Submission on regulatory barriers to entry or expansion

Fletcher Building Limited

1. Summary

1.1 The following sets out Fletcher Building's response to the Commission's request for submissions regarding any regulatory barriers to the entry or expansion of key building supplies, and more particularly a request for comment on: (i) what specific issues arise; and (ii) if there are factors affecting competition, what are the possible solutions to alter those factors.

1.2 In summary, while we see scope for some improvements – particularly those which would streamline the certification and consenting processes – we do not believe the current regulatory framework is so "broken" that it's in need of significant change.

1.3 When identifying the scope for improvements to regulations relating to certification and consenting, it is important to recognise the inherent policy tension between regulations designed to ensure building products are fit for purpose and quality assured on the one hand, and an objective of making it easy for new products to come to market on the other. If quality assurance rules and regulations are relaxed to promote new entry, then that could create other policy problems downstream if low quality products enter the market to the detriment of New Zealand's housing stock and more importantly the people who occupy the homes. Conversely, if the standards are set too high, efficient market entry may be deterred.

2. 'Macro' regulatory barriers to entry or expansion

2.1 While our submission focusses on potential regulatory impediments specific to building supplies, there are nevertheless several pan industry issues which have a direct impact on the speed, ease and overall cost to a firm looking to manufacture key building supplies in New Zealand.

(a) **A potential lack of carbon pricing/equivalency**. Domestic firms should expect to compete with overseas firms on the merits, but the scope for genuine competition is diminished when there is not a consistent assessment method to determine the carbon footprint of imported vs domestically produced product. By this we mean the carbon emitted in the actual production process as well as, for example, the emissions from:

(i) the energy used to power the manufacturing facility;

(ii) the transportation in the overseas country of raw materials and of the finished goods to the export port; and

(iii) finally, the emissions produced in shipping the product to New Zealand.

We do not believe it is an answer to say it is too complicated – recent moves to impose obligations on firms to tackle modern slavery suggests firms can achieve the requisite visibility of their supply chains.

(b) **RMA and planning laws** can make it hard to expand production quickly. While these issues can generally be overcome, their evolving and changing nature adds to regulatory risk and is inevitably a factor for firms assessing whether to commit to new facilities in New Zealand or deploy that capital elsewhere.

(c) **Overseas Investment Act** (**OIA**) requirements. For an open market economy, New Zealand's OIO regime is overly intrusive and particularly slow. While a business building a new factory should in theory meet the hurdle, OIA requirements can be a further complication with the consequent uncertainty, opaqueness and delays. We agree regulation of this type is needed, but we think there should at least be a fast-track process for certain defined activity, such as manufacturing and housing (where such housing genuinely adds to the amount of housing stock in New Zealand and land ownership is only transitory to achieve this goal).[1]

(d) **Immigration laws** make it difficult to attract skilled workers. New Zealand's protective stance through Covid amplified these issues, but there needs to be real urgency to address the shortages, which are constraining expansion in many quarters. In this regard it is the net position which is important – it is not simply enough to say we need X new workers to support expansion; we need those workers *on top of* a large number simply to 'stand still' and replace those workers heading overseas.

2.2 We turn now to regulations and potential solutions specific to key building supplies.

3. CodeMark approval and BRANZ appraisal processes

3.1 The current CodeMark and BRANZ processes can be slow, costly and thus influence the speed of entry (and in some cases disincentive entry entirely). While steps to strengthen the CodeMark framework have the potential to assist, doing so will require a substantial increase in funding and securing the necessary skilled workers. Naturally, we would welcome a recommendation to increase the resources available to these organisations. That said, we think the first step should be to ensure that the various certification processes adopt a risk-based approach.

3.2 Currently, all products, regardless of their inherent risk profile, face the same hurdles to achieve certification/approval in New Zealand. The overall process could be accelerated by adopting a risk-based approach where some 'low risk' products, e.g. insulation, which were already certified overseas, would benefit from an expedited approvals process in New Zealand. Conversely, an inherently riskier product, e.g. which goes to weather tightness, would still need to follow the full, New Zealand-specific process. Clearly, any changes must not come at the risk of quality, but we query if the current 'one size fits all' approach is in the best interests of New Zealand consumers.

4. Relevance of overseas standards and certification

4.1 New Zealand already shares some standards with Australia. For example, the base plasterboard standard is a joint Australia/New Zealand Standard. However, we believe there is scope to expand this concept to accept certification and standards from named overseas countries as constituting baseline compliance in New Zealand. This would need to be carefully worked through to ensure like for like comparisons and that any accepted overseas standards/certifications were sufficiently rigorous and transparent. While this might be intuitively appealing, the question of which countries might, and might not, be in the mix would not be easy to determine in practice. In addition, it may well be the case that some, but not all, standards from country X would be appropriate for New Zealand.

4.2 To the extent there were differences in New Zealand an option might be (at least for some products) to have a common baseline standard and then separate 'add-ons' to accommodate regional variations. For instance, Australia and New Zealand have joint steel standards, with variations for different regions to deal with, e.g. seismic issues. In Australia the various ratings can be appropriate in a range of locations whereas in most of New Zealand the "E" rating must be used to reflect seismic risk.

4.3 Finally, that a particular product is certified or meets a standard overseas does not, of itself, mean the wider system of which that product is a component would equally be compliant. This means that any

[1] While there is a pathway in the OIA which is intended to increase housing supply, in practice its application to large scale residential development is fairly limited.

recommendations to recognise certification/standards in overseas countries would need to address products and systems separately.

4.4 We see this approach as an adjunct to, not a replacement for, New Zealand Standards and certification, including to ensure we retain a framework that can evolve in response to innovation and to New Zealand-specific considerations which cannot otherwise be accommodated. The innovation point is important. While we should quite rightly pick and choose the best aspects of overseas standards, if we lose the ability to determine our own standards then we risk becoming less accommodating to innovative new products: updating standards when there are multiple stakeholders to get across the line is necessarily more difficult than when there is only one.

5. **Liability of BCA encourages conservatism**

5.1 New Zealand has over 80 BCAs and a regime that results in those BCAs attracting a very large share of the practical risk of building and product failure. The upshot is a very conservative approach to consenting and approving the use of new products and solutions, which we believe has created an environment where specifiers and builders rationally default to the solutions that worked previously to ensure they can deliver what their customers want – being an on-time and on-budget build that has all necessary consents.

5.2 While this means New Zealand benefits from a careful process which generally ensures only high quality products, designs and systems are used in residential construction, when combined with the fact that the BCA consenting processes are slow and costly for consumers, it creates a strong impetus for builders, architects and specifiers to use products which councils have experience with and which they know BCAs will provide consents based upon.

5.3 All things being equal, incumbents in all markets will generally enjoy some advantage over new players. To the extent this is perceived to be an issue that cannot be overcome in the normal course by newer players marketing their products and ensuring they have compelling product testing and literature available, the Commission could explore a requirement that a Guarantee and Insurance Product ("GIP") is put in place for all residential new builds and alterations over a certain monetary threshold. MBIE has previously described such a scheme in the following terms.

(a) Residential builders would offer a guarantee and insurance product to homeowners. The builder could either join one of the builders' associations or be approved by an insurer or broker to offer their product.

(b) Homeowners would either pay the premium directly through their builder or the builder would incorporate the premium into the overall cost of the build.

(c) The homeowner would be the 'policy holder' of the guarantee and insurance product allowing them to make a claim directly with the guarantee and insurance provider. Homeowners would still be able to take a claim for negligence through the courts whether or not they have a guarantee and insurance product. The term would be ten years, with the benefit transferring to the new owner if the property were sold.[2]

5.4 We acknowledge that:

(a) MBIE has previously considered this option; and

(b) in some respects it merely shifts the liability and hence the potential conservatism to another entity (e.g. the builder or specifier),

[2] MBIE, Discussion paper – Building system legislative reform, Risk and Liability, April 2019.

but we nevertheless believe it has the potential to go some way to reducing the conservatism on the part of BCAs, a point many submitters have noted is an issue.

5.5 Another option could be to increase the hurdle before a company can be liquidated, to temper the ability of builders and developers to incorporate limited liability companies specifically for the purpose of a single build or development, and then liquidate them afterward – which contributes to the BCAs carrying the lion's share of the practical risk.

6. **The consenting process in New Zealand is highly fragmented**

6.1 Because there are more than 80 BCAs in New Zealand, there is the potential for, and in some cases it results in, different BCAs interpreting compliance with the New Zealand Building Code requirements differently, which can impact the ease and speed with which new products and solutions can gain traction.

6.2 We would therefore support a recommendation to substantially consolidate the number of BCAs. We think that doing so has the potential to generate efficiencies and reduce the scope for differences in interpretations across the country.

7. **Product substitution**

7.1 The issue of post consent substitution has been raised as a potential issue. We do not object to the notion of removing any unnecessary impediments to such substitution, provided:

(a) the substituted product is appropriate and does not undermine the performance of the (already consented) solution – be it a single product or system;

(b) evidencing that it does so is the responsibility of the party arguing for the substitution; and

(c) there is no expectation that a supplier's warranty of a system should also extend to an offering which includes substituted products (although we accept suppliers should rightly stand behind the individual products that they supply).

8. **The Building Code is a performance-based code**

8.1 The Building Code is concerned with how the products themselves or the systems of which they form a part, and their installation, *contribute to the performance of the building itself*. This conceptual approach does not sit comfortably with individual products being the centre of gravity in terms of information requirements and certification: just because product A meets a specific standard does not necessarily translate into a system's performance and hence compliance with the Building Code. Rather, it is the complete system of products selected, and how they are installed and work together, that achieve Building Code compliance.

8.2 This approach has several advantages, including that it avoids prescriptive product-level requirements that can in theory stifle innovations which may have otherwise achieved the ultimate performance sought. However, it can make it more difficult for suppliers already supplying products certified overseas as having particular characteristics, e.g. a particular ductility, to supply into New Zealand, because merely being able to certify the *product* has a particular characteristic does not necessarily translate into compliance in a performance based framework. Moving to a product-based code would in theory make the importation of such products easier. However, the flip side is that it would transfer the obligation to make sure the combination of all of the (individually compliant) products *performs* as required to e.g. the builder, designer or component supplier (who will be reluctant to do so without suitable back to back arrangements).

8.3 It may be that the comments in the submission from Building Confidence that the Code System "needs improvement with a product lens" will assist the Commission to find a path which strikes the right balance, but the discussion above is another example which illustrates the inherent trade-offs associated with regulatory change in this space.

We look forward to continuing to engage with the Commission on these important issues.