



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:RHgl:1978518

15 October 2020

Review of the effectiveness and efficiency of
the NSW Home Building Fund
Independent Pricing and Regulatory Tribunal
PO Box K35
HAYMARKET POST SHOP NSW 1240

By online submission portal

Dear Sir/Madam,

Review of the effectiveness and efficiency of the NSW Home Building Compensation Fund – Draft Report

The Law Society of NSW appreciates the opportunity to comment on the Review of the effectiveness and efficiency of the NSW Home Building Compensation Fund – Draft Report (“Draft Report”). The Law Society’s Property Law Committee has contributed to this submission.

Draft Findings

We generally support the Draft Findings detailed in the Draft Report. However, in relation to Draft Finding 7, “That the regulatory framework deters entry by unnecessarily restricting how private insurers and providers compete in the market.”, we are not convinced that the restrictions are unnecessary, given the object of consumer protection and the difficulties in the sector following the collapse of HIH Insurance Limited.

Draft Recommendations

Our comments in relation to the Draft Recommendations are set out in the attached table.

Any questions in relation to this submission should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Richard Harvey
President

Encl.

**Review of the Efficiency and Effectiveness of the
NSW Home Building Compensation Fund
Draft Report**

Submission by the Law Society of NSW – October 2020

NO.	DRAFT RECOMMENDATIONS	COMMENTS
List of Draft Recommendations		
1	That the NSW Government improve access and timeliness to dispute resolution processes, by ensuring Fair Trading and NCAT are sufficiently resourced and have the relevant expertise.	We strongly support this recommendation. The Law Society particularly supports ensuring that NCAT is sufficiently resourced and that its Divisions have the appropriate expertise. Access and timeliness in respect of dispute resolution processes is also strongly supported by the Law Society.
2	That Fair Trading develop a program of proactive investigations and audits of building work in the low rise residential sector, similar to the approach being taken by the Building Commissioner in relation to apartment buildings.	We support this recommendation and note that it may be too early to analyse the effectiveness of the reforms being undertaken in the residential apartment sector. However, we support the intent of those reforms and agree that it would be appropriate to introduce a similar program of proactive investigations and audits of building work in the low rise residential sector.
3	Fair Trading and NCAT should collect information and publicly report on the number and type of complaints (including construction type, issue type, value of rectification and other costs), and the time taken to resolve them.	We support this recommendation, but it should not detract from the core work and responsibilities of Fair Trading and NCAT. We note that NCAT already collects data on the matters it determines, and we suggest that any reform should build on the existing work already undertaken.
4	The lodgement of a complaint or dispute with Fair Trading or NCAT for a specified defect within the warranty period preserve a claim for insurance in relation to that defect.	We strongly support this recommendation. In our view the current position is an unnecessary burden and is contrary to the interests of consumers.

NO.	DRAFT RECOMMENDATIONS	COMMENTS
5	SIRA report on costs as part of its annual performance monitoring review so that icare's costs can be more easily tracked over time, and compared with costs of the schemes in other states.	We strongly support this recommendation as being key to ensuring the scheme is sustainable and effective.
6	The use of brokers become voluntary under the scheme, to provide builders with more options on how they manage their HBCF obligations.	We strongly support this recommendation. With the move to a single insurer, it is appropriate to revise the role that brokers play in the scheme.
7	icare's premium calculator provide the estimated premium for each builder to help homeowners better manage their costs and understand the insolvency risk associated with different builders.	We are concerned that given the complex factors that determine loading and discounts, publication of the risk factor analysis may be confusing for homeowners and it may not be of assistance. Publication may create more problems than it solves.
8	The NSW Government amends section 104A of the <i>Home Building Act 1989</i> and associated Regulation to allow alternative indemnity providers to offer a discretionary (non-insurance) product.	<ul style="list-style-type: none"> • We support the suggested amendment of s 104A of the <i>Home Building Act 1989</i> ("Act") and associated Regulation. However, we suggest this be undertaken as part of a rewrite of the Act and Regulation, which has been suggested by several reviews of the scheme, including as early as the Review of Licensing in the NSW Home Building Industry undertaken by Irene Moss in September 2006. • We support allowing alternative indemnity providers to offer a discretionary (non-insurance) product, provided the level of consumer protection afforded by such products is not reduced.
9	That SIRA simplifies its licence application process for insurers to recognise that APRA's prudential standards apply, removing the need for a duplicate assessment. This could reduce licence fees payable by insurers.	The most important consideration is ensuring the appropriate level of prudential supervision is in place. The simplification appears to be appropriate where duplication can be removed without reducing the level of prudential supervision, but for non-insurance products a pathway is still required.

NO.	DRAFT RECOMMENDATIONS	COMMENTS
10	<p>That the NSW Government:</p> <ul style="list-style-type: none"> • limits the application of sections 103BD to 103BG of the <i>Home Building Act 1989</i> that regulate premium pricing to the default market incumbent, icare • removes the requirement for SIRA to approve private insurers and providers' eligibility and claims models, in favour of a market monitoring arrangement where SIRA reports on market participants' performance against high-level principles. <p>This should be reviewed in five years or earlier if the market composition has changed considerably.</p>	<p>We support the proposal, but we suggest that the review take place in three years, or earlier if considered appropriate due to changes in market composition.</p>
11	<p>That the NSW Government requires icare to make available separate cost-reflective construction period and warranty period products so that a new entrant could provide construction period cover only.</p>	<p>We support this as a necessary development.</p>
12	<p>An independent regulator determines icare's premiums for the HBCF to ensure they reflect efficient costs. SIRA's role, as the scheme regulator, could be expanded to provide it with determination powers. Alternatively, IPART, as the NSW pricing regulator, could be given the on-going role of determining icare's HBCF premiums.</p>	<p>We support such a role being given to an independent regulator, but we are unable to comment further as to who should be that regulator.</p>
13	<p>SIRA increases its regulatory oversight of icare by reviewing and determining icare's builder eligibility model and claims handling processes.</p>	<p>We support increased regulatory oversight of icare.</p>

NO.	DRAFT RECOMMENDATIONS	COMMENTS
14	SIRA establishes appropriate KPIs against which it can measure and publicly report on icare's performance in resolving eligibility issues and finalising claims in a timely manner.	We support this recommendation as incidental to SIRA's core function.
15	icare provides greater transparency in how it undertakes its eligibility assessments and how it determines individual builder loading/discounts used in risk-adjusted premiums.	We support increased transparency, subject to the concerns raised in response to recommendation 7 above.
16	icare: <ul style="list-style-type: none"> Provides information in plain language in the Builder Eligibility/Change application form or the Builder Self Service Portal, why particular information is sought and how it would be used in determining a builder's eligibility. 	We support this recommendation.
	<ul style="list-style-type: none"> Provides information in plain language on how the information provided by builders was used to determine their eligibility profile and their individual loading/discount, including any conditions of eligibility. 	We support the provision of the information to builders, but we reiterate the concerns raised in response to recommendation 7 above in relation to provision of this information more widely.
	<ul style="list-style-type: none"> Makes clear any adjustments that have been made to take into account any industry specific circumstances eg, the adjustment for a pool builder in determining their eligibility to account for 'sleeper pools'. 	We support this recommendation, and we support the submission of the Swimming Pool & Spa Association of Australia Ltd noted in footnote 137 of the Draft Report in relation to 'sleeper pools'.

NO.	DRAFT RECOMMENDATIONS	COMMENTS
	<ul style="list-style-type: none"> Periodically updates the work undertaken by the Data Analytics Centre in 2016, to examine whether the factors previously identified and currently used, continue to be significant in predicting builder insolvency, and if there is scope to reduce the amount of information sought without necessarily increasing risk. 	We support this recommendation.
17	icare reviews its dispute resolution processes to resolve eligibility issues in a more streamlined and timely manner.	We support this recommendation.
18	<p>SIRA produces guidance for the building industry that addresses the following questions:</p> <ul style="list-style-type: none"> For contracts that require HBCF cover, whether items such as soft-scape landscape works and pool equipment can be excluded from HBC requirements How to allow for variations in the cost of HBCF in contracts, if the exact contract price is not known at the time the contract is signed Whether head contractors can require subcontractors to also purchase HBCF cover for subcontracted residential works exceeding \$20,000 Whether HBCF cover is required for alterations and renovations for multi-units above three storeys. 	In our view, the appropriate vehicle for providing such guidance and clarification is the Act and the Regulation, as part of a rewrite of the legislation. However, in the short term such guidance would be welcome.