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**REPORT 3**  
(1215/52/IM)

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**GOVERNMENT PROPOSAL ON WEATHERTIGHT  
HOMES SUBMISSION ON THE WEATHERTIGHT  
HOMES RESOLUTION SERVICES (FINANCIAL  
ASSISTANCE PACKAGE) AMENDMENT BILL**

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**1. Purpose of Report**

To approve a Wellington City Council submission on the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Bill (the Bill), *attached* in draft form as Appendix One. The Bill proposes amendments to the Weathertight Homes Resolution Services Act 2006 (the WHRS Act).

This report follows on from Report 4 (1215/11/IM) and the resolutions of Council made on 29 September 2010.

**2. Executive Summary**

The Government introduced the Bill to Parliament on 23 November 2010. The Bill has been referred to the Local Government and Environment Select Committee. Submissions on the Bill close on 18 February 2011.

The Bill responds to territorial authorities' concerns about the potential for ongoing civil liability, notwithstanding the making of a payment to a leaky building owner in accordance with a contribution agreement entered into under the Financial Assistance Package (the FAP). Such liability can potentially arise through cross-claims made by co-defendants, or by third or subsequent party actions against the Council by other parties.

Officers have prepared a draft submission to the Local Government and Environment Select Committee that broadly supports the Bill, and seeks changes to address specific areas of concern. The draft submission is *attached* as Appendix One.

### 3. Recommendations

Officers recommend that the Committee:

1. *Receive the information.*
2. *Agree to the submission on the Bill attached in draft form as Appendix One.*
3. *Note that the closing date for the submission is 18 February 2011.*
4. *Delegate the Chief Executive the authority to approve minor editorial changes to the submission, or changes necessary to give effect to amendments approved by the Committee (if any), prior to the submission being sent to the Local Government and Environment Select Committee.*
5. *Delegate the Chief Executive the authority to appear before the Local Government and Environment Select Committee to speak in support of the submission.*

### 4. Background

On 29 September 2010 the Council resolved to opt-in to the FAP, subject to the resolution of six discrete issues.

The first of those issues was:

- (a) Third party legislation protection being introduced and passed to the satisfaction of the Chief Executive; or if legislation is not passed, an alternative agreement being reached that indemnifies Council for all liability and associated costs (to the satisfaction of the Chief Executive).

Since then, officers have continued to work closely with the Department of Building and Housing (**DBH**) and representatives from the other major metropolitan councils to refine the terms of the FAP and to develop operational processes around it. This has included working with DBH to develop legislation to protect territorial authorities that participate in the FAP from continued exposure to liability through cross-claims or third party claims.

This resulted in the introduction of the Bill to Parliament on 23 November 2010. The Bill received its first reading on 9 December 2010. The Bill amends the WHRS Act by inserting a new Part 1A. Part 1A:

- confirms that the purpose of the Part is to facilitate the repair of leaky buildings, through the provision of financial assistance measures to qualifying claimants;
- outlines who is eligible to apply for assistance under the FAP, and how they can go about making an application;
- states that an application for assistance under the FAP must be made within 5 years of the commencement of the Part;
- provides a statutory immunity for the Crown and various related persons and entities (not including territorial authorities), in relation to loss or damage that is caused by the repair of a leaky building or the provision of financial assistance to an owner under the FAP;
- provides a statutory immunity for the Crown, territorial authorities, and other persons who make contributions to owners under the FAP, that prevents a person from naming, joining, or seeking a relief/remedy from them in any civil proceedings;
- makes provision for the Crown to give guarantees or indemnities as a form of credit support for lenders, to enable the repair of leaky buildings;
- defines various terms that are relevant throughout the Part.

The Bill has been referred to the Local Government and Environment Select Committee. Submissions on the Bill are due by 18 February 2011. The Select Committee is scheduled to report back to Parliament on the Bill by 28 April 2011.

## **5. Discussion**

### **Risk of Ongoing Liability**

The Bill addresses the Council's identified concern about the potential for ongoing civil liability, notwithstanding the making of a payment to a leaky building owner under the FAP. It is recommended that Council support the purpose and intent of the Bill, but seek extensions to the scope of the statutory immunity so as to cover existing claims.

Proposed section 125F provides the statutory immunity sought by the Council. It prevents a person (whether a qualifying claimant or any other party to a claim) from:

- naming or joining the Council as a party to any civil proceedings,<sup>1</sup> where the Council has made a contribution under the FAP in relation to the affected leaky building; or
- applying for any remedy or relief from the Council in any civil proceedings, where the Council has made a contribution under the FAP in relation to the affected leaky building.

Proposed section 125F is forward looking and prospective in its application - i.e. it will apply to future attempts to name/join/apply for relief etc. On the basis of legal advice, officers are satisfied that the provision will provide robust protection for the Council against future claims. However, the immunity provided by proposed section 125F will not affect *existing* civil proceedings where the Council has already been named or joined as a party, or where a remedy or relief has already been sought against it. There is nothing in the Bill that extinguishes existing claims of this nature.

In relation to claimants, this is not an issue as the terms of any contribution agreement entered into under the FAP will involve an obligation for the claimant to discontinue (and not to recommence) any current civil proceedings against the Council.

However, in the case of other respondent or defendant parties, the position is more complicated. Those persons will not be parties to the contribution agreement entered into under the FAP. Consequently, they cannot be bound by its terms.

The logical response to this risk would be for the Council to refuse to exercise its discretion under the FAP eligibility criteria to allow existing claims to be subject to the FAP, thereby avoiding the risk of paying twice - once under the FAP and again through the courts. However, this approach would affect the availability of the FAP to demonstrably affected leaky buildings, contrary to the overarching policy intent.

Officers consider that there is a simple solution to this issue. A new subsection could be inserted into section 125F to the effect that no *award* can be made against a territorial authority where it has already made a contribution under the FAP. This would target the end of the civil proceeding process, which cannot have been reached in the case of eligible claims. In contrast, section 125F currently targets steps taken near the commencement of civil proceedings, which are not caught by the forward-looking nature of the provision. Suggested text for a new subsection along these lines is set out in the draft submission.

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<sup>1</sup> 'Civil proceedings' is defined to include proceedings under the WHRS Act and arbitration.

## **Crown Immunity**

The Bill notes in its Explanatory Note that one of the key features of the Bill is the establishment of Crown immunity for liability arising from the administration of repair work in accordance with a contribution agreement under the FAP.

It is recommended that the Council's submission questions the appropriateness of the immunity in the first instance, but seeks that if it is to be included, that it also be applied to territorial authorities who share the same risk as the Crown in this regard. For the avoidance of doubt, this does not mean that the Council will escape liability if it negligently performs its usual regulatory functions under the Building Act 2004 in relation to the repair of a leaky building. Rather, it means that an owner will not be able to sue the Council on the basis that the scope of repair work enabled under the FAP, or the scope of any financial assistance provided, was inadequate and resulted in further loss or damage.

## **Other Issues**

Officers have identified a technical discrepancy between the Bill's definitions of 'additional contributing party' and 'financial assistance measures'. A minor adjustment to the language of the latter of these definitions is suggested in the proposed submission to remedy this problem.

## **6. Conclusion**

Officers recommend that the Strategy and Policy Committee approve the draft submission *attached* as Appendix One and agree to it being sent to the Local Government and Environment Select Committee.

Contact Officers: *Sally Dossor, General Counsel*  
*Steve Cody, Manager Compliance (Building)*

## Supporting Information

### **1) Strategic Fit / Strategic Outcome**

This report relates to item 6.2.1 Building Control and Facilitation in the LTCCP, which is part of the Urban Development Strategy

### **2) LTCCP/Annual Plan reference and long term financial impact**

The Bill is important in eliminating the risk of Council being held liable for claims, in addition to contributing to the repair of homes under the FAP. The overall financial impact of the FAP has been considered by Council on 29 September 2010, where it was noted that the specific funding arrangements will be considered during the 2011/12 Annual Plan and 2012/22 LTCCP.

### **3) Treaty of Waitangi considerations**

No specific Treaty of Waitangi implications have been identified

### **4) Decision-Making**

This decision is not 'significant' in legal terms.

### **5) Consultation**

#### **a) General Consultation**

There is no need to consult on Council's submission on the Bill and the Select Committee process allows for consultation on the FAP legislation.

#### **b) Consultation with Maori**

No issues of specific interest to Maori have been identified

### **6) Legal Implications**

Council's General Counsel has been involved in the work with DBH on the FAP and the Bill and has reviewed this report. External legal advice was received during the development of the proposed submission to the Local Government and Environment Select Committee.

### **7) Consistency with existing policy**

The proposed submission to the Local Government and Environment Select Committee is consistent with the resolution of the full Council on 29 September 2010, by which the Council decided to opt-in to the FAP subject to the resolution of a number of identified concerns including the introduction of satisfactory legislation to protect the Council against ongoing civil liability in relation to leaky buildings subject to the FAP

## Appendix One

### WELLINGTON CITY COUNCIL SUBMISSION ON THE WEATHERTIGHT HOMES RESOLUTION SERVICES (FINANCIAL ASSISTANCE PACKAGE) AMENDMENT BILL

**To:** The Local Government and Environment Select Committee

**From:** Wellington City Council  
101 Wakefield Street, PO Box 2199, Wellington  
Contact: XXXX

**Date:** 18 February 2011

Wellington City Council wishes to appear before the Committee to speak to its submission.

#### 1 Introduction

Wellington City Council (**WCC**) welcomes the opportunity to make a submission on the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Bill (**Bill**).

Figures released by the Department of Building and Housing (**DBH**) indicate that approximately 8.5% of all active Weathertight Homes Resolution Services (**WHRS**) claims as at 30 November 2010 concern properties in Wellington City.<sup>2</sup> On that basis, WCC is the second most affected territorial authority in the country, after Auckland Council.<sup>3</sup>

WCC has been an active participant in the WHRS process since its inception in 2003. WCC's experience is that the resolution of leaky building claims under WHRS legislation involves significant process costs for all parties and is stressful, time-consuming, and extremely litigious. Critically, WCC considers that it is not the most efficient way of effecting the repair of leaky buildings and mitigating the social costs associated with the leaky building problem.

WCC has consequently taken up the Government's offer to participate in the development of the Financial Assistance Package (**FAP**) for leaky building

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<sup>2</sup> Department of Building and Housing, *Weathertight Homes Resolution Services (WHRS) Claims Statistics November 2010*, available at <http://www.dbh.govt.nz/ws-112010> (last accessed 25 January 2011).

<sup>3</sup> Prior to the amalgamation of local authorities in the Auckland Region, WCC was the fourth most affected territorial authority, behind Auckland City Council, North Shore City Council and Waitakere City Council.

owners. WCC endorses the FAP as an alternative to the facilitated dispute resolution process offered under the Weathertight Homes Resolution Services Act 2006 (**WHRS Act**). WCC considers that the FAP offers a pragmatic solution for leaky building owners that is more likely to result in the effective repair of leaky buildings than existing processes.

That said, WCC is conscious that the solution to the leaky building problem must be equitable. In that regard, a major issue for territorial authorities involved in leaky building claims (whether through the civil courts or under the WHRS Act) is the principle of joint and several liability of 'concurrent tortfeasors'. This principle means that a leaky building owner who successfully sues a number of parties who have all contributed to the damage to a building can recover the full amount of compensation from any one of them. This frequently results in territorial authorities making payments in excess of their proportionate liability as determined by the decision-maker (i.e. the relevant Court, the Weathertight Homes Tribunal, or a WHRS Adjudicator, as the case may be). The principle means that territorial authorities, which cannot escape involvement in legal proceedings by winding up or emigrating, are often in the position of 'last man standing'. WCC's experience is that this phenomenon is becoming increasingly apparent as time goes on and the number of solvent and/or locatable parties involved in building work in the mid to late 1990s reduces.

WCC is concerned to ensure that it does not expose itself to multiple payment obligations in relation to any particular leaky building by participating in the FAP: especially given the consequences of the principle of joint and several liability of concurrent tortfeasors. This could occur, for example, where a territorial authority makes a payment to a leaky building owner under the FAP *and* is found liable by way of a cross-claim or third party action taken by other parties when the owner tries to recover the balance of repair costs not covered by the FAP. To avoid this 'double hit' risk, the territorial authorities working closely with the DBH on the development of the FAP sought the introduction of legislation to make certain that a payment made under the FAP by a territorial authority would not only extinguish the territorial authority's potential liability to the leaky building owner, but also to any other person who might be sued by the leaky building owner for the balance of remedial costs not covered by the FAP.

The Bill responds to this concern through proposed section 125F. WCC is grateful for the legislative solution to the problem of uncertain and ongoing liability notwithstanding the making of a payment to facilitate the repair of a leaky building under the FAP. In this regard, WCC strongly supports the intent of the Bill. More detailed comments on proposed section 125F are set out in Part 2 of this submission.

WCC also has a range of comments on other aspects of the Bill, which are discussed in Part 3 of this submission. These comments are relatively technical in nature and are intended to test whether the Bill will operate in accordance with the FAP's policy intent and integrate smoothly with the balance of the



WHRS Act. They relate mainly to the proposed definitions set out in the Bill and the operation of proposed sections 125C to 125E.

WCC is broadly comfortable with proposed sections 125G to 125K, which deal with guarantees or indemnities given by the Minister for Building and Construction as a credit support facility for leaky building owners. WCC has no specific comments in relation to these provisions.

## **2 Limiting the potential liability of participating territorial authorities**

Proposed section 125F provides direct statutory immunity from suit. The Committee will be familiar with the scope of section 125F and it is not summarised here.

WCC is satisfied that the provision will adequately protect territorial authorities in relation to *future* claims under the WHRS Act or through the courts, where the relevant leaky building is or was the subject of a contribution agreement.

However, WCC considers that the provision will not prevent the continuation of existing claims, and potentially a finding of liability against a territorial authority. This is because the language of sections 125F(1) and (2) is active and forward looking. That is, it prevents *new attempts* to name or join a territorial authority, or to apply for a remedy or relief from a territorial authority. In contrast, nothing in sections 125F(1) or (2) requires *existing* claims or applications against territorial authorities to be abandoned.

In the case of leaky building owners, this can be dealt with contractually through the terms of a contribution agreement (i.e. a contractual requirement to discontinue the relevant claim against the contributing territorial authority). However, other parties will not be signatories to the contribution agreement and will, as section 125F(1) and (2) are currently framed, be able to maintain their claims against a contributing territorial authority. In cases lodged in the courts, a territorial authority may consequently continue to face cross claims from co-defendants or claims as a third or subsequent party. Under the WHRS Act, which is not a pleadings based jurisdiction, an Adjudicator has the ability to determine liability between respondent parties notwithstanding that a claimant may have relinquished their claim against a particular respondent.<sup>4</sup>

In either scenario, continued involvement in the claim will involve inevitable process costs, the risk of an award against the territorial authority directly, and the spectre of having to make an even larger second contribution on the basis of the principle of joint and several liability of concurrent tortfeasors.

This leaves territorial authorities vulnerable to ongoing liability and the 'double hit' phenomenon where an existing claim is able to access the FAP.

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<sup>4</sup> Weathertight Homes Resolution Services Act 2006, section 72(2).

WCC considers that this problem can be avoided by adding a new subsection to section 125F to the effect that no court, tribunal or other body considering a weathertightness-related claim in relation to a leaky building can *award* any remedy or relief against a territorial authority, where that territorial authority is a party to a contribution agreement in respect of the building. Using language consistent with existing sections 125F(1) and (2), a new subsection of this nature might read:

- (3) No person may, in any civil proceedings, award, determine, or order any remedy or relief against the contributing party and, if applicable, any additional contributing party relating to an affected dwellinghouse if-
  - (a) the affected dwellinghouse is or was the subject of a contribution agreement; and
  - (b) the civil proceedings relate to the circumstances that gave rise to the need to repair the affected dwellinghouse in accordance with the contribution agreement.

In the context of existing claims, WCC acknowledges that there may be concerns that this proposal involves the retrospective removal of other respondent/defendant parties' right to pursue a claim for contribution from a territorial authority. However, this needs to be balanced against the fact that that remaining respondent/defendant parties will materially benefit from the 50% reduction in the scope of damages that can be sought against them, by virtue of payments made by the Crown and the a territorial authority under the FAP.

It is noted that should the Committee reject the suggested amendment, that the design of the FAP and eligibility criteria gives territorial authorities a tool to mitigate this risk. Specifically, the eligibility criteria as currently agreed between the DBH and territorial authorities, provide territorial authorities the right to disqualify otherwise qualifying claims from the FAP where proceedings have already been issued, or the claim is being progressed through mediation or adjudication under the WHRS Act.

There is a high likelihood that that discretion is likely to be exercised where a territorial authority perceives a 'double hit' risk: i.e. where a claim is being pursued under the WHRS Act or through the courts. While this discretion is for the benefit of WCC, and is necessary given the scope of proposed section 125F, WCC notes that it could be seen as inconsistent with the overall policy intent of the FAP and Bill that supports it. That is, facilitating the remediation of leaky buildings.

WCC considers that this issue can be avoided if the statutory immunity against the 'double hit' risk is appropriately framed as suggested above.

### 3 Other comments

#### **Section 125B(1) - Inconsistency Between 'Additional Contributing Party' And 'Financial Assistance Measures' Definitions**

Subparagraph (a)(ii) of the Bill's definition of 'additional contributing party' covers:

Any other party (if any) who agrees to make a contribution (whether financial or otherwise) towards the agreed repair costs of the affected dwellinghouse concerned ...

This clearly contemplates that a non-financial contribution of relevant work, services, or materials can form part of the remedial contribution made to a claimant under the FAP.

Such a contribution offsets the 'agreed repair costs' for the claimant's leaky building, which are a component of the definition of 'financial assistance measures'.<sup>5</sup> Paragraph (a) of the 'financial assistance measures' definition only captures 'direct financial contributions to a claimant from the contributing party or, if applicable, any additional contributing party'. The reference to direct financial contributions seemingly excludes contributions based on work, services, or materials. There is consequently an inconsistency between the definitions of 'additional contributing party' and 'financial assistance measures'. WCC considers that this could be address to widening the language of the 'financial assistance measures' definition to accommodate the full scope of the 'additional contributing party' definition.

#### **Section 125B(1) - Significance Of 'Qualifying Claimant' Definition**

WCC considers that the establishment of eligibility criteria by the Chief Executive of the DBH by notice in the *Gazette* is a significant aspect of the Bill. It is noted that the eligibility criteria are fundamental to WCC's agreement to participate in the FAP, and the terms of the eligibility criteria will be contractually agreed between WCC and the Crown prior to them being gazetted. This approach is supported as it offers benefits in terms of flexibility, should the participating territorial authorities and the DBH agree changes are needed once the FAP is up and running.

#### **Section 125E - The Immunity For The Crown And Related Entities/Persons**

The Bill notes in its Explanatory Note, that one of the key features of the Bill is the establishment of Crown immunity for liability arising from the administration of repair work in accordance with a contribution agreement.<sup>6</sup>

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<sup>5</sup> Itself an essential component of the Bill's definition of 'contribution agreement'.

<sup>6</sup> See page 2 of the Explanatory Note to the Bill, second bullet point.

Proposed section 125E seeks to immunise the Crown and the other identified persons or entities for claims based on loss or damage that arise from the uptake of the FAP by a leaky building owner. In this regard, the Regulatory Impact Statement for the Bill comments (at paragraph 15):

... the [DBH]'s role to ensure repairs address the issues identified in assessments of damage, and ensure the public money is spent appropriately, creates new potential liability risks for the Crown

In this regard, it is significant that the DBH's view expressed in the Regulatory Impact Statement for the Bill lean strongly away from a statutory Crown immunity, stating:<sup>7</sup>

Protecting the Crown from liability for involvement in the repair process, while leaving councils and the sector fully exposed, will result in strong criticism of the financial assistance package ... From a legal standpoint it could be considered inappropriate for the Crown to legislatively shield itself from liability and is contrary to the principles of good law. For these reasons, the Department of Building and Housing does not consider legislative change [to impose a statutory Crown immunity] is necessary or appropriate.

Despite this view (which dates from 6 September 2010), proposed section 125E of the Bill is proposed and only extends immunity in relation to repair-related damages or loss to the Crown and its Ministers, Treasury and its Secretary, the DBH and its Chief Executive, and employees or contractors of the Treasury or the DBH. WCC questions whether this immunity is appropriate as a matter of public policy, and is concerned that it will unfairly place risk and further financial burden on territorial authorities.

If the Select Committee determines that the concept of an immunity is an appropriate and necessary part of the FAP, WCC submits that that same reasoning should equally apply to territorial authorities, as a key partner with the Crown in the FAP.

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<sup>7</sup> Department of Building and Housing, *Regulatory Impact Statement: Agency Disclosure Statement*, available at <http://www.dbh.govt.nz/UserFiles/File/Weathertightness/Cabinet-papers/pdf/fap-for-leaky-homes-ris.pdf> (last accessed 26 January 2011), at paragraph 62.