

Latest developments on Weathertight Homes as at September 2009

(Exerts from report by Government dept of Building and Housing)

The Minister for Building and Construction, Hon. Maurice Williamson, recently met with the Mayors of Auckland, Wellington, North Shore, Tauranga, Christchurch and Waitakere to discuss weathertightness issues. These Mayors represent the six most affected Councils.

The Minister reported that the Government is working closely with them on finding a solution to the problem. Any solution will be focused on fixing damaged homes rather than litigation.

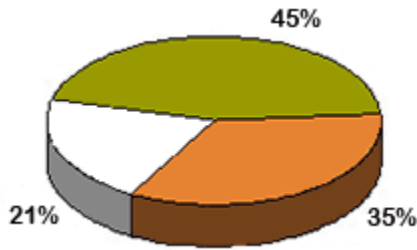
The Minister has canvassed a number of approaches which the Mayors have gone away to consider. There will be no further comment until he has considered their response.

Latest weathertight claims statistics as at 31 August 2009

The Department has received 5845 claims lodged for 7375 properties and completed assessments for 6695 properties.

Under the WHRS Act 2006 we accept applications for multi-unit properties as single claims.

Total claims

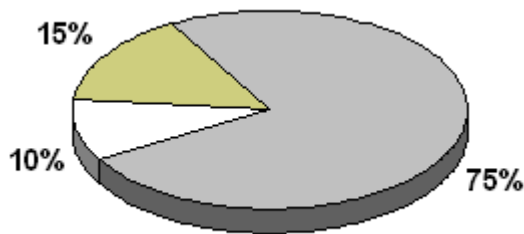


□ 1217 resolved claims (21%)

■ 2604 closed claims (45%)¹

■ 2024 active claims (35%)

Active claims

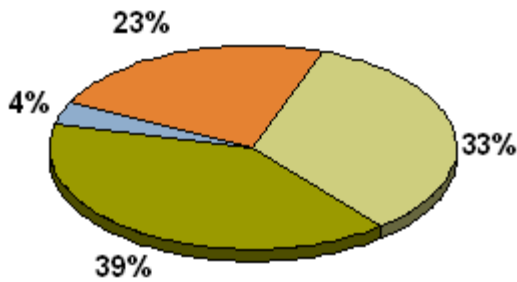


□ 203 claims in a process of assessing eligibility (10%)

■ 301 claims awaiting claimant decision (15%)²

■ 1520 claims pursuing resolution (75%)

Claims pursuing resolution



■ 509 claims with claimant pursuing repairs (33%)

■ 600 claims in alternative jurisdictions (39%)

■ 56 claims in the WHRS Act 2002 resolution process (4%)

■ 355 claims in the WHRS Act 2006 resolution process (23%)

1. Claims can be closed for a number of reasons including the following: claim discontinued by a claimant; claim being ineligible; property changed ownership; claim withdrawn under the WHRS 2006 Act so that the claimant

may join a class action; claim not progressing; claim transferred to another jurisdiction by the Weathertight Homes Tribunal (WHT) or claim terminated by the WHT.

2. Claimants can decide between 'eligibility' or 'full' assessment of the property. After the claim is decided eligible, they can decide to repair first or to resolve the claim and then proceed with repairs.

Limitation periods on claims

A claim must be made within 10 years of construction or alteration of the dwelling in order for the claim to be eligible under the Weathertight Homes Resolution Services (WHRS) Act 2006, but other statutory limitation periods could also affect your claim. The Limitation Act 1950 and Building Act 2004 both limit the period for starting legal proceedings, and respondents can use them as defences to a claim.

You should make a WHRS claim within six years of becoming aware of defects, and ultimately within 10 years of any relevant building or alteration work carried out by each respondent.


If you do not make a claim within the relevant time period, you could find you are left without a remedy either overall or against a particular respondent. A Department claims advisor or your lawyer can advise you on how a limitation period might affect your claim.

Weathertightness check for houses in drier climates

Weathertightness damage may take longer to show in areas with a drier climate.

Because of possible limitation defences, especially the 10-year

'longstop' period under the Building Act, it is important for homeowners in drier areas to have a thorough weathertightness inspection carried out on their dwelling if the limitation period is near.

You can find a building inspector in the phone book or on the [New Zealand Institute of Building Surveyors website](#) .

Useful insights on class actions

A 'class action' claim under the WHRS Act 2006 involves one claim for a group of owners in a unit title, cross lease or company share multi-unit complex. This is required if there is damage to a number of units or to common areas in the complex.

Consider 'class actions' favourably

If you think you have a 'leaky home' in a multi-unit complex then you are probably not alone. It is rare for only one unit in such a complex to be affected by weathertight problems. You should raise the matter with your body corporate or other unit owners.

A class action claim has many advantages:

- The claim has an appointed representative for the complex.

- That representative will be responsible for administration of the claim and will be the point of contact for all unit owners for decision-making and progress on the claim.

- Most of the issues affecting the complex and common areas can be dealt with together.

- You can share experiences and costs such as legal and expert advice. A multi-unit complex claim involves one assessment fee of \$1500 and one Weathertight Homes

Tribunal fee of \$400, regardless of how many owners join the claim or whether the claim includes common areas.

Concerns for a member of a class action

What is required to bring a class action claim under the WHRS Act 2006?

In complexes with damage to a number of units or to common areas, a 'multi-unit complex claim' must be made by a representative on behalf of the owners. The owners must authorise the representative to make the claim and authorise invasive testing of the common areas according to the rules governing the complex.

An 80% vote is all that is required if the rules governing the complex would otherwise require a higher vote. If the claim includes damage to units then the owners of at least 75% of the units in the complex must agree to join the claim and consent to invasive testing of their units.

In the case of a separate block of units within a complex, a 'stand-alone multi-unit complex claim' can be brought if all the owners in that block authorise the representative to bring the claim.

The WHRS Act ensures a 'whole of building' approach to assessment and repairs and avoids a minority unreasonably 'holding out' on making a claim.

How can I have a say in decision-making and levies?

The Unit Titles Act 1982 and the body corporate rules specify the way a body corporate operates about decision-making, levies and debt collection, seeking court orders (eg, for a binding scheme to repair the building), and the rights of unit owners and minorities regarding decisions.

Other rules may apply in other kinds of multi-unit complexes. Unit owners should be aware of what rules apply to their complex. Body corporate decisions or court orders may have implications on contributions expected of you. Talk to your body corporate manager, legal or financial advisor about the rules that apply in your particular complex and the implications for you.

How long will an assessment take?

The timeframe for assessing whether your dwelling is a leaky building and the extent of damage will depend on many factors. These include the size of the complex, the number of units in the claim, the size and shape of buildings in the complex, and ease of access to various parts of the complex.

How will any settlement or award be divided? Will I get anything?

This will depend on the rules that apply to the complex, relevant decisions on the claim, and the outcome of the resolution process.

Generally a class action claim will involve a total amount representing the particular damage to each unit and damage to common areas.

Usually the owners in a multi-unit complex will authorise the representative to organise repairs to the building. Any distribution to individual owners may depend on:

- whether and to what degree the claim is successful in the resolution process
- total repair costs
- deductions for expenses such as legal costs and experts
- any outstanding levies owed by unit owners
- the proportion of your unit entitlement or claim to the total claim

any individual claim for damages such as lost rental, medical expenses, or stress.

If the class action claim is unsuccessful, or repair costs outweigh any settlement or award, unit owners may still be faced with on-going costs and levies.

These are matters that unit owners need to discuss with their body corporate or other owners when making a WHRS claim.

Thermal image testing for weathertightness

Thermal or infra-red imaging is where a camera measures changes in the thermal energy or temperature of objects.

Thermal imaging also distinguishes between densities of objects. For example, a stud in a building will provide a slightly different wall surface temperature to that of a wall lining.

Thermal cameras can quickly detect the changes in temperature of specific parts of a building. Dense, damp or wet objects produce less heat than less dense or dry objects. This difference is shown as an image.

Aside from detecting very slight differences in surface temperature, thermal cameras can also identify where heat loss is occurring, or where moisture may be penetrating the exterior of a building.

Advantages of thermal imaging

- quick and non-invasive

- it does not require removal or manipulation of building materials

gives a visual presentation of findings
detects temperature variations that may indicate the
presence of moisture.

Disadvantages of thermal imaging

only detects surface temperature differences and cannot see
through walls
cannot detect subsurface damage
cannot indicate the extent of damage ie, the extent of the
decay, or the moisture content in affected areas
the process requires ideal external conditions, such as
external temperature, to maximise accuracy because it
measures changes in temperature
has no recognised standards for use in New Zealand.

Assessment procedures under the WHRS Act

Thermal imaging is not used as a standard part of weathertightness
assessment reports. Instead, a range of industry-proven testing
methods and equipment is used to undertake assessments, including:

moisture meters - to detect moisture content within building
materials
invasive testing - which consists of removing cladding or wall
linings to provide access to, and collection of, timber frame
samples
laboratory examinations of timber samples - to establish the
extent of timber deterioration
visual observations
consultation with off-site experts, such as quantity and
building surveyors, structural engineers, mould and timber
analysts
photographic evidence of findings.

Weathertight assessors must:

be experienced in the building industry and trained in weathertightness
be members of the New Zealand Institute of Building Surveyors, and adhere to the standards set by it
have a current practising certificate from a relevant professional body
regularly update their knowledge in leaky building damage and remediation procedures.

Case talk: Points from recent weathertight cases

Apportioning responsibility for damage

Responsibility for damage is not a simple mathematical exercise between parties who are jointly and severally liable. It may depend on the circumstances in each case.

In *Patel v Offord and Others* (High Court Ak 16/06/09), a project manager's contribution of 50% was held appropriate. He had overall control of the site, had the most opportunity to inspect, and had power to direct work and require remedial work. The council's contribution was set at 22%. Other parties shared the remaining liability in varying degrees.

Limitation Act 1950 – damage reasonably discoverable?

The general rule under the Limitation Act 1950 is that you must initiate proceedings within six years from when the defects are discovered, or are so obvious that they affect the value of the property.

In *Burns v Argon Construction Ltd & Others* (High Court Ak 05/03/09), some weathertightness damage was identified in a building consultant's

report in 1997. However, it was not until 2004 that another building consultant identified the fundamental causes of the damage. The Court held that in the late 1990s the nature of the weathertightness defects and necessary steps to repair were not fully understood, so it was not possible to clearly identify any defects and damage that were definitely discoverable at that time. [The claim has yet to be heard in the Weathertight Homes Tribunal.]

In *Body Corporate 169791 v Auckland City Council & Others* (High Court Ak 19/05/09), some weathertightness damage and concerns were highlighted in the body corporate minutes in 1996, but a building consultant's report in 1997 did not identify any clear cause of the problems. It was not until 2004 that a building surveyor identified the fundamental causes of the damage. The Court held that even though the 2004 report identified that the value of the building would have been affected at the time of the earlier concerns, the defects and remedial action required had not been made obvious at that earlier time. [The claim has yet to be heard in the High Court.]

Note that new instances of damage (but not damage worse than previously observed) can give rise to a separate claim, provided it meets WHRS Act eligibility criteria and proceedings are started within six years of discovery of the new damage or ultimately within 10 years of completing the relevant building work.

Individuals liable parties for defective construction

In *Body Corporate 183523 v Tony Tay & Assocs Ltd and Others* (High Court Ak 30/03/09), the Court gave some guidance on the potential liability of individuals for defective construction causing weathertightness defects:


A labour-only contractor might be held liable for defective work.

A party signing off the Practical Completion Certificate in an administrative capacity (which was not in issue in this case) does not provide an unqualified warranty on the builder's or vendor's behalf that the construction of the building has complied with the conditions and warranties of the building contract, or conforms to statutory requirements.

A development company director might not be held personally liable where the director has acted solely in his/her capacity as director, has had no personal involvement on site and in building supervision, and has not assumed any responsibility towards the claimants in a personal capacity.

Weathertight Homes Tribunal seminars

The Weathertight Homes Tribunal is running a series of seminars to explain the tribunal process in detail. Seminar dates and locations are regularly updated to meet demand.

Information packs can be sent to you or an appointment can be made for you to meet with a case manager. To find out more about the seminars and dates, visit the [Weathertight Homes Tribunal website's seminar page](#) .

If you are unable to attend a seminar but require further information contact the Tribunal on 0800 777 757 or email WHTenquiries@justice.govt.nz.