

Chairperson and Committee Members
CORPORATE BUSINESS COMMITTEE

22 SEPTEMBER 2011

Meeting Status: **Public**

Purpose of Report: For Decision

WEATHERTIGHT HOMES FINANCIAL ASSISTANCE PACKAGE

PURPOSE OF REPORT

1. This report considers whether the Council should become a participating territorial authority in the Financial Assistance Package (FAP) and a “contractor” to the Crown under the recently passed legislation, the Weathertight Homes Resolutions Services (Financial Assistance Package) Amendment Act 2011.

SIGNIFICANCE OF DECISION

2. This report does not trigger the Council’s Significance Policy

BACKGROUND

3. Problems related to leaky buildings throughout New Zealand arose from a series of building and system failures between the mid-1990’s and the mid-2000’s. Some buildings constructed during this period proved not to be weathertight and suffered significant structural issues due to water penetrating within the building frame.
4. Councils carried out consent approval and building inspections of these properties and subsequently the courts have found councils to be partly liable for the leaky building problem. Court cases across New Zealand have typically found the proportion of council “fault” at between 15% and 25% and the other building professionals, such as architects, builders and relevant subcontractors, to be liable for the balance.
5. However all parties have joint and several liability. If others have ceased trading or cannot afford to pay their share, a council, as the ‘last man standing’, will often end up paying substantially more than 25% of the repair cost.
6. There is a maximum ten year period for claims. The FAP does not provide any relief to those homeowners whose houses were consented and inspected more than ten years ago unless they make a claim within six years of first becoming aware of the problem and still within the ten year period.
7. In May 2010 the Minister wrote to the Council setting out the proposal by the Government to introduce the FAP scheme. The Minister asked the Council to support the scheme in principle.
8. On 8 July 2010 this Committee considered report AS-10-946 and adopted the following resolution;

That the Corporate Business Committee recommends to Council that Kāpiti Coast District Council agrees, in principle, to support the proposed financial assistance package announced on 17 May 2010.

That the Committee notes that the financial impacts of the financial assistance package cannot be fully determined until the details of it are settled, at which time the Council will then make decisions on providing for the quantum in the Annual Plan and Long Term Council Community Plan, and determine the appropriate funding under s101 (3) of the Local Government Act 2002.

On Thursday 15 July 2010 Council passed the following resolution:

That Council agrees, in principle, to support the proposed government leaky homes financial assistance package announced on 17 May 2010.

CONSIDERATIONS

Financial Assistance Package

9. The Weathertight Homes Resolutions Services (Financial Assistance Package) Amendment Act 2011 provides a new approach for repairing leaky buildings. It is a partnership between the government and local authorities. It is focused on repairing homes on a ‘no blame’ basis. The importance of this is that it avoids litigation and a significant amount of money claimants and councils are spending on the litigation process, money that would be better spent on fixing homes. The Package is optional for both councils and claimants although its availability to claimants depends on a council choosing to participate. If this Council decides to participate in the scheme then claimants in the Kāpiti district will be able to choose to pursue their claim under the Financial Assistance Package. If the Council should decide not to participate then claimants will not be able to compel the Council to participate.
10. The package includes:
 - Homeowner’s Agreement – an agreement between the council, Department of Building and Housing (DBH) and the homeowner, which establishes the scheme and funding for the individual claimant homeowner
 - Relationship Agreement – sets out the relationship between DBH and the council
 - Contract for Services – councils may opt to provide review and inspection services for the DBH
 - Gazette Notice – outlines the criteria under which claimants are eligible for the FAP
11. The Gazette Notice sets out the contribution criteria which identify those homeowners who will be eligible for the scheme. Councils will only pay where this is a residential dwelling (as opposed to a hotel or commercial shop or office within a residential building), and the council has a liability because it approved and inspected the building project. If the building was fully assessed and certified by private certifiers then the council has no liability and does not pay its 25%.

12. Under the FAP, the government pays 25% of the cost of repairing the home. The local authority pays its 25% where there is liability from having approved or inspected the home when it was built. The homeowner pays the remaining 50%. To assist the homeowner, the government has made arrangements with the banks to assist homeowners to raise their portion of the cost. Furthermore, other contributing parties such as builders can participate in the FAP scheme. Their contribution goes towards reducing the homeowner's 50%.
13. For the qualifying homeowner, this means their homes are repaired more quickly, they get 25% of the assessed repair cost from the government and, if the council is liable, they get 25% from the council. They also get an enhanced opportunity to borrow money because the arrangements made by the government gives the banks confidence to lend.
14. If the Council does not have any liability, for example, because a building was consented and inspected by private certifiers, then the council does not pay. The government still pays their 25% and the homeowner will have to fund the other 75%, perhaps with a contribution from another party, eg builder, architect.
15. The homeowner's agreement between DBH, the council and the homeowner sets out the obligations for all parties. It ensures the homeowner gets robust advice on how to repair the building, ensures they have the ability to pay their 50% of the cost (plus the cost of any repairs which are betterment), and requires them to go through a robust process for obtaining quotes and appointing contractors. It also requires the homeowner to make a commitment to carry through and complete the job. The process includes a series of checks and balances, to ensure that council expenditure is applied to repair work, and not to betterment, and is realistically priced. Not all homeowners will want to pursue this approach. The FAP scheme is optional. Homeowners who wish to pursue normal litigation will still be able to do so.

Benefits of the Financial Assistance Package

16. If the Council decides to opt into the scheme the benefits for the Council would be:
 - The Council will only pay if there is legal liability to contribute to the cost of the repairs.
 - The Council would pay a fixed percentage of the repair costs, which are established only after a rigorous review process.
 - The Council's contribution would go into repairing homes rather than the experience to date where 20% to 25% of costs can be lost in litigation expenses.
 - The Council does not have any exposure to additional cost through joint and several liability.
 - Once it has made a contribution under FAP, the Council is protected by the legislation from further legal claims relating to the events which gave rise to the claim, from any party.

17. For claimants joining the scheme the benefits are:

- They get their homes fixed quickly
- They receive 25% of the assessed repair cost from the Government
- They receive a further 25% from the Council if it is liable
- An enhanced opportunity to borrow money
- Retain the opportunity to seek compensation from other parties through litigation (excluding the Government and Council.)

18. There are two aspects the Committee should note.

- The first is that there are likely to be some additional claimants under the FAP in addition to the ten existing, current claims. These are likely to be people who do not want to pursue the current litigious system and would prefer the relatively quick and simple FAP scheme.
- The second is that there may be some claims where the Council would otherwise have insurance cover. Payments made by the Council under FAP are not an insured loss. The design of FAP permits a council with insurance cover for a particular property to elect to refuse to allow participation in FAP by that homeowner if the entry into FAP is likely to give rise to greater cost to the Council than leaving the matter as an insured claim. However this only applies where it is an existing claim subject to adjudication, mediation, or court proceedings. Of the current claims, five are insured and there is only one of these which would meet these criteria. With any future claim there are no options for the Council to refuse to participate in the FAP.

Services Contract

19. Within the Package is an option for a contract for services between the council and the Crown. Under this contract a council would assess repair plans and undertake FAP inspections on behalf of the Department of Building and Housing. The services provided by the council would be provided without charge and are a cost of the council's participation in the FAP. A council opting to take on these roles would retain its normal functions and exposure to liability as a building control authority when it issues and inspects building consents for this repair work.

20. It is not recommended that the Council become a contractor under the scheme as there are no benefits in doing so.

Relationship agreement

21. This defines how the Department of Building and Housing and the participating councils will work together to implement the FAP scheme. It sets out a governance structure with executive oversight of the relationship between DBH and the councils. Local Government New Zealand is part of this executive oversight. All participating councils will meet annually to review the programme and to make any recommendations for improvement. The relationship agreement sets out the functions of DBH and the councils. The agreement also provides a

dispute resolution process. Unresolved matters escalate through progressively senior people within the council and DBH. In the final circumstance, there is a binding arbitration provision.

22. A summary of the documents, agreements and the Gazette notice are attached as Appendix 2 to this report.

Financial considerations

23. The main objective of participation in the FAP scheme would be to provide an option for residents who own leaky buildings to get their homes repaired more easily. Participation would also reduce the Council's exposure to third party litigation and the difficulties with joint and several liability.
24. Participation in the FAP scheme would be likely to see this Council paying out about the same or less than under the status quo as its contribution to remedying leaky buildings. If the FAP scheme is successful it is likely that payments will be earlier in the process rather than the current situation which sees payments delayed by litigation.
25. Critically, all of the Council's payments under FAP will go to repairing homes rather than significant amounts being spent on litigation. Similarly, the Council's risk profile will be substantially reduced because the FAP scheme brings certainty as to the basis on which the Council would contribute to repairing leaky homes. There is a significant benefit in avoiding exposure to joint and several liability.
26. There will be some operational costs incurred in managing the FAP scheme but they would be similar to those for managing leaky buildings under the current system. In order to consider the financial impact of the Government's assistance package it must be compared to the costs of resolving leaky building claims under the current approach.
27. The Council's contribution has increased from 20% of the amount settled in 2006/07 to 25% in 2009/10. This is a result of the reduction in the number of parties contributing to the repair costs (last man standing). Until 2009 all the claims were covered by insurance. Up to 2006 the Council was liable for the first \$10,000 of each claim, and for the first \$50,000 thereafter.
28. This favourable insurance position is no longer available. There are currently ten outstanding claims. Five are covered and five are not covered by insurance due to exclusions relating to certain weathertightness clauses. The Council has been unable to obtain insurance to cover its future liability in respect of new weathertight claims since July 2009.
29. The following table provides a summary of Council's potential liability as at August 2011.

Summary of Potential Liability Costs				
	Joining the FAP Worst case:	Joining the FAP Best Case:	Not joining the FAP Worst case:	Not joining the FAP. Best case:
Current Potential Financial Liability	\$915,000	\$575,000	\$1,395,000	\$835,000
Future Potential Financial Liability Assume future claims of 2 per year for next 4 years	\$680,000	\$480,000	\$2,120,000	\$1,000,000
Potential Total Financial Liability	\$1,595,000	\$1,055,000	\$3,515,000	\$1,835,000

Full details of potential liability costs are attached as Appendix 1 to this report CS-11-320.

Options

30. Options have been considered for both aspects requiring a decision by the Council:
- the request by Government to consider joining the FAP, and
 - whether to become a “contractor” under the scheme. This is addressed earlier in this report. The recommended option is to decline the opportunity to become a contractor.

Option 1. Not joining the FAP.

31. With the current level of claims, although some are covered by insurance, the Council will incur significant financial risk if it does not join the FAP (where the Council will have no insurance cover for its liability.) The table attached as Appendix 1 to this report (CS-11-320) indicates the best option is to join the FAP.
32. If claimants elect to participate in the scheme the Council will lose (for those current claims covered) RiskPool cover. The Council may not minimise its liability through joining the FAP **and** claiming cover for the same liability through RiskPool. The unknown is the number of potential future claims for which the Council will have no RiskPool cover.

33. This option is not recommended.

Option 2. Joining the FAP.

34. Although 50% of the current claims are covered by RiskPool the best financial outcome for the Council is to join the FAP. It is considered unlikely that those claims where there is existing cover from Risk Pool will elect to join the scheme due to the time that these claims have been inactive. This is particularly true for

the larger claim which is for a multi-unit development as the scheme would require 75% of the owners to agree to join.

35. In addition 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 do not notify the Department the claim will be taken off “hold” and they will have to continue with the Weathertight Homes Resolution Service process.
36. By joining the scheme the Council would avoid the legal costs associated with current and future uninsured claims, if claimants choose to participate in the scheme.

37. The recommended option is for the Council to participate in the FAP

Financial Considerations

38. The financial implications of the Financial Assistance Package are set out in the body of the report.
39. The costs will continue to be funded from the contingency fund

Legal Considerations

40. Advice has been sought from Simpson Grierson to clarify details within the relationship agreement.

Delegation

41. Under section B.3 7.11 the Corporate Business Committee has “*Authority to assess and monitor key risks facing the Council including key risks associated with major projects*”.
42. However, this matter requires a decision and the Committee must make a recommendation to the Council.

Consultation

43. No consultation is required.

Policy Implications

44. There are no policy implications,

Tāngata Whenua Considerations

45. There are no tāngata whenua considerations.

Publicity Considerations

46. A media release will be prepared following this Committee's decision.

RECOMMENDATIONS

47. That the Corporate Business Committee recommends to the Council that Kāpiti Coast District Council agrees to participate in the Weathertight Homes Resolutions Services (Financial Assistance Package) Amendment Act 2011.

48. That the Corporate Business Committee recommends to the Council that Kāpiti Coast District Council declines to become a Contractor under the Weathertight Homes Resolutions Services (Financial Assistance Package) Amendment Act 2011.

Report prepared by:

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Approved for submission by:

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ATTACHMENTS:

Appaendix 1. Potential liability costs as at August 2011

Appendix 2 Financial Assistance Package Scheme Documents

Appendix

The following table provides an estimate of Council’s potential liability costs as at August 2011.

Potential Liability Costs						
Claim No	Status	RiskPool cover	Joining the FAP assuming those current claims covered by RiskPool participate in scheme (except No 7 where litigation has commenced) Worst case:	Joining the FAP assuming those current claims covered by RiskPool do not participate in scheme (except No 7 where litigation has commenced) Best Case:	Not joining the FAP RiskPool cover (Legal costs estimated at \$25,000 per claim) (except No 7 where litigation has commenced) Worst case:	Not joining FAP. RiskPool cover (Legal costs estimated at \$25,000 per claim) (except No 7 where litigation has commenced) Best case:
1	Claim lodged with DBH Remedial work being undertaken. Estimated \$1,400,000	Yes	25% of estimated remedial costs Estimate \$350,000	\$50,000	\$50,000	\$50,000
2	Claim lodged with DBH Quantum unknown	Yes	25% of unknown remedial costs. Estimate \$60,000	\$50,000	\$50,000	\$50,000
3	Claim lodged with DBH Quantum unknown	Yes	25% of unknown remedial costs. Estimate \$60,000	\$50,000	\$50,000	\$50,000

Potential Liability Costs						
Claim No	Status	RiskPool cover	Joining the FAP assuming those current claims covered by RiskPool participate in scheme (except No 7 where litigation has commenced) Worst case:	Joining the FAP assuming those current claims covered by RiskPool do not participate in scheme (except No 7 where litigation has commenced) Best Case:	Not joining the FAP RiskPool cover (Legal costs estimated at \$25,000 per claim) (except No 7 where litigation has commenced) Worst case:	Not joining FAP. RiskPool cover (Legal costs estimated at \$25,000 per claim) (except No 7 where litigation has commenced) Best case:
4	Claim lodged with DBH and formally lodged against Council. Quantum unknown	Yes	25% of unknown remedial costs. Estimate \$60,000	\$50,000	\$50,000	\$50,000
5	Claim lodged with DBH and formally lodged against Council. Quantum unknown	Yes	25% of unknown remedial costs. Estimate \$60,000	\$50,000	\$50,000	\$50,000
6	Claim lodged with DBH Quantum unknown	No	25% of unknown remedial costs. Estimate \$60,000	25% of unknown remedial costs. Estimate \$60,000	\$240,000 (assuming no other respondents) Plus Legal costs	\$100,000 (assuming there are other respondents) Plus Legal costs
7	Claim lodged with DBH Remedial work being undertaken, quantum \$251,000	No	Estimate \$60,000 plus legal costs	Estimate \$60,000 plus legal costs	Estimate \$60,000 plus legal costs	Estimate \$60,000 plus legal costs

Potential Liability Costs						
Claim No	Status	RiskPool cover	Joining the FAP assuming those current claims covered by RiskPool participate in scheme (except No 7 where litigation has commenced) Worst case:	Joining the FAP assuming those current claims covered by RiskPool do not participate in scheme (except No 7 where litigation has commenced) Best Case:	Not joining the FAP RiskPool cover (Legal costs estimated at \$25,000 per claim) (except No 7 where litigation has commenced) Worst case:	Not joining FAP. RiskPool cover (Legal costs estimated at \$25,000 per claim) (except No 7 where litigation has commenced) Best case:
8	Claim lodged with DBH Quantum unknown	No	25% of unknown remedial costs. Estimate \$60,000	25% of unknown remedial costs. Estimate \$60,000	\$240,000 (assuming no other respondents) Plus Legal costs	\$100,000 (assuming there are other respondents) Plus Legal costs
9	Claim lodged with DBH Quantum unknown	No	25% of unknown remedial costs. Estimate \$60,000	25% of unknown remedial costs. Estimate \$60,000	\$240,000 (assuming no other respondents) Plus Legal costs	\$100,000 (assuming there are other respondents) Plus Legal costs
10	Claim lodged with DBH Quantum unknown	No	25% of unknown remedial costs. Estimate \$60,000	25% of unknown remedial costs. Estimate \$60,000	\$240,000 (assuming no other respondents) Plus Legal costs	\$100,000 (assuming there are other respondents) Plus Legal costs
Current Potential Financial Liability			\$915,000	\$575,000	\$1,395,000	\$835,000

Future Potential Financial Liability	Joining the FAP Worst case	Joining the FAP RiskPool cover Best Case:	Not joining the FAP RiskPool cover Worst case	Not joining FAP.RiskPool cover Best case:
Assume future claims of 2 per year for next 4 years	25% of unknown remedial costs per claim. Estimate 8 x \$60,000 plus legal costs at \$25,000 per claim. \$680,000	25% of unknown remedial costs per claim. Estimate 8 x \$60,000 \$480,000	\$240,000 (assuming no other respondents) Plus Legal costs Estimate 8 x \$240,000 plus legal costs at \$25,000 per Claim \$2,120,000	\$100,000 (assuming there are other respondents) Plus Legal costs Estimate 8 x \$100,000 plus legal costs at \$25,000 per Claim \$1,000,000
Potential Current and Future Financial Liability	\$1,595,000	\$1,055,000	\$3,515,000	\$1,835,000

Financial Assistance Package Scheme Documents

FINANCIAL ASSISTANCE PACKAGE SCHEME – AGREEMENTS, CONTRACTS AND DOCUMENTS

1. Homeowner's Agreement

This is an agreement between the council, DBH and the homeowner. This is the primary document which establishes the FAP scheme and funding for the individual claimant homeowner. The key issues are:

- The Department of Building and Housing (DBH) determines if there is an eligible claim under the Weathertight Homes Resolution Services Act 2006. An assessment report is obtained and the owner may elect to enter the FAP.
- DBH and the council then determine whether the claim is eligible for FAP. A discretionary decision by the council to refuse eligibility is not likely to be able to be challenged.
- If DBH and the council agree that FAP is available, then the homeowner goes through a process of preparing repair plans, obtaining quotes, getting relevant regulatory consents and preparing a payment plan.
- DBH fronts the scheme and has the direct dealing with the claimant.
- The council is fully involved in assessing and recommending approval of the repair plan and payment plan.
- If the council and DBH can't agree these elements, then these are sorted out prior to DBH talking to the homeowner.
- Once the repair plan and payment plan are agreed, and the claimant has satisfied DBH that they can afford the cost of the repairs (by borrowing or otherwise) the homeowner gives a notice to proceed, i.e. a statement they wish to be part of the FAP. At this stage, they must discontinue any legal proceedings.
- The first payment is made by DBH on behalf of both DBH and the council. This triggers the legal provisions which prevent any person subsequently seeking compensation or redress from the council over weathertightness issues related to that home.

- The council undertakes the inspections, acting as a contractor for DBH so that we come under the umbrella of their immunity.
- Any changes to the repair plan or payment plan go back through a process which gives councils full involvement.
- DBH draws the funds for the council's portion of the payments (25 %) by way of direct debit. There are checks and balances to enable the council to check that drawdown amount is appropriate.
- Before DBH makes the final payment there is an opportunity for Council input and inspection of invoices and other supporting information.

2. **Discontinuance Addendum**

This is an addendum to the Homeowner's Agreement which is completed when the claimant has existing proceedings against the council which have to be discontinued before Council makes the first payment.

- The homeowner acknowledges that their legal rights are permanently altered and they can no longer seek redress from the council for weathertightness issues.

3. **Multi Units Addendum**

This is an addendum to the Homeowner's Agreement for claims involving multi unit buildings or multiple buildings in a single body corporate. The key points are:

- The Body Corporate and multiple owners need to sort themselves out so they can speak as one voice for the FAP scheme.
- For multi-unit developments in multiple buildings, the FAP scheme will apply to whole buildings.
- All the homeowners of the building plus the body corporate must agree to any staged or partitioned approach to repair.
- It is for the body corporate to determine how the funding the cost of repairs is distributed among members.
- The DBH / Council concern is to make sure that the whole project is affordable and that for staged projects, contingencies are applied in an equitable manner so they are not disproportionately used up by early stages.

4. **Fully Completed Repairs Addendum**

This is an addendum to the Homeowner's Agreement for use where a building has been fully repaired already. If a building has been partially repaired, then it goes through the normal process. The key elements are:

- DBH, in consultation with the Council determine a financial amount which is offered to the homeowner.
- The homeowner either accepts or rejects the offer.
- In making its offer the DBH, and the Council, take account of the evidence of costs put forward by the homeowner, any assessor's report, any betterment to be deducted, and the cost of similar jobs.
- The homeowner is relieved from having to prepare repair plans and payment plans because the job is already complete and they are simply getting a monetary payment.

5. **Contractor's Statement**

This document flows from the Homeowner's Agreement. It is a statement by the contractor/builder that:

- They are aware this is an FAP repair.
- They agree that FAP officers (including council officers when acting as a contractor to DBH) will have access rights to the site.
- There is an FAP payment plan that they need to be aware of (and in most cases will set the payment plan for the contractor).
- They need to carefully identify their costs to distinguish between repairs and betterment.
- When the building is declared, there will be a critical inspection which will determine the final cost of any variable amounts (provisional cost sums) and builder's contingencies in the quoted costs.
- Any adjustments to the repair plan or payment plan will need the consent of the homeowner, DBH and the Council.

6. **Relationship Agreement**

This is the primary document which sets the relationship between DBH and the Council. The critical elements are:

- The core objectives of DBH and council are outlined. It is about fixing leaky buildings. It also relates to us each giving 25%. The agreement particularly records that the parties do not intend that their respective 25% contributions be increased.
- A governance structure is established to ensure that there is executive oversight of the relationship between the Councils and DBH.
- The functions and accountabilities of the different parties are clearly set out, as is the commitment to work a collaborative model.
- It establishes a senior operational managers' forum and an executive group of chief executives (or their nominees).

- There is a dispute resolution process which targets resolving matters at operational level, but escalates to second tier managers, chief executives, the chief executive of DBH, then arbitration.
- There is a commitment by the parties to stay in the scheme until at least 2014. After that time, under certain circumstances councils can terminate the agreement.
- DBH is required to offer councils a contract to provide the repair plan review and inspection services for the FAP scheme. This ensures councils get the right to deal with repair plans inspections if they wish to.
- The Crown (including Housing New Zealand) and the Council agree not to claim under FAP for their own buildings.

7. **Contract for Services**

This is a contract between DBH and councils who want to take up the option of providing review and inspection services. It particularly relates to the approval of repair plans, inspections and any changes to repair plans. Their key points are:

- Councils are appointed as a contractor.
- Councils are able to appoint agents to carry out their work. These may be people who provide professional services to the council.
- DBH can suspend the contract for non-performance but cannot terminate it until the council has the right to go through dispute resolution procedures under the Relationship Agreement.

8. **Information Pack**

DBH is to publish an information pack to assist homeowners. As part of this document approval process, councils have agreed a checklist and bullet point content of the key elements to go into this information pack. These are the matters which impact the legal agreements / documents.

DBH have agreed the content list, which they will editorialise into a user-friendly information guideline.

9. **Contribution Criteria Gazette Notice**

This is the Gazette Notice which outlines the criteria under which claimants are eligible for the FAP. Claimants have to pass one set of criteria to qualify for the government's 25 % and then must pass a second set of criteria to be eligible for the Council's contribution. Key points are:

- Only residential dwelling houses are eligible.
- The property must not previously have been the subject of a settled claim against the Council

- Councils do not pay if they owed no duty of care and would not be liable if sued. For example council is not liable where private certifiers consented and inspected the job.
- The Council's 25 % contribution will not be available if the claim relates to a residential dwelling house in a retirement village and the claimant is the promoter or the operator of the retirement village.

Draft document