Department of
Building and Housing
Te Tari Kaupapa Whare

8 September 2010

Mr Tony Marryatt
Chief Executive
Christchurch City Council
P O Box 237
CHRISTCHURCH 8140

Dear Tony

COUNCIL AGREEMENT TO PARTICIPATE IN THE LEAKY HOMES FINANCIAL ASSISTANCE PACKAGE

After the most devastating earthquake in 80 years, we know you and your officials have pressing matters to deal with and we fully understand that in the present circumstances, the financial assistance package for the owners of leaky homes must become a second order of priority. Nevertheless, we hope you find the following information useful and that you will be able to find time to give it your consideration.

On 7 September 2010, the Minister for Building and Construction wrote to Mayors to invite councils to agree to participate in the financial assistance package for owners of leaky homes, conditional on the Government passing legislation or, if legislation is not able to be passed, an alternative method to "cap" council liability being agreed.

To facilitate timely implementation and provide more certainty for homeowners before the local body elections, the Minister indicated that he would like councils to agree to support the package in this council term and before local body elections on 9 October 2010, conditional upon resolution of the capping of council liability at 25% of agreed owner repair costs. The Minister also requested that councils delegate authority to Chief Executives to agree to final "sign up" to the financial assistance package if legislation is passed to facilitate the implementation process.

The Minister's letter noted that detailed features of scheme design were being sent to you to assist with briefings for councillors. The attached key features of the financial assistance package have been endorsed by senior territorial authority officials (subject to some minor operational details) and agreed by Joint Ministers (Finance, Building and Construction, Local Government). A more detailed scheme design, including some operational details which your officials will find useful, is also attached.

Should you have any questions please contact David McLellan (Project Director Weathertightness). His contact details are david.mclellan@dbh.govt.nz (04 817 4890).

Until your Council has made its decision, I would ask that you continue with the existing agreed messaging that the government and territorial authorities are still working on the details of scheme and progress is being made.

Other issues

Three other specific issues that have been raised in discussions on scheme design, these relate to: eligibility of Crown and council-owned dwellings; eligibility of retirement villages, and; insurance issues for territorial authorities for existing WHRS claims that may transition into the financial assistance package.

In respect of the first issue, the Minister for Building and Construction has agreed to write to the Minister of Housing seeking a commitment from the Chair of the Board of HNZC, that it will not apply for assistance to repair any Crown owned leaky homes under the financial assistance package. Councils are asked to give a similar commitment.

The eligibility for retirement villages to the financial assistance package is consistent with eligibility criteria for retirement villages to existing WHRS mediation and tribunal services.

In respect of the third matter, the Department is working with territorial authorities on an appropriate response to the issue.

A final matter that has been raised in discussions on scheme design relates to requirements under the Local Government Act 2002 in respect of Long-Term Council Community Plans (LTCCPs). Material is attached that may assist you in the development of advice for councillors in this regard.

Yours sincerely

Maria Robertson
Acting Chief Executive

Encl. (material on scheme design for financial assistance package)

Department of
Building and Housing
Te Tari Kaupapa Whare

MATERIAL FOR TERRITORIAL AUTHORITY CHIEF EXECUTIVES ON THE KEY FEATURES OF SCHEME DESIGN FOR FINANCIAL ASSISTANCE PACKAGE FOR OWNERS OF LEAKY HOMES*

*Financial assistance package involves:

- Government and territorial authorities each providing a 25% direct payment to agreed owner repair costs
- Government providing assistance to owners to access bank finance for remaining agreed repair costs by way of loan guarantees to banks for loans made to owners eligible for the assistance and who can meet the bank's lending criteria.

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KEY FEATURES OF SCHEME DESIGN FOR FINANCIAL ASSISTANCE PACKAGE FOR OWNERS OF LEAKY HOMES

As agreed by Joint Ministers on 24 August 2010

1. The eligibility criteria for the financial assistance package

	Eligibility Criteria	Comment
1.	All existing WHRS Act 2006 criteria will apply (10 year limit, dwelling leaky and damaged), including the restriction that only dwellings built before 1 Jan 2012, can apply.	Status quo – any person meeting definition of "owner" in WHRS Act may apply, the scheme does not discriminate based on who owns the dwelling.
2.	Applications to the scheme must be made within 5 years of its start date (i.e: if start date is 1 March 2011, last date to apply to scheme is 29 February 2016).	Previous Cabinet decision, slightly modified to align with expected start date of the financial assistance package.
3.	Dwellings already repaired are not eligible for the financial assistance package, but they can pursue claim in Weathertight Homes Tribunal or Courts.	Ensures financial assistance package is used to repair homes, not as compensation for repairs already done. If compensation is sought by the homeowner, it is more appropriate they litigate.
4.	Dwellings already covered by a settlement with the territorial authority (whether privately, in Court or under WHRS Act) are not eligible for the financial assistance package.	To prevent owners from "double dipping" where they have already agreed to or been awarded compensation.
5.	Application may be partially eligible for the financial assistance package, i.e: eligible for Government contribution/loan guarantee, but not TA contribution, if: (a) Established legal precedents for liability/duty of care of territorial authorities are that the TA is not liable. (b) Territorial authority did not inspect or issue code compliance certificates (including interim code compliance certificates) for the dwelling (see also private certifier scenarios below). (c) Territorial authority issued a code compliance certificate for building work relating to weathertightness as directed by a Department of Building and Housing determination. (d) Territorial authority issued a code compliance certificate for non-weathertightness related building work only.	Covers as many detailed scenarios as can currently be predicted where the council did not sign off the building work and therefore is not liable. Paragraph (a) ensures eligibility decisions always follow case law, e.g: councils do not have a duty of care in relation to buildings that are non-residential uses, see also paragraph (f) regarding multi-units.

(e) Dwelling “signed off” by private certifiers, as described below: (i) Private certifier processed the consent application, performed inspections and issued a code compliance certificate. The private certifier then forwarded documents to the territorial authority only for the purpose of adding them to the property file. (ii) TA issued code compliance certificate based solely on certificate from private certifier issued under s. 56 Building Act 1991. (iii) Territorial authority approved plans and issued building consent, then a private certifier undertook all inspections and issued a code compliance certificate. (iv) Territorial authority became involved part-way through building work, typically when a private certifier closed its business. The private certifier issued an interim code compliance certificate and handed the file over to the territorial authority. If the interim code compliance certificate covered weathertightness, then the homeowner is not eligible for the territorial authority contribution, unless the territorial authority subsequently inspected the weathertightness-related work. (iv) Territorial authority inspected weathertightness-related building work, identified problems, and issued a notice to fix (or notice to rectify under Building Act 1991) or otherwise advised the homeowner of defects in the work. The notice to fix or advice was not actioned by the homeowner. As a result no code compliance certificate has been issued. (vi) For avoidance of doubt, dwelling is eligible for territorial authority contribution if, in addition to involvement of private certifier, the territorial authority undertook one or more inspections and/or issued a code compliance certificate covering weathertightness.	

(f) Multi-units only: If building has mixed uses (some residential, some non-residential), owners of non-residential units will not be eligible for financial assistance package. If territorial authority has already settled a claim in relation to an individual unit, the owner of that unit is not eligible for the financial assistance package.	

2. Transition rules for existing claimants under WHRS Act

	Transition Rules	Comment
1.	Subject to eligibility requirements, any person with an active claim under WHRS Act (2002 or 2006) at the date financial assistance package "goes live" can choose to opt in to the package if: - repairs have not started or not been completed (i.e: code compliance certificate issued) and the claimant has a full assessment - no attempt has yet been made to mediate a settlement of the claim or, in the course of a mediation, both parties agree to opt in to the package.	To transition, the homeowner must meet the eligibility criteria for the financial assistance package. Cut off point for transition strikes fair balance between giving homeowner choice and the rights of defendants who have incurred costs to defend claims against them. Existing claimants who have completed repairs cannot transition – this is consistent with eligibility rule for the financial assistance package that repaired homes are not eligible because the package is to help people repair their homes, not provide compensation.
2.	Within 14 days of "go live" of the package all existing claimants with full assessments must decide whether they want to opt in to the package. If they want to, their claim will be put "on hold" for 3 months, during which time the claimant must take whatever actions are necessary for them to opt in (e.g: discuss with their bank). At the end of the 3 months the claimant must have formally (in writing) notified the Department they are opting in, if they haven't the claim will be taken off "hold" and they will have to continue with WHRS Act processes.	Time limit to provide certainty to defendants. Claimants will be able to decide if they want the option of the financial assistance package fairly quickly, but some will need further time before they can fully opt in. In practice the time limit will be applied by the Department informing all claimants that they will be treated as wanting to opt in unless they tell the Department otherwise within 14 days.
3.	Existing claimants without a full assessment can decide to opt in to the financial assistance package after they receive the full assessment and must do so within 3 months of receiving the full assessment.	Aligns with main scheme design where new claimant is required to decide whether to opt in to financial assistance package after they have a full assessment.

4.	If there are no other (non-territorial authority) parties, the WHRS Act claim continues to stay "on hold" until the financial assistance package process is completed in order to preserve limitation rights. If there are other parties, the WHRS Act claim process re-starts against those other parties only.	Important administrative procedure to ensure "clock" has "stopped" on 10 year limit and enable claimant to transfer back to WHRS at a later stage in the process if circumstances change, e.g: they cannot afford to pay their share of repair costs.
5.	If claimant has started repairs, building consent documents must be submitted to the Department together with information from claimant's designer/head contractor that compares consent documents with the WHRS Act full assessment and explains any differences, including cost differences. The Department and territorial authority agree scope and cost of repairs and calculate amount of direct contribution based on that information. If claimant disagrees with the Department/territorial authority agreed scope/cost, claimant can go back to WHRS Act process.	Allows for some retrospective assessment of repair scope and cost for claimants who started repairs before the financial assistance package was announced. However, if the Department and council cannot agree on the scope and cost retrospectively, the claimant will not be able to transition. The Department is currently advising claimants who are doing repairs to keep good records to ensure a retrospective assessment can be done.
6.	Claims closed by the Department for being "tardy" (claimant not making enough effort to resolve) under s. 56 of WHRS Act 2006 cannot reapply or be re-opened – s. 56(3) of WHRS Act prohibits them from being re-started.	Status quo.
7.	Claims that are closed for reasons other than "tardy" (see 6 above), the current owner can lodge a new claim for same dwelling if: - still inside the 10 year limit and meets all other WHRS Act 2006 eligibility criteria - repairs have not been completed (failed repairs are an entirely new claim and not covered by transition rules) - claim was not resolved in any way (e.g: mediated under WHRS Act, private negotiated settlement, adjudicated in Tribunal or Courts) and claim is only to access the financial assistance package, they cannot go back into the Weathertight Homes Tribunal processes.	Many previous claimants closed their claims because they had no parties to sue (e.g: private certifier signed off the building work and all other parties had disappeared or were insolvent), or they could no longer afford the cost and stress of litigation. The Department does not know what actions claimants then took to repair their home (or not). A large number of these claims are now likely to be outside the 10 year limit, but if some of these previous claimants can be helped by the financial assistance package, they should be given the opportunity to apply. However, they will not need access to the dispute resolution options (Weathertight Homes Tribunal) as they have already effectively decided that option is not right for them when they closed their original claim.

3. Matters that will be "agreed repair costs" and therefore covered by the direct contributions

The following costs will be covered by the direct contribution payments:

- Building work costs for agreed scope of repair work (see below for process for agreeing scope), including a contingency of a maximum of 10% and including GST
- Design work costs
- Project management of repair process (if required)
- Alternative accommodation, including storage of household effects (if required): 50% (25% Crown, 25%TA) of total of "actual and reasonable" costs, to maximum total payment of $5,000 ($2,500 Crown, $2,500 TA).
- Building consent costs.

Costs that will not be covered by the direct contribution payments include: general damages for stress etc, loss of income, loss of profits. These costs are not directly related to the repair of the home and cannot be objectively established in the 'no fault' approach of the financial assistance package.

4. High level process for Department of Building and Housing and territorial authority role in determining the "agreed repair costs"

	Department and territorial authority role in determining the "agreed repair costs"	Comment
1.	The Department (DBH) arranges for an independent expert to carry out a full assessment (per WHRS Act, status quo) based on guidance in the Department's Weathertightness Diagnosis document (due for publication in August 2010).	Status quo
2.	The assessment is accepted by the DBH, territorial authority and homeowner as the sole information about scope and nature of repair on which claim will proceed through financial assistance package.	To provide independent expert view of scope of repairs.
3.	Claimant gets (and pays for) plans, specifications and estimated costs for repair work ("a repair and payment plan"): [NB: "claimant" in the case of multi-unit buildings will be the representative, e.g: body corporate, of the owners] - Claimant encouraged to choose practitioner to do design from people recommended by DBH – DBH only recommends practitioners who are registered/licensed or have appropriate industry organisation membership. NOTE: after 2012 all weathertightness design work will be required to be done by Licensed Building Practitioners.	Process designed to ensure good quality repairs and proper spending of public money.

	- Design done in accordance with DBH Remediation Guide and for building work required to carry out scope and nature of repairs identified in full assessment. Designs must demonstrate how the dwelling will be made weathertight, but the repair and payment plan is not required to be specified to the level of detail required for building consent. - Repair and payment plan content is limited to weathertightness repairs only, no betterment (see definition below). Building work for other defects must not be included, however claimant should seek advice from designer about possibility of other defects at this stage. - Designer is responsible for plan meeting Building Code requirements. - Cost of building work estimated using a schedule approach (must include contingency in case new/additional damage is discovered when repair work starts and GST) and plan specifies milestones in repair work when direct contribution payments will be made.	
4.	DBH and TA review the repair and payment plan to approve: (a) that work specified in the repair and payment plan will: o repair the existing damage o make the dwelling weathertight ("future likely damage") as per the scope identified in the full assessment (including approval of incidental work required as a result of the remediation, e.g: replacement of insulation, that is not betterment) but no views on the Code compliance of the work are given, and (b) timing and sequence of milestone payments for direct contribution (but amount of direct contribution is not confirmed at this stage).	Process for how DBH and TA will approve the repair and payment plan is yet to be decided. DBH/TA agreement is key platform for later decisions on exact amount of direct contribution to be paid to homeowner.
5.	DBH advises claimant, in writing, of DBH/TA approval. DBH/TA approval enables claimant/designer to develop detailed plans and specifications to "consentable" form based on the repair and payment plan.	Expectation that designer will develop more detailed plans and specifications for purpose of building consent.
6.	If DBH and TA do not approve the repair and payment plan, DBH advises claimant, in writing, of amendments required to plan in order for DBH/TA to approve. Claimant either makes amendments (and re-submits to DBH/TA for approval) or exits FAP.	If claimant wants to do work that DBH/TA believe is "betterment", the claimant will not be able to progress through the FAP unless they pay the costs of the "betterment" themselves.

7.	Owner chooses contractor (3 quotes/tenders required) and enters into written contract for the work in the agreed repair and payment plan. Contract for building work required to specify: (a) "head" or "lead" contractor who will be responsible for, and liable for, the entire repair work process. NOTE: From 2012 work will have to be done by Licensed Building Practitioners and it can be specified that head/lead contractor must be licensed in the Site Class (b) fixed price for the work plus a provisional sum for the weathertightness-related work that cannot be included in the fixed price (e.g: amount of timber that will need to be replaced) + contingency of maximum of 10% of the weathertightness work.	Competitive quote/tender will not be required for specialised remediation work where there are few available contractors able to do the work. Sector support the contract "formula" of fixed price + provisional sum + contingency.
8.	Appropriate staff member (with expertise in weathertightness remediation work) from relevant TA attends building site at early stage of building work (e.g: when cladding has been removed) to discuss with head/lead contractor the work covered by the provisional sum. Amount of provisional sum in contract is confirmed following this discussion (and contract amended accordingly). DBH accepts decision of TA staff member on the confirmed amount of the provisional sum. A contingency of maximum of 10% of total cost for weathertightness work (including confirmed provisional sum) can still be included in the contract after the provisional sum is confirmed.	TA will be acting as "agent" of DBH in this process, DBH will accept decision of TA.
9.	DBH and TA (or just DBH if not eligible for TA contribution) calculate/agree amount of direct contribution based on contract price (fixed price + confirmed provisional sum + contingency + GST). DBH advises owner and their bank (if necessary) of amount of direct contribution and that agreement by DBH/TA to pay the contribution is now "unconditional". At this point owner must proceed to carry out repairs and cannot "opt out" of FAP (can opt out any time prior to this e.g: if financial circumstances change).	All parties involved in discussions on scheme design agree and support final confirmation of direct contribution taking place at this stage in the process. At this stage there is high certainty about the actual scope and cost of repairs.
10.	If at any stage in the above process, the scope and nature of the repair work is considered to be required to go beyond that identified in the full assessment, the homeowner can ask DBH for a re-assessment. Similarly, as repair work progresses, if the scope of work in the repair and payment plan needs to be changed, the homeowner can ask DBH and territorial authority to approve a new/amended repair and payment plan.	Final check and balance to ensure repairs are done right the first time.

5. Definition of "betterment"

Betterment is excluded from coverage by the financial assistance package and is defined as follows:

Betterment is:

- building work that is not required to achieve code compliance for weathertightness
- building elements or materials that do not need to be replaced to enable proper repair
- the least cost-effective option of two (or more) possible code compliant solutions.

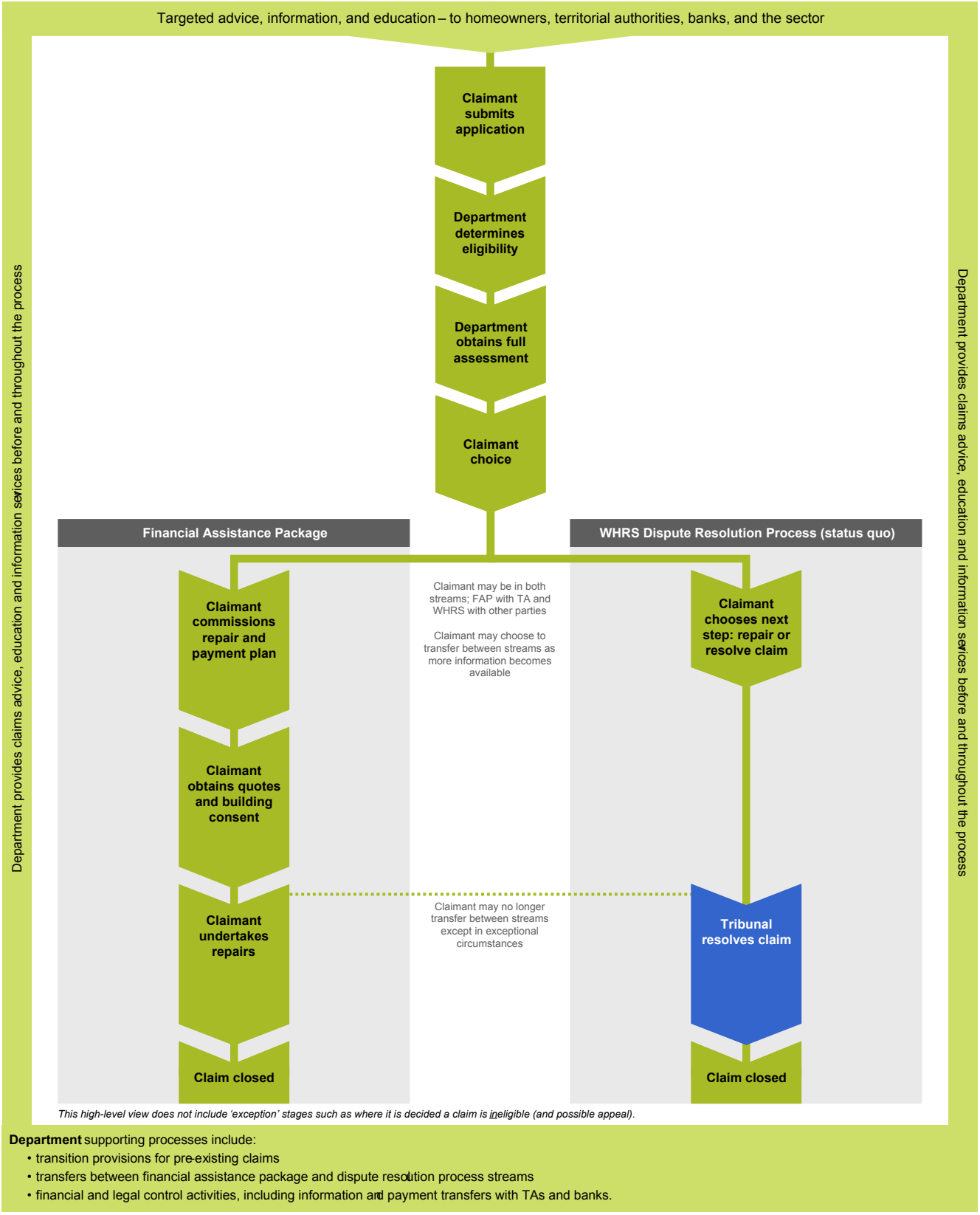
Work, elements or materials required to ensure the dwelling is no less than the standard/quality it was before it leaked is NOT betterment. For example, in a multi unit dwelling, if existing fire rating is required to be replaced because a cavity system is replacing a face sealed cladding system, the replacement of the fire rating is NOT betterment.

SUPPORTING MATERIAL: CLAIMS PROCESS OVERVIEW

Leaky Homes Repair System – Claim Process Overview

Leaky Homes Repair System comprises the Financial Assistance Package (FAP) and the WHRS Dispute Resolution Process

Summary diagram: Navigation aid for Financial Assistance Package system design document.



This high-level view does not include 'exception' stages such as where it is decided a claim is ineligible (and possible appeal).

Department supporting processes include:

- transition provisions for pre-existing claims
- transfers between financial assistance package and dispute resolution process streams
- financial and legal control activities, including information and payment transfers with TAs and banks.

SUPPORTING MATERIAL: CLAIMS PROCESS LEVEL 2: FINANCIAL ASSISTANCE

Leaky Homes Repair System – Claim Process Level 2: Financial Assistance

Summary diagram: Navigation aid for Financial Assistance Package system design document.

Claimant submits application	**Department**	• Provides application forms, FAP and WHRS information, and assistance in completing application.	
	Claimant	• Applies for an assessor's report to be prepared under the WHRS Act.	
	Department	• Lodges claim ("stops the clock" for purposes of determining eligibility). • Screens application, checking completeness and prima facie evidence of eligibility. • Performs "on papers" safety risk assessment. • Notifies territorial authority (TA) as per s.124 of the WHRS Act – information will appear on any future LIM.	• If a possible safety risk is detected, it is addressed as per existing WHRS processes.
Department determines eligibility	**Department**	• Commissions and funds eligibility assessment (built date, private residence, water ingress).	• If a safety risk is detected, it is addressed. • If Department finds the claim is ineligible, the claimant has the option to appeal to the Weathertight Homes Tribunal. • If TA disagrees with Department decision on eligibility for TA FAP contribution, TA can ask panel of senior officials to review the decision.
	Assessor	• Performs inspection and submits report. Report presents opinion on eligibility.	
	Department	• Decides if dwelling is eligible under WHRS criteria. *Remainder of process overview assumes dwelling is eligible.* • Notifies territorial authority as per s.124 of the WHRS Act – information will appear on any future LIM. • Assesses safety risk based on results of eligibility assessment. • Determines claimant eligibility for FAP, including eligibility for territorial authority contribution.	
Department obtains full assessment	**Claimant**	• Pays nominal fee towards the cost of a full assessment.	• Cost to claimant is $500 for standalone. Multi-unit cost varies, indicatively $1,500. • Betterment and non-weathertightness repairs are excluded from scope of FAP repairs. • WHRS Act allows for adjudication by the Tribunal after eligibility is confirmed (i.e. no full assessment). *A condition of accessing the FAP will be having a full assessment.*
	Department	• Funds bulk of cost and arranges for a full assessment to be carried out by a suitably qualified independent expert.	
	Assessor	• Carries out full assessment and reports on: current and likely future damage; cause; persons who should be parties to the claim; repair scope; and estimated cost to repair. Assessment is carried out in accordance with Diagnostic Guide published by Department.	
Claimant choice	**Department**	• Provides guidance regarding available choices, and encourages Claimant to talk to their lending provider.	• Claimant may alternately select the WHRS. • Claimant may opt-in to the FAP, but still pursue action against other (non-TA, Crown) parties – including via the WHRS. • Claimants in the WHRS track may transfer to the FAP any time before applying to the Tribunal.
	Claimant	• Chooses between taking up the FAP or pursuing resolution through the WHRS. *Remainder of process overview assumes claimant selects FAP.* • Discusses finance with bank (if required).	
Claimant commissions 'repair and payment plan'	**Department**	• Provides evidence for homeowner's lending provider regarding loan assistance available (if required).	
	Claimant	• Provides evidence of ability to pay the residual (after Crown and TA contribution) cost of repairs. • Signs contract with Department and TA agreeing to terms and conditions of scheme, agreeing not to sue Crown/TA, in return Department and TA conditionally agree (on basis claimant meets all other terms and conditions of the package) to pay their respective direct contributions.	• Agreement to be worded so as to allow withdrawal under appropriate circumstances.
	Department	• Publishes Remediation Guide to inform and assist preparation of repair and payment plans.	
	Claimant	• Commissions and pays for detailed plans for repair work, based on assessment. Claimant selects provider meeting guidance (e.g. registered/licensed, appropriate membership) provided by the Department.	• Claimant may apply to lending provider for finance to develop the repair designs.
	Designer / Quantity Surveyor	• Develops plans and specifications and detailed estimated cost to repair. This will include additional investigation (possibly invasive testing). Plans must address work required to remediate all existing and "likely future" damage. Plans to be limited to weathertightness repairs (no "betterment", no coverage of other faults). Cost of repairs estimated using a schedule approach that includes contingency. Contribution payment milestones identified.	• BCA provides pre-consent comments. • Department and TA may jointly require design change. • Claimant may choose to transfer to the WHRS, for instance if residual cost is unaffordable or they do not want to change repair and payment plan in accordance with requirements of Department and TA.
	Territorial Authority	• Agrees design work is as per scope identified in the full assessment. Agreement is required regardless of whether the dwelling is eligible for a contribution from the TA, as design work leads to building consent. Includes agreeing scheduled costs and contingency.	
	Department	• Agrees design work is as per scope identified in the full assessment. • Notifies Claimant of Department and TA agreement. • Provides guidance to Claimant relating to financial assistance.	
Claimant obtains quotes and building consent	**Claimant**	• Gains pre-approval for finance from bank (if required), conditional on finalisation of financial assistance. • Submits building consent application. • Sources quotes for repair work covered by the building consent and selects preferred quote. • Enters into contracts for repairs and initiates repair work.	• Claimant may also choose to get consent for other (non-weathertightness remediation) building work, but this falls outside the FAP. • Contract specifies fixed price for work, plus provisional sum to cover work that cannot yet be included in the fixed price + contingency of maximum 10%.
	BCA	• Issues consent.	
Claimant undertakes repairs	**Territorial Authority**	• Visits site once work has started, to confirm provisional sum amount. • Agrees contribution amounts, including confirmed provisional sum and contingency.	• Any subsequent cost increase arising from change (e.g. further damage found after repair starts) must be agreed by Department and TA before consent amended.
	Department	• Agrees contribution amounts, including confirmed provisional sum and contingency. • Notifies parties that Department, TA and Claimant agreement is now unconditional.	
	Claimant	• Finalises and draws-down finance as eligible/required. • Ensures repair work is completed, including applying for code compliance certificate.	
	BCA	• During repairs normal Building Act processes are followed for inspections and issue of code compliance certificate.	
	Department and TA	• Crown and TA contributions paid at points agreed in the repair and payment plan, with final payment on issue of code compliance certificate.	

Department of
Building and Housing
Te Tari Kaupapa Whare

SUPPLEMENTARY MATERIAL FOR TERRITORIAL AUTHORITY OFFICIALS ON SCHEME DESIGN FOR FINANCIAL ASSISTANCE PACKAGE FOR OWNERS OF LEAKY HOMES*

*Financial assistance package involves:

- Government and territorial authorities each providing a 25% direct payment to agreed owner repair costs
- Government providing assistance to owners to access bank finance for remaining agreed repair costs by way of loan guarantees to banks for loans made to owners eligible for the assistance and who can meet the bank's lending criteria.

SCHEME DESIGN – FINANCIAL ASSISTANCE PACKAGE FOR OWNERS OF LEAKY HOMES

Final scheme design with key features (highlighted in grey) as agreed by Joint Ministers (Building and Construction, Finance, and Local Government)[1]
24 August 2010

[For the sake of brevity content is presented in an informal notes format]

Step 1: Application – primarily "status quo"

- DBH provides application forms online (same as current system with additional sections for information relating to FAP to be collected)
- DBH provides advice, education and information to claimants
- Owner lodges application under WHRS Act 2006 for an "assessors report" with DBH – current provisions for applications, including for multi-unit dwellings, apply
- Claim "lodged" for purpose of 10 year limit under WHRS Act 2006
- DBH screens application to ensure it is complete, prima facie meets eligibility criteria (WHRS Act and FAP) and does risk assessment (notification to TA if dwelling appears to be dangerous or insanitary and/or advice to claimant about risks and mitigation measures)
- TA notified of application under s. 124 of WHRS Act - information will appear on any future LIM issued for the building

[1] Key features previously agreed by Cabinet (April 2010) are also highlighted in grey.

Step 2: Assess eligibility

- DBH decides if claim eligible under following rules:
  - Criteria for dwelling as per status quo (WHRS Act 2006 criteria), includes existing "cut off" date in WHRS Act 2006 of 1 Jan 2012, only dwellings built before this date can apply.
  - Dwellings already repaired are not eligible for FAP, but they can pursue claim in WHT.
  - Dwellings already covered by a settlement with the territorial authority (whether privately, in Court or under WHRS Act) are not eligible for FAP.
  - Claim must be lodged before date that is 5 years from date of "go live" of FAP, i.e: if FAP goes live on 1 March 2011, last date to apply is 28 February 2016, after that date claimant's only option will be dispute resolution in WHT.
  - Claim may be "partially" eligible for FAP, i.e: eligible for Government contribution/loan guarantee, but not TA contribution, if:
    (a) Established legal precedents for liability/duty of care of territorial authorities are that the TA is not liable.
    (b) Territorial authority did not inspect or issue code compliance certificates (including interim code compliance certificates) for the dwelling (see also private certifier scenarios below).
    (c) Territorial authority issued a code compliance certificate for building work relating to weathertightness as directed by a Department of Building and Housing determination.
    (d) Territorial authority issued a code compliance certificate for non-weathertightness related building work only.
    (e) Dwelling "signed off" by private certifiers, as described below:
      (i) Private certifier processed the consent application, performed inspections and issued a code compliance certificate. The private certifier then forwarded documents to the territorial authority only for the purpose of adding them to the property file.
      (ii) TA issued code compliance certificate based solely on certificate from private certifier issued under s. 56 Building Act 1991.
      (iii) Territorial authority approved plans and issued building consent, then a private certifier undertook all inspections and issued a code compliance certificate.
      (iv) Territorial authority became involved part-way through building work, typically when a private certifier closed its business. The private certifier issued an interim code compliance certificate and handed the file over to the territorial authority. <u>If</u> the interim code compliance certificate covered weathertightness, then the homeowner is not eligible for the territorial authority contribution, unless the territorial authority subsequently inspected the weathertightness-related work.
      (v) Territorial authority inspected weathertightness-related building work, identified problems, and issued a notice to fix (or notice to rectify under Building Act 1991) or otherwise advised the homeowner of defects in the work. The notice to fix or advice was not actioned by the homeowner. As a result no code compliance certificate has been issued.
      (vi) For avoidance of doubt, dwelling is eligible for TA contribution if, in addition to involvement of private certifier, the TA undertook one or more inspections and/or issued a code compliance certificate covering weathertightness.
    (f) <u>Multi-units only</u>: If building has mixed uses (some residential, some non-residential), owners of non-residential units will not be eligible for FAP. If TA has already settled a claim in relation to an individual unit (most likely claims made under WHRS Act 2002 as individual units cannot claim under WHRS Act 2006), the owner of that unit is not eligible for FAP.

- Eligibility assessment done by persons considered “suitable” by DBH – status quo provision in WHRS Act 2006:
  - assessors employed by or contracted to DBH
  - assessors excluded from liability
  - the “assessor” inspects property
  - Assessor does report to DBH as per status quo
- DBH decision on eligibility for FAP is final – no ability for claimant or TA to “appeal”
- Claimant can appeal to WHT if DBH decides dwelling not eligible (status quo, dwelling eligibility only, decision on FAP eligibility cannot be appealed by claimant)
- Eligible dwellings notified to TA (and therefore information on LIM) – status quo
- DBH does risk assessment - notification to TA if dwelling appears to be dangerous or insanitary and/or advice to claimant about risks and mitigation measures (status quo)
- Multi-units only: FAP option only available to claims lodged as “representative claims” under s. 22 of WHRS Act 2006.

Step 3: Full assessment

- DBH publications on Diagnosis and Remediation of Weathertightness problems provide guidance on:
  - Diagnosis of damage caused by leaks
  - Scope of remediation work required
  - Design and specification of remediation work
- Claimant pays fee for assessment (status quo)
- DBH arranges for an independent expert[2] to carry out a full assessment (per WHRS Act) based on guidance in DBH Weathertightness Diagnosis document:
  - assessors employed by or contracted to DBH
  - assessors excluded from liability
  - QA/peer review process by DBH

  (all per status quo)
- Assessment is sole information about scope and nature of repair on which claim will proceed through FAP.
- Betterment specifically excluded in assessment. Betterment is:
  - building work that is not required to achieve code compliance for weathertightness
  - building elements or materials that do not need to be replaced to enable proper repair
  - the least cost-effective option of two (or more) possible code compliant solutions

  Work, elements or materials required to ensure the dwelling is no less than the standard/quality it was before it leaked is NOT betterment. For example, in a multi unit dwelling, if existing fire rating is required to be replaced because a cavity system is replacing a face sealed cladding system, the replacement of the fire rating is NOT betterment.
- Assessment is not required to address code compliance beyond weathertightness repairs.

[2] Qualifications per current DBH policy.

Step 4: Claimant choice

- Claimant can seek independent advice to inform decision to opt in to FAP e.g: legal, financial, technical.
- DBH advises claimant what costs (items, not dollar amounts) will and will not be covered by FAP.
- If Claimant wishes to opt in to FAP, they must provide DBH, in writing, with information (evidence) to show they can meet their share (50% or 75%) of the costs (repair costs per estimate in assessment + other eligible costs). The information/evidence would either be an "in principle" approval of loan finance from their bank or reference to cash/assets available. With that information/evidence is also formal statement from claimant that they wish to opt in to FAP.
- If claimant opts in, a contract is signed between claimant, DBH and TA agreeing:
  - Claimant will not sue TA or Government
  - The DBH assessment is accepted by DBH, territorial authority and homeowner as the sole information about scope and nature of repair on which claim will proceed through financial assistance package.
  - Claimant commits to repairing the dwelling ASAP (could put a specific time frame, e.g: 12 months)
  - All the processes and terms and conditions of the FAP (set out in Step 5 below), e.g: repair and payment plan and role of TAs and DBH in approving scope and cost of repairs, role of body corporate in multi-unit claims
  - DBH and TA conditionally (subject to claimant meeting terms and conditions of FAP) agree to pay direct contribution (25% each) based on estimated costs of repair in full assessment.
- Claimant can pursue litigation against non-TA parties in the WHT or Court (i.e: do both processes in parallel). If claimant intends to use WHT, DBH provides advice and guidance about the process, including claims can be closed by DBH if they are not progressed at reasonable speed.
- Multi-units only – authorisation of owners' representative to opt in to FAP must be achieved following same process as used to bring claim (i.e: resolutions etc as required by s. 22 WHRS Act 2006) and each unit owner must sign contact with DBH and TA. Unit owners must also authorise representative to run claim through FAP and receive owners direct contribution into a specially created "repair fund" from which all payments for repair work will be made. Representative also has to provide information (evidence) to DBH that it has established a "repair fund" and has sufficient funds to meet the unit owners' share of repair costs.

Step 5: WHRS and FAP

WHRS/WHT

- Operates as per current system – planned enhancements to service delivery model etc made.
- Once claimant has made an application for adjudication to the WHT, and named the TA as a party/respondent, they cannot change their mind and opt in to FAP instead.

FAP

- Claimant[3] gets (and pays for) plans, specifications and estimated costs for repair work ("a repair and payment plan"):
  - Claimant encouraged to choose practitioner to do design from people recommended by DBH – DBH only recommends practitioners who are registered/licensed or have appropriate industry organisation membership (e.g: NZIBS). NOTE: after 2012 all weathertightness design work will be required to be done by LBP.
  - Design done in accordance with DBH Remediation Guide and for building work required to carry out scope and nature of repairs identified in full assessment. Designs must demonstrate how the dwelling will be made weathertight, but the repair and payment plan is not required to be specified to the level of detail required for building consent.
  - Repair and payment plan content is limited to weathertightness repairs only. Building work for other defects must not be included, however claimant should seek advice from designer about possibility of other defects at this stage.
  - BCA staff visit/inspect dwelling or meet with designer for pre-building consent "consultation" to check design meets all applicable code requirements (building work will be "alterations" per s. 112 Building Act 2004 and must "continue to comply with … the building code to at least the same extent as before the alteration") .
  - Designer is responsible for repair work meeting Building Code requirements (per s. 45(4) Building Act 2004 which applies from 2012).
  - Cost of building work estimated using a schedule approach (must include contingency in case new/additional damage is discovered when repair work starts and GST) and plan specifies milestones in repair work when direct contribution payments will be made.
- Other eligible costs of repair itemised and costed by claimant:
  - Design work
  - Project management of repair process (if required)
  - Alternative accommodation, including storage of household effects (if required): 50% (25% Crown, 25%TA) of total of "actual and reasonable" costs, to maximum total payment of $5,000 ($2,500 Crown, $2,500 TA).
  - Building consent costs

  (INeligible costs include: general damages for stress etc, loss of income, loss of profits)
- Repair and payment plan and itemised other eligible costs sent to DBH and TA.
- DBH and TA review the repair and payment plan[4] to approve:

  (a) that work specified in the repair and payment plan will:
  - repair the existing damage
  - make the dwelling weathertight ("future likely damage")

  as per the scope identified in the full assessment (including approval of any incidental work required as a result of the remediation, e.g: replacement of insulation, that is not betterment)

  but no views on the Code compliance of the work are given, and

[3] Body corporate or other representative will do these steps in relation to claims for multi-unit dwellings.
[4] Process for this review is yet to be decided.

(b) timing and sequence of milestone payments for direct contribution (but amount of direct contribution is not confirmed at this stage).

The approval of the repair and payment plan will create a new legal liability between DBH/TA and the homeowner. If DBH/TA are negligent in giving their approval of the plan, and as a result damage is caused to the homeowner (e.g: failed repairs), DBH/TA will be liable to the extent the approval of the plan caused the resulting damage.

- If dwelling not eligible for TA direct contribution, TA approval of the repair and payment plan is still required as part of normal "pre-lodgement" of building consent processes.
- DBH advises claimant, in writing, of DBH/TA approval. DBH/TA approval is treated as authorisation for claimant/designer to develop detailed plans and specifications to "consentable" form based on the repair and payment plan.
- If DBH and TA do not approve the repair and payment plan, DBH advises claimant, in writing, of amendments required to plan in order for DBH/TA to approve. Claimant either makes amendments (and re-submits to DBH/TA for approval) or exits FAP.
- Owner submits building consent application with detailed plans and specifications based on the approved repair and payment plan to BCA. At this point, owner can choose to do other building work (e.g: other defects and betterment) and have that consented at the same time, but that work and the processes around it are outside FAP.
- BCA issues building consent – status quo per Building Act 2004.
- Owner gets 3[5] quotes/tenders for work covered by the building consent. DBH encourages owner to seek contractors who have experience doing remediation work. If building work outside FAP is being done, quotes/tenders must itemise that separately.
- Owner chooses contractor from the 3 quotes/tenders and enters into written contract for the work. Contract for building work required to specify:
  (a) a "head" or "lead" contractor who will be responsible for, and liable[6] for, the entire repair work process. NOTE: From 2012 work will have to be done by LBP and it can be specified that head/lead contractor must be licensed in the Site Class
  (b) a fixed price for the work[7] plus a provisional sum for the weathertightness-related work that cannot be included in the fixed price (e.g: amount of timber that will need to be replaced) + contingency of maximum of 10% of the weathertightness work.
- Appropriate staff member (with expertise in weathertightness remediation work) from relevant TA attends building site at early stage of building work (e.g: when cladding has been removed) to discuss with head/lead contractor the work covered by the provisional sum. Amount of provisional sum in contract is confirmed following this discussion (and contract amended accordingly). DBH accepts decision of TA staff member on the confirmed amount of the provisional sum. A contingency of maximum of 10% of total cost for weathertightness work (including confirmed provisional sum) can still be included in the contract after the provisional sum is confirmed.
- DBH and TA (or just DBH if not eligible for TA contribution) calculate/agree amount of direct contribution (25% each) based on contract price (fixed price + confirmed provisional sum + contingency + GST). DBH advises owner and their bank (if necessary) of amount of direct contribution and that agreement by DBH/TA is now "unconditional". At this point owner must proceed to carry out repairs and cannot "opt out" of FAP (can opt out any time prior to this e.g: if financial circumstances change).[8]
- Normal Building Act process followed for inspections of the work and issue of code compliance certificate (for any amendments to the consent – related to weathertightness

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5 In cases of very complex or highly specialised remediation work, this requirement may be waived if there are insufficient suppliers in the market to source 3 quotes/tenders.

6 Individual practitioners will also be personally liable for the specific work they do.

7 How fixed price is arrived at is an operational detail yet to be decided.

8 Loan guarantee from the Government (if required by homeowner) will also be confirmed at this stage, but the detailed process and steps for the provision of the guarantee have not yet been decided.

defects only – that will increase the cost above agreed amount + contingency, owner must get agreement from DBH/TA[9] to the new work and cost)

- TA and Crown contribution paid in instalments linked to milestones specified in the repair and payment plan, with final payment always on issue of code compliance certificate. Milestones to roughly equate with timing of BCA inspections and completion of major stages of work - number of milestones may vary according to size and complexity of the repair work. Repair work can be done in stages (e.g: one elevation of the building at a time) if required to assist claimant's cash flow. Separate agreements to amount of direct contribution (following process described above) will need to be made for each stage.
- Crown pays contribution to owner (to designated bank account: loan account if bank finance required, representative's account if multi-unit) and recovers cost from TA.
- If, at any stage in the above process, the scope and nature of the repair work is considered to be required to go beyond that identified in the full assessment, the homeowner can ask DBH for a re-assessment. Similarly, as repair work progresses, if the scope of work in the repair and payment plan needs to be changed, the homeowner can ask DBH and territorial authority to approve a new/amended repair and payment plan.

[9] Operational process to be decided, but a quick process will be required, probably the TA staff who agreed the provisional sum in the contract should be authorised to agree to variations/increased cost.

Transition of existing (at date of "go live" of FAP) claims under WHRS Act 2006

- Subject to eligibility requirements, any person with an active claim under WHRS Act (2002 or 2006) at the date FAP "goes live" can choose to opt in to the FAP if:
  - repairs have not started or not been completed (i.e: code compliance certificate issued) and the claimant has a full assessment
  - no attempt has yet been made to mediate a settlement of the claim or, in the course of a mediation, both parties agree to opt in to the FAP;
- Within 14 days of "go live" of FAP all existing claimants with full assessments must decide whether they want to opt in to the FAP. If they want to, their claim will be put "on hold" for 3 months, during which time the claimant must take whatever actions are necessary for them to opt in (e.g: discuss with their bank). At the end of the 3 months the claimant must have formally (in writing) notified DBH they are opting in, if they haven't the claim will be taken off "hold" and they will have to continue with WHRS/WHT processes.
- Existing claimants without a full assessment can decide to opt in to FAP after they receive the full assessment and must do so within 3 months of receiving the full assessment.
- If there are no other (non-TA) parties, WHRS Act claim continues to stay "on hold" until FAP process is completed in order to preserve limitation rights. If there are other parties, the WHRS Act claim process re-starts against those other parties only.
- If claimant has started repairs, building consent documents must be submitted to DBH together with information from claimant's designer/head contractor that compares consent documents with the WHRS Act full assessment and explains any differences, including cost differences. DBH/TA agree scope and cost of repairs and calculate amount of direct contribution. If claimant disagrees with DBH/TA agreed scope/cost, claimant can go back to WHRS Act process.
- Claims closed by the Department for being "tardy" (claimant not making enough effort to resolve) under s. 56 of WHRS Act 2006 cannot reapply or be re-opened – s. 56(3) of WHRS Act prohibits them from being re-started.
- Claims that are closed for other reasons[10] than "tardy", current owner can lodge new claim for same dwelling if:
  - still inside the 10 year limit and meets all other WHRS Act 2006 eligibility criteria
  - repairs have not been completed (failed repairs are an entirely new claim and not covered by transition rules)
  - claim was not resolved in any way (e.g: mediated under WHRS Act, private negotiated settlement, adjudicated in Tribunal or Courts)

  and claim is only to access FAP, cannot go to WHT.

[10] Claim terminated because dwelling sold (approx 580), Claim transferred to Court (approx 35), Discontinued at claimant's request (approx 880).

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3 September 2010

David McLellan
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Dear David

Record of discussions on the effect of the new scheme to fund leaky home repairs on local authority LTCCPs

This letter records the key aspects of our discussions to date about how local authority long-term council community plans (LTCCPs) could be affected by the new scheme proposed by the Government to fund the repair of leaky homes.

You have asked for our view on the impact on a local authority that exercises its right to "opt in" to the new scheme. You have provided us with copies of the two views that you have obtained to date. These views have been provided by Simpson Grierson and the Department of Internal Affairs. Neither of these views leads to a conclusive position that can be implemented by all local authorities.

With respect to the Simpson Grierson opinion we note that the opinion is strongly tied to whether the new scheme represents an activity of a local authority or not. This is discussed in paragraph 11 of the opinion. While the opinion strongly argues that the new scheme would not represent an activity, the opinion goes on to raise some doubt as to this position given the absence of any case law related to the definition of an activity. Therefore, there remains a risk for local authorities should they choose to rely on this advice. This Office is unable to provide any further certainty because this is a matter for the courts to determine.

Given this position, the Simpson Grierson opinion discusses the approach that would be needed if its view (as expressed in paragraph 11) could not be adopted. To this extent, the views of Simpson Grierson and the Department of Internal Affairs are largely in agreement and they are views that we would largely share. This view is that the required decision-making process for a local authority to "opt in" to the new scheme depends on the specific circumstances faced by the individual local authority. This hinges around the quantified effect of "opting in", when compared to the amounts previously provided for by the individual local authority in its financial statements. It also depends on whether the quantified impact triggers section 97(1)(d) of the Local Government Act 2002 (the Act).

In our view local authorities should consider the following points in coming to a conclusion as to whether to consult about "opting in" to the new scheme:

- It is our view that, of itself, the scheme is not an activity of council. However, the leaky homes issue is related to local authorities' regulatory consent activity. Settling the liability arises from local authorities' involvement in regulatory activities. We also acknowledge that a local authority is generally in a position of constrained choice – because it has already been established by the courts that a portion of the liability in respect to the leaky homes issue falls upon local authorities.

  Therefore, it seems section 97(1)(d) is relevant. If the effect of adopting the new scheme is substantial the local authority will need to consider how it should meet the liability as it will affect individual ratepayer future liabilities for rates. This need would be heightened if the effect of meeting the liability was such that the local authority had to make choices about existing or future services because of the impost of meeting the leaky homes liability.

- If the liability under the new scheme is similar to prior provisioning (and funding) then there would seem to be no need to consult by way of an amendment.

- We note that, based on 30 June 2009 annual report disclosures (2010 figures are not yet available), there could still be some significant adjustments required by local authorities. We base this view on our review of the local authorities most significantly affected by leaky home issues, the "big 6". Please refer to our article titled *Local authority exposure to liabilities from leaky home claims* published in our report *Local Government – Results of the 2008/09 audits.*

  In this article, we noted that the majority of weathertight liabilities as at 30 June 2009 were only shown as contingent ($378.2 million) as in contrast to actually included in the financial statements of local authorities ($201.1 million). This means the majority of liabilities were not reflected in financial forecasts in LTCCPs or in financial statements in annual reports in a way that would demonstrate the "effect" of recognising such liabilities – particularly the funding effect.

- Local authorities may also want to consider the real transaction cost of carrying out an amendment process. Although there is an audit fee associated with an LTCCP amendment process this may be outweighed by the benefits of providing information to the community (through a formal process) about the new scheme (relative certainty as to liability). In doing so, this may reduce the decision-making risk that could arise if any challenge is raised as to whether an amendment was required. Unless the assessment of the weathertight liability under the new scheme leads to a pervasive impact across a substantial part of a local authority's plans and has a significant effect on financial viability we would not expect the associated audit fee to be large.

As we have previously discussed, the Local Government Act 2002 Amendment Bill (the Bill) proposes the repeal of section 97(1)(d). This Bill is currently being considered by the Local Government and Environment Select Committee and is due to be reported back to the House later this year. We cannot advise you on how to approach this issue given the possible repeal of this section of the Act.

We understand that you are working through a process to identify the consequences of implementing the new scheme. We are committed to continue working with you (and the other affected parties) on this matter.

Yours sincerely

Bruce Robertson
Assistant Auditor-General - Local Government

Simpson Grierson

17 August 2010

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For: John Duthie

Government's Weathertightness Package - Decision-making and Consultation

Introduction and background

1. We refer to your instructions dated 30 July 2010, written on behalf of Auckland City Council, Christchurch City Council, Tauranga City Council, Waitakere City Council, Wellington City Council (for convenience, the **Councils**), and Local Government New Zealand.

2. A number of New Zealand buildings suffer from weathertightness issues (so-called "leaky buildings"). The Courts have ruled that territorial authorities (**TAs**) are legally liable to contribute to the costs of repair of residential dwellings which have been damaged through a lack of weathertightness[1]. All of the Councils, and many others throughout New Zealand, face such claims. The scale of the claims varies between them.

3. The Government, through the Department of Building and Housing (**DBH**), is considering a financial assistance package for the owners of such dwellings. The parameters of the scheme, as decided by Cabinet, are set out as an Appendix to this letter. Within those parameters, a detailed scheme design is being developed by the DBH, based on discussions and agreements of a joint DBH and territorial authority working group.

4. The details of the scheme are not finalised[2], but in essence the package would involve the Government and TAs funding 25% each of the cost of repairing the leaky home, with the owner being responsible for the other 50%. The intention is to make available to such owners an option whereby they can receive guaranteed money quickly, and get on with fixing the leaky building. The alternative, which is the only present option, is a potentially lengthy, costly and less certain litigation process.

5. The scheme will not be compulsory, and TAs will have to decide whether to opt in or not. In that context the Councils have asked for our opinion on:

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[1] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC) applied in cases such as *North Shore City Council v Body Corporate 188529* [2010] NZCA 64 ("Sunset Terraces"), *O'Hagan v Body Corporate 189855* [2010] NZCA 65 ("Byron Avenue"), and *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881.

[2] We have seen a DBH memorandum dated 27 July 2010 to the TA Steering Committee, and minutes of that Steering Committee's meeting on 29 July 2010, which we understand set out the current position with respect to the scheme. This includes the current draft of the five-step "High Level Scheme Design".

(a) specifically, whether a decision to opt in must be provided for in the Council's long-term council community plan (**LTCCP**) - so that the LTCCP must be amended (using the special consultative procedure) if there is currently no such provision.

(b) more generally, what decision-making requirements arise in respect of a Council's decision whether to opt in or not.

6. Different Councils are in different factual circumstances both in terms of potential exposure for leaky homes and in the way the matter has been addressed to date in their LTCCPs. You are not seeking from us a detailed analysis of each Council, but rather generic advice which takes into account the variations that may exist.

Brief advice

7. Section 97 of the LGA02 is unlikely to apply because a Council's decision whether to opt in to the scheme is probably not a decision in relation to an "activity" of the Council. However, the meaning of "activity" has never been tested in the Courts and so there is some uncertainty and therefore risk associated with this conclusion.

8. Even if the decision is in relation to an "activity", section 97 is unlikely to apply on the grounds that the decision will not significantly affect the cost to the Council. For these purposes, the cost to the Council is the difference between opting in and opting out.

9. If section 97 does not apply, no amendment to the LTCCP will be necessary. The Council can make the decision irrespective of what its LTCCP presently says in terms leaky homes liability and associated financial provision.

10. Irrespective of section 97, the Council will need to comply with the normal part 6 decision-making requirements when making its decision. In particular, it should consciously turn its mind to, and document, its consideration of the exercise of its section 79 discretion in relation to the assessment of options (section 77) and the consideration of community views and preferences (section 78).

Fuller summary of advice

11. Section 97 of the LGA is the only provision which may impose a substantive prohibition on a decision which is not provided for in the LTCCP. There is a good argument that a Council's response to leaky homes claims (including settling existing or potential claims) is not an "activity" for the purposes of section 97, and therefore section 97 does not apply at all. We think a Court is more likely than not to come to that view. However, as the meaning of "activity" has not been settled by the courts, and there is an issue about what it means for costs to be "in relation to an activity", there is some uncertainty and risk with that conclusion. We have therefore gone on to provide advice on the assumption that section 97 does apply.

12. The only conceivable trigger in section 97 would be section 97(1)(d). However, section 97(1)(d) could not apply unless the level of <u>increased</u> cost (ie the cost to the Council of opting in to the scheme as compared to the cost of not doing so) is significant. (In that event, there would presumably be a question mark over the wisdom of the decision itself subject to our comments in paragraph 73 about a consideration of matters more broadly.) We emphasise that we are not referring here to the level of any increase in a current cost estimate – for example, there could be

such an increase once a more thorough assessment of current and future liability is carried out. Instead, the relevant increase for section 97(1)(d) purposes is any increase when comparing that "opt out" figure with the equivalent "opt in" figure under the Government scheme.

13. The Council must make an assessment of the significance of the decision. It may do so from the point of view that local authority liability for leaky homes has already been established by the Courts. Therefore the decision is only as to how the Council responds to that situation: that is, the difference between opting in and opting out of the Government scheme.

14. A significant decision in terms of the thresholds in the Council's significance policy does not of itself mean the LTCCP needs to be changed or there must be consultation – unless the policy itself says otherwise.

15. A comparative analysis of the options is also necessary to comply with the requirement in section 77 of the LGA to assess the benefits and costs of options. The extent of the assessment is for the Council to decide in its discretion under section 79, and largely dependent on significance. The exercise of that discretion should be conscious and recorded. Larger councils or those with higher exposure may decide that an actuarial assessment is necessary. Smaller councils or those with lesser exposures may be able to rely on conclusions reached by other councils, if there are reasonable grounds for believing that the conclusions would be applicable to them as well.

16. The exercise of the Council's section 79 discretion in relation to the 4-stage consideration of community views under section 78 should also be conscious and recorded. Whether or not community views and preferences are considered at each of those stages, and if so how, is for each Council to decide, taking into account section 79. However, because in this case the problem is largely self-defining, a Council might conclude that there is now little scope for such consideration at stage 1. Further, the extent to which those views and preferences are considered at stage 2 may depend on the Council's assessment of whether there are practicable options apart from opting in to the scheme or opting out of it.

17. Having properly complied with the decision-making requirements the Council could decide to opt in irrespective of what its current LTCCP contains (or does not contain) in terms of leaky homes liability and associated financial provision. There is no requirement that the LTCCP be amended (assuming section 97 does not apply – see above). However:

    (a) the annual report and the subsequent annual plan will have to accurately reflect the position at the time they are adopted; and

    (b) depending on what the LTCCP says, section 80 of the LGA may impose an additional procedural requirement at the time the decision is made to explain any significant inconsistency with the LTCCP (or significantly inconsistent consequences).

18. This advice is based on the key factual assumptions set out in paragraph 28 below.

Discussion

Nature of the decision

19. Before looking at the legal requirements attaching to the decision, it is necessary to identify and examine the nature of the decision itself.

20. Case law establishes that TAs face legal liability, in negligence, in relation to leaky homes. There is no Council "decision" which has been or will be made in relation to incurring that liability. The liability simply exists, as a matter of law.

21. The decision in question, if made, will be a decision to resolve that liability in a particular way ie to opt into the Government's assistance package, rather than addressing the matter through a litigation process.

22. In terms of Step 2 of the current draft scheme design, which covers the assessment of eligibility:

    (a) The criteria for acceptance of a "leaky home" is the status quo, that is the same as under the Weathertight Homes Resolution Services Act 2006;

    (b) The main circumstances in which a TA would not be liable under the general law seem to be excluded under the scheme as well. For example, the draft says that a claim may be eligible for the Government contribution but not the TA contribution if (amongst other things):

        (i) established legal precedents for liability/duty of care of TAs are that the TA is not liable;

        (ii) the TA did not inspect or issue the code compliance certificate;

        (iii) the dwelling was "signed off" by a private certifier.

23. Therefore, in general terms, it does not appear that opting into the scheme will involve a Council paying for new or additional liability, compared to the status quo. The Council would be changing how it pays, but not whether it pays.

24. We say "in general terms", because we understand that contributions by TAs to the settlement of the claims under the package may be differently "targeted" than is presently the case, reflecting the underlying "no fault" elements of the Government's proposal. The essence of the Council's decision, however, would be the selection of a dispute resolution mechanism to resolve leaky homes liability: through the assistance package, rather than through the Courts or via the Weathertight Homes Resolution Services.

25. We are advised that the following different outcomes are anticipated for TAs when the package applies, as compared to the current situation:

    (a) A reduction in cost to TAs through:

        (i) elimination of spending on legal fees, other process costs, interest and general damages;

        (ii) reduced repair costs (although the average repair costs under the package are anticipated to still exceed the historical average cost of settling claims (excluding costs and other expenses));

(iii) a reduction in the cost to TAs through a fixed contribution to repair costs of 25% (thereby removing the risk of the TA being "last man standing" ie the only remaining liable party of substance, as can presently happen);

(b) An increase in cost to TAs through:

(i) the absence of moderation of repair costs through claims for contributory negligence;

(ii) the availability of the package to homeowners who have purchased with knowledge of the need for repair;

(iii) the possible loss of the value of insurance cover held by TAs[3].

26. In addition there is the unresolved issue still before the courts relating to the ability of investor home-owners to recover damages for leaky buildings from TAs. As the law presently stands, such investors can claim. However, if the Supreme Court overturns the Court of Appeal decisions in *Byron Avenue* [2010] NZCA 65 and *Sunset Terraces* [2010] NZCA 64, there will be a different outcome for TAs (especially in metropolitan areas) as compared to under the package, where the "no fault" approach will make it available to such owners. Assuming a Supreme Court decision is not available at the time a Council is deciding whether to opt in to the scheme or not, it will be obliged to proceed based on the current law, that is, as determined by the Court of Appeal.

27. In the absence of all of the details, assessing the degree of uptake and the cost to the Councils if the package is adopted is difficult (and will remain difficult even when the detail is available). In general terms it will probably involve the Councils expending millions of dollars in compensation towards the repair of buildings. However, based in particular on work carried out by the Auckland City Council, you have advised that the amount is likely to be little or no different, and possibly less, than Councils would otherwise have ended up paying through a litigation process. The timing of payments may differ, that is, there is likely to be a greater outlay of money in early years with a lesser outlay in later years.

Key factual assumptions

28. Given that the scheme is not finalised and Council decisions may be some time away, this advice is based on the following key factual assumptions:

(a) The terms and conditions of the scheme will not differ materially from what you have advised us or from the draft high level scheme design which we have seen;

(b) A mechanism will be included in the scheme to protect TAs from third party claims relating to the same leaky home damage and two claims relating to the same property;

[3] The TA Steering Committee minutes of its 29 July 2010 meeting says. "Riskpool have advised that if the scheme is given effect as currently designed, Riskpool will not respond to reimburse any TAs for $ paid under the scheme – it goes beyond strict legal liability." However, as set out above, the claims eligibility assessment at Stage 2 seems in the case of TAs to largely reflect the general law - although a claimant will not have to "prove" their claim in the same way. Given the level of Riskpool's involvement in the leaky homes market, the impact of this issue on TAs may not be significant in any event.

(c) Crown owned rental housing, council owned rental housing and residential units in retirement villages will be excluded from the scheme;

(d) There has not been a decision by the Supreme Court on the question of investor-home owners (at the time any decision to opt in is made). Therefore as the matter currently stands owners of affected investment properties will be able to access assistance to repair properties under the proposed scheme.

29. Against the background above we now consider the questions you have asked us.

Inclusion in the LTCCP

30. Section 97 of the Local Government Act 2002 (the **LGA**) says that certain decisions can only be made if explicitly provided for in the LTCCP. If a decision is not explicitly provided for, then before it can lawfully be made the Council must amend its LTCCP and must ensure that the proposal to provide for the decision was included in the associated statement of proposal ie was explicitly consulted on.

31. Decisions not caught by section 97 can be made by a council whether or not they are explicitly provided for in the LTCCP, subject of course to compliance with all other statutory requirements.

32. Further, decisions can be made which are inconsistent with the LTCCP. Section 96(3) of the LGA says:

> Subject to section 80, and except as provided in section 97, a local authority may make decisions that are inconsistent with the contents of any long-term council community plan or annual plan.

33. If applicable, section 80 imposes a procedural requirement only, which we discuss below. The only potentially relevant provision which may substantively prohibit the decision is therefore section 97.

34. The decisions covered by section 97 are listed in subsection (1) as follows:

> (a) a decision to alter significantly the intended level of service provision for any significant activity undertaken by or on behalf of the local authority, including a decision to commence or cease any such activity:
>
> (b) a decision to transfer the ownership or control of a strategic asset to or from the local authority:
>
> (c) a decision to construct, replace, or abandon a strategic asset:
>
> (d) a decision that will, directly or indirectly, significantly affect the capacity of the local authority, or the cost to the local authority, in relation to any activity identified in the long-term council community plan.

35. Of the four categories of decision in section 97(1), paragraphs (b) and (c) can be ruled out as inapplicable: the decision in question has nothing to do with strategic assets.

36. Paragraphs (a) and (d) both refer to decisions in relation to "activities" of the council – subparagraph (a) to a "significant activity" and (d) to an "activity". Paragraph (a) is

concerned with significantly altered service levels of significant activities; paragraph (d) with a significant effects on capacity or cost in relation to activities.

"Activity"

37. The subject matter of the decision in question is the resolution of leaky homes claims which have been or may in the future be made against the Council. The first question is whether that is an "activity", or whether such a decision would be "in relation to [an] activity", for the purposes of section 97.

38. "Activity" is defined in section 5 of the LGA as:

> A good or service provided by, or on behalf of, a local authority or a council-controlled organisation; and includes:
>
> (a) the provision of facilities and amenities; and
>
> (b) the making of grants; and
>
> (c) the performance of regulatory and other governmental functions.

39. In our view, meeting a legal liability (for negligence), or settling an existing or prospective claim of negligence, is unlikely to be the provision of a "good" or "service" by the council, in terms of this definition.

40. A "good" can encompass both real and personal property, but excludes money or legal rights which do not have a tangible form[4]. So settling a leaky homes claim is not the provision of a "good". A "service" is potentially a broad category; however in this context we consider it is intended to refer to something which the local authority makes available for the use or benefit of its communities. The payment of a legal liability or the settlement of a legal claim is not the provision of such a service.

41. In our view an activity is something undertaken by the Council in the achievement of its role under section 11 of the LGA, which is to give effect to the purpose of local government in section 10, and to perform the duties and exercise the rights conferred on it by statute. It is a reference to matters which the Council carries out to satisfy that statutory function – those goods and services which it is required to provide and those which it can choose to provide. It does not refer to the Council's role in responding to legal liability in negligence.

42. The definition lists in (a), (b) and (c) some matters which are "activities". We do not think that any of those matters would apply in this case. Paying leaky homes compensation is not the provision of a facility or amenity. It is unlikely to be regarded as the making of a grant either. The essence of a grant is that it is a wholly gratuitous payment, whereas in this case a payment under the scheme is in effect in settlement of a claim which has been made (or could be made) against the Council.

43. Nor in our opinion is making payments under the scheme the performance of a regulatory function. The liability may arise out of the (mis)performance of such a function, but settlement of the claim is not itself a regulatory function.

44. Although the three express categories are non-exclusive and so it may be possible for a "good or service" (and therefore an "activity") to fall outside them, together they cover

[4] This interpretation of "good" is consistent with s 2(1) of the Goods and Services Tax Act 1985.

a very broad range of local authority functions. Our view that the payment of leaky homes compensation is not within the extended definition, is consistent with the conclusion above (ie that this is not likely to be the provision of a good or service).

45. This conclusion is reinforced by the context in which "activity" is used in section 97(1). Paragraph (a) refers to an altered service level for the activity. It is not natural to speak of service levels in the context of paying damages or settling claims in lieu of paying damages.

46. Paragraph (d) of section 97(1) makes it explicit that the "activities" being referred to are the council's activities identified in the LTCCP. Section 93(6) of the LGA says that the purposes of an LTCCP include:

- to describe the *activities* of the local authority;
- to provide a long-term focus for the decisions and *activities* of the local authority;
- to provide an opportunity for participation by the public in decision-making processes on *activities* to be undertaken by the local authority.

47. Clause 2 of Schedule 10 requires the LTCCP to do the following in relation to each group of activities of the local authority:

(a) identify the activities within the group of activities:

(b) identify the rationale for delivery of the group of activities (including the community outcomes to which the group of activities primarily contributes):

(c) outline any significant negative effects that any activity within the group of activities may have on the social, economic, environmental, or cultural well-being of the local community:

(d) identify the assets or groups of assets required by the group of activities and identify, in relation to those assets or groups of assets...

48. Similarly, clause 15 of Schedule 10 sets out the required contents of the annual report which must, in relation to each group of activities:

(a) identify the activities within the group of activities; and

(b) identify the community outcomes to which the group of activities primarily contributes; and

(c) report the results of any measurement undertaken during the year of progress towards the achievement of those outcomes; and

(d) describe any identified effects that any activity within the group of activities has had on the social, economic, environmental, or cultural well-being of the community; and

(e) include an audited statement—

(i) setting out a comparison between the actual levels of service provision of that group of activities and the intended levels of service provision (as set out in the long-term council community plan in respect of that year) of that group of activities; and

(ii) giving the reasons for any significant variance between the actual service provision and the expected service provision..

49. In our view, paying damages or settling negligence claims could not sensibly be treated as an "activity" for the purposes of compiling this information required by Schedule 10. We understand that none of the Councils in fact treats leaky homes claims and their resolution as an "activity", or part of a "group of activities", in its LTCCP or annual report. Those documents have all passed audit under section 94 and 99 of the LGA respectively.

50. Section 84(3) of the LGA is also of direct relevance. It sets out the requirements of a statement of proposal in the case of a section 97 decision, which include:

> In respect of a proposal that the local authority assume or cease responsibility for an activity [such a decision is referred to in section 97(1)(a)], -
>
> (i) an assessment of ,the possible effects on other current providers of the activity;
>
> (ii) an assessment of whether there are any conflicts of interest arising from the proposal, and, if so, what they are and how they will be managed.

It would not make sense to refer to the Council "assuming" or "ceasing responsibility" for the meeting of leaky building claims, or to consider other "providers" of that activity. The Council has no choice in the matter, and there are no other "providers". This also suggests that such an act by the Council cannot be an "activity".

51. There are many other references to "activity" or "activities" in the LGA. In most cases the word would not naturally encompass the payment or settlement of a damages claim - for example in the context of the local governance statement in section 40, and community outcomes in section 91. We acknowledge that in a few places the word could have a broader meaning (subject to the definition in section 5) - for example section 101(3)(a) suggests that everything giving rise to a funding need is an "activity"; and section 48 lists various "internal" council functions such as conducting meetings and calls them activities.

52. Although for the reasons above, we do not consider that such a meaning is likely to apply in the context of section 97 of the LGA, we acknowledge that the word is capable of a broader interpretation. Further, section 97(1)(d) speaks of council capacity or cost "in relation to" an activity, which raises the possibility that even if resolving leaky homes claims is not itself an "activity", the costs of doing so might be "in relation to" another activity, for example the performance of a council's Building Act functions.

Case law

53. There are no cases which decide what is an "activity" for the purposes of section 97. The nearest is the Court of Appeal decision in *Stop the Stadium Society Inc v Dunedin City Council* [2009] NZCA 370. The case concerned Dunedin City Council's decision to enter into a contract to construct a sports stadium. It was claimed that the decision was covered by section 97(1)(d) of the LGA, and that the Council had wrongly decided to proceed without the decision being explicitly provided for in the LTCCP, as required by section 97(2).

54. The Court said that "the entry into a commitment for a major new capital asset" did not fit very comfortably with the definition of "activity" (set out above). It said:

> On the face of it, "activity" is a strange word to use for something which had no previous existence and which will come into existence in the future or will involve some future activity...[I]n the context in which it is used under s 97(1)(d), it is at least possible that "activity" is referring to something which is already active on the Council's part and which will be subject to a change that significantly affects the cost of its continuance.

55. Because of the common position taken by the parties in that case, the Court assumed that the Council's entry into the commitment was an activity but it expressly said it was not making a decision to that effect. The quote above is not directly relevant to the present case anyway. It does however suggest that the word "activity" should be given its ordinary meaning rather than stretched to cover circumstances which do not naturally fit. This is consistent with the conclusion we have reached above.

Conclusion on "activity"

56. There is a good argument that a Council's response to leaky homes claims, including making settlements and paying compensation, is not an "activity" for the purposes of section 97 of the LGA, and therefore section 97 does not apply at all. We think a Court is more likely than not to come to that view. However, as the meaning of "activity" has not been settled by the Courts and there is an issue about what it means for costs to be "in relation to an activity", there is some uncertainty and risk with that conclusion. We therefore go on to provide advice on the assumption that section 97(1)(d) does apply.

Application of section 97 even if it is an "activity"

57. We now consider whether section 97 would apply even if (contrary to the argument above) the Council's function of paying or settling leaky homes claims could be regarded as an "activity".

58. For subsection (1)(a) to apply, the decision must be to "alter significantly the intended level of service provision for a significant activity". Although reference to "service levels" is artificial in this context, it would have to be construed as meaning the extent of Council "response" to such claims.

59. We do not consider that a decision to opt into the Government scheme, as distinct from letting the litigation process run its course, would be a significant alteration. The Council would still be providing the same level of "service" ie resolving leaky homes claims within its district. They may be some slightly different incidence of benefit because of the "no fault" nature of the Government scheme, but generally the level of "service provision" would be the same.

60. Therefore we do not think that paragraph (a) would apply.

61. Subsection (1)(d)[5] refers to activities identified in the LTCCP. As mentioned above, the resolution of leaky homes claims are not "activities" identified in the Councils' LTCCPs (although the Councils do make some provision in their financial statements for the potential liability). Assuming for present purposes that they nevertheless

[5] This is proposed to be repealed by the Local Government Act 2002 Amendment Bill which is presently before Parliament As the Bill is not expected to be passed until later this year, subsection (1)(d) remains relevant to this advice.

should be, paragraph (d) applies if the decision will, directly or indirectly, significantly affect the capacity of the local authority or the cost to the local authority in relation to the activity.

62. As set out above, the current information suggests that opting into the Government scheme will be cheaper or at least no more expensive than not doing so. If that is so, then paragraph (d) would not apply. As we say below, in our view it will be necessary for the Councils to undertake an analysis of the costs and benefits of opting in, and so at that stage it will be known (bearing in mind the inherent uncertainty of the calculation) whether or not opting in will significantly increase the costs. One assumes, however, that if there is a significant cost increase then that would call into question the wisdom of any decision to opt in, in which case no question of section 97 applying would arise. This is subject to our comments at paragraph 69 about consideration of matters more broadly.

63. We emphasise that significance for the purposes of assessing whether the decision "significantly affect[s] the cost to the Council" is judged not by considering simply the amount which the Council will have to pay if it opts in; or the difference between a Council's current costs estimate or financial provision (which may not be accurate) and the amount it is likely to pay under the Government scheme. Rather, it is a comparison between the quantified costs of opting in with the quantified costs of not doing so. The costs of opting out are already fixed, in the sense that the Council has no choice but to pay them and it does not make a decision to do so. The effect of any decision to opt in is therefore only the difference in costs (if any) of resolving the claims using that approach rather than the current approach.

64. For paragraph (d) to be triggered, the costs involved would have to be "significantly" affected ie affected with a high degree of significance (definition in section 5 of the LGA). As referred to below, the Councils have a discretion to make that assessment guided by their policies on significance.

Decision-making requirements under Part 6 of the LGA

65. We turn now to consider the decision-making requirements in Part 6 of the LGA.

Significant decision?

66. The first question is whether the proposed decision would be a significant decision ie one having a high degree of significance. If the decision is not significant, then sections 77 to 82 of the LGA are not mandatory; the Council simply needs processes promoting compliance, which presumably exist[6]. If the decision is significant, then the Council must observe section 76(1), that is, it must comply with such of the provisions referred to in that section as are applicable[7].

67. Each of the Councils will be familiar with the assessment of significance, which will involve consideration of its policy on significance prepared under section 90 of the LGA. We have briefly reviewed the policies on significance of each of the Councils and there are a variety of ways in which the significance thresholds and criteria are expressed. Obviously, each Council will need to make a judgment in light of its own policy.

[6] section 76(3) LGA.
[7] section 76(3)(b) LGA

68. We note that a significant decision in terms of the thresholds in the significance policy does not of itself mean the LTCCP needs to be altered or that there must be consultation - unless the policy itself says otherwise.

69. Consistent with what we have said above, in our view the Council may assess the significance of the decision from the point of view that leaky homes liability already exists and so the decision is only one of how the Council will respond to that situation: that is, the difference between opting in and opting out of the Government scheme.

Identification and assessment of options

70. Under section 77 of the LGA, the Council must carry out an assessment of options. This is not an issue prompted by any need to consult or to alter the LTCCP, but simply in order to ensure the basis of the decision to opt in or not is sound and reasonable and in accordance with the legislation. Compliance with section 77 is subject to the discretions in section 79.

71. This advice concentrates on two of the options - opting in and opting out - but there may be other options as well. Each Council will need to identify those options and then make a reasonable attempt to quantify and assess the benefits and costs of each. Under section 79 of the LGA, it is for the Council itself to decide, on reasonable grounds, the degree to which costs and benefits are to be quantified, taking into account the matters in subsection (2), which includes the significance of the matter and the extent of the local authority's resources.

72. For those councils with large exposures, a formal actuarial process may be considered necessary. For smaller councils, or councils with less exposure, then it may be acceptable to be guided by the conclusions other councils have reached – assuming it is reasonable to treat those conclusions as applicable to them as well. The Council should specifically turn its mind to the section 79 matters and record the way it has assessed them and what the outcome is.

73. In assessing options, although the differing financial cost will be a major matter, it may not be the only matter. The Council is entitled to take into account the social, economic, environmental and cultural well-being of its communities. It may lawfully consider that a quick fix as proposed, even if more expensive, has countervailing social and environmental benefits which makes it a preferable option. Again, for the avoidance of doubt, the costs we are discussing here are the quantified costs of opting in compared to the quantified costs of not doing so. We are not discussing the difference between the Council's current cost estimates and the amount it is likely to pay under the Government Scheme. These costs of meeting potential liabilities are fixed as the Council's have no choice but to pay them whatever they might be.

Community views

74. Section 78 of the LGA requires the Council to give consideration to the views and preferences of persons likely to be affected by or to have an interest in a matter, at the four stages listed in subsection (2)[8]. This is subject to the discretions in section 79. In the present case, the "matter" would be the resolution of leaky homes claims or potential claims in the Council's district.

[8] This is proposed to be repealed by the Local Government Act 2002 Amendment Bill, but that will not have happened by the time Councils make the decisions in question.

75. In the recent Court of Appeal decision in *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, a strict standard of compliance with section 78 was imposed (although the decision in question was clearly a significant one)[9]. In that case, the section 79 discretion was downplayed, elevating section 78 to close to a mandatory requirement. The Court explained that approach by saying that there was no evidence that the Council had exercised its section 79 discretion at all. This emphasises how important it is for the Council to consciously exercise the section 79 discretion, and record how it has done so.

76. Whether or not community views and preferences are considered at each of the stages in section 78, and if so how, is for each Council to decide, taking into account section 79. However, section 79(2)(c) says that the nature of the decision may affect the scope and opportunity to consider a range of options or the views and preferences of others. Because in this case the "problem" is largely self-defining, a Council might conclude that there is now little scope for the consideration of views at the first stage referred to in subsection (2)(a). The extent to which community views and preferences are considered at stage 2 may depend on the Council's assessment of whether there are practicable options apart from opting in to the scheme or opting out of it.

77. Further, although in principle community views could be sought and considered at stages 3 and 4 (subsection (2)(c) and (d)), the Council still has a discretion. For example, if the Government imposes a short deadline for a decision a Council might decide that there is insufficient time to do so; or that the nature and significance of the decision make it inappropriate for community views to be sought. Section 78 does not require that a consultation process be undertaken.

Current LTCCPs

78. We have reviewed the various ways in which leaky homes liability has been addressed in the Councils' LTCCPs. Only one Council explicitly quantifies potential leaky homes liability, and identifies the likely funding source (in the text of the document). However, we understand that in all cases some provision for the potential liability has been included in the financial accounts, although the amount may not be separately identified.

79. In our opinion, the way in which leaky homes liability is presented in the current LTCCPs does not affect whether or not a Council may now decide to opt into the Government scheme.

80. The Council must prepare and adopt its LTCCP as required by the LGA. The LTCCP includes forecast financial statements prepared in accordance with generally accepted accounting practice (**GAAP**). We understand that GAAP requires provision to be made in the accounts for actual and contingent liabilities.

81. If, however, a current LTCCP does not properly reflect known or contingent liability for leaky homes (and we are not suggesting that any of the Councils' LTCCPs are in this category), then that is a matter to be addressed in the annual report and the next annual plan. It is not a reason why a council may not now make a decision in respect

[9] Prior to this Court of Appeal decision, there were two High Court decisions taking different approaches: *Council of Social Services v Christchurch City Council* [2009] 2 NZLR 123 and *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799,. In the *Council of Social Services* case the LGA decision-making processes were essentially treated as mandatory and able to be second guessed by the Courts on the merits. In *Whakatane*, the Court emphasised the Council's discretion as to how and when to comply with the LGA decision-making requirements and recognised a high threshold for Court intervention. The Court of Appeal has now overturned the latter case, and quoted from the former with approval.

of the liability which it does have or may have in the future. Unless section 97 (discussed above) applies, the LTCCP does not impose any substantive prohibition or restriction on the decision which a council may make.

82. Section 80 of the LGA may however impose an additional procedural requirement in those circumstances.

Section 80 of the LGA

83. Section 80(1) says:

> If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—
>
> (a) the inconsistency; and
>
> (b) the reasons for the inconsistency; and
>
> (c) any intention of the local authority to amend the policy or plan to accommodate the decision.

84. Depending on how an existing LTCCP deals with leaky homes liability, including how fully or accurately the actual and potential liability is expressed, it might be the case that a decision to opt into the Government's scheme has consequences which are "significantly inconsistent" with that LTCCP. For these purposes we are assuming, conservatively, that an inconsistency can arise where the financial provision in the plan is significantly less than what is expected under the Government scheme.

85. In these circumstances, section 80 imposes a procedural requirement to be fulfilled at the time the decision is made. Because this requirement is not onerous, in our view it would be appropriate for councils to adopt the conservative view referred to in the previous paragraph.

Yours faithfully
SIMPSON GRIERSON

Bill Loutit/Graeme Palmer
Partner/Senior Associate

Simpson Grierson

APPENDIX

Parameters of scheme for financial assistance as decided by Cabinet

- owners have a choice about whether to opt into the repair scheme for leaky homes (or pursue a dispute through Weathertight Homes Resolution Services (**WHRS**) mediation and tribunal services, or the courts, in which case they do not receive the additional assistance outlined below)
- if an owner opts into the scheme they must agree not to sue contributing territorial authorities and Government (owners will still be able to pursue legal action against other parties) and must commit to repairing their home
- Government (Department of Building and Housing) administers the scheme, including providing an assessment of the nature and scope of damage and repairs required, and an estimate of costs to repair
- Government provides a 25% direct payment to agreed repair costs
- territorial authorities provide a 25% direct payment to agreed repair costs where they had signed off the work
- Government provides assistance to owners to access bank finance and service loans for remaining agreed repair costs by way of loan guarantees to banks for all loans made to owners eligible to enter the scheme and who can meet the lending criteria
- homes signed off by private building certifiers are eligible, however they will not receive a direct payment to agreed repair costs from territorial authorities
- the scheme be available to new applicants (and those within the current WHRS scheme) for a period of 5 years from the 2010/11 fiscal year
- anyone who has not registered a claim with the WHRS prior to the establishment of the scheme that has a home that is older than 10 years would not be eligible for assistance
- the scheme leave open the option for industry to provide a direct payment to owner repair costs
- owners of affected investment properties will be able to access assistance to repair their properties in the proposed scheme because it does not discriminate based on who owns the dwelling