

Departmental Disclosure Statement

Building (Overseas Building Products, Standards, and Certification Schemes) Amendment Bill
--

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

21 August 2024

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	5
Part Three: Testing of Legislative Content.....	7
Part Four: Significant Legislative Features	9

Part One: General Policy Statement

In December 2022, the Commerce Commission released the Residential Building Supplies Market Study final report, which found that competition for the supply and acquisition of key building products is not working as well as it could. New Zealand is a small trading nation. Removing barriers to high-quality products entering the New Zealand market could increase consumer choice, increase competition and provide greater resilience to supply disruptions.

The Commerce Commission recommended the building regulatory system needed clear compliance pathways for more key building products and to make it easier for designers and market participants to use new or competing building products.

The Building (Overseas Building Products, Standards, and Certification Schemes) Amendment Bill (the Bill) responds to competition issues in the sector by amending the Building Act 2004 to remove barriers to overseas building products entering New Zealand's building product market and being used in New Zealand buildings. It does so by:

- providing that the Minister for Building and Construction (the Minister) may by notice recognise overseas standards or standards certification schemes
- streamlining the citing of international standards that can be used with Acceptable Solutions and Verification Methods to comply with the Building Code
- requiring building consent authorities to accept building products or methods certified under an overseas product certification scheme and recognised by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) by notice.

These changes target each level of the building product assurance system (standards, certification schemes, and compliance pathways) and deliver the greatest benefit to improve competition.

Recognition of overseas standards and standards certification schemes

The Bill provides that the Minister may recognise in whole, or in part any:

- standards or groups of standards issued by an overseas standards organisation, or
- standards certification schemes issued by a standards certification organisation.

The Bill also includes a limited good faith liability protection for building consent authorities.

The Minister may recognise the above schemes or standards only if the Minister is satisfied they meet criteria to be set out in regulations.

This is intended to improve the confidence of designers, builders, and building consent authorities in building products that meet recognised standards from overseas standards organisations and are certified by standards certification schemes.

Streamlining the citing of international standards that can be used with Acceptable Solutions and Verification Methods to comply with the Building Code

The Bill introduces a new instrument (Building Product Specifications) to streamline the citing of international standards that can be used with Acceptable Solutions and Verification Methods issued by MBIE to comply with the Building Code. Building consent authorities will not be liable for reliance in good faith on the Building Product Specification.

This change will reduce the time and resources needed to incorporate standards that can be used with Acceptable Solutions and Verification Methods to comply with the Building Code. It is also intended to support building consenting processes and increased consumer choice for building products.

Requiring building consent authorities to accept certain building products certified overseas

Currently, the Building Act 2004 enables the Chief Executive of MBIE to specify certifications of building products or building methods provided by persons outside New Zealand that are to be treated as product certifications in New Zealand (CodeMark). However, this power has never been used and cannot be used proactively. The current power cannot recognise groups of products. Building consent authorities are also not required to accept specified certifications as evidence of compliance with the Building Code.

The Bill provides that the Chief Executive may, by notice, recognise one or more, or one or more groups of building products or building methods certified under an overseas product certification scheme. The Chief Executive may do so only if they are satisfied those products or methods meet criteria to be set out in regulations.

The Bill also provides that building consent authorities will not be liable for reliance in good faith on recognised certifications.

These changes will increase the range of products that can be used in New Zealand and streamline building consenting processes for using these products in building designs.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Residential Building Supplies Market Study, Commerce Commission, 6 December 2022 (a copy of the Commerce Commission's Final report is accessible at https://comcom.govt.nz/data/assets/pdf_file/0014/300704/Residential-Building-Supplies-Market-Study-Final-report-6-December-2022.pdf).	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
Regulatory Impact Statement: Mandating Approval of Overseas Building Products, 14 March 2024, Ministry of Business, Innovation and Employment, freely available at https://www.mbie.govt.nz/dmsdocument/28312-removing-barriers-to-overseas-building-products and can also be found and downloaded at https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-mandating-approval-overseas-building-products .	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Regulatory Impact Statement was not reviewed by the RIA Team in the Treasury as it did not meet the threshold for their assessment.</p> <p>A Regulatory Impact Summary was prepared and submitted at the time that Cabinet approval was sought for policy decisions relating to the Bill. The Ministry of Business, Innovation and Employment's Regulatory Impact Analysis Review Panel determined that the paper Partially Meets the criteria necessary for Ministers to make informed decisions on the proposals.</p> <p>The Panel gave the Regulatory Impact Statement a Partially Meets because, in the time available, MBIE was not able to consult sector participants on the specific proposals, and the Panel considers that the proposed Select Committee process will be critical to ensuring further public input into the proposals and mitigating risks and impacts.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
An analysis of the size of potential costs and benefits can be found in <i>Table 3: Impact of the preferred option</i> on pages 24-26 of the Regulatory Impact Statement, here: https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-mandating-approval-overseas-building-products .	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
<p>The Bill expands the range of compliance pathways for building products entering the New Zealand market and being used in building work. However, the Bill does not create compliance obligations.</p> <p>There are several pathways manufacturers, suppliers, and designers can use to provide assurance about the performance of building products and that when used in building work they will lead to code-compliant work. Building work must be compliant with the New Zealand Building Code. However, the use of any one compliance pathway is voluntary.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

MBIE has worked with the Ministry of Foreign Affairs and Trade (MFAT) throughout policy development to ensure the proposals are consistent with New Zealand's international obligations. In particular, ensuring compliance with the World Trade Organisation Technical Barriers to Trade (TBT) Agreement, which aims to ensure that technical regulations and standards:

- are non-discriminatory between local and imported products
- do not create unnecessary obstacles to trade
- do not discriminate between trading partners ('Most Favoured Nation' obligation), i.e., must offer the same trade terms to all trading partners.

MBIE is ensuring consistency with the TBT Agreement by working alongside MFAT, and by complying with World Trade Organisation notification and consultation requirements.

On 10 June 2024 MBIE notified the World Trade Organisation of the Cabinet policy approval regarding the Bill. Comment was required from World Trade Organisation members by 7 August 2024.

The Bill will be notified to the World Trade Organisation after introduction.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The proposals are consistent with the principles of the Treaty of Waitangi. Te Puni Kōkiri was consulted during the development of policy proposals.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill.

Such advice, or reports, will be accessible on the Ministry's website at:

<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/the-bill-of-rights-act/advice/>.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

NO

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
No privacy issues have been identified. The Office of the Privacy Commissioner was consulted on a draft of this Bill.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>On 10 June 2024, MBIE notified the World Trade Organisation of the Cabinet policy approval regarding the Bill. This was publicly notified here: https://www.epingalert.org/en/Search?%20viewData=G%2FTBT%2FN%2FNZL%2F133&lastAction=forum.</p> <p>Policy options were consulted with sector participants as a part of the development of the Commerce Commission market study into residential building supplies.</p> <p>MBIE consulted with the Legislation Design Advisory Committee during the drafting process of the Bill.</p> <p>MBIE consulted with the Office of the Privacy Commissioner on a draft of this Bill.</p> <p>Between May 31 and June 27, 2024, MBIE carried out targeted sector consultation on criteria for decision making and priorities for implementation of the Bill. This consultation included a webinar hosted by MBIE with 221 unique viewers. 196 submissions were received through this consultation.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>The Bill amends section 390 of the Building Act 2004 (Civil proceeding may not be brought against chief executive, employees, etc) to include:</p> <ul style="list-style-type: none">• any person employed or engaged by the chief executive to assist the chief executive in relation to decisions to be made for Acceptable Solutions and Verification Methods or Building Product Specifications, and for notices recognising overseas building product certifications• any person employed or engaged by the chief executive to assist the chief executive to provide advice to the Minister in relation to notices recognising overseas standards and standards certifications schemes (clause 14 the Bill refers). <p>Section 390 of the Building Act 2004 provides that no civil proceedings may be brought against a person to whom this section applies for any act done or omitted to be done by that person in good faith under this Act. The amendments to section 390 of the Building Act 2004 are necessary to support the implementation of the Bill.</p> <p>The Bill amends section 392 of the Building Act 2004 (Building consent authority not liable) to include reference to Building Product Specifications and notices recognising overseas building product certifications (clause 15 of the Bill refers).</p> <p>Section 392 of the Building Act 2004 provides that no civil proceedings may be brought against a building consent authority for anything done or omitted to be done in good faith in reliance on specified documents. The amendments to section 392 of the Building Act 2004 above ensure consistency with other documents specified under that section such as Acceptable Solutions and Verification Methods, and registered product certificates.</p> <p>The Bill also amends section 392 of the Building Act 2004 to provide that no civil proceedings may be brought against a building consent authority for anything done or omitted to be done in good faith reliance on a claim made by a manufacturer, importer, retailer, or wholesaler given under Part 4B of the Building Act 2004 that the relevant building product has been:</p> <ul style="list-style-type: none">• manufactured in accordance with a standard, or performs or will perform in accordance with a standard, that the Minister has recognised; and• certified as meeting the standard referred to above under a standards certification scheme that the Minister has recognised (clause 15 of the Bill refers). <p>The changes in the paragraph above are necessary to support the implementation of notices issued by the Minister recognising overseas standards and standards certification schemes.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill creates powers to make regulation by Order in Council to:</p> <ul style="list-style-type: none">• prescribe decision-making criteria to be applied by the Minister for Building and Construction for the recognition of building product standards issued by overseas standard organisations and standard certification schemes issued by standard certification organisations; and• prescribe decision-making criteria to be applied by the Chief Executive of MBIE for the recognition of building product or building methods certified under an overseas product certification scheme (clauses 13 and 16 of the Bill refer). <p>The regulations are necessary to act as a safeguard against the inappropriate exercise of the respective powers. The provisions in the Bill that relate to the regulations above will also come into force by Order in Council or two years after Royal Assent.</p> <p>Prescribing decision-making criteria in regulation enables flexibility in how the respective powers are exercised. As new information becomes available there may be a need to expediently change the decision-making criteria.</p> <p>The Bill also repeals and replaces a power of the Chief Executive of MBIE to recognise overseas building product certifications (clauses 12 and 13 of the Bill refer). This power will be exercised by notice and will be subject to decision-making criteria discussed above. The notice will be secondary legislation.</p> <p>It is appropriate that a notice by the Chief Executive is secondary legislation, as it provides for products that must be accepted as compliant with the New Zealand Building Code, under section 19 of the Building Act 2004.</p> <p>The Chief Executive being able to recognise overseas building product certifications via notice provides for the flexibility required to be able to amend or revoke specification of product certification where new information becomes available and use of products pose harm or risk building failure.</p> <p>Provisions of the Bill related to decision-making criteria will come into force in a date set by Order in Council. This will prevent any provisions of the Building Act 2004 referring to instruments that do not exist. Regulations will be drafted by Parliamentary Counsel, subject to Cabinet scrutiny, and not come into force until at least 28 days after their making.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO