



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

WEATHERTIGHT HOMES RESOLUTION SERVICES AMENDMENT BILL

16/04/2015

Submission on the Weathertight Homes Resolution Services Amendment Bill

Introduction and summary

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Weathertight Homes Resolution Services Amendment Bill (Bill).
2. This submission sets out the Law Society's recommendations on some issues. These are largely of a technical nature, to ensure the amendments to the Weathertight Homes Resolution Services Act 2006 Act (Act) achieve the Bill's objectives.
3. The Law Society also raises one issue relating to the treatment of potential claimants who are made eligible by the amendment, but who may now be unable to satisfy the contribution criteria.

Commencement date (clause 2)

4. Clause 2 of the Bill states that the 'Act is deemed to have come into force on the day it was introduced into the House of Representatives as a Bill'. The Bill was introduced on 23 February 2015 and it is recommended that clause 2 should be amended to state 'This Act comes into force on 23 February 2015'.

Interpretation (clause 4)

5. Clause 4(3) defines 'participating territorial authority', but does not list those participating territorial authorities. Qualifying claimants have no certainty that in pursuing the financial assistance package (FAP) they will have a participating territorial authority as an additional contributing party. The Law Society recommends that participating territorial authorities are listed in a schedule to the Bill, with a provision in the Bill that additions and deletions to that Schedule could be made by the chief executive by notice in the *Gazette*.
6. The Bill proposes to transfer the contribution criteria for a qualifying claimant from the 2011 *Gazette* notice into the Act. The Law Society suggests that the users of the Act would be better served if all of the contents of the 2011 *Gazette* notice were incorporated into the Act.
7. Further, the Bill (new subpart 8, section 164) then makes deletions and amendments to the 2011 *Gazette* notice. This is not an efficient way of providing access to or informing the users of the Act.
8. Clause 4(2) of the Bill alters the definition of 'qualifying claimant'.
9. However, no guidance is provided as to how either the claimant or the chief executive is to satisfy clause 4(2)(b) being that:

in the chief executive's opinion, [the claimant] is taking all reasonable steps to meet the criteria described in paragraph (a).
10. The Law Society recommends that the Bill includes a power for the chief executive to:
 - a undertake periodic reviews of claimants who wish to avail themselves of the FAP, but have yet to fully satisfy the criteria in clause 4(2)(a), and

- b where in the chief executive's opinion the claimant may not be taking all reasonable steps to meet those criteria, a warning letter be sent to the claimant requiring him or her to improve the time in which the steps are being taken otherwise he or she may be deemed ineligible to partake in the FAP.
11. The Bill aims to widen the definition of 'qualifying claimant' in section 125B of the Act to include claimants who are actively progressing claims so that these persons are not prevented from having recourse to the FAP provisions in the Act. However, if the Bill is passed without amendment, there is a subset of owners who had previously been ineligible and will become eligible, but will still not qualify for assistance under the FAP scheme.
 12. The Bill deems owners who were regarded as ineligible based on the case law prior to *Osborne v Auckland Council* [2014] 1 NZLR 766 (SCNZ) (defined as *affected claimants*) to be eligible. In essence, its function is to correct the injustice to those owners arising from an incorrect application of the law.
 13. However, if the Bill is passed in its current form, some of those affected claimants – specifically, those who repaired their houses after their claim was deemed ineligible – will still not be able to obtain financial assistance under the FAP provisions. The Bill in its current form does not allow owners in that position to apply for the FAP, even if they would have been able to meet the contribution criteria at the time that their claim was deemed ineligible, for the reasons set out below.
 14. Section 125C of the Act allows owners who are qualifying claimants to apply to obtain financial assistance. Qualifying claimants are persons who have an eligible claim and meet certain contribution criteria specified by notice in the *Gazette* dated 28 July 2011 (section 125B). Owners who have already repaired their homes do not meet the contribution criteria as set out in the *Gazette* notice, unless they meet the requirements of clauses 1H or 1I of the *Gazette* notice.
 15. Proposed section 166 (to be inserted by the Bill) states

Affected claimants deemed to have eligible claims

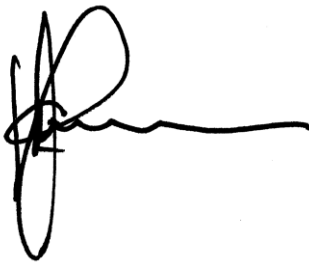
 - (1) An affected claimant is deemed to have an eligible claim under this Act in respect of the dwellinghouse concerned, and the provisions of this Act and the 2011 *Gazette* notice apply accordingly, subject to the rest of this section.
 - (2) A claim must be treated as eligible on and from the date 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.
 - ...
 - (5) To avoid doubt, this section does not automatically confer on an affected claimant the status of a qualifying claimant.
 16. The effect of proposed section 166 is to exempt affected claimants from the requirement to comply with the three month notice period in clause 1G (which expired three months after the publication of the *Gazette* notice), and to deem them to comply with the limbs of clauses 1H and 1I which require them to be eligible claimants.
 17. But proposed section 166(5) still requires these owners to meet the status of a qualifying claimant in all other respects. That is no longer possible for an owner who has repaired their home. That owner will be unable to meet clause 1E, because repairs have been completed and a repair plan is redundant. Nor can they meet the requirements of clause 1H and 1I, if their repairs were not under way before 28 July 2011 (which seems unlikely for most affected claimants). They will therefore not be able to *qualify* for the FAP, despite the Bill deeming them to be *eligible*.
 18. The contribution criteria in the *Gazette* notice permitted certain claimants to obtain financial assistance if those repairs were carried out/commenced before 28 July 2011 and a building consent

was granted on or after 1 November 2009. This means that, even as initially implemented, the FAP scheme permitted some owners to get financial assistance despite having fixed their homes before they applied for it. Therefore, there does not appear to be any policy reason for owners who have repaired their houses after their claim was deemed ineligible not to be able to obtain financial assistance in appropriate circumstances.

19. As at 31 January 2015, there were 1,147 claims representing 3,528 homes that had been assessed as qualifying for the Government contribution of 25%.¹ If the Bill is enacted, the Government has estimated that there will be about an extra 70 families with homes that will be deemed eligible.²
20. The Bill as it stands will require these 70 owners to file an application for adjudication if they have repaired their houses and wish to seek compensation, without the benefit of access to the FAP. The Law Society questions whether this consequence is intended and, if so, whether there is a policy justification for distinguishing between these homeowners and others who were previously considered ineligible.

Conclusion

21. The Law Society does not wish to appear in support of this submission, but is happy to meet with the Committee or officials advising if that would be of assistance.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long, horizontal, wavy line extending to the right.

Chris Moore
President
16 April 2015

¹ (10 March 2015) 703 NZPD 2055 per Dr Nick Smith.

² Ibid.