

Office of the Minister for Building and Construction

Cabinet Economic Growth and Infrastructure Committee

## **Regulations for consumer rights and remedies in relation to residential building work**

### **Proposal**

- 1 I seek agreement to make regulations to implement new consumer rights and remedies that were added to the Building Act 2004 by the Building Amendment Act 2013.

### **Executive summary**

- 2 The Building Amendment Act 2013 gives effect to Cabinet decisions made in 2010 following a review of the Building Act 2004. The Building Amendment Act 2013 inserts a new Part 4A into the Building Act 2004 to enhance consumer rights and remedies in relation to residential building work. Some of the detail of the new rights and remedies is required to be prescribed in regulations.
- 3 This paper proposes regulations be made for:
  - a minimum price for residential building work (\$20,000) that requires a written contract and provision of a checklist and disclosure information
  - the contents and form of information that building contractors must provide to clients, including default contract terms (see Appendices)
  - infringement offences and fees for failing to comply with the requirements of Part 4A of the Building Act 2004
  - the commencement date for Part 4A of the Building Act 2004 and the regulations to be 1 January 2015.
- 4 Making the regulations is one of the pre-conditions set by Cabinet in 2010 that must be in place before a new risk-based consenting system can be activated<sup>1</sup>. The risk-based consenting system is expected to deliver significant cost reductions (in the order of \$140 million) across the whole building consent system. Enhanced consumer rights and remedies and risk-based consenting are the key regulatory changes required to achieve the Government's objectives of an efficient, productive and accountable construction sector [CAB Min (10) 27/10, paragraphs 2 – 4, refer].
- 5 The new consumer rights and remedies are a significant change for the construction sector and require as much lead-in time as possible to inform the sector about the changes before they come into force. While the constitutional conventions about the pre-election period do not preclude making the regulations before the General

---

<sup>1</sup> The risk-based consenting system was enacted in the Building Amendment Act 2012, but is not yet in force because the pre-conditions are not all in place.

Election in September 2014, there would not be sufficient lead-in time to inform the sector about the regulations if they come into force before September. A commencement date of 1 January 2015 is therefore recommended.

## Background

- 6 The Building Act Review carried out in 2009/2010 resulted in significant amendments being made to the Building Act 2004 to improve the administration of the building consent system and provide for clearer accountabilities for building work. The amendments, along with other non-regulatory initiatives, are intended to improve the productivity, efficiency and accountability of the building and construction sector [CAB Min (10) 27/10, paragraphs 2 – 4, refer].
- 7 The Building Amendment Act 2013 inserts a new Part 4A into the Building Act to enhance consumer rights and remedies in relation to residential building work. Some of the details of the rights and remedies are required to be prescribed in regulations, these regulations were foreshadowed in the decisions Cabinet made on the Building Act Review in August 2010. As part of those decisions, Cabinet agreed that regulations would be drafted to prescribe:
  - a \$20,000 price threshold for the mandatory written contracts for building work
  - details of information to be disclosed by building contractors
  - details of information to be included in a checklist given to consumers
  - the wording to be included in the written contracts in relation to warranties, remedies, and reciprocal obligations on consumers
  - the wording to be included in written contracts in relation to the process that will be followed in the event of a dispute
  - details of the information and documentation relating to maintenance and product warranties to be provided by building contractors to consumers on the completion of the building work
  - details of the sanctions for non-compliance with the new requirements for written contracts, disclosure statements and checklists[CAB Min (10) 27/10, paragraph 13 refers].
- 8 The August 2010 Cabinet decisions also noted that strengthened contracting requirements and related measures in the residential construction sector are a pre-condition for implementing a new risk-based consenting system [CAB Min (10) 27/10, paragraph 18.3 refers]. The risk-based consenting system<sup>2</sup> is expected to deliver significant cost reductions for the construction sector (in the order of \$140million) as the amount of checking and inspections will be better aligned with the risk of the building work involved.
- 9 Subsequently, in February 2011, Cabinet agreed the sanctions for non-compliance would primarily be infringement offences with the maximum penalty to be set in regulations and within the range of \$500 to \$2000 [EGI Min (11) 1/8, paragraphs 5 to 7 refer].

## Comment

- 10 To implement the amendments made to the Building Act by the Building Amendment Act 2013, regulations are required to prescribe:

---

<sup>2</sup> The risk-based consenting system was enacted in the Building Amendment Act 2012, but is not yet in force because the pre-conditions are not all in place.

- the minimum price for residential building work that will trigger the requirements to provide a checklist and disclosure information and to have a written contract
- the contents and form of information that contractors must provide to clients, including default contract terms
- infringement fees for failing to comply with the new requirements
- the date for Part 4A of the Act to come into force.

Risk-based consenting cannot be activated until after these regulations are made. It is therefore desirable the regulations be made as soon as possible to prevent any unnecessary delay in activating risk-based consenting.

11 The new consumer rights and remedies are a significant change from the status quo for the construction sector. A commencement date of 1 January 2015 will give the Ministry of Business, Innovation and Employment (“the Ministry”) sufficient time to provide information and education to the sector about the content of the regulations so the sector is prepared for when the regulations come into force.

12 I propose the content of the regulations be as follows:

- The prescribed minimum price of building work for which written contracts and the provision of a checklist and disclosure information is required: \$20,000.

Consultation with the sector confirmed the original Cabinet decision to set the price at this level for mandatory written contracts remains appropriate and for simplicity the same price should apply to the requirements to provide a checklist and disclosure information. The regulations should also state how the price is to be calculated to ensure consistent application of the requirement. The Building Act already references section 10 of the Goods and Services Tax Act 1985 to calculate the estimated value of building work for the purposes of payment of the building levy. It is appropriate to use the same provision for calculating the minimum price for the consumer rights and remedies. To deter building contractors from splitting contracts to avoid compliance, the regulations should state the price is the total of all work being done by the contractor, regardless of whether it is covered by one or more contracts.

- A prescribed form for a checklist that contains the content set out in Appendix 1.

The proposed content was tested with the sector and influenced by research the Ministry commissioned on consumer experiences in the residential building sector. The content (together with the disclosure statement referred to below) ensures consumers get enough information “upfront” without it being overwhelming and will be backed up by comprehensive information and advice provided by the Ministry. The checklist will be published by the Ministry, with Ministry branding, for building contractors to print or provide electronically to their clients.

- A prescribed form for a disclosure statement that contains the content set out in Appendix 2.

The proposed content was tested with the sector and reflects information building contractors will readily be able to provide. The format of the disclosure information will be left up to the building contractors to determine, though the Ministry will provide a template they can use if they wish to.

- The prescribed minimum content of contracts as set out in Appendix 3.

The proposals reflect the provisions commonly found in the various standard form contracts used by the sector. I expect all existing standard form contracts will comply with the regulations or only need minor modifications to comply.

- The prescribed clauses, that are stipulated to be included in a contract that does not contain all of the minimum content or a contract that is not in writing, set out in Appendix 4.

The prescribed clauses reflect commonly used provisions in standard form contracts used by the sector and, in particular, are consistent with the wording of the NZ Standard 3902:2004 (Housing, alterations and small buildings contract).

- The prescribed information to be provided to the client after the building work is completed as set out in Appendix 5.

It is not proposed to prescribe information to be provided to the territorial authority, even though this is possible under the Act. All the appropriate information will already be collected by the territorial authority as part of the building consent process so it does not need to be duplicated in the regulations. The proposed information to be provided to the client is limited in scope to the kinds of information the vast majority of building contractors will readily be able to provide.

- Infringement fee for breach of checklist, disclosure or contract requirements: \$500.

The fee is in line with the existing infringement fees for other similar offences under the Act and within the range previously approved by Cabinet (see paragraph 8).

- Any necessary consequential amendments to existing regulations, including updating existing forms to reflect the amendments made in the Building Amendment Act 2013.
- Commencement date: 1 January 2015.

## **Consultation**

13 The Ministry consulted with representatives of the construction sector and consumers on proposals for the content of the regulations. The consultation included a face-to-face workshop in February 2014. Feedback and comments received are reflected in the proposals in this paper.

14 The Ministry of Justice and The Treasury were consulted on this paper. The Ministry of Justice confirmed the proposed infringement fees are appropriate. Comments received from The Treasury are reflected in the content of this paper. The Department of Prime Minister and Cabinet was informed about this paper.

## **Financial implications**

15 The proposals in this paper have no financial implications.

## **Human rights**

16 The proposals are not in any way inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

## **Legislative implications**

17 Regulations under the Building Act 2004 are required to implement the proposal. The regulations should come into force on 1 January 2015.

## Regulatory impact analysis

- 18 The regulatory impact of the proposals in this paper was considered when Cabinet made its original decisions on the Building Act Review. Two regulatory impact statements were prepared, one for the new consumer rights and remedies [Appendix 1 to EGI (10) 162 “Building Act Review: Overview of Reform Proposals (Paper 1)” refers] and one for the new offences relating to the rights and remedies [pages 9 – 12 of EGI (11) 4 “Building Act Review: Ensuring Compliance with the Consumer Protection Measures in the Building and Construction Sector” refers]. Both regulatory impact statements have been published on the Ministry’s website<sup>3</sup>.
- 19 The effectiveness of the regulations proposed in this paper will be monitored and evaluated as part of the wider monitoring and evaluation of the Building Act Reforms programme.

## Publicity

- 20 The new consumer rights and remedies will be a significant change for the building and construction sector. Currently there is minimal regulation for consumer rights and remedies and there is large information asymmetry between building contractors and their clients. The new consumer rights and remedies, that will be brought into force by the regulations proposed in this paper, will place the obligation on building contractors to communicate better with their clients and take responsibility for reducing the information asymmetry. Building contractors will need some time, and support from the Ministry, to become familiar with the changes and develop good practices for meeting their obligations.
- 21 To maximise the time available to help the sector prepare for when the regulations come into force, information and education will be provided to the sector about the decisions sought in this paper. A copy of the paper will be published on the Ministry’s website. The Ministry will partner with key sector organisations to deliver workshops and trade magazine articles to advise the sector about the new requirements. These activities will take place while the regulations are being drafted and in the period between when the regulations are made and when they come into force.
- 22 The Ministry is developing a campaign of advice, information and education for when the regulations come into force. The content and approach for this campaign (including the budget) were approved by the Minister for Building and Construction in 2011. The low-level information and education referred to in paragraph 21 will be an important lead-in to the campaign.

## Recommendations

- 23 I recommend the Committee:
- 1 **note** regulations are required to prescribe the detail of new consumer rights and remedies enacted by the Building Amendment Act 2013, including an Order in Council to bring the provisions into force;
  - 2 **note** in August 2010 Cabinet agreed the price threshold for mandatory written contracts for building work would be \$20,000 [CAB Min (10) 27/10, paragraph 13.1 refers];

---

<sup>3</sup> <http://www.dbh.govt.nz/ris-building-act-review> and <http://www.dbh.govt.nz/buildingactreview-consumer-support>

- 3 **agree** to affirm the decision referred to in paragraph 2 and further agree the same price threshold (\$20,000) will apply to the requirement to provide a checklist and disclosure information;
- 4 **agree** the price threshold referred to in paragraph 3 be calculated in accordance with section 10 of the Goods and Services Tax Act 1985 and be based on the total price for all work being done by the building contractor, regardless of whether it is covered by one or more contracts;
- 5 **note** in February 2011 Cabinet agreed sanctions for breaches of the new consumer rights and remedies would be infringement offences with maximum penalties within the range of \$500 to \$2000 [EGI Min (11) 1/8, paragraphs 5 to 7 refer];
- 6 **agree** the infringement fee for breach of the checklist, disclosure and contracting requirements will be \$500;
- 7 **agree** forms be prescribed for:
  - 7.1 A checklist as set out in Appendix 1 to this paper;
  - 7.2 Disclosure information as set out in Appendix 2 to this paper;
- 8 **agree** regulations be made to specify the:
  - 8.1 Minimum content of written contracts for residential building work as set out in Appendix 3 to this paper;
  - 8.2 Provisions that will be part of a contract for residential building work as set out in Appendix 4 to this paper;
  - 8.3 Information the building contractor must provide to the client after the building work is completed as set out in Appendix 5 to this paper;
  - 8.4 commencement date of 1 January 2015;
- 9 **invite** the Minister for Building and Construction to issue drafting instructions to the Parliamentary Counsel Office to draft regulations to implement the proposals in this paper and any consequential amendments to existing regulations that may be required to implement the proposals or as a result of the amendments made in the Building Amendment Act 2013;
- 10 **authorise** the Minister for Building and Construction to make any decisions on minor and technical matters that may arise during the drafting process that are consistent with policy decisions;
- 11 **authorise** the Ministry of Business, Innovation and Employment to place a copy of this paper on its website.



Hon Dr Nick Smith  
Minister for Building and Construction

26 / 6 / 2014

## Appendix 1 – Proposed content for prescribed form for checklist

### About this checklist:

- The building contractor is the person or company you have asked to do building work for you. The building contractor may not be a builder; it could be a plumber, electrician or other tradesperson you are dealing with directly who is doing building work for you.
- If the building work is estimated to cost \$20,000 (including GST) or more, the building contractor is required to give you this checklist and a document containing disclosure information about the building contractor before you sign a contract for doing the building work.

### Step 1 – get informed

All building work must comply with the provisions of the Building Act 2004. You can read the Building Act 2004 on the New Zealand Legislation website: [www.legislation.govt.nz](http://www.legislation.govt.nz).

“**Building work**” is any work done in relation to the construction or alteration of a building. This includes any work done on your home or other structures such as garage, retaining walls or fences. It includes work like painting/decorating and landscaping if it is part of the construction work, re-decorating work that does not require any construction work is not “building work”. If landscaping work does not include any structures (e.g: pergolas or retaining walls), it is not “building work”.

All building work requires a building consent unless it is exempt under the Building Act 2004.

- Generally only simple or low-risk work is exempt, certain gas and electrical work is also exempt. Find more information at [www.builditright.govt.nz](http://www.builditright.govt.nz).
- Building work that is significant or higher risk (such as structural alterations) is required to be carried out or supervised by a licensed building practitioner as well as requiring a building consent. For more information on these rules go to: [www.dbh.govt.nz/builditright-homeowners-what-is-restricted](http://www.dbh.govt.nz/builditright-homeowners-what-is-restricted).

### Step 2 – Project structure and management

Building projects don't run themselves. Decide how you want to manage the building project.

- A few different roles are needed on a building project. You need someone to manage timelines and costs, someone to manage subcontractors, someone to liaise with the council, someone to make decisions about the design of the work. You can do some of this yourself, but if you are not knowledgeable about the building work process, you should get help from a suitably qualified and experienced person.
- Be really clear about the scope and size of the project and get detailed plans up front, these decisions will have a big impact on the final cost.
- It is a legal requirement for you to have a written contract if the building work is going to cost more than \$20,000 (including GST). Get legal advice to ensure your contract complies with the legal requirements and you understand your rights and obligations.
- Be clear with your building contractor about who is doing the building work, who is supplying the materials and who is responsible for making design and change decisions during the project.

### **Step 3 – Hire competent building contractors**

The lowest price is not always the best price.

- Get detailed quotes (not estimates) for the building work. Look at the detail of the quotes and make sure they cover the same scope of building work and the same materials and fixtures so that you are comparing “apples with apples”.
- Be confident your building contractor has the skills and resources to carry out the project:
  - Ask around about them and get references for other work they have done
  - Are they a licensed building practitioner or have other appropriate qualifications? Go to: [www.dbh.govt.nz/builditright-homeowners-what-is-an-lbp](http://www.dbh.govt.nz/builditright-homeowners-what-is-an-lbp)
  - Do they have insurance to cover the work while it is being carried out?
  - Who are their employees and what sub-contractors will they use on the project?
  - If it is a company, look up its records on: [www.business.govt.nz/companies](http://www.business.govt.nz/companies) and if there is anything there that concerns you, ask the building contractor about it.

### **Step 4 – Get it in writing**

Have a written contract for a fixed price. Regulations made under the Building Act 2004 require contracts to include certain information such as:

- The start date and completion date
  - A description of the building work
  - The payment process, including dates or stages for payment and how payments will be invoiced, made and receipted
  - Dispute resolution processes to be followed
  - How variations to the building work will be agreed
- Make sure your contract complies with the regulations.

Ensure you have the funds to pay for the project before the work begins and that you understand the payment terms agreed with the building contractor. Never agree to pay more than the cost of the work that has been completed, or materials supplied, at the time you make the payment.

Have a clear line of communication with the building contractor through the site foreman, project manager or person who has authority to speak on behalf of the building contractor. This person should be identified in the disclosure information the building contractor has given you with this checklist.

Be clear when you are making decisions along the way, as to whether you are impacting your contract and costs. If you do decide to make a change, keep track of the impact of that change.

All residential building work is covered by implied warranties in the Building Act 2004 that address matters such as workmanship and building work being fit for purpose. To find out more go to: [www.builditright.govt.nz](http://www.builditright.govt.nz)

### **Step 5 – resolving disputes**

It is in both your and the building contractor’s interests to deal with any disputes as they arise.

- If you have concerns about the building project, raise them with the building contractor (or the nominated contact person) as soon as possible.

- Raise your concerns in good faith and use the dispute resolution processes agreed in your contract or go to [www.builditright.govt.nz](http://www.builditright.govt.nz) for information on your options.
- If you have received an invoice you have concerns about, you should provide a clear response to the building contractor outlining any areas you are unhappy or concerned about.
- If you do not make a payment when it is due, the building contractor may force you into a dispute resolution process before you have a chance to explain why you have not paid. Simply withholding payment often makes things worse.

### **More information**

For more information to help you ask the right questions and understand the answers you are given, please go to [www.builditright.govt.nz](http://www.builditright.govt.nz) or call the Ministry of Business, Innovation and Employment on 0800 242 243.

## Appendix 2 – Proposed content for prescribed form for disclosure information

1. Information about the business the consumer is contracting with to carry out the building work, including:
  - Name of building contractor (full legal name) and whether the building contractor is an individual, partnership or limited liability company and the date the partnership or company was formed.
  - The building contractor's business address or P O Box number, contact phone number/s and e-mail address.
  
2. Information about the key contact person (e.g: project manager or site foreman) who, as far as the building contractor is aware, will be involved in carrying out or supervising the building work. This person must be available to the client to discuss any aspect of the building project. The building contractor may change the person before or after a contract is signed provided the building contractor notifies the client if this happens. Information about the contact person must include:
  - Name of contact person
  - Contact phone number/s
  - Role in the building project
  - Relevant qualifications
  - Relevant skills and experience
  - Licensed building practitioner number (if applicable)
  
3. Information about insurance policies the building contractor has, or intends to have, in relation to the building work, including whether the building contractor has policies of the following types:
  - Contract works
  - Professional indemnity
  - Public Liability
  - Other policies not described above that are relevant

The information must specify the amount of the cover and any relevant exclusions on policy coverage.

4. Information about any guarantees or warranties the building contractor offers in relation to the building work, including whether the building contractor offers any of the following:
  - Product warranty – product covered must be specified
  - A guarantee or warranty about completion or non-completion of the building work
  - A guarantee or warranty about any defects in the building work
  - Other guarantees or warranties not described above that relate to the building work or products or materials used in the building work

The information must specify the period of time the guarantee or warranty is offered for and any limits or exclusions on coverage.

### **Appendix 3 – Proposed minimum content of contracts**

All residential building contracts must contain information on the following matters:

1. Names and physical and postal addresses (including address for service of notices) of the parties, including all relevant contact details such as telephone numbers and email addresses.
2. The address or location description of the site where the building work will be carried out.
3. Date the contract is signed by both parties.
4. The expected start date and completion date, including how possible delays will be dealt with, e.g: “force majeure” events.
5. Contract price or a method by which the contract price will be calculated (e.g: fixed hourly rate with materials invoiced separately by supplier).
6. A description of the building work covered by the contract, including (where known) materials and products to be used and who will be carrying out and/or supervising the work.
7. Which party will be responsible for obtaining building consents, and any other approvals required, to carry out the building work.
8. The payment process, including dates or stages for payment and how payments will be invoiced, made and receipted.
9. How notices will be given by one party to the other.
10. Dispute resolution processes to be followed.
11. How variations to the building work covered by the contract will be agreed.
12. How any defects in the building work will be remedied, including a reference to the existence and application of the implied warranties in section 362I of the Building Act 2004.
13. An acknowledgment the client has received the checklist and disclosure information under section 362D of the Building Act 2004.

## **Appendix 4 – Proposed provisions stipulated to be included in non-compliant contracts**

The following subjects will be clauses that are taken to be included in the contract if:

- (a) a residential building contract does not contain information on any or all of the matters listed below, or
- (b) there is no written contract for residential building work.

### **1. Which party will be responsible for obtaining building consents, and any other approvals required, to carry out the building work**

The clauses will provide that the building contractor is responsible for obtaining building consents and other approvals on behalf of the client and include a requirement for the building contractor to inform the client if any building consent is issued subject to conditions that may require a variation to the agreed building work. The process for agreeing any variation will be the same as described in matter 2 below. The building contractor will be required to provide a code compliance certificate to the client before submitting its final payment claim.

### **2. How variations to the building work covered by the contract will be agreed.**

The clauses allow the client to ask the building contractor to carry out variations to the building work and require the parties to agree, in writing, on the following matters:

- (a) a description of the building work required to achieve the variation;
- (b) the effect on any building consents obtained for the building work;
- (c) the effect (increase or decrease) on the building contractor's quoted or estimated price for the building work; and
- (d) the effect on the due date or the estimated due date for completion of the building works.

### **3. The payment process, including dates or stages for payment and how payments will be invoiced, made and receipted**

The clauses will provide for the building contractor to submit a payment claim (in accordance with the requirements of the Construction Contracts Act 2002) for the agreed contract price following the latter of:

- (a) the completion of the building works; or
- (b) the building contractor providing to the client any required code compliance certificates.

### **4. Who will be carrying out and/or supervising the work**

The clauses will allow the building contractor to engage subcontractors on the proviso the building contractor cannot subcontract all of the building work. The building contractor will be responsible and liable for:

- (a) any building work undertaken by its subcontractors; and
- (b) the quality and performance of any materials supplied by its subcontractors.

### **5. Dispute resolution processes to be followed**

The clauses will require the parties to serve written notice of the nature of any dispute and use their best efforts to resolve any dispute through good faith negotiations. If negotiations do not resolve the dispute, then either party will be able to refer the dispute to mediation by a mediator agreed between the parties or appointed by the President of New Zealand Law Society. If the dispute is not resolved through mediation, then either party will be able to refer the dispute to adjudication under the Construction Contracts Act 2002. Each party will be required to continue to perform its obligations under the contract as far as practicable given the nature of the dispute.

### **6. How notices will be given by one party to the other**

The clauses will require all notices under the contract to be in writing and hand delivered or sent by facsimile, email or post to the parties' respective advised addresses. Notices will be considered as received:

- (a) if personally delivered, when delivered; or
- (b) if posted, three (3) business days after posting; or
- (c) if sent by facsimile, upon production of a transmission report by the machine from which the facsimile was sent which indicates the facsimile was sent in its entirety to the facsimile number of the recipient; or
- (d) if sent by email, at the time the email leaves the communications system of the sender, provided that the sender does not receive any error message and has obtained confirmation that the email has been delivered.

## **Appendix 5 – Proposed information to be provided to client after building work is completed**

The building contractor must give the following information to the client after the building work is completed:

1. A copy of any current policy of insurance the building contractor holds in relation to the building work done under the residential building contract. This does not include policies that expire on completion of the building work.
2. A copy of any guarantees or warranties that apply to materials or services that comprise the building work, including information about how to make a claim under the guarantee or warranty, whether the guarantee or warranty is transferrable and whether it needs to be signed and returned to the issuer in order to be valid.
3. Information about the processes and materials to be used to maintain any element of the building work where maintenance is required to meet the durability requirements of the Building Code or will affect the validity of any applicable guarantee or warranty.