THE LAW SOCIETY
OF NEW SOUTH WALES

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11 August 2022

Mr Darren Parker
Executive Director
Workers & Home Building Compensation Regulation
State Insurance Regulatory Authority

By email: HBCreform@sira.nsw.gov.au

Dear Mr Parker,

Home building compensation reforms

The Law Society of NSW welcomes the opportunity to provide feedback on potential reforms to the home building compensation scheme and welcomes the breadth of the current review. The Law Society's Property Law and Business Law Committees have contributed to this submission.

We have set out our responses to the questions in the Discussion Paper in the attached table.

Given the broad scope of the contemplated reforms, if implemented, it would be our preference that this be achieved by a rewrite of the *Home Building Act 1989* ("Act"), rather than merely amending the Act. We note that a rewrite of the Act has been considered necessary for many years[1]. We would be pleased to be involved in consultation on such a rewrite as appropriate.

Any questions in relation to this letter should be directed to Gabrielle Lea, Acting Principal Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Joanne van der Plaat
President

Encl.

[1] For example, the 2006 Moss Review into Licensing in the New South Wales Home Building Industry recommended a rewrite of the *Home Building Act 1989*.

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Home building compensation reform – Discussion Paper
Comments from the Law Society of NSW

QUESTIONS	COMMENTS
Theme 1 – Better supporting homeowners	
Reform idea 1 – Cover victims of unlawfully uninsured home construction	
Question 1: Should victims of unlawfully uninsured work be able to claim on the home building compensation scheme in some circumstances?	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. Having said that, we support empowering the scheme to make ex gratia payments in limited circumstances, for example where the consumer has been induced to enter into the building contract by fraudulent insurance documents.
Question 2: If adopted, should cover for uninsured loss be limited to the construction or significant alteration of homes that requires planning consent or that must be declared to NSW Fair Trading?	If adopted, we support the proposed approach, although we note that the concept of 'significant alteration' will need clarification.
Question 3: If adopted, should homeowners be required to diligently pursue the responsible business for a remedy first, if they want to claim for uninsured loss?	If adopted, we support the proposed approach. Given that the process for claiming insured losses is currently structured as a scheme of last resort, it is appropriate that those claiming for uninsured losses be in a comparable position.
Question 4: Should unpaid premiums and claim costs for uninsured work be recovered from building businesses and developers that have not complied with their insurance obligations, including culpable directors?	We support the right of recovery, including against culpable directors.
Reform idea 2 – Allow claims earlier in the building dispute process	
Question 5: Should homeowners be able to make an insurance claim if the business that worked on their home fails to comply with a rectification order issued by NSW Fair Trading (whereas currently claims are only accepted if the business is no longer trading)?	We support steps to streamline the claims notification process. We also support the following features of the proposed approach, as outlined in the Discussion Paper: • Allegations by a homeowner against a business must be tested; • Homeowners must respect orders for work; • Insurers may arrange for the original or new contractor to do work; and • Remove or cap insurer liability for associated costs. However, given the potential complexity of litigated claims, we do not agree that adopting this proposal should necessarily lead to a shortening of the ten year claims lodgment period as suggested in the Discussion Paper, and this is not supported.

QUESTIONS	COMMENTS
Question 6: If homeowners are provided a quicker pathway to claim, should claims be limited to losses directly arising from non-completion and breaches of statutory warranty (i.e. remove cover for associated losses such as legal costs or alternative accommodation, removal and storage costs).	We oppose a proposal which forfeits the ability to recover consequential and frequently incurred associated losses, in order to provide a quicker pathway to making a claim. If a cap on accommodation costs were to be implemented, we prefer the Victorian model, which has a 60 day cap on accommodation, removal and storage costs, rather than the Queensland model, which has a monetary cap of $5,000 for accommodation.
Question 7: If homeowners are provided a quicker pathway to claim, should claims be limited to those lodged within the 6-year warranty period, plus an extended 6 months for losses that only became apparent at end of the warranty period (whereas currently the scheme accepts claims up to 10 years after the work is completed)?	As noted in our response to question 5, we do not support a shortening of the claims lodgment period. In our view, the current claim period of ten years is appropriate, given the time for some defects to become apparent, and the complexity of potential litigated claims. The ten year period also mirrors the general limitation period within which claims for defective building or subdivision work can be brought pursuant to section 6.20 of the *Environmental Planning and Assessment Act 1979*.
Reform idea 3 – Update the minimum insurance cover	
Question 8: Should the minimum amount of cover offered by the scheme be increased from $340,000 to $400,000 to reflect the increase in the average cost of building a new single dwelling since the cover amount was last updated in 2012? If you prefer a different amount, please tell us what it is and your reasons.	The IPART analysis in Chart 1 makes it clear that the current minimum insurance cover has not kept pace with the claims profile. We support the proposed increase to $400,000. We note that the suggestion by some stakeholders that instead of prescribing a fixed minimum cover amount, the insurance should offer cover to the value of the work, has been rejected. We suggest, however, that consideration be given to the homeowner having the option to 'top up' the minimum cover amount. If adopted, this would affect other reform proposals and the answers to some of the questions below, including the response to question 9.
Question 9: The legislation allows for projects to be insured by means of two contracts of insurance (one covering the construction period and the other for the post-completion warranty period), although no insurer offers this option at this time. If insurers were to start offering this option, should each contract also be increased from $340,000 to $400,000 of cover (i.e. together offering a potential total of $800,000 cover)? If you prefer a different amount, please tell us what it is and your reasons.	We support this proposal. Each contract of insurance covers different risks and attracts separate premiums. Consumers should have full recourse to each policy.

QUESTIONS	COMMENTS
Question 10: How often should the threshold amount be reviewed: a) every 3 years? b) every 5 years? c) every 10 years? If you prefer a different frequency, please tell us what it is and your reasons.	The period of five years accords with the usual time for review of regulations under the *Subordinate Legislation Act 1989.* If the ability to vary the threshold amount were contained in regulation, the review of the prescribed amount would coincide with the general review.
Reform idea 4 – Increase cover for non-completion claims	
Question 11: Should the cover for non-completion claims be increased from 20% of the value of the insured work, given most non-completion claims exceed that amount? Which of the following options do you prefer? a. Keep the current 20% amount of cover, or b. Increase non-completion cover to 25% of the value of the insured work (paid for by an estimated increase in insurance premiums of 2.4%), or c. Increase non-completion cover to 30% of the value of the insured work (paid for by an estimated increase in insurance premiums of 4.9%).	We support increasing the level of cover for non-completion claims. The claims history set out in Table 3, where in excess of half of the non-completion claims reach the 20% cap, clearly indicates that the current cap is inadequate. As to the appropriate increase to the cap, we would be interested to have the information in Table 3 expanded to indicate what proportion of non-completion claims would have been fully met under the higher proposed caps. Based on the information in the Discussion Paper, we suggest that the 25% cap provides an appropriate balance between enhancing consumer protection, and moderating increases in premiums.
Reform idea 5 – Publish exemptions granted by SIRA	
Question 12: Should SIRA publish a register of projects that SIRA has exempted from insurance, so that a person with an interest in the property may check whether work was lawfully done without insurance under an exemption granted by SIRA?	Yes, in our view exemption information should be publicly and freely available. We support the inclusion of the information on SIRA's existing public register of insurance, rather than maintaining a separate list. We also suggest that it would be helpful to include appropriate links to this information on the Fair Trading website. This will assist in informing, and better protecting consumers.

QUESTIONS	COMMENTS
Theme 2 – Housing affordability and regulatory burdens	
Reform idea 6 – Update the threshold for requiring insurance	
Question 13: Should the $20,000 threshold above which work must be insured be increased to $26,000 in line with increases in the average cost of building since the threshold was last updated in 2012? If not, what should the threshold be?	We support increasing the threshold to $30,000, having regard to the expected cost increases before the next opportunity to review the threshold, and the substantial increase in building costs in recent times.
Question 14: How often should the threshold amount be reviewed: a) every 3 years? b) every 5 years? c) every 10 years? If you prefer a different frequency, please tell us what it is and your reasons.	We support reviewing the threshold every three years as an appropriate frequency, due to the expected cost increases.
Reform idea 7 – Opt-outs of premium caps for high value projects	
Question 15: Should homeowners and building businesses be able to agree to opt-out of insurance for work of over $2 million to a single dwelling?	We oppose this approach. We believe that an ability to opt-out would generate ongoing uncertainty as to whether what is clearly residential building work has the benefit of insurance.
Question 16: Alternatively, should insurance remain mandatory for high value work on single dwellings, but with premium prices be capped for work over $2 million?	We prefer this alternative approach to the proposal outlined in Question 15.

QUESTIONS	COMMENTS
Reform idea 8 – Broader insurance exemptions for high rise buildings	
Question 17: Should the insurance exemption for the construction of multi-dwelling buildings over 3 storeys be expanded so that insurance is not required for renovations or alterations to such buildings?	We continue to have long standing concerns in relation to the insurance exemption for the construction of multi-dwelling buildings over three storeys, and have submitted that this exemption should be removed, to increase consumer protection. Similarly, we do not agree that the current exemption should be expanded to *renovations and alterations* in multi-dwelling buildings over three storeys. The benefit of insurance for such work can be significant, particularly for older buildings. Renovation and alteration works by owners corporations, can be in the range of hundreds of thousands of dollars, and such works should not be exempt from the requirement for insurance in our view. Increased regulation in relation to apartment buildings, as currently being pursued by the NSW Building Commissioner, may mitigate some of the risk from defective work, but it is not only defective work that requires renovation or alteration. Confusion in the market about when work should or should not be insured is not, in our view, a reason to reduce consumer protection.
Reform idea 9 – Insurance exemptions for some housing services	
Question 18: Should building work be exempt from insurance if there will be no beneficiary, because the homes will be used to provide social or affordable housing or specialist disability accommodation?	Yes, we agree building work should be exempt from insurance in these circumstances, provided there are safeguards to ensure these homes cannot be on-sold for private use, such as by the noting of a restriction on use on the title.
Question 19: Should this insurance exemption be limited to building work done on behalf of charities that provide housing services, so that there is no profit motive to sell the homes without insurance?	In our view, the exemption should be limited to building work done on behalf of charities, or not for profit organisations, that provide housing services. It would be appropriate to require those organisations to alert any successors in title to the exemption. One way of doing this could be to require the organisation to place a restriction on the title to the property which limits the use of the land to the original purpose which justified the exemption. This would enable developers of land for these purposes to have the benefit of the exemption, but not enable on-sale for private use by the developer, or any future owner of the building. The restriction could be drafted to lapse at the conclusion of the warranty period discussed in Question 7. Alternatively, if on-sale were to be permitted, the vendor could be required to include a warning to the purchaser that the work does not have the protection of the *Home Building Act 1989* ("Act"), similar to the obligations under section 96B of the Act in relation to a house or unit that is excluded from the definition of dwelling in the Act, because it was designed, constructed or adapted for commercial use as tourist, holiday or overnight accommodation.

QUESTIONS	COMMENTS
Question 20: Should this insurance exemption only apply to work where the conditions of planning consent or restrictions on the use of the land require that the homes must be used for housing services?	Yes, for the reasons set out in our responses to questions 18 and 19.
Reform idea 10 – Insurance exemptions for local government	
Question 21: Should councils be exempt from insurance to develop housing on council-owned land?	Yes, we agree councils should be exempt from insurance to develop housing on council-owned land because it will reduce the cost to the ultimate beneficiary, or increase the revenue to the council, which benefits its community. We note that as the developer, the council will remain liable as the developer under the Act. We suggest that consideration should also be given to the provision of safeguards to ensure these homes cannot be on-sold for private use, such as by the noting of a restriction on use on the title.
Reform idea 11 – Premium refunds or exemptions for 'build-to-rent' schemes	
Question 22: Given there is no beneficiary to claim insurance, should Build-to-Rent scheme developers be able to cancel the policy and claim a refund for the insurance premium?	Yes, we agree that Build-to-Rent scheme developers should be entitled to cancel a policy, and obtain a refund, provided the whole of the residential aspect of the development qualifies under the Build-to-Rent scheme.
Question 23: Should the renovation or alteration of a Build-to-Rent building be exempt from insurance, given the homes are intended to be used for long term lease over 15 years and there will be no person able to claim on insurance during that time?	Yes, unless the renovation or alteration is undertaken at a point at which the insurance period would exceed the remaining lease term. For example, if renovations or alterations are undertaken towards the end of the lease term to prepare a property for sale it is quite feasible that those works would exceed the insurance value threshold. Any such renovations and alterations should be insured for the benefit of the successor in title.
Reform idea 12 – Repeal provisions that regulate former scheme insurers	
Question 24: The former private home warranty insurance scheme stopped insuring work in 2010 and is no longer receiving claims. Is there any reason to not repeal legislation for that former insurance scheme?	No, we can see no reason to retain that legislation.

QUESTIONS	COMMENTS
Theme 3 – Providers and how they are regulated	
Reform idea 13 – Reform or repeal provision for 'alternative indemnity products'	
Question 25: Should fidelity funds be allowed to operate in the scheme that are not legally obliged to compensate homeowners, and instead have the discretion whether and how much to pay?	No. According to the Discussion Paper, fidelity funds operate in the ACT and NT as not-for-profit funds, administered in conjunction with a building industry association. The NSW market is considerably larger than those jurisdictions. We agree with the Discussion Paper that given major building associations in NSW oppose discretionary alternative indemnity providers, the option of fidelity funds does not appear feasible.
Question 26: If you answered 'yes', how can the risks to homeowners and buildings businesses from such a discretionary fund be managed?	Not applicable.
Question 27: Should the NSW Government instead remove provision for 'alternative indemnity products' such as fidelity funds from the scheme, given that IPART has found it is unlikely that any such product could be offered that would have the same consumer protections as insurance?	Yes. Alternative indemnity products have been permitted since 2018, and we understand that only two businesses applied, but licences were not issued. A fund that has a discretion to pay compensation, rather than an insurance policy which has an obligation to do so, does not provide the certainty that homeowners in NSW require for this type of risk.
Reform idea 14 – Legislatively amend SIRA's functions to regulate icare HBCF	
Question 28: Should SIRA have the power to make icare HBCF amend and resubmit its eligibility or claims handling models and to adopt specific changes, if SIRA finds the models do not comply with legislation or guidelines?	Yes, SIRA should have the proposed power in circumstances where the models do not comply with legislation or guidelines.
Question 29: Should the law require that SIRA must publish a statement about its assessment and decision each time icare HBCF's lodges a new eligibility or claims handling model?	Yes, for transparency.
Reform idea 15 – Refocus of the regulatory regime to a single, State-insurer model	
Question 30: Do you think it is commercially viable for multiple insurers and providers to operate in the NSW home building scheme?	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 scheme.

QUESTIONS	COMMENTS
Question 31: If relaxing the regulation of private insurers' pricing and eligibility practices fails to achieve new market entrants, should the NSW Government reinstate icare's monopoly and focus on running a sole insurer model as efficiently as possible?	The Discussion Paper indicates that that up to 30% of the cost of insurance premiums arise from maintaining a competitive system for insurance in NSW. Private insurers have no interest in participating in the scheme, with the result being there is only one insurer, the state of NSW. However, formalising a monopoly for the state insurer may lead to complacencies and inefficiencies in the scheme, which may effectively cost more than the 30% currently allocated to maintain structuring the scheme around commercial competition. On balance, based on the failed attempts to promote alternatives to a state based monopoly, we expect that the only feasible option is to reinstate icare's monopoly and focus on running a sole insurer model as efficiently as possible. One of the most frequent criticisms of the former Builders Licensing Board and Building Services Corporation was that the insurance and disciplinary functions were performed by a single entity, which was inevitably conflicted from the perspective of a licensee. It may be that a structural separation between icare and Fair Trading could effectively address that concern. The implementation of Key Performance Indicators ("KPIs") may also mitigate against any anticipated inefficiencies. 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.