



Fair  
Trading

# Consumer building guide

## About this booklet

By law, builders and tradespeople must give consumers a copy of the Consumer building guide before they enter into a contract for residential building work worth more than \$5,000.

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This publication can be viewed and printed from the Consumer building guide web page in the Tradespeople section of our website.

## **Disclaimer**

Information on this topic may have changed since this booklet was published. You can check our website for the latest information.

This publication is a plain language guide to your rights and responsibilities. It must not be relied on as legal advice.

For more information please refer to the appropriate legislation or seek independent legal advice.

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# Why do I need to read this guide?

If you are having renovation or building work done on your home where the reasonable market cost of the labour and materials involved in the work is over \$1,000 (including GST), you will need to engage a licensed contractor.

The builder or tradesperson must enter into a written contract with you where:

- the contract price is over \$1,000 (including GST) or
- if the contract price is not known, is for the provision of labour and materials by the contractor the reasonable market cost of which is more than \$1,000 (inclusive of GST).

By law, your builder or tradesperson must give you a copy of this booklet before you enter into a contract for residential building work worth more than \$5,000. The booklet contains important information about things you should know before you sign the contract or accept a quote and it is strongly recommended that you take the time to read it.

This booklet is the form of consumer information approved by the Director General 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).

## The basics

The *Home Building Act 1989* is the consumer protection law that regulates residential building work in NSW. Residential building work includes 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 co-ordinate 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.

## Do you need a builder or tradesperson?

If you want your plumbing fixed or your power points replaced, 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 itemised quotes from three different contractors so you can compare prices for each aspect of the work.

## Contracts

A written contract must be used for residential building work where:

- the contract price is over \$1,000 (including GST) or
- if the contract price is not known, is for the provision of labour and materials by the contractor, the reasonable market cost of which is more than \$1,000 (including GST).

Jobs worth between \$1,001 and \$5,000 require a written 'small job' contract with minimum basic information, while residential building work worth more than \$5,000 must be covered by more extensive written contracts.

## Home warranty insurance

If the contract price is more than \$20,000 (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 requires an approval before it can start. You can check if your work needs an approval with your local council or other building professionals such as town planners or accredited private certifiers. You should do this before you enter into a contract and before any work commences on your site.

## Development application

Some residential building work requires a development application (DA) to be lodged with your local council. Information on how to lodge a DA is available from your council's website and customer service centre. Your council can also tell you if your proposal is permissible and what planning controls apply to your site.

Once a DA is lodged, the council may notify your neighbours and advertise the DA in the local or regional newspaper. As a result, it is usually helpful to consult with your neighbours prior to lodging a DA.

If your DA is approved, council will issue a development consent, which is usually subject to conditions.

## **Construction certificate (CC)**

Once you have a development consent from council, you need to obtain a construction certificate before you can start your building work.

A construction certificate verifies that the plans and specifications:

- comply with the Building Code of Australia (BCA)
- are not inconsistent with the development consent
- comply with the relevant conditions of the development consent.

Accredited certifiers and councils can issue construction certificates after carrying out a site inspection.

You must obtain a construction certificate before you commence any building work. Without a construction certificate you will not be able to get an occupation certificate for the completed work, and this may prevent occupation and use of the building and it could impact on the future sale of the property.

## **Complying development**

Some residential building work can be approved in 10 days or less if it is classified as 'complying development' under the NSW Government Housing Code.

Complying development is an alternative to the traditional DA process.

Your council or other building professionals – such as town planners or accredited certifiers – can tell you if your building work is complying development. The housing code website at <http://housingcode.planning.nsw.gov.au> also has information on complying development.

Building work classified as complying development does not require a DA or a construction certificate. However, you must obtain a complying development certificate (CDC) before you commence any building work, including demolition and excavation. Without a CDC, you will not be able to obtain an occupation certificate for the completed work.

An accredited certifier or council can issue a CDC within 10 days if the proposed work meets the relevant complying development conditions and complies with the BCA. An accredited certifier or council must carry out a site inspection before issuing a CDC.

## **Appointment of a Principal Certifying Authority (PCA)**

A Principal Certifying Authority (PCA) is the only person or body who can issue an occupation certificate.

A PCA must be appointed before any building work can begin. A PCA can only be appointed by the person who benefits from the development (usually the owner); the builder cannot appoint the PCA unless they are also the landowner. Your PCA can be either a private or council accredited certifier.

The council must be notified of the appointment of a PCA at least 2 days before building work commences.

Your PCA must inform you about the inspections required to be undertaken at certain stages during construction and you must inform your builder of these inspections. In turn, your builder must contact the PCA for the inspections to be carried out as construction occurs.

If the required inspections are not undertaken, your PCA may not be able to issue an occupation certificate. Your PCA should advise you and the builder of any problems identified at an inspection.

The PCA inspects whether the building work complies with the relevant planning legislation, the development consent and the BCA. Your PCA is not responsible for supervising your builder or tradespeople or for ensuring the quality and finish of the building work.

Your PCA is also not responsible for ensuring that your work complies with the conditions of consent. You should read the conditions of consent carefully, note which conditions must be complied with at different stages, and liaise regularly with your builder and PCA to ensure conditions are satisfied.

## Choosing a PCA

The Building Professionals Board (BPB) is responsible for accrediting qualified professionals as private and council accredited certifiers. You can find an accredited certifier in your area under the 'find a certifier' link on the BPB website at [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au)

Choose a PCA in the same way you would choose an architect, draftsman or builder:

- seek recommendations from others
- obtain quotes from council and a selection of accredited certifiers
- check references from certifying authorities
- check inclusions in any contract or service level agreement before entering into it.

Applying for a construction certificate or a CDC is not the same as appointing a PCA. However you may choose to appoint the accredited certifier or council who issues your construction certificate or CDC as your PCA.

## Commencement of work

Once the relevant building approvals have been obtained and a PCA appointed, work can commence providing:

1. You have informed your PCA of your principal contractor (builder) details (name, contractor licence number and insurer). If you intend to carry out the work as an owner-builder, you must have an owner-builder permit. Your PCA must advise council of this information.
2. You have notified your PCA and council that work is to commence at least 2 days before it starts.
3. Your PCA has notified council of their appointment at least 2 days before work starts.
4. Your PCA has advised you of the inspections required to be carried out at least 2 days before work starts and you have advised your builder of these inspections.
5. All relevant conditions of consent have been complied with.

## Occupation certificate

Before you occupy the building, you must obtain an occupation certificate from your PCA. Your PCA will inspect the completed work to determine if the building satisfies the relevant standards and is suitable to occupy and use. When satisfied, your PCA will issue an occupation certificate.

It is an offence to occupy or use a building without an occupation certificate.

# The contract

A written contract must be used for residential building work where:

- the contract price is over \$1,000 (including GST) or
- if the contract price is not known, is for the provision of labour and materials by the contractor the reasonable market cost of which is more than \$1,000 (including GST).

Jobs worth between \$1,001 and \$5,000 require a written 'small job' contract which contains minimum basic information. Residential building work worth in excess of \$5,000 must be covered by more extensive written contracts.

*It is strongly recommended that you consider seeking legal advice before signing a contract.*

## Small job contracts

Residential building work worth between \$1,001 and \$5,000 must have a written 'small jobs' contract which includes the following minimum information:

- the date of the contract
- names and signatures of both parties
- the contractor's licence number
- a brief description of the work (including any plans and specifications)
- the price (if known).

## Contracts for large jobs

Residential building work worth more than \$5,000 requires a more extensive home building contract. The contract sets out all the details of the work to be done and it contains important information about your rights, insurances the builder or tradesperson has to have and what to do if you have a dispute about the work.

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 18). 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.

## 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 different types of contracts that can be used in residential building work. The ones commonly used are listed below.

### Fixed price or lump sum 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. Changes to the total price of a fixed price contract usually occur



when the builder encounters a condition that was not anticipated (eg. the existing footings are insufficient for the new work). The builder will usually seek an increase in the price of the contract by asking for a 'variation' to the price. Refer to 'Contract variations' on page 9.

## **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.

Ask the builder to produce receipts for all materials that have been purchased and any other costs such as the hire of equipment.

## **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, 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.

### ***Rise and fall***

'Rise and fall' is an agreed method of upward or downward adjustment to the price of the contract 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 released 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.

## **Contract contents**

By law, any contract for home building work worth more than \$5,000 must contain certain information listed below.

It is strongly advised you go through the contract before signing it to make sure it contains the following 15 items:

## The parties

1. Your name.
2. 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 you should contact the licensee for clarification BEFORE you sign the contract. 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.*

## 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 a reason 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 provided, do not sign the contract until you have contacted the builder or tradesperson to discuss, or contacted 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 \$20,000.

**Note:** *The builder or tradesperson must provide you with a certificate of insurance before receiving any money (including a deposit) or before doing any work if the work is for more than \$20,000. For work under \$20,000 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. Even if the contract does not contain the list of warranties shown on page 16, they are implied under the law.*

## 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 previous 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 if 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.

**Do not 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 have 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 5).

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. Ideally, documents authorising variations should contain a statement explaining the cost implications of the variation and the impact on the overall contract price, and 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.

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.

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 for residential building work worth more than \$5,000.

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.

# Check list

	Yes	No
<b>1. Does the builder or tradesperson hold a current contractor licence with NSW Fair Trading?</b>	<input type="checkbox"/>	<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.		
<b>2. Is the licence for the type of work you want done?</b>	<input type="checkbox"/>	<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.		
<b>3. Is the name and number on the builder or tradesperson's licence the same as on the contract?</b>	<input type="checkbox"/>	<input type="checkbox"/>
If no, contact Fair Trading.		
<b>4. Is the work to be undertaken covered in the contract, drawings or specification?</b>	<input type="checkbox"/>	<input type="checkbox"/>
If no, contact the builder or tradesperson to clarify what has to be done.		
<b>5. Does the contract clearly state a contract price or contain a warning that the contract price is not known?</b>	<input type="checkbox"/>	<input type="checkbox"/>
If no, contact the builder or tradesperson to discuss. If they refuse to include a price, contact Fair Trading.		
<b>6. If the contract price may be varied, is there a warning and an explanation about how it may vary?</b>	<input type="checkbox"/>	<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.		
<b>7. Do you know if you are entitled to a cooling-off period?</b>	<input type="checkbox"/>	<input type="checkbox"/>
If the value of the contract is more than \$20,000, 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 11)</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>		
<b>8. Is the deposit within the legal limit?</b>	<input type="checkbox"/>	<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.		
<i>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.</i>		
<b>9. Do you understand the procedure for variations?</b>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Tip: Read the 'Contract variations' section on page 9. When you are clear about the procedure for variations under your contract, proceed to question 10.</i>		

Yes No

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**10. Are you aware of who is to obtain any council or other approval for the work?**

Read the 'Before work starts' section on page 2. When you are clear about the approval procedure for the work you want done, proceed to question 11.

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**11. 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 \$20,000?**

Read the 'Home warranty insurance' section on page 15. When you are clear about the home warranty insurance requirements, proceed to question 12.

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**12. Has the builder or tradesperson given you a copy of this booklet?**

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## Things to look out for

Be wary of:

**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 11.

**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 does not have the right kind of licence, or cannot get home warranty insurance. Sometimes, it is 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 \$20,000 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 your contract price or the market cost of labour and materials exceeds \$20,000.*

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 \$20,000) 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 should equate to the value of work done. Make sure the dollar value placed on each stage is realistic. Ideally, a schedule of all progress payments required to be made during the course of the project should 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.

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 may limit 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 16.
- 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 20.

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 payment 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 NSW Government Procurement website at [www.nswprocurement.com.au](http://www.nswprocurement.com.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 and \$500 for each inspection.

## Access to the site

Some contracts give temporary ownership of the construction site to the builder. You should check with the builder before entering the site.

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 NSW Health on 02 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 \$20,000 (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.

### 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 building means a building that has a rise in storeys of more than three and that consists of two or more separate dwellings.

Rise in storeys has the same meaning as it has in the Building Code of Australia. 'Storey' does not include a space within a building if the space includes accommodation only intended for vehicles.

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 6 years for structural defects and 2 years for non-structural defects, commencing from the date when the work was completed.

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 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' on this page.

## 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 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 complaint online 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, disciplinary proceedings may be considered.

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 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 buyers

The subsequent buyers 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 02 8833 0911.

## Home warranty insurance claims

A home warranty insurance policy enables home owners (including subsequent purchasers) to notify or lodge a claim with an insurer if they suffer a loss because a contractor fails to commence or complete work or fails to rectify defective work and the home owners cannot recover the financial loss from the contractor.

### Periods and types of cover

Home warranty insurance provides a set period of cover for loss caused by defective or incomplete in the event of the death, disappearance or insolvency of the contractor. Cover is also provided for defective or incomplete work 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.

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
- 2 years for loss arising otherwise than from a structural defect.

An additional 6 months cover applies in cases where the loss becomes apparent in the final 6 months of the period of insurance. The 6-month period starts from the date of the loss becoming apparent.

Cover is also 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.

## 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
- formal lodgement of a claim.

**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.*

### **Notification to insurer**

The legislation provides that where a home owner gives notice of a loss to an insurer, the home owner is taken to have given notice of every loss that was caused by the same defect as caused the notified loss, whether or not the claim in respect of the notified loss has been settled.

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 when you become aware of defective or incomplete work. You may also be required by the insurer to provide other information about the defect at the time the notification is made.

Notice of a loss as a result of defective work must be given to the insurer within the period of insurance. However, if the home owner becomes aware of a loss within the final 6 months of the insurance period, they can take an additional 6 months from the time they became aware of the loss to notify the insurer.

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.

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.

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

### **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.

New home warranty insurance arrangements in NSW commenced on 1 July 2010 when the NSW Self Insurance Corporation took over as the sole provider of home warranty insurance. The NSW Self Insurance Corporation trades as the NSW Home Warranty Insurance Fund. The new scheme is capitalised by the NSW Government and funded by premiums.

For more information about home warranty insurance, the new arrangements and 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.

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.

## **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?**

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 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.