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# Consumer building guide

Essential information for anyone building or renovating their home

[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

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ISBN 0 7347 6016 7

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October 2009

## Why do I need to read this guide?

If you are having renovation or building work done on your home where the value of the work (labour and materials, even if you are providing the materials) is over \$1,000, you will be entering into a legally binding contract with the builder or tradesperson.

Before you sign that contract, or accept their quote, there are certain important things you need to understand and this booklet provides you with that information.

Your builder or tradesperson is required to give you a copy of this booklet before entering into a contract for residential building work with you and it is strongly recommended that you take the time to read it.

It is the form approved by the Commissioner for Fair Trading, for the purposes of the *Home Building Act 1989*, section 7AA (contractor obligation), section 96 (2B) ('spec' builder obligation) and section 96A (1A) (developer obligation).

Provided by NSW Fair Trading, the home building authority in New South Wales.

## The basics

The *Home Building Act 1989* is the law that regulates residential building work in NSW. Residential building work is building or trade work on single dwellings, villas, houses and home units.

### Licensing

Under the law:

- All builders and tradespeople must be licensed for the kind of residential building work they do where the value of the work (labour and materials, even if you are providing the materials) is over \$1,000.
- All specialist tradespeople doing electrical wiring, plumbing, draining, gasfitting, air-conditioning or refrigeration work must be licensed regardless of the value of the work and irrespective of whether the work is residential, commercial or industrial.

You should always confirm the licence details of any builder or tradesperson before using them to do work on your home. Go online to [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) or call 13 32 20 to do a licence check.

The licensing requirements also apply to builders and tradespeople carrying out work for owner-builders.

### *What does a builder do?*

Many builders do not actually do building work themselves. They:

- manage and coordinate home building or renovation projects
- manage the purchase and delivery of materials
- co-ordinate the work of tradespeople such as plumbers, painters and carpenters involved in the project.

### *What does a tradesperson do?*

A tradesperson works in a particular field in the home building industry. The term tradesperson includes all licensed:

- concreters
- bricklayers
- carpenters
- electricians
- plumbers
- roof tilers
- plasterers
- tilers
- painters
- fencers
- gasfitters.

### *Do you need a builder or tradesperson?*

If you want your gutters replaced, your plumbing fixed or your floors sanded, you need a tradesperson.

If you want to add another bedroom or build a new home, you need a builder to organise the right tradespeople to do the work. It is recommended you obtain three itemised quotes so you can compare prices for each aspect of the work.

### **Contracts**

A written contract must be used for residential building work where the value of the contract (inclusive of labour and materials, even if you are supplying the material), is more than \$1,000.

### **Home warranty insurance**

If the contract price is more than \$12,000 (including the cost of any materials supplied by the contractor), the builder or tradesperson must give a certificate of home warranty insurance to the home owner, before taking any money (including a deposit) on the contract, and before starting any work. The home warranty insurance requirements also apply to work carried out for owner-builders by builders and tradespeople.

### **Before work starts**

Most residential building work needs council approval before it can start. If you are unsure you should enquire with your local council before entering into a contract, or before any work is started.

### **Development application**

For most residential building proposals, a development application (DA) needs to be lodged with the local council. Applicants should go to the website and/or office of the local council for an application form and information on how to lodge a DA. Before the DA is lodged, applicants should also find out from council if the proposal is permissible on the site and what planning controls may apply.

If you are building a new home in NSW, you need to know about the BASIX (Building Sustainability Index) Certificate. BASIX was introduced to local government areas in the Sydney metropolitan area in 2004 to make sure new homes use less water and energy. On 1 July 2005, BASIX was extended to apply across NSW. This means you need to include a BASIX Certificate with your DA for a new home. Go to [www.basix.nsw.gov.au](http://www.basix.nsw.gov.au) for more information.

Once a DA is lodged, the council will notify the neighbours and may advertise the development application in the local or regional newspapers. As a result, it is usually beneficial to consult with neighbours and others likely to be affected by the development prior to lodging the DA. The council will assess the impacts of the proposed development taking into consideration any comments received. If there is opposition to the proposal, the council may appoint a panel to provide independent advice.

## Development consent

If the DA is successful, the council will issue development consent, usually subject to conditions.

## Construction certificate

A construction certificate must be issued before building work under development consent can commence.

A construction certificate verifies that the plans and specifications of the development complies with the Building Code of Australia and is consistent with the council's development consent. Either an accredited certifier or the local council can issue a construction certificate.

If the development consent involves work being carried out that affects an existing building, an accredited certifier or the local council are required to carry out an inspection before a construction certificate can be issued.

It is very important to ensure that a construction certificate has been issued before any work starts under a development consent. If not, you will be unable to obtain an occupation certificate for the completed work, which will prevent occupation and use of the building work and may also have implications for the future sale of the property. It is an offence to occupy or use a building without an occupation certificate.

If a construction certificate is issued after the start of the work to which it relates, it will be invalid and will prevent an occupation certificate from being issued.

## Commencement of work

Once a construction certificate has been issued for building work under development consent, work can commence once the following conditions (a – e) have been met:

- (a) A Principal Certifying Authority (PCA) (either an accredited certifier or the local council) has been appointed to undertake critical stage inspections of the work during construction, and to issue an occupation certificate upon completion. This certificate is to the effect that the building meets standards, and is safe to occupy and use.
- (b) The PCA has been notified of whether the work is being undertaken by an owner-builder, or by a contractor, and the name of that contractor.
- (c) The PCA and local council have been notified that work is to commence at least 2 days before that work starts.
- (d) The PCA has notified the consent authority (who issued the development consent) and the local council of his/her appointment at least 2 days before that work starts.
- (e) The contractor has been notified of any critical stage inspections and other inspections the PCA requires, that are to be carried out in respect of the work.

## Complying development

If the home building work you want to undertake is common or routine and its impact on the environment is predictable and minor, it may be classified as a complying development.

Work classified as a complying development does not need development consent or a construction certificate before work can commence.

To commence work on a complying development, a complying development certificate (CDC) must be obtained from an accredited certifier, or the local council.

An accredited certifier or local council is to inspect the site of the development before a complying development certificate can be issued.

During construction under a complying development, the building work must be inspected by council or an accredited certifier to check that it meets national building standards (the Building Code of Australia). A certificate to allow occupation or use of the completed building work (occupation certificate) can only be issued if the work generally meets these standards.

## Choosing a certifying authority

Choosing a certifying authority (local council or an accredited certifier), is an important decision. Your builder, architect or draftsman may recommend someone, but it is your decision as the land owner to choose who will certify your building plans and building work. The owner of the land is the only one allowed to choose a certifying authority.

Note: You can appoint one accredited certifier or the council to issue the construction certificate or complying development certificate (CDC), and a different accredited certifier or the council as the Principal Certifying Authority (PCA).

Whether you choose council or an accredited certifier, they are working for you and the community to ensure that the building work is safe and meets relevant building standards.

The Building Professionals Board (BPB) is responsible for accrediting qualified professionals as accredited certifiers.

Before choosing a certifying authority, you should:

- obtain quotes from a number of certifiers, and your local council
- check their references
- make sure they hold current accreditation for the type of building work you want to do. If in doubt, check with the Building Professionals Board (BPB) on 9895 5950
- view a list of accredited certifiers by the BPB at [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au) or find a certifier in the Yellow Pages under 'building surveyors' or 'building certifiers'.

## The contract

As explained earlier in 'The basics', a written contract must be used for residential building work where the combined value of the work (labour and materials, even if you are providing the materials) is more than \$1,000.

The contract not only sets out all the details of the work to be done, it contains a lot of other really important details about your rights, insurance the builder or tradesperson has to have and what you need to do if you have a dispute about the work.

## What should the contract look like?

There is no law about what the contract should look like and many different organisations produce contracts so they will all look a bit different. It is important that you take the time to make sure that no matter how the contract is laid out, it still contains everything required by law.

## Types of contracts

There are a number of contracts that can be used in residential building work. The ones commonly used are listed below. The one that you would be most familiar with is a fixed price contract.

### *Fixed price contract*

Although a 'fixed price' contract is intended to be for a 'fixed price', it is not uncommon for the final cost to increase as builders will occasionally seek a variation in the contract price due to unforeseen circumstances. Refer to 'Contract variations' on page 16.

If you are inexperienced in residential construction, it is strongly recommended that you consider seeking legal advice from a suitably qualified and experienced person before signing a 'fixed price' contract. You could consider

contacting a qualified architect, or a solicitor with particular experience in home building matters or the Home Building Advocacy Service run by the Macquarie Legal Centre (see page 33). There may be a fee for this type of advice, but it could save you money in the end. Using the wrong type of contract for your home building work could be very costly.

If you sign a fixed price contract and then variations are required, it is important you understand how the contract price will be adjusted.

### **Adjusting a fixed price contract**

'Rise and fall' is an agreed method of upward or downward adjustment to a fixed price contract sum to allow for fluctuations in the cost of labour or material during the construction period.

Rise and fall clauses are extremely useful when the cost of materials can increase on a monthly basis. They allow the builder to recover cost increases; or, if there is a drop in the price of materials, the builder should pass the cost savings onto the home owner.

Cost adjustments are made according to a 'rise and fall' formula generally based on monthly industry figures release by the Australian Bureau of Statistics and changes to CPI. The method for calculating any cost adjustment to a contract should be clearly stated on the front page of the contract.

### *Cost plus contract*

A cost plus contract is a contract under which the builder is reimbursed for the direct and indirect cost of the work plus a fee (fixed or percentage of the cost of the work) for services. Cost plus contracts can be cost effective as the home owner only pays for the actual cost of materials and labour.

A cost plus contract should include:

- an estimated budget
- a timetable for reporting actual labour and material costs to the home owner (it is recommended that reports are provided at least once a month to avoid confusion and possible dispute)
- a way of tracking actual labour and material costs against the project budget.

### *Design and Construct (D&C) Contract*

A D&C contract covers both the design and construction of a residential property.

In a typical D&C contract, the home owner supplies a basic brief to the contracting organisation, who then provides the documentation, designs approvals and builds the project.

A D&C contract can be either fixed price or cost plus.

### *Prime cost items*

Prime cost items are specified fixtures or fittings such as kitchens, hot water services, and toilet suites etc. that are required to complete the building work. The cost listed against each item may be subject to a variation at a later date once the item has been selected and approved by the home owner and builder.

## Contract contents

Any contract for home building work must, by law, contain the following 15 items.

It is strongly advised you go through the contract before signing it to make sure it contains these items:

### *The parties*

1. The name of the builder or tradesperson and their licence number

**Note:** The name and number listed on the builder or tradesperson's licence should be EXACTLY the same as on the contract. If it is not the same, do not sign the contract, contact the licensee for clarification. A licence in the name of an individual does not permit the individual's company to make the contract, even if the individual is a director of the company. If the company is making the contract, the company needs to be licensed in the company name. You should always use a licensed builder or tradesperson. Do an online licence check at [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) or call 13 32 20.

2. Your name

### *The work*

3. An accurate description of the work to be carried out

**Note:** If the description is not accurate, do not sign the contract, contact the licensee to clarify their understanding of what you want done.

4. If there are any plans or specifications for the work, these should be attached and there should be a clause stating that all plans and specifications for work to be

done under the contract (including any variations to those plans and specifications) are taken to form part of the contract

**Note:** If you have plans or specifications and they are not referred to in the contract, contact the builder or tradesperson to get this fixed before you sign the contract

5. The contract price must be shown on the front page of the contract. If the price is not known, or is subject to change, the front page must clearly state this, and provide an explanation of why (ie. such as in the case of a cost plus contract).

**Note:** If the price of the work is not included and there is no explanation of why, do not sign the contract, contact the builder or tradesperson to discuss or contact Fair Trading for advice.

6. A clause that states that any agreement to vary the contract or any of the plans and/or specifications must be in writing and signed by you and the builder or tradesperson

**Note:** It is very important that you put all variations – no matter how small – in writing. This could become vital if there is a dispute about the work later on.

### *Insurance*

7. A statement about the builder or tradesperson's legal requirement to have a current home warranty insurance policy if the work is for more than \$12,000

**Note:** The builder or tradesperson must provide you with a certificate of insurance before receiving any money under the contract (including a deposit) or before doing any work if the work is for more than \$12,000. For work under \$12,000 home warranty insurance is not required. If the licensee does not give you a certificate of insurance and one is required, contact Fair Trading. You can check the validity of the certificate of insurance by contacting the home warranty insurer whose contact details appear on the certificate. Contact details for insurers are also available on the Fair Trading website.

### *Statutory warranties*

8. Relevant statutory warranties (guarantees about the performance of the work being done) required by the *Home Building Act 1989*.

**Note:** Statutory warranties set out your entitlements under the contract. If the contract does not contain the list of warranties shown on page 34, they are implied under the law anyway.

### *Compliance with laws*

9. A clause that states the work, or components, will comply with the Building Code of Australia, to the extent required under the *Environmental Planning and Assessment Act 1979*, all other relevant codes, standards and specifications that the work is required to comply with under any law, and the conditions of any relevant development consent or Complying Development Certificate
10. A clause that states that the contract may limit the liability of the contractor to comply with the clause

referred to immediately above if the failure relates solely to a design or specification prepared by or on behalf of the owner, or a design or specification required by the owner, if the contractor has advised the owner in writing that it contravenes the clause referred to immediately above.

**Note:** The above clause means that if there is a defect with the work resulting from a mistake in the design or specifications (where someone other than the builder did the design or specifications), then the builder is not responsible for rectifying the defect and the cost of rectification will not be covered by the home warranty insurance policy covering the project.

### *Other contents*

11. A note about your entitlement to a copy of the contract once it has been signed by both parties.

**Note:** The contractor must give you a copy of the contract within 5 business days after you sign it (the weekend, NSW public holidays and 27-31 December [inclusive] do not count).

12. A checklist of questions designed to assess whether or not you are ready to sign the contract.
13. A caution about signing the contract if you cannot answer yes to all questions in the checklist.
14. An acknowledgment by you that you have read and understood this booklet and that you have answered yes to all the checklist questions.
15. The date that it was signed by both you and your contractor.

Don't even think about signing a contract that does not contain every one of the 15 items listed above.

## Contract variations

Before you sign a contract, be confident that you've thought of everything. Once you and the builder sign the contract, any change you need to make is known as a variation, because it is a change or adjustment to what has already been agreed to.

The builder or tradesperson may need to vary the contract because of a council requirement or unforeseen circumstances such as a rise in the price of materials (see 'Types of contracts', on page 9). If the reason for variation is the contractor's fault, you do not have to pay for any extra work to rectify the problem.

**All variations must be in writing and include the signature of both parties to the contract.** This includes changes to plans, schedules, attachments to the contract and other documents referred to in the contract. Approved variations then become subject to all contract conditions.

In almost all circumstances, any variation (addition or deletion) to a contract will have an impact on the contract price. In most cases, this will result in a price increase but in some circumstances a price reduction might occur. In all circumstances, documents authorising variations must contain a statement explaining the cost implications of the variation and the impact on the overall contract price. Ideally, the basis for the calculation of the price change should be shown, rather than just a simple dollar amount.

Before the work commences on the variation or addition, the builder or tradesperson should give you:

- a written description of the work
- any plans or specifications for the work
- the extra cost, and any extra time required to complete the work.

Both of you should sign this written notice if you agree on the work and price. Once this is done, the work may commence.

If the variation is needed because there is likely to be danger to someone or damage to property, there may not be time to put the details in writing. In this case, the written variation may be done after the work has been carried out. In all other instances, variations must be in writing.

Following these procedures for additions and variations will help to protect you if there is a dispute about the work later on.

## Before you sign the contract

After you have read the contract to make sure it contains the necessary 15 items, it is strongly recommended you go through the following checklist before you sign. This checklist of questions is required by law to be in the contract.

Only when you can answer yes to all these questions should you think about signing a contract with a builder or tradesperson to do work on your home.

### Checklist

1.	<b>Does the builder or tradesperson hold a current contractor licence with NSW Fair Trading?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	<i>Tip: Do a licence check online at <a href="http://www.fairtrading.nsw.gov.au">www.fairtrading.nsw.gov.au</a> or call 13 32 20.</i> If no, do not sign the contract and contact Fair Trading.
2.	<b>Is the licence for the type of work you want done?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	<i>Tip: Check online at <a href="http://www.fairtrading.nsw.gov.au">www.fairtrading.nsw.gov.au</a> or call 13 32 20.</i> If no, contact Fair Trading.
3.	<b>Is the name and number on the builder or tradesperson's licence the same as on the contract?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	If no, contact Fair Trading.
4.	<b>Is the work to be undertaken covered in the contract, drawings or specification?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	If no, contact the builder or tradesperson to clarify what has to be done.
5.	<b>Does the contract clearly state a contract price or state that the contract price is not known?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	If no, contact the builder or tradesperson to discuss, if they refuse to include a price, contact Fair Trading.
6.	<b>If the contract price may be varied, is there a warning and an explanation about how it may vary?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	If no, or if you are not happy with the explanation, contact the builder or tradesperson to discuss, or contact Fair Trading.

7.	<b>Is the value of the contract (including labour and materials) \$12,000 or more?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	If yes, there are two very important things you need to know: <ul style="list-style-type: none"> <li>• That you have cooling-off rights if you change your mind and want to cancel the contract (read the 'Cooling-off period' section on page 21).</li> <li>• That the builder or tradesperson must have a policy of home warranty insurance and provide you with a certificate of insurance before receiving any money under the contract (including a deposit) or before doing any work.</li> </ul>
8.	<b>Is the deposit within the legal limit?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	<i>Tip: The legal limit is 10% for work costing \$20,000 or less, or 5% for work costing more than \$20,000.</i> If no, contact the builder or tradesperson to discuss, or contact Fair Trading. Note: The loss of any deposit paid that exceeds the legal limit will not be covered by the home warranty insurance policy for the project.
9.	<b>Do you understand the procedure for variations?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	Read the 'Contract variations' section on page 16. When you are clear about the procedure, proceed to question 10.
10.	<b>Are you aware of who is to obtain any council or other approval for the work?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	Read the 'Before work starts' section on page 5. When you are clear about the approval procedure for the work you want done, proceed to question 11.
11.	<b>Do you understand that the builder or tradesperson must have a policy of home warranty insurance if the value of the work is more than \$12,000?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>
	Read the 'Home warranty insurance' section on page 27. When you are clear about the home warranty insurance requirements, proceed to question 12.
12.	<b>Has the builder or tradesperson given you a copy of this booklet?</b> Yes <input type="checkbox"/> No <input type="checkbox"/>

## Tactics to look out for

Be alert to any builder or tradesperson putting pressure on you:

**A salesperson, builder or tradesperson who encourages you to sign a contract quickly to avoid a price increase.**

This is usually just a sales pitch. Refer to the information on the cooling-off period, on page 21.

**A builder who suggests you get an owner-builder permit while they organise all the building work.**

This can be a ploy by a builder who doesn't have the right kind of licence, or can't get home warranty insurance. Sometimes, it's simply to avoid responsibility. If you become an owner-builder, you take on added responsibilities and place yourself at greater risk if the work is not done properly. As an owner-builder you may be held accountable for statutory warranties provisions for subsequent purchasers of the property.

Go to [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) for more information about being an owner-builder.

**A builder or tradesperson who gives you a quote which seems extremely low compared with others you have received.**

It is worth asking yourself – are they providing such a low quote just to get the job? Are they cutting corners that could impact the quality of the job?

## Signing the contract

Once you have made sure the contract contains everything required by law, and you feel confident in your understanding of what you are agreeing to, who will be doing the work and how much it will cost, you are ready to sign the contract.

## Cooling-off period

If the contract price or the market cost of the labour and materials is more than \$12,000 you have cooling-off rights. This means that you have the right to cancel the contract if you change your mind, but you must do this within 5 business days. The 5-day period excludes the weekend, NSW public holidays and 27-31 December (inclusive).

A cooling-off period for residential building contracts was introduced into the *Home Building Act 1989* to allow time for consumers to have their legal representatives review the contract and if necessary cancel the contract if it is deemed to be unfair or unsuitable.

The cooling-off period is available to you for 5 days:

- after you have been given a copy of your signed contract, or
- after you became aware that you should have been given a copy of the signed contract, but did not get one.

You may exercise your cooling-off rights and cancel your contract by giving written notice.

You must give this notice:

- to the holder of the contractor licence personally, or
- by leaving it at the address shown in the contract as the address of the holder of the contractor licence, or
- by serving it on the holder of the contractor licence in accordance with any notice or service provision in the contract.

If you do cancel your contract after having paid the builder or tradesperson any money, they may keep an amount of that money for reasonable out-of-pocket expenses incurred under the contract before it was cancelled. All other money paid must be refunded in full.

You can waive (or cancel) your cooling-off rights if you wish. To do this you need to:

- ask a solicitor to give you a certificate which states that you have given up your cooling-off rights
- add a statement into the contract which says that you have waived your cooling-off rights.

**Remember:** You only have cooling-off rights to cancel your contract if the cost of labour and materials exceeds \$12,000.

If the contract was supposed to state that a cooling-off period was included, but this was not, you may cancel the contract within 7 days of becoming aware that it should have contained a cooling-off period. You may be liable for any costs that the builder has incurred on the project that you will be the beneficiary of, up until the contract is cancelled.

## Paying a deposit

Under NSW home building law, there is a maximum deposit that you can be asked to pay:

- If the contract price is \$20,000 or less, you cannot be asked to pay over 10% of the contract price as a deposit.
- If the contract price is more than \$20,000, you cannot be asked to pay over 5% of the contract price as a deposit.

If the work is required to be covered by home warranty insurance (which means the value of the work including labour and materials exceeds \$12,000) it is illegal for the contractor to ask for a deposit or other payment under the contract, unless home warranty insurance has been taken out, and a certificate of the insurance is given to you.

**Note:** The loss of any deposit paid by a home owner that exceeds the legal limit will not be covered by the home warranty insurance policy for the project.

## Progress payments

Your builder or tradesperson may ask you to make payments so that they can pay for materials and labour as they go.

Progress payments are usually made at specific stages of a project (eg. when the slab is laid or the frame goes up or at lock-up). These payments, which include GST, should equate to the value of work done. Make sure the dollar value placed on each stage is realistic. A schedule of all progress payments required to be made during the course of the project must be included in the written contract.

A stage of work is usually considered to have reached completion when it has been finished in accordance with the contract documents and any variations agreed to and is free of apparent defects. Any deposit paid should be deducted from the first progress payment.

Never pay for work that has not been performed or pay any money in excess of that required under the contract. Also, make sure that progress payments are for work done and not simply time on the job.

**Note:** Sometimes the bank lending you the money for the work will have special requirements for progress payments. If so, these will need to be included in the contract under an additional clause.

**Note:** Your home warranty insurance policy limits the amount of compensation for incomplete work to 20% of the original contract price (including variations) so it is very important you do not agree to arrangements for progress payments that cover work not yet completed. The loss of any progress payment made by a home owner to a builder that exceeds the amount stipulated in the contract will not be covered by the home warranty insurance policy for the project.

## Disputes over progress payments

On occasions, a home owner may dispute the amount requested by a builder as a progress payment.

If you are having building work done on a property you currently live in, or propose to live in, you have two avenues open to you for dispute resolution:

- If the dispute is about incomplete or defective building work a complaint can be lodged with NSW Fair Trading. More information about the dispute resolution services provided by Fair Trading is on page 31.
- If the dispute is about a contractual issue, an application for a hearing can be lodged with the Consumer Trader and Tenancy Tribunal. More information about the operation of the Tribunal is on page 39.

However, if the building work is being conducted on a property that you do not reside in or propose to reside in, such as an investment property, granny flat or dual occupancy development, any dispute over the payment of monies due under the contract can be the subject of an application for an adjudication made under the *Building & Construction Industry Security of Payments Act 1999 (Security of Payments Act)*.

The Security of Payments Act sets very specific deadlines under which documents are to be served and answered. It sets time frames for final decisions to be made by the adjudicator.

If you are served with a notice under the Security of Payments Act for the payment of outstanding monies you must not ignore the notice and you should seek competent legal advice. Further information can be found on the Department of Services, Technology and Administration website under *Procurement* at: [www.commerce.nsw.gov.au](http://www.commerce.nsw.gov.au)

## Progress inspections

For large projects such as building a new home, you may consider getting a progress inspection done by an independent building consultant or architect before each payment is made.

If you do, it will be the consultant's job to make sure all the work set out in the contract has been done and meets the appropriate standards. However, defective work may have been covered up with paint or internal wall cladding and may not be picked up by a building consultant.

Ideally, the consultant should inspect the work at times when problems can be identified. Be prepared to pay between \$250 – \$500 for each inspection.

## Access to the site

Most contracts allow the builder to be given access to the site for the purpose of carrying out the works. You shouldn't interfere with this as it may obstruct the plan of work and incur extra costs.

The builder should give you access to the site for the purpose of inspecting and viewing the works.

It may also be necessary for others to access the site and if this is something you are involved in, it is important to get the builder's permission before making arrangements.

Others who may need to access the site include:

- lending authorities
- owner's agents
- inspectors from statutory authorities regarding supply of gas, electricity and water
- council officers or private certifiers.

## Asbestos and other hazardous products

When doing home building, renovations or work around the home, you may come into contact with asbestos and other hazardous products such as lead or certain solvents.

Asbestos and other hazardous products can cause serious injury, harm and even death in certain circumstances if safety precautions are not followed. For some hazardous products, such as asbestos, the law sets out who can do work involving these products, and how to handle and dispose of the materials.

Products containing asbestos may include fibro or asbestos cement sheets used on the roof or walls or wet areas of a home, or as insulation material in the roof and around pipes.

It is recommended that before you take on any building, renovation, or other work on your home, you contact WorkCover on 13 10 50 or at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au) or the Department of Health on 9391 9000 or at [www.health.nsw.gov.au](http://www.health.nsw.gov.au) for advice about hazardous products that may be involved in the proposed work.

For advice on the removal of asbestos products in New South Wales, contact the Department of Environment, Climate Change and Water on 13 15 55.

## Insurance

For your own protection, check that the builder or tradesperson (or the vendor, if buying a home from a 'spec' builder or developer) has the following types of insurance and that the certificates are current.

### Home warranty insurance

Home warranty insurance allows consumers to make a claim for a loss (eg. financial loss or damage) caused by the contractor's defective or incomplete work in the event of the contractor's insolvency, death or disappearance.

Home warranty insurance policies issued from 19 May 2009 onwards enable home owners to be able to make a claim under the policy where the licence of a contractor they are using is suspended because the contractor failed to comply with a money (compensation) order in favour of the home owner made by a Court or the Consumer, Trader and Tenancy Tribunal.

If the builder or tradesperson does not have home warranty insurance where the contracted work is valued over \$12,000 (including the cost of any materials supplied by the contractor), they are committing an offence under the *Home Building Act 1989*.

### 'Spec' builders/developers

Home warranty insurance is also obligatory for speculative ('spec') builders and developers who on-sell residential building work which they carried out or had built on their behalf. It is an offence for such 'spec' builders and developers to enter into a contract for sale of the property without attaching a certificate of home warranty insurance to the contract. Without home warranty insurance, a purchaser may rescind the contract for sale before settlement.

**Note:** It is recommended that prior to making any payment under a sale or building contract, you check the validity of the certificate of home warranty insurance by contacting the home warranty insurer whose contact details should appear on the certificate. Contact details for insurers are also available on the Fair Trading website.

### *Owner-builders*

Owner-builders are also required to obtain home warranty insurance and attach a certificate of home warranty insurance to the contract for sale of an owner-builder project that occurs within 6 years of completion of the owner-builder work.

### *Multi-storey buildings*

The home warranty insurance provisions do not apply to the construction of new multi-storey residential buildings. A multi-storey residential building is a building containing two or more dwellings and having more than three storeys (not including an underground basement or any storey used solely as a car park). So, if you are planning to buy a unit that is part of a multi-storey residential building the developer is not required to attach a copy of a home warranty insurance certificate to the contract for sale.

### *Councils*

Compliance with the home warranty insurance provisions of the *Home Building Act 1989* is a standard condition attached by councils to the development consent for residential building work. If the conditions of the development consent are not complied with, the council may be unable to issue a final occupation or building certificate. This may adversely impact on your ability to sell and/or legally occupy your residence.

## **Other insurances**

You should ensure the builder and any professional involved in your building work have other relevant insurances including:

- contract works insurance
- public liability insurance
- workers compensation insurance
- professional indemnity insurance.

## **Statutory warranties**

The following warranties set out what you are entitled to under the contract between you and your builder and tradesperson.

Even if these warranties (promises) are not written into the contract you sign, the law says that they still apply to the work you are having done on your home. Statutory warranties are in effect for 7 years, commencing from the date when the work became available for you to use.

The warranties are:

- The work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.
- All materials supplied will be suitable for the purpose for which they are used, and that those materials will be new, unless specified otherwise.
- The work will be done under and will comply with, the *Home Building Act 1989* or any other law.
- The work will be done with due diligence and within the time stated in the contract, or otherwise in a reasonable time.
- If the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling, or the repairing, renovation, decoration or protective treatment of a dwelling; the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling.

- The work and any materials used in doing the work, will be reasonably fit for the specified purpose or result that the owner has made known to the contractor, so as to show the owner relies on the contractor's skill and judgement.

If you believe that there has been a breach of any of these warranties (within the 7 year statutory warranty period) you may be in dispute with your builder or tradesperson and you should follow the dispute resolution procedure explained under the heading 'If things go wrong' below.

### **Subsequent buyers**

The subsequent buyers of any property where residential building work was carried out by a contract builder, a 'spec' builder, an owner-builder or a developer, are entitled to the benefit of the 7-year statutory warranties applicable to the work.

## **If things go wrong**

Things do not always go to plan when you are building or renovating. You may find problems with the work, either while it is being done or some time after it has been finished.

It is important to develop and maintain positive communication with your builder or tradesperson. Sometimes people in dispute have not even spoken to each other about the problem. This makes it very hard for people to continue with the work, or to fix mistakes.

If your dispute is about the quality of the work, consider getting a copy of a free publication called the *Guide to standards and tolerances*. The *Guide* will help you understand what standard of work is acceptable. Get a copy of the *Guide* from [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) or a Fair Trading centre.

## **At the first sign of a problem**

Write a letter to the builder or tradesperson about your concerns. It is a good idea to do this as a follow-up measure after you have first discussed it. The letter should outline what you have both agreed to do and by any set date. Keep a copy of the letter and note the date you posted it or delivered it (it may be useful to send the letter by registered post).

## **Free dispute resolution service**

If you and your contractor cannot resolve the problem by talking it through, you should contact Fair Trading and ask for dispute resolution assistance.

Fair Trading deals with disputes about incomplete and/or defective home building work and/or damage caused to other structures or work as a result of the work being done.

You will generally be asked to put your dispute in writing. If there are health and safety issues, an oral complaint will be sufficient. Lodge your written complaint at [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au), by post, or at a Fair Trading Centre.

Fair Trading will then attempt to negotiate a suitable outcome between you and your contractor.

If appropriate, a Fair Trading Building Inspector will arrange to meet on-site with you and your contractor to inspect and discuss the issues under dispute. Where possible, the Building Inspector will encourage the parties to agree on how to resolve the dispute. An inspection report will then be provided to both parties.

Where defective/incomplete work exists, the Inspector may issue a Rectification Order listing the work that is to be rectified/completed and the conditions that both parties are to meet in complying with the Order. A date will be set by which the work is to be completed.

If the Order is complied with and you are satisfied with the outcome, the matter is resolved. Should the Order not be complied with, or if either party lodges a claim at the Consumer, Trader and Tenancy Tribunal during the Order period, the Order ceases to have effect, and the Tribunal will hear the matter.

If your contractor fails to comply with the Order, the breach is referred to Home Building Investigations for further action.

If you and your contractor fail to resolve the dispute, an application to the Tribunal for a decision on a building claim can be made. You cannot lodge a claim with the Tribunal unless you have been through the free dispute resolution service provided by Fair Trading first.

**Important:** Under home warranty insurance, a home owner must take action (eg. initiate dispute resolution by lodging a complaint with NSW Fair Trading) to try to have the builder finish any incomplete work and rectify any defective building work. Where a home owner does not take action to enforce a statutory warranty, an insurer may reduce its liability (or the amount paid under a claim) to the extent that the insurers interests have been prejudiced as a result of the home owner not trying to have the builder complete or repair the work.

## Subsequent buyer

The subsequent buyer from a 'spec' builder-vendor may seek dispute resolution assistance from Fair Trading before making a claim at the Tribunal against the 'spec' builder.

Claims by a subsequent buyer against a vendor who was a developer or an owner-builder in respect of a breach of statutory warranty may be lodged directly with the Tribunal.

## Home Building Advocacy Service

The Home Building Advocacy Service (HoBAS) is funded by NSW Fair Trading to provide another level of support for NSW consumers experiencing a home building dispute. HoBAS complements the free dispute resolution service provided by Fair Trading, with practical and commonsense advice, particularly with regards to contractual and legal issues associated with building disputes.

The services offered by HoBAS include:

- advice to consumers on home building rights, responsibilities and dispute resolution options
- advocacy on behalf of consumers in disputes with home building licensees or relevant parties via telephone, letters or face to face representation
- negotiation of dispute resolution
- assistance to consumers in the preparation of home building hearings at the Tribunal
- representation of consumers at home building hearings at the Tribunal
- referrals to relevant authorities
- community education activities.

HoBAS can only assist consumers after they have been through the Fair Trading dispute resolution process. There may be charges for some services offered by the Centre. For more information email [hobas@clc.net.au](mailto:hobas@clc.net.au) or call 8833 0911.

## Home warranty insurance claims

A home warranty insurance policy enables a claim to be lodged with, or a loss (eg. financial loss or damage) notified to, an insurer by a home owner (including a subsequent purchaser), in the event of a loss being suffered as a result of a builder, tradesperson, developer or owner-builder (as the case may be), failing to complete or commence work and/or failing to rectify defective work and the home owner cannot recover financial loss nor have the work rectified or completed.

### *Periods and types of cover*

#### **All policies**

Cover is provided for loss arising from non-completion of work for a period of 12 months after the failure to commence, or cessation of, the work.

#### **Policies issued before 1 July 2002**

For policies issued before 1 July 2002, cover is also provided for a period of 7 years from the date of completion of the work or the end of the contract for the work (whichever is the later), for loss arising from defective work.

#### **Policies issued from 1 July 2002**

For policies issued from 1 July 2002 onwards, cover for all losses, (including loss arising from non-completion) is also provided (in the event of the death, disappearance or insolvency of a builder, tradesperson, developer or owner-builder). Cover for loss arising from defective work is provided for a period of:

- 6 years from the date of completion of the work or the end of the contract for the work (whichever is the later), for loss arising from a structural defect, and
- 2 years for loss arising otherwise than from a structural defect.

## **Policies issued from 19 May 2009**

For policies issued from 19 May 2009 onwards, cover is also provided in the event of the suspension of the contractor licence of a builder or tradesperson responsible for work on the home owner's property for failure to comply with a money (compensation) order in favour of the home owner made by a Court or the Consumer, Trader and Tenancy Tribunal. The period of cover provided in this event is the same as for policies issued from 1 July 2002.

### *Notification and lodgement*

As part of the conditions of approval to provide home warranty insurance in New South Wales, insurers are required to comply with provisions contained in the *Home Building Act 1989*, Home Building Regulation 2004 and Claims Handling Guidelines concerning the acceptance of claims under home warranty insurance policies.

The legislation and Guidelines distinguish between:

- the notification of a loss, and
- formal lodgement of a claim.

**Note:** In order to ensure that future rights to lodge a claim under a home warranty insurance policy are protected, a home owner need only to notify an insurer of a loss within the periods contained in the legislation. A formal claim (with all required supporting documentation) may be lodged at a later date.

### **Notification to insurer**

The legislation provides that where a home owner gives notice of a defect to an insurer, the home owner is taken to have given notice of every defect to which the defect is directly or indirectly related.

Accordingly, and in order to safeguard your position under your home warranty insurance policy, you should immediately notify your home warranty insurer of a loss in writing (on becoming aware of defective or incomplete work).

Generally, notification of a loss as a result of defective work should be notified to the insurer within 6 months of the home owner becoming aware of the defects. This must occur during the period of cover (or within 6 months of the loss becoming apparent where that occurs in the last 6 months of the period of cover).

Notification of a loss resulting from incomplete work should be notified to the insurer within 12 months of the contract date, or the date provided in the contract for commencement of work, or the date the work ceased, whichever is the later.

Notification within these periods will mean that the insurer cannot reduce its liability under the policy, or reduce any amount otherwise payable in respect of a claim, merely because of a delay in the insurer being notified of a loss.

Nevertheless, a loss resulting from defective work can still be notified to an insurer at any time within the period of cover (or within 6 months of a loss becoming apparent in where that occurs in the last 6 months of the period of cover).

You should read the policy carefully to check the period of cover and the time limits for notifying a loss and any other requirements of the insurer.

For guidance about what information you should provide to your insurer as notification of a loss (including a standard notification form) visit [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

### **Formally lodging a claim**

In the event that attempts to have work completed or rectified prove unsuccessful you may be able to formally lodge a claim under your home warranty insurance policy.

Ask the insurer to send you information on the actual insurance policy and their claims-handling procedures or access this information on the insurer's website. Some insurers prefer to have claims made on specific forms which generally can be downloaded from the insurer's website. If an insurer refuses to provide you with a claim form, you are still entitled to make a claim in writing and have its receipt acknowledged by the insurer. It may help to send the claim by registered post.

You need to attach copies of all the following documents to your formal claim letter:

- home warranty insurance certificate
- the contract you signed with your contractor
- any document showing agreed variations.

Other documents which may also be helpful are:

- independent reports itemising defects and necessary rectification or completion work
- estimates of costs to fix the itemised defective or incomplete work
- photographs
- relevant letters or documents supporting your claim.

You should also read the policy carefully to check the period of cover and the time limits for lodging claims and any other requirements of the insurer.

For more information about the home warranty insurance scheme, including the contact details for approved insurers, go to the Fair Trading website at [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) or call 13 32 20.

### **Rejected or disputed insurance claims**

In the event that a claim is rejected or the amount approved for payment by the insurer is considered unsatisfactory, the home owner may appeal the insurer's decision through the Consumer, Trader and Tenancy Tribunal (Tribunal). Note that

your claim to the Tribunal will be against the insurer, not the builder.

There is a \$500,000 limit on orders that can be made by the Tribunal in relation to residential building work.

The Tribunal can hear appeals arising from private home warranty insurance cover for a period of up to 10 years from completion of the work. Generally, appeals must be lodged within 45 days of written notification by the insurer that the claim has been rejected (clause 65 Home Building Regulation 2004). The period within which to lodge an appeal may only be extended with the leave of the Tribunal.

#### **For policies issued up to 31 August 2005**

For home warranty insurance policies issued up to 31 August 2005 an insurance claim is taken to have been refused if a decision is not given to the claimant within 45 days (clause 64 of the Home Building Regulation 2004). A home owner may, if they wish, then take the matter to the Tribunal.

#### **For policies issued from 1 September 2005**

For home warranty insurance policies issued from 1 September 2005 onwards, an insurance claim is deemed to have been accepted if the insurer has not determined liability within 90 days of the home owner having provided all necessary claim information (clause 62A Home Building Regulation 2004).

For more information on how to lodge an appeal with the Tribunal against a decision by an insurer, contact Fair Trading on 13 32 20.

## **The Consumer, Trader and Tenancy Tribunal**

The Consumer, Trader and Tenancy Tribunal (Tribunal) may make orders, including:

- the payment of money
- relief from paying money
- the delivery, return or replacement of goods
- reversing an insurer's decision on an insurance claim
- the payment of compensation for loss because of a breach of a statutory warranty, for example, work not done in a proper and workmanlike manner.

### *Are there limits on what the Tribunal can do?*

The Tribunal cannot hear a building claim over \$500,000. There are also time limits on making claims:

- 3 years from the date of supply on claims about building goods or services supplied
- 3 years from the date for supply on claims about building goods or services not supplied
- 10 years from the completion date of the relevant work on claims about home warranty insurance
- 7 years from the completion date of the relevant work (or if the work is not completed, from the date for completion in the contract, or if there is no such date, the date of the contract) on claims for breaches of a statutory warranty
- 3 years from the date of the contract for any other building claim.

The fact that a time limit for making a building claim to the Tribunal has expired may not prevent a building claim being made to a court.

### *How is a decision made?*

Each side presents their evidence. If a Building Inspector made a report, the Tribunal may take the report into consideration. The Tribunal may also appoint an expert to advise the Tribunal. Where such an expert is appointed, no party may call another expert to give evidence unless the Tribunal agrees. Subject to an order of the Tribunal, the cost of the expert is to be shared by the parties.

### *When will the Tribunal make its decision?*

Usually the Tribunal makes a decision after everyone has finished giving their evidence. Sometimes the Tribunal might want more time to think about your case, or it might direct either or both parties to provide additional documentation or clarify an issue in some other way. If this happens, the Tribunal will give its decision later. A notice of the order is sent out after the Tribunal makes its decision.

### *How do you apply?*

A form to notify the Tribunal of a dispute or a building claim can be obtained from the Registry of the Tribunal, from [www.cttt.nsw.gov.au](http://www.cttt.nsw.gov.au) or a Fair Trading Centre.

You need to attach certain documents to your application, such as:

- the home building contract
- any independent building reports
- photographs showing the details of alleged defective work.

After carefully reading the guide notes, complete the form and return it to the Tribunal. There is a fee to lodge an application with the Tribunal.