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BRANZ SUBMISSION ON REVIEW OF THE BUILDING CONSENT SYSTEM

SUBMITTER CONTACT INFORMATION

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PREFACE

1. The Building Research Association of New Zealand (BRANZ) welcomes the opportunity to input into to the Issues Discussion Document on the Ministry of Business, Innovation and Employment (MBIE)'s Review of the Building Consent System (Review).
2. In this submission we will:
 - provide our reflections on the issues associated with the building consent system requiring further consideration and attention through an articulation of a working hypothesis we have developed using a systems approach;
 - recommend that MBIE engages further with key building and construction system players to do further work on the issues outlined in this submission;
 - respond, at the high level, to the sections of the issues discussion document on the Review of the Building Consent System¹; and
 - provide background on BRANZ and our role and highlight some relevant research we have commissioned and done of relevance to this work.
3. This submission does not respond to all questions in detail in the Issues Discussion Document.
4. We welcome further engagement with MBIE on this feedback and as the system interventions arising from this process start to take shape.
5. We sought a two-week extension from MBIE on the provision of this feedback, for which we are grateful. The extension we sought was in part due to the desire to fully frame our feedback to the Commerce Commission's Draft Report on their Market Study Residential Building Supplies Market Study. The deadline for feedback on this work was on a similar timeframe to this process.

¹ See: <https://www.mbie.govt.nz/dmsdocument/22845-issues-discussion-document-review-of-the-building-consent-system>

WORKING HYPOTHESIS ON CHALLENGES OF THE BUILDING CONSENT SYSTEM

6. In responding to the Discussion Document, we felt it was best to first map out a logic flow for how we see the building regulatory and consent system is working in practice. We think it is important to do this to get a deeper understanding as to why the system is delivering the results that it is.

7. This approach aligns to the view expressed by British theorist and operational research professor Anthony Stafford Beer:

"The purpose of a system is what it does. There is after all, no point in claiming that the purpose of a system is to do what it constantly fails to do."

8. This quote is a helpful reminder that systems should not be articulated on their original intent, rather on what they are delivering. Unlike the quote, however, we do not think the building consent system is constantly failing, given that buildings are being built in line with the intent of the system. However, we do think there are significant failure points, which if not addressed, will make other changes to the consenting system less or totally ineffective.

9. Below we outline a working hypothesis regarding what we consider is causing pain in the building consenting system. We believe that there are two quite distinct paths being navigated through, and supported by, the building consent system, depending on the levels of certainty provided by the regulatory framework.

10. We will outline these two pathways below and draw out what why these pathways are happening and what they are delivering. We will call them 1) the certain path and 2) the uncertain path.

11. We think more consideration needs to be given to further deepen understanding across the system with respect to these two pathways. Both require further consideration. However, it is addressing the uncertain path where we think the most gains can be made from any system reform.

12. We recommend that before MBIE embarks on identifying options for reform, more work is done to consider these issues. We recommend that MBIE works with other system players to do this and BRANZ is available to support and contribute to this important work.

13. In this work we have built on the following inputs in particular:

- The evaluation of the Building Consent System carried out by MBIE and published in June 2022². This provides a positive foundation for laying out some of the issues and challenges associated with the building consent system.
- The Commerce Commission's Draft Report on their Residential Building Supplies Market Study.³ This highlighted where the regulatory system could be improved to support more new and innovative products being introduced onto the New Zealand building and construction market with the view to improving competition.
- BRANZ's response to the Commerce Commission's Draft Report⁴. In our response, we highlighted our views on the complexity of the building regulatory system and that this complexity is creating uncertainty and in turn driving behaviours and decisions which are risk averse and conservative.

² See: <https://www.mbie.govt.nz/dmsdocument/22845-issues-discussion-document-review-of-the-building-consent-system>

³ See: https://comcom.govt.nz/_data/assets/pdf_file/0028/289360/Draft-report-Residential-building-supplies-market-study-4-August-2022.pdf

⁴ See: https://comcom.govt.nz/_data/assets/pdf_file/0035/292598/BRANZ-Submission-on-residential-building-supplies-market-study-draft-report-1-September-2022.pdf

Both pathways start in the same place – at the Building Code’s regulatory framework...

14. The Building Code’s regulatory framework⁵ is provided by the Building Act 2004. It is performance based and not prescriptive and is designed to allow for flexibility, new developments and innovation in building design, technology and systems.
15. At the same time the framework aims to provide minimum standards for how building work must perform across a range of aspects. In other words, it is risk based. In theory it is logical and clear, makes sense, and strives to ensure that people can use buildings safely and without endangering their health.
16. The 2004 Act required a review of the Code, and this review was completed in 2008. The review proposed a framework for explicit performance measures for buildings and building work but acknowledged that further work would be required before such measures could be implemented.

...but this framework has not been fully implemented.

17. With the exception of amendments to the fire-safety provisions no substantive changes arose from this review. John Gardiner in his report for the Commerce Commission said:

“If all its recommendations had been implemented, there would now be a clearer articulation of the performance required of buildings and by inference the products used in buildings.”⁶

18. It is not entirely clear to us why the review was not fully implemented. However, we are concerned that this is because it takes considerable time and resource to develop the necessary evidence to create new and updated guidance, standards, acceptable solutions or verification methods to support decision-making in the building consent system. The regulatory and standards setting processes are slow to develop these compliance pathways which often require new research to be undertaken and considerable effort from many system players to develop. In our submission to the Commerce Commission, we queried whether full implementation, as originally envisaged, was practical or possible.

Incomplete implementation of the regulatory framework has led to two pathways.

19. Given this context there exists two distinct pathways used to navigate through the consenting system to demonstrate code compliance. The first pathway is more certain, because code compliance pathways exist, or alternative solutions can be demonstrated and provide clarity for building system players. The second pathway is much less certain and hard to navigate. It is one where judgement, experience, skill, knowledge, resource and risk appetite all contribute to differing degrees and impact on decision-making by all system players involved. We describe these two pathways in more detail below.

Pathway One – The certain path

20. Where there is a clear compliance pathway there is good information available for example through Acceptable Solutions / Verification Methods, and standards. The availability of this clear pathway and good information leads to decisions to use ‘tried and tested’ products and method. There is evidence that the regulatory system is working well in these circumstances.

...drives the used of ‘tried and tested’ products and methods.

21. The result is that ‘tried and tested’ products are being specified in designs because designers and specifiers are confident that they will be accepted by Building Consent Authorities (BCAs). BCAs

⁵ See: <https://www.building.govt.nz/building-code-compliance/how-the-building-code-works/>

⁶ See paragraph 14 of: https://comcom.govt.nz/_data/assets/pdf_file/0031/289363/John-Gardiner-Practical-issues-with-the-building-regulatory-system-for-suppliers-of-building-products-3-August-2022.pdf

clearly prefer the use of the 'tried and tested' products as they perceive they have a reduced risk and liability.⁷ This is borne out as there are low levels of building and product failure with 'tried and tested' products. This leads to the conclusion held by some that in general "despite its problems, there is confidence that the system is delivering compliant building work"⁸.

The result is the building consent system is delivering under this pathway, but it is not always optimal.

22. Arising from decisions where compliance pathways are clear, some consequential, however not so positive outcomes arise. These include:
- There is less innovation than there could be.
 - New and innovative products and methods are not being used as much.
 - There is less competition in the market than is needed.
 - A conservative risk appetite in key system players is rewarded.
 - System players are less inclined to pursue, because they are less capable and less confident, anything that does not come through this path.

Pathway Two – The uncertain path is causing pain.

23. A much more uncertain pathway to demonstrate code compliance exists when there is no or poor implementation of the regulatory framework elements. This affects system plays in a number of ways, but this is where we consider the most pain is arising from the building consent system.
24. Specifiers and designers experience pain because they:
- Find it hard to get the necessary information⁹ they can rely on regarding products and materials that are not 'tried and tested'.
 - Are worried about their liability if a product that they have chosen fails.
25. Manufacturers and distributors experience pain because there is uncertainty about how they demonstrate code compliance. They know that many system players won't have enough confidence in the manufacturer or distributor's product performance statement and warranties. They find it hard and expensive to engage independent product assurers to help them demonstrate product compliance pathways. In some instances, they may have received a product assurance statement which is not accepted by the BCA.
26. BCAs are similarly challenged, they:
- Lack the confidence to rely on the information that is supplied.
 - Can't see a clear compliance pathway and information to support them to make their decisions and that can be relied on when litigation occurs.
 - Make their judgements on how much they trust the provider of information. For example, they trust some certification, assurance and/or testing bodies but not others.
 - Are very conscious that the 'buck stops here', that they are often the last person standing, if something fails.
 - Are reliant on the skills, knowledge and judgement of individual consenting officers who are being called on to navigate more complex and greater volumes of information.

⁷ See decision cycle on page 8: https://comcom.govt.nz/_data/assets/pdf_file/0029/289361/Executive-summary-Residential-building-supplies-market-study-4-August-2022.pdf

⁸ For example, see 5.3, page 29 of MBIE's Evaluation of Building Consent System

⁹ Information in this context refers to either a pathway to compliance or performance information in a range of different situations such as wind and seismic zones, environmental zones (e.g., coastal and volcanic areas), building height, and fire risk.

Those who have the confidence of decision-makers can work around this uncertainty.

27. However, there are times when compliance pathways are not clear that the consenting system can work well and provide more certainty. This happens when BCAs have confidence in:
- The evidence for code compliance provided to support alternative solutions, and
 - The design and build teams' ability to bear their share of the risk. BCAs know these teams are not likely to go bust and they won't leave BCAs holding the liability 'baby' should buildings or their products fail.
28. This BCA confidence is more likely if the design and build teams have strong balance sheets and proven long-term performance. It also is more likely when companies have the capability and resources to invest in demonstrating a compliance pathway or information that is trusted by system players.

The pain is compounded by other issues in the building consent system.

29. MBIE's Evaluation of the Building consent system highlighted that this pain was compounded by other issues, including:
- A challenging workforce to manage from both a capacity (for example high turnover) and capability perspective (for example varying experience, education).
 - Increased demand for BCA services given increasing consent volumes.
 - Tight budgets for training and upskilling.
 - The increasing complexity of buildings being consented.
 - Different BCAs who have different risk understandings and appetites.
 - Inconsistencies at the individual building consent officer (BCO) level.

30. The quote by an architect referenced in the Evaluation sums up the situation well:

*"The Compliance Documents are not mandatory solutions, but BCAs seem totally incapable of considering or accepting any solution that does not exactly match Compliance Document solutions. So we do not have the performance-based system that the Building Act envisaged"*¹⁰

Both pathways are compounded by the issues associated with the regulatory system and identified by MBIE in its Issues Discussion document.

31. MBIE and others have identified a range of other issues associated with the consenting process, many of which have been identified in the Issues Discussion document. These include:
- Roles and responsibilities not well understood, especially when dealing with alternatives to acceptable solutions.
 - Variable processes, tools and functions across the BCAs.
 - The wide range of IT systems used by BCAs.

Addressing the issues outlined in the Issues Discussion document won't lead to substantial improvement

32. We conclude that if the issues outlined in the Issues Discussion document are the only issues addressed, the benefits that may accrue will likely be marginal and incremental if done well. We posit that they may improve the areas that are already working well in the system. However, it is possible, that in implementing solutions to address these areas – such has been suggested by some commentators that the BCAs could be consolidated, may not address the right issues.
33. And worse still, while they may be perceived as addressing pain experienced in the building consenting system, they are unlikely to move the dial significantly on the deeper more underlying

¹⁰ See page 25 of MBIE's evaluation of Building Consent System.

root causes created by the regulatory framework. They will require significant time and resource but may miss the opportunity to make more longer lasting change to the system.

34. There have been many evaluations, assessments¹¹, reviews, and policy work that have been done since the Building Act 2004 became the basis for the regulatory framework. The results of all this work generally concludes the same or very similar issues to those that have been highlighted in the Issues Discussion document. Unless the role of the regulatory system, in the two pathways we have outlined, are addressed, it seems likely that system players will look back at the system in 10 years' time and see these continue to persist.

Further work is needed to digger deeper into what will make a more transformational shift in the consenting system.

35. We also conclude there is too much pain in the system arising from the uncertain pathway articulated above. We do not think that this pain has been understood well enough, even by us. More work on this is required in order to identify solutions that are going to make substantial difference to the way the regulatory framework is being implemented through the building consent system.
36. Our request of MBIE is to engage relevant players to further understand the fundamental pain arising from the uncertain path and identify ways to resolve that. In this way, we can all use the opportunity provided by this review of the consenting system to make a real difference. BRANZ is available to support this work.
37. This does not mean that some of the work outlined in the Issues Discussion document should not progress to support positive incremental change. Where it makes sense, it could be done in parallel and in a way that ensures that it does not prevent or close off options for this other important work.

¹¹ See: <https://www.mbie.govt.nz/assets/f5b5aeec12/summary-of-building-regulatory-system-assessment.pdf> as well as other references in this document.

HIGH LEVEL RESPONSE TO SECTIONS OF THE ISSUES DISCUSSION DOCUMENT

38. We provide the following brief points in relation to the sections of the Issues Discussion document, which need to be considered alongside the points made above.

The role of government in providing assurance that buildings are safe, healthy and durable.

- We recommend that MBIE facilitates work to deepen understanding of the pain caused by the uncertain pathway outlined in our working hypothesis above.
- We recommend that MBIE develops a ten-year vision for the building consent system and articulates what will be different as a result of the current review in meeting that vision.

Desirable Outcomes

- We recommend that an additional outcome needs to be articulated. This should relate to there being full understanding of how the regulatory framework is impacting on the ability of the building consent system to do the role expected of it.
- This will then ensure that the other four outcomes are achieved in that knowledge.

Issues with the current system

- The five issues articulate well what is constraining the current system from within. However, we do not believe that if these are addressed, the resulting benefit to the building consent system will be significantly different to now. We believe that not enough consideration has been given to how the regulatory framework is creating uncertainty in the building consent system. Focused work on the regulatory framework will be needed to reduce that uncertainty enough to make meaningful, transformational change.

ABOUT BRANZ

39. BRANZ¹² is a multi-faceted, independent science-led organisation. We use independent research, systems knowledge and our broad networks to identify practical solutions that improve Aotearoa New Zealand's building system performance. BRANZ is driven by the knowledge that to thrive as a society, New Zealanders need a built environment that is safe, healthy and performs well.
40. The BRANZ vision is to ***Challenge Aotearoa New Zealand to create a building system that delivers better outcomes for all.***
41. To do this, BRANZ cultivates strong relationships with industry, government and building users through collaboration and facilitating the sharing of insights, opportunities and ideas. These relationships underpin the range and depth of BRANZ's knowledge and ability to understand the linkages and interactions that influence the building system. This uniquely broad perspective not only influences BRANZ's research, but also our commercial services.
42. BRANZ undertakes and commissions research, funded by the Building Research Levy, which is both practical and drives positive building and construction system change. This work helps improve industry practices around the performance of buildings and how we use them, through to informing policy and legislation and all points in between.
43. BRANZ also contributes to practical improvements in Aotearoa New Zealand's built environment through independent product testing, assurance and consultancy services. Evidence-based advice is available at all phases of the product life cycle from preliminary R&D and standards compliance, through to verifying end-use product performance. A BRANZ assessment is universally trusted, providing assurance that the products should do what the manufacturer says they will do.

Investing the Building Research Levy to address priorities

44. The Building Research Levy Act of 1969¹³ established BRANZ as an incorporated society. Through this Act, authority is given to levy building contractors to provide money for research into improved techniques and materials for use in the building industry. The Act sets out how the Levy can be used which includes conducting and funding building and construction research, publication, provision of advice and investment in capital assets to support research.
45. BRANZ invests the Building Research Levy to improve the building system performance by co-creating enduring solutions that make a real difference in the lives of people in Aotearoa New Zealand. Investment signals are developed through a range of means, from input by the Building Research Advisory Council¹⁴ and other stakeholders and through our biennial industry needs survey. We have core research programmes and invest in research across the system to meet the long-term knowledge needs and gaps as outlined in our Levy Investment Portfolio¹⁵. Research programmes are independently assessed against a framework to ensure the research outcomes meet the needs identified.¹⁶

¹² See: <https://www.branz.co.nz/>

¹³ See: <https://www.legislation.govt.nz/act/public/1969/0023/latest/DLM391231.html>

¹⁴ See: <https://www.branz.co.nz/about/building-research-advisory-council/>

¹⁵ See: <https://www.branz.co.nz/investing-research/>

¹⁶ For more information on our investment approach and the programmes we fund please see our recent Levy in Action publication: https://d39d3mj7qio96p.cloudfront.net/media/documents/Levy_in_action_2021.pdf

46. Our current research is broadly aligned to four multi-year research programmes:
- Transition to a zero-carbon built environment.
 - Warmer, drier, healthier homes.
 - Eliminating quality issues.
 - Building fire-safe densified housing.
47. We also fund other organisations across Aotearoa New Zealand to carry out research aligned with our priorities. Over the past 5 years (since 2017), we have directly funded 40 external research organisations to a total value of \$11.7 million. A component of this work is to support the future building and construction research workforce through funding, and in some cases jointly supervising, an annual cohort of Master's and PhD scholarships.

Our networks

48. We have collaborative relationships with universities, Crown Research Institutes (CRIs) and other research providers that are essential to the outcomes we are striving to meet. Shared information helps inform priorities for funding, ensuring we aren't duplicating effort and we are playing to our respective strengths and leveraging our respective resources.
49. BRANZ connects internationally with our counterpart organisations and through sitting on standard setting bodies. We have extensive connections across the building and construction sector in Aotearoa New Zealand. These networks ensure our work is relevant and of high standard and has actionable outcomes for the users of research. We are well connected with the government both as the building regulator and a facilitator of pan industry and government action such as the Construction Sector Accord.

Our system perspective

50. We have a strong history of system thinking in our work and this capability now underpins our organisational strategy to deliver on our vision. We view opportunities and problems for building and construction through that systems lens, which is underpinned by knowledge and insight gained through the work we do. Our system perspective has been used to inform our views on this submission.