



## Determination 2016/006

### **Regarding the refusal to issue a code compliance certificate for a 20-year-old house with brick and weatherboard claddings at 33 West Ridge Drive, Western Heights, Hamilton**



#### **Summary**

This determination considers the authority's decision to refuse to issue a code compliance certificate; the authority's concerns were largely to do with the weathertightness and durability of the exterior envelope. The determination discusses the authority's refusal to inspect the building work and whether there was sufficient evidence of compliance in order to issue a code compliance certificate.

#### **1. The matter to be determined**

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> ("the current 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 owner of the house at the time the application for a code compliance certificate was made, S Pornsiriopoj ("the applicant") acting via a real estate agent ("the agent")
- the new owner of the house, L Wong ("the new owner")
- Hamilton City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

1.3 This determination arises from the following:

- When preparing the house for sale, the agent discovered that the house had not been issued with a code compliance certificate due to several minor outstanding items identified during a 1999 inspection.
- The agent arranged for the items to be attended to and completed an application for a code compliance certificate on the applicant's behalf. Following several months of discussions, the agent was informed that the authority would not inspect the house due to its age.
- The agent was also advised that the authority would not consider undertaking an inspection and issuing a code compliance certificate without a full weathertightness survey by an approved assessor.

1.4 I take the above as a decision by the authority to refuse to issue a code compliance certificate for a 20-year-old house because it was not satisfied that the building work complied with certain clauses<sup>2</sup> of the Building Code (First Schedule, Building Regulations 1992). The authority's concerns regarding compliance of the building work appear to relate to the age and weathertightness of the house.

1.5 The matter to be determined<sup>3</sup> is therefore whether the authority was correct to refuse to issue a code compliance certificate. In deciding this matter, I must consider:

- (a) Whether the house complies with the relevant clauses of the Building Code that was in force at the time the building consent was issued. This includes compliance of the external building envelope of the house with Clause B2 Durability and Clause E2 External moisture of the Building Code. The building envelope includes the components of the systems (such as the wall claddings, the windows and the roof cladding) as well as the way components have been installed and work together. I consider this in paragraph 7.
- (b) Whether the house complies with other relevant parts of the Building Code in force at the time. I consider this in paragraph 8.
- (c) The authority's exercise of its powers in its apparent refusal or purported refusal to issue a code compliance certificate. I consider this in paragraph 10.

1.6 The authority has raised concerns regarding the age of the building work. I note that the owner will be able to apply to the authority for a modification of the durability periods for the 20-year-old house to allow specified periods to commence from the date of substantial completion. I consider this in paragraph 9.

1.7 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute ("the expert") and the other evidence in this matter.

## 2. The building work

2.1 The building work consists of a detached house that is three-storeys high and is situated on a sloping site in a medium wind zone for the purposes of NZS 3604<sup>4</sup>. The basement level is set into the slope of the site, with steps leading up from the driveway to the main entry to the north. The expert takes the garage door as facing

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<sup>2</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>3</sup> Under sections 177(1)(b) and 177(2)(d) of the Act

<sup>4</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

west and this determination follows that convention. The house is fairly complex in plan and form with some complex roof to wall junctions, and is assessed as having a low to moderate weathertightness risk (see paragraph 7.2).

- 2.2 Construction is generally conventional light timber frame, with concrete foundations and floor slab, concrete block retaining walls, weatherboard and brick veneer wall claddings, concrete tile roofing and aluminium joinery. The upper roof is hipped and gabled, with roofs to lower levels forming lean-tos against upper walls, and a gable roof over the garage. The roofs have eaves and verge overhangs of 600mm or more.
- 2.3 Basement walls and the north wall to the foyer are clad in brick veneer. The remaining wall cladding consists of rusticated cedar weatherboards with corner facings, which is fixed through the building wrap and finished with a stain finish.
- 2.4 The expert was unable to identify the treatment of exterior wall framing timber and I have seen no evidence on the matter. However, given the date of wall framing installation in 1995, I consider that timber wall framing is likely to be boric treated to resist decay but the level of resistance achieved by that treatment is not known<sup>5</sup>.

### 3. Background

- 3.1 The authority issued building consent No. 95/0207 to the original owner on 20 April 1995 under the Building Act 1991 (“the former Act”). The authority carried out various inspections from April to September 1995, including pre-line inspections in July 1995. The last inspection was of foul water on 12 September 1995 and it is likely that the house was occupied by November 1995.
- 3.2 No final inspection was carried out until 1999 when the authority followed up on its records of uncompleted building consents. The authority carried out an inspection on 15 October 1999 which identified the following items to be attended to:
  1. Fix toilet bowls to floor
  2. Fix broken stormwater downpipe
  3. Fix leaking showers and repair damaged walls
  4. Hot water cylinder requires steel straps to stop movement in an earthquake.
- 3.3 In a letter to the original owner dated 19 October 1999 the authority listed the items to be completed and noted that a final inspection would be necessary. There was apparently no response to this and the property was sold in 2005 without a code compliance certificate to a second owner.
- 3.4 The authority’s internal records note a ‘general memo’ dated 28 August 2006, which was stamped ‘No CCC – No response from owner to correspondence’ and summarised the background of the building consent as follows:

Visited site 10/9/1999. No one home left card in letter box. Property inspected and list of uncompleted work faxed to owner. Letter sent 19/10/1999 confirming outstanding issues. No response and due to age of project we have not issued a Code Compliance Certificate.
- 3.5 The applicant purchased the property in 2011, and in preparing to sell the property in 2014 became aware that the house lacked a code compliance certificate. The agent arranged for the items to be attended to, and on 9 April 2014 completed a formal application for a code compliance certificate on the applicant’s behalf.

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<sup>5</sup> In 1993 the primary risk was considered to be insect attack rather than decay, with the required preservative level reduced accordingly.

- 3.6 After some months of requesting a final inspection of the work, the agent was verbally informed that the authority would not inspect the house due to its 'age and era'. He was later advised that the authority would not consider undertaking an inspection and issuing a code compliance certificate without a full weathertightness survey by a certified weathertight inspector approved by the authority.
- 3.7 The agent was unable to obtain a weathertightness report and the Ministry received an application for a determination on 21 September 2015.

#### **4. The submissions**

- 4.1 In a statement on behalf of the applicant, the agent outlined the recent background to the situation describing his unsuccessful attempts to obtain a final inspection. The agent explained that he had also been unable to find an approved weathertightness inspector.
- 4.2 The applicant provided copies of:
- a hand-completed inspection record dated 15 October 1999
  - the authority's letter to the original owner dated 19 October 1999
  - a builder's quotation dated 4 March 2014 for repairs carried out
  - the certificate of title for the property.
- 4.3 The Ministry sought advice from the authority on 22 September 2015 and 6 October 2015 for its reasons for refusing the code compliance certificate under section 95A. The Ministry received no response to these requests.
- 4.4 On 19 November 2015 a legal adviser acting for the applicant sent information to the Ministry by email to the effect that a section of rusted guttering had been repaired, that surface water drain has been inspected and a broken down pipe repaired: the downpipe was above and adjacent the retaining wall referred to by the expert (refer paragraphs 5.3.2 and 5.3.3).
- 4.5 A draft determination was issued to the parties for comment on 20 November 2015. No responses were received from the parties and a reminder was sent on 4 December 2015. A further and final request for submissions was sent by email to the parties on 11 January 2016.
- 4.6 On 12 January 2016 the legal adviser acting for the applicant advised that the property had been sold, and provided the contact details of the new owner.
- 4.7 On 12 January 2016 the new owner of the house was provided with the expert's report and draft determination, and invited to make a submission. No response has been received from the new owner.
- 4.8 The authority provided a response to the draft determination by email on 15 January 2016, noting that it accepted the decision. The authority advised it was still not in a position to issue a code compliance certificate and confirmed its expectations with regard to the remedial work required.

## 5. The expert's report

5.1 As mentioned in paragraph 1.7, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert inspected the house on 15 and 20 October 2015, providing a report dated 22 October 2015 which was provided to the parties on 29 October 2015.

### 5.2 General

5.2.1 The expert noted that weatherboards were 'in reasonably good condition considering the age of the house' and had apparently been re-stained within the last 12 months. The bricks showed no signs of cracking at mortar joints, weatherboards appeared to be 'straight and true with no splitting or cupping noticeable and aluminium windows 'properly installed', with 'correctly fitted' metal head flashings.

5.2.2 The expert noted that outstanding items identified in the 1999 inspection had been satisfactorily attended to, with the ensuite bathroom upgraded. (I note that the builder's quote included stripping out fittings, replacing any damaged flooring and finishes and refitting the shower and toilet.)

5.2.3 The expert observed that maintenance was needed to a number of areas, including:

- deterioration of fascia and barge boards
- some weatherboards yet to be re-stained
- deterioration of some fixing brackets to downpipes
- overgrown planting and garden soil levels currently too close to walls.

5.2.4 The expert noted the following minor changes to the consent drawings:

- Shower and vanity added to the basement laundry.
- Changes to the upper floor bathrooms.

### 5.3 Moisture testing

5.3.1 The expert inspected the interior of the timber framed walls, generally noting no 'sign of water stains or adversely affected painted wall or ceiling surfaces'. The expert also lifted the carpet in several rooms and noted no signs of dampness or water staining at the exterior walls.

5.3.2 However, the expert observed three areas of concern as follows:

- The concrete block retaining wall to the basement, with efflorescence to the bottom of some areas and deteriorating timber skirting.
- The bottom plates to brick veneer at the entry foyer, where soil and planting approach the cladding.
- The bottom plate to brick veneer at the southwest corner of the dining room doors, where soil and planting approach the cladding.

5.3.3 The expert took invasive moisture readings of the above and other areas considered at-risk; using probes from the inside into skirting and bottom plates and recording:

- 21% to 30% in skirting to the east basement concrete block retaining wall
- 18% and 30% in bottom plates to the north foyer wall brick veneer
- 40% in the bottom plate to the south dining wall brick veneer

- 30% in the bottom plate at the southeast internal corner to the dining porch.

#### 5.3.4 Commenting on the exterior envelope, the expert noted that:

- some fascia and barge boards are deteriorating, with paint peeling and moisture damaging some areas
- the efflorescence to the rear concrete block retaining wall suggests failure of the damp proofing to some areas behind the wall, allowing water to penetrate (I also note that the site slopes steeply down towards the east elevation)
- rear downpipes are not secured to the brickwork
- planting and ground levels are too close to the brick veneer, which impedes drainage from the cavity and has resulted in high moisture levels in two areas
- downpipes from some upper level roofs lack spreaders
- there was a 30% moisture level reading in the porch corner beside the dining doors needs further investigation to establish the cause (see paragraph 7.4).

#### 5.3.5 The expert made the following additional comments:

- Although the curved heads to three windows provide risk of moisture penetration, these windows are protected beneath deep verge overhangs and are likely to be satisfactory in the circumstances.
- Although cladding to the two monolithic-clad columns butts against the paving, the areas are protected beneath roof overhangs and the paving is well drained with no evidence of deterioration over the past 20 years.
- Although the face-fixed meter box on the brick veneer lacks a head flashing, the box is sheltered beneath the eaves and the brick veneer includes a cavity.

## 5.4 The other relevant clauses

### 5.4.1 The expert also assessed compliance with other relevant clauses of the Building Code and his findings are summarised as follows:

**Table 1**

	<b>Building Code Clauses</b>	<b>Expert's opinion</b>
<b>B1</b>	Structure	No evidence of structural problems observed
<b>D1</b>	Access routes	Internal stairs over 1m wide with full landings and compliant treads and risers. Compliant handrails to internal stairs
<b>E1</b>	Surface water	Site slopes steeply towards street to the west. (Ref Clause E2 re moisture penetration to east basement walls.)
<b>E3</b>	Internal moisture	Fittings in good condition. <b>Water splash, impervious linings, etc, to be verified<sup>6</sup></b>
<b>F2</b>	Hazardous materials	Windows to bathrooms at acceptable height <b>Safety glazing to showers to be verified</b>
<b>F4</b>	Safety from falling	Compliant balustrades to internal stairs.

<sup>6</sup> Shaded cells / items in bold indicate areas that were not fully considered by the expert and need to be verified.

	<b>Building Code Clauses</b>	<b>Expert's opinion</b>
<b>G1 to G8</b>	Facilities and environment	Satisfactory laundry and hygiene facilities Sufficient opening windows. Adequate heating, room sizes and lighting. Extracts fans vented to exterior.
<b>G9</b>	Electricity	No matters of non-compliance observed
<b>G12</b>	Water supplies	The hot water cylinder is seismically restrained. <b>Provision of tempered hot water, and safety devices to the hot water cylinder to be verified.</b>
<b>G13</b>	Foul water	Drainage systems appear satisfactory, with no evidence of leaking or odours noted. Gully traps raised sufficiently above ground level.
<b>H1</b>	Energy efficiency	Fibre wool insulation observed in ceiling space Wall insulation observed via removal of power outlet

## 5.5 Summary

- 5.5.1 The expert concluded that the areas outlined in paragraph 5.3.4 required further investigation and/or remedial work to comply with Clauses E2 and B2.
- 5.5.2 The expert considered that other elements in the house complied with the relevant clauses of the Building Code and items identified during the authority's 1999 inspection had been satisfactorily attended to.
- 5.5.3 The compliance of the specific items noted in the table above are to be verified: these relate to Clauses E3, F2, and G12.

## 6. Compliance generally

- 6.1 This building consent was issued under the former Act, and accordingly the transitional provisions of the Act apply when considering the issue of a code compliance certificate for work completed under this consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.
- 6.2 An application can be made to the authority for a modification of durability requirements to allow durability periods to commence from the date of substantial completion in 1995. Although that matter is not part of this determination (see paragraph 1.5), I have taken the anticipated modification into account when considering the weathertightness performance of the claddings as most areas of exterior building envelope have continued to perform for more than 20 years to date.
- 6.3 In order to determine whether the authority was correct in refusing to issue a code compliance certificate, I must consider whether the building work complies with the Building Code. The following paragraph therefore considers the code-compliance of the external building envelope.

## **7. The external envelope**

7.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regards to weathertightness have been described in numerous previous determinations (for example, Determination 2004/1).

### **7.2 Weathertightness risk**

7.2.1 This house has the following environmental and design features, which influence its weathertightness risk profile:

#### **Increasing risk**

- the house is three-storeys-high in part
- the house includes some complex roof to wall junctions
- the walls have rusticated weatherboards fixed directly to the framing

#### **Decreasing risk**

- there are generous eaves to shelter the wall claddings and junctions
- external wall framing is likely to be treated to a level that provides some resistance to decay if it absorbs and retains moisture.

7.2.2 Using the E2/AS1 risk matrix to evaluate these features, elevations are assessed as having a low to moderate weathertightness risk rating. If current E2/AS1 details were adopted to show code compliance, drained cavities would be required for the timber weatherboards to all elevations. However, this was not a requirement when the building consent was issued in 1995.

### **7.3 Weathertightness performance**

7.3.1 Generally the claddings appear to have been installed in accordance with good trade practice at the time of construction. However the expert has identified that the areas outlined in paragraph 5.3.4 require attention.

7.3.2 I also note the expert's opinions as outlined in paragraph 5.3.5 and accept that those areas are adequate in the particular circumstances described.

### **7.4 The dining area porch**

7.4.1 Included in areas requiring attention is a need to investigate the cause(s) for the high moisture level recorded in the bottom plate adjacent to the dining room doors. In regard to that location, I note the following:

- The bottom of the wall is in a very sheltered corner beneath a deep porch.
- The area is unlikely to be subject to windblown rain due to shelter offered from trees and the site slope above.
- Although the wall is below a roof/wall junction, moisture levels of only 11% were recorded in the bottom plate of bedroom 2 above, despite that floor level being beneath the level of the roof/wall junction.
- Despite the lack of a spreader to a downpipe from the upper roof, the wall is some 800mm away from that downpipe.
- There is no evidence of recent ponding against the wall.

- 7.4.2 The expert has advised me that it is possible that metal interference could have affected this particular reading. Taking account of the above, I therefore consider that further readings are needed as a first step in the investigation to confirm the accuracy of the original reading.
- 7.4.3 If the moisture level is confirmed as significantly elevated, investigation will be necessary to establish the cause(s) of the moisture penetration, which should include removal of linings to establish the condition of the underlying framing.

## **7.5 The basement retaining walls**

- 7.5.1 I note the moisture penetration through the basement retaining walls reported by the expert and the slope of the site towards the house. I consider that groundwater pressure, surface water run-off, or insufficient waterproofing and/or deficient subsurface drainage behind the wall may have led to the moisture ingress. The causes need to be investigated and remediated. I note the expert's view that the failure of the wall in terms of water ingress appears to be relatively recent.
- 7.5.2 The applicant advised that a broken downpipe adjacent the one end of the wall, which may have contributed to the failure of the wall, has been repaired.

## **7.6 Condition of the timber framing**

- 7.6.1 I note the expert has recorded two other areas with moisture levels of 30% and 40%, which is a level likely to initiate decay in the timber framing despite the probability of some level of preservative in the timber.
- 7.6.2 If moisture levels have been highly elevated over an extended period of time this may have resulted in damage to the timber framing, and this should be investigated further.

## **7.7 Weathertightness conclusion**

- 7.7.1 I consider the expert's report establishes that the current performance of the building envelope is not adequate because there is evidence of moisture penetration to several areas. Consequently, I am satisfied that the claddings currently do not comply with Clause E2 of the Building Code.
- 7.7.2 The durability requirements of Clause B2 include a requirement for wall claddings to remain weathertight for a minimum of 15 years. Although a modification of the durability provisions to allow provisions to commence from substantial completion in 1995 would mean that most cladding areas have already performed satisfactorily for 20 years, I am satisfied that several areas may not have complied with Clause E2 for that all of the required 15 years and I am therefore satisfied that the building envelope does not comply with the durability requirements of Clause B2.
- 7.7.3 Because the identified moisture penetration and cladding faults occur in discrete areas, I am able to conclude that satisfactory investigation of areas outlined in paragraphs 7.4 and 7.6, together with rectification of areas outlined in paragraph 5.3.4 will result in the building envelope being brought into compliance with Clauses E2 and B2 of the Building Code.
- 7.7.4 The durability requirements of Clause B2 also include a requirement for the structural elements to be durable for a minimum of 50 years. The high moisture readings in the timber framing at two locations noted in paragraph 7.6 may have led to the timber framing in those locations being damaged: while I do not consider this

to be so significant in extent and effect as to lead to the structure not satisfying Clause B1 Structure, the matter needs to be investigated as noted above.

- 7.7.5 It is emphasised that each determination is conducted on a case-by-case basis. Accordingly, the fact that a particular cladding system has been established as being code compliant in relation to a particular building does not necessarily mean that the same cladding system will be code compliant in another situation.

## **7.8 Maintenance of the building envelope**

- 7.8.1 Although a modification of the durability provisions to allow the provisions to commence from the date of substantial completion in 1995 means that wall claddings have already met the minimum life required by the Building Code for the cladding, the expected life of the building as a whole is considerably longer and careful maintenance is needed to ensure that claddings continue to protect the underlying structure for its minimum required life of 50 years.
- 7.8.2 Effective maintenance of claddings is important to ensure ongoing compliance with Clauses B2 and E2 of the Building Code and is the responsibility of the building owner. The Ministry has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

## **8. The remaining Building Code clauses**

- 8.1 Taking account of the expert's report and other comments shown in Table 1 (see paragraph 5.4), I am satisfied that the house complies with relevant clauses of the Building Code, with the compliance of the specific items noted in Table 1 that relate to Clauses E3, F2, and G12 to be verified.

## **9. The durability considerations**

- 9.1 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") "from the time of issue of the applicable code compliance certificate" (Clause B2.3.1).
- 9.2 In this case the 20-year delay since the completion of the house in 1995 raises concerns that many elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date.
- 9.3 I have considered this issue in many previous determinations and I maintain the view that:
- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements, if requested by an owner
  - (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued at the time of substantial completion in 1995.
- 9.4 I therefore leave the matter of amending the building consent to modify Clause B2.3.1 to the parties once outstanding matters are resolved.

## 10. The authority's regulatory actions

- 10.1 In my view authority has failed to satisfy the requirements of section 95A as it did not even attempt to identify whether the building work was compliant. A generalised verbal refusal that fails to identify non-compliant aspects of the building work is not sufficient to comply with Section 95A. If the authority believes code compliance has not been achieved in any given situation it must formally advise an owner of the reasons for the refusal.
- 10.2 The authority did not inspect the building work in order to observe how the house had performed over the past 20 years, which would have allowed it to identify any non-compliance. No account was taken of the particular attributes of the building and apparent risk profile. If a determination was required about any disputed matters of compliance, this should have followed such an inspection, not preceded it.
- 10.3 The authority has not provided me with any evidence of why it considers the house is not compliant with the Building Code. It is important that, should an owner be declined a code compliance certificate, they be given clear and appropriate reasons why. The owners can either then act on those reasons or apply for a determination if they dispute them. I conclude the authority did not properly exercise its powers in respect of its refusal or purported refusal to issue a code compliance for the house.

## 11. What happens next?

- 11.1 A detailed proposal should be developed to address the investigations outlined in paragraphs 7.4, 7.5, and 7.6, together with the defects identified in paragraph 5.5 of this determination. The proposal should be produced in conjunction with a suitably qualified person and should be submitted to the authority for its consideration and approval. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 11.2 In respect of the outstanding matters to be verified (refer paragraphs 5.4 and 5.5.3), these can be assessed by the inspected by the authority in conjunction with the remedial work identified herein, or alternatively the new owner can seek advice about the compliance of these items.
- 11.3 I note that the building consent was issued to the original owner of the house and, as noted in Determination 2014/035<sup>7</sup>, no notice to fix is able to be issued to the new owner in respect of breaches of the Act or Regulations in respect of work carried out by previous owners.

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<sup>7</sup> Determination 2014/035: The issue of a notice to fix for weathertightness remedial work carried out by a previous owner

## **12. The decision**

- 12.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority did not exercise its powers correctly when it refused to issue the code compliance certificate without providing its reasons in writing as required under section 95A
- 12.2 Notwithstanding the above, I also determine that the external cladding, including the basement retaining walls, do not comply with Building Code Clauses E2 and B2, and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate.
- 12.3 I have insufficient evidence to make a decision with respect to compliance with Clauses E3, F2 and G12.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 February 2016.

John Gardiner  
**Manager Determinations and Assurance**