

From: [Richard Potts](#)
To: [HBCreform](#)
Subject: FW: HBCF review questionnaire
Date: Wednesday, 17 August 2022 2:26:22 PM

From: [REDACTED]
Sent: Wednesday, 17 August 2022 12:29 PM
To: Darren Parker <Darren.Parker@sira.nsw.gov.au>; Richard Potts <Richard.Potts@sira.nsw.gov.au>
Subject: FW: HBCF review questionnaire

[REDACTED]

Tell us about you

Are you a: *Please select the description that best describes you*

building or trade business

developer

insurance industry

legal profession

homeowner

other

prefer not to say

If 'other' please let us know

37 years as a lawyer with work in construction and specifically residential construction since 1996 with actual exposure to all parties who are involved in residential building + worked on actual construction projects and for a developer as well interacted with the public service on the HBA, SOP, dispute resolution and achieving better outcomes for parties. Retained by OFT to write a paper on alternative ways to provide builder warranty protection.

I don't know everything but I do know that there are ways and means to make the HBCF regime work better for all parties. The questions asked are a start but there are many more aspects that need to be considered and used to reduce risks and allow the scheme to deliver for consumers, industry and the Government. Achieving better outcomes for all three groups is definitely deliverable if things are done in a certain and in some regards different way.

Theme 1 – Better supporting homeowners

Reform idea 1 - Cover victims of unlawfully uninsured home construction

Currently, the home building compensation scheme does not cover homeowners if the business that worked on their home unlawfully failed to take out insurance. We want your feedback on whether we should let homeowners claim in those circumstances.

1. Do you think victims of uninsured work should be able to claim on the scheme?

Yes

Also need to consider if the cover should be extended to house and land packages where developer induces gets payment but builder does not deliver.

2. If victims of uninsured work were allowed to claim on the scheme, 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 Fair Trading?

Yes

No

Not sure

definitely any work requiring a DA / Council approval and a fee could be paid as part of the development approval and refunded when HBCF is obtained. Linking approval regime and HBCF would see an alarm as the DA and CC would come before the need for HBCF etc.

3. If victims of uninsured work were allowed to claim on the scheme, should homeowners be required to diligently pursue the responsible business for a remedy first, if they want to claim for uninsured loss?

As it currently stands yes but what if the scheme was not operated as a last resort – which is very possible and can be made to happen quite easily – but it has to be a balanced approach and NOT revert to the prior first resort private equity model as it was butchered by those who operated it. But there is a way to avoid the scheme needing to be last resort.

4. If victims of uninsured work were allowed to claim on the scheme, 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?

Yes – so long as their obligations were clearly known before the work started and the costs claimed are real and backed up by market relevant detail. In fact there should be a concerted effort to make sure that all parties pay the correct amount and obtain the relevant cover and that effort to make sure that is done can be highlighted and made a “do not pass go until HBCF – or whatever it will be called” is obtained etc.

No

Not sure

Reform idea 2 – Allow claims earlier in the building dispute process

The home building compensation scheme currently helps homeowners only as a ‘last resort’ if the business that worked their home has ceased to trade due to insolvency, ‘deemed insolvency’, death or disappearance. We want your feedback on whether homeowners should instead be able to claim if the building business fails to comply with a rectification order issued by Fair Trading. This would mean a claim can be made in some

circumstances where the business holds a current licence and continues to trade.

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 Fair Trading?

Yes – but OFT as it exists is NOT the party to do it. There is presently a review of how the HBCF cover is provided and that allows the delivery and support regime to be looked at and adjusted.

OFT is merely a starting point but as one senior OFT person has said to me “apart from a bit of plastic what does the OFT do for a license holder” ?

So the party who does this needs to get involved earlier than when there is a dispute as prevention is better than a cure etc.

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)?

Not sure – the HBA is being rewritten so what is covered and what the warranties allow to be claimed etc may not be here and now the same in the future. The existing s18B warranties already have internal inconsistencies and acts like the EPA and its regulations show that that conflict should not be ignored.

The homeowner can with adjustments to how things are done have a much easier / simpler role to play thereby improving their experience. Why should a consumer need to find a lawyer and or a consultant to tell them what if anything is wrong etc.

Why does the claims process need to / so readily allow lawyer involvement and or competing experts so as to be so adversarial.

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)?

Based on my research there should be an ability for major defects to be covered for 10 years so this criteria would become redundant! The 10 year cover is NOT premised on the LDI cover that has recently been announced for class 2 works.

Reform idea 3 - Update the minimum insurance cover

The minimum amount of cover insurers must offer under a contract of insurance has not changed since 2012. It is currently \$340,000. In practice, this is the maximum a person may claim, because icare HBCF does not offer contracts of insurance that provide more than that minimum amount of cover. We want your feedback about what should be the minimum cover offered by the scheme to reflect changes in the cost of building work, and how often this amount should be updated.

8. What should be the minimum amount of cover offered under a contract of insurance?

Ok

what was the basis –for the cover increasing the last time or why was the existing figure seen as needed?

If data was collected so that real time building costs were known and used there is the capacity for the cover to be unlimited or capped at a higher sum but the minimum amounts prescribed are not based on any publically declared detail and criteria.

How many claims here and now exceed the present cover?

What are the most common defects and what is the cause of the same arising – design and or building work so that direct action can be taken to reduce if not eliminate defects so that by consequence the consumer is better protected?

What are the causes of builder insolvency and how can they be addressed or even better prevented/

These are relevant issues which need to be considered as prevention is better than cure for all parties.

Keep the current \$340,000 insurance cover amount

Reduce the insurance cover to an amount less than \$340,000

Increase the insurance cover to \$400,000 to reflect the increase in the average cost of building a new single dwelling

Increase the insurance cover to an amount more than \$400,000.

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)?

No one was vaguely interested in providing such cover so what is the basis for this question?

Yes

No

Not sure

If you prefer a different amount, please tell us what it is and your reasons

10. How often should the threshold amount be reviewed:

if it was not capped but claims were made based on actual market costs reviewed and supported by the collection of real time data which over time was used to establish costs then the frequency of review would not be relevant. Much more can be detailed but this is not the place for that – but happy to discuss.

every 3 years?

every 5 years?

every 10 years?

If you prefer a different frequency, please tell us what it is and your

reasons

Reform idea 4 – Increase coverage for non-completion claims

Insurers are not required to cover losses arising from non-completion of work that exceed 20% of the total contract price for the building work.

However, the majority of non-completion claims involve losses that have reached or exceeded that 20% amount. We want your feedback about whether we should increase cover for non-completion claims.

“the majority of non-completion claims involve losses that have reached or exceeded that 20% amount”

Please provide claims details to show that or in other words back up that position?

What of the 9 HBCF categories sees non completion claims made and what category does project / volume builders fall within and what is the frequency of claims in that sector relative to the small volume builder

If the cost to build was checked at the time of HBCF or earlier then there is an improved ability to stop before they happen projects ?

Has the ability to tyre kick the cost to build been considered so as to check for and catch under-priced projects – noting prior comments by the Public Service that these are a risk of claims etc?

11. Which of the following options do you prefer?

Keep non-completion cover at the current amount of 20% of the value of the insured work

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%)

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%)

Reform idea 5 - Publish exemptions granted by SIRA

SIRA can currently exempt a person (e.g. a building business or developer) from insurance requirements in a particular case, if there are special circumstances or if full compliance is impossible or would cause undue hardship. There is currently no public register on which a person with an interest in a property may check whether work on the property was done without insurance on the basis of an exemption granted by SIRA.

in the last 10 years how many policies have been issued and how many

exemptions have been allowed? Basically is this a serious issue or more a peripheral happens rarely concern.

12. Should SIRA publish a register of projects that SIRA has exempted from insurance?

Yes

No

Not sure

If 'no', please tell us your reasons

Theme 2 – Housing affordability and regulatory burdens

Reform idea 6 - Update the threshold for requiring insurance

Building businesses must buy insurance for each residential building work project over \$20,000 including GST, unless exempt. The threshold amount of \$20,000 has not changed since 2012. We want your feedback about whether the \$20,000 threshold should be updated, and if so what the new amount should be. We also want your feedback on how often the threshold should be reviewed.

Is a monetary sum the best criteria to be used to determine what needs to be covered?

10 years – 2012 – 2022 sees \$12,000 increased by 66% to \$20,000 ?

What has the level of cover changed by in this period?

What was the impact of increasing the threshold from \$12,000 to \$20,000 on scheme finances and solvency? If that was negative what is the anticipated impact of raising the threshold to a figure higher than \$20,000 or using different criteria such as work requiring council approval?

These and other issues are relevant to making an informed decision.

13. What should be the value of residential building work above which insurance is required?

Keep the current \$20,000 threshold

Lower the threshold to an amount less than \$20,000 (i.e. so that a wider scope of work must be insured)

Increase the threshold to \$26,000 to reflect increases in building costs since 2012

Increase the threshold to an amount higher than \$26,000.

14. How often should the threshold amount be reviewed

every 3 years?

every 5 years?

every 10 years?

If you prefer a different frequency, please tell us what it is and your reasons

Reform idea 7 - Opt-outs or premium caps for some high value projects

Building businesses (and ultimately their customers) pay premiums that are calculated, in part, based on the value of the insured work. This can result in premiums for high value work that are relatively high compared to the limits on what a homeowner may claim under the scheme. We want your feedback on whether there should be a cap on premiums or an insurance opt-out for high value work to construct, alter or renovate a single dwelling. IPART has suggested a threshold of \$2 million.

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?

Yes (the estimated impact on the scheme is under \$7 million per year of forgone premiums) \$7m out of a pool of what?

No

Not sure

16. Alternatively, should insurance remain mandatory for high value work on single dwellings, but with premium prices capped for work over \$2 million?

Yes (the estimated impact on the scheme is under \$4 million per year of forgone premiums)

No

Not sure

Reform idea 8 - Broader insurance exemptions for high rise buildings

Currently, home building compensation insurance is not required for the construction of a building of more than three storeys that has two or more dwellings, such as high-rise apartment buildings. However, the insurance is typically required for renovations or alterations of such buildings. IPART's review noted some stakeholders think there is a lack of clarity about these different insurance requirements for construction and for renovation or alterations of multi-storey buildings. We want your feedback about whether we should adopt a broader and clearer insurance exemption for multi-storey buildings. This would also remove both the insurance costs and cover for some homeowners. It would align to existing arrangements in Queensland, Western Australia, the Australian Capital Territory, and Northern Territory.

17. Should all construction, renovation and alteration work to multi-dwelling buildings that are over 3 storeys be exempt from home building compensation insurance?

Yes – if they can get LDI cover but what impact is this sort of work having on the scheme – historically and what are the defects and causes of builder inability to fix and do it correctly the first time.

No

Not sure

Reform idea 9 - Insurance exemptions for some housing services

Home building compensation insurance must be bought to construct homes, but the insurance will have no beneficiary, if the developer retains the property to provide long term housing services. For example, this is the case for the construction of some social or affordable housing

or specialist disability accommodation. We want your feedback on whether we should automatically exempt this type of work from insurance in some circumstances.

18. Should building work be exempt from home building compensation insurance if there will be no beneficiary, because the homes will be used to provide long-term social or affordable housing or specialist disability accommodation?

Yes – so long as it remains that type of dwelling

No

Not sure

19. If there were an insurance exemption, should it 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?

Yes

No

Not sure

20. If there were an insurance exemption, should it 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

No

Not sure

Reform idea 10 - Insurance exemptions for local government

Currently, there are insurance exemptions or opt-outs for work done on

behalf of NSW Government public sector agencies, but not local councils. The NSW Government released a housing strategy in 2021 that supports the use of council-owned land for housing, where this is deemed appropriate by local communities. We want your feedback about whether such work should be exempt from home building compensation insurance, because if local government acts as a developer, it cannot claim on the insurance. If the homes were to be sold, the council, as a developer, will have statutory warranty obligations to the purchasers.

21. Should councils be exempt from insurance to develop housing on council-owned land in circumstances where the council acts as a developer?

Yes

No

Not sure

Reform idea 11 - Premium refunds or exemptions for 'build-to-rent' schemes

Build-to-rent properties are a new type of housing model for NSW, where a developer builds homes that are offered for long term lease. The NSW Government recognises such developments for tax concession purposes where they contain at least 50 dwellings and will remain within a unified ownership structure for 15 years. Given developers cannot claim on home building compensation insurance, we want your feedback about whether to provide for premium refunds or exemptions for this type of work.

22. Should insurance be cancelled and the premium refunded, for the construction of homes that, on completion, are offered for long-term lease under a 'build-to-rent' model, given there will be no beneficiary able to claim on insurance?

Yes

No

Not sure

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

No

Not sure

Reform idea 12- Repeal provisions that regulate former scheme insurers

NSW's former privately-underwritten home warranty insurance scheme stopped insuring work in 2010 and is no longer receiving claims. We want your feedback about whether there would be any issue with repealing the legislation that governed those former insurers. **Does that summary and the question below support that the re-entry of private sector parties is now categorised as "not going to happen"?**

24. Is there any reason to not repeal legislation for that former insurance scheme?

Yes

No

Not sure

If you answered 'Yes', why do you think we need to keep legislation governing the former insurance scheme?

Theme 3 – Providers and how they are regulated

Reform idea 13 - Reform or repeal provision for 'alternative indemnity products'

Since 2018, the scheme's legislation has provided that 'alternative indemnity products', such cover by means of a fidelity fund, may be offered instead of insurance. In practice no business has entered the scheme to provide any such products. In order to make it easier for such providers to enter the scheme, IPART suggested allowing them the discretion whether to pay homeowner claims. IPART acknowledged this

could put at risk outcomes for homeowners, and suggested some risk mitigations. However, our analysis is that none of those mitigations are adequate to manage the risk to homeowners. Major building industry and insurance industry stakeholders have also told us they oppose allowing for such discretionary alternative indemnity products. We want your feedback about what to do in these circumstances.

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?

Yes

No

Not sure

26. If you answered 'yes' how can the risks to homeowners and buildings businesses from such a discretionary fund be managed?

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?

There is a very simple alternate model that is NOT insurance and can deliver the protection to consumers, benefit even reward good building practitioners and as necessary supplement the ICARE HBCF regime or replace that regime but getting anyone to consider it is not as easy as it should be!

Yes

No

Not sure

Reform idea 14 - Legislatively amend SIRA's functions to regulate icare HBCF

IPART has recommended that icare HBCF should continue to propose its own builder eligibility assessment model and claims handling model, but with SIRA given stronger powers to determine the final models that

icare HBCF must implement. We want your feedback on the design of an option to grant SIRA additional powers to require icare HBCF to change its eligibility or claims models in some circumstances.

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 – this should see the relationship between the 2 entities as well as other relevant Govt agencies who affect who can build what where in NSW better co-ordinated so that as other models have done there is the removal of risk as early as possible which here and now is not done effectively or at all. Recent advertisements have asked for applications to work for SIRA where how HBCF is regulated and delivered is part of the role- which is a good start but not the end of the review and adjustment regime.

No

Not sure

29. Should the law require that SIRA must publish a statement about its assessment and decision each time icare HBCF lodges a new eligibility or claims handling model?

What would this achieve or show noting the risk covered concerns building work and historically there are not many people in the HBCF regime as presently carried out who have a building background.

Yes

No

Not sure

Reform idea 15 - Refocus of the regulatory regime to a single, State-insurer model

The NSW scheme has been the subject of multiple attempts to achieve and sustain a competitive, private sector underwritten scheme since

1996, none of which have been successful. This aligns to experience in other Australian states and territories. The NSW Government has agreed that SIRA will consult on changes to its insurance guidelines to remove regulation of eligibility and pricing for any new insurer entering the scheme, as a means to entice private competition (SIRA will conduct a separate consultation on those new guidelines). This would move NSW's regulatory arrangements closer to those that apply in Victoria, which has limited private sector participation in its market for this type of insurance. If that fails to achieve sustained private sector insurer participation in the HBC scheme, we want your feedback about whether the NSW Government should shift the regulatory framework back to a monopoly Government-insurer and focus on operating that model as efficiently as possible for the building industry and homeowners.

30. Do you think it is commercially viable for multiple insurers and providers to operate in the NSW home building scheme? (In terms of market size: there were 20,133 businesses eligible to buy insurance at the end of financial year 2020-21, and 88,270 projects were insured in that year)

Yes

No- why is competition in providing a product that the private market has clearly abandoned still considered relevant. Using the words monopoly provider is self-defeating and grossly inaccurate when there is no market nor appetite to create a market by those who historically entered but ran away with their tails between their legs.

General insurers have other areas of risk that are and are not always profitable but which do not have a long tail liability etc.

So the issue is not why it is provided but how and a model is available but it will be a more of a whole of picture model not an end of line "undertaker" provider.

Not sure

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?

Yes – but it does not have to be even should not be ICARE operating as it presently does which is in its own words at the end of the line of consumer protection so as to be effectively an undertaker.

The provider should be a whole of life “watcher and helper” with preventative, palliative and undertaking functions, duties and roles so that risk identification, risk management and risk removal are in play from as early as possible.

Australian history shows this can be done successfully as do some overseas models and with appropriate data collection, education and rewarding the good and successful coupled with easier access to technology the ability to successfully run a provider is very much a real deliverable.

No

Not sure

Additional feedback for SIRA

32. Do you have any other comments or feedback about the home building scheme that you would like to share with SIRA?

Consumer protection is an outcome of what is done not just a policy called insurance.

It's not why HBCF is needed but how HBCF is delivered that needs to be looked at. The model that can deliver better outcomes for all parties is not that hard to detail, deliver and maintain. Happy to discuss but this questionnaire is not the best way for that to be done.

Bottom of Form

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If you can't provide your submission electronically, you can send your submission by mail to:

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