

# **Weathertight Homes Resolution Services Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

The purpose of this Bill is to amend the Weathertight Homes Resolution Services Act 2006 (the **Act**)—

- to remove any doubt about the validity of the criteria in clauses 1B and 1C of the notice published under the authority of the Act in the *Gazette* on 28 July 2011 entitled “Contribution Criteria: Financial Assistance Package” (the **notice**); and
- to deem certain claims determined as ineligible on the basis of the meaning of the term built in sections 14 to 18 of the Act to be eligible claims (as a result of the Supreme Court’s decision in *Osborne v Auckland Council* [2014] 1 NZLR 766 (SCNZ)); and
- to widen the definition of qualifying claimant in section 125B of the Act to include claimants that are actively progressing claims so that these persons are not prevented from having recourse to the provisions in the Act relating to the financial assistance package (the **FAP**) established under Part 1A of the Act.

*Criteria*

The criteria in clauses 1B and 1C are two of a number of criteria that a person needs to meet in order for the person to be a qualifying claimant for the purpose of receiving financial contributions to agreed repairs from the Crown, and in some cases the relevant territorial authority, under the FAP.

The Act provides for contribution criteria that are specified by the chief executive by notice in the *Gazette* in respect of the FAP (*see* paragraph (b) of the current definition of qualifying claimant in section 125B(1)). It is the notice, rather than the Act, that contains the detail of the FAP contribution criteria.

The notice was issued in 2011 following consultation between the Chief Executive of the Department of Building and Housing (now the Ministry of Business, Innovation, and Employment) and relevant territorial authorities. The contribution criteria in the notice are applicable only to a relevant territorial authority that has agreed to become a participating territorial authority (**PTA**) for the purpose of the Act.

The effect of the criterion in clause 1C is that, where a FAP claimant commences civil proceedings against a PTA, the claimant can no longer qualify for a Crown contribution under the FAP unless the PTA agrees to the claimant receiving the contribution and the claimant discontinues the civil proceedings entirely. The criterion in clause 1B imposes a similar requirement in relation to adjudication proceedings brought under the Act.

Recent consideration of the criteria in clauses 1B and 1C has raised the question as to whether the criteria, which give PTAs the power not to permit the owner of a dwellinghouse to be eligible for a Crown contribution under the FAP, would be better located in the Act rather than a *Gazette* notice. The criteria in clauses 1B and 1C go to the heart of the relationship between the FAP and civil proceedings, and they were an integral reason why the relevant territorial authorities agreed to become PTAs.

In order to avoid any doubt as to the intended effect of the criteria in clauses 1B and 1C, this Bill moves those criteria into the Act so that there is no question of inconsistency with the Act. The Bill also validates all previous decisions made in accordance with the criteria in clauses 1B and 1C.

The protections in the criteria sit alongside the protection from civil proceedings in section 125G of the Act. However, the protection from civil proceedings in section 125G applies only to PTAs that agree to make contributions to a claimant and only from the point at which the PTA actually makes its first contribution to a claimant. Protection of PTAs from civil proceedings while FAP assessment is underway is, as stated above, an important part of the PTAs' collective decision to become PTAs for the purpose of the FAP.

The FAP is intended to channel resources that would otherwise be used in litigation into repairing leaky homes. This Bill furthers that purpose as it clarifies, so there is no doubt, the intended effect of the criteria in clauses 1B and 1C. The FAP is a time-limited scheme that expires in July 2016.

#### *Built date*

To have an eligible claim under the Act, claimants must meet a series of statutory criteria, including that the claim must be made within 10 years of the date on which the affected structure was built (*see* the requirements of sections 14(a), 15(c), 16(a), 17(a), and 18(c) of the Act). The term built is not defined in the Act.

On 10 June 2014, the Supreme Court held that section 14(a) of the Act, when construed in context and with regard to the Act's purpose, should be interpreted as a paraphrase of section 393 of the Building Act 2004. It held that the word built in section 14(a) was intended to be construed by reference to the expression building work in section 393, which expression encompassed certifications. The effect of that decision is that entitlement to consideration under the Act runs for 10 years from the date on which the code compliance certificate for the building work for the affected structure is issued. This allows for a larger number of claimants than the previous interpretation, being the date of final inspection (and sometimes being a date earlier than the issue of a code compliance certificate).

The Bill deems claimants who were found ineligible on the basis of that previous interpretation of built but who would have been eligible had the decision been made based on the Supreme Court interpretation of built to be eligible.

*Qualifying claimant*

In order to apply for the FAP under the Act, a notice to proceed must be issued. The claimant must become a qualifying claimant so that a notice to proceed can be issued. To become a qualifying claimant there are a number of steps involved, including obtaining an assessor's report, arranging funding, signing a homeowner agreement, commissioning a repair plan, obtaining a building consent, obtaining quotes, and agreeing to a payment plan.

The Act sets a deadline for the FAP of 23 July 2016, which means that claimants who wish to access the FAP need to progress their claims to the notice to proceed stage by 23 July 2016.

The Bill makes an amendment to the definition of qualifying claimant to ensure that claimants actively progressing towards the notice to proceed stage will also be in a position to make an application for the FAP before 23 July 2016 and, therefore, continue to progress under the scheme after 23 July 2016.

**Departmental disclosure statement**

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. It provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2015&no=6>

**Regulatory impact statement**

The Department of Building and Housing produced a regulatory impact statement on 23 November 2010 to help inform the main policy decisions taken by the Government relating to the contents of the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Bill 2010.

A copy of this regulatory impact statement can be found at—

- <http://www.treasury.govt.nz/publications/information-releases/ris/pdfs/ris-dbh-faplh-nov10.pdf>
- <http://www.dbh.govt.nz/ris-financial-assistance-package>

### Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* states that the date of commencement is deemed to be the day on which the Bill is introduced into the House of Representatives.

*Clause 3* identifies the principal Act amended, which is the Weather-tight Homes Resolution Services Act 2006.

### Part 1 Amendments to Part 1A

*Clause 4* amends the interpretation section of Part 1A of the Act. The main changes are to—

- amend the definition of the term qualifying claimant, first, as a result of the contribution criteria being moved from the notice into the Act and, secondly, to ensure that those individuals who are taking reasonable steps to meet the contribution criteria are not disadvantaged by having not completed the preliminary steps before 23 July 2016 (being the final date on which an application may be made for financial assistance);
- insert a definition of the term 2011 *Gazette* notice, to enable the notice to be identified. It can also be seen at <https://gazette.govt.nz/notice/id/2011-go4866>
- insert a definition of the term participating territorial authority, which means the relevant territorial authority if it has agreed to participate in the package of financial assistance measures.

*Clause 5* inserts *new section 125BA* into Part 1A of the Act.

*New section 125BA* moves the criteria from clauses 1B and 1C of the 2011 *Gazette* notice (the **notice**) into the Act with no substantive change in the criteria.

*New section 125BA(1)(a)* sets out the criteria that were previously in clause 1B of the notice and *new section 125BA(1)(b)* sets out the criteria that were previously in clause 1C of the notice. The criteria provide that where the claimant has applied for adjudication (*paragraph (a)*) or has applied for or is involved in other civil proceedings (*paragraph (b)*), and where the relevant PTA has been named as a party in the application or later joined as a party, the claimant must withdraw from adjudication or discontinue the civil proceedings en-

tirely and the PTA must also agree to the claimant subsequently receiving a financial contribution from the Crown under the FAP.

*New section 125BA(2)* sets out a provision that was previously in both clauses 1B and 1C of the notice.

## **Part 2**

### **Consequential amendments, validations, and transitional amendments**

*Clause 6* amends section 4 of the Act, which provides an overview of the Act, to update its contents because of the amendments made by this Bill.

*Clause 7* inserts *new subparts 8 and 9* into Part 2 of the Act. *New subpart 8* comprises—

- *new section 161*, which provides that clauses 1B and 1C of the notice were validly made:
- *new section 162*, which validates those decisions made in reliance on the notice where a claimant was not recognised as a qualifying claimant because the PTA did not agree to the claimant receiving a financial contribution from the Crown under the FAP (the section validates the decisions only to the extent of the invalidity relating to that lack of agreement):
- *new section 163*, which relates to undecided applications made under section 125C of the Act. The effect of this section is that the applications must be determined as if the relevant criteria had been moved into the Act and as if the notice had always been validly made:
- *new section 164* amends the notice to take account of this Bill.

*New subpart 9* deems certain claims to be eligible claims under the Act (without automatically conferring on the claimant the status of a qualifying claimant). This amendment is in response to the Supreme Court's decision in *Osborne v Auckland Council* [2014] 1 NZLR 766 (SCNZ).

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*Hon Dr Nick Smith*

## **Weathertight Homes Resolution Services Amendment Bill**

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**The Parliament of New Zealand enacts as follows:**

- 1 Title**  
 This Act is the Weathertight Homes Resolution Services Amendment Act **2014**.
- 2 Commencement** 5  
 This Act is deemed to have come into force on the day it was introduced into the House of Representatives as a Bill.
- 3 Principal Act**  
 This Act amends the Weathertight Homes Resolution Services Act 2006 (the **principal Act**). 10

**Part 1  
Amendments to Part 1A**

- 4 Section 125B amended (Interpretation)**
- (1) In section 125B(1) and (2), after “In this Part”, insert “and **subpart 8** of Part 2”. 15
- (2) In section 125B(1), replace the definition of **qualifying claimant** with:
  - “**qualifying claimant** means a claimant who has an eligible claim in respect of a dwellinghouse and either—
    - “(a) meets— 20
      - “(i) the contribution criteria that are specified by the chief executive by notice in the *Gazette* in respect of the package of financial assistance measures; and
      - “(ii) the contribution criteria that are specified in **section 125BA**; or 25



- “(b) in the chief executive’s opinion, is taking all reasonable steps to meet the criteria described in **paragraph (a)**”.
- (3) In section 125B(1), insert in their appropriate alphabetical order:
- “**2011 Gazette notice** means the notice published in the *Gazette* on 28 July 2011, at pp 3198 and 3199, issued under this Act and entitled ‘Contribution Criteria: Financial Assistance Package’
- “**participating territorial authority** means the relevant territorial authority if it has agreed to participate in the package of financial assistance measures”.

**5 New section 125BA inserted (Contribution criteria)**

After section 125B, insert:

**“125BA Contribution criteria**

- “(1) The contribution criteria referred to in **paragraph (a)(ii)** of the definition of qualifying claimant in section 125B(1) are as follows:

*“Mediation and adjudication under this Act*

- “(a) if the claimant has applied for adjudication under this Act (regardless of whether the claimant has commenced mediation or adjudication) and the relevant participating territorial authority was either named as a party in the application or later joined to the application, then—
- “(i) the participating territorial authority must agree to the claimant receiving a financial contribution under the package of financial assistance measures; and
- “(ii) the claimant must withdraw from adjudication in accordance with section 67; and

*“Other civil proceedings*

- “(b) if the claimant has applied for or is involved in any other civil proceedings relating to the weathertightness of the dwellinghouse to which the relevant participating territorial authority is named as a party, or has been joined as a party,—
- “(i) the participating territorial authority must agree to the claimant receiving a financial contribution

- under the package of financial assistance measures; and
  - “(ii) the claimant must discontinue the civil proceedings entirely; and
  - “(iii) if the claimant has applied for mediation or adjudication under the Act in respect of the same dwellinghouse, the claimant must also comply with **paragraph (a)(ii)**. 5
- “(2) To avoid doubt, a claimant is not required to withdraw an application for adjudication under **subsection (1)(a)**, or to discontinue civil proceedings under **subsection (1)(b)**, until all other applicable criteria that a person needs to meet in order to become a qualifying claimant are met.” 10

**Part 2**

**Consequential amendments, validations,  
and transitional amendments** 15

**6 Section 4 amended (Overview of this Act)**

Replace section 4(i) with:

- “(i) Part 2—
  - “(i) repeals the Weathertight Homes Resolution Services Act 2002; and 20
  - “(ii) makes consequential amendments; and
  - “(iii) specifies how Part 1 of this Act applies to, and who is to deal with, claims under the Weathertight Homes Resolution Services Act 2002 that have not been disposed of before the transition date (1 April 2007); and 25
  - “(iv) validates certain matters in relation to the 2011 *Gazette* notice; and
  - “(v) deems certain claims to be eligible claims under the Act.” 30

**7 New subparts 8 and 9 of Part 2 inserted**

In Part 2, after subpart 7, insert:

“Subpart 8—Validations connected to 2011  
*Gazette* notice

“**161 Validation of clauses 1B and 1C of 2011 *Gazette* notice**

Clauses 1B and 1C of the 2011 *Gazette* notice were validly made and have always been valid.

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“**162 Certain decisions not invalid because of lack of agreement by participating territorial authority**

“(1) A decision referred to in **subsection (2)** is not invalid merely because a participating territorial authority did not agree to the claimant receiving a financial contribution under the package of financial assistance measures.

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“(2) This subsection refers to a decision, made before the commencement of this section, that a claimant was not a qualifying claimant because the criteria in clause 1B or 1C of the 2011 *Gazette* notice were not met.

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“**163 Certain applications continue on basis of law as amended**

“(1) This section applies to an application made under section 125C but not decided before the commencement of this section.

“(2) For the purposes of determining the application, the amendments made by the Weathertight Homes Resolution Services Amendment Act **2014** must be treated as having been in force on and from the time the application was made.

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“**164 2011 *Gazette* notice amended**

“(1) This section amends the 2011 *Gazette* notice.

“(2) Replace paragraph (b) on page 3198 with:  
“‘(b) meet all of the criteria set out in clause 1 and **section 125BA** of the Act.’

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“(3) Revoke clauses 1B and 1C.

“(4) Replace clause 2A with:

“‘A The claimant must meet all of the criteria set out in clause 1 and **section 125BA** of the Act; and’ .

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“Subpart 9—Certain claimants deemed to  
have eligible claims

**“165 Meaning of affected claimant**

In **section 166**, **affected claimant**, means a person to whom the following circumstances apply: 5

“(a) the person brought a claim under section 9 in respect of a dwellinghouse; and

“(b) the chief executive or the chair decided, within the period starting on 1 April 2007 and ending on 10 June 2014, that the claim was not an eligible claim; and 10

“(c) the sole reason for the chief executive’s or the chair’s decision was that the claim failed to satisfy the criteria in, as the case may be, section 14(a), 15(c), 16(a), 17(a), or 18(c); and

“(d) in reaching that decision, the chief executive or the chair treated the date on which the dwellinghouse was built or altered as a date earlier than the date on which the code compliance certificate for the relevant building work was issued (or, if more than one code compliance certificate was required to be issued, the date on which the final code compliance certificate was issued); and 20

“(e) immediately before the commencement of the Weather-tight Homes Resolution Services Amendment Act **2014**, the person still owned the dwellinghouse.

**“166 Affected claimants deemed to have eligible claims** 25

“(1) An affected claimant is deemed to have an eligible claim under this Act in respect of the dwellinghouse concerned, and the provisions of this Act and the 2011 *Gazette* notice apply accordingly, subject to the rest of this section.

“(2) A claim must be treated as eligible on and from the date on which the claim would have been an eligible claim if the chief executive or the chair had originally decided the claim in the person’s favour. 30

“(3) Clause 1G of the 2011 *Gazette* notice does not apply to an affected claimant. 35

“(4) A claim must be treated as satisfying the requirements of clause 1H(i) and I(i) of the 2011 *Gazette* notice.

“(5) To avoid doubt, this section does not automatically confer on an affected claimant the status of a qualifying claimant.”

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