Will revisiting council liability improve the consenting process

By Janine Stewart and Mark Lin

The Minister for Building and Construction, Jenny Salesa, has instructed her officials to explore options for rebalancing risk and liability in the building process so that parties take appropriate responsibility for their work.

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While it is unclear whether a risk-based approach will necessarily improve the consenting process, the regime pushes the building industry in the right direction – considering the reallocation of risk

This reflects the Department of Building and Housing's review of the Building Act 2004 (Building Act) in 2010 that highlighted their key concerns with the status quo in the construction industry, including the uneven allocation of risk and responsibility in building projects. In particular, the review noted that the liability placed on councils for defective buildings did not match their control over the quality of the completed building.

Underlying this issue is the tension between the need to build reliable buildings versus the need for an efficient consenting process to deal with the growing demand for construction in New Zealand. The critical question is whether or not rebalancing councils' risk and liability will encourage a more efficient consenting process.

This article looks at the risk for councils as the territorial authorities in building projects and their associated liability. It will also examine attempted legislative reform and case law concerning defective buildings, with a particular focus on how the law can shift councils' liability in relation to the consenting process.

REHASHING COUNCIL LIABILITY

Depending on the building defect, an owner of a defective property can potentially bring claims against multiple parties (see diagram right). As the regulatory authority for construction projects, councils are often the primary party in defective building claims or are responsible for driving the conversation around resolution.

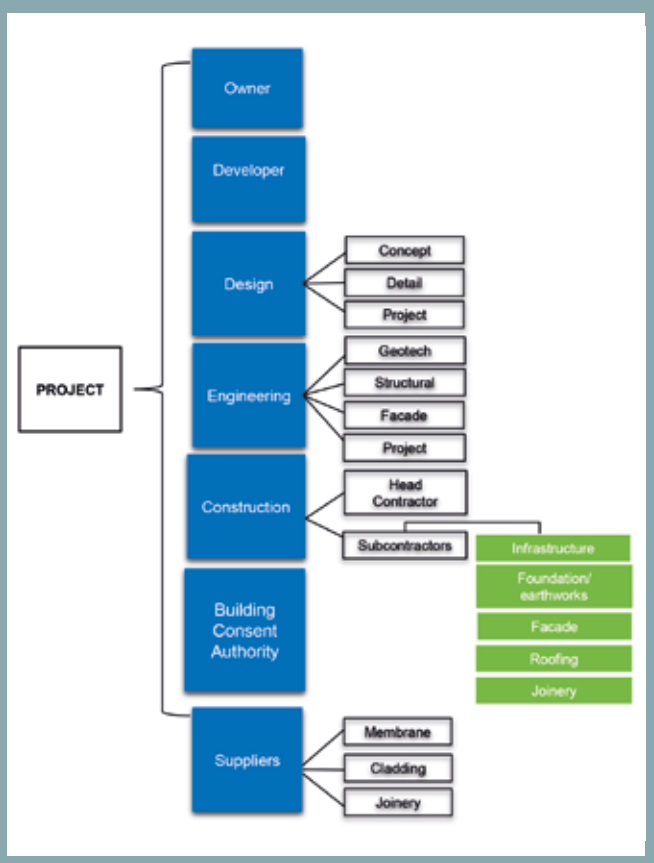
Under section 12 of the Building Act, territorial authorities (city and district councils) perform the function of a building consent authority. Claims against the territorial authority in construction disputes are usually based on negligence and arise out of councils' duty to issue building consents, inspect the building work and issue code compliance certificates.

Under section 49 of the Building Act, the building consent authority has a duty to issue building consents only if it is satisfied on reasonable grounds that a proposed project can comply with the NZ Building Code, and under section 94 has a duty to issue code compliance certificates only if it has reasonable grounds to be satisfied that the completed project complies with the building consent.

The judicial interpretation of the territorial authority's duty has been expanded since the enactment of the Building Act, including extending councils' duty of care in inspection to original and subsequent homeowners (in North Shore City Council v Body Corporate 188529 Sunset Terraces), and to owners of both residential and commercial dwellings (in Body Corporate 207624 Spencer on Byron v North Shore City Council).

The court in the Spencer on Byron case considered the impact of imposing a duty of care on territorial authorities, noting that it might encourage overly defensive behaviour from building inspectors, including in the consenting process.

This was foreshadowed in the 2010 review of the Building Act where it was observed that while territorial authorities face a high risk of liability, they do not realise any benefits from risk-taking in the context of a building project, thereby creating incentives for councils to be risk averse.



Despite noting this risk aversion, the courts have continued to impose a duty, premised on the policy point that councils control all aspects of the building work to ensure that it complies with the Building Code.

In the 2017 case of Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council, the Supreme Court confirmed that the territorial authority's duty is not obviated by an independent expert's negligence or knowledge. The court found that there is no valid distinction between any of the council's regulatory functions in terms of the council's duty of care. This judgment keeps in line with how the courts have evolved and expanded the duty of care owed by territorial authorities under the Building Act.

WHERE ARE WE NOW?

The Building Amendment Act 2012 introduced risk-based consenting provisions, which were aimed at streamlining the consenting system. Although not in force, the provisions underscore the government's intentions to move towards a segmented consenting system.

The risk-based scheme envisages four types of building consent pathways: standard, low-risk, simple residential, and commercial. For lower-risk building projects, councils are only required to inspect certain aspects of the consent – e.g. whether any person named as a licensed building practitioner is within the appropriate class for the work on application. The criteria for a building consent become more onerous under the commercial category as risk profiles and quality assurance systems have to be reviewed and approved.

In principle, this scheme should improve the efficiency of the consenting process as councils will not have to over-inspect relatively low-risk work, and will allow councils to take a risk-averse approach in its regulatory functions for complex building projects, which is where the consenting process provides the most value.

The previous Minister for Building and Construction agreed not to progress with risk-based consenting in its current form, due to territorial authorities' low level of confidence in practitioner capability, which is crucial for implementing the risk-based scheme.

The Ministry of Business, Innovation and Employment's (MBIE) view is that a wider approach is needed to better understand the drivers of behaviour in the consenting process. MBIE's work programme includes looking at risk, responsibility and liability in the sector, as well as looking at ways to support councils in further exploring what they can already do under the current legislative setting.

WHERE ARE WE GOING?

While it is unclear whether a risk-based approach will necessarily improve the consenting process, the regime pushes the building industry in the right direction – considering the reallocation of risk.

On the face of it, the risk-based provisions should increase the efficiency of the consenting process, as councils can determine the scrutiny they place on a consent based on its complexity. However, until these provisions are brought into force, there are clear incentives for the construction industry to get building projects right and to drive efficiency in construction projects outside of the consenting process.

The courts' approach also suggests that without legislative change, and under a regime of joint and several liability, councils will continue to incur liability as they are often the 'last man standing' in defective building claims.

If the efficiency of councils' consenting process is linked to its risk and liability, other mechanisms which reallocate inordinate risk and liability on councils should also be explored – e.g. legislative measures against defaulting companies who make themselves judgment proof through liquidation.

The courts also have a part to play in this process, by addressing and clarifying the extent of the duty of care for other parties in a construction project – e.g. the liability of manufacturers of building products.

The focus for now will have to be on leadership within the industry to advocate for best practice, as a foundation for the implementation of any legislative reform surrounding risk-based consenting.

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