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Building Act Emergency Management Consultation
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

By email: buildingactemergencymanagement@mbie.govt.nz

Building Act emergency management proposals, May 2015

Thank you for the opportunity to comment on the Building Act Emergency Management Proposals consultation paper (consultation paper). The consultation paper has been considered by the New Zealand Law Society's (Law Society) Property Law Section. The Law Society's comments are set out below.

Proposal 1 – A Civil Defence Controller may decide whether to use Building Act emergency management powers.

During a state of emergency declared under the CDEM Act, a controller appointed under that Act may decide whether to use Building Act emergency management powers.

The controller must give consideration to the following factors:

a) significance of the scale of the damaging events
b) reasonably foreseeable likelihood of further related damaging events which could pose risks to life-safety
c) distance and direction of the damaging event or hazard, or possible events or hazards, and impacts in relation to buildings in built-up areas
d) observed scale of structural damage to buildings
e) information available about building and ground conditions
f) need for shelter in residential buildings
g) likely scale of structural damage to buildings
h) likely scale and risk to life-safety from buildings
i) advice and information from relevant territorial authorities, suitably qualified persons, and relevant government agencies
j) credible discoveries or disclosures about risks from buildings
k) the territorial authority's ability to manage risks adequately without building emergency management powers.

The building emergency powers are divided into those that can be renewed for up to one year and those that are available for up to three years after the state of emergency has ended. Every 28 days after the end of the state of emergency, the territorial authority must decide whether to continue using those powers that can be renewed for up to one year.

Question 1
Are the considerations that must be taken into account appropriate? Why / Why not?

The considerations identified above are broad enough to deal with a range of emergency situations without unnecessarily compromising the rights of a building owner.

Referring to factor (a), the scale of the event might be highly localised but the damage to buildings might be such that it is appropriate for the Emergency Management Powers (EMP) to apply. Further, it may be unfair on building owners to invoke the EMP in circumstances where a particular building is not affected.

The only 'use' that appears to be taken into consideration is the need for shelter in residential buildings (factor (f)). The Law Society suggests amending factor (f) to include other needs such as public services, food, hospitals etc.

It is also unclear whether the considerations are listed in priority, or if more weight is to be given to one factor over another. It would be helpful to have some guidance on how a decision is to be made.

Question 2
Is 1 year an adequate length of time for the powers that enable territorial authorities to make initial building assessments and take action to reduce or remove more immediate risk? If not, what length of time would be more appropriate and why?

On one hand, one year may seem inadequate where the scale of the emergency is significant, which will impact on access to resources to implement the powers. On the other, one year may seem excessive because of the negative commercial implications for property owners. The need to protect the safety of the public needs to be weighed against the need to allow property owners to deal with their own property.

Taking these conflicting considerations into account, one year is an adequate length of time but territorial authorities should be encouraged to carry out initial assessments as quickly as possible within that timeframe.

Consideration should also be given to what happens if there is a series of events (whether related or not). Does time start running from when the first state of emergency begins? Where the powers are not exercised after the first event, can the Controller take into account the first event when making a decision under Proposal 1? Should the series of events be considered as a whole or as individual events?

Question 3
Is 3 years an adequate length of time for the remaining powers to stay in force? If not, what length of time would be more appropriate and why?

Our answer to Question 2 is also relevant here.

Consideration should be given to whether the 3 year powers should be subject to review (as with the 1 year powers). The period of review should be longer than for the 1 year powers (i.e. 28 days), for example reviewable every 3 months.

On balance, 3 years is an adequate length of time but property owners should be encouraged to comply with the requirements of any assessment before then if possible.

Question 4
Is the requirement to review the proposed 1 year powers every 28 days appropriate? Why / Why not?

Yes. It is a good idea to have a check on the powers to prevent excessive or unnecessary use, and therefore protect the rights of property owners. It is also appropriate because the status of a particular building will change over time as more information becomes available.

Question 5
Is it appropriate to link the building emergency powers to a state of emergency? Why / why not?

It is appropriate to link the building emergency powers to a state of emergency. The EMP and states of emergency are closely linked concepts, and in most cases where one arises so will the other. And in many cases where a state of emergency has not been declared, it will not be appropriate for the building emergency powers to apply. This also aligns with the intention of the reform, which is to provide a transition from states of emergency.

However, there may be situations where it is appropriate to invoke the emergency powers in respect of an individual building without a state of emergency being in place, as discussed below (Q6).

Question 6
Are there situations when a state of emergency has not been declared when the building emergency management powers should be made available? Please provide examples.

Yes. There may be situations when a state of emergency has not been declared when the building emergency management powers should be made available. Examples include factory explosions, acts of terrorism, sink holes and small earthquakes (in size and/or coverage).

Where a state of emergency has not been declared, the Building Act provides for action to be taken to remove or prevent danger posed by dangerous, earthquake-prone and insanitary buildings.

The definition of a dangerous building under the Act specifically excludes risk from earthquakes. Therefore if there is a dangerous building following an earthquake event and a state of emergency has not been declared, there will be no ability to carry out building works on that building.

In addition, section 129 for example imposes a relatively high threshold before the powers in subpart 6 of the Building Act can be exercised. Where a building does not meet the section 129 criteria, there may be considerable delay before a territorial authority can take action (under section 126) to remove or prevent the danger. This delay will be problematic in some circumstances.

Therefore, although the examples listed above will in most cases be covered by existing legislation, the existing legislation does have some limitations.

Consideration should therefore be given to implementing a discretionary power to use emergency powers in exceptional cases without a state of emergency being declared. There is a high threshold for the use of the emergency powers, so there is a relatively low risk of unnecessary use in the absence of a state of emergency.

Proposal 2: Territorial authorities have powers to do assessments and place placards.

Territorial authorities have powers to do, or authorise, assessments during a state of emergency and up to one year after the state of emergency has ended. The power is reviewed every 28 days for up to 1 year after the state of emergency has been terminated.

Territorial authorities may place placards as a result of the assessment which will state the restrictions and requirements imposed on the buildings. Placards will be valid for three years after the state of emergency has been terminated.

Proposal 3: power to assess further and change placards.

Territorial authorities may require further assessments and change placards placed as a result of any previous assessments. Territorial authorities may undertake these assessments if necessary. The power is available for up to 3 years after the state of emergency has terminated.

Proposal 4: Territorial authorities have powers to restrict access including placing cordons and other protective measures (up to 3 years).

Territorial authorities can restrict access based on assessments up to three years after the state of emergency has been lifted. The placards placed on the building will state the restrictions and requirements imposed.

Question 7
Should territorial authorities have the powers to continue to assess buildings and place placards for up to one year after the state of emergency has ended? Why / why not?

Assuming the assessments are of a high standard, it is appropriate that territorial authorities have this power because it may be that assessments will not be complete by the time the state of emergency has ended, and there may be ongoing events (such as the Canterbury earthquake sequence of 2010/2011).

However, the assessment timeframe considerably impacts on an owner's commercial position: the EMP should not unfairly fetter the building owners' ability to deal with their own land and should be limited to exceptional circumstances only. It would be appropriate to allow property owners the ability to have their property re-assessed and to have a decision to place a placard reviewed.

Question 8
Should territorial authorities be able to restrict access to buildings on the basis of an assessment? Why / why not?

Territorial authorities should be able to restrict access to buildings on the basis of an assessment but property owners should have the right to appeal such a decision.

Territorial authorities have a statutory duty to ensure compliance with the Building Act. It is appropriate that this should extend to restricting access to buildings where damage has occurred rendering a building non-compliant with the Building Act. In addition, steps are necessary to ensure life-safety and to implement the other purposes of the reform. Whilst the powers should not unduly fetter the building owners' ability to deal with their own land, the life-safety of the public takes priority.

Given the impact of an assessment on property owners, it is important that the assessment is comprehensive and accurate. At the same time, given the emergency circumstances, there will inevitably be limitations on how detailed it can be.

If access is to be restricted, the assessment should be more comprehensive and perhaps accompanied by an engineer's report because the consequences are considerable for property owners. This will involve time and cost.

Consideration should be given to whether territorial authorities should be required to seek property owners' permission before restricting access, and to putting in place a process where permission is denied. There should also be a right of appeal of any decision of the territorial authority.

Question 9
Do you agree with the Royal Commission prioritisation of further assessments as outlined in Figure 4? Do you consider an alternative model could be used, and if so what is it?

It is appropriate to group types of assessments according to level of risk. However, the Royal Commission's prioritisation of further assessments does not factor in the actual use of the building.

An alternative model is the building importance levels contained in the Building Regulations 1992 – this groups structures and ranks buildings according to importance level. A similar model could be used in the context of emergency powers.

Proposal 5: Resource or building consents will not be required to remove significant or immediate dangers.

A territorial authority will not require resource consent or building consent where urgent work is required to reduce or remove significant and immediate dangers for up to one year after the state of emergency has ended.

After issuing a warrant to remove significant and immediate dangers, territorial authorities may begin, or require work to begin, immediately.

Proposal 6: Heritage values will be taken into account where possible when removing significant or immediate dangers.

Territorial authorities should seek to preserve heritage values where possible.

Before issuing a warrant to undertake work to remove significant and urgent dangers, a territorial authority must:

- Obtain the approval of the Minister for Building and Housing, in consultation with the Minister for Arts, Culture and Heritage, for any buildings listed in district plans that are **National Historic Landmarks, or Category 1 Historic Places.**

- Give at least 24 hours' notice (where possible) to Heritage New Zealand Pouhere Taonga, and have particular regard to its advice in respect of heritage buildings individually listed in district plans, and buildings that are subject to a heritage order or covenant

Question 10
Should territorial authorities be able to do building work to remove immediate life-safety risks without the requirement for a resource or building consent? Why / why not?

In relation to Proposal 5, territorial authorities should be able to do building work to remove immediate life-safety risks without the requirement for a resource or building consent. Ultimately the risk to life should outweigh the need to obtain building and/or resource consents.

However, a code compliance certificate ensures building work complies with the Building Act and any building consent issued by the relevant territorial authority. Therefore, there is a real risk that building work under these proposals will not be legal and/or code compliant. Consideration should be given to liability for defective building work carried out under these proposals, especially the liability of the council which has not given building consent.

An alternative option would be to fast-track the building and resource consent process so that territorial authorities can obtain resource and/or building consents, whilst retaining the ability to remove immediate life-safety risks in an appropriate timeframe.

Given that Proposal 5 relates to immediate dangers, the levels of consultation and involvement of stakeholders will inevitably be reduced. Although that is appropriate, the proposal is currently silent on the question of consultation with landowners. Although their views would not be determinative, as the key stakeholders in such a decision the views of landowners should be considered, before undertaking works that bypass the consent processes. A mechanism should be provided for the situation where the views of the landowner have been sought but unable to be reasonably obtained.

Proposal 5 allocates the cost of the works to the landowner, which is consistent with the Building Act provisions relating to dangerous buildings. It would be useful to clarify that the cost of the works are to be borne by the owner of the property causing the danger, and that costs will not be allocated to a neighbouring owner if their property is damaged in the process of removing the danger. (These latter costs will presumably need to be allocated to the owner of the damaged building (or their contractor) or the territorial authority.)

Consideration could be given to whether Proposal 5 should be extended to cover an owner-instigated process. This would enable the owner of a building causing immediate danger to bypass the consent process for life-safety protection. It would also potentially introduce efficiencies from the perspective of territorial authorities (for example in terms of obtaining assessments of the dangers).

Question 11
Is it appropriate to have Ministerial approval before undertaking work on any buildings listed in district plans that are National Historic Landmarks, or Category 1 Historic Places? Why / why not?

On balance, it is appropriate to have Ministerial approval before undertaking such work, subject to the following comments.

The Purpose Statement in the consultation paper states that the proposals are part of a wider work stream to address the recommendations of the Royal Commission. The Purpose Statement also states that the proposals are intended to minimise injury or death caused by buildings after states of emergency.

To give effect to the Royal Commission's Recommendation 100, the consideration of heritage values needs to be secondary to removing significant or immediate dangers. Where there is a significant danger to life that cannot be managed temporarily (and therefore Proposal 5 applies), Proposal 6 should apply in a way that does not undermine the intent and effect of Proposal 5. Amendments to achieve this are suggested below, in response to Question 12.

The final decision in relation to National Historical Landmarks or Category 1 Historic Places should be made by the Minister for Building and Housing.

Question 12
Is it appropriate for territorial authorities to give at least 24 hours' notice (where possible) to Heritage New Zealand Pouhere Taonga, and have particular regard to its advice when considering actions on heritage buildings that are listed on district plans and/or subject to a heritage order or covenant? Why / Why not?

Without appropriate direction, giving 24 hours' notice to Heritage New Zealand Pouhere Taonga (Heritage New Zealand) and having "particular regard" to its advice could potentially undermine the intent of Proposal 5.

To overcome this potential conflict, Proposal 6 could be amended to make clear the priority to be given (in appropriate circumstances) to Proposal 5, and that the intention of Proposal 6 is that in issuing a warrant, the works should be carried out in a way that minimises damage to heritage values while not undermining the overall intent of removing significant or immediate dangers.

Proposal 6 already goes some way to doing this, including statements such as "preserve heritage values where possible", however more direction would be helpful. The wording of Proposal 6 could be further refined as follows:

- Bullet point 2 refers to "heritage buildings individually listed in District Plans". This definition will require careful consideration as to what is intended to be caught by the provision. It is assumed that the word 'individually' will carve out broad heritage listings such as the Auckland pre-1944 Character Overlay in the Unitary Plan. This should be clarified.

- One option would be to only require 24 hours' notice to Heritage New Zealand where a building is both listed in a District Plan *and* listed on the New Zealand Heritage New Zealand List. This would carve out more general listings in District Plans.

- The proposal to consult (or obtain approval from the Minister) should only relate to works that are on the actual heritage components of a building that is listed. For example, if only a façade is listed, Proposal 6 should apply only to works to the façade.

- Even if a building is on the Heritage New Zealand list, consideration could be given to amending Proposal 6 so that if the heritage considerations that led to the listing have been destroyed, the approval of the Minister and/or consultation with Heritage New Zealand is not required. This would presumably require an evidential basis confirming that the heritage values are no longer present.

- Bullet point 2 refers to "having particular regard to its [Heritage New Zealand's] advice". Given Heritage New Zealand's focus is understandably purely heritage-related, it is likely that their view will focus on the retention of the heritage considerations rather than the works to remove significant or immediate dangers. As such, there is a need for guidance on

what happens if Heritage New Zealand does not support the proposed works – and in particular, how the council is to have "particular regard" to such advice. As suggested above, one option would be for the council to be required to minimise damage to heritage aspects if that can be done in a way that also removes significant or immediate dangers.

If the above amendments are made, it would be appropriate for territorial authorities to be required to give at least 24 hours' notice to Heritage New Zealand.

Proposal 7: Resource or building consents will not be required to remove dangers causing significant economic disruption.

Territorial authorities will not require resource or building consents when reducing or removing dangers causing significant economic disruption for up to 1 year.

Before issuing a warrant to undertake or require work to remove dangers causing significant economic disruption:

- The territorial authority must take reasonable steps to give notice to owners and tenants of the building, and owners and tenants of properties whose access is affected by the building.
- The parties will have the right to apply to the chief executive of MBIE for a determination where they dispute the issuing of the warrant.
- After issuing the warrant, the territorial authority must not commence the work for 48 hours (providing further opportunity for parties that dispute the warrant to seek a determination).

Proposal 8: Heritage values will be taken into account where possible when removing danger causing significant economic disruption

Territorial authorities should seek to preserve heritage values where possible.

Before issuing a warrant to undertake work to remove significant and urgent dangers, a territorial authority must:

- Obtain the approval of the Minister for Building and Housing, in consultation with the Minister for Arts, Culture and Heritage, for any buildings listed in district plans that are **National Historic Landmarks, or Category 1 Historic Places.**
- Have particular regard to advice from Heritage New Zealand Pouhere Taonga for any other heritage buildings listed in district plans, and buildings that are subject to a heritage order or covenant. HNZPT will be allowed at least two weeks to provide their advice.

Question 13
Should territorial authorities be able to remove dangers causing significant economic disruption without requiring resource or building consents? Why / why not?

In principle, territorial authorities should be able to remove dangers causing significant economic disruption without requiring resource or building consents. However, care would need to be taken in defining 'significant economic disruption' so that it represents circumstances that properly justify action being taken without the usual controls under the Resource Management and Building Acts.

Proposal 7 relates to economic disruption rather than danger to life, and therefore the comments in response to Proposal 6 do not apply and heritage considerations may need to be given more weight.

Proposal 7 entails control being taken away from property owners at a time when there is no immediate danger. In these circumstances it would be appropriate that territorial authorities, in addition to the requirement to notify property owners, also be required to consider the views of the property owners before issuing a warrant under Proposal 7.

As currently drafted, Proposal 7 appears to apply only to a danger that is causing disruption to other buildings (that is, buildings other than the building causing the danger). Consideration should be given to whether:

- landowners themselves could instigate the process with a territorial authority under Proposal 7, to avoid the need for heritage-related resource consent where damage is causing economic damage to their building but not surrounding buildings; and

- surrounding landowners who are being subjected to the economic disruption could instigate the process rather than waiting for the territorial authority to do so.

As noted above in respect of Proposal 6 – in relation to how a territorial authority is to apply the views of Heritage New Zealand – consideration should be given to whether more guidance could be included in Proposal 7 as to how economic considerations are to be balanced against heritage considerations.

Question 14
Is it appropriate to have Ministerial approval before undertaking work to remove dangers causing significant economic disruption on any buildings listed in district plans that are National Historic Landmarks, or Category 1 Historic Places? Why / why not?

Buildings listed as National Historic Landmarks or Category 1 Historic Places are of sufficient significance that Ministerial approval before undertaking any work to remove dangers is an appropriate check.

Question 15
Is it appropriate for Heritage New Zealand Pouhere Taonga to have at least two weeks to provide advice to territorial authorities on removing dangers causing significant economic disruption on any other heritage buildings listed in district plans and/or subject to a heritage order or covenant. Why / why not?

Given the significance of the buildings concerned, it is appropriate for Heritage New Zealand to have a reasonable and adequate time to provide advice.

However, whether the 'at least two weeks' timeframe suggested will be adequate (from the point of view of Heritage New Zealand) or reasonable (in light of the nature and extent of the relevant significant economic disruption) will depend on the circumstances. Care should be taken to provide an appropriate mechanism to extend or shorten the timeframe if required and desirable.

Question 16
Should territorial authorities have particular regard to the advice of HNZPT? Why / why not?

Given that Heritage New Zealand is the national historic heritage agency, and has significant expertise on heritage sites within New Zealand, it is appropriate that territorial authorities have particular regard to its advice.

Proposal 9: Power to remove danger in other situations

Territorial authorities can undertake or require work to reduce or remove dangers in situations where danger to people is being managed temporarily (e.g. by cordons) and is not significantly disrupting other properties, for up to three years after the state of emergency has ended.

This power requires territorial authorities to use the normal resource and building consent processes under the Resource Management Act 1991 and the Building Act 2004.

Question 17
Should territorial authorities be able to remove danger using building emergency management powers in situations when it is not posing an immediate life-safety risk or a significant economic disruption? Why / why not?

Where there is no immediate life-safety risk or significant economic disruption, and if the building emergency management powers are the same as those set out under the Resource Management Act 1991 and the Building Act 2004, then in principle it is appropriate for the territorial authorities to resort to the building emergency management powers to remove other dangers. However, care will be needed to provide appropriate limits on the powers, to minimise the risk of actions being taken which may have far-reaching or long-lasting implications that are disproportionate to the risk addressed.

Question 18
Should resource and building consent processes be followed in these situations? Why / why not?

It is appropriate for territorial authorities to follow building and resource consent processes if there is no life-safety risk or significant economic disruption.

Question 19
Is three years after a state of emergency an appropriate timeframe for these powers? If not, what would you suggest is an appropriate timeframe?

Three years is an appropriate default timeframe for the powers. However, the period that will in fact be appropriate in any given situation will differ. There should be a mechanism for extension or reduction of the period in appropriate circumstances.

Proposal 10: Appeals

Appeals to the Chief Executive of MBIE about territorial authorities' building actions or omissions will be available in most situations.

Building owners will be able to apply for a determination against territorial authorities under section 177 of the Building Act regarding the use of building emergency management powers in most situations.

Question 20
The appeal rights are intended to protect people from life-safety risks, by allowing territorial authorities to manage unusable buildings whilst not interfering with private property rights more than is absolutely necessary. Do the appeal rights have the correct balance between life-safety risks and private property rights? Why / why not?

Whether or not the appeals process will strike the correct balance will depend on the detail of that process. The proposal suggests that the existing process under the Building Act will apply to actions under the emergency management powers. In addition to an effective appeals process, it is fundamentally important that rights and procedures for the initial determination are clear and specific so that private property rights are appropriately protected.

Proposal 11: Liability

Territorial authorities and assessors authorised by the territorial authority will be under no liability arising from any action that they take in good faith under building emergency management powers.

Question 21
Is it appropriate that territorial authorities and assessors are not liable for any action under the building emergency management powers for actions taken in good faith? Why / why not?

It is appropriate for territorial authorities and assessors to have a good faith defence to liability for actions taken under actual emergency situations.

However, where actions are taken under the emergency management powers but in circumstances that do not in fact amount to an emergency (which might be the case in situations such as those relevant to question 17 above), the parties taking those actions should not be immune from liability for negligence or breach of statutory duty.

Proposal 12: Costs

Owners will be liable for most costs associated with the building emergency management powers. Territorial authorities have the power to recover costs from owners for any work done.

Territorial authorities are responsible for the costs of the initial rapid building assessments and for cordons and restrictive measures for up to three months after the state of emergency has been lifted.

Question 22
Is it appropriate for building owners to be liable for costs associated with the building emergency powers? Why / why not?

It is appropriate for an owner to be liable for costs as proposed, provided (a) that the costs arise from actions taken because of that owner's building (rather than an adjacent property) and (b) that the costs are actual and reasonable.

Proposal 13: Compensation

Owners will be liable for most costs associated with the building emergency management powers, but can seek compensation for actions where the action caused disproportionately more harm than good.

Question 23
Are the compensation proposals appropriate? Why / why not?

The compensation proposals are generally appropriate as a matter of principle. It will be necessary for the statute to define the nature and degree of disproportionality required to be shown to establish a right to compensation.

Proposal 14: Offences

It will be an offence, with a fine of up to $5,000 for an individual and $50,000 for a body corporate, to interfere or not comply with protective measures and placards.

It will be an offence, with a fine of up to $200,000, not to comply with a notice to remove danger, or to use a building in breach of the directions on a placard.

Question 24
Where there is interference or non-compliance with protective measures and placards, is a fine of up to $5000 for an individual and up to $50,000 for a body corporate appropriate? Why / why not?

Question 25
Is a fine of up to $200,000 appropriate for not complying with a notice to remove danger, or using a building in breach of the directions on the placard? Why / why not?

In relation to both Q24 and Q25:
It is appropriate to set maximum fines for these offences. The level of those maximums is a policy matter. The maximums proposed do not appear extreme in terms of the range of maximum fines prescribed for regulatory offences of the same general nature.

Conclusion

If you wish to discuss these comments, please do not hesitate to contact the Law Society's Law Reform Manager, Vicky Stanbridge (04 463 2912, vicky.stanbridge@lawsociety.org.nz) in the first instance.

Yours sincerely

Chris Moore
President