



COVERSHEET

Minister	Hon Dr Megan Woods	Portfolio	Building and Construction
Title of Cabinet paper	Government response to the Commerce Commission market study into residential building supplies	Date to be published	20 June 2023

List of documents that have been proactively released

Date	Title	Author
May 2023	Government response to the Commerce Commission's market study into residential building supplies	Office of Hon Dr Megan Woods, Minister for Building and Construction
3 May 2023	Government response to the Commerce Commission's market study into residential building supplies DEV-23-MIN-0060 Minute	Cabinet Office

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister for Building and Construction

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Development Committee

Government response to the Commerce Commission's market study into residential building supplies

Proposal

1. This paper seeks Cabinet's agreement to the Government's response to the Commerce Commission's market study into residential building supplies and recommendations.

Relation to government priorities

2. This paper relates to Labour's 2020 Election Manifesto commitment to ensure New Zealanders are paying fair prices for building supplies, that innovation is not stifled, and that access and competition are appropriate as the economy recovers from the COVID-19 pandemic.

Executive Summary

3. On 6 December 2022, the Commerce Commission (the Commission) published the final report on its market study into residential building supplies. The Commission's conclusion is that competition is not working as well as it could be. The Commission's recommendations focus on making it easier for building products to be introduced and for competing suppliers to expand their businesses.
4. The issues identified by the Commission are not new and are consistent with what we have heard from stakeholders as part of our own engagements on existing work programmes. However, the issues have been compounded by recent supply chain issues during a period of high demand for building work.
5. The Commission made nine recommendations in its market study. These fall within three broad areas: enhancing the regulatory system, supporting sound decision making and addressing strategic business conduct.
6. We seek Cabinet agreement to the Government accepting the Commission's conclusion and the proposed Government response (as set out in Annex One). The response proposes that the Government agrees or agrees-in-principle to eight recommendations and notes one recommendation that falls within the responsibilities of the Commission.
7. Many of the Commission's recommendations relate to the Ministry of Business, Innovation and Employment's (MBIE's) existing role and building regulatory functions. As appropriate, the Government response notes where next steps can be incorporated into existing work programmes.
8. Two of the Commission's recommendations relate to the availability of, and access to, building product information, which are likely to be addressed through the Building

(Building Product Information Requirements) Regulations 2022 (building product information regulations) that come into force on 11 December 2023. We recommend that these regulations be allowed to bed-in before any further intervention is considered. MBIE will monitor the effectiveness of the new regulations and consider if any further regulatory intervention is necessary.

9. The Commission also acknowledged that there is a significant amount of work underway that will help address the issues they have identified. This includes the building consent system review, the establishment of the Plasterboard Taskforce (now the Critical Materials Taskforce), the broader Building System Reforms, and the Construction Sector Accord Transformation Plan 2022-2025.
10. We will return to Cabinet to seek approval for policy options once further work is completed on how the Commission's recommendations may be implemented, and how the problems identified by the Commission are best addressed. This will include work on the building consent system review and the economy-wide review of land covenants and exclusive leases.

Background

11. On 22 November 2021, the Minister of Commerce and Consumer Affairs required the Commerce Commission, by notice issued under section 51(1) of the Commerce Act 1986, to undertake a study into any factors that may affect competition for the supply or acquisition of key building supplies¹ used to build major components of residential buildings.
12. The market study investigated whether competition is working to benefit consumers through the prices they pay for key building supplies, the quality and range available, and the level of innovation. The terms of reference included, but was not restricted to:
 - 12.1. the industry structure for key building supplies
 - 12.2. the nature of competition for these key building supplies, including any industry pricing practices or acquisition requirements that impact on competition
 - 12.3. impediments to the entry or expansion of new or innovative building supplies, such as "green" building supplies or novel prefabricated products.
13. To inform the Commission's report, engagements were conducted with a range of stakeholders including building supply merchants, manufacturers and importers, building industry representatives, government agencies and a range of industry peak bodies with differing perspectives on the industry.
14. On 6 December 2022, the Commission published its final report on the market study.

The Commission's key findings

15. The Commission found that there are few competing suppliers for many categories of key building supplies and competition at the supplier level appears limited for some key building supplies.

¹ Key building supplies is understood to be the following components: foundation, flooring, roof, walls (structural interior and exterior) and insulation.

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16. The Commission concluded that competition could be improved if it was easier for building products to be introduced and for competing suppliers to expand their businesses. The Commission identified two main factors negatively impacting competition:
 - 16.1. the building regulatory system incentivises designers, builders and building consent authorities to favour familiar building products over new or competing products
 - 16.2. quantity-forcing rebates paid by established suppliers to merchants makes it difficult for new or competing products to access distribution channels and increase sales.
17. The Commission recognised that there is already significant work underway that will help address the issues they have identified. This includes the building consent system review, the establishment of the Plasterboard Taskforce, (now the Critical Materials Taskforce), the broader Building System Reforms and the Construction Sector Accord Transformation Plan 2022-2025.
18. The Commission acknowledged that actions taken by MBIE and the Plasterboard Taskforce to raise awareness about plasterboard alternatives, issue guidance on plasterboard substitutions and look at ways to ease assurance pathways for overseas-certified products are measures that better facilitate competition for alternative products. The Commission considered that these tools can also be utilised with other key building supplies, of which the Critical Materials Taskforce is actively considering.
19. The report also reiterated concerns from other market studies (on retail fuel and the retail grocery sector) about the effect on competition arising from the use of land covenants, exclusive leases, and contractual provisions. Other factors affecting competition include the small New Zealand market and its isolated geographical location. However, the Commission makes limited comment on the extent to which the lack of competition can be attributed to features of the regulatory system rather than external factors.
20. The Commission did not comment on whether New Zealanders are 'paying too much' for key building supplies. However, the Commission's framework for the report assumes that more competition would lead to better outcomes for consumers in terms of price, quality and range of supplies.
21. As a direct result of this market study, the Commission notified Fletcher Building that another investigation was being opened into Winstone Wallboards' use of tiered retroactive rebates. On 6 December (ahead of the Commission publishing its final report), Fletcher Building announced that Winstone Wallboards will discontinue its use of rebates and will move to a tailored, flat pricing model based on volume. This demonstrates the benefit of putting a spotlight on industry and shows the changes already being made in response to the market study.

The Commission's recommendations

22. The Commission has made nine recommendations:
 - 22.1. Introduce competition as an objective to be promoted in the building regulatory system.

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- 22.2. Better serve Māori through the building regulatory system.
- 22.3. Create more clear compliance pathways for a broader range of key building supplies.
- 22.4. Explore ways to remove impediments to product substitution and variations.
- 22.5. Establish a national system to share information about building products and consenting.
- 22.6. Establish an education and mentoring function to facilitate a better co-ordinated and enhanced approach by building consent authorities to consenting and product approval processes.
- 22.7. Develop and implement an all-of-government strategy to co-ordinate and boost offsite manufacturing.
- 22.8. Promote compliance with the Commerce Act, including by discouraging the use of quantity-forcing supplier-to-merchant rebates that may harm competition.
- 22.9. Consider the economy-wide use of land covenants, exclusive leases and contractual provisions with similar effect.

Proposed Government response to the Commission's recommendations

23. We propose that the Government accept the Commission's conclusion that competition is not working as well as it could if it was easier for residential building products to be introduced and for competing suppliers to expand their businesses.
24. The Commission made nine recommendations. We propose the Government agree or agree-in-principle to eight of the recommendations and note recommendation 8. We also propose the Government goes further than what is proposed in recommendations 1, 4 and 7.
25. MBIE has already begun progressing short-term actions to address the Commission's recommendations. This includes developing new guidance targeted at people planning to do building work that requires a consent and developing a standardised template for residential building consent applications. The Construction Sector Accord will also prioritise the delivery of its initiatives aimed at building a stronger Māori economy over the next 12 months
26. Further policy work will determine the detail of how these recommendations may be implemented. We recommend that some of this work progress as part of existing reviews and work, including the building consent system review. Other recommendations will be implemented by the Construction Sector Accord Transformation Plan 2022-2025 and by MBIE monitoring the impact of recent building product information regulations.
27. We will come back to Cabinet for policy approvals to implement some of these recommendations once further work is complete. This will include approval to release public consultation documents on the building consent system review and the economy-wide review of land covenants and exclusive leases.

28. We propose the Government notes recommendation 8 (Promote compliance with the Commerce Act, including discouraging the use of quantity-forcing supplier-to-merchant rebates that may harm competition). The Commission concluded that the competition effect of rebates is situation-specific, and prohibiting or capping rebates can at times make consumers worse off. The Commission are of the view that this is most appropriately addressed under the provisions of the Commerce Act, of which they are responsible for.
29. Annex One provides an overview of the full proposed Government response.

Recommendation 1: Introduce competition as an objective to be promoted within the building regulatory system (Agree-in-principle)

30. The Commission considers that competition needs to be more prominent in the building regulatory system and its decision-making. The Commission recommends introducing competition as another objective of the building regulatory system, to be evaluated alongside safety, health and durability—without compromising those essential objectives.
31. In recommending this, the Commission acknowledges that promoting competition as an express objective, on its own, would not deliver improvements to competition. However, it would ensure that the competition implications for decision-making are considered across a range of regulatory tools already available.
32. The Commission also notes that a competition objective would support the implementation of its recommendations aimed at reducing complexity, increasing compliance pathways, reducing barriers to certification and appraisal of building products, and addressing decision-making behaviours.

Proposed Government response

33. We propose the Government response agree-in-principle that competition should be introduced as another consideration in the building regulatory system. More work is required to understand how in the pursuit of the primary outcomes of safe, healthy and durable buildings competition is supported. Implications for the broader building regulatory system, and the current Building System Reforms, will also need to be examined before final decisions are made.
34. Submissions to the Commission expressed a range of views about the merit and role of competition as an objective in the building regulatory system and the extent to which legislative change is needed. We propose this recommendation be considered alongside other options as part of the building consent system review. Promoting competition as an objective in the building regulatory system complements the review's focus on how the building consent system can be more responsive, better enable innovation and unlock productivity.
35. MBIE is currently developing a suite of options to reform the building consent system for public consultation. The Minister for Building and Construction plans to seek Cabinet agreement to release an options discussion document Confidential advice to Government. These options will collectively address some of the barriers to innovation and competition for building products identified throughout the Commission's final report. MBIE will draw on the Competition Assessment Guidelines when considering the competition implications of different options.

36. We also propose that the Government response take this recommendation further and require MBIE to monitor the prices of key building supplies in New Zealand and its impact on suppliers. MBIE will work with the Critical Materials Taskforce and other key players within the sector in developing the monitoring approach. The monitoring information will be made publicly available on MBIE's website and will be updated regularly. This will enable the Government to track progress in promoting competition within the building regulatory system and consider whether further intervention is required.

Recommendation 2: Better serve Māori through the building regulatory system (Agree)

37. The Commission's engagements with Māori identified that the building consent system and other related regulatory regimes do not adequately respond to the needs and aspirations of Māori.
38. The Commission concluded that Māori needs can be better served by delivering on Treaty of Waitangi obligations and by addressing the challenges faced by Māori within the sector.
39. To achieve this, the Commission recommended:
- 39.1. creating opportunities that enable greater involvement of Māori in the identification of issues, and the design and implementation of any improvements, including greater representation in leadership and decision-making
 - 39.2. ensuring the building consent system provides opportunities for Māori to build productive relationships with building consent authorities and the flexibility to accommodate Māori building objectives
 - 39.3. supporting opportunities to build capability and capacity among Māori, including workforce development, identifying opportunities for Māori leadership across the sector and supporting Māori businesses to expand and compete at scale.

Work underway that will address the issues identified

40. The Commission acknowledged a number of initiatives underway that will help address the issues identified. These are outlined below.
41. The Construction Sector Accord (the Accord) is a partnership between industry and government to transform the sector. Within its current work programme (Transformation Plan 2022-2025), the Accord will deliver the following actions aimed at building a strong Māori economy:
- 41.1. **Kōtuitiā te hono** (Māori Advisory Group): this group forms a core part of the Accord's governance structure and oversees the delivery of the Māori construction priority and related initiatives in the Transformation Plan.
 - 41.2. **Māori end-to-end supply chains**: enabling Māori to have greater ownership in the building supply chain from access to raw materials (particularly timber) through to construction.

- 41.3. **Māori small and medium enterprise capability development:** supporting Māori service providers and lead contractors to improve business capability and enable tendering for larger and more complex work.
 - 41.4. **Māori procurement panels:** Kōtuitiā te Hono (Māori Advisory Group) and the Accord are engaging with large Crown infrastructure agencies to improve access for Māori businesses, including investigating options for Māori procurement panels.
 - 41.5. **Kaiako Construction Mentorship Programme:** connecting Māori in construction to experienced Māori leaders to help them build and grow their leadership and business skills from a Te Ao Māori perspective.
42. The Commission's findings are also consistent with the issues MBIE identified as part of the building consent system review. The building consent system review has investigated issues experienced by Māori and sought to identify opportunities to create a consenting system that is responsive to their needs and aspirations. To inform this, Māori were engaged early in the identification of issues, and then again to shape and refine the problem definition.
43. MBIE also ran a series of hui with Māori organisations and building sector professions between March and April 2022 to identify actions that can be taken internally to support the needs and aspirations of Māori. As a result, the following commitments have been made by MBIE:
- 43.1. Recruitment for a new Principal Advisor – Regulatory Partners, responsible for building relationships with Māori, establishing a Māori Building Advisory Group and ensuring Māori are involved across the building regulatory system.
 - 43.2. Lifting internal staff capability with focus on four areas: Te Reo Māori; Te Tiriti o Waitangi and New Zealand history; tikanga/kawa; and engagement and partnership with Māori.

Proposed Government response

44. We propose the Government response agree with the issues identified and recommendations made by the Commission to better serve Māori within the building regulatory system.
45. Specifically, we propose the Government agree that partnering and maintaining strong relationships with Māori is essential to providing the environment for meaningful participation by Māori in sector conversations and decision making.
46. We propose the Government response confirms a commitment to addressing the challenges experienced by Māori. A number of initiatives are already underway through the Accord's Transformation Plan and the building consent system review. These initiatives have been developed in partnership with Māori.
47. Consequently, we propose the Government response prioritises the delivery of actions identified under the Accord Transformation Plan 2022-2025 that aim to build a stronger Māori economy (refer para 37) over the next 12-24 months.
48. Options are also being developed as part of the building consent system review to encourage and facilitate stronger relationships between Māori and building consent authorities and to lift capability and capacity. These options will form part of the

options discussion document, which is planned for released Cabinet agreement. Confidential advice to Government subject to

Recommendation 3: Creating more clear compliance pathways (Agree)

- 49. The Commission recommended that more compliance pathways for a broader range of building supplies could be created, using approaches such as:
 - 49.1. updating and developing more acceptable solutions and verification methods, including to better reflect international standards for building products
 - 49.2. developing guidance for key building supplies that identifies the appropriate New Zealand Building Code (Building Code) clauses and the possible means of proving compliance
 - 49.3. expanding the range of product certification schemes, enabling international bodies to certify products as compliant with the Building Code, and investigating further barriers to certification and appraisal.

Updating and developing more acceptable solutions and verification methods

- 50. The Commission considers that the existing acceptable solutions and verification methods do not provide clear compliance pathways for new and innovative products, and updates to these documents do not keep pace with the development of new products. These barriers incentivise designers, builders and building consent authorities to favour familiar building products over new or less familiar competing products.
- 51. MBIE makes regular updates to the acceptable solutions and verification methods to improve technical content or to reflect changes to technology and construction methods. These updates are informed by MBIE's strategic work programme, with current priorities including solutions to support higher density housing, Building for Climate Change, and addressing seismic risk in New Zealand.
- 52. The Commission also recommended that:
 - 52.1. new or updated compliance pathways should be better aligned with, and provide reference to, international standards to reduce barriers to imports and increase the availability of new products
 - 52.2. the product performance criteria should be set out in acceptable solutions, verification methods, or in guidance to increase the availability of new products through providing greater comparability of products.
- 53. We agree that greater use of international standards can increase the availability of new building products in the New Zealand market. MBIE looks to incorporate international standards into the acceptable solutions and verification methods where there are reasonable options to include. This is required by section 29 of the Building Act 2004 (Building Act).
- 54. Of the 343 standards listed for primary reference in the Building Code, 25 per cent are New Zealand standards, 25 per cent are joint Australia/New Zealand (AS/NZ) standards, and the remaining 50 per cent are international standards.

Expanding the range of product certification schemes

55. In response to plasterboard shortages experienced in 2022, MBIE investigated how section 262² of the Building Act might be used to enable international product certification schemes to demonstrate compliance with the Building Code. However, MBIE found that the certification of typical standard plasterboard products is not common overseas, and viable alternative plasterboard products that comply with the Building Code were identified. MBIE continues to consider the potential use of section 262 as part of the Critical Materials and Products Work Programme.
56. In the interim, supporting innovation in product compliance with the Building Code is best pursued through the CodeMark product certification scheme or through alternative solutions. Both of these pathways look at how a new product contributes to compliance with the Building Code's performance outcomes.
57. CodeMark is a voluntary product certification scheme that shows how a building product meets the requirements of the Building Code. The regulations for CodeMark were recently revised to improve the robustness of the scheme.
58. Building consent authorities must accept a CodeMark certificate as evidence of compliance with the Building Code, provided the certificate is current and valid, and the product or method is used in accordance with the scope and limitations as defined on the certificate.
59. New building product information regulations will require building products to include information about how they contribute to Building Code compliance from December 2023. This will better support designers, builders and building consent authorities to assess whether new or alternative products are suitable for use. The background and expected impact of these regulations is discussed later in this paper (refer to Recommendation 5).

Proposed Government response

60. We propose the Government response agree that maintaining the health and relevancy of the Building Code is important for the overall performance of the sector. MBIE makes regular updates to the acceptable solutions and verification methods to improve technical content or to reflect changes to technology and construction methods.
61. We also propose that the Government focus on the successful implementation of the building product information regulations and operation of the CodeMark scheme, and to continue to monitor their effectiveness.
62. In the meantime, MBIE will deliver online learning modules to provide education to support user understanding of selected acceptable solutions and verification methods. To date, modules have been introduced for the general provisions of the Building Code along with specific topics such as protections from fire and insulation requirements for energy efficiency.
63. MBIE will consider options to prioritise the use of generic conformance criteria in the Building Code acceptable solutions and verification methods, review and incorporate

² Section 262 of the *Building Act 2004* provides that the chief executive of MBIE may, by notice, specify that building methods or products certified overseas be treated as being certified in New Zealand if they meet the standards required of New Zealand-certified products.

international standards, publish guidance information to encourage the use of alternative solutions, and to evaluate and certify products from overseas bodies.

Recommendation 4: Barriers to product substitution and variation (Agree)

64. The Commission considers that making product substitution easier would promote competition by allowing more changes to products after a building consent or MultiProof certificate has been granted. The Commission reflects that the requirement to obtain approval from a building consent authority for an alternative product or design is a key impediment to product substitution.
65. The Commission recommends:
 - 65.1. expressly allowing product substitution options to be included in building consent applications and/or giving stronger direction about what constitutes a minor variation.
 - 65.2. amending the MultiProof³ legislative framework and scheme rules to provide for designers to self-certify that minor changes are Building Code compliant. Alternatively, the legislative framework could provide a detailed list of design aspects that could be changed without affecting the MultiProof certificate's validity.

Proposed Government response

66. We propose the Government response agree that brand specification can create barriers to competition. Recent plasterboard shortages in New Zealand have highlighted the impact brand specification can have on competition and the ability to substitute products after a building consent has been approved.
67. MBIE will develop options to remove impediments to making minor changes after a building consent and/or a MultiProof certification has been issued as part of the options discussion document on the building consent system review. This will include consideration of the following:
 - 67.1. amending the Building (Forms) Regulations 2004 to allow product substitution options to be included in a building consent application
 - 67.2. developing regulations to define minor customisations to increase the flexibility of the MultiProof scheme and to codify aspects of MBIE's product substitution guidance.
68. In addition to the Commission's recommended actions, the options discussion document on the building consent review will also include options to provide guidance to support builders, architects and building consent authorities make good decisions about product substitution and variation. The Minister for Building and Construction intends to seek Cabinet approval to release this options discussion document **Confidential advice to Government**

³ MultiProof allows builders who replicate the same or substantially similar buildings several times to benefit from a streamlined building consent process. A MultiProof design does not need to be assessed by building consent authorities each time it is proposed to be built on a different site. Building consent authorities instead focus on site-specific aspects, which enables faster processing times and reduces duplication and costs for volume builders.

69. The Critical Materials Taskforce will continue to monitor supply-constrained materials and products as well as market concentration to identify emerging risks.

Recommendation 5: Improving accessibility to building product information (Agree)

70. The Commission recommended a national system be established to encourage information sharing about new or innovative building products or methods. This is intended to better facilitate competition by enabling those specifying, purchasing and installing products to use a wider range of brands or products.
71. Manufacturers and importers will soon be required to make a consistent minimum level of information publicly available for building products that contribute to compliance with the Building Code (with some exceptions).
72. The Building (Building Product Information Requirements) Regulations 2022⁴ (building product information regulations) come into force on 11 December 2023 and will set out what information is required to be provided about building products, as well as when and how. The information must include a statement specifying the clauses of the Building Code that are relevant to the product and how the product is expected to contribute to compliance.
73. The building product information regulations seek to address many of the issues identified by the Commission, with the following benefits anticipated:
- 73.1. The regulations will 'level the playing field' as all product suppliers will provide the same base level of information.
 - 73.2. Specifiers will be better equipped to make decisions about new or alternative products, and it will be easier to compare this information between products.
 - 73.3. Building consent authorities will have access to more information to support their assessments, including allowing them to compare the specifications between familiar products and other products.
 - 73.4. It will be easier to see whether an alternative product is suitable, which will better support builders, specifiers and building consent authorities to make substitutions or vary consents.
74. MBIE considered the implementation of a national building product register as part of the building product information regulations. However, it was determined that the cost to introduce and maintain such a register would be significant and outweigh any additional benefits, which were likely to be incremental.
75. MBIE will monitor the implementation and effectiveness of the regulations as the sector becomes familiar with the increased amount of information available about building products.

⁴ The *Building (Building Products and Methods, Modular Components and Other Matters) Amendment Act 2021* introduced regulatory powers into the Building Act to prescribe information requirements for building products, including what information must be disclosed, who must disclose the information and when the information must be disclosed. Regulations were made on 7 June 2022.

Proposed Government response

76. We propose the Government response agree-in-principle to this recommendation but consider that the building product information regulations will achieve the outcomes intended by the Commission's recommendation.
77. We propose the Government note that any further action for building product information is considered after the regulations have had time to bed-in and more is known about their effectiveness.
78. In March 2023, MBIE published guidance and examples to show how manufacturers and importers and suppliers can meet the requirements of the new building product information regulations.
79. The following initiatives are currently underway to support the implementation of the building product information regulations:
 - 79.1. updating MBIE's enforcement strategy to ensure compliance with the regulations is monitored and action is taken where necessary and
 - 79.2. undertaking a review of MBIE's national competency assessment system for building officials and the compliance schedule handbook, which will support the sector's understanding of the new building product information regulations.
80. The Commission recommended other types of information be shared as part of a national system:
 - 80.1. Alternative solutions: these are, by nature, relatively unique. While they may be replicated, their acceptance in relation to one application does not necessarily make them transferable to other building work.
 - 80.2. Links to acceptable solutions, verification methods and product certificate registers: this information is already available on MBIE's building.govt.nz website.
 - 80.3. Product failures: the Building Act provides regulatory tools to identify product failures and issue a warning about or ban the use of building products or methods. Information on any affected products is published on MBIE's website.

Recommendation 6: Education and mentoring function for building consent authorities (Agree)

81. The Commission identified fragmentation of the building regulatory system, with 67 building consent authorities delivering consenting services, as a factor that discourages new products being specified in planned building work.
82. To address this, the Commission recommended establishing an education and mentoring function to facilitate a better co-ordinated and enhanced approach by building consent authorities to consenting and product approval processes.

83. The Commission identified the following initiatives that could be pursued:
- 83.1. a risk framework for building consent authorities to assess risk of non-compliance
 - 83.2. providing guidance on applying the 'reasonable grounds' test
 - 83.3. sharing examples of effective working relationships between Māori and building consent authorities and practices consistent with the Treaty of Waitangi
 - 83.4. an online resource to share information and case studies about best practice in building consents
 - 83.5. promoting the uptake of systems that facilitate online building inspections.
84. The building consent system review has identified many of the same issues as the Commission. MBIE is currently developing options to address the issues identified through the review and its own consultation, which also provides an opportunity to incorporate some of the suggestions and recommendations from the Commission's final report.

Proposed Government response:

85. We propose the Government response agrees with the issues identified and the recommendation made by the Commission.
86. The Building Act currently enables MBIE to deliver the initiatives suggested by the Commission without the need to establish a specific function to implement this recommendation. However, the building consent system review provides a timely opportunity to address the underlying issues the Commission identified. MBIE will consider options to respond to this recommendation and the Minister for Building and Construction will seek Cabinet approval Confidential advice to Government to consult on these options.
87. Some of the recent initiatives and guidance MBIE has delivered includes:
- 87.1. improving acceptable solutions and verification methods for higher density housing to support more efficient consenting of these building (ongoing since 2019; refer also to recommendation 3);
 - 87.2. publishing general guidance on product substitution for designers and builders (November 2021) and product-specific guidance to building consent authorities in relation to plasterboard substitutions (released June 2022, last updated August 2022);
 - 87.3. developing new guidance targeted at people planning to do building work that requires a consent to support their understanding of the current building consent system and process (December 2022);
 - 87.4. preparing guidance to support understanding of the BuiltReady scheme for building consent authorities, designers, builders, consumers, and scheme participants (December 2022); and
 - 87.5. developing a standardised template for residential building consent applications.

88. MBIE is also progressing initiatives on remote inspections, including investigating whether creating a building related standard will help reduce barriers to compliance with the Building Code, providing case studies on exemplar work from building consent authorities and undertaking an evaluation on remote inspections for plumbing.
89. MBIE will also deliver an educational campaign on its certification schemes (CodeMark, MultiProof and BuiltReady). This will include targeted guidance and webinars for the industry, building consent authorities and central government about how these schemes can streamline consenting processes, as well as a roadshow and promotional activities aimed at building consent authorities.

Recommendation 7: Develop an ‘all-of-government’ offsite manufacturing strategy (Agree)

90. The Commission considers that, at scale, offsite manufacturing has the potential to lower construction costs compared to traditional construction methods. However, participants engaged in the market study identified that the benefits have yet to be realised due to the industry being in early stages of development.
91. Achieving scale while managing investment risk is the main challenge identified by the offsite manufacturing industry. A lack of demand certainty and absence of larger-scale, longer-term contracts to provide a pipeline of work means the investment risk remains.
92. To address these challenges, the Commission recommends that an all-of-government strategy for offsite manufacturing is developed to provide greater focus, coordination and scale of production. The Commission also identifies that the government and industry partnership through the Accord provides a unique opportunity to drive this work.
93. The Commission acknowledges that the BuiltReady scheme⁵ is a significant advancement to enable faster, more consistent building consent approaches for offsite manufacturing. To support the uptake of BuiltReady, MBIE will partner with Offsite NZ to better understand what guidance and initiatives are needed to incentivise uptake of the scheme.
94. Government has also taken a role in supporting increased uptake of offsite manufacturing. For example, between 2019 and 2021 Kāinga Ora doubled the number of homes delivered using offsite manufacturing solutions. In 2021 Kāinga Ora released their offsite manufacturing plan *Transforming construction through innovation*. This plan outlines a range of commitments, including a goal to increase offsite manufacturing use by 20 per cent year-on-year.
95. Kāinga Ora has also taken a lead role in establishing a cross-government offsite manufacturing forum, which includes participants from agencies that procure building work (e.g. Ministry of Defence, Ministry of Health, Ministry of Education and the Department of Corrections) and agencies that can enable (e.g. Ministry of Business, Innovation and Employment, Ministry of Housing and Urban Development, Ministry of Social Development and Callaghan Innovation).

⁵The BuiltReady scheme enables modular component manufacturers to show that their design and/or modular component complies with the Building Code. BuiltReady aims to enable faster, more consistent building consent approaches, with the aim of improving productivity, reducing costs and contributing to better environment outcomes.

Proposed Government response

96. We propose the Government response agrees that offsite manufacturing has the potential to improve productivity, innovation and competition in the New Zealand construction sector.
97. We also propose the Government response agree that greater coordination across government is required for the full benefits of offsite manufacturing to be realised and to bring greater demand certainty to the sector.
98. In response to this recommendation, we consider there is opportunity to go further than recommended by the Commerce Commission. We propose that current ad hoc arrangements be formalised and accelerated in order for government to take practical steps to create a pipeline of demand to increase scale of offsite manufacturing in New Zealand.
99. The Accord will task the existing cross-government offsite manufacturing forum to develop an action plan to increase the uptake of offsite manufacturing in government projects. The action plan will:
 - 99.1. increase the capability within government agencies to develop offsite manufacturing strategies (similar to Kāinga Ora's *Transforming construction through innovation*) and fit-for-purpose procurement/contracting methods
 - 99.2. increase government programmes and services that help offsite manufacturing businesses grow and innovate (such as the Ministry of Social Development's Skills for Industry programme's partnership with offsite manufacturers to deliver pre- and at-work training, and work to develop micro-credentials)
 - 99.3. support agencies to monitor and report on their government projects that use offsite manufacturing to track progress and benefits, and
 - 99.4. deliver outcomes for Māori through collaborating with existing groups, such as the Māori Offsite Manufacturing Collective - Te Kāhui Whakatū Whare and enable regional opportunities.
100. Kāinga Ora have already set a goal to increase the number of offsite manufacturing solutions they use by a minimum of 20 per cent year on year for the duration of the public housing plan. In order to drive further uptake of offsite manufacturing at scale, we propose that the Government look to encourage other government agencies to consider setting a goal to increase the number of offsite manufacturing solutions by a minimum of 10 per cent year on year.
101. We propose government efforts are enhanced by partnering with the building and construction sector. The Accord is currently bringing together representatives from industry to develop an action plan to support the adoption of offsite manufacturing within the sector. The action plan will:
 - 101.1. seek to establish agreed elements of the build process that can be standardised, so offsite manufacturing solutions can more easily be used in a wider range of projects
 - 101.2. develop an open-access guide, similar to *The Product Platform Rulebook* recently released by the Construction Innovation Hub in the United Kingdom,

that sets guidelines for how building projects can best exploit offsite manufacturing.

102. We consider that this programme of work being led through the Accord will achieve the same, if not better, outcomes as intended through the development of an all-of-government strategy.

Recommendation 9: Review economy-wide use of covenants (Agree)

103. The Commission identified that land covenants, exclusive leases and other contractual provisions with similar effect appeared to be limiting competition between merchants, primarily by restricting new entry and expansion of businesses. This is the third market study that has identified these issues.
104. The Commission recommended an economy-wide review into the use of land covenants and exclusive leases (including other contractual provisions with similar effect) to assess whether a wider multi-sector solution is needed to address their impacts on competition.
105. The Commission identified two main categories of land covenants potentially affecting competition for key building supplies:
- 105.1. Store covenants: Covenants on land containing clauses or terms which prevent or restrict the site from being used for operating a business that sells key building supplies.
- 105.2. Land development covenants: Covenants on land zoned for residential buildings, which contain clauses or terms which give a building supplies merchant preferential rights to supply key building supplies for any housing to be constructed on the land.

Store covenants will tend to reduce the availability of sites for merchant stores

106. Store covenants are likely to reduce a new or existing merchant's ability to access suitable sites. In turn, this may hinder entry and expansion. The effect is likely to be greatest in developed urban areas where the cost of land is high or there is less availability of suitable sites. The Commission identified around 60 store covenants benefitting the major merchants.
107. Merchants can also enter into commercial leases with landlords containing exclusivity clauses or terms which prevent or restrict the operation of businesses selling key building supplies nearby (exclusive leases).
108. Merchants reported that the primary purpose of store covenants is to stop a competitor from establishing itself near a merchant's planned or existing store. They consider this is justified, as it provides them with the necessary confidence that they will make a return on the investment associated with developing a new store. The Commission considered that these claimed benefits are unlikely to negate the competitive harm caused by the reduced availability of sites. It also noted that this justification appears inconsistent with the long duration of many covenants: a store covenant appears unnecessary to achieve this purpose once the merchant stops operating on the land or after it has had a reasonable period to recoup its investment.

Land development covenants will tend to limit other merchants' ability to attract customers

109. The Commission noted that land development covenants may be used where a merchant has a related land development business. In this situation, the land development business could lodge a covenant benefitting its related merchant business.
110. These types of covenants have the potential to affect competition by:
 - 110.1. removing the incentive on the benefitting merchant to initially quote a competitive price
 - 110.2. removing uncertainty regarding the price needed to win a tender, given the benefitting merchant is provided visibility of quotes from other merchants.

Proposed Government response to this recommendation

111. We propose the Government response support the Commission's intention to undertake a compliance programme to promote broader compliance with the *Commerce Act* in relation to land covenants and exclusive leases and its ongoing enforcement work in this area.
112. We also propose the Government response agree that it is timely to carry out an economy-wide review of the use of land covenants and exclusive leases following competition concerns identified across all three market studies the Commission has undertaken.
113. The Minister of Commerce and Consumer Affairs plans to seek Cabinet approval to release a discussion document Confidential advice to Government which will:
 - 113.1. request information on the use of land covenants and exclusive leases across the economy and their effect on competition
 - 113.2. test options available to address any adverse effect on competition created.
114. Work is underway elsewhere in government which is likely to be relevant to this review. The Ministry of Housing and Urban Development (HUD) is carrying out a review of 'development-limiting covenants' (which may include, for example, covenants which restrict the size and shape of housing, and in turn may restrict urban development and densification). Changes to New Zealand's planning laws are being taken forward under the broader Resource Management reforms.
115. Officials at MBIE will work to ensure that the proposed economy-wide review of land covenants and exclusive leases is scoped to align with other government work. The proposed discussion document will also be developed in consultation with HUD, the Ministry of Justice, the Treasury, the Ministry for the Environment and Land Information New Zealand.

Financial Implications

116. The proposed response to recommendations 3 and 6 will require MBIE to scale up its existing roles and functions. In particular, MBIE will need to increase funding and resources for the teams that are responsible for maintaining the Building Code and compliance pathways and its team that delivers information and education to the sector.

117. An increase in appropriation will be required to meet increased resource requirements. However, these functions are currently funded by the Building Levy. The Building Levy is currently operating at a surplus, with considerable reserves available in the memorandum account. An increase in appropriation to meet increased resource requirements will, therefore, have no financial implication for the Crown. The Commission's recommendations offer an opportunity to invest those reserves to improve the building regulatory system.
118. MBIE is required to review the rate of the Building Levy every three years.
119. Active consideration [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Legislative Implications

120. There are no immediate legislative implications from this paper. Further decisions on regulatory proposals will be sought from Cabinet [REDACTED] Confidential advice to Government

Impact Analysis

Regulatory Impact Statement

121. There are no regulatory proposals in this paper, therefore Cabinet's impact analysis requirements do not apply.

Climate Implications of Policy Assessment

122. There are no policy proposals in this paper, therefore the Climate Implications of Policy Assessment (CIPA) requirements do not apply.

Population Implications

123. Specific consideration has been given to the needs and aspirations of Māori within the context of the building regulatory system. This is addressed in the proposed Government response to recommendation 2: better serving Māori within the regulatory system (refer paras 39-47).

Human Rights

124. The proposals in this paper have no implications under the *New Zealand Bill of Rights Act 1990* or the *Human Rights Act 1993*. There are no gender or disability implications arising from this paper.

Consultation

125. MBIE consulted with the following government agencies on the draft Cabinet paper: Department of the Prime Minister and Cabinet; the Treasury; Ministry of Justice; Ministry of Housing and Urban Development; Kāinga Ora; Ministry for the Environment; Ministry of Social Development; Ministry of Education; Manatū Hauora Ministry of Health; New Zealand Defence Force; Ministry of Transport; Te Puni Kōkiri; Department of Internal Affairs; Department of Corrections; Ministry for Pacific Peoples; and Ministry for Primary Industries.

Communications

126. We intend to announce the Government response to the Commission's market study into residential building supplies following Cabinet approval.

Proactive Release

127. We propose to proactively release this Cabinet paper and associated Cabinet Minute.

Recommendations

The Minister for Building and Construction and Minister of Commerce and Consumer Affairs recommend that the Committee:

- 1 **Note** the Commerce Commission in its market study into residential building supplies has found that competition for the supply and acquisition of key building supplies is not working as well as it could be;
- 2 **Note** the Commerce Commission made nine recommendations:
 - 2.1 Introduce competition as an objective to be promoted in the building regulatory system;
 - 2.2 Better serve Māori through the building regulatory system;
 - 2.3 Create more clear compliance pathways for a broader range of key building supplies;
 - 2.4 Explore ways to remove impediments to product substitution and variations;
 - 2.5 Establish a national system to share information about building products and consenting;
 - 2.6 Establish an education and mentoring function to facilitate a better co-ordinated and enhanced approach by building consent authorities to consenting and product approval processes;
 - 2.7 Develop and implement an all-of-government strategy to co-ordinate and boost offsite manufacturing;
 - 2.8 Promote compliance with the *Commerce Act*, including by discouraging the use of quantity-forcing supplier-to-merchant rebates that may harm competition; and
 - 2.9 Consider the economy-wide use of land covenants, exclusive leases and contractual provisions with similar effect;
- 3 **Agree** to the proposed Government response outlined in Annex One;
- 4 **Note** further work is required to consider how the Commission's recommendations will be implemented and the identified issues addressed;
- 5 Active consideration
[Redacted]
[Redacted]
[Redacted]
- 6 **Note** the Minister for Building and Construction intends to return to Cabinet Confidential advice to Government
Confidential advice to Government to seek approval to release a discussion document providing options on the building consent system review;
- 7 **Note** the Minister of Commerce and Consumer Affairs intends to seek Cabinet approval Confidential advice to Government
Confidential advice to Government to release a discussion document on an economy-wide review of the use of land covenants and exclusive leases; and

IN CONFIDENCE

- 8 **Note** a joint press release on the Government response to the Commerce Commission's market study into residential building supplies will be released following Cabinet approval.

Authorised for lodgement

Hon Dr Megan Woods

Minister for Building and Construction

Hon Dr Duncan Webb

Minister of Commerce and Consumer Affairs

IN CONFIDENCE

Annex One: Government response to the Commerce Commission’s market study into residential building supplies

Enhance the regulatory system

The Commission’s recommendation	Government Response	Implementation approach
<p>1. Introduce competition as an objective to be promoted in the building regulatory system</p>	<p>AGREE IN PRINCIPLE The Government agrees in principle that competition should be introduced as another consideration in the building regulatory system. We also agree that competition is important for well-functioning markets which lead to and support safe, healthy and durable homes.</p> <p>Promoting competition will have implications for the broader regulatory system. How this is introduced will need to be carefully worked through and understood.</p> <p>This recommendation will be considered alongside other options as part of the building consent system review. Promoting competition as an objective in the building regulatory system complements the review’s focus on how the building consent system can be more responsive, better enable innovation and unlock productivity.</p> <p>BUT GO FURTHER The Government will require MBIE to monitor the prices of key building supplies in New Zealand and its impact on suppliers. MBIE will work with the Critical Materials Taskforce and other key players within the sector in developing the monitoring approach. This will enable the Government to track progress in promoting competition within the building regulatory system and consider whether further intervention is required.</p>	<p>Longer-term work: Options to promote competition as an objective in the building regulatory system will be developed as part of the building consent system review. Cabinet approval will be sought to release a discussion document on options for public consultation.</p> <p>MBIE will draw on the Competition Assessment Guidelines when considering options.</p>
<p>2. Better serve Māori through the building regulatory system</p>	<p>AGREE The Government agrees with the issues identified and recommendations. We also agree that Māori needs can be</p>	<p>Short-term: Initiatives identified under the Accord Transformation Plan will be</p>

The Commission's recommendation	Government Response	Implementation approach
<p>3. Create more clear compliance pathways for a broader range of key building supplies</p>	<p>better served by delivering on Treaty of Waitangi obligations and addressing challenges faced by Māori within the sector.</p> <p>The Construction Sector Accord Transformation Plan 2022-2025 will deliver a number of initiatives aimed at building a stronger Māori economy. These initiatives have been informed by engagements with Māori: Kōtuitiā te hono (Māori Advisory Group), Māori end-to-end supply chains, Māori SME capability development, Māori procurement panels and the Kaiako Construction Mentorship Programme.</p> <p>MBIE has also committed to the following actions internally in order to support the needs and aspirations of Māori within the building regulatory system:</p> <ul style="list-style-type: none"> • Recruitment for a new Principal Advisor – Regulatory Partners, that will be responsible for building relationships with Māori, establishing a Māori Building Advisory Group and ensuring Māori are involved across the building regulatory system. • Lifting internal staff capability with focus on four areas: Te Reo Māori, Te Tiriti o Waitangi and New Zealand history, tikanga/kawa, and engagement and partnership with Māori. <p>AGREE</p> <p>The Government agrees that maintaining the health and relevancy of the Building Code is important for the overall performance of the building and construction sector.</p> <p>The Government will focus on the successful implementation of the building product information regulations and the CodeMark scheme and will monitor their effectiveness.</p>	<p>delivered in the next 12-24 months.</p> <p>MBIE has already begun implementing its work programme aimed at lifting the Māori capability of staff in order to support the needs and aspirations of Māori within the building regulatory system.</p> <p>Longer-term work: options to create a building consent system that is responsive to Māori needs and aspirations will be developed as part of the building consent system review. Cabinet approval will be sought <small>Confidential advice to Government</small> to release a discussion document on options for public consultation.</p>
		<p>Note the implementation approach to recommendation 5 for the building product information regulations.</p>

The Commission's recommendation	Government Response	Implementation approach
	<p>In the meantime, MBIE will consider options to prioritise the use of generic conformance criteria in the Building Code acceptable solutions and verification methods, review and incorporate international standards, publish guidance information to encourage the use of alternative solutions, and evaluate and certify products from overseas bodies.</p>	

Supporting sound decision-making

The Commission's recommendation	Government Response	Implementation approach
<p>4. Explore ways to remove impediments to product substitution and variations</p>	<p>AGREE The Government agrees that brand specification can create barriers to competition. This was evident with the plasterboard shortages in New Zealand.</p> <p>MBIE will consider options to remove impediments to making minor changes after a building consent and/or a MultiProof certification has been issued. This will include consideration of the following:</p> <ul style="list-style-type: none"> amending the Building (Forms) Regulations 2004 to allow product substitution options to be included in a building consent application developing regulations to define minor customisations to increase the flexibility of the MultiProof scheme and codify aspects of MBIE's product substitution guidance. <p>BUT GO FURTHER The options discussion document on the building consent review will include options to provide guidance to support builders, architects and building consent authorities make good decisions about product substitution and variation.</p>	<p>Options to remove impediments to product substitution and variations will be developed as part of the options discussion document on the building consent review. Cabinet approval will be sought ^{Confidential advice to Government} to release this options discussion document for public consultation.</p> <p>In the meantime, the Critical Materials Taskforce will continue to monitor supply chain issues and product shortages and consider actions to address these.</p> <p>MBIE's educational campaign on its certification schemes will also help build understanding of the MultiProof scheme.</p>

The Commission's recommendation	Government Response	Implementation approach
<p>5. Establish a national system to share information about building products and consenting</p>	<p>AGREE The Government agrees with the issues identified relating to the consistency and availability of product information, including how products contribute to meeting New Zealand Building Code requirements.</p> <p>New building product information regulations come into force on 11 December 2023, requiring designated building products to have a consistent minimum set of information available with the product at the point of purchase and accessible online.</p> <p>In March 2023, MBIE published guidance and examples to show how manufacturers and importers and suppliers can meet the requirements of the new building product information regulations.</p> <p>The Government considers these regulations will achieve the aims of the Commission's recommendation.</p>	<p>MBIE will monitor the implementation and effectiveness of the regulations as the sector becomes familiar with the increased amount of information available about building products.</p> <p>The Government will consider whether any further action is required for building product information once more is known about the effectiveness of the new regulations.</p>
<p>6. Establish an education and mentoring function to facilitate a better co-ordinated and enhanced approach by building consent authorities to consenting and product approval processes</p>	<p>AGREE The <i>Building Act 2004</i> includes sufficient provisions to enable MBIE to deliver the intended outcomes without the need to establish a specific function to implement this recommendation.</p> <p>The building consent system review provides a timely opportunity to address issues identified by the Commission.</p> <p>MBIE is concurrently progressing work on a package of short-term opportunities to address aspects of this recommendation (refer paras 87-88).</p>	<p>Longer-term work: options to increase co-ordination among building consent authorities will be developed as part of the building consent system review. Cabinet approval will be sought ^{Confidential advice to Government} to release a discussion document on options for public consultation.</p>
<p>7. Develop and implement an all-of-government strategy to coordinate and boost offsite manufacturing</p>	<p>AGREE The Government agrees that offsite manufacturing has the potential to improve productivity, innovation and competition in the New Zealand construction sector.</p>	<p>The Accord intends to have action plans agreed to by May 2023, and implementation of</p>

The Commission's recommendation	Government Response	Implementation approach
	<p>We also agree that greater co-ordination across government is required for the full benefits of offsite manufacturing to be realised and to bring greater demand certainty to the sector.</p> <p>BUT GO FURTHER</p> <p>We propose practical actions that government can take to create a pipeline of demand to increase scale of offsite manufacturing in New Zealand.</p> <p>The Accord will task the existing cross-government offsite manufacturing forum to develop an action plan to increase the uptake of offsite manufacturing in government projects. The Accord is currently bringing together representatives from industry to develop an action plan to support the adoption of offsite manufacturing within the sector.</p> <p>Kāinga Ora have already set a goal to increase the number of offsite manufacturing solutions they use by a minimum of 20 per cent year on year for the duration of the public housing plan. In order to drive further uptake of offsite manufacturing at scale, the Government will look to encourage other government agencies to consider setting goals to increase the number of offsite manufacturing solutions by a minimum of 10% year on year.</p>	<p>those plans started by June 2023.</p>

Address strategic business conduct

The Commission's recommendation	Government Response	Implementation approach
<p>8. Promote compliance with the <i>Commerce Act</i>, including by discouraging the use of quantity-forcing supplier-to-merchant rebates that may harm competition</p>	<p>NOTED</p> <p>This fits with the Commerce Commission's current work programme. The <i>Commerce Act</i> was recently reformed to strengthen the Commission's ability to take effective enforcement action for misuse of market power.</p>	<p>N/A</p>

The Commission's recommendation	Government Response	Implementation approach
<p>9. Consider the economy-wide use of land covenants, exclusive leases and contractual provisions with similar effect</p>	<p>The Government supports the Commission's advocacy work to promote compliance with the <i>Commerce Act</i>. No specific further actions Government are required. The Commission must act independently in the performance of its enforcement functions.</p> <p>AGREE</p> <p>It is timely to carry out an economy-wide review of the use of land covenants and exclusive leases following competition concerns identified across all three studies the Commission has undertaken.</p> <p>Work is underway elsewhere in government which is likely to be relevant to this review. The Ministry of Housing and Urban Development (HUD) is carrying out a review of 'development-limiting covenants' (which may include, for example, covenants which restrict the size and shape of housing, and in turn may restrict urban development and densification). Changes to New Zealand's planning laws are being taken forward under the broader Resource Management reforms.</p> <p>Officials at MBIE will work to ensure that the proposed economy wide review of land covenants and exclusive leases is scoped to align with other government work, in consultation with HUD, the Ministry of Justice, the Treasury, the Ministry for the Environment, and Land Information New Zealand.</p>	<p>MBIE is currently preparing a discussion document for public consultation for the Minister of Commerce and Consumer Affairs that will:</p> <ul style="list-style-type: none"> request information on the use of land covenants and exclusive leases across the economy and their effect on competition. test options available to address any anti-competitive effects created. <p>The Minister of Commerce and Consumer Affairs will address any anti-competitive effects created.</p> <p>Confidential advice to Government</p>