



## **TERMS OF REFERENCE – SECTION 363 REVIEW**

Section 363B of the Building Act makes it an offence for a building owner to permit any part of a building to be used that is intended to be open to or used by members of the public for which building work was undertaken between 1 July 1992 and 31 March 2005 but a code compliance certificate never issued for the work.

As part of the Building Act Review, the Department of Building and Housing wishes to engage a suitably qualified and experienced person to undertake a review of Section 363B, including the relationship of this section to other sections of the Building Act that were designed to address dangerous or unsanitary or earthquake prone buildings and non-code compliant buildings constructed prior to the enactment of the Building Act.

### **Background**

#### *The Building Act Review*

In August 2009 the Minister for Building and Construction announced a review of the Building Act 2004 (the Act) in response to concerns about:

- the Act's implementation at local government / consent authority level
- the costs and complexity associated with the building consent process
- consumer confidence in the technical capability of practitioners
- the allocation of risk and liability between the parties involved in the building control system.

The aim of the review is to identify reforms to the Act and its associated regulation and administration to reduce the costs associated with the building control system without compromising building quality. The review therefore seeks to achieve the following results:

- quality homes and buildings are produced through a business-enabling and efficient regulatory framework
- consumers make informed decisions and have confidence transacting in the building and housing market
- homes and buildings are produced cost-effectively by a productive sector with the right skills and knowledge
- an efficient and cost-effective regulatory system.

#### *Section 363*

Section 363 of the Building Act was originally drafted to address the cave Creek Inquiry's recommendations by requiring councils to confirm the safety of the parts of premises intended for public use that are affected by building work. It originally did this by making it an offence to allow a building affected by building work to be used by the public prior to the issuing of a Code Compliance Certificate - the policy intent

being to provide a means of ensuring the safety of completed building work prior to its public use so as to minimise risks to human life and safety of faulty building work.

S363 was subsequently amended to provide for a certificate of public use, so as to provide a safe and practical means of allowing public activity to occur within a building concurrently with building work.

In order to clarify doubt as to whether or not S363 applied to building work undertaken under the previous Building Act 1991 the section was also amended (through the addition of S363B) to require owners of public premises where building work was undertaken between 1 July 1992 and 31 March 2005 and for which a building consent was required but a code compliance certificate never issued, to apply for a code compliance certificate, a certificate of acceptance or a certificate of public use (if the building work was never completed) by 1 July 2010. Section 363 provides for a fine not exceeding \$200,000 for owners that fail to meet the requirement.

Concerns were raised during the course of the Building Act review as to the likely effectiveness and efficiency of S363B, and whether there may be a more effective and efficient means of achieving its policy intent. In particular concerns were raised that:

- S363B is broad in scope and captures a large number of buildings that were the subject of building work undertaken without a consent or code compliance certificate prior to 2005 (such as shop fit outs and minor interior alterations)
- That while some of this uncertified building work might represent a material risk to public health and safety much will not
- There appears to be poor awareness of the S363B requirement
- There is no plan or strategy for how S363B will be implemented by 73 local authorities
- It is unclear whether and how local authorities actively and consistently enforce compliance with s363B
- There is no certainty that S363 it will provide an effective and efficient means of identifying and addressing uncertified building work likely to pose a threat to public health and safety
- The Act provides other means for local authorities to address buildings that pose threats to public health and safety, such as the Act's provisions for local authorities to identify, inspect and address dangerous, unsanitary and earthquake prone buildings.

In considering the findings of the Building Act review, Cabinet directed the Department of Building and Housing to review the retrospective application of section 363 of the Building Act, including consideration of an effective means of identifying and addressing non-compliant and dangerous building work in buildings built between 1 July 1992 and 31 March 2005.

## Purpose

The purpose of the review is to provide the Department of Building and Housing with well informed and robust advice on whether or not s363B provides an efficient and effective means of identifying and addressing uncertified building work undertaken prior to enactment of the Building Act 2004 with the potential to result in harm to the health and safety of public users.

The reviewer is required to:

- familiarise themselves with:
  - the risks and potential consequences to public health and safety of uncertified building work undertaken prior to the enactment of the Building Act 2004 under the previous Building Act 1991
  - s363B and the various other provisions of the Building Act 2004 and other pieces of legislation that can be used to address any such risks – including the dangerous, unsanitary, earthquake prone provisions of the Act
  - how these various provisions are currently being applied (or are planned to be applied) by the Department of Building and Housing and local authorities – including whether or not they are being applied in a manner that is strategic, proactive and consistent across local authorities
- advise on the likely nature and materiality of risks to public health and safety likely to be associated with uncertified building work undertaken under the previous Building Act 1991
- identify and describe any issues associated with (or likely to be associated with) the implementation and ongoing operation of s363B, and the implications of these issues for the overall effectiveness and efficiency of the provision in mitigating risks to public health and safety of uncertified building work undertaken under the Building Act 1991
- advise on whether or not s363B is an effective and efficient means of addressing these risks to public health and safety or whether other means, such as those designed to address dangerous and unsanitary and earthquake prone provisions might be more effective
- recommend any changes to s363B (or other sections of the Act), necessary to provide an effective and efficient means of address any risks to public health and safety of uncertified building work undertaken under the Building Act 1991.

## Stakeholder engagement

In undertaking this review, the reviewer is expected to engage with representative of the Department of Building and Housing, local authorities and other persons and organisations with knowledge needed to inform the analysis.

The reviewer must, however, form their own independent view on the substance and significance of any issues identified in discussions with stakeholders during the course of the review.

## **Timing and Reporting**

Time is of the essence. The review must be completed by the end of April 2010.

The product of the review will be a short written report that clearly sets out the reviewers:

- advice on the likely nature and materiality of risks to public health and safety likely to be associated with uncertified building work undertaken under the previous Building Act 1991
- advice on any issues associated with (or likely to be associated with) the implementation and ongoing operation of s363B, and the implications of these issues for the overall effectiveness and efficiency of the provision in mitigating risks to public health and safety of uncertified building work undertaken under the Building Act 1991
- advice on whether or not s363B is an effective and efficient means of addressing any such risks to public health and safety or whether other means, such as those designed to address dangerous and unsanitary and earthquake prone provisions might be more effective
- recommendations on any changes to s363B (or other sections of the Act), necessary to provide an effective and efficient means of address any risks to public health and safety of uncertified building work undertaken under the Building Act 1991.

## **Independence**

The review must be conducted by a suitably experienced and qualified person who is independent on the particular interests of stakeholders and persons affected by the implementation and operation of S363B.