Regarding Section 7 that references Building Act Sections 9A and 9B:

> *9A (1) In this Act, building product means a product that… is declared by the Governor-General by Order in Council to be a building product.*
>
> *(2) However, a building product …is not a building product if it is declared by the Governor-General by Order in Council not to be a building product.*
>
> *9B (1) In this Act, building method means a method— … for carrying out building work that is declared by the Governor-General by Order in Council to be a building method.*
>
> *(2) However, a method that would otherwise be a building method under subsection (1)(a) is not a building method if it is declared by the Governor-General by Order in Council not to be a building method.*

New Zealand is a representative democracy where laws are clear – comprehensible to its citizens. For example:

- In the Building Act 2004, ***building*** *means a temporary or permanent movable or immovable structure.*
- In the Resource Management Act 1991, ***structure*** *means any building, equipment, device, or other facility made by people and which is fixed to land;*
- In the Land Transfer Act 2017, ***land*** *includes (a) estates and interests in land: (b) buildings and other permanent structures on land:* [emphasis added]

These are very clear meanings where in grey areas a person can ask a judge to make a ruling and the judge can do so because the law is clear, based on 954 years of common law and property law: the law of the land

In Legislative Guidelines 2018 Chapter Four **Fundamental constitutional principles and values of New Zealand law**, the Legislative Design & Advisory Committee (LDAC) writes:

> *Constitutions are concerned with public power. They confer (and also limit and regulate) the power of a State over its people. Fundamental constitutional principles and values in New Zealand law and practice run so deep that the courts will often draw on them when interpreting legislation or otherwise deciding cases. If new legislation is inconsistent with or challenges one of these fundamental principles, it will become the subject of concern and increased scrutiny by Parliament, the public, and often the courts.*

In the past two years a disturbing trend has occurred within NZ governance. It began with MBIE Determination 2019/017 in which MBIE gave a bizarre interpretation of the meaning of *building* in the Section 8 of the Building Act 2004. In effect, MBIE said that real estate (real property) could be permanently fixed to chattel (personal property). Further, in that determination, respondent Hurunui District Council made no response, thus the MBIE Manager Determinations both wrote the case for the council and then found for the council while stating her determination was a quasi-judicial function. She was both prosecutor and judge in what should be considered a severe conflict of interest, except that apparently this is legal in NZ. In February 2020, Judge Callaghan firmly rejected MBIE's interpretation because the law was clear on the matter. All buildings are real property, thus mobile property not fixed to land cannot be real property, hence not a building.

However, this did not stop the Government. In a 72 page document entitled National Planning Standards (NPS), MFE came up with a new definition of *building*. On page 55 it says

> *building means a temporary or permanent movable or immovable **physical construction** that is: (a) partially or fully roofed; and(b) fixed **or located on or** in land; but excludes any motorised vehicle or other mode of transport that could be moved under its own power. [emphasis added]*

In the 234 page background document published in April 2019, MFE devotes six pages (p47-53) to explain why they had to invent new definitions. Initially, they sought to redefine the meaning of **structure,** but could not because that word was already defined in the Act. And because the Act clearly states *structure is fixed to land*, MFE had to invent a new concept *physical construction* so they could then modify the thousand year old real-property meaning of *building*, that always meant fixed to land (located in land) to also encompass its opposite, personal property (chattel) that is not fixed to land (located on land). This is known as Orwellian doublespeak where a word that has a specific meaning is declared by the autocracy to mean or include its opposite.

The NPS is not a law, however. It is a policy standard under the Resource Management Act. As such, it was not subjected to the usual checks and balances by which good law is made. I was told that when Hon David Parker, Minister for the Environment was asked to approve it, he was unaware of this radical change embedded on page 55. MFE had not brought it to his attention in a cover sheet or briefing. Ministers are overloaded with ministry documents, which is why checks and balances are necessary for a democracy to function properly.

Now Building Minister Hon Jenny Salesa has put forth a bill, apparently drafted by MBIE, which does away with the checks and balances upon which Alan Dall relied when he sought the protection of the judiciary in challenging Determination 2019/017 in Dall v MBIE.

The Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill is an amendment that is about building products and methods. Thus, a reasonable person would expect that when made into law, they could read the Act and know what it is talking about. That it would clearly state what is and what is not a building product and a building method. But this bill does not do that.

Instead, it says that a building product and a building method is whatever the Governor General by Order in Council says it is; and that this can change at any time. The law ceases to be bedrock and becomes sand.

While the power officially lies with the Governor General and the Executive Committee, the de facto power moves to the ministry, in this case MBIE. A low-level official within the ministry drafts a definition that blesses or excommunicates a building product or method which is signed off by the manager and the CEO and presented to the Minister in a thick stack of documents for approval. No representative of the loyal opposition is in the room. No representative of the affected parties, such as the welder Alan Dall, are in the room. Like the NPS radical redefinition of *building*, the blessed or excommunicated building product or method will pass without checks and balances. Few will know about it until MBIE unleashes it on an unsuspecting citizen.

This practice is the tool of autocrats and popes, and I intentionally use the term blessing and excommunication to refer to the thumbs up / thumbs down implications embedded in the bill.

On its web site, the Governor General's office explains the purpose of the Executive Council: *The principal function of the Executive Council is to advise the Governor-General to make Orders in Council (to make, for example, regulations or appointments) that are required to give effect to the Government's decisions*.

But that is not what is happening in this bill. The Government is abdicating its decision-making role.

In a system of checks and balances, all representatives of the people – in power and in opposition – shape policy and the executive executes it. The law should say what a building product and building method is, and it then is up to makers of building products and providers of building methods to adapt their goods and services to fit the meaning in the Act. The Executive's job is to articulate and make determinations on the grey areas, and the judiciary hears appeals when an affected party believes the executive has erred in applying the law.

However, when the Executive can at any time declare what is and what is not a product or method, the legislative role is abdicated and the judicial role is extinguished. The executive becomes all powerful, and as has been shown in the examples above, the potential for abuse is real and present.

My recommendation is simple. Delete the language in Section 9A and 9B that grants power to the Governor General by Order in Council to declare what a building product and method is and is not. Demand before the bill progresses, proper legal advice is secured that comprehensively defines the meaning of building product and method that among other things, limits it to buildings as understood in common law – real property fixed to land. Ensure the language serves the public interest rather than the pecuniary interest of established industries represented by trade associations and official bodies who are likely to make up the majority of submitters. Protect the constitutional principles of checks and balances that make New Zealand a democracy.

Specific Recommendations

The following language is a first-draft suggestion for proposed changes. The most important changes are those marked with strikeout. These are essential to preserve constitutional democracy. The underlined words are suggestions. The definition of building product was taken from EU Regulation (EU) No 305/2011.

To this internationally accepted definition, I added language that protects traditional building products and methods. Te Tiriti o Waitangi provides protections to the chiefs (nga Rangatira), the tribe (nga hapu) and to all the people of New Zealand (nga tangata katoa o Nu Tirani) paramount control (te tino rangatiratanga) over their lands (wenua), community (kainga) and all of value to them (taonga katoa). This bill is about all three.

As the government seeks to establish standards and controls over modern building products and modern building methods, which increasingly involve sophisticated engineering, factories and machinery, including advanced computer-controlled systems, it is important to not breach the principles of Te Tiriti by outlawing, or creating so many obstacles as to effectively bar traditional or timeless building materials and methods. An example of such codification is the NZS 4297 "Engineering Design of Earth Buildings" and NZS 4299 "Earth Buildings Not Requiring Specific Design". That code was the product of a dedicated team led by architect Graeme North in order to protect a timeless building method in the face of increased government regulation. But it should not have been necessary. Timeless methods use mass over precision and forcing them into a regulatory regime never intended is the classic square peg into round hole exercise.

In including this recommended addition, the most ignored words in Te Tiriti are defended: *nga tangata katoa o Nu Tirani* was inserted into Te Tiriti by Rev. Henry Williams when he drafted Te Tiriti because Common Law is equal law for all. A Pakeha who builds out of rammed earth in the fashion of Pompallier House in Russell should be accorded the same protections (ka wakarite ka wakaae) as the Māori who build a raupo structure in the fashion of the raupo Anglican church built by Wiremu Hoete in Hangaura, Waiheke Island.

Finally, for clarity, there has been a disturbing trend in Government of regulatory creep in which lazy law and rule making seeks to address new technology trends in NZ by using Orwellian doublespeak to say words that have one time-honoured meaning in law can also mean their opposite. This is bad governing. Building has always meant a structure fixed to land, as in the Latin maxim *Quicquid plantatur solo, solo credit* (whatever is attached to the soil becomes part of it). The introduction of adapted products, such as shipping containers converted to homes and workplaces, and mobile trailer homes made in factories or DIY) have caused problems for territorial authorities and BCAs because the Building Act was written for buildings (real property) not chattel shelter or habitat (personal property). The answer is not to redefine building, one of the most fundamental words in Common Law to say it also means personal property. That is lazy and sloppy. Instead, follow the lead of most other OECD nations and write fit-for-purpose rules that ensure health, safety and durability without adversely impacting their most important qualities: affordability and accessibility.

RECOMMENDED CHANGES TO THE BILL:

7 New sections 9A and 9B and cross-heading inserted

After section 9, insert:

Meanings of building product and building method

9A Meaning of building product

~~(1) In this Act, **building product** means a product that~~

~~(a) could reasonably be expected to be used as a component of a building; or~~

~~(b) is declared by the Governor-General by Order in Council to be a building product.~~

~~(2) However, a product that would otherwise be a building product under **subsection (1)(a)** is not a building product if it is declared by the Governor-General by Order in Council not to be a building product.~~

(1) In this Act, **building product** means any product or kit which is produced and placed on the market for incorporation in a permanent manner in building works or parts thereof and the performance of which has an effect on the performance of the building works with respect to the basic requirements for building works.

Building products include products manufactured or fabricated offsite such as premanufactured structural frames, pre-cut timber, bricks and blocks, doors, windows, shutters and gates, membranes, thermal insulation products, chimneys and flues, sanitary appliances, fire alarms, flooring, fire retardant products, space heating appliances, power cables, glass, and fixings.

(2) In this Act, **customary building product** means any raw material taken from the land and shaped or fashioned by human hand on site or near the building site using building methods that predate the 21st century.

Customary building products include raupo and other native species used by Māori in precolonial times, gathered stones that are not shaped by artificially powered machinery (other than hand tools such as grinders), logs and hand-hewn local timber, subsoil shaped into earthbricks, rammed earth and other vernacular materials that are time honoured and known to be safe and healthy when used properly.

(3) In determining whether something could reasonably be expected to be used as a component of a building, the following are relevant considerations:

(a) the purposes for which the thing is ordinarily used:

(b) the purposes for which the manufacturer or supplier intends the thing to be used:

(c) the purposes for which the thing is represented as being used for:

(d) the purposes for which the thing is likely to be used (because of the way in which it is presented or for any other reason).

(4) The matters listed in **subsection (3)** are relevant, but not determinative, considerations and do not limit what may be considered.

(5) For clarity,

(a) a prefabricated building either in module or kitset form that arrives on site as a complete structure, either ready to install or in a kit that consists of all parts and components that are assembled (not constructed) on site is not a **building product**. Such a module or kitset is a finished unit that has its own fit-for-purpose regulations that evaluate it as a whole for health, safety and durability; and

(b) In this Act, the word **building** means a structure (real property) fixed to land and does not include chattel shelter or habitat (personal property) that is not fixed to land. Chattel property has its own fit-for-purpose regulations that evaluate it as a whole for health, safety and durability.

9B Meaning of building method

(1) In this Act, **building method** means a method—

(a) for using 1 or more products or things as part of building work; or

(b) for the manufacture, fabrication or assembly of any building product or kit in accordance with the instructions provided by the manufacturer or supplier or following customary practices known to be safe for the builders and the future users of the product, kit and/or constructed or assembled structure.

~~(b) for carrying out building work that is declared by the Governor-General by Order in Council to be a building method.~~

~~(2) However, a method that would otherwise be a building method under subsection (1)(a) is not a building method if it is declared by the Governor-General by Order in Council not to be a building method.~~