



THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Bronwyn Weir
Home Building Compensation Regulation Policy Team
State Insurance Regulatory Authority
Level 15, 231 Elizabeth Street
Sydney NSW 2000

By email: HBCF.Review@sira.nsw.gov.au

Dear Ms Weir,

Review of the NSW Home Building Compensation Scheme

Thank you for the opportunity to make a submission in response to the Review of the NSW Home Building Compensation Scheme (**HBCS**). The Law Society's Property Law, Business Law and Litigation Law and Practice Committees contributed to this submission. We set out our responses to the matters raised in the Supporting Information document (**SI**).

Introduction

As noted in the SI, home building compensation (**HBC**) insurance is not required for the construction of new apartment buildings that are more than three storeys. The Law Society has longstanding concerns in relation to this HBC insurance exemption. In our view, this exemption should be removed to increase consumer protection. We are mindful of the consumer protections provided by the strata schemes building bond under the *Strata Schemes Management Act 2015* (NSW), and the transition to decennial liability insurance, but we note the important function of HBCS as a scheme of last resort. We consider that this scheme should be available to all homeowners, including those whose home is in a multi-storey apartment block which is greater than three storeys in height.

We are also aware of issues arising in connection with the definition of a "storey",¹ and in particular, technical issues relating to whether a basement is considered a "storey" in the application of the HBCS, which is dependent upon the definition of "storey" in the *Building Code of Australia* of the National Construction Code Series.² Although outside the scope of the current Review, it would be helpful if this issue could be considered in due course. We suggest that the complexity of this issue may be a factor contributing to a lack of clear understanding of the HBCS.

¹ Section 56(7) *Home Building Regulation 2014* (NSW).

² For the definition of "storey" see Glossary, National Construction Code 2022 Volume One - Building Code of Australia Class 2 to 9 buildings, <https://ncc.abcb.gov.au/editions/ncc-2022/adopted/volume-one/1-definitions/glossary>

We also note the ongoing building reforms agenda of the Government, and that any changes made to the HBCS must be cognisant of these significant building reforms. We note that this theme is reflected in the third Term of Reference for the Review, which we support:

Given the Government is in the process of consolidating building-related legislation, review the draft legislation relating to the HBC and recommend the changes, if any, that are necessary or desirable at this time to promote cohesiveness with the wider legislative package.³

Insolvency

Concerns about insolvency of eligible building businesses in NSW

Current levels of insolvency across the building industry are concerning. Page 2 of the SI provides some data from the Australian Securities and Investments Commission about the increasing rate of construction industry insolvencies, including that construction industry insolvencies in NSW increased by 40% in 2023-24. We note, as the SI indicates, that this relates to construction companies only, rather than building businesses, which include sole traders or partnerships. Nonetheless, the rise in insolvencies in the building industry is a key consideration for the future operation and sustainability of the HBCS.

Factors that are usually highlighted in commentary on the increased levels of insolvency in the building industry include the significant increase in the cost of building materials and difficulties in obtaining labour. The impact of the withdrawal of the various business support measures implemented during the COVID-19 pandemic at both a State and Commonwealth level may also be a factor.

Value in publishing and monitoring insolvency data specific to HBC Scheme

We support the publication and monitoring of insolvency data specific to the HBCS as suggested by the SI. This data is an important measure for monitoring the sustainability of the HBCS, particularly noting that 87% of the claims made upon the HBSC are triggered because of builder insolvency, as noted on page 1 of the SI.

We note that the annual reports published by the State Insurance Regulatory Authority (**SIRA**) provide some insights on the operation of the HBSC, such as the number of claims made, and the average value of claims paid each year.⁴ However, the online publication of more detailed data specific to the HBCS would be helpful, particularly real time data on the nature of claims made on the HBCS, such as the number of claims made due to insolvency, as compared to claims due to the death or disappearance of the builder, or suspension of the builder's licence.

Cover amount – Issue 1: maximum cover for completed work - \$340,000

The appropriate cover amount

We support increasing the maximum cover for completed work to \$540,000, noting that the amount of cover has not been updated since 2012, and the average cost of building a new house has risen significantly. The commentary on page 3 of the SI notes that the increase to

³ NSW Government, Terms of reference, Review of the Home Building Compensation Fund https://hdp-au-prod-app-nsw-haveyoursay-files.s3.ap-southeast-1.amazonaws.com/6817/2783/7872/Terms_of_Reference.pdf.

⁴ State Insurance Regulatory Authority, SIRA Annual Report 2022–23, 35. https://www.sira.nsw.gov.au/data/assets/pdf_file/0009/1215468/SIRA-Annual-Report-2022-23.pdf.

\$540,000, an increase of 60%, will reflect changes in home building costs during this period. Additionally, the predicted effect of an increase in cover to \$540,000 upon the average cost of HBC insurance is an estimated increase from \$4,400 to \$5,130, as indicated on page 3 of the SI. In our view, the expected relatively moderate increase to the insurance premium is justified, given the increased protection that will be afforded by increasing the cover amount to \$540,000.

We suggest that consideration could also be given to the homeowner having the option to 'top up' the minimum cover amount.

Whether the cover amount should differ for different types of home building work

We do not support different cover amounts applying for different types of home building work. Such an approach may be unduly complex to administer.

How often the cover amount should be adjusted

We suggest that the cover amount should be adjusted every five years. The period of five years accords with the usual time for review of regulations under the *Subordinate Legislation Act 1989* (NSW). If the ability to vary the cover amount was contained in the relevant regulation, the review of the prescribed amount would coincide with the general review of the regulation every five years.

We do not support the cover amount being automatically increased annually, whether linked to HBCS data about building costs, the Producer Price Index, or some other measure of increased building costs. It is important, in our view, to consider other factors before increasing the cover amount, such as the predicted impact upon insurance premiums, as is being appropriately considered in this Review. An automatic adjustment does not allow for the consideration of wider relevant factors.

Cover amount – Issue 2: maximum cover for incomplete work – 20% of the contract price

The appropriate cover percentage

We support increasing the maximum cover for incomplete work to 40% of the contract price. The tables on page 5 of the SI indicate the predicted impacts upon the average cost of HBC insurance of increasing the limit to 40% for non-completion of new home building work, and non-completion of a renovation or alteration to an existing single dwelling house. Having regard to the relatively small, predicted increase in the average cost of HBC insurance in both cases, we consider the increase in the limit to 40% of the contract price to be appropriate.

The complexity of the conditions of insurance for incomplete works

In our members' experience, complexities arise in determining whether a particular building issue should be classified as a "building defect" or a matter of "incomplete work". Sometimes the homeowner may regard it as a defect, while the builder may consider that it is more a matter of not having had the opportunity to complete the work.

Whether the 20% limit should be increased for only some types of home building work

Again, we do not support a different approach for different types of building work as this is likely to be unduly complex to administer.

Awareness

The level of awareness and understanding of the HBCS

We support steps to increase the level of awareness and understanding of the HBCS. Apart from increasing overall levels, we suggest that one particular focus area could be awareness of the need to take out HBC insurance for renovations, alterations or remedial works valued at more than \$20,000, undertaken to any existing apartment building, including those over three storeys.

We also agree that consistency in the terminology used for the HBCS would foster better understanding, particularly across the websites of the relevant Government bodies.

Compliance

How easy, or hard is it to comply with the insurance requirements

Anecdotally, our members are aware of difficulties faced by building businesses in satisfying the eligibility requirements to purchase HBC insurance.⁵ Page 2 of the SI details some of the ways icare regulates the eligibility of building businesses to purchase HBC insurance, such as limiting the value and number of projects, and imposing conditions. We suggest that the review may wish to consider whether the requirements for eligibility are working as originally intended, and whether these requirements should also be reviewed, having regard to the overarching principles of the home building compensation (eligibility) insurance guidelines published on 17 December 2021.⁶

Should homeowners that don't have insurance be compensated (if so how) and what if any limits should apply?

We oppose a broad extension of the scheme to uninsured work. The need for insurance for residential building work has been an integral part of the various schemes since their inception and should in general be retained. However, we support empowering the scheme to make ex-gratia payments in limited circumstances, for example where the consumer has been induced to enter the building contract by fraudulent insurance documents, or where insurance was paid for but was not taken out by the building business. As to how such ex-gratia payments should be funded, the responsible building business should first be pursued, including any culpable directors. Where that is not feasible, recourse may be needed to other funding, and we note the various options that could be considered as set out on page 9 of the SI.

Ways that compliance could be improved

We support the steps to improve compliance outlined on pages 7 and 8 of the SI, including increased information sharing between the Building Commission, SIRA and icare.

⁵ icare HBCF, icare HBCF Eligibility Manual, Version 11.2, November 2023 <https://www.icare.nsw.gov.au/-/media/icare/unique-media/builders-and-homeowners/builders-eligibility/eligibility-guidelines/media-files/files/download-module/hbcf-eligibility-manual.pdf>.

⁶ State Insurance Regulatory Authority, Home building compensation (eligibility) insurance guidelines, 17 December 2021 <https://legislation.nsw.gov.au/view/pdf/asmade/si-2021-762>.

Multi-insurer market

The commercial viability of a multi-insurer market

The experience in NSW, since the departure from a single government-based insurer model in 1997, suggests that it is not commercially viable for multiple insurers and providers to operate in the NSW home building insurance market. The SI also notes that other Australian states and territories have had a similar experience.

The SI indicates on page 9 that:

the premiums charged by icare are higher than they would be if it was the sole insurer. This provides 'competitive neutrality'.

Whether to continue maintaining the current competitively neutral system for insurance in NSW is an important issue to consider, given that to date, private insurers have shown no interest in participating in the scheme. However, formalising a monopoly for the state insurer, may lead to complacencies and inefficiencies in the scheme, which may effectively cost more than the current cost of maintaining competitive neutrality. On balance, based on the failed attempts to promote alternatives to a state-based monopoly over a significant period, we suggest that the only feasible option is to reinstate a state-based monopoly and focus on running a sole insurer model as efficiently as possible.

One advantage of a sole insurer government model is that some of the consumer protections lost under the private system, such as cover for multi-storey buildings, could be reconsidered.

Thank you for the opportunity to provide feedback to the Review. Questions at first instance may be directed to Gabrielle Lea, Senior Policy Lawyer, at gabrielle.lea@lawsociety.com.au or (02) 9926 0375.

Yours sincerely,



Brett McGrath
President