

## 7. WEATHERTIGHT HOMES RESOLUTION SERVICES AMENDMENT BILL

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### PURPOSE OF REPORT

1. To advise the Council of the Weathertight Homes Resolution Services Amendment Bill which has been referred to the Social Services Select Committee after being introduced on 23 August 2006, and seek approval for a Council submission on the Bill. The Social Services Select Committee has allowed four weeks for submissions closing on 6 October 2006.

### EXECUTIVE SUMMARY

2. This Bill amends the Weathertight Homes Resolution Services Act 2002 "(the principal Act)" to make enhancements to the assessment and resolution of leaky building claims under it.
3. The Weathertight Homes Resolution Service (WHRS) was set up in 2002 to provide homeowners with a speedier, more flexible and cost-effective alternative to the courts for the resolution of leaky building claims. The WHRS was reviewed earlier in the year and the Government announced a number of changes which were communicated to the Council by way of a memo on the 17 May 2006.
4. The Bill complements a suite of other ongoing changes designed to transform the building and construction industry. These include the licensing of building practitioners, the review of the Building Code, a new product certification regime, the auditing and accrediting of Building Consent Authorities, and a loan scheme to assist homeowners repair leaky buildings.
5. The number of claims involving the Council should diminish over time as new processes and building methods improve the weathertightness and durability of buildings.
6. The key changes presented in the Bill are:
  - a wider scope of claims for weathertightness deficiencies;
  - an option of an eligibility assessor's report or a more comprehensive assessor's report;
  - a new Weathertight Homes Tribunal to provide strengthened adjudication services;
  - a low-value claims process;
  - a class action approach to claims relating to multi-unit complexes;
  - improved processes and case management.
7. The Social Services Select Committee has called for submissions on the Bill to be lodged by Friday 6 October 2006. This is an unusually short timeframe and reflects the Government's intention to fast track the Bill.

### FINANCIAL AND LEGAL CONSIDERATIONS

8. The wider scope of claims proposed in the Bill has significant implications for the Council because of the possibility of an increase in the number and value of claims that are received. While the Council has insurance cover, an increase in claims may lead to an increase in premiums and the excess which the Council has to pay. However, these are claims that could be made if the proceedings were in the Courts, and it may be preferable that all possible defects are addressed at the same time to avoid future claims being made. There is also a concern with regard to assessors requiring more work to be done than is necessary, as a result of the increase in scope.

9. The proposed requirement in the Bill for Councils to include information on LIMS in respect of houses that have been assessed as eligible assists in clarification for local authorities. Although the Council currently has a discretion about including that information, it may not be aware of all houses that have been subject to a weathertight claim, particularly where the Council is not a party. Including this as a statutory requirement in the Bill removes the decision, and potential liability, from Councils of including or not including that information. Councils should, however, not be liable for not including such information on a LIM until it receives that information from the Tribunal or chief executive.
10. There are also other legal issues, related to the management and resolution of claims, including proportionate liability, timeframes and third party claims, as well as some other minor technical matters that need to be fixed in the Bill, that are addressed in the draft submission.

#### **STAFF RECOMMENDATIONS**

It is recommended that the Council:

- (a) Consider the submission and grant approval for it to be submitted to the Select Committee.
- (b) Resolve whether or not the Council wishes to appear before the Select Committee in support of its submission, and if so, who should represent the Council before the Select Committee.

## **BACKGROUND ON THE WEATHERTIGHT HOMES RESOLUTION SERVICES AMENDMENT BILL**

11. This Bill amends the Weathertight Homes Resolution Services Act 2002 "(the principal Act") to make enhancements to the assessment and resolution of leaky building claims under it.
12. The Weathertight Homes Resolution Service (WHRS) was set up in 2002 to provide homeowners with a speedier, more flexible and cost-effective alternative to the courts for the resolution of leaky building claims.
13. The Bill complements a suite of other ongoing changes designed to transform the building and construction industry. These include the licensing of building practitioners, the review of the Building Code, a new product certification regime, the auditing and accrediting of Building Consent Authorities, and a loan scheme to assist homeowners repair leaky buildings.
14. The Bill aims to:
  - strengthen and streamline management of the overall WHRS process;
  - improve the efficiency and effectiveness of each stage of the process;
  - enhance the independence of the adjudication process;
  - increase the proportion of claims resolved through early negotiation;
  - reduce the average length of time for claims to be resolved;
  - lower the evidential and legal costs for all parties using the service.
15. The key changes in the Bill are:
  - a wider scope of claims for weathertightness deficiencies:
  - an option of an eligibility assessor's report or a more comprehensive assessor's report:
  - a new Weathertight Homes Tribunal to provide strengthened adjudication services:
  - a low-value claims process:
  - a class action approach to claims relating to multi-unit complexes:
  - improved processes and case management.
16. The principal matters giving effect to the policy objectives, in the same order as in the Bill, are:

### **Commencement and Transitional Provisions**

17. The Bill provides for the commencement of different Parts and provisions on dates to be appointed by Order in Council. This will enable the appointment process for members of the new Weathertight Homes Tribunal to commence and for the substantive provisions in the Bill to take effect once the tribunal is established. The Bill also provides for the continuity of claims when the amendments come into force, and for claimants to take advantage of the enhancements to the WHRS process where appropriate.

### **Assistance and Guidance**

18. The Bill provides for the Departments responsible for administering the principal Act to provide assistance and guidance to claimants and respondents. This will include guidance on understanding assessment reports, the advantages of early negotiation, and on resolution options and processes. This will help speed up the claims process and make it more cost-effective for all parties.

### **Class Action Approach to Multi-Unit Complexes**

19. The ownership and occupation rights in multiple-unit residential complexes, and the nature of damage and requirements for making repairs to multi-unit complexes, raise many complex issues. A whole-of-building approach is required, as far as possible, to achieve the effective assessment and resolution of claims, and to make repairs.

20. The Bill provides for claims from within multi-unit complexes (as defined in the Bill) where rights of ownership or occupation are governed by arrangements commonly referred to as-
  - a unit title (under the Unit Titles Act 1972); or
  - a cross-lease; or
  - a company share.
21. The Bill requires a class action approach to claims relating to multi-unit complexes. For a claim relating to dwellinghouses, the owners of at least 75 percent of the dwellinghouses must authorise the representative to bring and resolve a claim, and to authorise invasive testing of those dwellinghouses. A representative will be able to bring a claim, and to authorise invasive testing on common areas.
22. The only exceptions to the class action approach will be claims relating to:
  - a dwellinghouse in a multi-unit complex where no other dwellinghouse or common area is affected; or
  - separate dwellinghouse(s) in a stand-alone complex; or
  - common area only claims.
23. The Bill also provides measures relating to the withdrawal of an authorisation, the sale of a dwellinghouse and adding further dwellinghouse owners to claims in multi-unit complexes. In addition, it provides for relief where any voting threshold within a multi-unit complex, in relation to any decisions about the WHRS claim, requires more than 80 percent of owners who are eligible to vote. The new provisions in respect of multi-unit dwellings raise issues with regard to whether every such claim should be dealt with via the WHRS or whether "large-value" or complex claims should more appropriately be dealt with in the High Court.

#### **Sale and Purchase of Dwellinghouses Subject to a Claim**

24. Claimants who sell their dwellinghouses will no longer be able to pursue their claims within the WHRS process. This is to ensure WHRS focuses on assisting those claimants who own a leaky building and want to repair their dwellinghouse so it is weathertight. The former owner may be able to continue a claim in the general courts.
25. The Bill later provides that purchasers who find that they have purchased a leaky building for which a WHRS claim was earlier made may be able to apply to use earlier assessment reports and, in the case of an eligible claim, adjudication evidence and orders relating to the former owner's claim. This will allow purchasers to benefit where possible from a former owner's claim.

#### **Eligibility**

26. The Bill amends the eligibility criteria to accommodate the new provisions relating to multi-unit complexes.
27. The Bill sets a time limit so that only homes built or altered before 1 January 2012 will be eligible for claims to the WHRS. This means that the WHRS will substantively cease around 2021. The Building Act 2004 made changes that are now addressing the failures that led to leaky building problems and will be fully in place by 2012. Given that the new Licensed Building Practitioners regime will be fully in force in November 2009, a better "end" date for the WHRS may be December 2009, rather than January 2012.

#### **Remedies, Expanded Scope of Claims**

28. Currently, leaky building claims are limited to actual damage and homeowners must wait until further damage arises from weathertightness deficiencies to make a subsequent claim. The Bill expands the potential scope of claims to include weathertightness deficiencies that have not yet leaked. However, for a claim to be eligible, there must be actual damage to the dwellinghouse. Claimants will be able to seek any remedy that could be claimed in a court of law in relation to actual damage and weathertightness deficiencies that have not yet leaked.

### **More Comprehensive Assessor Reports and New Category of Eligibility Assessment Reports**

29. The Bill requires claimants to consent to "invasive testing" of their building (defined in the Bill), to better determine eligibility and the nature and scope of any damage.
30. The Bill provides claimants with the option of choosing an eligibility assessment report, at no cost, to establish whether they have an eligible claim. This will enable claimants to proceed with early repairs to limit further damage to the dwellinghouse and to engage in direct negotiation. Claimants with an eligibility assessment report may subsequently seek resolution of their claim on the basis of receipts for repair costs.
31. The Bill expands the scope of the current assessment report. A full assessment report, subject to a fee to be set in regulations, will cover not just actual damage (the current scope of the principal Act) but also other weathertightness deficiencies that have not yet leaked.

### **Decision on Eligibility**

32. The Bill provides for the chief executive (of the Department of Building and Housing) to make the decision whether a claim is eligible under the principal Act. Evaluation panels currently fulfil that role, but the reporting required of assessors has resulted in the panels adding limited value to the assessment and resolution process. If a claim is decided as ineligible by the chief executive, the claimant will be able to request that the chair of the Weathertight Homes Tribunal reconsider the decision.

### **Tardy Claimants**

33. The purpose of the principal Act is to provide claimants with speedy, flexible and cost-effective procedures for resolving their leaky building disputes. Claimants also receive benefits from the WHRS process and should progress their claim in a timely way. In cases where a claimant delays the progress of their claim, the dwelling may deteriorate and respondents may no longer be available. In addition, respondents may have to defend claims beyond the relevant limitation period where the claimant applies to the Service within time.
34. The Bill provides for the chief executive (of the Department of Building and Housing) to terminate claims where the claimant is not making enough effort to resolve the claim. Claimants must be given notice and the opportunity to make submissions to the chief executive before a decision is made to terminate their claim. Such a claimant may be able to continue their claim in the general Courts.

### **Low-value Claim Stream, Mediation**

35. The costs of going through the WHRS process are often out of proportion to the value of the claim, and the WHRS process can be overly formal and complex. The Bill establishes a low-value stream for claims that are below a given claim ceiling, to be set in regulations. Low-value claims will be given concentrated case management to assist claimants and respondents to use informal dispute resolution options to resolve their claim. These will include WHRS mediation that will be time limited. If negotiation and mediation of a low-value claim are not successful, an expedited adjudication process will be available. The Government needs to ensure there will be no delay in implementing the regulations setting a low-value claim amount.

### **Adjudication by New Weathertight Homes Tribunal**

36. The Bill will establish a new Weathertight Homes Tribunal to provide strengthened adjudication services under the principal Act. The tribunal will be administered by the Ministry of Justice. This will improve the independence of the adjudication process. Members will be appointed by the Governor-General on the recommendation of the Minister of Justice after consultation with the Minister for Building Issues. One member will be appointed as the chair of the tribunal. Members will be required to take an oath of office before the High Court. The Bill specifies that the Minister of Justice must only appoint person having regard to their knowledge, skills and experience, which should ensure that only people with suitable technical and legal backgrounds are appointed to the Tribunal.

### **Improving the Mediation and Adjudication Process**

37. The Bill contains a number of provisions to give the tribunal wider powers and to make the resolution process more efficient and effective-
- the Bill sets objectives for the management of claims by tribunal members, to ensure that adjudications are speedy, flexible, and cost-effective.
  - these objectives will also facilitate a more inquisitorial approach;
  - the chair of the tribunal will be able to issue practice notes and the
  - tribunal will be able to refer questions of law to the High Court;
  - the Bill also establishes new offence provisions for disobeying a tribunal order or failing to comply with a witness summons.
38. There will be a new requirement for a preliminary pre-hearing conference for general claims (other than low-value claims), under the direction of the tribunal, to set the ground rules for the resolution process.
39. WHRS mediation, subject to time constraints, will be available following the pre-hearing phase, with the consent of the tribunal member assigned to the claim. This will reduce the delays and costs associated with the current separate options and processes for mediation and adjudication. Mediation services will continue to be provided by the Department of Building and Housing. For multi-unit complex claims the timeframe will be 40 working days, while for other claims it will be 20 working days. If a claim does not go to mediation or is not settled at mediation the claim will proceed to adjudication, before the tribunal, to be conducted within current time limits.
40. If negotiation and mediation of a low-value claim are not successful, an expedited adjudication process will be available, on the papers. The Bill sets specific objectives for the management of low-value claims by tribunal members.
41. These focus on minimising unnecessary evidence other than the assessor's report, keeping the cost of the process at a level appropriate to the amount of the claim, and maximising the use of informal means to resolve the claim.

### **Notices on Land Information Memorandum Reports**

42. Currently, territorial authorities (where they are aware of a claim) have a discretion to note the fact of a weathertightness claim on the LIM, but there is no requirement for them to do so. The Bill will require the Department of Building and Housing and the Weathertight Homes Tribunal to send notices to territorial authorities when a claim has been decided eligible and when the outcome of a claim is known. The Bill proposes a consequential amendment to the Local Government Official Information and Meetings Act 1987 to require territorial authorities to place these notices on LIM reports.
43. The Bill will ensure that territorial authorities are aware of claims and provide for consistency in LIM notices, including notices on the outcomes of claims (other than details of mediation settlements that are confidential under the principal Act). The Bill will reduce the imbalance of information on the weathertightness of a home that exists between home buyers and sellers.
44. The WHRS information on the number of active claims dated 15 September 2006 is that there are 169 active claims in the Christchurch City Council area. We currently have been advised of the details of 42 of these claims.
45. If the amendment Bill is implemented we will receive details of the claim when it is decided it is eligible and the information will be added to the property file. However, the Bill could be clarified to ensure that the Council will not be liable for not including WHRS information on a LIM, if the Council has not yet been provided with that information by the Tribunal or the Department.

## ISSUES FOR COUNCIL CONSIDERATION

46. The submission attached comments on four major issues that impact on the Council:

1. Potential Damage

The provisions allowing claimants to claim for potential damage may be interpreted liberally. This will increase the value of claims, and could lead to additional direct costs and possibly also to increases in insurance premiums.

2. Time Limit on Claims

The Bill sets a time limit so that only homes built or altered up to 1 January 2012 will be eligible. We support the time limitation as the improved building regime will lead to a reduction in the number of claims. We think that the date should be December 2009 because the Licensed Building Practitioners regime comes fully into force on 30 November 2009 and this will ensure capable people are responsible for the construction of all buildings.

3. Improving the resolution process by setting time limits to achieve settlement

We support the principle that claimants should have their claims dealt with promptly. We do however have concerns that other parties have to be located and persuaded to be involved in mediations and this can take time. We have included in the submission that extensions of time should be given when attempts are being made to locate and contact potentially liable parties.

4. Proportionate Liability

The Bill does not address proportionate liability (whereby everyone pays only their share of the liability). The present system is unfair in that if any party fails to pay, the remaining solvent parties may have to pay the total amount to the claimant.