

BUILDING ACT 2004

Introduction

The Building Act 2004 (“the Act”) is designed to remedy the defects in the 1991 Act and improve the quality of buildings in New Zealand. It continues the reform process that commenced with the introduction of the Construction Contracts Act 2002 and the Weathertight Homes Resolution Services Act 2002 (now the Weathertight Homes Resolution Services Act 2006).

This paper discusses some of the key changes that will be introduced under the Act.

Department of Building and Housing

On 30 November 2004 the Building Industry Authority will cease to exist and its functions and powers will be assumed by the new Department of Building and Housing.

The Department will administer the existing building code whilst commencing a review of the code with the aim of a comprehensively revamped building code being introduced by 30 November 2007.

Licensing of Building Practitioners

From 30 November 2004 building practitioners will be subject to a licensing and disciplinary regime. By 30 November 2009 all “restricted building work”, which will be defined as work that is critical to the integrity of a building, will have to be carried out by a licensed building practitioner.

In the meantime, regulations will be enacted that define the classes of building work and building inspection work for which licences will be available.

Building work has a broad definition under the Act and includes site, design, prefabrication, demolition and removal work.

Applications for licences will be made to the Registrar of Licensed Building Practitioners but trades and professions, such as architects and quantity surveyors, that are already regulated under another Act be treated as if they are licensed under the Act.

Licence holders will be periodically assessed to determine whether they meet the minimum standards for licensing. A register of licensed building practitioners will be established and the public will be able to search the register for licence holders and their track records.

Building Practitioners Board

Any person may complain to the Board about the conduct of a licensed building practitioner. The Act prescribes the situations that the Board may take action against a building practitioner. Some of these are:

- (a) a building practitioner has carried out building work in a negligent or incompetent manner;
- (b) a building practitioner has carried out building work of a class or type that they are not licensed to undertake; or
- (c) a building practitioner has carried out building work that does not comply with a building consent.

The following are some examples of the penalties that the Board may impose:

- (a) cancel the building practitioner’s licence;
- (b) suspend the building practitioner’s licence for a maximum period of 12 months;
- (c) restrict the type of building work the practitioner can carry out or supervise;

- (d) a fine not exceeding \$10,000.

Other offences under the Act

It will be an offence under the Act to use, or permit to be used, any part of a building that is intended for public use and is affected by building work when there is no building consent or code compliance certificate. A fine of up to \$200,000 may be imposed or for continuing offences a fine of up to \$20,000 per day for which the offence continues.

Interim Code Compliance Certificates

No interim code compliance certificates will be available from 31 March 2005 for either new building consents or building consents previously applied for under the Building Act 1991 ("the former Act").

The ramifications of this change are particularly significant to developers of multi-unit developments who will have to wait until all units are completed before obtaining a code compliance certificate.

A possible solution to this problem is for developers to apply for staged building consents. An application may be made for a staged building consent to replace consents issued under the former Act. However, developers would lose any benefit of being issued with a code compliance certificate under the former Act if they were to apply for a staged building consent under the new Act.

Certificates of Acceptance

Under the Act a consent authority may issue a certificate of acceptance for building work that has been completed when a building consent was required. The certificate of acceptance may state that as far as the consent authority can tell, the work was completed in accordance with the building code. However, the consent authority may qualify the certificate to state what work could not be inspected or is otherwise excluded from the certificate.

If building work does not comply with the building code a consent authority may issue a Notice to Fix to require compliance.

As Certificates of Acceptance cannot be used where the work is pre-meditated, it seems that they will not be able to be used in place of interim code compliance certificates.

Transfer of household units

From 30 November 2004 it is an offence, subject to a penalty not exceeding \$200,000, for a "residential property developer" to complete a sale of a household unit or allow a purchaser to enter into possession before a code compliance certificate is issued.

A "residential property developer" is defined as any person who in trade builds a household unit, arranges for it to be built, or acquires it from a person who built it or arranged for it to be built.

The restriction may also prevent the sale of a household unit by a mortgagee or liquidator to another developer as the purchaser is not restricted to private persons.

However, the restriction may be contracted out of in writing in the prescribed form only.

A significant problem exists for residential property developers who have contracted to transfer household units before 30 November 2004 but the unit has yet to be transferred. Unless the purchaser is willing to vary the contract to include a contracting out provision in the prescribed

form, the developer will commit an offence once the sale is completed or possession given without a code compliance certificate.

The Department of Building and Housing has advised that it will not pursue the prosecution of developers in this situation as its position is that the new Act does not apply to contracts entered into before 30 November 2004.

An additional solution for residential property developers is to apply for a staged building consent in place of their old building consent so as to obtain a code compliance certificate on completion of each stage. The contract for sale will then be satisfied and an offence against the Act avoided.

Home Handy Man

From 30 November 2004 a home handy man will not be able to carry out restricted building work unless the work is supervised by a licensed building practitioner.

Implied warranties for household units

The Act puts in place a series of statutory warranties that will give the purchasers of household units the type of protection that is provided for consumers under the Consumer Guarantees Act 1993. These warranties are implied into contracts for building work on household units and contracts to purchase household units from a property developer. Some of these warranties are that the materials are suitable for their purpose, that the standard of workmanship is good and that the building is suitable for its intended purpose.

It will, however, be possible to contract out of these warranties if the breach was known or ought to have been known by the homeowner.