



Determination 2014/064

Regarding the authority's exercise of its powers of decision in requiring a Record of Work for tanking as Restricted Building Work for a building consent at 7 Marsh Way, Kaiwharawhara, Wellington

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the applicants, Wellington City Council ("the authority"), acting through a lawyer, carrying out its duties as a territorial authority or building consent authority.
 - the owners of the house, A and P Lloyd ("the owners")
- 1.3 This determination arises from Determination 2014/021² ("the previous determination") involving the same parties. The previous determination was based on the authority's decision to issue a qualified code compliance certificate as it believed the basement tanking for the owner's building was restricted building work and therefore required a record of work signed off by a licensed building practitioner ("LBP").
- 1.4 Following a clarification request from the authority, the current determination has been lodged by the authority. The current determination does not alter the decision in the previous determination in relation to the issue of an unqualified code compliance certificate.
- 1.5 The matters to be determined³ are therefore:
 - Matter one: whether the authority can require a building consent to carry the condition that a record of work for restricted building work is needed before a code compliance certificate is issued.
 - Matter two: whether a record of work is required for tanking being restricted building work.
- 1.6 In making my decision, I have considered the submissions of the parties and other evidence in this matter.
- 1.7 The Licensed Building Practitioner Rules 2007 are referred to herein as the LBP Rules.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Determination 2014/021 Regarding the authority's exercise of its powers of decision in respect of issuing a qualified code compliance certificate requiring a Record of Work for basement tanking.

³ Under sections 177(1)(b) and 177(2)(a)

- 1.8 The Building (Definition of Restricted Building Work) Order 2011 (“the RBW Order”) was amended during the course of this determination by the Building (Definition of Restricted Building Work) Amendment Order 2014 (“the Amendment Order”). The legislation can be found at Appendix A of this determination. A further explanation about the Amendment Order can be found at paragraph 5.6.

2. The background

- 2.1 The three storey house consists of concrete block foundations and retaining walls with timber framing to the upper levels. There is a low pitch roof with aluminium joinery and weatherboard cladding. The house is located in a very high wind zone.
- 2.2 The tanking membrane is reinforced bituminous self-adhesive membrane which is 2mm thick. The tanking is applied to a block work wall at basement level. The product has a current BRANZ appraisal.
- 2.3 The tanking membrane is protected by a purpose-made board to protect the membrane from damage, and there is a subsoil drain installed in fill at the base of the block work wall.
- 2.4 On 15 January 2013 the authority issued building consent No. 271515 for the building. The building consent documentation sent to the owner stated:
- before a code compliance certificate is issued, the following documentation is required:
- Record of building work from [LBP] who carried out or supervised restricted building work
- 2.5 Around 7 January 2014 the owners applied for a code compliance certificate for the building work.
- 2.6 On 10 February 2014 the authority issued a code compliance certificate with a qualified statement in the project description ‘[record of work] for block wall membrane excluded from [code compliance certificate].
- 2.7 On 18 March 2014 the owners applied for a determination regarding the qualified code compliance certificate. The Ministry issued the previous determination on 24 April 2014.
- 2.8 The authority’s lawyer made a request for clarification on the previous determination in a letter dated 12 May 2014. This letter forms part of the submission for the current determination and is detailed at paragraph 3.1.
- 2.9 On 30 May 2014 the Ministry responded to the clarification request, in summary:
- A clarification is not an avenue for re-litigation of the matters covered in the previous determination.
 - The previous determination was amended to note the authority’s intention to make a submission; the failure of which was a result of administrative oversight and miscommunication rather than a deliberate intention not to respond.
 - The substantive matters raised by the authority regarding whether tanking is a form of restricted building work can be addressed in a separate determination relating to the issue of the building consent, and does not alter the decision made in the previous determination.
- 2.10 On 6 June 2014 the Ministry received an application for determination from the authority’s lawyer.

3. The submissions

3.1 In the letter dated 12 May 2014, the authority's lawyer submitted:

- 'Exterior' tanking forms part of the exterior moisture management system for the purposes of Clause 5 of the RBW Order. Exterior tanking can be described as 'a continuous waterproof membrane applied to a surface to prevent the ingress or egress of water (usually applied to parts of a building that would otherwise be in direct contact with the ground)'⁴.
- The absence of a relevant licensing class for building work has no bearing on whether or not building work is restricted building work. There is nothing in the Act, the RBW Order, or the LBP Rules that justifies the argument that building work must be covered by a relevant licensing class in order to be restricted building work.
- The previous determination drew a distinction between tanking (on the vertical plane) and damp proofing (horizontal plane) with the conclusion being that damp proofing is restricted building work whereas tanking is not. The authority does not agree with this distinction. The terms 'damp proofing' and 'tanking' and 'waterproofing' are used interchangeably across literature generated by manufacturers.

3.2 The authority's lawyer also provided a submission dated 6 June 2014 regarding the clarification for the previous determination and accepting the proposal of the Ministry for a further determination. The authority's lawyer submitted that:

- It is acknowledged that the provision for records of work under section 88 of the Act is not a relevant consideration when the authority determines it is appropriate to issue a code compliance certificate under section 94 of the Act.
- The interpretation of section 92(2A) of the Act allows the authority to require an owner to obtain and provide outstanding records of work before accepting a code compliance certificate application and is read to support the requirements of section 88(1) of the Act.
- The authority's ability to reject a code compliance certificate as incomplete as no records of work were provided is an important means of 'encouraging compliance' with section 88(1) of the Act.
- The authority acknowledged that the note included on the building consent application documentation (refer paragraph 2.4) needs to be modified to identify compliance with section 92(2A) of the Act rather than section 94 of the Act. The relevant records of work are requested for the purposes of section 88 of the Act and a failure to provide them will not affect the authority's assessment of whether it is appropriate to issue a code compliance certificate.
- The authority is concerned that a record of work was not provided for the applicants' tanking work and believes tanking work is restricted building work that requires a record of work for the reasons set out in a letter to the Ministry dated 12 May 2014.

⁴ Standards New Zealand MP 4212:1998 – Glossary of Building Terms

4. The draft determination and further submissions

4.1 On 25 August 2014 the draft determination was sent to the parties. In summary the draft determination concluded:

- There must be a relevant license class for building work to be restricted building work under clause 5(3) of the RBW Order.
- The RBW Order does not define the licensing classes specified, guidance is provided from the LBP Rules relating to competencies and performance indicators.
- Tanking does not fall within the existing licensing classes of carpentry or foundations work.

4.2 On 2 September 2014 the owner accepted the draft determination without comment.

4.3 On 30 October 2014 the authority's lawyer provided a substantive written submission. In summary the authority's lawyer submits:

Matter One: whether the authority can impose a building consent condition stating that a record of work is needed before a code compliance certificate is issued

- The authority generally accepts the discussion in the draft determination around matter one but seeks clarification about what kinds of conditions can be included in building consents.

Matter Two: whether a record of work is required for 'tanking' (i.e. whether tanking is restricted building work)

- The authority's lawyer noted sections 14E(3) and 84 to be the starting point as to whether a license class is a pre-requisite for building work to be restricted building work and demonstrate the separation between restricted building work and the licensing class of the LBP who is required to carry out or supervise it.
- There is nothing in the language of section 84 that suggests an intention that restricted building work ceases to be so if the relevant licensing class does not exist. The wording of section 84 is reflected in the declaratory nature of clause 5(3) of the RBW Order.
- Clause 5 of the RBW Order is carefully arranged and there is nothing in the structure which supports the view that such a prerequisite must be 'read in'. The Parliamentary material does not support this 'inferred legislative intent'.
- A separate scheme is provided for the creation and implementation of building practitioner licensing, under sections 285 and 353 of the Act. The LBP Rules are consistent with these provisions. The authority's lawyer submits that there is no express or indicated cross over between the provisions that define the scope of restricted building work and those that provide for building practitioner licensing.
- The applicant's lawyer concluded the apparent intent of the Act and secondary legislative instruments is that restricted building work should be identified in accordance with the statutory definition and the RBW Order. Building practitioner licensing classes are responsive to rather than controlling the scope of restricted building work.
- The authority's lawyer disagrees with a 'fluctuating scope of restricted building work'.

- The LBP Rules do not establish legal definitions, although tanking is not specifically mentioned it can still be part of the scope of the carpentry licence.
- If tanking is regarded as a specialist activity, this is concerning to the authority as it will result in a building element which is an accepted part of a building's external moisture management system being omitted from the restricted building work and LBP regime.
- The authority's lawyer describes the practical effect of creating 'niche' building work that do not have a license class to cover them including administrative difficulties.

4.4 On 17 November 2014 the Ministry invited the authority's lawyer to provide a further submission, following the notification of the Amendment Order in the New Zealand *Gazette* on 6 November 2014) refer paragraph 5.6.

4.5 On 27 November 2014 the authority's lawyer provided a further submission. In summary:

- The key changes brought about by the Amendment Order were noted. The authority accepts the existence of a relevant building practitioner licensing class will be an 'essential component' of restricted building work once the Amendment Order comes into force. The authority's lawyer asks that this determination record the position up until the commencement of the Amendment Order.
- The authority's lawyer disagrees with the *Explanatory Note* for the Amendment Order that the new clause 5(2)(c) carries over the effect of the former clause 5(3).
- The authority's lawyer submits their previous submissions in relation to the meaning of tanking and damp-proofing, whether a current license class encompasses tanking, practical problems and the scope of permissible references to records of work in building consent terms or conditions are still relevant.

5. Discussion

5.1 Restricted building work includes the design, construction or alteration of the primary structure or external moisture management system of a house or small-to-medium apartment building. Restricted building work was defined under section 7 of the pre 2012 version of the Building Act 2004⁵ ("the previous Act") as building work that is 'of a kind declared by the Governor-General by Order in Council to be building work that must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise that work'.

5.2 Under the current Act, restricted building work was amended to 'building work of a kind declared by the Governor General by Order in Council'⁶. The empowering provision of section 401(B)(1) replaced section 402(1)(n) of the previous Act stating:

The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.

5.3 The Act also governs the establishment of the Building Practitioners Board ("the Board")⁷ and the preparation of the LBP Rules.⁸ Section 315 of the Act specifies

⁵ Prior to the amendments contained in the Building Amendment Act 2012

⁶ Section 7 of the Act

⁷ Section 341 of the Act

⁸ Section 354 of the Act

that any person may complain to the Board about the conduct of an LBP in accordance with the regulations and sets out the grounds for disciplining an LBP.⁹

- 5.4 An LBP who carries out or supervises restricted building work is responsible for ensuring that they are licensed in a class for carrying out or supervising that restricted building work.¹⁰ This is echoed in section 84 of the Act that all restricted building work must be carried out or supervised by an LBP who is licensed to carry out or supervise the work.¹¹

5.5 The RBW Order

- 5.5.1 The RBW Order is the relevant Order in Council for the purposes of the definition of restricted building work under section 7 and the empowering section 402(1)(n) of the previous Act and respectively section 7 and 401(B) of the current Act. The RBW Order came into force on 1 March 2012. Clause 5 has subsequently been amended by the Amendment Order (refer paragraph 5.6). As requested by the authority I have maintained the discussion in this determination relating to the RBW Order before the Amendment Order came into force.

- 5.5.2 The RBW Order provides some defining terms under the interpretation section; however this is not an exhaustive list. The RBW Order does provide a definition for an ‘external-moisture management system’, refer paragraph 5.7.1 of this determination. The RBW Order also defines, under the former clause 5(2)¹², types of building work that must be carried out or supervised by an LBP being:

- bricklaying or block laying work
- carpentry work
- external plastering work
- foundations work
- roofing work.

- 5.5.3 Under the former clause 5(3)¹³ of the RBW Order, restricted building work was ‘building work that must be carried out or supervised by an LBP who is licensed to carry out or supervise that kind of building work’. The reading of clause 5(3) of the RBW Order aligned with the definition of restricted building work under section 7 of the previous Act. The purpose of LBP’s is set out under section 282A of the current Act as:

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and
- (b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

- 5.5.4 The RBW Order was not immediately repealed and remade under the new provisions of section 401(B) which created some issues in how the RBW Order read in conjunction with the current Act, as it was drafted to be read with the provisions of the previous Act. The definition of restricted building work under section 7 of the previous Act and Clause 5(3) of the RBW Order were drafted in similar phrases; that restricted building work is building work that must be carried out by an LBP who is licensed to carry out that work. The pre-requisite included in the RBW Order was not

⁹ Section 317 of the Act

¹⁰ Section 14E of the Act

¹¹ Section 84 of the Act

¹² Clause 5(3) under the Amendment Order

¹³ Clause 5(2)(c) under the Amendment Order

simply descriptive but formed part of the definition of restricted building work as was provided in the previous Act (now repealed). The intention of the legislative frame work was to create a pre-requisite that there must be a license class for building work to be restricted building work. This corresponded with section 84 of the Act that all restricted building work must be carried out or supervised by a LBP who is licensed to carry out or supervise the work.

- 5.5.5 It is normal for a regulation to be repealed when the empowering provision is repealed, however section 20 of the Interpretation Act 1999 provides that enactments can continue in force if the new legislation ‘replaces, or that corresponds to’ the repealed enactment, and that the enactment could be made under the new empowering provisions. It is clear that section 401(B) of the Act replaces section 402 (1)(n) of the previous Act. In my view it was fair to conclude the RBW Order was still valid, although as discussed in paragraph 5.6 the RBW Order has subsequently been amended and any issues relating to validity now resolved.

5.6 The Amendment Order

- 5.6.1 Whether or not a license class was a pre-requisite for building work to be restricted building work was an issue noted in the earlier submissions by the authority’s lawyer and discussed in the Draft Determination issued 25 August 2014. Subsequently the Amendment Order was enacted which came into force on 4 December 2014. The Amendment Order amends clause 5 of the RBW Order (refer Appendix A for legislation).

Clause 5(2)(c) now states:

[building work] of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.

- 5.6.2 As discussed in the *Explanatory Note* of the Amendment Order, the intent was to align clause 5 of the RBW Order with the changes introduced by the Building Amendment Act 2012 to the definition of restricted building work and reflect the wording of the definition of restricted building work in section 7 of the previous Act, at the time the RBW Order was first made. The Amended RBW Order and the Act operate in conjunction with the LBP Rules. Section 285(1)(a) of the Act allows for the Governor-General to designate a licensing class or classes for carrying out or supervising particular types of building work.
- 5.6.3 Therefore, under the Amendment Order, for building work to be restricted building work, all of the following three criteria must be satisfied:
- (a) The building work is the construction or alteration of the primary structure of a house/small to medium apartment building, or the external moisture management system of a house or small to medium apartment building, *and*
 - (b) One of the following kinds of work; bricklaying or blocklaying, carpentry, external plastering, foundations or roofing, *and*
 - (c) Of a kind for which a license class to carry out/supervise the building work has been designated under the Act.

5.7 Is tanking an external moisture-management system?

- 5.7.1 To determine whether a record of work was required in this case, the question to answer is whether tanking is restricted building work. The first place to look to is the RBW Order. It is submitted by the applicant’s lawyer that tanking falls within the definition of an external moisture management system, under Clause 3 of the RBW

Order defined as:

- (a) means a system (whether comprising only one or 2 or more building elements) that is intended to provide—
 - (i) resistance to the penetration of the building by moisture from outside it; or
 - (ii) resistance to the accumulation within the building's fabric of moisture that has penetrated it from outside the building; and
- (b) includes any of the building's building elements that are or form part of damp-proofing, roof cladding or a roof cladding system, a ventilation system, wall cladding or a wall cladding system, or waterproofing; and
- (c) includes any part of its external moisture-management system

5.7.2 In my view, tanking falls within this definition. A building's external moisture management system is comprised of the building elements and systems that prevent the ingress of external moisture and help control moisture within the building fabric.¹⁴ A tanking system resists the penetration of moisture into the building from outside it, and includes part of the building's external moisture-management system.

5.8 Defining tanking and damp-proofing

5.8.1 Firstly, I have to define what is 'tanking' to determine if it falls within an existing license class. The authority's lawyer has submitted that 'tanking' and 'damp-proofing' are used interchangeably and there is no clear divide between the terms as a matter of ordinary natural language in the construction industry context. Tanking is not defined under the Act, the RBW Order or the LBP Rules specifically. The Acceptable Solution for External Moisture, E2/AS1, includes the following definitions:

Damp-proof membrane ("DPM") – a sheet material, coating or *vapour barrier*, having a low water vapour transmission, and used to minimise water and water vapour penetration into *buildings*. Usually applied against concrete in contact with the ground (also known as a concrete underlay).

Waterproof or waterproofing – the complete and total resistance of a *building* element to the ingress of any moisture

5.8.2 I acknowledge that the terms 'tanking' and 'damp-proofing' are used interchangeably, and that, in some cases, the same materials can be used for both purposes. I accept the submission from the authority that it is unrealistic to place strict limits on these definitions.

5.8.3 'Tanking', as in this situation, generally takes the form of a system incorporating a membrane material, and some form of protection board to protect the membrane from drainage material installed behind it. Typically a subsoil drain is located near the bottom of the drainage material to drain away any ground water. The ongoing performance of a tanking membrane will depend on the proper protection of the membrane, and to a lesser extent, the installation of suitable drainage material and a subsoil drain.

5.8.4 Tanking membranes include specialist membranes applied by licenced applicators; however, they can also take the form of bituminous emulsions that can be applied without specialist expertise. In a residential situation tanking is usually applied to vertical surfaces of concrete or blockwork. Although there are situations where a taking membrane is used for the purpose of damp proofing, the purpose of obtaining

¹⁴ Department of Building and Housing "Build it Right – Guide to Restricted Building Work (RBW)" December 2011 at page 6

complete waterproofing of a building element is usually achieved by tanking. In acknowledging the same materials can be used for both tanking and damp proofing it is important to look at the purpose for what is to be achieved in application.

- 5.8.5 In a residential situation a DPM is usually installed horizontally under poured concrete although it can continue up a short distance up vertical faces. A DPM, as in this situation, is typically a layer of polythene sheet with taped points that can be installed without specialist expertise. Although a damp-proofing product used for tanking may be used as a DPM the function of damp-proofing remains as a minimum requirement. However, as noted above, both tanking and damp-proofing could be installed without specialist expertise.
- 5.8.6 The authority has quoted from the BRANZ appraisal of Nuplex damp proofing and tanking membranes and the Ministry's guidance document to restricted building work in submitting that damp-proofing is not necessarily limited to waterproofing products installed under slabs on horizontal applications.¹⁵ I agree that DPM is not always limited to horizontal application. For the purposes of this determination the common usage of a DPM is distinct from tanking, which is usually a more complex system as opposed to the simple application of a membrane. In defining tanking I have compared this to damp proofing but I do not intend to place strict limits on either term as I acknowledge there are circumstances, for example, where a DPM is applied vertically, that need to be taken into account.

5.9 Is there an existing license class for tanking?

- 5.9.1 As noted by the authority 'carpentry work' and 'foundations work' are not defined under the RBW Order of the Act. There are no definitions of the scope of the licensing classes under the LBP Rules, only definitions of competencies. The ordinary and natural meanings can be taken from the New Zealand Standards Glossary of terms¹⁶ being:

Carpentry – The production of work or construction (either temporary or permanent) in wood other than joinery

Foundation – those parts of a building or structure such as piles, piers or footings which transmit and distribute loads to the ground

- 5.9.2 These are the more 'conventional' definitions for carpentry and foundations work. The LBP Rules provide a source for the competency proficiencies for each license class as opposed to strictly legal definitions, there are no definitions of carpentry or foundations or the scope of the licensing class. However, there are performance indicators that provide the primary guidance to support the ordinary and natural meanings for carpentry and foundations. The performance indicators for carpentry and foundations work do not expressly mention tanking under the LBP Rules.
- 5.9.3 For the carpentry license the relevant performance indicators such as constructing a retaining wall and concrete foundations do not include tanking. Consequently the performance indicators for the foundations license class include 'applying damp proof material (membrane or emulsion)' but provide no mention of tanking. In my view the performance indicators for carpentry and foundation licensing classes does not include tanking.
- 5.9.4 The authority has raised the practical problem of excluding tanking from the current licensing classes. However, in my view it is necessary to allow for specialist trades

¹⁵ Department of Building and Housing 'Build it Right – Guide to Restricted Building Work' December 2011

¹⁶ New Zealand Standards Glossary of Building Terms MP 4212:1998

like tanking outside of the license classes. If a person holds a carpentry license, for example, it is unlikely they would have been trained to install a specialised tanking system. Conversely a specialist tanking operator would not be expected to hold the competences for a carpentry license. Tanking does not fit within the ordinary usage of carpentry or foundations work which is supported by the performance indicators under the LBP Rules omitting any reference to tanking. Tanking often requires specialist application depending on the complexity of the job.

- 5.9.5 I recognise there may be some administrative difficulties for the parties in practice however these difficulties have been managed acceptably by territorial authorities and owners in the past and in my view will continue to be managed in a competent manner. I conclude that tanking is not covered by an existing license class.
- 5.9.6 Tanking is not restricted building work, and therefore no record of work is required. However tanking still falls within section 17 of the Act, where all building work must comply with the Building Code. The specialist carrying out the tanking work would need to provide an owner plans and technical information to be passed onto the authority when applying for a building consent.

5.10 The consent process and the role of the authority

- 5.10.1 Under section 88(1) of the Act each LBP who carries out or supervises restricted building work under a building consent must, on completion of the building work, provide the owner and the authority with a record of work. Under 92(2A) of the Act records of work that have been provided to the owner must be included with a code compliance certificate application.
- 5.10.2 Restricted building work is an additional layer of accountability on top of the building consent regime. Restricted building work is to be carried out by LBPs who are in turn accountable to the Board. Section 92(2A) has the effect that an authority can require an owner to include with their code compliance certificate application the relevant records of work that have been provided to them by the LBP under section 88. The authority plays an important role in the regulatory scheme as it is in the best position to administer the checking of records and the recording of details provided to it under section 88(1) and section 92(2A). The authority can use the information gathered to assist it with the accountability of LBPs to the Board. The authority's existing powers remain and can be used where relevant, for example, relating to a notice to fix where an unlicensed person is carrying out or supervising restricted building work.
- 5.10.3 It is relevant to note the distinction between the authority exercising a function under the Act as a building consent authority, compared to that of a territorial authority. The restricted building work regime sits within a territorial authority's functions, as noted in section 88 of the Act, in comparison the authority's functions to issue a building consent, and a code compliance certificate fall within the role of a building consent authority.
- 5.10.4 Section 92(2A) serves an important function for records of work to be provided to the authority with an owner's code compliance certificate application. In terms of issuing the code compliance certificate under section 94 of the Act, the authority must determine whether it is satisfied on reasonable grounds that the building work complies with the building consent. However, as established in the previous determination, a record of work is not grounds for an authority refusing to issue a code compliance certificate. I consider the note included on the building consent application documentation (refer paragraph 2.4) has been phrased incorrectly. A

record of work is required when an owner applies for a code compliance certificate, under section 92(2A) but is not a requirement for the authority to consider when issuing a code compliance certificate.

- 5.10.5 The comparable example provided by the applicant's lawyer is that of energy works certificates. Under section 92(4) of the Act an energy work certificate must be provided, if the building work comprises or includes energy work, with an application for a code compliance certificate. Under section 94(3) of the Act if an energy work certificate is not provided, this failure 'is a sufficient reason' for the authority to refuse to issue a code compliance certificate. In comparison, records or work are a requirement under 92(2A) of the Act to be provided with an application for a code compliance certificate, but this is not a matter required to be considered by the authority under section 94 of the Act when deciding to issue a code compliance certificate.
- 5.10.6 I note under section 93(4) of the Act, the failure of an applicant to provide a record of work with the code compliance certificate application could result in a request for further information and a suspension of the statutory time frame. However, once an applicant has responded (whether with or without the record of work) the suspension should cease and a code compliance certificate can still be issued.
- 5.10.7 The regulatory mechanism of the LBP Rules and the Board are an additional accountability scheme to the building consent process. If a record of work has not been supplied by the owner (whether this is due to an owner, an LBP dispute or the LBP not complying with their duty under section 88 of the Act) this is a matter for the Board to investigate as a complaint. Under section 315 of the Act any person can make a complaint against an LBP to the Board. The authority is important to the running of the accountability scheme; however, non-conformance is a disciplinary function which is to be dealt with by the Board.
- 5.10.8 The accountability scheme remains a separate matter from whether an owner can be issued a code compliance certificate or not. The criteria for issuing a code compliance certificate under section 94 of the Act is primarily around whether the building work has been carried out in accordance with a building consent, which in turn should comply with the Building Code.
- 5.10.9 The authority has sought direction as to a 'condition' that could be included on building consents in relation to records of work. I sought clarification from the authority on 3 December 2014 regarding this request. The authority confirmed they would call the type of material it includes in a building consent a 'condition' but acknowledges formal 'conditions' can only apply to a limited number of circumstances under the Act. The authority describes the conditions as more akin to 'notes' and references Determination 2012/079¹⁷ which stated:
- I accept that it is common practice for building consents to be accompanied by notes and conditions. It is my view that this practice is acceptable, provided the conditions are used appropriately to highlight specific areas for attention, and are used to clarify aspects of the building work and the processes that relate to it.
- 5.10.10 In my view the wider context of this statement in Determination 2012/079 makes it clear the 'condition' relates to compliance with the Building Code or a Building Consent. In this case a code compliance certificate does not rely on the receipt of a record of work under section 94 of the Act. The record of work is more akin to an

¹⁷ Determination 2012/079 Regarding the refusal to issue a code compliance certificate in respect of the compliance of the fire safety design for a new retail warehouse building (*Ministry of Business, Innovation and Employment*) 19 December 2012 at paragraph 5.4.1

administrative document for the additional accountability scheme of restricted building work. I do not consider this should be classified as a 'condition' on the building consent. I consider guidance is appropriate; however, I would need to review the document in full to determine the context of any 'note' and this should be done outside of the determinations process.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- Matter one: the authority was incorrect to include on a building consent a requirement for a record of work to be provided before a code compliance certificate is issued with regard to section 94.
- Matter two: the authority was incorrect to require a record of work for tanking, as tanking is not restricted building work.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 December 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A 1 The relevant sections of the Act

14E Responsibilities of builder

(1) In subsection (2), builder means any person who carries out building work, whether in trade or not.

(2) A builder is responsible for—

(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:

(b) ensuring that building work not covered by a building consent complies with the building code.

(3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—

(a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and

(b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

84 Licensed building practitioner must carry out or supervise restricted building work

All restricted building work must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise the work.

88 Licensed building practitioner to provide record of work in respect of restricted building work

- Each licensed building practitioner who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of the restricted building work, provide the persons specified in subsection (2) with a record of work, in the prescribed form, stating what restricted building work the licensed building practitioner carried out or supervised
- The persons are—
 - (a) the owner; and
 - (b) the territorial authority for the district in which the restricted building work is situated.

...

92 Application for code compliance certificate

(1) An owner must apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed.

...

(2A) If applicable, the owner must include with the application any records of work provided by licensed building practitioners under section 88(1).

282A Purposes of licensing building practitioners

The purposes of licensing building practitioners under this Act are—

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and

(b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

285 Licensing classes may be designated by regulations

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, designate a licensing class or classes for carrying out or supervising particular types of—

- (a) building work:
- (b) building inspection work.

(2) An order made under subsection (1) may designate a licensing class or classes for carrying out the work, or for supervising the work, or for carrying out or supervising the work.

353 Rules relating to licensed building practitioners

(1) There must be made, and there must always be, rules containing the following minimum standards (LBP standards):

- (a) minimum standards of competence (including standards relating to knowledge and skills) that must be met for each licensing class; and
- (b) minimum standards for demonstrating current competence for each licensing class that must be met for continued licensing, and for the frequency at which assessments of current competence must be carried out.

(2) There must be made, and there must always be, rules that govern all of the following matters:

- (a) the information that must be provided by an applicant for licensing, and the way in which this information must be evaluated and decisions on the information must be made and implemented; and
- (b) the information that must be provided by a licensed building practitioner to demonstrate his or her current competence, and the way in which this information must be evaluated and decisions on the information must be made and implemented; and
- (c) the way in which a proposed cancellation or suspension of licensing (that does not relate to a disciplinary matter) is to be considered, decided on, and implemented, and any minimum and maximum periods for suspension.

(3) The rules must be consistent with this Act

401B Order in Council declaring work to be restricted building work

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.

(2) An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.

(3) The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.

- (4) Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work

A 2 The relevant clauses of the RBW Order (note Clause 5 has been amended by the Amendment Order)

5 Declaration of building work that must be carried out or supervised by licensed building practitioner

- (1) This clause applies to building work of a kind set out in subclause (2) when the building work is the construction or alteration of—
- (a) the primary structure of a house or a small-to-medium apartment building; or
 - (b) the external moisture-management system of a house or a small-to-medium apartment building.
- (2) The kinds of building work are:
- (a) bricklaying or blocklaying work:
 - (b) carpentry work:
 - (c) external plastering work:
 - (d) foundations work:
 - (e) roofing work.
- (3) Building work of a kind to which this clause applies is declared to be building work that must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise that kind of building work.

3 Interpretation

external moisture-management system, in relation to a building,—

- (a) means a system (whether comprising only one or 2 or more building elements) that is intended to provide—
 - (i) resistance to the penetration of the building by moisture from outside it; or
 - (ii) resistance to the accumulation within the building's fabric of moisture that has penetrated it from outside the building; and
- (b) includes any of the building's building elements that are or form part of damp-proofing, roof cladding or a roof cladding system, a ventilation system, wall cladding or a wall cladding system, or waterproofing; and
- (c) includes any part of its external moisture-management system

A 3 The relevant clause of the Interpretation Act 1999

20 Enactments made under repealed legislation to have continuing effect

- (1) An enactment made under a repealed enactment, and that is in force immediately before that repeal, continues in force as if it had been made under any other enactment—
- (a) that, with or without modification, replaces, or that corresponds to, the enactment repealed; and
 - (b) under which it could be made.

(2) An enactment that continues in force may be amended or revoked as if it had been made under the enactment that replaces, or that corresponds to, the repealed enactment

A 4 The relevant clauses of the previous Act

7 restricted building work—

- (a) means building work that is—
 - (i) critical to the integrity of a building, for example, its envelope and structure; and
 - (ii) of a kind declared by the Governor-General by Order in Council to be building work that must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise that work; and that Order in Council may relate, without limitation, to certain types or categories of buildings, or parts of buildings specified in the Order in Council; and
- (b) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and
- (c) does not include any building work for which, in accordance with section 41, a building consent is not required

402 Regulations: general

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for all or any of the following purposes:
 - (n) prescribing building work that amounts to restricted building work:
 - (na) designating a licensing class or classes for carrying out or supervising particular types of—
 - (i) building work; or
 - (ii) building inspection work:

A 5 The relevant clauses of the Amendment Act

4 Clause 5 replaced (Declaration of building work that must be carried out or supervised by licensed building practitioner)

Replace clause 5 with:

5 Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work

- (1) The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.
- (2) This clause applies to building work that is—
 - (a) the construction or alteration of—
 - (i) the primary structure of a house or a small-to medium apartment building; or
 - (ii) the external moisture-management system of a house or a small-to-medium apartment building; and
 - (b) of a kind described in subclause (3); and
 - (c) of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.
- (3) The kinds of building work referred to in subclause (2)(b) are—
 - (a) bricklaying or blocklaying work:
 - (b) carpentry work:
 - (c) external plastering work:

- (d) foundations work;
- (e) roofing work.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order, which comes into force on the 28th day after the date of its notification in the Gazette, amends the Building (Definition of Restricted Building Work) Order 2011 to align clause 5 of that order with changes introduced by the Building Amendment Act 2012 to the definition of restricted building work in the Building Act 2004 (the Act).

For a kind of building work to be restricted building work, the definition requires a declaration by Order in Council. Before recommending the making of an order, the Minister must be satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.

As envisaged by paragraph (a) of the definition in section 7 of the Act, new clause 5 (as set out in clause 4 of this order) declares certain kinds of building work to be restricted building work. In the former clause 5, the same work was declared to be building work that must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise that kind of building work, which reflected the wording of the definition in section 7 at the time the order was made.

Building work will be restricted building work under new clause 5 if all 3 of the following criteria apply:

- it is the construction or alteration of the primary structure or external moisture-management system of a residential building, which carries over the effect of former clause 5(1);
- it is of a kind listed in new clause 5(3), which is the same list as in the former clause 5(2);
- it is of a kind for which a licensing class to carry out or supervise the work has been designated under the Act (the Building (Designation of Building Work Licensing Classes) Order 2010), which carries over the effect of former clause 5(3).

The clause relates to carpentry work, external plastering work, bricklaying or blocklaying work, foundations work, or roofing work on the construction or alteration of—

- the primary structure of a house or a small-to-medium apartment building; or
- the external moisture-management system of a house or a small-to-medium apartment building.