

## **WHY ISN'T IT WORKING? THE RISE AND FALL OF THE FINANCIAL ASSISTANCE PACKAGE IN THE REPAIR OF LEAKING BUILDINGS WITHIN NEW ZEALAND**

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**Abstract:** In July 2011 the NZ Government passed into law a financial compensation package in the form of the Weathertight Homes Resolution Service (Financial Assistance Package) Amendment Bill to assist homeowners in repairing homes damaged by water entering their buildings. The Financial Assistance Package (FAP) scheme for homeowners was a no-faults scheme that offered a remedy for cash strapped owners where none had existed previously. Why then, some three years after its introduction, has there been limited uptake by homeowners, with some labelling the scheme a failure?

This paper explores the reasons leading up to its introduction of this financial package legislation, particularly the thrust of the submissions made to the New Zealand Parliament Local Government and Environment Select committee in the submission period prior to the reporting back to Parliament. It will also examine the construction issues that have plagued the NZ building industry since the 1990s, and which have led to the passing of this legislation. The paper will outline the main characteristics that set this FAP apart from normal lending systems and explore the implications of the package for the homeowner and the building industry here in New Zealand. The reasons for the low uptake of the scheme three years on from its introduction in July 2011 are examined and analysed.

**Key words:** Financial assistance package; leaking buildings; construction technology

## 1. Introduction

The introduction of the Weathertight Homes Resolution Service (Financial Assistance Package) Bill (FAP) into Parliament in November 2010 and subsequent passing in July 2011 marks a further step in the Country's attempt to mitigate the considerable loss that the leaky building scenario has been to the New Zealand building industry and building public.

Background milestones leading up the passing of the FAP into law in July 2011 can be summarized in broad terms as follows:

- **1991.** The introduction of the of the Building Act 1991 into parliament.
- **1996.** A change to the building regulations within the Building Code allowing the use of kiln dried, treatment free *pinus radiata* timber in building construction.
- **1998-2000.** A period that saw increased concern expressed by building industry professionals over the lack of the building quality, particularly as it related to moisture egress through the external cladding system.
- **2001.** The publication of the Auckland House Cladding Survey, a report commissioned by the Building Industry Authority (BIA) to investigate the extent of poor quality and leaking buildings (Murphy, 2000).
- **2002.** The Government acknowledges there is a problem and sets up a commission of inquiry to seek out the causes for this sudden upsurge in building failure (Hunn *et al*, 2002).
- **2002.** The Government sets up the Weathertight Homes Resolution Service Act 2002, initiating a framework for mediation and adjudication between owner, builder and other stakeholders to handle the significant increase in complaints over poor quality building.
- **2004.** The 1991 Building Act is rewritten as The Building Act 2004. This new legislation tightens up procedures and policies surrounding the implementation of building controls.
- **2009.** A further review of the 2004 Building Act is instigated, with the Act amended to allay growing concerns by the Government that parts of the Act are now too cumbersome, expensive to administer and not achieving the outcomes required.
- **2009-2011.** The introduction into law of the Weathertight Homes Resolution Service (Financial Assistant Package) Amendment Bill.

The bullet points above summarize briefly the refurbishment policies taken by successive Governments to counter and remedy the systemic failures visited on many buildings constructed in the 1990s and early 2000s.

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## **2. The Weathertight Homes Resolution Service (Financial Assistance Package) Amendment Act (FAP)**

In broad terms, owners who qualified and volunteered into the FAP scheme (it was not compulsory) could expect the Government to pay 25 per cent of the agreed repair costs for the repair of a faulty building. The participating Territorial Authority that approved the original construction, if they agreed to be a party to the Scheme, would also contribute 25 per cent, leaving the balance (50%) to be paid by the homeowner.

### **2.1. The 2010 Submission Process and Responses**

Most organizations in 2010 were in general favour of the Bill. A significant number were from large Territorial Authorities accredited with issuing building consents. They, particularly in the case of the largest, the Auckland Council, where the majority of the leaking buildings are located, were often on the receiving end of the “joint and several” scattergun approach to liability that is the hallmark of NZ law at the present time. In these situations the brunt of liability, regardless of the extent of culpability, tends to fall on those least able to avoid litigation.

They [the Territorial Authority] cannot escape involvement in legal proceedings by winding up or emigrating, are often in the position of ‘last man standing’. WCC’s experience is that this phenomenon is becoming increasingly apparent as time goes on and the number of solvent and/or locatable parties involved in building work in the mid to late 1990s reduces (Wellington City Council, 2011).

As such, and as can be imagined, they were amongst the FAP’s strongest supporters.

Other industry organizations, such as the Bankers Association, the Certified Builders Association and the Registered Master Builders Federation (RMBF) also gave cautious support for the proposals:

The Bill is a fair and pragmatic proposal that gives some certainty to affected homeowners and allows for all parties to become involved in the solution, rather than be dragged through the long, expensive and distressing process of arguing about who’s to blame for the problem (Registered Master Builders Federation, 2011).

The RMBF was however critical of aspects of the Bill, particularly in the areas of concern it felt were not addressed such as “...around liability, technical solutions and administrative processes around repair”. The overriding concern is that when repairs are done, they must be done right, and

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nothing in this Bill assists this process. The stakes are of course high, and if success is not achieved further misery and frustration follows, which will, in turn, result (if the claimant can afford it) in more litigation.

Concerns around the damaging effects of poor quality repairs were also expressed by the Construction sector working parties, submitted as part of the RMBF submission.

Repairs had often failed to address the underlying problems and some buildings were experiencing 2<sup>nd</sup> generation faults. The sector was embroiled [in] an “all faults” adversarial approach with legal costs, mediation settlements and awards/judgments (often disproportionate to the actual liability) contributing to an environment of litigation and a sense of unfairness by all involved...(Registered Master Builders Federation, 2011).

Not all organizations were supportive. The Home Owners & Buyers Association (HOBANZ) opposed the Bill in its entirety, suggesting it will not provide a useful and viable option for most of its members, in particular for those who:

- Were not eligible, for whatever reason, under the Weathertight Homes Resolution Act.
- Could not raise the money to fund the 50% required (if the Territorial Authority was implicated) or 75% (if the TA was not implicated)—plus any other sums that fell outside the “Agreed Repair cost”.
- Had homes more than 10 years old.
- Lived in multi-unit complexes.  
(Home Owners and Buyers Association, 2011)

The true nature of the calamity surrounding the leaking building crisis comes home when considering the position of apartment owners in the Body Corporate developments that proliferated across the Auckland Urban environment within the last 10-20 years. Behind the 8 submissions representing Body Corporate organizations are the stories of many individual owners caught up in a situation not of their making, committed to expenditure often beyond their means and from which they are unable to extricate themselves.

Several Body Corporate submissions spoke of the difficulty in funding the final actual costs of a repair, even though appropriate professional advice and procedures were diligently sought from the start. Particular difficulties included the need for resource consent approval to apply to the whole building because of each individual owned apartment’s intrinsic interconnectedness, even though damage may well be limited to one apartment. In this regard all apartment owners within a building are drawn

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into the web of litigation and mediation, regardless of whose unit is at fault. Body Corporate management have the task of convincing individual apartment owners within the Body Corporate to participate, a difficult task where approval is required for those who did not occupy their premises, or who were overseas, or who for a variety of reasons, refused to acknowledge their responsibilities. "Trying to get every owner who needs funding to apply for loans separately takes a long time and causes delays" (Bunting, 2011). The delays take a psychological and financial toll on owners.

With 76 individual owners in our situation, we are each relying on all 76 owners raising the funds for repair. Those of us willing to just get on and fix the apartment are outnumbered by those that cannot or will not raise the funds – making it extremely difficult to start repairs (Macreadie, 2011).

Private building owners formed the majority of submissions. Most were supportive but had issues with aspects of the bill that in the main reflected their own experiences.

Some 20% of submitters wanted extensions to the 10year limitation on claims, and spoke of personal experiences in having claims to the Weathertight Homes Resolution Service rejected because of time considerations. Another 20% focused on the problems associated with claims in progress or under repair whilst this new Bill was under deliberation, and doubts about eligibility to opt in to the FAP –and hence receive belated costs from Government and Territorial Authority –should they proceed with their existing remedial contract process to completion.

Several owners lamented the injustice of the FAP scheme excluding Territorial Authority contributions (25%) to claimants because their home was signed off by a private certifier, or even a certifier legally contracted to the Territorial Authority, in place of that same Territorial Authority, when they had no part in the decision making process leading to that action.

A few took issue with the generally held view that litigation was providing a poor outcome for the home owner and were dismissive of the impact this new piece of legislation would have. John Wilson saw it as a cynical offering to people in difficult circumstances and useful only for small claims of "less than \$100,000 where the owner could afford an extension to their mortgage" (Wilson, 2011).

It is untrue that litigation results in poor outcomes for the homeowners. Litigation is an effective means of getting accountability for the building system failures. ...Litigation through the courts has proven to

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be cost effective, and is the only means to hold Council, Builders, and Developers to full account. (Wilson, 2011)

To the Government, the reality speaks otherwise:

There is too much confusion in the current litigious process, because a number of people who have sought litigation have ended up winning their case, and then their legal fees have been almost the same size as—and in many cases, more than—their settlement. It is a case of even when one wins, one still loses (Williamson, 2011, (A))

### **3. The financial assistance package (FAP): reasons for the lack of uptake**

The FAP was introduced into law in July 2011. As of April 2014, almost 3 years on, only 87 properties have been repaired using the FAP process (Radio New Zealand, 2014). Another 364 have been approved for remediation and a further 3059 have qualified for assistance. These figures are in stark contrast to the predicted uptake of some 16-17,000 predicted when the FAP was launched.

Just as the number of repair cases has fallen well short of estimated targets, so too has the liability to the taxpayer of the repair bills, from an estimated \$1 billion over 5 years at the Scheme's inception, to a yearly provision of \$104 million in April 2014, a mere 10% of the original figure estimated in the original policy announcement (Williamson, 2014). This is a stark contrast to the projected uptake made by the Minister of Building and Construction at the scheme's introduction.

If, as officials forecast, 70 per cent of affected homeowners with the 10-year liability limit take up this package, the Government is anticipating its share will be around \$1 billion over the next five years (Williamson, 2011, (B))

This ironically could give rise to the cynical view that the more complex and difficult the criteria for joining the FAP, the less will be the uptake, and hence the less call on Government (and taxpayer) funds.

In fairness to the Government, the FAP offered help where no help had existed prior to its inception. The Scheme was mooted as an alternate course of action for the homeowner who, prior to its inception, would have only the Weathertight Homes Tribunal (WHT) mediation system or the legal route through the high court, with all the uncertainty and expenses inherent in such a course of action. The FAP offered a degree of certainty in that up to 50% of agreed construction costs, design fees, project management fees, building and resource consent fees, the cost of alternative accommodation—capped at \$5000, would be met by Government and Territorial Authority (assuming

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they agreed to contribute into the repairs). This was a limited offer, made for political purposes. The previous Government had staunchly denied any wrongdoing in the crisis and had not come up with any monetary solution beyond the WHT and action through the legal system.

Why then the very large discrepancy in numbers between the predicted and actual uptake by homeowners? An analysis of commentary on the topic plus discussions with affected participants in the building industry suggest the following as reasons

### **3.1. Entry into the FAP does not represent value for money**

Many claimants are being persuaded by their legal advisors that a claim through the WHT or the high court represents better value for money, in that, particularly for larger claims, the prospect of succeeding and achieving 100% of the costs represents time and effort better spent than a route through the FAP that would at best only achieve 50% of the agreed costs.

We're finding that claimants don't want to take up that offer when they can recover a hundred per cent of repair costs and other consequential losses by pursuing the claim either through the Tribunal or in the courts. It's just not enough for homeowners who've got a good claim (Wroe, 2014).

Indeed, without the co-operation and agreement of the Local Authority to participate, a mere 25% of the agreed costs would be recoverable. This to some puts the Council into a position where their participation or not would determine the viability of the Package:

...it is the councils who are benefitting by picking and choosing winners, and deciding whether to participate or not (O'Sullivan, 2012).

Organisations representing homeowners continued to be critical of the FAP, as this HOBANZ quotation suggests.

While touted as the answer for leaky homeowners, the FAP is not proving to be everything it promises and is not necessarily the best option for everyone (HOBANZ, 2014).

As mentioned above, recoverable costs include valuation reports, project management fees, design, building and resource consent fees, and a limited budget for alternative accommodation (\$5000) whilst the project is underway. Excluded are legal and expert costs and other damages to compensate for stress, anxiety and other related non-tangible expenses that are recognised expenses within the WHRS option and the Court system. The omission of these items may be fair and reasonable, given the structure of

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the FAP. However they are a further reason for the anxious homeowner to not take up the Package and put their trust in the unpredictable but potentially more advantageous outcome possible through the WHRS or the Courts.

The scheme rests on the various parties agreeing about the actual cost of the project prior to the commencement of work, a notoriously difficult thing to achieve given the nature of the remediation work. There is hence, a temptation to limit remedial work to meet this agreed figure, as any additional amount, even if eventually approved by the DBH as administrator of the scheme, would result in 50% of those additional costs being borne by the homeowner. Cost cutting can lead to poor quality, and for projects of this sort, where 100% success is required; the result can be a repeat of the leaky building cycle.

There is a very real concern that the FAP may lead to inadequate repairs due to unrealistic expectation of owners, or advice and services from an influx of inexperienced trades-people and professionals. Over the course of the last 10 years, we have already seen a number (of) failed repairs as a result of design and construction failures, even with cavity systems (O'Sullivan, 2011).

This issue seems to bear out the points raised in this regard (Sec 2.1) by the RMBF in the 2010 submission process prior to the introduction of the FAP.

### **3.2. The FAP limitation period.**

Many of the defects in the leaky buildings were a product of shoddy work carried out in the 1980s or 1990s. Eligibility for entry into the Package requires notification of the defect and the lodging of a claim within 10 years after the completion of the building. Considering the Package was not introduced until July 2010, eligibility to homeowners is restricted to those whose homes were built after the year 2000, with that date advancing with each passing year.

So what has happened is that a very, very large number of those homes that they were considering as being potential candidates for the FAP have fallen off the 10year cliff. ...they are therefore unable to file a claim under the Weathertight Homes Resolution Act and therefore not eligible for the FAP scheme (Gray, 2014).

The Government view is that the limitation is essential to ensure the financial viability of the Package. The Supreme Court ruling confirmed the Government has under no legal obligation to repair private dwellings. This Package is therefore a bonus option for those that qualify, and as such the

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Government feels entitled to put whatever limitations it believes are necessary to ensure its viability:

### **3.3. The FAP: too much complexity and uncertainty?**

The Department of Building and Housing pathway illustration for a FAP applicant has 12 separate activities recorded as necessary prior to the signing of the homeowner agreement and prior to the commencement of design! “The process – despite government intentions – is complicated” (O’Sullivan, 2011).

Much of the success of the process, and the decision to proceed with the FAP or not, depends on the confidence a legal advisor can place on the quality of an assessor’s report, in an area of construction where there is inherently much uncertainty. An underestimate of the actual repair costs could result in owners agreeing to work that are totally inadequate for the job in hand. Whilst there is provision for adjustment of costs, approval of these costs is, in the opinion of those in the field, a tedious and often cumbersome process that could easily tip the balance away from the FAP as a viable remediation and repair option.

The consequences of the current FAP scheme is (sic) a greater level of uncertainty for owners, thus the need for additional legal and expert advice. There is a lack of certainty and thus confidence among these advisors, and even councils are struggling to understand elements of the scheme. This can only reduce owner’s confidence and explains in part why there has been a very poor uptake of the FAP. (O’Sullivan, 2012).

### **4. Conclusion**

The reasons for the introduction of the Financial Assistance Package can be traced back to the poor performance of the NZ building industry following the introduction of the performance based NZ Building Act in 1991. The self-regulatory nature of this Act coupled with other factors such as the rapid introduction of new building materials and systems with dubious durability capability, poor quality construction methods, inappropriate design, lax documentation and supervision and the introduction of chemical free timber all combined to create many more defective buildings than had been the case in the past. The cost of repair to the economy has been such that the Government could not ignore the issue. Since the Hunn report published its report in 2002 it has reviewed the Building Act (2004), tightened up on a variety of contributory causes, set up an adjudication and mediation strategy and promised to license building practitioners.

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None of this has been of particular assistance to the owners of the defective buildings already leaking, who have, until the introduction of this financial package, been left largely to fend for themselves, their only recourse litigation through the courts or mediation through the Weathertight Homes Tribunal. In either case for reasons given, the outcome was often unsatisfactory. This Package, hence, was an opportunity to assist the average homeowner to cope with the difficult task of remedying poor quality building.

The 2010 submission on the pending FAP legislation spoke of likely difficulties associated with the 10year limitation period, with the complexity of the scheme and the challenges faced in securing a quality building outcome within agreed price limits. These apprehensions appear to be borne out in practice and now, three years from the FAP's passage into law, are evidenced by the lack of uptake of the Package by homeowners.

How can the Package be made more attractive and less onerous to operate? In this regard, it is difficult to pass up the suggestions made by O'Sullivan and others to loosen the FAP ties with the DBH, simplify the process and allow accreditation for people experienced in remediation to undertake the bulk of the decision making necessary for this complex recladding work to proceed as smoothly and efficiently as possible. The DBH suggests O'Sullivan, needs to become "outcome focussed rather than cost driven".

If Government genuinely wants to help people and improve the FAP scheme it should set up a work group comprising people experienced in remediation who could then streamline the process, improve the outputs and reduce transaction costs. (O'Sullivan, 2012).

Procedures need to be put in place that limit delays and disruption to the building repair process. This could be achieved by experienced personnel having more discretion over contingency sums available for items that inevitably arise in complex building operations. Small variations in cost are of small consequence compared to the inconvenience and cost of building work having to be redone for a second or even third time, as has happened. Submitters to the bill representation major service organizations emphasised the importance of the repair work being done well and done once!

Parallel with these reforms is the need to educate and upskill designers, contract administrators and the like to cope better with the complexities of the task in hand. Until then, the apprehensions voiced in the 2010 submissions by the RMBF for example - the failure to address underlying problems, the 2<sup>nd</sup> generation faults - will continue to be self-fulfilling.

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