The licensed building practitioner scheme: another step in the New Zealand leaking building battle

ABSTRACT: The long-term proposal to license building practitioners, a reality from 1st March 2012, marks a significant retreat from the strong pioneering tradition of self-help building that historically has been a significant element in small-scale construction within New Zealand. The Licensed Building Practitioner’s Scheme (LBP) is another government initiative prompted by criticism of the systemic deficiencies within the NZ building industry by the 2002 Hunn Report. Its implementation restricts most design and construction of residential buildings to licensed personnel.

The Government views the Licensed Building Practitioner scheme as part of an ongoing process to increase trade skill levels and building quality within the industry. It is also part of a process to shift responsibility for building oversight from the public to private industry, and hence lessen the financial burden to the New Zealand tax and ratepayer from poor supervision and decision making practices on the part of local government.

This paper will provide a brief history of the controversy surrounding building under performance. It will examine the role proposed for the Licensed Building Practitioner and the role LBP’s will play within the building industry. Submissions on the merits of the scheme, made in response to a request for feedback to the Building Act Review in 2010, are examined, evaluated and compared to an industry survey completed six months after the scheme’s introduction in March of 2012. The paper supports the view that the transfer of responsibility, of which the LBP is a part, runs the risk of failure unless legislative and educational systems supporting the intended role have had time to coalesce and prove their effectiveness.

Keywords: Leaking buildings. Building Code Policy, Construction Technology. Licensed Building Practitioner.

1 INTRODUCTION

The introduction of the Licensed Building Practitioner marks another turning point in the history of the building industry in New Zealand. First signaled in the 2004 Building Act, its introduction was an outcome of the deficiencies noted in the 2002 Report of the Overview Group in Weathertightness (Hunn et al, 2002), a report commissioned by the Government in 2002 to investigate the causes of building failure due to moisture ingress. The Hunn report (Hunn et al, 2002) had noted systemic personnel defects in the New Zealand building industry as:

- Inadequate contract documentation
- Inadequate trade skills and supervision on site
- A lack of co-operation and sharing of responsibility on site.

The review initiative was a governmental reaction to the post Building Act laissez faire practices of the 1990s, when entry to the building industry was still possible to anyone capable of welding a hammer. The damage caused to the reputation of the industry, aggravated by, but not solely due to the presence of unqualified personnel, was evidenced by the financial loss to thousands of owners from poor performing buildings constructed over that period, and from which many problems still arise. A “capable industry” and a “credible” LBP Scheme were seen by the industry as “key components to restoring pride in the industry and ensuring quality buildings” (Department of Building and Housing (B), 2010, p59).

1.1 Background.

The construction traditional weatherboard and brick cladding materials, common construction materials in NZ construction up to the 1980s, reduced as new and face sealed proprietary rigid sheet cladding systems and the once commonly used, but largely forgotten, traditional stucco cladding system came onto the market. The upsurge in the use of these “new” cladding materials coincided with other changes in the building industry. The running down of the apprenticeship programme, a rise in the number of apartment buildings under construction and a corresponding move away from traditional fixed price contract to other forms of construction procurement to meet the rapid growth in this particular corner of
the housing sector, all combined to create a period of uncertainty that saw many operators installing new systems and materials into often complex building forms, without the necessary background and training.

In addition to this, in 1996, five years after the introduction of the first nationally binding performance based New Zealand Building Code in 1991, a change was made to the NZ Standard NZ3602 to allow the use of untreated kiln-dried *pinus radiata* into timber house framing. This change, which was subsequently retracted in 2004, had significant and long-term consequences for the NZ building industry. (Murphy, 2003).

The pre Building Act environment traditionally saw inspectorate attention during construction concentrated on the structural aspects of the building framework, typically the structural integrity of the flooring, walls (including bracing) and roof. Cladding integrity and the inspection thereof were not considered as important elements in the checking process. Cladding design and installation methods on the other hand, followed well-formulated design and build procedures using materials familiar to the industry. By and large, for these traditional brick and timber weatherboard structures this approach to construction oversight was satisfactory.

As mentioned above, the advent of more complex cladding systems, elevation profiles and larger, more complex structures within the domestic market in the 1980s and 1990s, along with the introduction of monolithic type face fixed cladding systems, cavity insulation and kiln dried chemical free timber studs meant this approach was no longer sufficient. Yet both designer and the local authority consent processor were slow to adapt to the fall off in construction quality.

Deficiencies in the external building fabric continued to become apparent as inquiry and debate over the quality of construction intensified. In 2001 a report by the writer commissioned by the Building Industry Authority (BIA) (Murphy, 2000) that surveyed some 287 pre-purchase reports indicated some 60% of the dwellings inspected let in moisture through the cladding to an unacceptablle degree. Whilst buildings in New Zealand had always leaked to some degree (NZ is a coastal climate and capable of extreme climate variation), what was different and new and picked up by the survey, was the significant percentage increase in cladding systems letting in moisture (compared to building defects) in the period following the introduction of the National Building Code in 1991. This can be clearly seen in Figure 1, where the graph columns indicating defects for the cladding case reviewed is to a similar proportion for all periods except the 1990s. In this last column the ratio of defect to the number of cladding cases reviewed increases significantly.

![Figure 1: Defect v Cladding Cases](https://example.com/figure1.png)

The factors briefly outlined above were not the only reason for building deficiencies. Additional contributory causes of poor performance identified in the HunnReport (Hunn et al, 2002) included:

- Inadequacy in the Building Code and Approved Documents
- Insufficient checking at building consent stage.
- Inadequacy of building products, materials and components including evaluation of their suitability of fitness of purpose.

The public reaction to the Hunn Report was such that Government felt compelled to put into place additional procedures designed to restore public confidence in the building industry.

### 2.0 SUMMARY OF POST HUNN REPORT LEGISLATIONAL INITIATIVES.

#### 2.1 Weathertight Homes Resolution Service Act 2002*et al.*
An early initiative was the Weathertight Homes Resolution Service Act 2002, which set up a framework for mediation and adjudication between owner, contractor and other stakeholders. This act was later replaced by the WHRS Act 2006, which came into force on 1st April 2007, creating in turn the Weathertight Homes Tribunal, a judicially independent Tribunal providing adjudication on matters of weathertightness.

Additional initiatives included the movement of the Building Industry Authority (BIA), a crown entity, from the Internal Affairs ministry to the more proactive Ministry of Economic Development. Government intentions to tighten up controls associated with building and construction were signaled in March 2003 through this Ministry, culminating in the introduction of a major piece of new legislation. The Building Bill was read in Parliament on August 29th 2003 and came into effect as ‘The Building Act 2004’ in November 2004. (Murphy & Frost, 2004).

At the same time, facing strong criticism from the public and media over inadequacies in the BIA’s role within the ongoing saga, the government in November 2004 established the new Department of Building and Housing and absorbed the Building Industry Authority (BIA) functions into this new Department.

2.2 The Building Act 2004:

The Building Act 2004 saw a considerable tightening up of procedures and policies surrounding the implementation of building controls. Changes included re-introducing timber treatment requirements removed in 1996, upgrading the Acceptable Solution E2, a significant step to document in a prescriptive manner, standard domestic building practice. Changes were also made to Local Council requirements tightening the rules around Building Consent accreditation. They also signaled the impending introduction of the Licensed Building Practitioner’s scheme, the main focus of this paper.

2.3 The Weathertight Homes Resolution Service (Financial Assistance Package) Amendment Bill

The introduction of this legislation reflected apprehensions around the performance of the various stakeholders operating in this post 2004 environment. It also reflected Government apprehension hinted at within a report by Price Waterhouse Cooper in 2009 indicating the extend of repairs for poor performing building in New Zealand at $NZ11.3 billion, and that despite lower failure rates since 2006, there was plenty of more bad news to come! (PriceWaterhouse Coopers, 2009) Another concern was the collateral damage from assessing fault; such as the assertion made in the Covec report that a significant proportion of cost to the country from poor quality building comes from expenses “other than actual repair costs.” (Irvine et al, 2010)

Another imperative was an ethical one. The government was at pains to state that its involvement was one necessitated by the size and scale of the problem, rather than moral obligation:

Even though the Government has no legal liability, the magnitude of the issue means central government involvement is essential if we are going to find a way forward. (Williamson, 2011)

To the owners who qualified (there were limits to those that do) and volunteered into the scheme (it was not compulsory), the Government offered to pay 25 per cent of the agreed repair costs. The participating Territorial Authority that approved the original construction would also pay 25 per cent, leaving the balance (50%) to be paid by the homeowner.


The reasons for the review reflected apprehensions round the performance of the various stakeholders operating in this post 2004 environment. Whilst not wanting to take the ‘foot off the accelerator’ in terms of compliance for appropriately complex structures, the Government had concerns that the parts of the Act were now too cumbersome, too costly to administer and not achieving the outcomes required by the Act’s key principles. To quote the Minister of Building, there was a need to “…strike a better balance between the amount of control, the level of risk, and the capability and responsibility of those involved. (DBH (A), 2010).

Consultation took the form of a DBH sponsored discussion document titled *Cost effective quality; the next generation building controls in New Zealand*, and focused on:

- Clarifying the purpose and principles of the Building Act and the requirements of the Building Code – implying much confusion still remains in the public domain about the nature of the Act and the difference between the Act and Code.
Moving to a more balanced approach to building control—thereby acknowledging there exists, for low risk work, an undue reliance on building consent authorities to protect consumers from defective building work, even when, as the document states, “the consequences of failure are low”. (2010, p6)

Building consumer confidence—including improving the contracting practices, more effective warranties involving surety as security and better access to dispute resolution. Allied to this was the Licensed Building Practitioner Scheme, the main focus of this paper, where the construction of “critical” elements of a building was to be (and now has been) limited to approved accredited building operators. (2010, p1)

3.0 THE LICENSED BUILDING PRACTITIONER’ SCHEME

3.1 Background

The introduction of this Scheme was flagged in the 2004 review. It was, until March 2012, a voluntary scheme that enabled builders and trades people with a genuine track record “…to have their skills and knowledge formally recognized, whether they are trade-qualified or not.” (Department of Building and Housing (C), 2010). With the schemes implementation in March 2012 the consequences surrounding licensing tightened, and since that date, persons not licensed are restricted from undertaking and signing off responsibility for certain types of building work, including work associated with the construction of the cladding system, the primary structure, including foundations and framing, and the design of certain types of fire systems in small to medium sized residential apartments. In 2015 this competency based system moves to a qualification based one, with applicants after this date needing the appropriate trade qualification to qualify.

Eight license classes include Design, Site, Carpentry, Roofing, External Plastering, Bricklaying and Block-laying and Foundation.

The scheme is administered by the Department of Building and Housing, who, as a part of their duties set the licensing standards, manage assessment, issue ID cards where necessary and maintain a public register. The Department, through an appointed Registrar, administers the LBP rules that determine the minimum standard of competence required for each license class, updates addresses, establishes processes for ongoing assessment of practitioners’ current competence, and the provision of ongoing skills maintenance programmes. (DBH (C),2010)

Applicants are assessed based on their ability to work within building categories of varying complexity. These range in general terms from simple single unit family dwellings (Category 1) to more complex single unit dwellings less than 10m in height (Category 2), eventually through to multi unit and commercial complexes greater than 10m in height.

3.2 Summary of 2010 Submissions relating to the LBP Scheme.

Submissions on the merits of the scheme, made in response to a request for feedback to the Building Act Review in 2010, suggested many respondents wanted greater building controls and an effective licensed regime that would achieve it. As the Summary of Submissions document noted, “…A capable industry and a credible LBP Scheme was [sic] seen as key components to restoring pride in the industry and ensuring quality buildings” (DBH (B), 2010, p61). The building communities view was that quality in building had fallen to an unacceptable low level over the last 15-20 years, and if raising it meant a cultural change in the area of DIY, then so be it.

Combining an effective licensing scheme with mandatory warranties and surety and better informed consumers undertaking ongoing maintenance will provide for better building outcomes (DBH (B),2010, p51)

3.2.1 Issues associated with the competency of LBPs

Whilst the general tone of submissions was in favour of the Scheme, A number of submissions in 2010 expressed apprehension about the ability of the LBP scheme to deliver improved construction quality in the time allowed. The low quality of present day building consent submissions and on-site supervision was seen as an issue:

Department of Building and Housing and IANZ have observed a poor quality of documentation accompanying building consent applications across the country (DBH (B), 2010, No 373 p59).
Council records confirm that 49% of building consent applications contain defective documentation and …15% of inspections are not approved due to deficient construction practices on building sites. (DBH (B), 2010, No.363 p60).

Given this perceived lack of quality, misgivings were expressed at the impending introduction of the scheme in 2012. A considerable number of submissions expressed a desire for a longer transition time.

[A] transition time (eg. five/ten years) is needed to increase the knowledge and skill level of licensed building practitioners (DBH (B), 2010 p52).

Some submissions were apprehensive the LBP scheme would succeed in eliminating the poor performing contractor. Whilst it may shift the burden of responsibility from Local Authority to site, the problem of quality would persist.

Without any actual rebalancing of responsibility, the behaviours that are currently demonstrated in the industry will not change. Builder LBPS will continue to fail and/or avoid liability by going out of business, or-more concerning-builders will not take up a license at all and exit the industry (RMBF, 2010 p50).

The new licensing regime will not of itself eliminate ‘cowboy’ builders, because they will be able to do unlicensed work or licensed work under the supervision of an LBP (CBANZ, 2010 p52).

3.2.2 Consequences of a poorly implemented scheme

Submissions expressed the need for an overarching guarantee of quality amongst the building fraternity, and an instigation of a guarantee scheme that tied quality to contractors after the project was completed. It remains to be seen whether the licensed building practitioner regime will ensure improved quality building work. If the LBP system is not robust and/or a warranty or surety system does not work then the reduction in BCA involvement make the situation worse for building owners. There is in fact a risk of a repeat of the leaky building crisis (NZ Law Society, 2010 p53).

3.2.3 Transfer of Responsibility:

The submissions made to the Dept. of Building and Housing in 2010 contained mixed views on the feasibility of a “reduced role for Building Consent Authorities” as a result of the LBP initiative (this being one of the stated aims of the Government in wanting to review the Act). Apprehensions were expressed over the ability of the LBP to take over the role, and questioned how the BCA could limit its liability under current law.

Yes, limit BCA oversight proportionate to risk, but within a sensible framework aligned to a framework of proportionate liability (Cement and Concrete Association of NZ, 2010 p25).

Until such time as the laws governing liability and precedents are changed, BCAs may be left with liability/a larger than proportionate duty of care despite their legally reduced oversight role. (DBH (B) 2010, p26)

3.3 The Licensed Building Practitioner’s Scheme: Has it met expectations?

In the light of the comments made in 2010 to the Governmental Department, and to ascertain the effectiveness of the new legislation, a survey of five building professionals in key BCA and private building surveying positions were chosen for detailed interview between July and August 2012, some six months after the introduction of the legislation. Questions focused around the effectiveness of the new legislation, with subsequent questioning design to elicit information on the validity of apprehensions made in 2010.

3.3.1 Question 1: Have you noticed an improvement in the quality of building consent applications presented since the start of the LBP scheme in March 2012?

All recipients were of the view that the quality of building consent applications had not improved to any extent following the introduction of the Scheme, even though designers were required to be registered and required to sign Memoranda confirming the building consent application, of which their drawings formed the major part, complied with the Building Code.

No, surprising how many don’t understand the LBP scheme…Ignorance about the system [is] across the board. (McLaughlan, 2012)
One respondent conceded there was some improvement, but at a cost of the Building Consent Authority putting up extra front line staff to ensure projects were “up to speed” prior to processing them.

    The Auckland Council [is] still picking up errors that would make the building non compliant. (Snape, 2012)

The feedback seems to confirm the continued apprehension felt in Local Authority and expressed in the 2010 submissions, that the many document errors persisting in present day applications were an indication accredited LBPs were still lacking the skills necessary to ensure their building consent applications complied with the Building Code.

This apprehension extended to the site, where concerns over the additional bureaucracy and the lack of a site license meant at present all contracting trades had to take responsibility for, and sign off, their portion of the work, leaving the collection of the Producer Statement to the owner, not always the best person to receive such information.

3.3.2 Question 2: What is your response to the following statement by the Law Society viz: “(that) if the LBP system is not robust and/or a warranty or surety system does not work then the reduction in BCA involvement will make the situation worse for building owners. There is in fact a repeat of the leaking building crisis” (NZ Law Society, 2010)

All respondents agreed with this statement and reiterated that the LBP needed to be made accountable; if ever the BCA was to withdraw from the consent process to any significant degree. Apprehensions were expressed on the training of builders “...Many builders do not know what the building code is” (McLaughlan, 2012). Others spoke of additional legislation coming on stream (The Building Amendment No 3 Bill) that would act to cement the obligation to comply fully onto the LBP contractor, is so far as the BCA would only issue Completion Certificates, and no longer vouch for the quality of work, as is implied at present by them signing off the Code Compliance Certificate. To some the warranty scheme remained a suitable way forward, as it removed the incentive of companies to liquidate as a means to avoid the consequences of poor construction:

    [The] LBP in tandem with Companies involved in a warranty scheme would work. This way products, documentation, construction, all come under the responsibility of the one company. They would have the incentive to get things right, negotiate with [the] insurance company and move forward. (O’Sullivan, 2012).

3.3.3 Question 3: From your experience of the LBP’s operation to date, do you think this “transfer of responsibility” (from the BCA) back to the building sector can be achieved.

Responses were more mixed to this question. There was a sense of frustration on the part of some respondents that they were still forced to play a greater part in the implementation of the LBP scheme than should be necessary. “We spend a lot of time educating builders” (Kerite, 2012). The system could work but there was a need for a “...good liability insurance scheme to be set up”. (Snape, 2012).

A view common to several was that the building industry needs someone to rely on. Builders were not capable of it on their own and Governmental Departments, Standards NZ or BRANZ were not interested or capable. “The BCA (Local Authority) is the only force left. It will get dragged in anyway” (O’Sullivan, 2012).

There was a sense that in an ideal world this transfer of responsibility from the Building Creditation Authority back to the people doing the work would on balance be a good thing (not withstanding the remarks above), but that, in the present circumstances, such a move was extremely unlikely to work.

4.0 CONCLUSIONS

The Licensed Building Practitioner’s scheme has been in operation for some six months. It has removed the right of non-qualified and non-registered persons to undertake restricted building work, yet another legacy to changes brought about by Government attempts to bring additional accountability and quality to the beleaguered building industry still coping with the fallout from poor quality and leaking buildings.

Feedback from qualitative research survey of five key building personnel indicates no significant change to date to the quality of building consent application or on site accountability as a result of the introduction of the LBP scheme. Apprehensions expressed about the quality of LBPs in 2010 remained valid today, six months after the scheme’s introduction. Examples were given of designers not aware of their obligations as licensed practitioners and of the “liability implications for signing the Memoranda” (Subranamiam, 2012). Building consent applications were still requiring considerable up-front checking on the part of the local authority staff to achieve compliance. Examples were also given of delays in
accreditation of licensed practitioners by the Department of Building and Housing, the managers of the Scheme, and hence presenting BCAs with dilemmas around eligibility of a contractor to undertake work. All interviewees shared the same a desire for the scheme to work as the submitters did in the 2010 submissions, even though reservations were expressed about the methods used to achieving the goals. Some felt the responsibility for the success of the scheme had been passed unfairly to Local Authority, when it should be the Licensed Practitioner’s Board taking the initiative for proper implementation. Others were of the view that the whole approach to minimizing risk, particularly risk to the Local Authority, was at the heart of the problem of responsible building. The Government was “focused on law and beating people into submission” (O’Sullivan, 2012) to solve the problem of poor quality building. As a result Local Authorities (BCAs) were now “demanding and pedantic” in their request for information, because (understandably) their own liability issues have demanded this approach. The result is designers now spend a lot of time providing information on “things that are not necessary”.

E2/AS1 was meant to be a document that contained all that was standard (similar to NZS3604), so you only had to draw special details. There has been a missed opportunity here to reduce the amount of unnecessary detail. (O’Sullivan, 2012).

Comments made in the interviews suggest six months is still too early to properly ascertain meaningful change. The system is still “bedding in” and backlogs associated with the accreditation and licensing process mean a proper analysis on the scheme’s merits is still premature. The scheme is part of a governmental push to transfer responsibility and hence liability from the public to the private sector. The processes needed to complete the legal framework for this are still under consideration. Irrespective of legal process however, the LBP scheme that underpins this transfer of responsibility, runs the risk of failure unless operational and educational systems supporting the intended role for the LBP scheme have had time to coalesce and prove their effectiveness.

REFERENCES


Registered Master Builders Federation (2010). Submission No 131 In Building Act Review, Summary of Submissions, Department of Building and Housing, Wellington.

