

3. WEATHERTIGHT HOMES

General Manager responsible:	General Manager, Regulation and Democracy Services, DDI 941-8462
Officer responsible:	General Manager, Regulation and Democracy Services
Author:	Steve McCarthy, John Buchan

PURPOSE OF REPORT

1. This report had been requested by the Committee at its 4 March 2010 Committee Meeting.

EXECUTIVE SUMMARY

2. At that 4 March meeting the Committee considered a report on Weathertight Homes and asked that staff report back to the April Committee meeting with a view to formulating a policy response on this issue.
3. At that 4 March meeting the Committee asked staff to specifically report back on the current position of Local Government New Zealand (LGNZ), and also on the model to address the Weathertight Homes issue used in Canada.
4. This report addresses both of those requests and concludes with a recommendation regarding a policy response as requested by the Committee.

LOCAL GOVERNMENT NEW ZEALAND RESPONSE

5. The approach of LGNZ, as adopted by its National Council, has been to work through the Metro Sector meetings of the Mayors and Chief Executives of the metropolitan councils in New Zealand. Those Councils which are represented at Metro Sector meetings are:

Auckland City Council	Christchurch City Council
Dunedin City Council	Franklin District Council
Hamilton City Council	Hutt City Council
Manukau City Council	North Shore City Council
Papakura District Council	Porirua City Council
Rodney District Council	Tauranga District Council
Upper Hutt City Council	Waitakere City Council
Wellington City Council	

6. The LGNZ has adopted the position taken by the Metro Sector meetings, and in particular the position adopted by Mayors Kerry Prendergast and John Banks regarding their discussions with the Government late last year where those two Mayor's declined the Government's 2009 proposal. (as reflected in the PWC report)
7. The two proposals are:

Contributions	Government's 2009 Proposal	LGNZ 2008 Proposal
Homeowners	64%	25% - 75%
Government	10%	50% - 75%
Councils	26%	25%

8. LGNZ supports the approach of the two Mayors that Central Government needs to be actively involved in a much greater way than simply making a contribution which is the current cost to the Government of operating the Weathertight Homes Resolution Service.
9. The current position of LGNZ is best reflected in a position paper it adopted in May 2008 which had formed the basis of the discussions by the two Mayors with Central Government. A copy of extracts from that 2008 LGNZ paper is attached for the Committee's information. **(Attachment A)**

10. Some information regarding the size of the problem in New Zealand has been omitted as that information has now been updated as a result of the Price Waterhouse Coopers report which was released by the Government late last year.
11. On Tuesday 23 March 2010 it was reported in the New Zealand Herald that the Minister of Building and Housing, Maurice Williamson, was due to announce a new scheme in the next few weeks which was to succeed the proposal he had negotiating with a number of Mayors last year. The report stated that discussions had been held between representative's of the Prime Ministers departments, Finance, Treasury and the Department of Building and Housing.

CANADIAN MODEL

12. Vancouver in Canada had reported serious problems in 1993 with leaky problems where buildings had been designed using Stucco Cladding systems.
13. They had tried to address the problems with amendments to the Building Code Guidelines but took a moratorium in 1996 on most of these types of cladding systems to half the problem.
14. The British Columbia Provincial Government established the Reconstruction Loan Programme to provide financial support to help with the cost of repairing homes damaged by water and which were built before July 1st 1999. The programme was funded through a \$750 levy charged on new residential construction. The programme was launched in 1998 to run for 10 years and was anticipated to give out approximately \$250 million in interest free loans. To date the Provincial Government has approved more than \$617 million in no interest loans through the programme, assisting more than 1600 households to repair leaky homes. The Provincial Government also provided an additional \$23 million in provincial sales tax rebates on repairs.
15. The reconstruction programme covers:
 - Cost of repairs.
 - Cost of consultants.
 - Construction costs including contingencies.
 - Miscellaneous expenses, for example landscaping, additional property management fees.
 - Litigation fees.
 - Warranty costs.
16. A home owner is eligible if they:
 - a) own a water damaged home in a coastal climatic zone
 - b) do not have savings or other assets that could be used to pay for repairs
 - c) do not qualify for conventional mortgage financing or cannot afford the monthly payment on a conventional loan.
17. If the eligibility criteria is met then financial assistance could be secured for the full amount needed to repair the building envelope. The terms on any loans are generally set for a date between 3 -5 years and the loan is secured by way of mortgage on the title.
18. In July 2009 the Provincial Government announced that the programme will stop accepting new applications as at 31 July 2009. a recent slowdown in residential construction resulted in less money being collected through levies to fund the programme and the Provincial Government has decided it can no longer afford to fund the programme.

SUNSET TERRACES CASE - COURT OF APPEAL DECISION

19. On Monday 22 March 2010 the Court of Appeal released its decision on 2 cases involving the North Shore City Council. These can be referred to for the purpose of this report as the Sunset Terraces Case and the Byron Avenue decision case. To provide context for this Court of Appeal decision in 1996 the Privy Council had decided in Hamlin v Invercargill City Council that Councils would be liable to the owners of residential properties if those properties were constructed with latent building defects. This decision included liability to the subsequent owners of those properties.

20. Since 1996 there have been a number of court decisions as to the extent of that Hamlin case in terms of the types of buildings for which councils are liable.
21. The Courts have established that the Hamlin duty by Councils does not apply with regard to motels (because of the commercial context), luxury lodges and schools (as they are non residential buildings).
22. The issue before the Court of Appeal in the Sunset Terraces case and the Byron Avenue case was whether investor owners of apartments and multi unit dwellings (where the owners do not occupy the apartment) fall within the Hamlin duty. So that if negligence can be proved on the part of the Council through the consenting or inspection process then the council would be liable to make a contribution to any damages that may be awarded by the Court.
23. As has been reported in the media the Court of Appeal decided that the Hamlin duty did apply in respect of such multi-unit apartments even though the investor owners do not occupy the apartments. And that duty is owed to any one who acquired one of those apartments where the intended use had been disclosed as residential in the plans submitted for building consent approval.
24. The Court found that there is no material difference between the owners of leaky apartments and the owners of leaky houses in the legal duty to be owed by Councils.
25. As in all these cases there is also the issue of any contributory negligence by the home owner which may lessen the damages to be awarded by the court. Examples of that contributory negligence can be lack of maintenance of the property or purchasing a property being aware from the LIM there are weathertight issues.
26. The Court of Appeal decision on the 2 cases does not alter the fact that a home owner can join a number of parties who the owner believes were negligent in the exercise of their functions regarding the construction of the house. Typically such parties are the architects / designer, engineer (if any), the builder, sub contractors and the Council. So the Council is not the sole party that can be involved in any litigation.
27. In terms of the active WHRS claims currently being processed by the Council the decision does not have any real practicable effect as a number of those claims involve multi-units. The court effectively treats owners of stand alone residential houses and owners of apartment units in the same way when it comes to the legal duty of care to be owed by the Council to those owners in any building project. As will be seen from the attached LGNZ Proposal (page 10) that proposal has been prepared on the basis that such owners of apartment buildings should be included in any central government solution to this matter.
28. One of the Court of Appeal judges made a number of general comments on the weather tight homes issue which are of relevance with regards to any forthcoming discussions with the Government. Those comments were:
 - *It is also plain that the leaky home problem is the result of what can fairly be described as systemic failure, occurring at all levels within the building industry, in both the public and private sectors. As has been detailed in my colleagues' judgments, the Building Industry Commission's report, Reform of Building Controls recommended an approach to building controls which moved away from the existing highly prescriptive code to a performance-based code which focused on the preservation of the health and safety of occupants and protection of neighbouring properties rather than on the protection of property owners' economic interests in the properties being built. The focus on performance would, it was thought, allow for greater innovation in building methods. Market forces would operate to ensure that owners received value for money, and owners could protect their interests in their properties through insurance arrangements if they chose. Territorial authorities would be subjected to the discipline of competition from private sector building certifiers, who would be required to hold public liability insurance to protect the interests of homeowners. These recommendations were made after a lengthy and highly consultative process.*

- *In the Building Act 1991 Parliament accepted the philosophy underlying the Report and largely adopted its recommendations. However, the Act did not produce the outcomes anticipated. Market forces, compliance regimes and insurance arrangements did not in fact operate to protect the interests of homeowners and prevent the construction, on a large scale, of residential properties that are not weather-tight. The sheer size of the problem points to systemic failure rather than simply failures by individual players within the industry.*
- *In this context, litigation, which looks to impose responsibility on particular actors for particular consequences on the basis of legal principles, cannot offer a sufficient solution. Systemic failure of the type that has occurred will not necessarily result in legal liability being imposed on all the entities which have had some part to play in the failure, even though they bear some responsibility (in a moral sense) for what has occurred.*
- *There is little doubt that litigation is a poor instrument to provide appropriate remedies to people affected by large-scale systemic failure of the type that has occurred. For example:*
 - (a) Generally speaking, courts are confined to determining the specific issues that particular proceedings raise, certainly where private law claims are made. They are unable to undertake a holistic or comprehensive assessment of the underlying problem, much less to impose a comprehensive solution on all involved. In this context, litigation is piecemeal and ill-directed.*
 - (b) Whether individual purchasers will be able to obtain relief depends on factors which have nothing to do with their individual merits. For example, whatever legal remedies may theoretically be available, a innocent purchaser whose property was inspected negligently by a private sector building certifier is likely to be in a far worse position than a similar purchaser whose property was inspected negligently by a territorial authority. It is clear that most building certifiers against whom claims might have been made have gone out of business and their insurance arrangements provided wholly inadequate protection for homeowners. (The same observation applies to most developers, builders, architects and designers.) By way of further example, William Young P has referred to the ten-year long-stop limitation period. Whether a particular purchaser whose property suffers from leaky home syndrome falls within or without the period may well be a matter of chance. In other words, relief through legal proceedings will be available on a haphazard basis, not reflective of underlying merits. It is surely unacceptable that access to relief should be determined by happenstance rather than by merit.*
- *Against this background the only realistic solution is one which is comprehensive in its coverage and to which all who bear some responsibility for what has happened contribute. Given that many from the private sector have gone out of business, the burden may ultimately fall substantially on central and local government, but each has played a contributing part. This may be the price that we are all, as taxpayers and ratepayers, obliged to pay for remedying the results of a regulatory construct that simply did not work as envisaged.*

DISCUSSION ON NEW BUILDING ACT

29. Combined with the scheme to resolve historical claims the Government has also released a discussion paper on proposed amendments to the Building Act 2004. The new Act will seek to strike a balance between ensuring the quality of new buildings with an efficient and affordable process of control. The new Act will be significant in the light of any future claims and the Government has signalled that it intends to shift the burden of weathertight claims from local government. The Submissions Panel will consider a draft Christchurch City Council submission on the discussion paper in early April which includes:

A more balanced and cost-effective policy approach to future regulation in the building industry which could include:

- A licensing model which would be underpinned by insurance and protection for homeowners through building warranty provisions.
- A change from joint and several liability, to one of proportional liability.
- A long stop limitation provision which is in alignment with the ability for individuals to obtain insurance for such a period.
- A change in legislation which would enable local authorities to rely on statements for products and services without incurring liability arising out of the acceptance of such certificates.
- Changing legislation to ensure that liability rests with the author of such certificates.

Key initial changes would be:

- Home warranty - possibly funded by a levy on each building consent or included in development costs and passed on to the consumer.
- Registered/licensed builders.
- Registered/licensed products.
- Fully compliant design solutions.
- Pre-purchase inspections and surveys - possibly linked to mortgage lenders.

CONCLUSION

30. The Committee asked staff to report back with a view to formulating a policy response on this issue. It is recommended that the Committee support the work currently being carried out by the Metro Sector Mayors in their ongoing discussion with the Government and supports the model set out in the May 2008 paper prepared by Local Government New Zealand.
31. The LGNZ model seeks a significant contribution from Government which, although not stated in so many words, could be said to reflect the view that given Central Government initiated the changes in the early 1990's, which led to changes in building techniques, which led to the present Weathertight Homes situation then that is a position supported by the Committee from comments made at its last meeting

STAFF RECOMMENDATION

It is recommended that the Council:

- (a) Supports the Local Government New Zealand 2008 model regarding the Weathertight Homes situation issue.
- (b) That in any future negotiations with the Government on proposals to resolve weathertight homes claims the following matters are taken into account:
 - That the proposal reflects a level of contribution that is a fair and affordable contribution by parties including the Government, Councils and the homeowner.
 - That the scale of the issue in particular areas and exposure by individual Territorial Authorities is taken into account.
 - That the proposal generally follows the position paper prepared by LGNZ and attached to this report as **Attachment A**.
- (c) That staff report to the Committee once the Minister has made an announcement regarding a revised Government Scheme.
- (d) That the Council submission on proposed changes to the Building Act 2004 include support for a home warranty scheme for new building works, registered and licensed builders and building products, approval of fully compliant design solutions and compulsory pre-purchase inspections and surveys.