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13 32 20



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Consumer building guide



www.fairtrading.nsw.gov.au

This document contains important information.

If you are building/extending/renovating all the information applies – read it carefully and go through the checklist on page 10 before you sign your building contract.

If you are entering into a contract for sale of land with a ‘spec’ builder (ie. buying a house already built on a block of land) or buying from a developer (apartment/townhouse/villa) pages 15-20 apply.

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This publication can be viewed or printed from the Publications page of our website at: www.fairtrading.nsw.gov.au

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Government

Contents

Introduction	2
The <i>Home Building Act 1989</i>	2
Provision of consumer information	3
Approval for building work	4
Commencement of building work requiring development consent	4
Choosing a building certifier	5
Contracts	7
Cooling-off period	8
Contract variations	9
Checklist for owners entering a building contract	10
Statutory warranties	11
Deposits	11
Progress payments	12
Asbestos and other hazardous products	12
Insurance	13
Home warranty insurance	13
Councils and home warranty insurance	14
Other insurances	14
When things go wrong	15
Are there limits on what the Consumer, Trader and Tenancy Tribunal (CTTT) can do?	17
How is a decision made?	18
When will the CTTT make its decision?	18
How do you apply?	18
Making an insurance claim on your home warranty insurer	19

Introduction

The role of the NSW Office of Fair Trading in the home building industry is to promote fair trading by licensing builders and tradespeople, protecting the rights of consumers and providing information.

In accordance with the *Home Building Act 1989*, a contractor is required to give you this guide before entering into a contract for residential building work or supplying a kit home.

Developers and speculative builders are required to give you this guide before entering a contract for sale of land.

This guide is intended to give you a basic understanding of the operation of the *Home Building Act 1989*, the contract of insurance and the procedure for the resolution of building disputes. It is the form approved by the Commissioner for Fair Trading, for the purposes of the *Home Building Act 1989*, section 7AA (contractor obligation) and section 96A (1A) (developer obligation).

In this guide your builder or tradesperson is referred to as your 'contractor'.

The Home Building Act 1989

The *Home Building Act 1989* is a law that regulates residential building work in NSW. Residential building work is building or trade work on single dwellings, villas, houses and home units. Some of its most important provisions are listed below:

- all builders and tradespeople must be licensed to practise their trade where the value of the work (including labour and materials) is over \$1,000 (except the specialist trades of electrical, plumbing, draining, gasfitting, air-conditioning or refrigeration work, which must be licensed regardless of value of work)
- a written contract must be used for residential building work where the value of the contract is more than \$1,000

Important

Builders and tradespeople must be licensed and give you a written contract for work over \$1,000.

Important

Home warranty insurance applies to contracts over \$12,000.

- if the value of the contract 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 Building Act 1989* also applies to contracts to supply kit homes. A kit home means a set of building components which, when offered for sale, are sufficient for the construction of a dwelling (home), garage or carport according to plans or instructions provided by the supplier.

Provision of consumer information

This guide does not have to be provided if the contract is:

- subordinate to a principal contract to do residential building work (eg. a contract between a subcontractor and a head builder to do residential building work), or
- made between a speculative licensed builder and a licensed trade contractor, or
- for the doing of specialist work (plumbing, draining, gasfitting, electrical wiring, refrigeration or air conditioning) that is not also residential building work (eg. in factories, offices or buildings excluded from the definition of residential building work), or
- for a contract price not exceeding \$1,000, or
- for the provision of labour and materials by the contractor, the reasonable market cost of which does not exceed \$1,000, or
- required to be completed urgently so as to rectify a hazard, or potential hazard, to the health or safety of people, or to prevent substantial damage to property, or
- for residential building work entered into between a contractor and a developer doing the work.

Approval for building work

Most building work needs the following approvals before work can start.

Development consent or Complying Development Certificate (CDC)

Your local council can issue a development consent. If a CDC is permitted for the type of development you propose under the council's local plan, it can be issued by either your local council or an accredited certifier.

Construction approval

Approval for the work (a construction certificate) can be given by either your local council or an accredited certifier.

Note: You do not need a construction certificate if you have a CDC.

During construction, the building work must also 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.

Commencement of building work requiring development consent

Building work requiring development consent cannot be commenced until:

- (a) A construction certificate has been issued, either by an accredited certifier or the local council, for the plans and specifications. This certificate covers compliance with the Building Code of Australia and consistency with the council's development consent.

Important

Be sure that all necessary approvals have been obtained before work is commenced.

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

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

You should therefore check to ensure that a construction certificate has been issued before your building contractor starts work 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.

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. They are not allowed to make the choice unless they are also the owner of the land.

Note: You can appoint one accredited certifier or the council to issue the construction certificate (or CDC) and a different accredited certifier or the council as the 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.

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 certifiers accredited by the BPB at www.bpb.nsw.gov.au alternatively, find a certifier in the Yellow Pages under 'building surveyors' or 'building certifiers'.

Contracts

By law, the written contract you sign must contain:

- the date that it was signed by both you and your contractor
- your name and the exact name on your contractor's licence and licence number
- a sufficient description of the work to be carried out
- any plans and specifications attached
- relevant warranties required by the *Home Building Act 1989*
- 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
- a checklist of 12 items (the form of the checklist is set out on page 10)
- a caution about signing the contract if you cannot answer yes to all items in the checklist
- a note about your entitlement to a copy of the signed contract
- a note about home warranty insurance
- an acknowledgment by you that you have read and understood this guide and that you have completed the checklist and answered yes to all items on it
- a clause that states 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
- a clause that states that any agreement to vary the contract or any plans and specifications must be in writing and signed by you and your contractor
- 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*

Important

Check carefully to ensure that your contract satisfies all these requirements.

1979, including any instrument made under that Act, 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

- 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.

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

Make sure that the name on the licence certificate matches the name on the contract (and any other documents used by the contractor). 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. Go to www.fairtrading.nsw.gov.au/building and do an online licence check.

Cooling-off period

If the contract price or the market cost of the labour and materials is more than \$12,000 your contract is subject to a cooling-off period of five clear business days within which you may rescind (cancel) the contract.

The five-day period excludes the weekend, NSW public holidays and 27-31 December (inclusive).

Important

If cost of labour and materials exceeds \$12,000, the law gives you a cooling-off period of five clear business days.

The five-day period is available to you:

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

You may cancel your contract by way of a written notice, which should clearly state that you cancel the contract. 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, your contractor may keep from any money already paid, an amount of reasonable out-of-pocket expenses incurred under the contract before cancellation, and must refund all other money paid.

You can avoid or shorten the cooling-off period if you wish by including a provision in the contract and by giving the contractor a certificate (in accordance with the *Home Building Act*) which you must get from a solicitor.

If the contract was supposed to include a cooling-off period but one was not included, you may cancel the contract within seven days of becoming aware that it should have contained a cooling-off period.

Contract variations

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.

Important

All variations to a contract need to be in writing and signed by both parties.

Checklist for owners entering a building contract

By law, the written contract you sign must contain the following checklist:

1. Does the contractor hold a current contractor licence? Yes No
2. Does the licence cover the type of work included in the contract? Yes No
3. Is the name and number on the contractor's licence the same as on the contract? Yes No
4. Is the work to be undertaken covered in the contract, drawings or specification? Yes No
5. Does the contract clearly state a contract price or contain a warning that the contract price is not known? Yes No
6. If the contract price may be varied, is there a warning and an explanation about how it may be varied? Yes No
7. Are you aware of the cooling-off provisions relating to the contract? Yes No
8. Is the deposit within the legal limit? The limit is 10% for work costing \$20,000 or less, or 5% for work costing more than \$20,000. Yes No
9. Is the procedure for variations understood? Yes No
10. Are you aware of who is to obtain any council or other approval for the work? Yes No
11. Do you understand that the contractor must have a policy of home warranty insurance under the *Home Building Act 1989* and provide you with a certificate of insurance before receiving any money under the contract (including a deposit) or before doing any work for more than \$12,000? Yes No
12. Has the contractor given you a document that explains the operation of the *Home Building Act 1989* and the procedures for the resolution of contract and insurance disputes? Yes No

Important

Make sure you are not being charged more than the maximum deposit that is legally permitted.

Statutory warranties

The following warranties are implied by law into contracts by builders and tradespersons, even if they are not written into the contract:

- 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.

Deposits

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 (see page 13), 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.

Progress payments

The contractor may ask you to make progress payments. This is usually so that they can pay for materials and labour as the job progresses. As for how much and how often, the general rule is, you only pay for work that has already been done.

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 www.workcover.nsw.gov.au or the Department of Health on 9391 9000 or 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 and Conservation 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 (HWI) allows a claim to be made because of the loss caused by the contractor's defective or incomplete work, in the event of the contractor's insolvency, death or disappearance. Home warranty insurance covers the consumer – home owner and subsequent purchasers – for a period of six years for structural defects and two years for non-structural work, or a period of 12 months for incomplete work. 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*.

Home warranty insurance is also obligatory for '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 a home warranty insurance certificate attached. Without HWI, a purchaser may rescind the contract for sale before settlement.

However, the HWI provisions do not apply to residential building work which is the construction of multi-storey buildings after 31 December 2003, that is a building containing two or more dwellings and having more than three storeys (not including a storey which is the residents' car park). So, if you are planning to buy a unit that is part of a multi-storey building built after 31 December 2003, the developer is not required to provide you with a home warranty insurance certificate.

Important

Consumers are legally required to be given home warranty insurance if the cost of labour and materials exceeds \$12,000.

Councils and home warranty insurance

Compliance with the insurance provisions of the *Home Building Act 1989* is a 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 check with your contractor that they have other relevant insurances including:

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

When things go wrong

Things don't always go to plan when you are building or renovating. Even if you have followed our advice and been thorough by checking out the builder or tradesperson, things can still go wrong. You may find problems with the work, either while it is being done or some time after it has been finished. There is a step-by-step process for resolving disputes, which works as follows:

Step 1 – Talk about it

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.

Step 2 – Put it in writing

Write a letter to the builder or tradesperson about your concerns with the work. It is also 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 for your records and note the date you posted it or delivered it (it may be useful to send the letter by registered post).

Step 3 – Intervention by the Fair Trading Centre and the Home Building Service

If you and your contractor cannot resolve the problem, you may notify your local Fair Trading Centre that there is a dispute and ask for help to resolve it. The Fair Trading Centre will accept a written complaint or, if there are health and safety issues, an oral complaint is sufficient. They will attempt to negotiate a suitable outcome between you and your contractor. However, should you be unable to reach an agreement, the Fair Trading Centre will give you information about other appropriate

options that may be available to you including the Home Building Service, any other service which may be available, and the Consumer, Trader and Tenancy Tribunal (CTTT).

The Home Building Service deals with disputes relating to incomplete and/or defective home building work and/or damage caused to other structures or work as a result of the building work being carried out. If appropriate, a Building Inspector will arrange to meet on-site with you and your contractor to inspect and discuss the complaint items. Where possible, the Building Inspector will encourage the parties to agree on how the dispute is to be resolved. 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. An inspection report will be provided to both parties following the meeting.

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

Where your contractor fails to comply with the Rectification Order, the breach is referred to the Home Building Service's Investigations Branch for further action.

Step 4 – Claim before the Consumer, Trader and Tenancy Tribunal

If you and your contractor fail to resolve the dispute, an application to the CTTT for a decision on a building claim can be made. You cannot lodge a claim unless you have been through steps 2 and 3 (unless the CTTT directs otherwise).

The successors-in-title to (ie. subsequent purchasers) of the property on which 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 seven-year statutory warranties applicable to the work.

The subsequent purchaser from a 'spec' builder-vendor may seek dispute resolution assistance from the Home Building Service before making a claim at the CTTT against the 'spec' builder.

Claims by a subsequent purchaser 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 CTTT.

The CTTT 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 CTTT can do?

The CTTT cannot hear a building claim over \$500,000.

There are also time limits on making claims:

- three years from the date of supply on claims about building goods or services supplied
- three years from the date for supply on claims about building goods or services not supplied
- ten years from the completion date of the relevant work on claims about home warranty insurance
- seven 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

- three 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 CTTT 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 CTTT may take the report into consideration. The CTTT may also appoint an expert to advise the CTTT. Where such an expert is appointed, no party may call another expert to give evidence unless the CTTT agrees. Subject to an order of the CTTT, the cost of the expert is to be shared by the parties.

When will the CTTT make its decision?

Usually the CTTT makes a decision after everyone has finished giving their evidence. Sometimes the CTTT 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 CTTT will give its decision later. A notice of the order is sent out after the CTTT makes its decision.

How do you apply?

A form to notify the CTTT of a dispute or a building claim can be obtained from the Registry of the CTTT, a Fair Trading Centre or from www.cttt.nsw.gov.au

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 CTTT. There is a fee to lodge an application with the CTTT.

Making an insurance claim on your home warranty insurer

A claim may be lodged where the contractor (or 'spec' builder or developer, as the case may be) becomes insolvent, dies or disappears, and you cannot recover financial loss or have the work fixed. You will need to read the policy carefully to check the period of cover and the time limits for making claims. Ask the insurer to send you information on the actual insurance policy and their claims-handling procedures. Some insurers prefer to have claims made on specific forms. 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 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.

If the insurer gives you a written decision on your claim and you disagree with it, you have 45 days in which to lodge an appeal with the CTTT against that decision. The period within which to lodge an appeal may be extended with leave of the CTTT. Note that your claim to the CTTT will be against the insurer, not the builder.

For policies issued before 1 September 2005

If the insurer does not give you a written decision within 45 days after the date you lodged the claim, unless you have agreed to extending their time, the insurer is deemed by law to have refused your claim. You may then lodge an appeal against the insurer with the CTTT without any time limit.

*For policies issued on or after
1 September 2005*

If the insurer has not written you a decision within 90 days then, unless you or the CTTT agreed to extending their time, the claim is deemed to be accepted. The 90 days starts from the time you provide the insurer with all the claim information. If your claim is incomplete, the insurer should write to you within five days of receiving the claim and inform you that further information is required.

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