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Via submissions portal

Submissions on Building (Earthquake-prone Building Deadlines and Other Matters) Amendment Bill

The Law Association (formerly the Auckland District Law Society) is a national lawyers membership organisation which is responsible for drafting many of the standard forms and property agreements used by most people in New Zealand for the sale and purchase of land and leasing, often in consultation with the Real Estate Institute of New Zealand.

Many of our members deal with property and building law, and the impacts of seismic strengthening requirements and the Building Warrant of Fitness (BWF) regime. On behalf of The Law Association, the Property Law Committee appreciates the opportunity to submit on these proposed changes.

1. Earthquake-prone building remediation deadlines

- 1.1 We support the proposed extension of remediation timeframes for earthquake-prone buildings by four years, with a limited power to extend deadlines by a further period of up to 2 years by Order in Council for buildings whose deadlines have not expired (as at 02 April 2024). We would query however why the extension is limited to that date, given the extension will be applying retrospectively. It seems possibly arbitrary with that cut off point, and this could be extended further, given the review which is about to be undertaken.
- 1.2 We are supportive of clarity and certainty as to the statutory obligations of building owners and territorial authorities while a review of the management of seismic risk in existing buildings and any subsequent legislative amendments take place as this review is needed.

2. Independently qualified persons and building warrant of fitness scheme

- 2.1 We support the clarification being provided by the Bill that an independently qualified persons must only issue a certificate for a specified system if the inspection, maintenance, and

reporting procedures stated in the compliance schedule have been fully complied with during the previous 12 months. The Bill will also make it an offence to issue a certificate when a specified system has not met these requirements.

- 2.2 However, the proposed amendments fail to address the current situation which has many unlegislated gaps leading to huge uncertainty and unlegislated “work arounds” devised by MBIE to deal with issues which have arisen when specified systems have not been fully complied with for technical reasons which do not arise from failures by building owners, and which do not impact on the health and safety of building occupants, but have significant impacts on building owners and occupiers as a result.
- 2.3 The current system is a mess and is putting some buildings in an impossible situation. This needs review and amendment to reflect that sometimes building owners cannot get a BWOFF because of repairs being carried out building works being carried out or because systems are being upgraded. Buildings are not static, and are subject to repairs, maintenance, and fitout works, which may mean some systems are temporarily shut down, under Council consented programs, but without addressing these issues, (which are not safety issues), buildings will fail to get BWOFFs, be subject to greater fines, even if the repairs, maintenance, fitout works are fully operation and safe at the time the BWOFF should be issuing.
- 2.4 Failing to have an issued BWOFF impacts the building owner, but also the occupants. It will consequentially impact insurance and banking obligations for the owner but may also exposes the occupants to regulatory licensing issues and potentially subjects the owners to claims (such as rent abatement) from the tenants, which may or may not be justified depending on the failure. Further consequences are set out from paragraph 2.20 below.

What is the BWOFF Process?

- 2.5 The purpose of the BWOFF process is *to ensure routine maintenance, testing, and inspection of Specified Systems (such as fire sprinkler alarms, automatic doors, emergency lighting, power, HVAC, lifts etc) are carried out as required by the Building Act 2004.* This is because these systems are critical to the safety and health of a building and its occupants. Building owners have a responsibility to make sure that systems are inspected and looked after as required by the compliance schedule. BWOFF accordingly relate to the specified systems only, not other building elements such as the condition of cladding, roofing etc.

2.6 What is the process for issuing a BWOFF?

1. When a building consent is obtained which contains specified systems on completion a compliance schedule will be issued by the local building consent authority (usually the local council) with a code compliance certificate. The compliance schedule will include the details of any Specified Systems that need to be regularly maintained, inspected, and reported on.

2. The building owner then engages Independent Qualified Persons (IQPs) to carry out this testing and maintenance work.
3. The building owner then needs to ensure that the maintenance, reporting, and inspections required in the compliance schedule are carried out within the required intervals.
4. The IQPs must provide a Form 12A to show the requirements set out in the Compliance Schedule have been met. Without this supporting information a BWOFF will not be issued.
5. Records of inspections, repairs and maintenance must be kept for at least 2 years. This includes any work carried out, dates, faults found, remedies and details of the individual who carried out the work.
6. The building owner or their agent must complete the requirements, sign, and publicly display a new BWOFF every 12 months to confirm that the Compliance Schedule requirements have been met. Failure to comply can result in fines.
7. A copy of the BWOFF and Form 12As completed by IQPs and any recommendations to amend the Compliance Schedule are sent to the Council. Copies of these are kept by the Council for the life of the building.

What happened in the past if an inspection was missed or an IQP change?

- 2.7 In the past, if a service contractor missed an inspection or was waiting to remedy a minor defect, or if the IQP changed within the last 12 months, (where the IQP was unable to issue a 12A Certificate), an alternative option was used by many Councils (including Auckland Council). A Report in Lieu was issued (RIL) and a BWOFF could still be issued. This was not a technically compliant interpretation of the Building Act 2004 but enabled buildings which may have had a minor omission in the past, but which were meeting the standards required at the time, to be issued a BWOFF. The RIL had no legal standing. A RIL was never to be issued if the specified system remained defective at the time of issue, thus achieving the purpose of health and safety.

What is the new approach?

- 2.8 The changes by removing the practical work arounds to allow the issue of BWOFF, as directed by MBIE have changed the procedures without wide consultation or announcement, catching the property industry by surprise, and will have far reaching negative consequences on the property industry.
- 2.9 As the Building Act 2004 (the Act) requires completion of all inspection, maintenance and reporting (IMR) procedures in the building's compliance schedule for the previous 12 months¹, in order for a BWOFF to be issued², MBIE has recently confirmed that the Act does not provide any flexibility or exemptions to this requirement. This means for those buildings where IMR

¹ S108(3)(b) Building Act 2004

² S108(3)(b) Building Act 2004

procedures have been missed, at the time the next BWOFF is due, a valid BWOFF will not be able to be supplied or displayed and the RIL processes to get around this will not be accepted.

2.10 MBIE have implemented by policy and without legislation the following measures to provide reassurance that the specified systems are currently performing as required and provide information about the missed IMR procedures while a BWOFF cannot be issued.

2.11 When a BWOFF is due, but cannot be supplied and displayed because IMR procedures were missed, the building owner should issue a BWOFF Report and Declaration (B-RaD) which:

- states that this document has been issued in lieu of a BWOFF.
- states that the requirements of the compliance schedule were not complied with and that a BWOFF cannot be supplied or displayed (because one or more IMR procedures were missed)
- lists the specified systems contained in the building where IMR procedures have been missed in the previous 12 months.
- states the performance status of each of the specified systems.

2.12 When supplying the B-RaD to the territorial authority, the building owner should also attach:

- all Form 12As for the specified systems where no IMR procedures have been missed.
- a Specified System Report and Declaration (S-RaD) issued by an IQP for each specified system where IMR procedures were missed.

2.13 Where IMR procedures have been missed, an individual report (S-RaD) for each affected specified system should be issued by an IQP which:

- states the specified system.
- states that a Form 12A cannot be issued because one or more IMR procedures were missed.
- lists the IMR procedures (as stated in the compliance schedule) that were missed in the previous 12 months and the reason the procedures were missed (e.g., 1 IQP inspection due in April 2022 was missed due to IQP illness and no available replacement)
- lists any measures put in place to ensure the procedure is not missed again in the future.
- states that the specified system is/is not currently performing to the performance standard.

- states whether the missed IMR procedures have materially affected the ability of the specified system to perform to the performance standard for that system.
- gives a description of the status of the non-performing specified system (If applicable)
- lists the measures put in place (or will be) to ensure the system performs to the performance standard (If applicable).

2.14 The building owner should supply a B-RaD to the local council on the anniversary of the issue of the compliance schedule and publicly display a copy of the B-RaD in the building.

2.15 It is important to note the supply and display of a B-RaD does not change any responsibilities an owner has under the Act, including the offence provisions under section 108 and breaches under section 164 of the Act. Territorial authorities are tasked with administering and enforcing the BWoF provisions at a local level, and we expect a pragmatic approach will be taken.

2.16 S-RaD allows:

- A process for a minor inspection error not affecting system performance.
- Notes that the issue is resolved.
- It is informative to the Council.
- Cautionary to the building owner
- A repeat breach may result in enforcement action by the Council.

2.17 An S-RaD should not accept a not-performing system or allow a critical inspection to be missed but be used as a tool to report non-compliances.

2.18 This S-RaD and B-RaD system should be legislated so that it has official standing, rather than being an unlegislated work around. The current legislation does not recognise the consequential problems from the de facto system being deactivated. This can arise from works being carried out, from a change in building ownership, buildings being empty, contractors changing, records being lost and so on leading to a need to a work around. If a provider goes out of business, passes away or retires during the year, although a replacement IQP is appointed, no BWOF will be issued if records are unavailable. Similarly, if a building owner changes their IQP during the year between their last BWOF being issued if they are unhappy with their performance, they may not get a BWOF. Again, these are all unsatisfactory and likely unintended outcomes.

2.19 It is notable that this change does not focus on the IQP's performance or competence, just having the same person carrying out inspections appears to be enough. Even if a higher standard of service is provided by a subsequent IQP and the building is raised to a higher standard, no BWOF will be issued. If an IQP decides to increase their charges the building will be stuck with that supplier until the BWOF has issued and then there is a 1-month window to

change suppliers. If an IQP is sick and misses an inspection by a few days, no BWOFF will be issued.

- 2.20 If all inspections have been carried out, throughout the year, but in month 11 there is an issue with the lift and parts have to be obtained from overseas, and the repair cannot be effected until a few days after the monthly inspection is due, no BWOFF can be issued and no BWOFF is held for the building for the following 12 months despite the system operating at the necessary standard two days after the BWOFF expiry, and 11 months prior.

What are the problems caused by no issue of a BWOFF and Issue of a B-RaD?

- 2.21 While the RIL had no legal standing, neither does a B-RaD as it is not referred to in the Act or the Regulations.
- 2.22 With there now being the inability for a BWOFF to issue, if an inspection has been missed or there is an inability to obtain a Form 12A due to a change in IQP supplier this may cause problems with:
- Lending Finance – often it will be a precondition to drawdown that the building has a BWOFF.
 - Certifications required for some building uses e.g. liquor licences, aged care, early childhood education licences – i.e. cannot trade with no BWOFF.
 - Insurance requirements – this may negatively affect insurability.
 - Tenantability of a lease – depending on the lease terms this may affect a tenant's ability to occupy.
- 2.23 The Act requires completion of all inspection, maintenance, and reporting (IMR) procedures in the building's compliance schedule for the previous 12 months, in order for a BWOFF to be issued. The B-RaD does not change any responsibilities of the building owner under the Act. This will be a breach of Act, triggering following offences and penalties under s108. As well as committing an offence and risking a fine (often through no fault of the owner), having no BWOFF could also invalidate building insurance policies, put mortgagors in breach of mortgages, and should anyone sell a building they will be in breach of warranties under The Law Association (formerly ADLS) and REINZ standard form of agreement.
- 2.24 There should be a difference between minor non-compliance (which does not impact safety) and building owners that flagrantly breach building safety legislation and regulations. These should be clear directions to territorial authorities in dealing with building systems and inspections while repairs, maintenance and fitout works are undertaken.

- 2.25 No one wants to see further tragic consequences from non-compliance with legislation however, without addressing the gaps (there are many), some building owners and their occupiers will get caught in the crossfire without the gaps being addressed, with unintended consequences.

Whereto from here?

- 2.26 As stated above, the BWOF system relates to safety of occupants. However, the new approach (like the old) requires a work around as the legislation has a gap for dealing with situations where there are minor technical oversights with an inspection missed, even though the building systems are operating well. We need to incorporate the new S-RaD and B-RaD forms in the legislation and regulations so that they have legal standing and amend the Act accordingly.
- 2.27 We are concerned that the above issues are anticompetitive by holding building owners captive to IQPs regardless of their service level, with a narrow window of a month to change if their performance is unsatisfactory when the BWOF has just issued. This change in approach focuses on form rather than on substance, and actual safety. The changes are not focused on obtaining and maintaining high standards of building performance. It is notable that these changes in policy affect all owners and occupiers of buildings with BWOFs, including bodies corporate.
- 2.28 Better guidance needs to be given to Councils to confirm that where an IQP changes during a year whether each IQP can provide certifications for the period they were the IQP. Also, when part of systems is not operating due to say a tenancy fitout with a valid building consent that a Form 12A can still issue even if during the period of the works some systems were not tested because they were intentionally shut off.
- 2.29 Legislative amendment is necessary, and this must be addressed with urgency as the consequences of not being able to be granted a BWOF can be too great a penalty for a compliant building when situations such as those set out above occur and there is still a gap in the legislation and framework.
- 2.30 Addressing this gap will allow property industry participants, not just owners and IQPs, but banks, insurers, and the territorial authorities to focus on the fundamental issues – namely that the building is fundamentally safe and operating well to ensure that building owners and occupiers don't see disproportionate repercussions that outweigh the actual issue.
- 2.31 The amendment to s.108 by the insertion of new s.108A, with the added penalty for IQPs will likely mean that the use of the unlegislated B-RaD and S-RaD system that the MBIE has implemented will be used more frequently. This will put more building owners under significant pressure as they will be unable to obtain a BWOF. The issue of a B-RaD is not the equivalent to

a BWOFF. This is a flawed system which needs to be recast and this Bill serves as an ideal opportunity to do that now under urgency.

3. Miscellaneous matters

3.1 We support the other minor technical changes to the Act to improve its workability.

4. Conclusion

4.1 We would like the opportunity to make an oral submission if it is possible.

4.2 We again thank the Transport and Infrastructure Committee for the opportunity to make submissions.

4.3 We would like to thank the Subcommittee of the Property Law Committee for working on these submissions, particularly Joanna Pidgeon with the additional assistance of Tina Hwang on behalf of the Property Law Committee of the Law Association.

4.4 If you have any questions or queries please contact the Property Law Committee Executive, Gandhya Senanayake gandhya.senanayake@thelawassociation.nz

Yours sincerely,



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Disclaimer: While this letter has been carefully prepared, it may contain errors and omissions, and the views contained in this letter are those of the Committee and do not necessarily reflect the position of The Law Association. This letter is not intended to provide legal advice.