

# **Weathertight Homes Resolution Services (Remedies) Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

This Bill amends the Weathertight Homes Resolution Services Act 2006 (the **Act**) to make clear the remedies that may be—

- claimed under the Act; and
- ordered by the Weathertight Homes Tribunal (the **tribunal**) in determining a claim adjudicated by it under the Act.

In particular, the amendments make it clear that those remedies include general damages for mental distress and anxiety. To that extent, the amendments reverse effects of the decision in *Hartley & Another v Balemi & Others* (High Court, Auckland, CIV 2006-404-002589, 29 March 2007, Stevens J). That decision relates to the Weathertight Homes Resolution Services Act 2002 (the **former Act**, repealed on 1 April 2007), but the similarities in their provisions mean that the decision is also relevant to claims under the Act.

The Act is intended to provide claimants with access to a speedy, flexible, and cost-effective procedure for the assessment and resolution of their claims that is an alternative to the courts. Section 90(1) of the Act empowers the tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law.

The amendments ensure that remedies may be claimed in relation to, or for consequences of (for example, for mental distress the claimant suffers as a consequence of), all or any of the following:

- deficiencies that enabled the penetration of water into the building concerned:

- the penetration of water into it:
- damage or loss of value caused by the penetration of water into it:
- loss of value caused by the fact that there are deficiencies in it:
- deficiencies that are likely in future to enable the penetration of water into it.

A **deficiency** of a building (as defined in section 8 of the Act) is any aspect of its design, construction, or alteration, or of materials used in its construction or alteration, that has enabled (or, as the case requires, is likely in future to enable) water to penetrate it.

The Act is amended so a claim brought under it, and eligible for mediation and adjudication services under it,—

- may be for general damages (for example, for relevant mental distress), or for any other remedy, that could be claimed in a court of law in relation to, or for consequences of, all or any of specified damage, deficiencies, loss of value, and penetration of water; and
- may be resolved by a determination that is made under it by the tribunal and that is or includes an order requiring the payment of general damages (for example, for relevant mental distress).

Similar amendments will also apply to claims initiated, and that the Act provides are to be dealt with, under the former Act.

## Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* relates to commencement. If enacted, the Bill will come into force on the day after the date of Royal assent.

*Clause 3* identifies the principal Act amended. References in this analysis to sections are, unless the context otherwise requires, references to sections of the principal Act.

## Part 1 General provisions

*Clause 4* states the Bill's purpose.

*Clause 5* specifies the claims affected by amendments in this Bill. The Bill does not affect any claim that was the subject of the

proceeding *Hartley & Another v Balemi & Others* (High Court, Auckland, CIV 2006-404-002589, 29 March 2007, Stevens J).

*Clause 6* relates to claims affected by, but brought before the commencement of, the amendments in this Bill. It makes clear that claimants may amend those claims to include in them any remedy that may be claimed under—

- *new section 50* (as substituted by *clause 10*); or
- *new section 26A* of the former Act (a modification of that Act required by *new section 148A* inserted by *clause 14*).

*Clause 7* ensures the Bill does not affect claimants' ability to withdraw claims under the former Act, either to discontinue them, or to have them adjudicated under the principal Act.

*Clause 8* ensures the Bill does not affect specified determinations.

## Part 2 Amendments to principal Act

*Clause 9* amends section 8, which relates to interpretation. The amendment inserts definitions of damages, general damages, mental distress, and relevant mental distress.

*Clause 10* substitutes a *new section 50*, which relates to remedies claimants may seek under the principal Act.

*New subsection (1)* largely re-enacts section 50(1), but also ensures that an eligible claim under the principal Act may be for any remedy that could be claimed in a court of law in relation to, *or for consequences of*, all or any of specified damage, deficiencies, loss of value, and penetration of water. *New section 50* contains no exact equivalent to section 50(2). That is because the references in *new subsection (1)* to deficiencies impose limits similar to those imposed by section 50(2).

*New subsection (2)* ensures that a **remedy**, in *new subsection (1)*, includes general damages (for example, for relevant mental distress).

*New subsection (3)* is an equivalent provision to section 50(3).

*Clause 11* amends section 62(3)(c), which relates to applications to have a claim adjudicated, so that the form for those applications refers only to remedies (and not also relief), and also to add a reference to *new section 50* (what remedies may be claimed).

*Clause 12* amends section 90, which specifies orders the tribunal may make and that are, or are part of, the tribunal's determination of a claim adjudicated under the principal Act. The amendment substitutes *new subsections (1) to (1B)*.

*New subsection (1)* re-enacts section 90(1) so as to correct an erroneous reference to "A tribunal".

*New subsection (1A)* ensures an order under *new subsection (1)* may require the payment of general damages (for example, for relevant mental distress).

*New subsection (1B)* ensures *new subsection (1A)* does not limit *new subsection (1)*.

*Clauses 13 to 15* relate to claims initiated, and that the Act provides are to be dealt with, under the former Act. *Clause 13* substitutes a *new section 148(1)*, which requires the claims to be dealt with under the former Act as modified by *new section 148A* (inserted by *clause 14*). *New section 148A* explains that, for the purposes of *new section 148(1)*, the former Act is modified in the manner specified in *new Schedule 4* (added by *clause 15*).

## **Regulatory impact and compliance cost statement**

### **Executive summary**

As a result of a recent decision of the High Court, general damages for mental anxiety or distress cannot at present be awarded under the Weathertight Homes Resolution Services Act 2006 (the **Act**). However, the Act is intended to provide claimants with access to a speedy, flexible, and cost-effective procedure for the assessment and resolution of their claims that is an alternative to the courts.

The proposed amendments to the Act:

- make it clear that damages of that kind can be awarded:
- reverse effects of a judicial decision that reduce the effectiveness of the current legislation:
- cost less than the continuance of the status quo:
- make it possible for claimants to obtain general damages equivalent to those available in the courts.

### **Adequacy statement**

The Department of Building and Housing confirms that the principles of the Code of Good Regulatory Practice and the regulatory

impact analysis requirements have been complied with, except for the consultation requirements. Consultation was not as full as would normally be the case because of the short timeframes.

### **Status quo and problem**

A recent decision of the High Court has set a precedent by interpreting the Weathertight Homes Resolution Services Act 2002 to mean that general damages for mental anxiety or distress cannot be awarded under that former Act. This sets a precedent for decisions made under the Act.

The amendment has been proposed to make it clear that the tribunal may make an order for general damages for mental distress and anxiety. The amendment will have the effect of restoring the situation to what it was before the decision of the High Court, when general damages for mental anxiety or distress were able to be awarded.

### **Objectives**

The objectives that options should be measured against are those that are reflected in the purpose of the Act. That purpose is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

### **Alternative options**

Two options have been considered:

#### *Option 1*

Amend the Act to make it clear that general damages for mental anxiety or distress can be awarded under the Act.

#### *Option 2*

Retain the status quo.

The costs and benefits of the options are summarised in tables 1 and 2.

**Table 1—Costs and benefits of the proposed amendment**

**Costs**

*Cost to respondents:*

Respondents will potentially have to pay more in general damages.

**Benefits**

*Benefit to claimants:*

Claimants will potentially receive compensation equivalent to what they could receive in the court system.

*Benefits to all parties:*

Claims are more likely to be resolved in the WHRS process alone, reducing costs to all parties.

*Benefit to the Crown:*

If claims are more likely to be resolved solely through the WHRS system the Crown will benefit from more efficient use of judicial and semi-judicial resources.

*Benefits to others in the court system:*

Others in the court system will benefit from weathertightness claims using the alternative process.

*Benefit to the credibility of the current legislation:*

The full availability of general damages helps to achieve fully the purpose of the Act.

**Table 2—Costs and benefits of the status quo**

**Costs**

*Cost to claimants:*

The potential amount that claimants receive is less than what they could receive:

- in court
- in the WHRS process before the status quo.

*Cost to all parties:*

The total cost to all parties will be higher (than if the amendment is passed) because the claimant is more likely to choose the court system. Costs will be higher in the court system because of the greater length and complexity of the process. Claimants are likely to abandon any claim for general damages for mental anxiety or distress as it is not economic to pursue that claim in the courts.

**Benefits**

*Benefit to respondents:*

The potential amount they have to pay is reduced because no general damages for mental anxiety or distress are able to be awarded.

*Benefit mostly to claimants:*

A higher incidence of claims being pursued in court increases the likelihood of legal costs being awarded. This is more likely to benefit claimants than respondents. This is a benefit (in the sense of compensation for loss from legal costs) not available in the WHRS process. Costs awarded do not, however, cover the actual cost of bringing the action. There is always a shortfall.

**Costs***Cost to the Crown:*

Weathertightness claims in the court system will incur a higher cost to the Crown than if those claims use the WHRS process.

*Cost to others in the court system:*

A higher volume of cases in the court system is likely to result in delays for other cases, with associated costs for those involved.

*Cost to the credibility of the current legislation:*

The purpose of the Act is not achieved fully due to the narrowed availability of general damages.

**Benefits****Preferred option**

Option 1 is the preferred option because it:

- enables parties to resolve their claims in an alternative process that is faster and more cost-effective than the courts:
- retains the ability to provide general damages to claimants in a manner equivalent to the courts:
- restores the credibility of the process set up by the legislation.

**Implementation and review**

It is proposed to refer the Bill to the Social Services Committee and to pass the Bill in 2007.

**Consultation**

The proposed amendment has been discussed with the Ministry of Justice and the Crown Law Office.

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*Hon Clayton Cosgrove*

# **Weathertight Homes Resolution Services (Remedies) Amendment Bill**

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

- 1 Title**  
This Act is the Weathertight Homes Resolution Services (Remedies) Amendment Act **2007**.
- 2 Commencement** 5  
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act amended** 10  
This Act amends the Weathertight Homes Resolution Services Act 2006.
- Part 1  
General provisions**
- 4 Purpose of this Act**  
The purpose of this Act is to amend the principal Act so a claim brought under it, and that is an eligible claim,— 15
- (a) may be for general damages (for example, for relevant mental distress), or for any other remedy, that could be claimed in a court of law in relation to, or for consequences of, all or any of specified damage, deficiencies, loss of value, and penetration of water; and 20
- (b) may be resolved by a determination that is made under it by the tribunal and that is or includes an order requiring the payment of general damages (for example, for relevant mental distress).
- 5 Claims affected by amendments made by this Act** 25
- (1) The amendments made by this Act apply only to the following claims:
- (a) claims brought under the principal Act after the commencement of this Act; and
- (b) claims brought under the principal Act, but not withdrawn, terminated, or otherwise disposed of (for example, through resolution by a settlement agreement, or by a determination by the tribunal), before the commencement of this Act; and 30

- (c) claims adjudication of which was initiated under the Weathertight Homes Resolution Services Act 2002 (in this Act called the **former Act**) before the transition date and that,—
- (i) under section 149 of the principal Act must, if they are not withdrawn before they are disposed of under the former Act, be dealt with in accordance with section 148 of the principal Act by a person specified in section 149(1) of the principal Act; and
  - (ii) are not withdrawn, terminated, or otherwise disposed of before the commencement of this Act.
- (2) The claims in **subsection (1)(a) and (b)** include claims—
- (a) brought under the former Act; and
  - (b) of the kind specified in **subsection (1)(c)**; and
  - (c) that, in the way contemplated by **section 7(a)**, are withdrawn and adjudicated under the principal Act.
- (3) A reference in **subsection (1)(b)** to a claim brought under the principal Act includes a claim to which subpart 3, 4, or 5 of Part 2 of the principal Act applies, and therefore to which Part 1 of the principal Act applies—
- (a) as if it were a claim brought under the principal Act; and
  - (b) subject to the relevant modifications specified in subpart 3, 4, or 5 of Part 2 of the principal Act.
- (4) The former Act applies to a claim that was the subject of the proceeding *Hartley & Another v Balemi & Others* (High Court, Auckland, CIV 2006-404-002589, 29 March 2007, Stevens J) as if this Act had not been enacted.
- (5) **Subsection (4)** overrides **subsections (1) to (3)**.
- 6 Amending affected claims to include remedies available**
- Nothing in this Act prevents the claimant concerned from amending a claim of the kind specified in **section 5(1)(b) or (c)**, at any time before it is withdrawn, terminated, or otherwise disposed of, to include in it a claim for any remedy that may be claimed under—
- (a) section 50 of the principal Act (as substituted by **section 10** of this Act); or

- (b) **section 26A** of the former Act (a modification of that Act required by **section 148A** of the principal Act inserted by **section 14** of this Act).

- 7 Ability to withdraw claim under former Act to have it adjudicated under principal Act not affected by this Act** 5  
Nothing in this Act prevents a claim of the kind specified in **section 5(1)(c)** from being—
- (a) withdrawn, and adjudicated under the principal Act, in accordance with section 150 or 153, and subject to the relevant modifications specified in subpart 6 of Part 2, of the principal Act; or 10
- (b) withdrawn under section 30 of the former Act (as contemplated by section 148(4) of the principal Act).
- 8 Determinations not affected by this Act** 15  
This Act does not affect determinations made before the commencement of this Act, whether they are made—
- (a) by the tribunal, and under the principal Act; or
- (b) by an adjudicator or a person specified in section 149(1) of the principal Act, and under the former Act.

## **Part 2** 20

### **Amendments to principal Act**

- 9 Interpretation**
- Section 8 is amended by inserting the following definitions in their appropriate alphabetical order:
- “**damages** means any form of monetary compensation or damages (however described) 25
- “**general damages** means damages that—
- “(a) cannot be objectively quantified in monetary terms; and therefore
- “(b) are assessed and quantified in broader terms 30
- “**mental distress** means all or any of the following:
- “(a) emotional or mental anxiety:
- “(b) distress or stress
- “**relevant mental distress**, in relation to a claimant, means mental distress suffered by the claimant as a consequence of 35

all or any of the damage, deficiencies, loss of value, and penetration of water specified in **section 50(1)(a) to (e)**”.

- 10 New section 50 substituted**
- Section 50 is repealed and the following section substituted:
- “50 What remedies may be claimed** 5
- “(1) As long as it is an eligible claim, a claim under this Act may be for any remedy that could be claimed in a court of law in relation to, or for consequences of, all or any of the following:
- “(a) deficiencies that enabled the penetration of water into the building concerned: 10
- “(b) the penetration of water into the building concerned:
- “(c) damage or loss of value caused by the penetration of water into the building concerned:
- “(d) loss of value caused by the fact that there are deficiencies in the building concerned: 15
- “(e) deficiencies that are likely in future to enable the penetration of water into the building concerned.
- “(2) **Remedy**, in **subsection (1)**, includes (without limitation) general damages (for example, for relevant mental distress).
- “(3) **Subsections (1) and (2)**— 20
- “(a) are not limited or affected by subsection (2)(d), (3)(d), or (4)(d) of section 42; but
- “(b) are subject to section 91 (which relates to costs of adjudication proceedings).”
- 11 How to initiate adjudication** 25
- Section 62(3)(c) is amended—
- (a) by omitting “relief or”; and
- (b) by inserting “(see **section 50**)” after “remedy”.
- 12 Tribunal’s determination: substance** 30
- Section 90(1) is repealed and the following subsections are substituted:
- “(1) The tribunal may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law.

“(1A) An order under **subsection (1)** may require the payment of general damages (for example, for relevant mental distress).

“(1B) **Subsection (1A)** does not limit **subsection (1)**.”

**13 Claim may continue under former Act or be withdrawn** 5  
Section 148(1) is repealed and the following subsection substituted:

“(1) The claim must be dealt with—

“(a) as if Part 1 had not been enacted; and

“(b) under the former Act as modified by **section 148A**.”

**14 New section 148A inserted** 10  
The following section is inserted after section 148:

“**148A How former Act modified for section 148(1)**

The former Act must for the purposes of section 148(1) be treated as if it had been amended in the manner specified in **Schedule 4**.” 15

**15 New Schedule 4 added**  
The principal Act is amended by adding the **Schedule 4** set out in the **Schedule**.

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**Schedule**  
**New Schedule 4 added to principal Act**

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**Schedule 4**  
**Modifications to former Act for section 148(1)**

s 148A

<b>Section 5</b>	5
Insert in their appropriate alphabetical order:	
“ <b>damages</b> means any form of monetary compensation or damages (however described)	
“ <b>general damages</b> means damages that—	
“(a) cannot be objectively quantified in monetary terms; and therefore	10
“(b) are assessed and quantified in broader terms	
“ <b>mental distress</b> means all or any of the following:	
“(a) emotional or mental anxiety:	
“(b) distress or stress	15
“ <b>relevant mental distress</b> , in relation to a claimant, means mental distress suffered by the claimant as a consequence of all or any of the damage, deficiencies, loss of value, and penetration of water specified in <b>section 26A(1)(a) to (d)</b> .”	
<b>New section 26A</b>	20
Insert after section 26:	
“ <b>26A What remedies may be claimed</b>	
“(1) As long as it is an eligible claim, a claim under this Act may be for any remedy that could be claimed in a court of law in relation to, or for consequences of, all or any of the following:	25
“(a) deficiencies that enabled the penetration of water into the building concerned:	
“(b) the penetration of water into the building concerned:	
“(c) damage or loss of value caused by the penetration of water into the building concerned:	30
“(d) loss of value caused by the fact that there are deficiencies in the building concerned.	
“(2) In <b>subsection (1)</b> ,—	
“ <b>deficiency</b> , in relation to a building, means any aspect of its design, construction, or alteration, or of materials used in its	35

**Schedule 4**—*continued***New section 26A**—*continued*

construction or alteration, that has enabled water to penetrate it

“**remedy** includes (without limitation) general damages (for example, for relevant mental distress).

“(3) **Subsections (1) and (2)**—

“(a) are not limited or affected by section 7(2); but

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“(b) are subject to section 43 (which relates to costs of adjudication proceedings).”

**Section 42**

Insert after section 42(1):

“(1A) An order under subsection (1) may require the payment of general damages (for example, for relevant mental distress).

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“(1B) **Subsection (1A)** does not limit subsection (1).”

