

Weathertight Homes Resolution Services Amendment Bill

Government Bill

As reported from the Local Government and Environment Committee

Commentary

Recommendation

The Local Government and Environment Committee has examined the Weathertight Homes Resolution Services Amendment Bill, and recommends that it be passed with the amendments shown.

Introduction

The Weathertight Homes Resolution Services Amendment Bill would amend the Weathertight Homes Resolution Services Act 2006, which sets out procedures for owners of leaky buildings to resolve claims and access financial assistance to facilitate the repair of eligible buildings. The bill as introduced has the following three main objectives.

First, the bill aims to remove doubt regarding the validity of clauses 1B and 1C of a Gazette notice published on 28 July 2011, by inserting them into the Weathertight Homes Resolution Services Act. These clauses cover claimants who have applied for adjudication under the Act, or who have applied for, or are involved in, other civil proceedings.

Second, the bill aims to deem certain claims eligible which previously were not as a result of the term “built” in sections 14 to 18 of the Act. The interpretation of the term was challenged in the 2014 Osborne v Auckland Council Supreme Court case. Its ruling potentially allowed a larger number of claims to be eligible under the Act.

Third, the bill aims to widen the definition of “qualifying claimant” so that claimants are not required to have reached the “notice to proceed” stage by the date on which the financial assistance package (FAP) scheme expires in July 2016. Instead, claimants actively progressing claims would be eligible for the FAP. This would allow them to apply for a subsidy of up to 50 percent of the cost of repairing a leaky build-

ing, through Crown and participating territorial authority (PTA) financial contributions.

This commentary covers the main amendments that we recommend to the bill.

Qualifying claimants

We recommend that the definition of qualifying claimant in clause 4(2) of the bill be deleted. Instead, we recommend inserting clause 5, new section 125BA of the principal Act, which groups together all related matters into one section. This definition would make it clear that a claimant must meet the contribution criteria in either clause 1 of the 2011 Gazette notice, or in any other notice issued by the chief executive of the Ministry of Business, Innovation and Employment.

We also recommend inserting new section 125BB into clause 5, to distinguish between the eligibility requirements for Crown and PTA contributions, and to make it clear that in order to receive a PTA contribution a claimant must first have qualified for a Crown contribution. This section would address concern about the two criteria being unclear in the bill as introduced.

We note concern about the reference to a claimant taking “all reasonable steps” to meet the contribution criteria, which would, as the result of our amendments, now be located in new section 125BA of the Act. We do not believe it would be practicable or desirable to specify in legislation what constitutes reasonable steps, but would expect the chief executive of the Ministry of Business, Innovation and Employment to take into account actions by the claimant such as obtaining an assessor’s report or an agreed repair plan. We note that the chief executive of the ministry has the power to terminate what it considers to be inactive claims under section 56 of the Act.

Gazette notice

As a result of our recommended changes above, we recommend some consequential amendments to clause 7, (new sections 164(1A), 164(2), 164(4), and 164(5) of the principal Act), to amend the 2011 Gazette notice.

Certificate requirement

We are aware of concern that the bill as introduced would make certain claims eligible when a code compliance certificate was not issued at the date of the eligibility decision. Accordingly, we recommend amending clause 7, new section 165(a), to make it clear that a code compliance certificate must have been issued by the date of an eligibility decision.

For consistency with section 14 of the Act, we also recommend amending clause 7, new section 165(a) to specify that code compliance certificates must have been issued before 1 January 2012.

Additional eligible claims

We recommend amending clause 7, (new section 166(4) of the principal Act), to specify that a claim would be treated as satisfying clauses 1H(ii) and 1I(ii) of the Gazette

notice. We consider this to have been an oversight in the bill as introduced, which would have prevented claimants from being eligible for the FAP if they had commenced repairs to a house after their claim had been found to be ineligible due to the previous interpretation of “built”.

Regulations Review Committee advice

We note a suggestion by the Regulations Review Committee that the full content of the Gazette notice contribution criteria be inserted into the Act. However, we note that the criteria are the result of PTA negotiations, and for future flexibility we consider it unnecessary for them to be included in the Act in full.

The Regulations Review Committee also suggested specifying that the Gazette notice is a disallowable instrument. We do not consider this necessary, noting that it is already a disallowable instrument under sections 38 and 39 of the Legislation Act 2012.

Appendix

Committee process

The Weathertight Homes Resolution Services Amendment Bill was referred to the committee on 10 March 2015. The closing date for submissions was 16 April 2015. We received and considered three submissions from interested groups, and heard from one submitter.

We received advice from the Ministry of Business, Innovation and Employment and the Parliamentary Counsel Office. The Regulations Review Committee reported to the committee on the powers contained in clause 4 of the bill.

Committee membership

Scott Simpson (Chairperson)

Matt Doocey

Paul Foster-Bell

Julie Anne Genter

Joanne Hayes

Tutehounuku Korako

Ron Mark

Todd Muller

Eugenie Sage

Su'a William Sio

Dr Megan Woods

**Weathertight Homes Resolution Services Amendment
Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Dr Nick Smith

Weathertight Homes Resolution Services Amendment Bill

Government Bill

Contents

	Page
1 Title	2
2 Commencement	2
3 Principal Act	2
Part 1	
Amendments to Part 1A	
4 Section 125B amended (Interpretation)	2
5 New section 125BA inserted (Contribution criteria)	3
125BA Contribution criteria	3
<u>5 New sections 125BA and 125BB and cross-heading inserted</u>	<u>3</u>
<u>125BA Meaning of qualifying claimant</u>	<u>4</u>
<i>Eligibility for financial assistance measures</i>	
<u>125BB Eligibility for financial assistance measures</u>	<u>5</u>
Part 2	
Consequential amendments, validations, and transitional amendments	
6 Section 4 amended (Overview of this Act)	5
7 New subparts 8 and 9 of Part 2 inserted	5
Subpart 8—Validations connected to 2011 <i>Gazette</i> notice	
161 Validation of clauses 1B and 1C of 2011 <i>Gazette</i> notice	5
162 Certain decisions not invalid because of lack of agreement by participating territorial authority	5
163 Certain applications continue on basis of law as amended	6
164 <u>Amendments to 2011 <i>Gazette</i> notice amended</u>	<u>6</u>

Subpart 9—Certain claimants deemed to have eligible claims		
165	Meaning of affected claimant	6
166	Affected claimants deemed to have eligible claims	7

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~~ 23 February 2015.
- 3 Principal Act** 10
This Act amends the Weathertight Homes Resolution Services Act 2006 (the **principal Act**).

**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”.
- (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—
- (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
- (b) ~~in the chief executive’s opinion, is taking all reasonable steps to meet the criteria described in~~ **paragraph (a)**
- qualifying claimant** has the meaning given in **section 125BA**
- (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

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(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—

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(i) the participating territorial authority must agree to the claimant receiving a financial contribution under the package of financial assistance measures; and

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(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,—

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(i) the participating territorial authority must agree to the claimant receiving a financial contribution under the package of financial assistance measures; and

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(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)**.

(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.

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5 New sections 125BA and 125BB and cross-heading inserted

After section 125B, insert:

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125BA Meaning of qualifying claimant

- (1) In this Part, **qualifying claimant** means a claimant who has an eligible claim in respect of a dwellinghouse and who—
- (a) meets—
- (i) the contribution criteria specified by the chief executive in either clause 1 of the 2011 *Gazette* notice (as amended by the Weather-tight Homes Resolution Services Amendment Act **2014**) or any other notice in the *Gazette* that the chief executive has issued for the purposes of setting contribution criteria; and 5
- (ii) the contribution criteria specified in **subsection (2)**; or 10
- (b) in the chief executive’s opinion, is taking all reasonable steps to meet the contribution criteria described in **paragraph (a)**.
- (2) The contribution criteria referred to in **subsection (1)(a)(ii)** are as follows:
- (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— 15
- (i) the participating territorial authority must agree to the claimant receiving a financial contribution under the package of financial assistance measures; and 20
- (ii) the claimant must withdraw from adjudication in accordance with section 67; and
- (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,— 25
- (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 30
- (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)**.
- (3) To avoid doubt, a claimant is not required to withdraw an application for adjudication under **subsection (2)(a)**, or to discontinue civil proceedings under **subsection (2)(b)**, until all other applicable criteria that a person needs to meet in order to become a qualifying claimant are met. 35

Eligibility for financial assistance measures

125BB Eligibility for financial assistance measures

- (1) All qualifying claimants are eligible for financial assistance measures from the Crown.
- (2) Only those qualifying claimants who also meet the criteria specified in clause 2 of the 2011 *Gazette* notice (or the equivalent clause in any other *Gazette* notice) are eligible for financial assistance measures from participating territorial authorities.

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Part 2

Consequential amendments, validations, and transitional amendments

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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
- (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
- (iv) validates certain matters in relation to the 2011 *Gazette* notice; and
- (v) deems certain claims to be eligible claims under the Act.

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7 New subparts 8 and 9 of Part 2 inserted

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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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**Weathertight Homes Resolution Services Amendment
Bill**

Part 2 cl 7

(2) This subsection refers to a decision, made before the commencement of this section ~~23 February 2015~~, that a claimant was not a qualifying claimant because the criteria in clause 1B or 1C of the 2011 *Gazette* notice were not met.

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. 5

(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.

164 Amendments to 2011 *Gazette* notice amended 10

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

(1A) Delete all the words after the heading “Contribution Criteria: Financial Assistance Package” and before the heading “Definitions”.

(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. 15

(2) In clause 1, delete “To qualify for a contribution from the Crown, all of the criteria in this clause 1 must be met.”.

(3) Revoke clauses 1B and 1C.

(4) Replace clause 2A with: 20

A The claimant must meet all of the criteria set out in clause 1 and ~~section 125BA~~ of the Act; and

(4) In clause 2, delete “Subject to clause 2C, to qualify for a contribution from a Participating Territorial Authority:”.

(5) Revoke clause 2A. 25

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:

(a) the person brought a claim under section 9 in respect of a dwellinghouse; and 30

(a) the person brought a claim under section 9 in respect of the construction or alteration of a dwellinghouse for which—

(i) 1 or more code compliance certificates were issued for the relevant building work; and 35

- (ii) the certificate or certificates were issued before 1 January 2012;
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 5
- (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~~ constructed 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~~ 1 code compliance certificate was ~~required to be~~ issued, the date on which the final code compliance certificate was issued); and 10
- (e) immediately before ~~the commencement of the Weathertight Homes Resolution Services Amendment Act 2014~~ 23 February 2015, the person still owned the dwellinghouse. 15

166 Affected claimants deemed to have eligible claims

- (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 (as amended by the Weathertight Homes Resolution Services Amendment Act 2014) apply accordingly, subject to the rest of this section. 20
- (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. 25
- (3) Clause 1G of the 2011 *Gazette* notice does not apply to an affected claimant.
- (4) A claim must be treated as satisfying the requirements of clause 1H(i) and (ii) and I(i) and (ii) 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. 30

Legislative history

23 February 2015
10 March 2015

Introduction (Bill 6-1)
First reading and referral to Local Government and Environment
Committee