THE INDEPENDENT VOICE OF STRATA OWNERS

16 August 2022

SIRA
Locked Bag 2906
LISAROW NSW 2252

Attention: Darren Parker, Executive Director, Workers & Home Building Compensation

HOME BUILDING COMPENSATION REFORM CONSULTATION

The Owners Corporation Network of Australia Limited (OCN) is the independent peak consumer body representing residential strata and community title owners and residents. As such, OCN is uniquely positioned to understand the impact that the legislative framework has on day-to-day machinations and community living. As the key consumer voice in the apartment building defects space, OCN welcomes the opportunity to comment on the consultation paper and is happy to engage with SIRA on any aspect of this submission.

In NSW, urban consolidation has been a goal of successive Governments, resulting in a rapid expansion of the residential strata sector. Over half the new dwellings to be built in our metropolitan areas over the next decades will be strata titled.

The emphasis on increasingly tall and more complex apartment buildings to house a growing population demands that only the most suitably qualified professionals are permitted to undertake this work. However, regulatory system and construction industry failures have led to systemic defects in apartment buildings.

Until governments address phoenix type behaviours to avoid responsibility for rectifying defects, the Home Building Compensation Fund safety net is of critical importance to purchasers.

In announcing the new Home Building Compensation Fund industry stakeholders and consumers were assured that premiums would be scaled from least to most trustworthy builders. Yet a company recently reported that despite not triggering a single claim on $40m work their premium is soon to increase. Again. Ultimately, the apartment owners pay this price.

OCN would like to see the data SIRA has kept on multiple claims against individual directors since OCN provided 42 examples in its September 2017 submission … and what is being done to address serial offenders.

Sincerely

K Stiles

Karen Stiles
Executive Director

www.ocn.org.au
Level 4, 95 Pitt Street, Sydney NSW 2000 Phone: (02) 8197 9919 Email: eo@ocn.org.au
Owners Corporation Network of Australia Ltd. | ABN 99 153 981 205

Owners Corporation Network
Submissions on Home Building Compensation Scheme Reforms
Authors: Paul Jurdeczka, Chambers Russell Lawyers, and Banjo Stanton, Stanton Legal

1. Fair Trading has sought submissions (by 16 August 2022) in respect of the Home building compensation reform Discussion Paper (**Paper**).

2. The Owners Corporation Network (**OCN**) is essentially the only consumer group providing submissions to NSW government in respect of home building and related issues on behalf of owners of units in residential strata schemes (**consumers**). Many of these issues affect residential and mixed-use strata schemes, not only as they relate to the construction of new strata schemes but also subsequent remedial or maintenance work to such strata schemes. Further, in many regards the interests of unit owners and single dwellings owners will be the same or similar on some issues, but there is no consumer group making submissions on behalf of single dwelling owners.

3. Noting OCN makes limited submissions on some questions below, OCN expects to be able to make submissions on more properly detailed reform proposals for giving effect to each of the indicated proposal(s) in due course.

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?

4. OCN supports the proposal that uninsured work be covered by the HBC scheme, to avoid consumers being left unprotected due to illegal work without insurance. This appears a similar situation to uninsured workers compensation claims where such is covered to protect workers.

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?

5. The preference is that cover be provided for any work requiring insurance under the HBC scheme in the usual way. Otherwise, the proposed application to work requiring planning consent or to be declared under the *Design & Building Practitioners Act 2020* (**DBPA**) makes sense.

6. Owner-builders should be excluded from claiming, except to the extent that a sub-contractor was required to do work for them and did not have HBC scheme insurance when required.

7. Related entities of the relevant builder or developer, or close associates, should not be able to claim including if they would normally be excluded if such had been insured properly.

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?

8. The obligations on an insured should be the same as much as practically possible as if insured, including diligent pursuit as proposed. The obligations on an (uninsured) insured should be the same as much as practically possible as an insured under the current scheme, including diligent pursuit as proposed.

   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?

9. Yes. This is needed as strong disincentive for the illegal behaviour in addition to assisting the viability of the scheme. In addition to the recovery entitlements referred to in the discussion paper, it might also be considered to:

   (a) Reverse the onus of proof in any recovery, such that the defendant needs to prove the claim was not properly assessed and paid out, with it deemed or assumed such has been unless proven otherwise.
   (b) The director(s) and nominated supervisors of the builder and/or developer could be personally liable in the same way as the builder and developer, unless they can prove they had no knowledge or involvement in the failure to obtain the relevant insurance (with the onus lying on them to prove such).
   (c) Any certifying authority could also be liable for recovery to the extent that it failed to take reasonable steps to confirm that insurance was in place when it should have, in issuing any construction certificates, compliance certificates or occupation certificates in their role for the relevant planning consent.

   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)?

10. OCN supports introducing what amount to a "5th trigger", being a failure of a builder to comply with a work order by Fair Trading as the result of a complaint.

11. The contractor doing repairs, and owners being required to provide reasonable access to comply with such an order, should be capable of being dealt with under the current legislation dealing with such work orders. Failing that, the previous "first resort" insurance scheme that applied up to 2002 provides guidance as to what obligations and processes might be put in place for such claims under the insurance.

12. The issue here would be ensuring that the scope of repair works was clearly identified to avoid the risks involved in relying on the builder who did the original work defectively to determine the scope, making clear that the owners had the benefit of fresh statutory warranties for that work, and that work was also insured in turn (per section 92(5) of the *Home Building Act 1989* (**HBA**).

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).

13. The owners may still have incurred substantial costs in respect of expert costs or may need to incur alternative accommodation and related costs due to the defects or to allow the repairs to be done. The owners should not be left without remedy where such has arisen as the result of a breached work order. In such circumstances the builder should be liable for such, the insurer should be able to issue an order to pay such, and if the builder failed to pay such then the insurer should pay such and be able to recover such from the builder.

14. Bringing forward the ability of owners to make a claim is also an opportunity for the scheme to substantially limit the costs that insureds will incur pursuing a builder. That can in turn substantially limit the scheme's liability for the costs of insured's pursuing builders. Further, the experience of OCN's advisors when acting for first resort insurers in many cases was that when the insurer involved a respected consultant, there was a much greater chance of an owner and builder putting aside their differences and agreeing upon a scope to be carried out by the builder. In addition to reducing the owner's claimable costs, that assists in minimising HBCF liabilities resulting from builder's using up all their resources on the cost of fighting claims instead of carrying out repairs.

    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)?

15. OCN opposes the reduction of the period within which to notify losses or make claims. The current insurance scheme already provides inadequate protection for consumers against building defects. The scheme needs to be strengthened and extended, not reduced in other ways. The concerns of the government about the premiums and sustainability of the insurance scheme arise mainly due to the governments of the last 25 years failing to properly regulate the residential building industry.

16. The government has taken serious steps in recent years, with the DBPA, *Residential Apartments Building Act 2020* (**RABA**) and so forth. These should result in improvements in the next few years via regulation and compliance in the industry. However, it is the government that should bear any increased costs in the meantime, while the benefits of same begin to be shown and the "tail" on claims is dealt with, and not the long suffering and inadequately insured consumers.

17. This is especially so where loss has been notified under the policy in time, but litigation continues after 6 years as is quite common, but a claim can be made within the current 10-year limit. Such circumstances should remain covered unless and until the scheme is returned to a completely 'first resort scheme'. Changing that as contemplated would bring the scheme into further disrepute as many owners would lose their rights against the government scheme through no fault of their own by following the legal processes that the government requires them to follow.

18. The concerns about disagreements between Fair Trading and insurers might also conceivably be dealt with (in part) by making the Office of Building Commissioner responsible to deal with all residential building complaints under the auspices of the RABA, not just Class 2 BCA buildings, thus placing

responsibility for complaints with one authority rather than the current split (and arguably inefficient) system.

19. The risks to insurers could be dealt with by providing additional recovery rights as outlined for Reform idea 1, where a liable person has failed to comply with an order. There should also be much stricter limitations (both licencing and underwriting) against persons involved in a company for which an insurance claim has been paid being able to continue trading through another company or in their own name.

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.

20. OCN supports this increase. The amount should be indexed to increases in building costs and updated regularly.

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.

21. OCN supports this proposal.

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.

22. OCN supports the threshold being reviewed every 3 years.

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%).

23. A further statistic from claims that would have been useful is by how much claims were found to have exceeded the original price, rather than only noting when the 20% cap was met. This would provide some idea of what cap might be required (and which of 25% or 30% covered how many more claims to produce the premium increases indicated).

24. OCN supports increasing the non-completion cover to 30%, to maximise the consumer protection provided by the insurance scheme.

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?

25. OCN supports such a proposed register.

Reform idea 6 – Update the threshold for requiring insurance

26. The Paper seems to be under the misapprehension that the size of projects that can be done without insurance has been shrinking is a bad development. Similarly that more businesses and their customers need to pay for the cost of insurance is also a bad development. Instead, this means arguably a larger premium pool and more consumers protected by insurance (and contractors regulated and scrutinised by the scheme, and data recorded as a result).

27. Further, there seems to have been no real analysis of the types of projects or work that might fall under or be over the threshold. Any residential building work can have effects and cause loss far out of proportion to its cost. A $20,000 project could cause hundreds of thousands of dollars of loss or damage.

28. Finally, the discussion completely ignores the related effect under Clause 46 of the *Home Building Regulation 2014* to work on existing residential flat buildings. The threshold for needing insurance for a project on a residential flat building (such as significant maintenance or remedial works), and whether the base minimum amount of cover or that amount for each dwelling applies, is essentially determined by multiplying the number of dwellings by the threshold for insurance. So a scheme involving 100 units would need only a single $340,000 (or $400,000) policy cover for a project between $20,000 and $2,000,000. OCN submits this would leave prima facie very substantial projects with minimal (and insufficient) insurance protection. For example, the application of a new waterproofing membrane to the roof of a building for say several hundred thousand dollars, and affecting numerous units or the entire building if defective, could only require minimum cover.

29. The original provision which is now Clause 46 was put in place some 20 years ago and has remained essentially the same since. The average and maximum size of residential strata schemes has increased since that time, but the Clause has remained essentially the same. The effect is now disproportionate, and the consumer protection provided seriously weakened.

30. Irrespective of whether the $20,000 threshold changes, Clause 46 needs to be reviewed and amended to provide better protection for residential strata buildings having post completion work done.

31. At the least, where the value of the project is the current minimum insurance cover amount, then cover should be provided to each dwelling.

32. Alternatively, Clause 46 needs comprehensive review as to how it should operate to provide proper consumer protection and insurance cover.
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?

33. The $20,000 threshold should continue to apply, to provide maximum consumer protection, subject to the submission below.

34. Noting the indication "*The current insurance threshold aligns to the current $20,000 threshold above which businesses must comply with certain detailed contract requirements under the Home Building Act 1989 (and that Act is currently being reviewed)*", the increase in the threshold should instead be dealt with as part of that review (and any submissions by stakeholders). The detailed contract requirements, and the consumer protection provided, need to be considered at the same time, and how it and the protection provided by insurance should operate together.

    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.

35. The threshold should be reviewed every 3 years and should be the same frequency as for Question 10 above.

    Reform idea 7 – Opt-outs or 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?

    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?

36. These issues do not relate to strata construction, and OCN does not seek to make submissions as a result.

    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?

37. The comments:

    (a) *"IPART's review noted some stakeholders think there is a lack of clarity over whether insurance is required for renovations and alterations done in multi-dwelling buildings over three storeys high.";* and
    (b) *"some businesses may unwittingly break the law and be exposed to penalties for failing to take out insurance because they do not realise they must have insurance for a renovation or alteration projects,";* and
    (c) *"it may be difficult for businesses to determine whether particular types of projects must be insured or alternatively will be subject to the strata building bond scheme"*

    suggest that sophisticated operators in the industry are ignorant (or engaged in wishful thinking) of the clear obligations under the law, and this is somehow excusable or a reason to reduce consumer protection. The opposite is the case.

38. Further, the comment "*owners corporations of high rise residential strata buildings can have less choice over which businesses they can ask to work on their building (because only contractors eligible to obtain insurance can do the work) and face higher costs for the work due to the added cost of insurance,*":

    (a) completely ignores or is oblivious to part of the explicit intent of the insurance scheme (introduced in 1997) being to regulate the building industry (in part) by eligibility for such insurance, in that contractors who could not meet certain requirements and standards would not be able to do certain work (i.e. that requiring insurance);

    (b) contractors unable to obtain such insurance are *prima facie* the very contractors a consumer does not want to contract with, and should avoid doing so;

    (c) suggests cheaper is better, and that insurance protection is not worth the premium. Optional insurance would result in consumers making price conscious decisions, and sacrificing insurance protection to obtain minimal (and in the long run completely insufficient to cover the cost of dealing with defects) savings;

    (d) ignores that remedial work is more complex and challenging than normal work, is usually undertaken only by the most experienced (and willing) contractors and should not be open to be undertaken by any contractor without regard to their experience and skills. It is worth noting the current defects crisis in high rise residential strata schemes is prima facie in part due to those contractors not having to be subject to the eligibility criteria and scrutiny involved in eligibility for HBC insurance, which is not required for high rise work, and with no extra requirements for doing that work. The least scrutinised contractors who were worst placed to do the most challenging work were essentially allowed to do that work, with disastrous consequences for consumers.

39. The suggestion by SIRA that more guidance be provided for the building industry was clearly to ensure there is no excuse for ignorance, not to change the law to fall into line with that ignorance.

40. OCN opposes vigorously any proposal to remove or reduce the need for insurance for post-completion works to residential flat buildings. To the contrary, better protection is required, and the ignorance

raised by SIRA in the above comments exists and continues to be allowed to exist because the government has failed to provide sufficient clarity over decades despite this issue being raised repeatedly in submissions to government by various stakeholders about the HBA.

41. This provides the opportunity to make the requirements for insurance for such work clear, not reduce consumer protection.

42. Finally, it is worth noting any "high rise" residential flat buildings already lack the protection of insurance for their original construction since 2002. The suggestion appears to be they not even have the protection of insurance for post completion work. Such proposals suggest the government has learned nothing from the last 25 years, and the "defects crisis" with Opal Tower and other residential flat buildings it has been trying to deal with since December 2018 as a result of how it has regulated (or failed to) the industry from 1997 until recently.

43. The OCN has repeatedly made submissions on the largest reason for the scheme's losses being the highly disproportionate number of last resort insurance claims against licenced companies. The problems with underwriting, and licencing, criteria not controlling the higher risk of companies, particularly companies managed or controlled by persons who have been involved in other companies that have had defect issues, has not been properly addressed. The scheme and licencing provisions should not be tolerating the minority in the industry who exploit the corporate veil to the detriment of consumers and the public (via its funding of the scheme). The government should focus on improving the scheme (and consumer protection generally) by addressing those issues and plucking the 'bad apples' out of the industry instead of reducing consumer rights to make them even more vulnerable to the 'bad apples' in the industry.

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?

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?

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?

44. As long as there is no consumer as owner in the usual sense, in that the owner will be a government body, charity or large and sophisticated corporation with sufficient means to protect their own interests at the construction contracting stage, then such should be allowed.

Reform idea 10 – Insurance exemptions for local government

Question 21: Should councils be exempt from insurance to develop housing on council-owned land?

45. As long as the owner is to remain the council, or where the council is selling the housing has and will have liability for defects under the statutory warranties (and is not allowed to seek to avoid or

minimise such liability by the use of "special purpose vehicle" companies or similar), then such should be exempt.

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?

46. As long as there is no consumer as owner in the usual sense, in that the owner will be a large and sophisticated corporation with sufficient means to protect their own interests, then such should be allowed.

47. However, if the dwelling was ever sold within 6 years of completion, then HBCF insurance should be required to be put in place to provide protection to later owners and/or the vendor made liable under the statutory warranties as if a developer under the HBA.

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?

48. As long as there is no consumer as owner in the usual sense, in that the owner will be a government body, charity or large and sophisticated corporation with sufficient means to protect their own interests, then such should be allowed.

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?

49. Receiving and dealing with claims are different issues. Insurers continue to deal with claims from the relevant period, and the OCN is aware of same.

50. Until such time as all claims are finalised, and any proceedings relating to same are concluded, any insurers dealing with same should continue to report as relevant to government.

51. Only once such are all concluded and finalised should the relevant obligations cease. The claims data still being, and to be, received will also be of benefit for future reviews of the scheme.

52. It should also be noted that the repeal of some provisions will expose the former private insurers to further claims now being made.

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?

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

53. No. If such a fund accepts payments or contributions then a discretion whether and how to pay provides no real protection in return. It amounts to an ex gratia payment scheme. It is not a substitute for insurance.

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?

54. Yes.

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?

55. Yes.

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?

56. Yes.

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?

57. Only when the building industry is sufficiently regulated, and the risk involved in offering insurance is sufficiently reduced for insurers to offer insurance on reasonable and commercial terms on an ongoing basis.

58. Currently insurers are reluctant or unwilling to offer various insurance for various types and professions in the building industry, such as certifiers, professionals, etc. Once the perceived risk has reduced to the point those parts have returned to "normal", if they do, then home building insurance should be able to be insured within the context of a market.

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?

59. See above. Private insurers will not enter the market until the building industry is better regulated, and the perceived risk is low enough to insure most participants against risks on commercial and reasonable terms on an ongoing and long term basis.

60. Frankly, the NSW government does not seem to understand the private insurance market or consult sufficiently with it about its needs to insure for such. The assumption, during 2019 and stakeholder discussions about what became the DBPA, that insurance for building and design practitioners envisioned as required under the proposed Act would be readily available at reasonable premium levels illustrated that.