in the event the owner builder's work (or that done on their behalf) is defective or fails.

### **Options**

8. Three alternative options were considered.

#### Option 1 – risk based threshold

9. Under this option the Order in Council defining restricted building work in detail would exempt certain low risk work from being restricted building work. This work would then be able to be done by any person whether they are an owner builder or another unlicensed person/builder. This option was developed in some detail in 2007 and approved in principle by the then Minister for Building and Construction. The work proposed to be exempt would have included:
  - Alterations to an existing home, provided the floor area was not increased and certain limits on the extent of the alterations (e.g: removing only one structural wall) were met.
  - Construction of a new house of one or two stories, timber framed, simple design, limited size and traditional cladding.
10. This option was not well received by building industry representatives who believed it would allow “cowboy” builders to continue to do significant amounts of work while not having to meet the competency requirements of the LBP scheme. They believed this would seriously undermine the integrity and achievement of the Building Act 2004 reforms.
11. The option also does not provide any direct means of protecting the interests of future owners as there would be no clear record of who did the work and therefore no clarity of who should be held accountable for doing the building work in the event it failed.

12. The main benefit of this option is that it is relatively simple to implement and would support the overall risk-based approach to building regulation reflected in the Building Act 2004 and Building Code. However, it is not certain the descriptions of the exempt building work would capture everything an owner builder wanted to do on their home. To cover every possible scenario would require complex descriptions of the work and the option would no longer have the benefit of being simple.
13. While this option would allow for a significant amount of restricted building work to be done by owner builders, it does not provide the necessary consumer protection for future owners. The option therefore does not meet the public policy objective and the costs and risks of the option outweigh the benefits.

#### Option 2 – registration system

14. Under this option a centralised/national owner builder registration system would be established. Any person wanting to do work as an owner builder would have to be registered as such. Registered owner builders would be able to carry out restricted building work. Most of the Australian states run such registration systems and a New Zealand system could be modelled on them. It would require owner builders to demonstrate an appropriate level of competency to do building work and also require them to pay a fee in order to be registered.
15. The costs of this option are high. Firstly, the cost to central government of setting up and administering the system. Secondly the cost to owner builders of registration fees. As many owner builders have no formal training, it is likely they would also incur costs in doing courses or other work necessary to demonstrate their competence to be registered.
16. The main benefit of this option is it would capture all genuine owner builders and ensure unlicensed “cowboy” builders are not able to masquerade as owner builders and continue to do restricted building work. Also, once registered, the owner builder would be able to do any restricted building work they wanted to do anywhere in the country. Future owners would easily be able to determine who did the building work on their home and their interests would be protected.
17. While this option meets the public policy objective, the benefits of the system are significantly outweighed by the costs.

#### Option 3 – owner builder defence (Preferred option)

18. The preferred option is to provide a definition of who is an owner builder in the Building Act 2004. Any person who meets the definition will be exempt from the restricted building work requirements. To fit in with the way the restricted building work regime is drafted in the Act, the exemption would state an owner builder who meets the definition will not be committing any of the restricted building work offences.
19. The proposed exemption has five elements. These are:
  - a) The person must be an individual
  - b) The person must have a beneficial interest in the land and/or house the restricted building work is done on
  - c) The person must intend to (or already) reside in the house (includes a bach or holiday home)

- d) The person can only do restricted building work on a subsequent property after 5 years has passed since they completed the restricted building work on the previous property; and,
  - e) The person must do the restricted building work themselves, or use a family member or friend, and be accountable for the quality of the work under the exemption.
20. The following process will apply to the exemption:
- A statutory declaration (under the Oaths and Declarations Act 1957) confirming the person meets above requirements must be included with building consent and code compliance certificate applications
  - Building consent authorities and territorial authorities will keep owner builder statutory declarations on their files for future purchasers/owners to be able to search

### **Policy Intent of Exemption as a Whole**

21. The exemption seeks to allow homeowners to do restricted building work on their own homes while protecting future owners of the property in the event of a defect or failure in the building work. In providing for an exemption for owner builders, two key outcomes need to be met to ensure the integrity of the Licensed Building Practitioner scheme is not undermined:
- unlicensed builders and designers are not able to claim to be owner builders in order to carry out restricted building work for other people
  - future purchasers/owners are able to clearly establish whether a licensed building practitioner or an owner builder carried out restricted building work on the house.

### **Individual Elements of the Exemption**

22. The first part of the exemption is to define who is an “owner builder”. Traditionally this is a person (individual) who does building work on their own home (or bach or holiday home too). Often this work is done over a period of many years, incrementally, whether they are building from scratch or making extensions or alterations to an existing house. Suitably skilled owner builders do critical and complex work themselves. Those who are less skilled often hire builders to assist them to do the complex work (including hiring a designer to prepare plans).

#### *Element 1 – person must be individual (the “builder” element)*

23. Only an individual can claim to be an owner builder. A company or trust or other type of “legal person” cannot be an owner builder as they are not able to both own and build. Only an individual can physically carry out building work. Types of ownership arrangements the individual can be party to are covered in element 2.

#### *Element 2 – person must have beneficial interest in the land and/or house (the “owner” element)*

24. The person must either own (themselves or jointly with another person) or have a beneficial legal interest in the land and/or house the building work is being done on. It is sufficient for that right to be any form of legal interest, e.g: beneficiary of a trust, shareholder of a company, co-ownership of Maori land, long term lease etc.

*Element 3 – person must intend to reside in the house*

25. An owner builder must genuinely intend to occupy (or already occupy) the house and not be building (or altering) it only to sell it or rent it to someone else. Occupation does not need be permanent or exclusive, intermittent occupation will be sufficient so as to include places like holiday homes. While intention can be difficult to prove, this element is important for ensuring only true owner builders consider claiming the exemption. This element also makes it clear the exemption only applies to residential buildings; a person cannot (for instance) claim the exemption to build a factory or office building.

*Element 4 – Person can only do restricted building work on a subsequent property after 5 years has passed since they completed the restricted building work on the previous property.*

26. While it is blunt, this element is the key to ensuring unlicensed builders do not use the exemption as a loophole to get around the Licensed Building Practitioner scheme. An owner builder can do restricted building work on the same property as often as they like (e.g: gradually doing alterations to a home periodically over a number of years). However, they can only do restricted building work on a subsequent property after 5 years has passed since they completed the restricted building work on the previous property. The five year period reflects that homeowners in New Zealand on average change houses every seven years. It is acknowledged however, that the period does limit 'true' DIYers, especially those working on investment properties.
27. The five year period is also in line with owner builder regulation in Australia. All Australian states require an owner builder to obtain a permit (and in NSW and Queensland, take a course) before they undertake building work on their home. Owner builders are limited to one permit every 5-6 years in most states, except for Victoria (3 years).
28. This element is considered essential to prevent people working professionally as builders passing themselves off as serial do-it-yourselfers. In some Australian states, for example, 30 – 50% of all new residential work is built in this way.<sup>3</sup>

*Element 5 – person must do the restricted building work themselves or use a family member or friend.*

29. The proposed exemption will enable the owner-builder to carry out restricted building work on their own homes, but also allow them to use a family member or friend. The building owner would still need to take accountability for the quality of the work under the exemption, and future buyers would have access

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<sup>3</sup> The Department of Building and Housing is aware of estimates of 30% in New South Wales, 60% in South Australia, 40% in Victoria.

to information that the house had been built under the exemption to assist them to make an informed purchasing decision.

30. This may not be easily enforced, notwithstanding the statutory declaration that a home owner will need to sign attesting that the elements of the exemption have been met.
31. The intention is to reflect the reality that a home owner who has a retired builder as a friend or relative, will use them to carry out or supervise the building work. The exemption however, seeks to avoid the development of a 'secondary' industry where unlicensed practitioners promote themselves to unsuspecting home owners as being able to do their building work under the owner builder exemption.

#### *Exemption applies to design restricted building work*

32. Requiring a licensed designer to undertake the designing of restricted building work (rather than an owner builder designing such work themselves) was questioned during consultation.
33. On the one hand, given that construction is based on the design, a design done correctly will reduce the risk that the construction will be faulty or defective. As the design of restricted building work relates to design of building elements that are integral to the integrity of the building (not just any design work), an argument can be made that owner builders must employ a licensed building practitioner to do any design restricted building work.
34. On the other hand, if an owner builder is competent to do the construction work then they may also be competent to do design. There is little hard evidence of failure associated with owner-builder design, or that do-it-yourself design is widely practiced. Anecdotally, owner builders use simple designs that don't need formal qualifications or training to prepare. These are likely to be 'off the shelf' designs, largely based on compliance documents published and made freely available by the Department of Building and Housing, and will be subject to the usual consent checking processes applied by building consent authorities.
35. On balance therefore, the proposed exemption for owner builders should also include design work.

#### **Process that will apply to the exemption**

*A statutory declaration (under the Oaths and Declarations Act 1957) confirming the person meets above requirements must be included with building consent and code compliance certificate applications*

36. A person who meets all 5 elements of being an owner builder will be able to do restricted building work without having to use/employ licensed building practitioners.
37. Currently the Building Act provides that it is an offence for a non-licensed person to carry out or supervise restricted building work. Therefore, the Act needs to be amended to state that a person who meets the owner builder exemption will not be committing a restricted building work offence.

38. To avoid any allegation that an offence is being committed, the exemption will need to be claimed at the time a building consent and a code compliance certificate are applied for. This is because it is at these times that a building consent authority will require information from the applicant about who is doing, or has done, the restricted building work.
39. Accordingly, to claim the owner builder exemption:
- The application for the building consent and code compliance certificate must include a statutory declaration (under the Oaths and Declarations Act 1957) from the owner builder stating they comply with all 5 elements of being an owner builder.
  - The owner builder must apply for the building consent and code compliance certificate i.e.: the application must be in the name of the owner builder (though a duly authorised agent could sign and physically lodge the application) – this is a current requirement of the Act and is mentioned here for completeness.

*Building consent authorities and territorial authorities will keep owner builder statutory declarations on their files for future purchasers/owners to be able to search.*

40. To ensure the interests of future owners are protected they need to be able to identify who did the restricted building work on their home. This requires appropriate disclosure of work done by owner builders.
41. The purpose of disclosure is to enable future owners to identify a person who they can claim against for compensation for any defects or failures in building work. The statutory declaration proposal for owner builders will ensure that information about the restricted building work done by owner builders is kept on territorial authority building files. The information will be available to any prospective purchaser in the future or at the time when any defects are discovered and it is necessary to find out who did the work.
42. Licensed building practitioners are already required by the Act to disclose the restricted building work they do in a memorandum that will be held on territorial authority files.
43. Various disclosure options were considered - disclosing information, in writing, to any purchaser; recording work done by owner builders on the land title; and, including information on owner builder work on any Land Information Memorandum issued for the land. As a result of sector consultation, it was decided that none of these disclosure mechanisms will achieve both timely and appropriate provision of information to future owners/purchasers.
44. Building consent authorities and territorial authorities are not required to verify the declaration or enforce the provisions of the exemption. However, if in the course of its activities a building consent authority or territorial authority becomes aware that the information provided is incorrect, then it has the power to take enforcement action if it chooses.

45. In terms of protection to future home owners, the Building Act Review is to examine options for increasing the support for consumers through greater information and disclosure, and improving the mechanisms for resolving disputes and providing consumer redress.

## **Analysis**

46. The preferred option has greater simplicity than Alternative Option 1 and significantly less cost than Alternative Option 2. The proposed exemption would impose minimal costs on owner builders in addition to those they are already required to incur (fees for processing building consents, inspections etc).
47. In 2008, Local Government New Zealand expressed concerns the exemption would result in significant additional work for territorial authorities. For example, LGNZ feel councils will need to work closely with owner builders to ensure they understand and follow the correct requirements and also that council will incur additional work in processing of the statutory declaration. However, the number of owner builders who choose to use the exemption will be small. Best estimates are that less than 2% of restricted building work will be done by owner builders under the exemption. Spread across all councils the impact on workloads will be minor, if any. In individual cases where councils are required to do significantly more work, they are able to recover the costs of that work through the fees they charge under the Building Act.
48. The main risk of the preferred option is that unlicensed builders will manufacture situations to cover their work so they can claim to be an owner builder, or that a 'secondary' industry will develop whereupon unlicensed practitioners promote themselves to unsuspecting home owners as being able to do their building work under the owner builder exemption.
49. However, this risk is mitigated by the requirement for a person claiming the exemption to sign a statutory declaration confirming they meet the definition of an owner builder. Making a false statutory declaration is a criminal offence. It is also an offence, liable to a fine up to \$5,000 under the Building Act 2004 to make a false or misleading statement.
50. In addition, officials will work with Parliamentary Counsel Office during drafting to identify what offences could be established to deter unlicensed builders from promoting themselves as being a family member or friend so as to take advantage of the exemption.
51. There is also some risk the exemption will increase the possibility of building failure due to restricted building work being done by an owner builder who has not had to demonstrate they are competent to do it. This will adversely affect consumers. However, this risk will be mitigated by the current building consent and inspection process and the focus of the Building Act review in terms of dispute resolution and redress (referred to in paragraph 45 above).
52. The preferred option would have limited impact on the stock of regulation and any costs of implementing and monitoring the legislation will be met from within existing central government resources. While the exemption will introduce new provisions into the Building Act 2004 (providing for the exemption), the net effect



will be to reduce the effects of regulation on owner builders as it will be easier to comply with the exemption than the restricted building work regime.

### **Implementation and review**

53. The proposal will be given effect to in amendments to the Building Act 2004.
54. The Department of Building and Housing will keep the sector informed of progress of the implementation of the exemption through its regular communications.
55. Once the exemption provisions are in the Building Act 2004, the Department of Building and Housing will set up a process for monitoring the use of the exemption. This will involve getting information from building consent authorities on how often the exemption is used. There is power under the Act to make regulations to require building consent authorities to give this sort of information to the Department. Accordingly, regulations will be made for this purpose once the exemption is in place (and will be the subject of separate, later, Cabinet approval).

### **Consultation**

56. A discussion document titled "Proposal for an owner builder exemption to the restricted building work regime" was publicly released on 30 June 2008. Submissions on the document closed on 1 August 2008.
57. The Department received 43 submissions from a wide range of people: owner builders, council officers, professional builders and other trades and retired building professionals. The majority of views were in favour of the proposed exemption, though strong opposition was also expressed.
58. Those opposing did so either because they believe there should be no restrictions at all on what building work people can do on their own homes, or they thought the exemptions went too far and owner builders should not be able to do any restricted building work without the assistance of a LBP or demonstrating they have the competence to do the work.
59. Comments on the detail of the exemption resulted in some changes to the original proposals which are reflected in the final proposals set out in the attached Cabinet Committee paper.
60. The following government departments were sent copies of the discussion document, a draft of the Cabinet Committee paper and a draft of the regulatory impact statement to comment on in 2008: The Treasury, Ministry of Consumer Affairs, Ministry of Economic Development, Department of Internal Affairs, Department of Conservation and Land Information New Zealand. Local Government New Zealand was also provided with a copy of the discussion document and the opportunity to comment on a draft of the Cabinet Committee paper and a draft of the regulatory impact statement.
61. The RIS was re-circulated to the Treasury, Ministry of Economic Development, Department of Prime Minister and Cabinet, Ministry of Consumer Affairs, Department of Internal Affairs, and Department of Labour in July 2009. It has been revised based on their feedback.