



Building Consent Authority Complaint 2016/003 against Kaikoura District Council

29 September 2016

1. The matters of complaint

- 1.1 This is a complaint under Part 3 Subpart 1 of the *Building Act 2004*¹ (“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 complaint was lodged by a property inspector (“the consultant”) acting on behalf of his clients, P and N Sutherland (“the complainants”). It was received by the Determinations and Assurance Group of the Ministry of Business, Innovation and Employment on 8 December 2015. The complaint has been lodged against the building consent authority (“the BCA”) of the Kaikoura District Council in accordance with section 200 of the Act.
- 1.3 In a submission accompanying the complaint application, the consultant raised several matters of complaint, some of which concerned the BCA’s exercise of its powers of decision in relation to building consents issued for the complainants’ house. These matters have been excluded from this complaint decision as they were the subject of a determination² and have already been considered and decided on. The consultant also raised matters relating to the fees charged by the BCA for its inspections. These matters are also excluded as they are outside the jurisdiction of the Act.
- 1.4 The remaining matters of complaint raised in the application and accompanying submission concern the inspections carried out by the BCA in relation to the consented building work and the BCA’s alleged failure, without good reason, to properly perform its functions when it carried out those inspections.
- 1.5 Unless otherwise stated in this complaint, all references to sections are to sections of the Act and all references to clauses are to clauses of the *Building (Accreditation of Building Consent Authorities) Regulations 2006* (“the BCA Regulations”).

2. The legislation

- 2.1 Under section 200 of the Building Act 2004, the Chief Executive may receive complaints alleging that a BCA has been negligent in or has failed or is failing, without good reason, to properly perform any of its functions. The functions of a

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

² The complainants applied for a determination regarding the exercise of the BCA’s power of decision in issuing the building consent. See: *Determination 2015/051 Regarding the issue of a building consent for a 1-year-old house* (12 August 2015), Ministry of Business, Innovation and Employment.

BCA include the issuing of building consents, notices to fix, code compliance certificates and inspecting building work for which it has granted consent.

2.2 Specific to this complaint, the BCA is governed by the BCA Regulations. The relevant Regulation 7 states:

7 Performing building control functions

(1) A building consent authority must have policies and procedures for performing its building control functions.

(2) The policies and procedures must cover the following: ...

(e) planning, performing, and managing inspections; ...

3. Background

3.1 The complainants applied for a building consent to build a single-storey house, with an attached garage in September 2010. The BCA issued the consent with a list of ten inspections that would be required.

3.2 Over the following months, the BCA's inspector visited the site several times to carry out inspections, with pre- and post-wrap inspections in March 2011. Subsequent to those inspections, which passed, the builder started installing the plywood cladding and internal bracing.

3.3 At some point, the complainants grew concerned about the quality of the building work and engaged the consultant to assess the work that had been completed to date. The building work halted at this point.

3.4 On 15 June 2011, the consultant wrote to the BCA outlining his assessment of the building work. This correspondence raised concerns about the building work, the consented plans and the BCA's inspections to date. These concerns included:

- the inspector's failure during the pre-line inspections (17 and 23 March) to identify that the incorrect timber grade had been used for the rafters and the depth of the cut into these rafters to accommodate the internal gutter
- the inspector's failure to notice during the pre-line inspections that not all of the plywood extended to the top plate, and his notation that 'ply bracing all correct to plans'
- the lack of full height studs on the North wall, and the failure to connect the lintel above the bi-fold doors to a full height stud (in the consultant's opinion, citing advice obtained from an engineer, this would require a steel portal to be added to strengthen the wall)
- insulation would have been in place at the next inspection meaning none of these issues would have been dealt with.

3.5 It appears that the consultant met with the BCA's inspector and chief executive officer to discuss the matters and that following this meeting both parties engaged engineers to assess what was required to make the house structure compliant.

3.6 Also following that meeting, the BCA's inspector provided an undated internal report entitled 'Summary of Events', which concluded by stating that '...the next

inspection would have sorted out all the concerns that the building consultant has raised...’.

- 3.7 In August 2011, the authority’s engineer produced an amended bracing design, detail for remedial work to the North wall, and a new ‘Producer Statement – PS1 – Design’ for some of the building’s rafters, bracing, studs and framing. In October the BCA issued the first amendment to the building consent, covering these and other minor matters.
- 3.8 In February 2013, the consultant submitted a further application for an amendment relating to further structural strengthening measures, and the BCA issued a second amendment to the consent on 5 March 2013.
- 3.9 Work on the complainants’ house resumed using a different builder, and the BCA carried out five further inspections, with the final inspection passed in February 2014 and a code compliance certificate issued on 12 March 2014. I note that no complaint is being made about these later inspections or of the BCA’s actions in issuing the code compliance certificate. This complaint decision relates solely to the earlier inspections (see paragraph 3.2) conducted before the consultant was engaged, and I have discussed these inspections in more detail in paragraph 5.5.2.
- 3.10 On 8 December 2015, the Ministry received the complaint application. After a preliminary investigation, on 26 January 2016 the Ministry notified the parties that the complaint application was accepted under section 200(2) of the Act.

4. Submissions

- 4.1 The consultant made a submission with the complaint application, dated 5 December 2015, that outlined the background of the building work and issues that form the basis of the complaint. It provided a chronology of the various inspections that were completed for the building work, with comments about what the consultant considered had been and should have been covered at each inspection.
- 4.2 The consultant also listed 14 specific ways in which he believed the BCA failed in its functions, seven of which relate to the BCA’s actions in issuing the original building consent (refer paragraph 1.3). The remaining seven matters relate to the BCA’s actions in carrying out inspections of the building work that was completed under the original and amended building consents and the recording of the results of those inspections. I have not set out the specific items and details of the inspections that the consultant included in his submission here; these are discussed in the analysis section of this complaint (see paragraph 5).
- 4.3 With his submission, the consultant provided copies of:
- photos of various aspects of the building work
 - the inspector’s undated summary of events (see paragraph 3.6)
 - the consultant’s letter to the BCA dated 15 June 2011 (see paragraph 3.4)
 - the BCA’s submission dated 29 April 2015 in response to the application for a determination

- correspondence relating to the original application for a building consent
 - some of the inspection records.
- 4.4 The application details and consultant's submission were sent to the BCA on 17 December 2015. The BCA responded on 11 January 2016, and the main points of this response can be summarised as follows.
- The BCA has undergone two International Accreditation New Zealand ("IANZ") audits since the first set of inspections were carried out, as well as 'a fairly comprehensive internal audit for the National BCA Competency Assessment System'.
 - Ten inspections were allocated for this job, and 11 were completed. The complainant was not charged for the extra inspection (as is the usual practice) due to the 'difficult nature of the job'.
 - 'The inspections were done as per [BCA] procedure and using the approved prompt sheets at that time'. These prompt sheets have now been updated 'in accordance with IANZ procedures'.
 - The inspections also used 'the building inspection report sheet'.
 - The complainants and contractor have failed in their responsibilities in 'employing an incompetent contractor without doing a background check'. Current licensing regimes mean that 'It is much more difficult now for contractors to design work and build without holding the appropriate licensing'.
 - The BCA 'has provided a reasonable standard of care and there has been no harm or injury to anybody'. The BCA has 'bent over backwards to assist this build'.
 - Both of the BCA's current inspectors have been on 'rigorous training regimes this past year. One inspector holds accreditation for this authority to meet the requirements of regulation 18 and the other inspector is working towards this qualification'.
- 4.5 With its response the BCA enclosed a copy of its standard procedure for processing building consents dated February 2012. While this is not directly relevant to the current complaint, the procedure does list the 'common inspections' that may be required for a building consent. I note that all of these listed inspections that were relevant in the current case were completed.
- 4.6 I issued a draft of this complaint decision to the parties for comment on 4 May 2016. The complainants, through the consultant, made a submission on this draft decision on 23 May 2016. I have taken the complainants' submission into account, where appropriate, in issuing this final complaint decision.
- 4.7 The BCA did not make a submission on the draft complaint decision.

5. Analysis

5.1 Under section 203 of the Act, the Chief Executive has specified powers regarding a complaint. For a complaint to be upheld, after conducting an investigation and considering the submissions made by the BCA I must be satisfied the BCA has failed without good reason to properly perform their functions or has been negligent in performing those functions.

5.2 I have undertaken enquiries on this matter including collecting evidence by:

- providing the BCA with an opportunity to make submissions and provide a formal written response to the complaint
- providing the complainants with the opportunity to comment on any submission made by the BCA
- allowed the complainants and the BCA the opportunity to provide further submissions on a draft of this decision prior to issuing the final decision.

5.3 I have performed a careful and extensive review of the information collected and submissions provided to determine whether there is evidence of a failure and/or negligence on the part of the BCA.

5.4 I have provided formal advice to the complainants about which of the matters raised in the complaint application fall outside the scope of section 200 of the Act, and the alternative avenues open to resolve those matters.

5.5 The BCA's inspections

5.5.1 The complainants and their consultant have raised specific matters that they believe demonstrate that the BCA has failed without good reason to properly perform its functions with respect to the inspections of the building work for their house. Some of these matters relate to particular inspections and some relate to the BCA's inspection procedure in general.

5.5.2 I have provided below my comments or assessments of the matters raised by the complainants and their consultant, based on my consideration of the evidence. I have not commented on any of the later inspections (conducted from July 2013 onwards), or the BCA's processes relating to these, as the adequacy of these inspections is not in dispute. I have not provided comment on those issues that relate to the issuing of the building consent or fees (refer paragraph 1.3)

Foundation inspections (15, 21, 22 December 2010)

- The BCA inspector acted correctly during the inspection to reject polystyrene under footings.

Pre-wrap inspection (17 March 2011) – Interior ply

- Use of plywood bracing on internal walls is an aesthetic issue only. It is not the BCA's job to look after the interests of the owner, beyond ensuring the building work complies.

- The pre-wrap inspection typically checks structural framing, fixings, hold-down straps, etc., including exterior bracing panels before wrap is installed on the exterior face of the wall and roof framing. Interior bracing panels would normally be installed after the wall insulation.

Pre-wrap inspection (17 March 2011) – Bracing panel height

- The manual for the ply bracing states that ‘bracing panels must be fixed from top plate to bottom plate... a part sheet can be stacked above a full sheet, butt joined on a single row of nogs with each sheet/part sheet independently nailed off...’. The photo shows an exterior bracing panel not extending to the top plate. Wrap has been installed, indicating that this installation was incorrectly approved at the pre-wrap inspection.
- The plans show two lines of framing (100x50mm, 150x50mm) in the middle of the house adjacent to the clerestory windows. The bracing plan show bracing panels to the 150x50mm wall framing. The consent does not detail the connection of the 150x50mm framing to the 100x50mm framing. The bracing panel has ply to one side and plasterboard to the other. However, the plasterboard cannot be fixed to the other side of the framing to which the ply is installed.
- The BCA did not appear to address the anomalies with this bracing. However, the issue of the compliance of the consented plans is outside the scope of this complaint.
- The exterior plywood cladding could provide adequate bracing to the external walls, but it is not known if the cladding was nailed as a bracing element: the required bracing units will likely be achieved if this is the case.
- The bracing installation is a fundamental element of the structure and in my opinion the BCA’s inspection process has failed in this regard.

Pre-wrap inspection (17 March 2011) – Rafters

- It is apparent that the inspector noted the rafters at this inspection. The inspector would have required a ladder to read the timber grade stamp³ and it appears it did not occur to the inspector that the wrong grade timber was installed.
- While this is a relatively critical error, and I consider it unlikely the inspector would re-check the rafter timber grade and size at the pre-line inspection, unless already alerted to the issue (which would have been noted on the appropriate inspection sheet).
- The timber rafter grading is a fundamental element of the structure and in my opinion the BCA inspection process has failed in this regard.

³ The consultant claims that the timber grades would have been capable of being read from the floor, without the need for a ladder: based on the photos I have been provided with, I do not accept that this is the case

Pre-wrap inspection (17 March 2011) – Framing

- The pre-wrap inspection was the appropriate time to pick up any framing issues; the wall framing was readily observable and defects should have been picked up by during the pre-wrap inspection. The exterior wrap would have been installed next, preventing any external view of the framing at the post-wrap inspection. I note that the fitting of the insulation would not obscure the framing: the framing would still be visible from the inside up until installation of linings and bracing panels. However, installation of the cladding would make framing changes difficult.
- With respect to the BCA's comments that insulation would be pulled out at the next inspection as a matter of course, I consider it unlikely that the inspector would re-check components concealed by insulation during the pre-line inspection unless an issue warranting such investigation had previously been noted. In this case, I would expect to see a note on the appropriate inspection sheet that a particular item was to be re-inspected later.
- The wall framing is a fundamental element of the structure and in my opinion the BCA inspection process has failed in this regard.

Post-wrap inspection (23 March 2011)

- I note by way of comment that the inspector should have noted any significant issue with the fixing of the exterior cladding on the inspection sheet. It is not known whether the ply cladding was being used as a bracing element. I have not seen any later inspection notes that indicate the builder did not do what was discussed or that more bracing fixing may have been required.

Inspection procedure and inspection records

- I have noted only minor discrepancies in the recording of site inspection notes.
- In my opinion, the inspection sheet notes have been recorded reasonably, such that any other inspector can read them, know what has been inspected and the results of the inspections.
- The record sheet for the foundation inspection of 21 December 2010 should have stated that the polystyrene had to be removed, or it should at least have been noted on the re-inspection sheet for the following day. However, I do not consider this a significant error.
- The inspector's reference to 'ply bracing all correct to plans' and 'All ply in place to plan' (pre-wrap inspection 17 March 2011) could refer to both the interior and exterior ply bracing. However, the 'pre-stopping' inspection specifically refers to the inspection of bracing and bracing fixings. In my opinion, the inspector's reference to 'ply bracing all correct...' at the pre-wrap inspection refers ply bracing to the external face of the framing.

5.5.3 Based on the above assessment, I agree that in certain respects the BCA's inspection process has failed. These failures all occurred during the pre-wrap inspection of 17 March 2011, and related to the inspector's failure to notice important structural aspects of the building work that were non-compliant, namely the bracing, rafters and

wall framing. I have found no evidence of any failures in respect of the other ten inspections completed.

- 5.5.4 The BCA in its response to this complaint has not provided any evidence of the inspection policies and processes that the inspector would have been following when completing his inspections. (The building consent assessment process provided by the BCA in its response is outside the complaint's scope.) Accordingly my comments and assessment of the inspection process are based on what a reasonable building inspector would have done.
- 5.5.5 I have found only minor discrepancies in the inspection notes made at each inspection, and in my opinion these do not amount to a failure in the inspection process. Where the inspection process has been inadequate is in the inspector failing to appreciate that there was an issue with compliance in several crucial regards. In my opinion, these are matters that a reasonable inspector would have raised as potentially non-compliant and either requiring further investigation or remedying before the inspection could have been passed.
- 5.5.6 The function that the BCA has failed to properly perform is in its performance in carrying out inspections under Section 90 of the Act. With regards to Regulation 7(1) of the BCA Regulations, the BCA has not provided any evidence of the policies and procedures underpinning the inspection process.
- 5.5.7 In addition, the BCA Regulations provide guidance on the systems that BCAs should have in place to ensure that their officers who are carrying out their building control functions are competent and adequately trained. This includes systems for ensuring that: work is allocated to competent officers (Regulation 9); an officer's competence is established when they are employed for a particular role (Regulation 10(1)); an officer's competence is regularly assessed (Regulation 10(2)); and officers are trained to carry out building control functions and the application of this training is monitored (Regulation 11). The matters that an officer's competence must be assessed in relation to are set out in Regulation 10(3) and include, among other things, their ability to inspect building work.
- 5.5.8 I note that the particular officer who conducted the inspections that form the basis of this complaint has left the BCA's employment, and that the BCA has furnished no evidence in relation to its assessment of his competence or the training he was provided with. I also note that in its submission that BCA has stated that it considers training for its staff to be important and that both of its current inspectors are undergoing training, with one inspector having already achieved certification. The policies and systems that support this requirement for inspectors to be adequately trained should form part of the BCA's inspection procedures. The BCA has referred to these procedures, but I have not seen them or evidence of the individual training that inspectors now undergo.
- 5.5.9 It is important to appreciate that the focus of a complaint under Section 200 of the Act is not solely on the individual circumstances in which a BCA has exercised a particular function, but also the BCA's policies and procedures that support this function. I note that the BCA states that these processes, and the inspection

documentation that flows from them, have been strengthened as a result of the various external audits it has been through in recent years.

- 5.5.10 In its submission the BCA asserted that there is a limit to which it can be held responsible for the actions of an insufficiently competent tradesperson. By way of comment, I note that the Act now encapsulates the responsibilities of building owners, designers and builders in sections 14B, 14 D and 14E of the Act⁴. However, the responsibilities set out in those sections does not negate or in any way moderate the responsibilities of BCAs – it is a BCA function to inspect building work to ensure it complies with the Building Code and one of the purposes of this function is to catch building work that may have been inadequately executed.
- 5.5.11 I consider the BCA should take into account the findings of this complaint decision and review its inspection policies, procedures and systems to ensure that they are in accordance with the Building (Accreditation of Building Consent Authorities) Regulations 2006. No disciplinary action under section 203 of the Act is to be taken against the BCA. Despite this decision, I will be notifying IANZ of the BCA's performance in this matter so IANZ can assist in ensuring the BCA's consenting and inspection process has improved since this event.

6. Conclusion

- 6.1 I conclude that the in this particular circumstance the BCA failed without good reason to properly perform its functions in respect of some of the inspections conducted of the building work, and in this respect the complaint is upheld.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 September 2016.

Yours sincerely

John Gardiner
Manager Determinations and Assurance

⁴ These sections were not in force at the time the original building consent was lodged