



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:Business:GUgl1092277

18 February 2016

HBCF Reform
Fair Trading Policy and Legislation
PO Box 972
Parramatta NSW 2124

By email: HBCFreform@finance.nsw.gov.au

Dear Sirs,

Reform of the Home Building Compensation Fund

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper, "Reform of the Home Building Compensation Fund" issued by NSW Fair Trading.

The Law Society has long supported the existence of a fund such as the Home Building Compensation Fund ("HBCF"), believing it provides important safeguards and consumer protections.

In the Law Society's view, any reform of the HBCF should examine all aspects of the current scheme, including whether the scheme should continue to be limited to insurance of last resort and whether multi-unit high-rise buildings should continue to be excluded from the scheme. It is the longstanding view of the Law Society that coverage for high-rise multi-unit buildings should be reinstated as part of the HBCF scheme.

The Law Society notes the focus in the Discussion Paper on the losses sustained by the HBCF over the last two years. Given the volatility of the building industry as noted in the Discussion Paper, the Law Society considers it essential that a longer perspective be taken. For example, the Discussion Paper does not appear to address the significant decline in losses between the 2013 and 2014 years. Additionally there appears to be no breakdown of the claims to expenses ratio either while SICorp was the operator or when private insurers played the major role.

There is also no analysis of the state of the private scheme as at its commencement. The Law Society understands there was a substantial transfer of funds from the former Building Services Corporation to consolidated revenue at the time the private scheme commenced.

The Law Society notes the figures provided on page 15 of the Discussion Paper. Over a 12 year period, it appears that an average of approximately 500 claims per year were received; with 80% of claims being accepted and 20% of claims being declined. The Law Society had difficulties in reconciling the comparatively small number of claims with the substantial losses the scheme suffered over recent years. However, based on the data provided in the Discussion Paper, it is clear that reform of the HBCF is necessary.

Responses to the specific questions contained in the Discussion Paper are set out in the table attached at "A".

Home Building Advisory Council

The Law Society has been involved for several years on the Home Building Advisory Council ("HBAC") and regards the operation of the Council as very valuable. The Law Society understands that the terms of the members of the HBAC expired in early 2015 and new members have not been appointed. The Law Society suggests the revival of the HBAC and would be pleased to be represented on a new HBAC. The HBAC could provide incisive input into considerations as to the future and reform of the HBCF.

Should you have any queries about this letter, please contact Gabrielle Lea, Policy Lawyer, on 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Gary Ulman', with a stylized flourish at the end.

Gary Ulman
President

Reform of the Home Building Compensation Fund

Attachment A to the submission by the Law Society of NSW

No.	Questions	Comments
1.	Do you think that the period of insurance cover for major defect claims is appropriate?	Yes it is appropriate. The Law Society does not support the shortening of the period of risk in relation to these claims.
2.	What do you anticipate would be the impact of reducing the insurance cover period on: <ul style="list-style-type: none"> a) the consumer b) the builder c) the building industry? 	<ul style="list-style-type: none"> a) A significant loss of protection. b) The direct impact may be limited to a reduction in premiums, since it is currently last resort insurance. However, lowering the risk exposure of builders may remove the onus on the builder to ensure a higher standard of work and higher quality of workmanship. c) Probable loss of confidence. At worst, it may encourage builders to build to the reduced period of coverage, reducing the quality of building work generally. Anecdotal evidence suggests that building to the reduced period has already occurred as a consequence of splitting the insurable periods for the insured risk of structural and non-structural.
3.	Should insurance cover under the HBCF be split into separate cover for loss arising from non-completion and loss arising from defective work?	More detailed figures and analysis would assist in considering this issue further, however, no separate cover model should be adopted if it results in a reduction of coverage for the consumer
4.	Is coverage of \$200,000 for loss arising from non-completion and \$200,000 cover for loss arising from defective work appropriate?	More detailed figures and analysis would assist in considering this issue further.
5.	Should insurance under the HBCF be voluntary?	Definitely not; if insurance under the HBCF is made voluntary, the Law Society agrees that the problems outlined at pages 24 and 25 of the Discussion Paper are inevitable.
6.	Should insurance under the HBCF be mandatory for non-completion and voluntary	Definitely not; if any component is made voluntary, again the problems outlined at pages 24 and 25 of the Discussion Paper are likely to occur. Insurance for all types of

No.	Questions	Comments
	for defective work?	coverage should remain compulsory.
7.	Should there be mandatory insurance cover for only certain types of defects? What types of defects should require mandatory cover?	Mandatory cover should apply for all types of defects. If a distinction is made, again the problems outlined at pages 24 and 25 of the Discussion Paper are likely to occur where the cover is voluntary.
8.	Do you think that a similar scheme to the Western Australian proposal should be adopted in NSW?	No.
9.	Should the cost threshold for insurance be increased? If so, what amount should the threshold be increased to?	Yes, the Law Society considers that an increase to \$25,000 would be appropriate.
10.	Should the requirement to hold insurance be focused on core residential building work such as the construction of a new home or significant structural renovations of an existing home?	No, the definition of “core residential building work” is likely to create difficulties. Any attempt to focus on “core residential building work” would be counterproductive.
11.	What (if any) types of work could be excluded from the requirement to hold insurance?	<ul style="list-style-type: none"> • The Law Society notes that there are already numerous provisions of the <i>Home Building Act 1989</i> and the <i>Home Building Regulation 2014</i> relating to the regulation of different types of work. • In relation to the three examples provided in the Discussion Paper, the Law Society supports retaining the requirement for insurance for swimming pools work, but landscaping and fencing could be excluded from the requirement to hold insurance. • The Law Society defers to other stakeholders with greater expertise as to other types of work that could be excluded from the requirement to hold insurance.
12.	What types of work should not be excluded from the requirement to hold insurance?	Other than to say that significant or substantial work should not be excluded from the requirement to hold insurance, the Law Society defers to other stakeholders with greater expertise as to types of work that should not be excluded from the requirement to hold insurance.

No.	Questions	Comments
13.	Should any excluded works be subject to insurance requirements when done as part of a larger contract?	Yes, works excluded if done on a standalone basis should not be excluded when done as part of a larger contract.
14.	Should low-rise multi-unit buildings apart from duplexes be exempted from HBCF insurance requirements?	No. It is the longstanding view of the Law Society that coverage for high-rise multi-unit buildings should be reinstated as part of HBCF coverage.
15.	Do you agree with low-rise multi-unit buildings being covered by the strata building defects inspection regime?	No, the more appropriate consumer protection regime is the HBCF.
16.	Should a fee-for-service distribution model be considered for the provision of insurance under the HBCF?	Yes.
17.	Should insurance under the HBCF be directly sold to builders by the Government?	Yes.
18.	Should homeowners also be able to purchase insurance directly from the Government? Should this be in addition to, or instead of, builders purchasing the insurance?	To the extent that there are gaps in the existing scheme, the Law Society supports a proposal for homeowners to be able to purchase insurance, such as top-up cover, directly from the Government. This should only be in addition to builders purchasing insurance; the primary responsibility must remain with the builder.
19.	Should the application/eligibility assessment function and the claims management function be separated for the purpose of outsourcing these tasks?	As a threshold issue, the Law Society is not convinced that the activities of the current providers should be outsourced at all. The benefit of separating the two activities is not immediately clear to the Law Society.
20.	Is there any reason why these functions should not be individually defined and procured from a wider marketplace?	Greater competition in the provision of these functions is supported (assuming that they cannot be adequately provided by SICorp internally).

No.	Questions	Comments
21.	Could the introduction of licence classes based on the type of construction improve the quality of building in NSW?	No. The Law Society is concerned that the introduction of licence classes places greater burdens on builders and consumers to correctly identify the appropriate licence class, and failure to do so correctly might then jeopardise the level of protection afforded.
22.	If tiered licensing was introduced, should project and financial management skills be introduced as licensing eligibility requirements for more complex building projects?	The Law Society does not support tiered licensing.
23.	Do you think that eligibility for a company contractor licence should be amended to require the director to hold a qualified supervisor certificate?	Yes, definitely.
24.	Do you agree that public companies should be exempt from this proposal? If yes, on what basis should they be exempt?	No.
25.	What length of time should a person be disqualified from being the director of a contractor licensed company?	The length of time should be substantial so as to act as a deterrent.
26.	Are there any other penalties that could be imposed on directors? If so, what?	Penalties should be substantial so as to act as a deterrent.
27.	Are there any other measures that could be introduced to reduce the number of insolvency claims caused by companies that hold contractor licences? If yes, please explain.	<ul style="list-style-type: none"> • The Law Society acknowledges the serious issue of phoenixing and notes the need for co-operation at State and Commonwealth level to resolve the issues of insolvency and phoenixing. • Measures could include: <ul style="list-style-type: none"> ○ Implementing a regime where directors/contractors/nominated supervisors are required to provide disclosure under their licence about past involvement with

No.	Questions	Comments
		<p>entities that had previously held a contractor licence and have been wound up or de-registered.</p> <ul style="list-style-type: none"> ○ Implementing a regime that limits the number of insolvent or de-registration events for licence holders and suspend the licence of a director involved in more than two entities that have been wound up or de-registered. ○ Investigating whether it would be possible to trace through an obligation to rectify so that it follows the director to the new entity as a deterrent to simply closing down one entity and starting a new one. ○ Considering whether the corporate contractor ought to contribute to the insurance premium an amount, that cannot be passed on to the homeowner, and which is required to be disclosed in the contract to the homeowner. This mandatory contribution could also be increased for any entity which has a director that had previously been involved in an insolvent or de-registration event. Equally, the contribution could be decreased for a continuing corporate entity with a good claims history.
28.	Do you think that some or all of the insurance eligibility assessment process should be transferred to the Fair Trading licensing process?	No.
29.	If it should be transferred to Fair Trading, what aspects of the insurance eligibility assessment process should be transferred?	Not applicable.
30.	Is there scope to improve home building licensing through the revision, consolidation or removal of some licences? If so, what licences could be considered?	The Law Society defers to other stakeholders with greater expertise in this area.
31.	Should excavation work continue to be licensed? Should fencing work continue to be licensed? Should cleaning work continue to be	As for excavation, yes. As for the other two areas of building work, the Law Society defers to other stakeholders with greater expertise in this area.

No.	Questions	Comments
	licensed?	
32.	Should CPD requirements be more targeted towards risk areas that lead to claims on the HBCF?	Yes, the Law Society acknowledges the importance of appropriately targeted CPD.
33.	Should a condition be placed on the licence of a builder found to have previously produced defective work?	Yes.
34.	Should the requirements of CPD be narrowed to only apply to general builders (i.e. to cease applying to swimming pool builders)	No.
35.	Should additional supervision requirements be imposed on licensees?	<ul style="list-style-type: none"> • No, the existing supervision requirements are adequate. The options outlined in the second paragraph of page 39 are unduly onerous. • However, for entities supervising numerous projects, consideration could be given to separating the supervision tasks and having a nominated financial controller supervising the building costs, payment claims and cash-flow. That supervisor should then have appropriate accounting/management experience rather than on the job experience.
36.	If there were new supervision requirements, what would be the best way to implement them? For example, should supervisors be limited in how many projects they can undertake or have on-site requirements?	Not applicable.
37.	<p>How should any additional supervision requirements be targeted to where they are most needed? For example:</p> <p>a) Should the requirement apply only to</p>	Not applicable.

No.	Questions	Comments
	<p>particular types of building or trade work? If yes, indicate which types.</p> <p>b) Should any requirements to have additional supervisors be linked to the volume or scale of building projects that a licensee works on?</p>	
38.	<p>Could inspections by qualified assessors assist in detecting defective work earlier, and therefore enable it to be rectified for less cost?</p>	<p>Yes at face value but the Law Society anticipates practical difficulties and significant expense in the implementation of such a measure.</p>
39.	<p>Which of the above reform models do you believe should be adopted? Please give reasons.</p>	<ul style="list-style-type: none"> • The Law Society supports Model 1, subject to enhancing the current scheme as referred to in this submission, such as increasing the threshold to \$25,000, reinstating cover for high-rise multi-unit buildings and allowing consumers to purchase top-up cover. • The Law Society does not support Models 2 or 3 as it does not support a reduction of coverage. • The Law Society does not support Models 4 or 5 as it does not support any component of voluntary insurance.
40.	<p>Are there any other combinations of reform options that you think should be considered? Please give reasons.</p>	<p>Another option could be to increase the maximum excess to \$500, with consideration being given to a tiered maximum excess, based on the value of the claim.</p>
41.	<p>What do you see as the costs and benefits of your preferred option?</p>	<p>The Law Society is unable to provide a cost benefit analysis; it can only provide the general comments already made.</p>