

## ANNEX A

### The Building Control System and the Report of the Building Industry Commission (BIC)

1. The BIC's report to the Minister of Internal Affairs of January 1990 ("Reform of Building Controls", Volumes I and II) was the basis on which the Building Act 1991 was designed and remains the key document in understanding the current regulatory system for the building sector. It should be the starting point for any reconsideration of the Building Act. It is instructive to reassess the thinking behind the BIC's conclusions in the light of the experience of the past decade, and particularly of the evident failure of the framework established by the Act to prevent, to detect or to manage the serious problem of weathertightness.
2. We have not attempted a detailed analysis of the BIC report but we think it is useful by way of illustration, to draw to the attention of the BIA to two aspects of the document. The first is the significant difference in some important respects between the BIC report and the subsequent Act and the second is the need to reassess the principles advanced by the Commission against the situation described in the body of this report.
3. As far as the first point is concerned, it is obvious the Commission saw the success of its proposals depending on their being implemented in an integrated manner, each part supporting the concept as a whole. This was not what happened, a number of important elements being omitted from the Act or not being realized in practice. A few examples of these are:
  - (a) Occupancy Consent.  
Provision for this was in the Building Bill as first proposed but was later dropped. We have not been able to discover why this was so, although it would not be surprising if it had been seen to be over prescriptive in terms of the prevailing philosophy of the day. If such a measure had been adopted it would have dealt with the problem identified elsewhere in our report of homes being on-sold without a Code Compliance Certificate and would thus have minimized the risk of damaged buildings being passed on to subsequent owners. It is imperative that the problem of weathertightness be identified and remedied as early as possible in the life of a building (qv. Recommendation 9 (b));
  - (b) Accreditation of products.  
We have noted elsewhere the failure of the accreditation system to fulfil the role envisaged for it by the Commission (and probably by Parliament also). This is already covered in Recommendations 12 and 21 but it is worth noting here that the BIC (in paragraph 4.68 of its report) gave a specific example of what it had in mind being "the proprietor of a cladding system might wish to have its material content and method of fixing accredited as complying with the Code to expedite construction consents and expand its market nationwide". It is highly significant there have been only 15 accreditations in the 11 years of the Act's existence, not one of them covering cladding systems;

- (c) Management of External Moisture.  
Attached to the BIC report were the draft Building Code regulations. The draft concerned with External Moisture (E2) provided that its purpose was “to avoid the penetration or accumulation of moisture from the outside causing: (a) illness, and (b) the deterioration of building materials”. The formulated Objective for E2 did not adopt the wording as drafted in (b) above but instead used the word “injury” indicating perhaps the emphasis that was being sought on achieving “social objectives” rather than those related to building quality. At this stage we can only speculate as to what would have been the outcome of including that provision. It could have been expected that greater emphasis would have been given in the Approved Documents to the issue of weathertightness than has been the case.
- (d) Compulsory House Guarantee Scheme.  
While this scheme was envisaged as operating outside the Building Act, under its own legislation, nevertheless it was regarded by the Commission “as an integral part of the Commission’s recommendations for reform of the building control system” (qv. Appendix 7). In the event the proposal was not pursued, again we do not know why. If it had been, the scheme would have gone a long way to solving the acute problem of accountability which we have identified in our report (qv. Recommendation 14 which suggests the BIA should examine the efficacy of adopting the concept of a home building contract).
- (e) Enforcement.  
Among the 10 tasks the Commission lists as needed to manage the control system is one “to enforce control provisions and penalties for non-compliance”. The ‘*Constructive Guide to the Building Act*’ (Department of Internal Affairs, 1992) stated:
- “The Building Industry Commission reported to the Minister of Internal Affairs in January 1990 advising that regulatory interaction should be limited to provisions for safeguarding people’s wellbeing where there are insufficient assurances that voluntary arrangements such as market forces, self-regulation, or self-interest will do the job”.*
- In our opinion the emphasis on self-regulation and light-handed control has led to the BIA having insufficient authority to fulfil its role. As has been said, it “needs teeth and needs to show them occasionally”.

4. In respect of the second point, again we give a few examples of the principles promulgated by the Commission that may now benefit from reconsideration in the light of experience (all of these are drawn from the important chapter on “The Control System”):
- (a) In 2.16, the Commission contends that the purpose of a building control system should be “to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare, will be satisfied.....” As laudable as these social objectives are, they seem to us to be too narrow a definition of purpose. In our view this constricted proposition has de-emphasized such matters as durability and thus has contributed to the slowness to react to the issue of weathertightness.
- (b) The Commission states that “ideally every control provision should represent a balanced position between acceptable cost and acceptable risk” (para.2.20). There follows an illuminating passage on risk assessment and risk management, reaching the conclusion that the principle of balance “must be kept steadfastly in view”. The Commission was concerned principally with over-reaction to risk producing higher than desirable costs. Given the emergence of the weathertightness problem one could

ask whether that should now be re-examined in order to determine whether a new balance should be struck, conceding that mitigating certain risks (i.e. moisture penetration) warrants additional costs.

- (c) In assessing the likely effectiveness of voluntary arrangements and light-handed control against the merits of a more comprehensive regulatory building control system (and the BIC was obviously inclined to the former) the Commission stated that because of the highly technical and complex nature of buildings “the market principle of caveat emptor - let the buyer beware - cannot be applied equally to all building users”. Having provided this useful insight the Commission does not go on, in our view, to accept the logic of its own proposition. While conceding the point that the building market is imperfect because of the imbalance of information, the Commission does not suggest how this should be reflected in protections for the weakest participants (i.e. the consumers). Any new thinking should do so.
- (d) Having agreed on the limitations of the buyer beware principle, the Commission nevertheless postulates that “the control system simply creates the basic framework of safeguards within which people can make their own choices” (para 2.65).

While on the face of it this is unexceptionable, the inference is that these safeguards can be minimalist since freedom of choice will provide sufficient incentive to regulate the market in an acceptable manner. This assumes that the consumer will operate in the housing market as he or she does in other markets. We have contended throughout this report that housing is not just another commodity and that it requires a control system which is sensitive to the different perspective the public brings to bear on the purchase of the family home.

- (e) In enumerating the tasks required to operate the building control system (para 2.74), the Commission says “each task involves action by a control body or bodies and corresponding action by the participants in the building process; the building owners (who may not be the end users); and the building producers. In essence the three parties: the control authority, the owner and the producer, share the responsibility for efficient operation of the system”. In our view this equal sharing of responsibility has not occurred in practice. We have drawn attention to the need for the control authorities and the producers to improve their game, but it is also important that owners understand the Building Act assumes they have a major role to perform - a point that was stressed in Parliament when the Bill was discussed. The decision to drop the occupancy consent that would have given greater substance to the owner’s role may have contributed to this lack of recognition of a tripartite responsibility.