



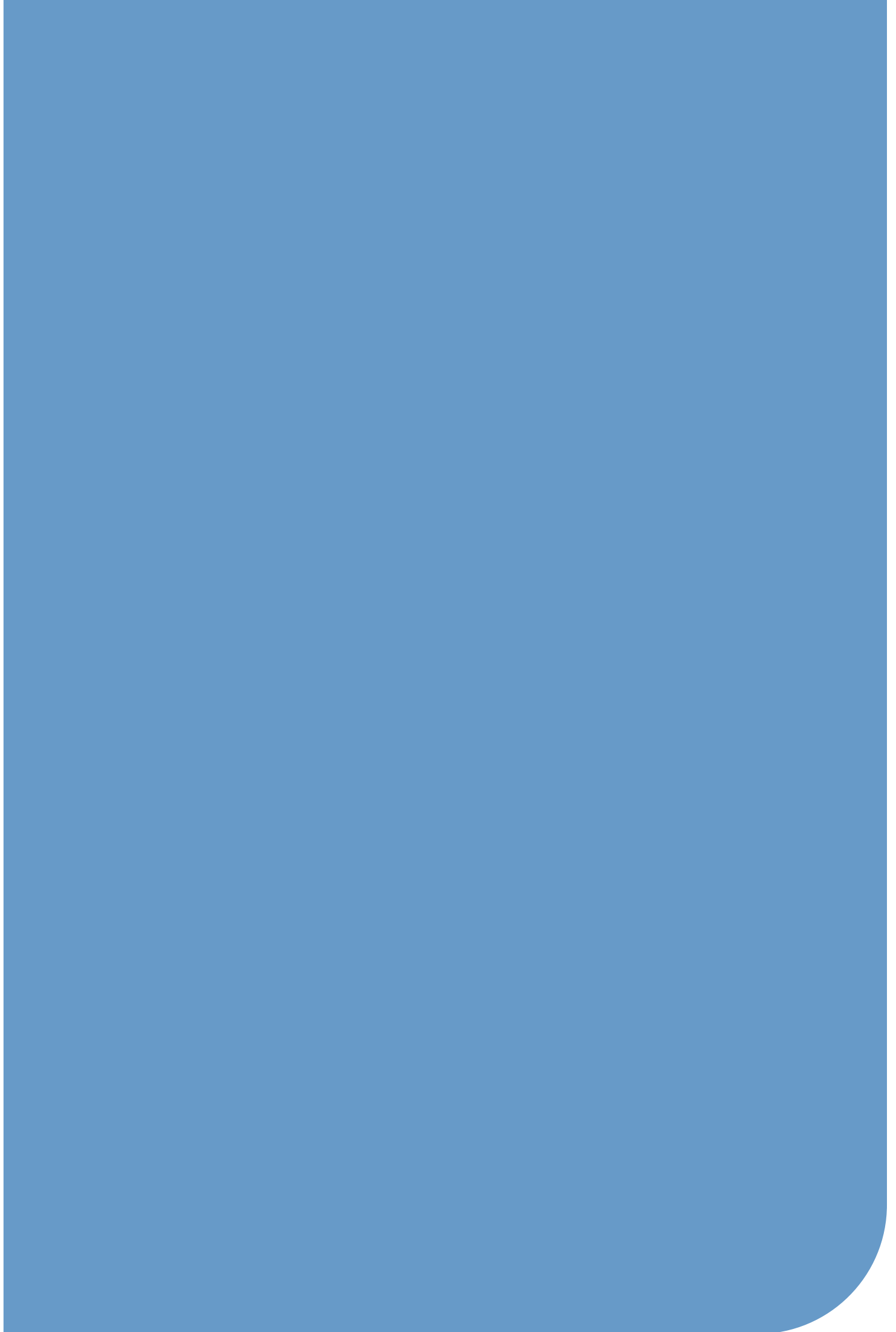
Department of
Building and Housing
Te Tari Kaupapa Whare

Summary of Consultation Outcomes

Private Building Consent Authority 'Adequate Means' and Civil Liability Insurance

31 March 2008





Introduction

In July 2007 the Department of Building and Housing (the Department) published the consultation paper *Private Building Consent Authority 'Adequate Means' and Civil Liability Insurance Proposals*.

The consultation paper presented information, raised issues for consideration and sought answers to questions about:

- the broad context in which the Department must consider the 'adequate means' requirements of section 192 of the Building Act 2004 (the Act)
- generally how the Department could approach adequate means assessments
- proposals for minimum terms and conditions for insurance policies that would be set by regulations made under the Act.

Feedback, primarily in the form of written submissions, was sought from a range of stakeholders to inform policy recommendations. The closing date for written submissions was 21 September 2007.

The Department takes this opportunity to thank the people who prepared submissions or provided support to those who did so. Your participation and willingness to assist is greatly appreciated.

As summarised in the following pages, the Department took careful account of the submissions in developing advice for Ministers. In some cases discussions were held with a submitter and/or their advisors to clarify matters before determining how best to address consultation feedback.

Policy proposals were submitted to Ministers this month (March 2008). Subject to usual government approval and drafting processes, we expect that regulations will be made and come into force within the next few months.

Summary of consultation feedback and Department responses

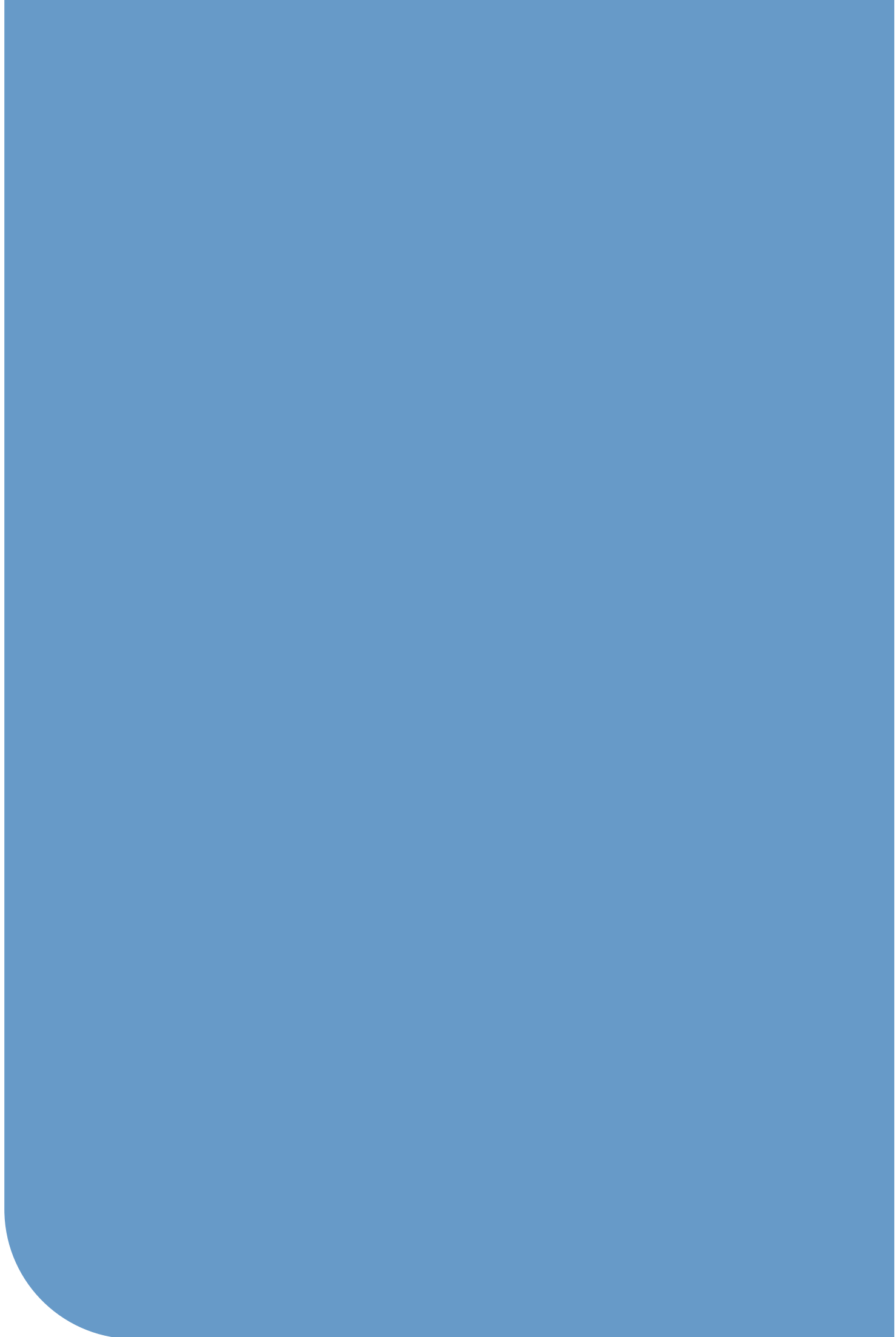
The following table summarises consultation feedback and the Department responses to the feedback on the July 2007 consultation paper *Private Building Consent Authority 'Adequate Means' and Civil Liability Insurance Proposals*. Policy proposals submitted to Ministers are consistent with the responses summarised in the table.

The feedback points in the table and the Department's responses are in no particular order, and points made were not necessarily raised by all or most of the submitters. In some cases, the point may have been raised by only one submitter.

CONSULTATION FEEDBACK	DEPARTMENT OF BUILDING AND HOUSING RESPONSE TO CONSULTATION FEEDBACK
<p>Consumer protection should be at the same level as that provided by territorial authority and regional authority building consent authorities (BCAs). The proposed approach to setting minimum terms and conditions for insurance does not provide adequate cover or protection for consumers.</p>	<p>The long-term existence and viability of private BCAs is much less certain than that of territorial authority and regional authority BCAs. It is not possible for private BCAs to provide the same level of protection at least in terms of their ability to raise funds to meet the costs of their liabilities – in particular they don't have access to the rates struck by territorial authority and regional authority BCAs. These are two of the reasons why the Building Act 2004 requires special consideration of the range and mix of arrangements to protect consumers who use the services of private BCAs.</p> <p>The Department acknowledges that insurance, whatever its terms and conditions, is not an absolute form of consumer protection. The Department did, however, take account of the outcomes of the 2004–2005 private building certifier insurance review and the performance specification that was reaffirmed in January 2005. Both appear to be a very sound basis for the development of minimum terms and conditions for BCA civil liability insurance.</p> <p>The Department will consider whether it is possible to develop a requirement (eg, through BCA accreditation or registration regulations) for private BCAs to disclose the extent of their 'adequate means' relative to territorial and regional authorities.</p>
<p>Accepting lower levels of protection for private BCAs will lead to more territorial authorities setting up trading entities in order to obtain the lower cost of insurance – at least until proportional liability and home warranty schemes are in place.</p>	<p>The Department has received no information to suggest that this is likely. It is also not clear that the costs associated with establishing and maintaining trading entities would be offset by savings on insurance costs (which are not known). As it seems that insurance of the nature proposed is unlikely to be available in the foreseeable future, this point is moot.</p>
<p>The objective of 'adequate means' should simply be that 'consumers are continuously well-protected from financial and other losses that may arise from the actions or inactions of a private building consent authority' and insurance cover should be similar to the cover provided by a territorial or regional authority BCA.</p>	<p>There appears to be some confusion about the objectives proposed on page 6 of the consultation paper. The objectives are to guide judgements about adequate means in its broadest sense and are not limited to insurance-related matters.</p> <p>The second objective recognises that, while it is not possible for private BCAs to provide the same level of protection as territorial authority and regional authority BCAs, the protection should be as close as is possible. The third objective acknowledges the importance of encouraging effective risk-management.</p>
<p>The stated objectives (page 6 of the consultation paper) to inform judgements about 'adequate means' as a registration criterion are confused and conflicting.</p>	<p>As noted above, the objectives are to guide judgements about adequate means in its broadest sense and are not limited to insurance-related matters. Subsequent discussions with Local Government New Zealand (LGNZ) (who made this submission) clarified this intent.</p>

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<p>The use of regulations to set minimum terms and conditions for insurance is inconsistent with:</p> <ul style="list-style-type: none"> • accepted risk management practices • accepted insurance approaches in other professional areas. 	<p>Representatives from the insurance industry have been engaged in earlier reviews and during the development of the proposals. No concerns were raised about the use of regulations to set minimum terms and conditions for insurance of this nature.</p> <p>The option of regulations is specifically provided for in the Act and a regulatory approach is common practice internationally. This is, perhaps, a reflection of the nature and size of the risks faced by individual consumers in the housing sector versus other financial risks they must face.</p> <p>After further discussions with LGNZ, the Department consulted directly with the local government insurer 'Riskpool' (as this issue, raised by LGNZ, came from advice to LGNZ from Riskpool). Riskpool clarified that this view had been expressed in the context of its preference for a first party home warranty scheme rather than professional indemnity cover. Riskpool noted and did not disagree with the Department's observation that a regulated approach in this area was common internationally.</p>
<p>Consumer protection and insurance are separate matters. The insurance market cannot deliver long-term consumer protection.</p>	<p>Insurance has been recognised internationally as contributing to improving consumer protection and promoting good building outcomes (through the application of insurance disciplines). In some jurisdictions, insurance is mandatory.</p> <p>The Department acknowledges that the primary purpose of the insurance is arguably to protect a BCA from financial risk. The insurance does, however, increase the likelihood of a consumer receiving financial compensation for a loss attributed to the actions or inactions of the BCA – provided the BCA's liability for the loss can be sustained at law.</p>
<p>'Likely liability' needs to account for recent amendments to the Weathertight Homes Resolution Services Act 2006 to allow claims for any remedy that could be claimed in a court of law, such as:</p> <ul style="list-style-type: none"> • rectifying deficiencies likely to cause damage in the future • damages for personal suffering • legal costs. 	<p>These matters would be taken into account. BCAs will be required to use a generic risk management framework (such as that outlined in appendix A of the consultation document) as a guide to plan, implement and monitor their risk management strategies and to determine their likely liabilities. The onus will be on the BCA to undertake this work and present the documentation to the Department for assessment. It is likely that they will require expert advice, including legal advice, to do this effectively.</p> <p>The Department would expect that any such advice would include reference to all relevant legislation and account for all areas of potential liability. The Department would then review information provided by the BCA and make its own determination of the 'likely' liability of the BCA and the means available to the BCA to cover that liability.</p>
<p>The proposed sum insured is inadequate.</p>	<p>The Department has reviewed insurance cover from similar schemes in a number of overseas jurisdictions. The material reviewed indicates that the 'sums insured' the Department is proposing are broadly comparable. A direct comparison is difficult, however, due to significant differences in legal frameworks and building control practices.</p> <p>Representatives from the insurance industry have been engaged in earlier reviews and during the development of the proposals. The Department notes that no concerns were raised by the insurance industry about the proposed sums insured.</p> <p>Further discussions were held with LGNZ. LGNZ advised that advice it had received from the local government insurer 'Riskpool' indicated that the proposals are not consistent with the significant claim information that Riskpool holds. The Department consulted directly with Riskpool and found that the Riskpool advice to LGNZ was founded on a misunderstanding of the basis for setting the sum insured (ie, Riskpool had thought that the building values were for individual buildings rather than for the total value of all the building work).</p>

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<p>The Chief Executive of the Department should not be able to approve lower 'sums assured'. Cover determinations should be left to insurers.</p>	<p>The Department will consider removing the proposed power to approve lower 'sums assured' from policy proposals that go to Ministers.</p>
<p>The value of cover should be reassessed annually on the basis of replacement value (ie, some form of ongoing price indexing or inflation adjustment). The Department should also monitor actual claims and pay-outs to ensure adequacy of claim processes and to inform the methodology used to set sums insured.</p>	<p>The Department is satisfied that if there was a need for this approach, it would already have been raised by insurance representatives. The annual renewal and assessment by insurers of the adequacy of ongoing cover (ie, based on the ongoing value of building work) should be sufficient to manage these issues.</p>
<p>A home warranty system should be established to provide contractual certainty (regarding liability), as BCA insurance protects the BCA not the homeowner and the current insurance market will not provide cover.</p>	<p>The Department has initiated work that will lead to further detailed consideration of policy options such as homeowner warranty schemes. While possibly relevant in terms of the risk to BCAs, homeowner warranties are a separate policy consideration.</p>
<p>New Zealand should move from 'joint and several' liability to 'proportional' liability for the following reasons.</p> <ul style="list-style-type: none"> • The cost of 'proportional liability' insurance cover could be absorbed by the building consent fee. • Any additional insurance, such as home warranty cover, could deal with the liability not covered by the 10-year forward cover of proportional liability insurance. • Consumers will not have to pay twice for cover/ protection. 	<p>This issue is outside the scope of the Department's work on adequate means and BCA insurance requirements under the Building Act 2004.</p>
<p>Insurers should have AA++ ratings.</p>	<p>In developing the proposals identified in the consultation paper, the Department noted mixed views about the value to consumers of insurance ratings. Accordingly, the Department is not proposing that insurers be required to obtain or declare a rating in respect of civil liability cover for private building consent authorities.</p>
<p>Insurance cover should be for the first 10 years of a building's life.</p>	<p>The proposals are consistent with this suggestion.</p>
<p>Private BCAs should be required to give reasonable cooperation to any potential or actual claimant, as is the case with a territorial authority or regional authority BCA.</p>	<p>The Department is satisfied that requirements beyond the normal disclosure requirements in civil claims are unlikely to be warranted.</p>
<p>Ten-year forward cover negates the need for run-off cover.</p>	<p>The Department agrees that this is likely to be true in most, if not all, instances. As explained in the footnote on page 14 of the consultation paper, however, 'The requirement to purchase retrospective cover would only apply where BCA functions performed in the last 10 years were not already covered by some other form of "adequate means", including a pre-existing policy of insurance that meets the prescribed minimum terms and conditions for insurance.'</p>
<p>An alternative approach to insuring for 'adequate means' should be applied, including the following features.</p> <ul style="list-style-type: none"> • The insurance industry should check all applications for building consent, including the physical construction of buildings • The insurance industry should only insure for material loss, with ACC covering loss or injury • The insurer should recover costs from any negligent designers or builders as the need arises. 	<p>This issue is outside the scope of the Department's work on adequate means and BCA insurance requirements under the Building Act 2004. The approach being suggested would require a completely different approach to the longstanding approach to New Zealand building controls (ie, which is reflected in the provisions of the Building Act 2004.</p>



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