



**Western Sydney Community Legal  
Centre (WSCLC)**

**Home Building Advocacy  
Service**

**Submissions on  
Home Building Eligibility Guidelines based on the Discussion  
Paper – August 2017**

August 2017

## **Table of Contents**

1. Introduction	3
1.1. Western Sydney Community Legal Centre	3
1.2. The Home Building Advocacy Service (HoBAS)	3
1.3. Scope of Services at HoBAS	4
1.4. The form of these submissions	5
2. Background to the Reforms	5
2.1. Background to the Reforms	6
2.2. Reforms	6
3. Purpose of this discussion paper	7
4. Response to focus questions	9

# 1. INTRODUCTION

## 1.1 Western Sydney Community Legal Centre

The Western Sydney Community Legal Centre (WSCLC) was formed in 2016, as a result of the amalgamation of the Macquarie Legal Centre, Mt Druitt and Area Legal Centre, Hawkesbury Nepean Community Legal Centre.

WSCLC is committed to serving the community by providing free legal information, referrals, advice and casework for low-income earners living in Western Sydney on a range of issues, including apprehended violence orders, care and protection, civil law and consumer complaints, credit and debt, crime, discrimination, family law and relationships, guardianship and powers of attorney, home building disputes, local government, motor vehicle accidents, neighbourhood disputes, tenancy, traffic offences, victims compensation, wills and probates.

The WSCLC is managed by a committee made up of members of the community and employs both permanent staff and volunteers who dedicate their time and skills to assisting the public. The management committee also oversees outreach programs such as Children's Court Assistance Scheme (CCAS), Central West Contact Service (CWCS), Women's Domestic Violence Court Advocacy Service (DVCAS) and the Family Relationship Centre Advice Service (FRC).

WSCLC is also involved in various education programs for both students of law, providing community legal centre experience alongside educational clinical programs, as well as facilitating awareness programs at other public institutions such as schools.

## **1.2 The Home Building Advocacy Service**

The Home Building Advocacy Service (HoBAS) is one of the specialist services run by WSCLC. HoBAS provides free legal advice to all residents of NSW, on home building disputes arising under the *Home Building Act 1989* (NSW).

HoBAS is funded by NSW Fair Trading and run by WSCLC. This program assists the government to achieve its consumer protection and social justice policy objectives.

As part of our ongoing experiences in providing advice and conducting casework on home building disputes and claims at HoBAS, WSCLC wishes to make submissions on the Home Building Eligibility Guidelines as it affects the Home Building Consumers of NSW.

## **1.3 Scope of Services at HoBAS**

HoBAS provides free legal information and advice, to home building consumers in NSW on home building disputes and claims, which may arise with builders or trades persons. In specific instances HoBAS provides advocacy, further assistance and legal representation to culturally and linguistically disadvantaged consumers, consumers with a disability, aboriginal consumers and elderly home building consumers in relation to Home Building Law under the Home Building Act 1989 (NSW)

HoBAS advises clients on:

- Defective and incomplete work.
- General advice on contractual disputes,
- Damages caused by the builder/ trades person.

- Process and procedure at NSW Civil and Administrative Tribunal (NCAT), including advice on evidence required and document preparation .
- Advice on NCAT appeals.
- Transfer of proceedings from the court system to NCAT.
- General advice on Home Building Compensation Fund.

#### **1.4 The form of these submissions**

Our experience in assisting clients with home building disputes have revealed a number of systemic issues and areas of concern in relation to the consumer protection provided by Law, the Home Building Compensation Fund. We would like to comment on the Discussion Paper on Home Building Eligibility Guidelines as it will have an impact on the Home Building Consumer. if the contractor's eligibility is not assessed without considering all risk factors , the contractor may engage in building projects which result in:

- defective work, if the builder does not have the technical capability to do the work. or engage unskilled tradespeople with inadequate supervision.
- Incomplete work, if the builder takes on too many projects and lacks business capacity (over trading).
- Insolvency of builder due to lack of financial capacity or intentionally going into voluntary liquidation with a view to phoenix trading.

The submissions take the form of a response to the Discussion Paper of the Home Building Eligibility Guidelines. The headings and focus questions 1 to 26 below, mirror the structure adopted under the same headings in the discussion paper.

## **2 BACKGROUND TO THESE REFORMS**

### **2.1 Purpose of the HBCF Reforms**

As stated in the discussion paper, the Home Building Compensation fund cannot continue to operate in its current form as it was not financially sustainable to continue to protect consumers (home owners). It does not operate effectively or efficiently as a monopoly product since the private insurers left the market in 2010. Builders and consumers have not had a choice of product or provider to suit their needs.

Page 7 of the discussion paper states that builder insolvency accounts for about 95% of the claims and costs in the HBCF scheme.

The benefits envisaged from the HBCF reform were, financial sustainability, to maintain consumer (home owners) protection, more choice for builders and tradespeople, better transparency for homeowners and better regulation and monitoring.

Our comments will be focusing on the benefits of the HBCF reforms to maintain consumer protection and better transparency for homeowners.

### **2.2 The Reforms**

#### **The following will change**

- Private insurers or alternative indemnity product providers will be able to provide HBCF insurance
- Products, premiums and eligibility to be regulated
- Scheme costs to be covered
- Level playing field for all providers

- There will be two types of cover
- Homeowners will be better informed
- Incentives to reduce risk
- Opportunities for better cover

**No changes to the following**

- Cover remains compulsory
- Threshold will remain \$ 20,000

### **3. PURPOSE OF THE DISCUSSION PAPER**

The discussion paper states the reforms are intended to limit risk to homeowners:

- From contractors not having sufficient technical expertise
- Having insufficient business and financial capacity

#### **HoBAS Comments -**

From the perspective of the consumer, the reforms have made the insurance of last resort more complex. It will no doubt be a good revenue earner to the government, as the construction period insurance and the warranty period insurance, will generate double the income.

#### **Recommendation -**

It is recommended that SIRA work closely with NSW Fair Trading. Contractor eligibility and licencing of contractors could be done under one roof, There should be sharing of information on complaints made by consumers to NSW Fair Trading. Regular complaints or recurrent breaches of the Home

Building Act 1989 (NSW) is recorded by NSW Fair Trading for their own investigations. This information is an indication of lack of skill or lack of willingness to complete a project due to a genuine resource constraint or with a view of go into voluntary liquidation.

Past performance, (complaints lodged at NSW Fair Trading , NCAT order and penalties imposed by NSW Fair Trading's own investigation) and directors involvement in phoenix trading needs to be considered when assessing HBC eligibility. These risk have to be reviewed periodically as it has a bearing on HBC claims, given that 95% of HBC claims being insolvency.

While working on the implementation of the bill on HBC reforms, it is important to impose stricter regulation of contractor licences. When renewing such licences it is important that NSW Fair Trading keep track of Phoenix Trading, and decline licenece renewal for such companies.

It is recommended, that past licencing, track record of sole traders engaged in phoenix trading and directors involvement in phoenix trading, be considered when HBCF eligibility is considered. If personal liability can be imposed on the performance of a company, by taking the personal guarantee of directors, there would be a substantial reduction in the insolvency rates as the directors will have a personal interest in assessing the risk and keep the company solvent.



## 4 RESPONSE TO FOCUS QUESTIONS

### *Why have eligibility?*

**1 Question -** *Should the eligibility guidelines give HBC providers the flexibility to set their own standards within certain limits to issue an eligibility profile, as long as they can demonstrate they meet certain principles. Or should SIRA prescribe in detail the standards and criteria that all HBC providers must apply?*

#### **Recommendation -**

SIRA should prescribe in detail the standards and criteria that all HBC providers must apply to the two types of compulsory cover, which will be an insurance of last resort. If eligibility guidelines are not set, HBC providers may compromise standards with a view to attracting more insurance. It may also have an implication on premiums where HBC providers may charge higher premiums from contractors who are not eligible and the contractor may pass on this cost to the ultimate consumer.

HBC providers who offer innovative products and additional insurance that cover additional areas of risk will be an insurance of first resort. These claims will be made on the insurer while the builder is still solvent and trading. Hence, HBC providers may be given the flexibility to set their own standards within certain limits to issue an eligibility profile, as long as they can demonstrate they meet certain principles.

**2. Question** - *Should contractor eligibility profiles be portable between HBC providers, so that a contractor may buy HBC insurance from any provider without needing to be reassessed?*

**Recommendation** -

Yes.

It is also recommended that the contractor eligibility profiles be portable between HBC providers and publicly accessible to home building consumers so that there is transparency and they can make informed decisions on whether they should engage a particular contractor. This is similar to a home building consumer being able to conduct a licence check on the NSW Fair Trading Data base prior to engaging a contractor.

There should be a common database where the eligibility profile is recorded and the eligibility availability should be updated when insurance is granted for each project. This could be on the SIRA website and the new Construction Assist website which acts as an one stop shop.

The eligibility profile of each contractor should also indicate the maximum number of projects and /or the total of value of projects a contractor could undertake at a given time. This will enable consumers to make an informed decision on whether a contractor would have the ability to take out an insurance for their particular project. It will also assist other insurance providers on the value of insurance they could provide.

**3. Question** - *SIRA intends to collect and share some information between HBC providers to help manage scheme-wide risks and potentially reduce the amount of information that a contractor would need to resupply when applying to a new provider for HBC insurance. What information should SIRA require be shared? What information should SIRA not share? Please provide reasons.*

## **Response**

All elements necessary to ascertain the eligibility profile of the contractor should be available on the SIRA data base as the regulator of the HBC Insurance, which should be shared between HBC providers to help manage scheme wide risk.

The information that should be shared is

- Contractors technical capabilities - Current contractor licence – link to NSW Fair Trading
- Contractors likelihood of going into liquidation –
  - Financial capacity and business capability– details to be obtained from the contractor
  - Past performance of the contractor - .
    - Breaches of Act – NSW Fair Trading Licence check
    - NCAT orders - NSW Fair Trading Licence check
    - History of directors involved in previously deregistered companies - NSW Fair Trading
    - History of sole traders going into liquidation and forming new companies (Phoenixing) - - NSW Fair Trading
    - History of insurance claims - SIRA
- Business capacity - details to be obtained from the contractor
  - Number of employees / tradespeople
  - Number of projects in hand
  - Level of supervision
  - Class of construction.

The contractor has to provide items to support the financial stability, management capability and business capability.

NSW Fair Trading will have the current licence and past performance.

SIRA will have data on past claims.

This eligibility profile is necessary for the compulsory insurance that is a last resort insurance.

Any new and innovative products offered by HBC providers should not require an eligibility profile and could be offered by each HBC provider and no information sharing is necessary as that will be a first resort insurance where the insurer will decide on the risk it takes.

### ***How eligibility affects builders and why it must be fair***

***4. Question - Should HBC providers be obliged to offer insurance to any contractor who meets that provider's eligibility criteria (or should they retain some discretion)?***

**No comment**

***5. Question - What aspects of the current eligibility system are the most difficult or costly to comply with? Please provide examples or estimates of relevant costs.***

**No comment**

***6. Question - Are there any requirements of the current eligibility system that are difficult to understand or can improve to provide more transparency about what contractors can do to improve assessment outcomes?***

**No comment**

***7. Question - Is there particular information or other requirements of the eligibility system that you think are not effective at reducing risk or should be reviewed? Please advise which they are and your reasons.***

### **Recommendation**

It is recommended that the current eligibility system be reviewed.

As per the SIRA website, the current eligibility system looks at some aspects of risk as only the following documents are requested to make that decision.

- a recent balance sheet, profit and loss statement or tax returns
- a statement of personal assets and liabilities
- copies of rates notices for all properties declared on the statement of personal assets and liabilities
- copy of current contractor licence

The current eligibility system looks at:

- financial capacity and management capability .
- contractors having sufficient technical expertise, by requesting the current contractor licence.

The current system does not look at

- the business capacity –which may result in defective and incomplete work.
  - Number of projects contractors have undertaken at the same time.
  - Do they have the workforce to perform the work contracted under the home building contract?
  - Supervision of tradespeople.
- Past performance and conduct - phoenix trading..

Factors to be considered in the eligibility assessment should be the number or value of projects a contractor could undertake after assessing, the financial capacity, management capability, business capacity, technical capacity and past history of the contractor of completing projects taking into account the number of complaints to NSW Fair Trading, and phoenixing . The assistance of an actuary will be necessary to make an objective assessment of all the risks and make evidence based calculations.

Once eligibility is assessed by the insurance provider for that financial year as per SIRA guidelines, it should be publicly accessible to all other providers and

the public. HBC providers should update the eligibility profile when they issue an insurance as per SIRA guidelines. This will provide transparency on availability of eligibility to other insurance providers and consumers.

If there is no transparency and information sharing among HBC providers, contractors may approach different HBC providers and obtain insurance in excess of their eligibility. Home owners and insurers will then be at risk of contractors engaging in projects in excess of their capability, resulting in insurance claims due to insolvency.

***8. Question - Are there matters not currently considered in the eligibility process that should be considered? What are they and why?***

**Response**

As per answer in 7 above

The current system does not look at

- the business capacity –which may result in defective and incomplete work. They do not look at:
  - How many projects have been undertaken by the contractor at the same time.
  - Do they have the workforce to perform the work contracted under the home building contract?
  - Is there sufficient supervision?
- Past performance and conduct of contractors.
  - - Phoenix trading.. The directors taking advantage of protection of the corporate veil and intentionally deregistering companies and taking advantage of the insurance system and continuing business by forming a new entity.
  - Conflict of interest - If the contractor works in conjunction with private certifiers who does not conduct critical inspections resulting in consumers not being able to get an occupation certificate after the build is complete.

- Complaints lodged by consumers at NSW Fair Trading in relation to defective and incomplete work.
- Claims lodged against the insurance under the Home Building Compensation Fund (HBCF).

**9. Question** - *Do you agree that eligibility methodology should be transparent (public) and based on objective and evidence-based elements (please give reasons)?*

**Recommendation**

Yes

Answered in 7 and 8 above.

**10. Question** - *What factors should be considered in the eligibility risk assessment?*

**Response**

- financial capacity and management capability.
- technical expertise - by requesting the current contractor licence.
- the business capacity –which may result in defective and incomplete work.
  - How many projects have been undertaken by the contractor at the same time.
  - Do they have the workforce to perform the work contracted under the home building contract?
  - Is there sufficient supervision.
  - Are the critical inspections being done by private certifiers?
- Past performance and conduct-

Refer 7 and 8 above.

## *Managing/excluding risks versus pricing risks*

**11. Question** - *Which factors are most important and why?*

No comment

**12. Question** - *The current eligibility system can restrict contractors to certain types of work as outlined in the seven factors, above. Are there issues with this approach or the particular categories that are used?*

No comment

**13. Question** - *Could the threshold where contractors are denied eligibility be made more flexible if contractors were charged a higher premium or were subject to risk controls such as greater supervision of the contractor by the HBC provider? If so, how should SIRA regulate such arrangements?*

### **Response**

Contractors will be denied eligibility after the risk assessment is made considering all the elements being assessed. Hence, if a contractor cannot meet the eligibility, they should not be granted insurance, as they would be deemed not fit to engage in residential building work as they have not met a particular standard set by the regulator (SIRA) or if they have reached the level up to level of their eligibility profile.

**14 Question** - *Could eligibility profiles give contractors scope to take on extra work beyond their current limit? For example: if they were willing to pay a higher premium for HBC insurance or were subject to risk controls such as greater supervision of the contractor by the HBC provider? If so, how should SIRA regulate such arrangements?*



## **Responset**

It is not recommended that premiums be increased to cover any risk for residential building working over the eligibility profile which has been assessed. The increased premiums will be passed on to the consumer and incorporated in the value of the building contract. Such additional work in excess of their eligibility profile will result in defective or incomplete work for the consumer or insolvency resulting an insurance claim.

**15. Question** - *Are the current dispute resolution mechanisms to resolve eligibility decision disputes appropriate? Are there any material issues and what could be done to address them? Note: we have asked related questions about pricing in our discussion paper on premium guidelines.*

No comment

## ***Eligibility and new builders***

**16. Question** - *How can the eligibility guidelines best support or encourage HBC providers to include better access for new and small contractors to be classified as eligible, while ensuring that homeowners and the scheme are not exposed to unreasonable risks?*

No comment

## ***Eligibility and regional or cross-border businesses***

**17 Question** - . In terms of getting and maintaining eligibility under the current scheme, what specific challenges do contractors face when operating across NSW's borders?

No comment

**18. Question** - How can the eligibility guidelines better support contractors who operate across NSW's border regions?

No comment

**19. Question** - Should the eligibility requirements vary for contractors who work in regional locations?

No comment

## ***Eligibility and new HBC products***

**20. Question** - *Should the guidelines specify different eligibility standards depending on the type of product to be offered? For example, if the HBC provider proposes to perform quality assurance checks and oversight progress payments, could the standard to issue an eligibility profile be lowered to reflect these risk controls?*

No comment

**21. Question** - *Should the eligibility guidelines specify appropriate standards for any additional insurance products (in excess of minimum HBC insurance requirements) that HBC providers might want to incorporate?*

No comment

## ***Eligibility data and analytics***

**22. Question** - *Whatever the eligibility standards, should SIRA require that HBC providers collect certain data from contractors that contributes to predicting insolvency or other relevant factors?*

No comment

**23. Question** - *Designing and building suitable systems to integrate data and apply analytics will take time and resources. What data projects should SIRA prioritise to support the HBC scheme?*

No comment

**24. Question** - *Should SIRA develop assessment tools and make these available to all HBC providers to support their eligibility assessments, or should it be up to individual HBC providers to decide whether and how to apply their own data analytics models?*

**Response** -

As SIRA is the regulator, and the assessment criteria should be the same for all HBC providers, it is important that the same assessment process is used for uniformity. Hence, it is recommended that SIRA develops the assessment tools and make it available to all HBC providers to support their eligibility assessments.

**25. Question** - *SIRA may seek to use data to improve how the eligibility requirements apply to different contractors (e.g. so that the process is less burdensome for some contractors). How can SIRA best support HBC providers with such an approach?*

No comment

**26. Question** - *What information about contractor eligibility should SIRA make publicly available? In what ways and what formats should the data be made available?*

**Response**

Eligibility profile which reflect the value, number and category of work a contractor can engage in during a particular period should be publicly available. There should be a common database where the eligibility profile is recorded and the eligibility availability be updated when an insurance is granted for each project. This will meet the objective of the reform form the consumer

perspective of better transparency for homeowners. It will also assist SIRA with better regulation and monitoring.

The eligibility profile could be on the SIRA website and the recently launched Construction Assist website which acts as an one stop shop.

A publicly available and regularly updated eligibility profile will provide transparency to consumers on the contractors' ability to take out insurance for their particular project. It will also assist other insurance providers how much insurance they could issue.