



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: BLC:MTib1399899

20 September 2017

HBC Stakeholder Lead
Workers and Home Building Compensation Regulation
State Insurance Regulatory Authority
Level 6, McKell Building
2-24 Rawson Place
Sydney NSW 2000

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

Dear Sir/Madam,

Home building eligibility guidelines (“guidelines”)

The Law Society of NSW appreciates the opportunity to comment on the guidelines. The Law Society’s Business Law Committee has contributed to this submission.

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

We do not propose making any comments on the “Home building compensation premium guidelines”.

Thank you for the opportunity to provide comments to this review. Please direct any questions at first instance to Liza Booth, Principal Policy Lawyer, by email at [REDACTED] or by phone on [REDACTED]

Yours faithfully,

[REDACTED]

Michael Tidball
Chief Executive Officer

Encl.

HOME BUILDING ELIGIBILITY GUIDELINES

Why Have Eligibility?	
Focus Question	Law Society Submission
<p>1. 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?</p>	<p>One aim of the legislative regime is to exclude or limit the involvement of contractors who present a high risk of causing unrecoverable losses to homeowners who are covered by the HBC scheme. We support the State Insurance Regulatory Authority (“SIRA”) prescribing in detail the standards and criteria which would apply to all HBC providers as a set minimum standard. This measure would assist to ensure that all consumers are provided the same level of protection.</p> <p>HBC providers, so long as they adhere to the minimum standards and criteria should be allowed to also determine further additional criteria that, if considered appropriate, can be linked to premium incentives or discounts.</p>
<p>2. 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?</p>	<p>Portability of eligibility profiles relieves part of the administrative burden on the builder. While this is a process that could be permitted, insurers should also be permitted to have their own additional processes in place to either allow portability or, alternatively to carry out a reassessment, which may result in a higher standard and lower risk product being ultimately provided.</p>
<p>3. 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.</p>	<p>It would be beneficial for HBC providers to share:</p> <ul style="list-style-type: none"> • any previous insolvency events linked to a director, contractor or supervisor licence holder as it will be an indicator of risk that the HBC provider may factor in to the additional eligibility criteria or premium calculations. • previous claims history, for similar reasons.
<p>4. Should HBC providers be obliged to offer insurance to any</p>	<p>Yes. Provided that the builder/contractor meets the minimum</p>

<p>contractor who meets that provider's eligibility criteria (or should they retain some discretion?)</p>	<p>standard of eligibility, then the HBC provider should be obliged to offer cover. However, the HBC provider may retain some discretion in relation to the quantum of coverage and premium calculations.</p>
<p>How eligibility affects builders and why it must be fair</p>	
<p>Focus Question</p>	<p>Law Society Submission</p>
<p>5. What aspects of the current eligibility system are the most difficult or costly to comply with? Please provide examples or estimates of relevant costs.</p>	<p>The Law Society has no comments.</p>
<p>6. 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?</p>	<p>The Law Society has no comments.</p>
<p>7. 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.</p>	<p>The Law Society has no comments.</p>
<p>8. Are there matters not currently considered in the eligibility process that should be considered? What are they and why?</p>	<p>The Law Society has no comments.</p>
<p>9. Do you agree that eligibility methodology should be transparent (public) and based on objective and evidence-based elements (please give reasons)?</p>	<p>Yes. Transparency would ensure that contractors understand the eligibility application process and should demonstrate that the requirements are proportionate and address the relevant risks.</p>

Managing/excluding risks versus pricing risks	
Focus Question	Law Society Submission
<p>10. What factors should be considered in the eligibility risk assessment?</p>	<p>The following factors should be included in the eligibility risk assessment:</p> <ul style="list-style-type: none"> • the type of residential building work, within the meaning of the <i>Home Building Act 1989</i> (“the Act”), undertaken by the builder/contractor; • whether the type of work is specialist work (as defined in the Act); • previous claims history relating to HBC; • general history as disclosed to NSW Fair Trading; • the length of time that particular entity has held its licence; • whether the proposed insured entity has been involved in an insolvency event; • whether the director, contractor or supervisor related to or engaged by the proposed insured entity has been involved in an insolvent or de-registered entity.
<p>11. Which factors are most important and why?</p>	<p>A high level of importance should be placed on assessing the solvency history of the entity and whether the directors/contractors/supervisors of that entity have been involved in any entity that has been involved in an insolvency event such as administration or liquidation or even the de-registration of an earlier entity.</p> <p>This will have multiple benefits:</p> <ul style="list-style-type: none"> • it will identify builders engaged in potential phoenix activity in relation to the corporate entity undertaking residential building work; • it will seek to identify high risk builders; • it will aim to give a higher level of protection to homeowners; and • it should operate to encourage builders to have continuity in the

	entities which undertake residential building work.
12. 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. If a contractor lacks eligibility for one type of work then that should affect all types of work undertaken by that contractor.
13. Could the threshold where contractors are denied eligibility be made more flexible if contractors were charged a higher premium or where subject to risk controls such as greater supervision of the contractor by the HBC provider? If so, how should SIRA regulate such arrangements?	Yes, the threshold could be made more flexible in those circumstances, if: <ul style="list-style-type: none"> • the level of consumer protection is preserved; • the portion of the premium charged to the consumer remains the same; and • the burden of payment of any “builder levy” or a higher portion of premium is borne by the builder and not the homeowners.
14. 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?	Yes, there could be scope for a builder to take on extra work beyond their current limit. However, the implementation of this type of regime should not be at the risk of oppressively high premiums being passed on to the consumer.
15. 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.	The Law Society has no comments.

Eligibility and new builders	
Focus Question	Law Society Submission
16. 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?	<p>We suggest that this could be achieved by the following steps:</p> <ul style="list-style-type: none"> • continue with the Building Contract Review Program; • offer ongoing educational programs; • offer programs focused on high risk areas; and • promote premiums reductions/discounts for high performing builders, low claims history, longevity and no insolvency or de-registration events.
Eligibility and regional or cross-border business	
Focus Question	Law Society Submission
17. In terms of getting and maintaining eligibility under the current scheme, what specific challenges do contractors face when operating across NSW's borders?	The Law Society has no comments.
18. How can the eligibility guidelines better support contractors who operate across NSW's border regions?	We suggest that the development of clear minimum standards may assist to develop cross border uniformity.
19. Should the eligibility requirements vary for contractors who work in regional locations?	The minimum standard of eligibility should be uniform. The cost of the insurance coverage is passed on from the builder/contractor to the homeowner. It is important that all consumers have the same protection which would flow from uniform eligibility criteria.

Eligibility and new HBC products	
Focus Question	Law Society Submission
20. 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?	Yes, on the basis that a minimum standard of eligibility is set by SIRA then any additional eligibility standards specified by the HBC provider could only serve to improve the product offered to homeowners.
21. 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?	Yes.
Eligibility data and analytics	
Focus Question	Law Society Submission
22. Whatever the eligibility standards, should SIRA require that HBC providers collect certain data from contractors that contributes to predicting insolvency or other relevant factors?	Yes.
23. 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?	We suggest that the data projects SIRA should prioritise include: <ul style="list-style-type: none"> • insolvency and de-registration events; and • claims history.
24. 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	In line with determining minimum eligibility criteria, SIRA should develop minimum assessment tools which individual HBC providers may be entitled to add to and develop. Having minimum set standards promotes uniformity in the product and premiums being

<p>data analytics models?</p>	<p>passed on to homeowners.</p>
<p>25. SIRA may seek to use data to improve how the eligibility requirements apply to different contractors (eg. so that the process is less burdensome for some contractors). How can SIRA best support HBC providers with such an approach?</p>	<p>The Law Society has no comments.</p>
<p>26. What information about contractor eligibility should SIRA make publicly available? In what ways and what formats should the data be made available?</p>	<p>Access to information allows homeowners to make more informed decisions about the builder/contractors that they intend to engage. In addition to the data already published on the profile in the NSW Construction Assist portal, relevant data could include details of any disciplinary or enforcement action, or consumer complaints.</p>