

HOME BUILDING DEFECTS

Building your dream home can be the biggest investment you'll make. It doesn't come without risks to cost, time, and quality. Defects and incomplete works are common issues.

In this article, we look at commonly-occurring construction defects that lead to dispute. Learn how to address them whether you're using the [HIA](#), [Master Builder](#), or [Fair Trading contract](#).

What kind of defects commonly occur in home building projects in NSW?

Home building projects often result in defective and incomplete works upon completion. The most common of these is wall damage.

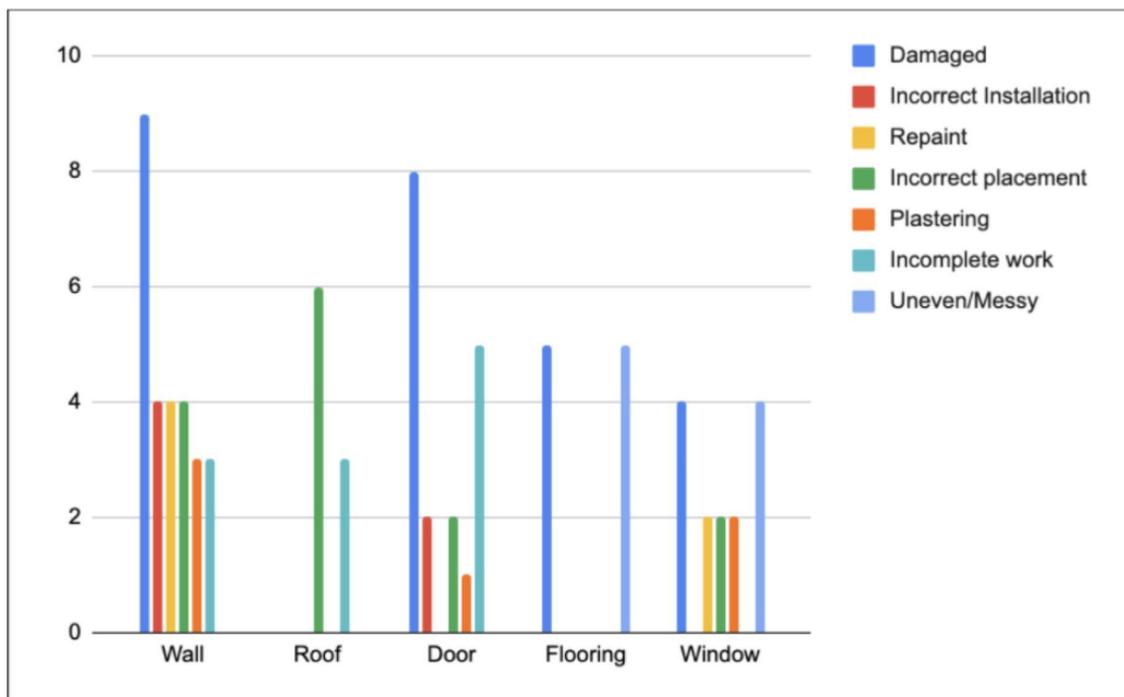


Figure 2. Frequency of Defective and Incomplete Work per Fixture or Furniture

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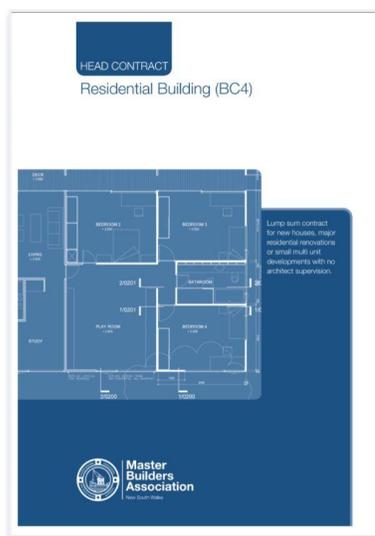
The table above shows that the most commonly-occurring defects in NSW, in order of frequency, are as follows:

- damage on the wall
- incomplete placement of roof
- incomplete work involving doors
- damaged doors
- uneven work for flooring
- damaged flooring
- messy work

What to do in case of defects

Your contract - whether it's from the HIA (Housing Industry Association), MBA (Master Builders Association), or the Office of Fair Trading - have clauses that deal with Defects.

Read on to know how to navigate your contract and find the clauses you may refer to should you encounter Defects in the construction of your home.



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Clauses that deal with defects

Defects are usually defined within the Statutory Warranties, which you will find listed in your contract.

 **If you're using the HIA contract**

Clause 99. Statutory Warranties

39.1 To the extent required by the Home Building Act, the builder warrants that:

- (a) the building works will be done with due care and skill and in accordance with the plans and the specifications attached to this contract;
- (b) all materials supplied by the builder will be good and suitable for the purpose for which they are used and that, unless otherwise stated in this contract, those materials will be new;
- (c) the building works will be done in accordance with, and will comply with, the Home Building Act or any other law;
- (d) the building works will be done with due diligence and within the time stipulated in this contract, or if no time is stipulated, within a reasonable time;
- (e) if the building works 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 building works will result, to the extent of the building works conducted, in a dwelling that is reasonably fit for occupation as a dwelling; and
- (f) the building works and any materials used in doing the building works will be reasonably fit for the specified purpose or result, if the owner expressly makes known to the builder, or other person with express or apparent authority to enter into or vary contractual arrangements on behalf of the builder, the particular purpose for which the building works are required or the result that the owner desires to be achieved, so as to show that the owner relies on the builder's skill and judgment.

If you're using the MBA contract

Conditions of Contract

1. Responsibility of Builder and Results of Construction

(b) The Builder will, subject to these Conditions and the work specified in the contract, be responsible for the work required for the Contract.

NOTE: Work which is excluded from the contract work but appears from the contract documents should be listed in Schedule 2 Item 16 or otherwise made clear, through the contract details, that such work is excluded from the work the Builder is to carry out.

Statutory Warranties for Residential Building Work

39.1 To the extent required by the Home Building Act 1989 (the "Act") the Builder warrants that, in relation to any residential building work to be done by the Act and for the purposes of the Act:

- (a) the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract;
- (b) all materials supplied by the Builder will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the work will be done in accordance with, and will comply with, the Act or any other law;
- (d) the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time;
- (e) 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;
- (f) the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the owner expressly makes known to the holder of the contract or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the Owner relies on the holder's or person's skill and judgment. (Refer to Schedule 2 Item 6.)

Clause 9 Statutory warranties

The contractor warrants that:

- (a) the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract;
- (b) all materials supplied by the contractor will be good and suitable for the purpose for which they are used and, unless otherwise stated in the contract, those materials will be new;
- (c) the work will be done in accordance with, and will comply with, the Home Building Act or any other law;
- (d) the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time;
- (e) 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; and
- (f) the work and any materials used in doing the work will be reasonably fit for the specific purpose or result, if the owner expressly makes known to the contractor or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the contractor, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the contractor's skill and judgment.

These warranties do not in any way reduce or limit the contractor's obligations in relation to workmanship, materials, completion or other matters specified in Clauses 2 and 3 or elsewhere in this contract. No provision of this contract can reduce, restrict or remove these statutory warranties.

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You should also look at pertinent dates: the commencement of works, building period, and practical completion.

The only time you'll know if there is a building defect is after the handover of the property upon practical completion.

Note that practical completion is computed after the building period commences.

Here's where to find them:



If you're using the HIA contract Schedule 1 Item 6 Building period

6. **Building period** (Clause 12)
The **building works** must reach the stage of **practical completion** no more than _____ working days/weeks after the **building period** commences, subject to Clause 19.

Clause 12 Commencing the Building Works

Clause 12. Commencing the Building Works

- 12.1 The **builder** is to commence the **building works** within 20 **working days** after the day that:
- (a) the **builder** receives all necessary building permits and planning approvals for the **building works** to commence; or
 - (b) the **owner** satisfies all of the requirements of Clause 4, whichever is later.
- 12.2 The **building period** commences on the date the **builder** starts performing the **building works** on the site.

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Clause 21 Practical Completion

Clause 21. Practical Completion

Refer to the definition of practical completion in Clause 1.

- 21.1 The **builder** must give the **owner** a **notice of practical completion** at least **5 working days** prior to **practical completion** being reached.
- 21.2 The **notice of practical completion** is to:
- (a) state the **builder's** assessment of the **date of practical completion**;
 - (b) state the date and time for the **owner** to meet the **builder** on the **site** to carry out an inspection of the **building works**; and
 - (c) have attached the **builder's** final progress claim.
- 21.3 The **owner** must meet the **builder** on the **site** for the inspection at the date and time stated by the **builder** in the **notice of practical completion** or at a date and time otherwise agreed with the **builder** and either:
- (a) pay the amount of the final progress claim; or
 - (b) if the **owner** believes that the **building works** have not reached **practical completion** give the **builder** a written notice detailing anything to be done to reach **practical completion**.
- 21.4 If the **owner** pays the amount of the final progress claim under sub-clause 21.3(a) the **date of practical completion** stated in the **notice of practical completion** is deemed to be the **date of practical completion**.
- 21.5 If the **owner** gives the **builder** a notice under sub-clause 21.3(b) of work to be completed:
- (a) the **builder** must carry out any work required for **practical completion** and give the **owner** a further **notice of practical completion**;
 - (b) if the **builder** does not agree that there is any further work to be carried out to reach **practical completion** the **builder**:
 - (i) must give the **owner** written notice rejecting the **owner's** notice. In this case, such a notice will also serve as notice of the matters in dispute for the purposes of Clause 35;
 - (ii) is not obliged to carry out any further work on the **site** while the dispute remains unresolved.
- 21.6 If the **owner** does not pay the amount of the final progress claim under sub-clause 21.3(a) or give the **builder** a notice under sub-clause 21.3(b):
- (a) the amount of the final progress claim is deemed to be a debt due and owing from the **owner** to the **builder**;
 - (b) the **date of practical completion** stated in the **notice of practical completion** is deemed to be the **date of practical completion**; and
 - (c) the **owner** acknowledges the **building works** have reached **practical completion**.
- 21.7 On the **owner** paying the final progress claim, the **builder** must give the keys, certificates, warranty documentation and other documents pertaining to the **building works** to the **owner**.

The owner is responsible to insure the building works from the date of practical completion. See Clause 39.7.

For dispute resolution refer to Clause 35.



If you're using the MBA contract Schedule 2 Item 5(a) - Commencement of works Schedule 2 Item 5(b) - Construction Period

Residential Building (BC4) eContract

SCHEDULE 2

5. Construction Period - when will the work be done?

Refer to Clauses 2, 10, and 11

(a) **Proposed Date for Commencement. Refer to Clause 10.**

(b) Number of **days*** to carry out the work ("Construction period") **Refer to Clause 11.**

(c) In addition those **days*** excluded in Clause 32, the following days will not form part of the Construction Period (for example, dates of Christmas shutdown, dates of school holidays, days where **Builder** is unavailable).
For example: Christmas break, school holidays, etc.

Specific **days*** not included in Construction Period
All Public Holidays, Novi Constructions Xmas Break Period, Any Public Health Order Shutdown.

**Refer to definition of days Clause 32*

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Clause 10 - Date for Commencement and Time for Completion of Works

10. Date for Commencement and Time for Completion of Works

- (a) The **Builder** should commence the works:
- (i) on the date specified in **Schedule 2 item 5(a)**;
 - (ii) within **20** days after the **Owner's** compliance with **Clause 2(a)**;
 - (iii) within **20** days after receipt of the Construction Certificate; or
 - (iv) within **20** days of any deposit referred to at **Schedule 2 item 4(b)** being paid; or
 - (v) within 20 days of the issuance of the Home Building Compensation Fund insurance certificate;
- whichever is the later. If the commencement of the work will be delayed the **Builder** is to notify the **Owner** in **writing** and advise why. **See Clause 11(a)**.
- (b) The **Builder** is to proceed with due diligence and bring the works to Practical Completion within the Construction Period stated in **Schedule 2 item 5(b)**. The construction period and consequently the date by which Practical Completion is to be achieved are subject to change under **Clause 11**. **Refer to Clause 11**.

Clause 22 Practical Completion

22. Practical Completion

- (a) Practical Completion is that stage when the works are complete except for minor omissions and defects which do not prevent the works from being reasonably fit for their intended use; or
- (b) For the purposes of this Clause the works that need to be completed to achieve Practical Completion do not include
- (i) the results of any labour or materials which are to be or were supplied or fixed by the **Owner** or work done or to be done by the **Owner**; or
 - (ii) the provision of any certificates required to obtain an occupation certificate unless the **Builder** is the party who is to obtain the occupation certificate.
- In this contract unless stated otherwise as a special condition it is not the **Builder's** obligation to obtain an occupation certificate.
- (c) When in the opinion of the **Builder** the works have reached Practical Completion, the **Builder** is to give to the **Owner** notice of this in **writing**.
- (d) Within **five (5) days** after the service of notice of a Practical Completion the **Owner** must give to the **Builder** a **written** list, of all those things (if any) required by this Contract to be done to achieve Practical Completion. The **Builder** is to as soon as possible do all those things necessary for Practical Completion and give to the **Owner** **notice in writing** on completion of such things.
- (e) In the event of the **Owner** not complying with the provisions of **Clause 22(d)**, the works will be deemed to have reached Practical Completion.

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If you're using the Fair Trading contract Clause 6 Time for Completion

E **Explanation:** The time allowed for completion should be realistic. The contract time should allow for any public holidays or periods when it is known the work will not be performed, for example the building industry shutdown over the Christmas period and industry rostered days off. Instances can occur when the time for completion has to be adjusted. See Clause 7.

Clause 6 Time for completion

The contractor must diligently proceed and complete the work within calendar weeks from the date the work is due to commence as referred to in Clause 5. The period of time allowed for completion has taken into account any public holidays and other days when it is known that work will not be performed. The time for completion may be subject to amendment in accordance with Clause 7.

Clause 5 Commencement of Work

C **Note:** The contractor should check that the owner's name stated on the contract is the same as that appearing on the certificate of title for the land. A letter from the lending authority or owner's bank may be requested in relation to capacity to pay.

The contractor must obtain home building compensation insurance or cover and provide proof of this to the owner before starting work or requesting or receiving payment. Failure to take out insurance or cover may affect the contractor's right to payment.

Clause 5 Commencement of work

The contractor must commence the work within _____ working days from:

- the date of this contract, or
- if the approval of the local council or other statutory authority has still to be obtained for the work, the date of written notification of that approval, or
- if the consent of the lending authority is required, the date of written notification of consent that the work may proceed whichever is latest.

The contractor may, by written notice, request the owner to provide satisfactory evidence of the owner's title to the land and capacity to pay the contract price and for any variations agreed to after the contract is signed.

If the owner fails to provide such evidence within 10 business days from receipt of such notice, the contractor may suspend the work under the contract in accordance with Clause 24 or take action to end it in accordance with Clause 26.

Clause 8 Completion of work

E **Explanation:** Should any defects or omissions become apparent after completion, refer to the Defects Rectification clause (Clause 23).

E **Explanation:** Under the Home Building Act 1989 the contractor is required to give the warranties set out in this clause.

The statutory warranties in the contract are as printed in the Home Building Act. They require the contractor to provide a product as agreed, in a suitable state, fit for its intended purpose, complying with all relevant laws and within the agreed time, or if not agreed a time that is reasonable

C Paragraph (f) on this page relates to work where the owner makes known to the contractor the intended purpose of the works or the result the owner expects to achieve with the work. This warranty requires the contractor to use appropriate expertise to provide the stated and expected results.

Clause 8 Completion of work

The work will be complete when the contractor has finished the work in accordance with the contract documents and any variations, there are no omissions or defects that prevent the work from being reasonably capable of being used for its intended purpose, any damage of the kind referred to in Clause 19 has been repaired, and all rubbish and surplus material has been removed from the site.

When the contractor believes the work is complete, the contractor must notify the owner in writing certifying that the work has been completed in accordance with this contract. Within 10 business days of receipt of written notice from the contractor, the owner must advise the contractor in writing of any items of work the owner considers to be incomplete or defective. If the owner does not so notify the contractor, the work will be taken to be complete.

The contractor must complete any outstanding work promptly and again notify the owner in writing. Unless the owner notifies the contractor in writing that any item is still incomplete or defective within a further 10 business days from receipt of notification by the contractor, the work will be taken to be complete.

Should there be any dispute between the parties as to whether the work has been completed, it must be dealt with in accordance with the dispute resolution procedure (Clause 27).

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When defects become an actionable wrong

So, supposing the building works have reached the stage of practical completion. You now have the right to inspect the works and the premises.

What should you do if upon inspection of the premises after practical completion, you find that there are defects or incomplete works?

Generally, you send the Builder a list of defective and incomplete works, within what's called the "Defects Liability Period." This then obliges the Builder to rectify the defects in the notice. The details and timelines would depend on the contract you're using.



If you're using the HIA contract Clause 24 Defects Liability Period

Clause 24. Defects Liability Period

*Refer also to the
Statutory Warranties
set out in Clause 39.*

- 24.1 The defects liability period is a period of 13 weeks commencing on and including the **date of practical completion**.
- 24.2 The **owner** may, before the end of the defects liability period, give the **builder** one list of defects in the **building works** that appear after the **date of practical completion**.
- 24.3 The **builder** must rectify defects that are the **builder's** responsibility and which are notified to the **builder** during the defects liability period.
- 24.4 The **owner** must provide the **builder** with reasonable access to carry out rectification works.

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**If you're using the MBA contract
Schedule 2 Item 7
Clause 24 Defects Liability Period**

7. Defects Liability Period
Refer to Clause 24.

24. Defects Liability Period – Builder's Obligations

- (a) The Defects Liability Period commences upon Practical Completion of the works and will continue for the period stated in **Schedule 2 item 7**, or if no period is stated, for **thirteen (13) weeks**.
- (b) Prior to the expiration of the Defects Liability Period the **Owner** is to provide to the **Builder** a **written** list of all defects or faults arising out of workmanship or material provided by the **Builder** which is not in accordance with the Contract. The parties must meet to review the items listed by the **Owner**, if the **Builder** requests such a meeting.

- (c) The **Builder** is to make good defects or faults which are attributable to the **Builder's** work or failure to do something at his own cost and within a reasonable time of notification.
- (d) The **Owner** is to allow the **Builder** the opportunity to attend and rectify the defects or faults identified. Any dispute as to defects or faults does not prevent the **Builder** exercising the right to attend to inspect and or rectify the works.
- (e) The **Owner** must provide access for the **Builder** to carry out his obligations under this clause during normal working hours Monday to Friday and must allow a reasonable time for such work to be carried out. The parties are free to agree on alternative times for any such work to be carried out.
- (f) Subject to **Clause 24(d)**, if the **Builder** fails to comply with his obligations under this Clause within a reasonable time of a notification made under **Clause 24(b)** then the **Owner** may, after giving the **Builder** **twenty five (25) days written** notice, engage others to make good the listed defects or faults. The **Owner** must provide access to the site for the **Builder** to do rectification work within this notice period.
- (g) The **Builder's** duty to attend to and carry out work pursuant to this clause is limited to work and materials or defects which directly relate to the workmanship of the **Builder**. The **Builder's** duty does not extend to matters caused by:
 - (i) the use or occupation of the works by the **Owner** or their agents;
 - (ii) fair wear and tear or design faults where the design is not the responsibility of the **Builder**; or
 - (iii) a failure to maintain the works post practical completion.
 Further where the work involves a renovation, any **Builder's** duty to attend to and carry out work pursuant to this clause does not cover matters arising from conditions in the existing structure.

After Defects Liability Period and or work by Builder is completed

- (h) At the end of the Defects Liability Period and subject to the matters identified in the **Owner's written** list of issues being dealt with as set out above, the work of the **Builder** is agreed to have been completed as required by the Contract.

Parties to work Cooperatively

- (i) The **Owner** and **Builder** agree to utilise the Defects Liability Period to identify and resolve issues covered by this clause. Consequently there is no breach by the **Builder** if matters are not immediately attended to. However the **Builder** must with regard to matters covered by the Defects Liability Period act with reasonable speed in carrying out necessary work.



**If you're using the Fair Trading contract
Clause 23 Defects Rectification**

Explanation: After the work has been completed omissions and defects may become apparent. The defects rectification period is intended to allow the owner to bring these matters to the attention of the contractor so that the contractor may attend to them. It is not intended that the defects rectification period be used to finish items of work which should have been completed to achieve completion of the work in accordance with Clause 8. This clause does not affect your rights to pursue the rectification of defects under the statutory warranties. See the Consumer building guide included as an Appendix of this contract (and available from the Fair Trading website) for more information.

**Clause 23
Defects rectification**

The contractor must rectify omissions and defects in the work which become apparent within the period of 13 weeks from the date the work has been completed. The date of completion shall be determined in accordance with Clause 8.

The owner must notify the contractor in writing of any omissions or defects which need to be made good no later than 10 business days after the expiry of the 13 week period. The contractor must rectify the omissions and defects at the contractor's own cost within 30 business days from receipt of such notification and the owner must give the contractor reasonable access for this purpose.

In respect of major omissions and defects in the work, a further defects liability period of 13 weeks from the date the work has been completed will apply.

If there is a dispute between the parties as to whether any item of work is defective, has been omitted or has been satisfactorily rectified the dispute must be dealt with in accordance with the dispute resolution clause (Clause 27).

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Dispute Resolution

What if the Builder refuses to rectify the defects?

If the Builder refuses to rectify the defects after you've given them notice to do so, you may resort to dispute resolution.

Usually, the procedure is as follows:

1. Give written notice to the builder, setting out the matter in dispute. In this case, building defects.
2. You and the builder must meet within a certain number of days, to attempt to resolve the dispute, or to agree on methods of doing so.
3. If the dispute is resolved, you write down the resolution and sign it.

The finer details of the dispute resolution procedure depends on which contract you're using.

If you're using the HIA contract
Clause 35 Dispute Resolution

Clause 35. Dispute Resolution

35.1 If a dispute arises then a party must give written notice to the other party setting out the matter in dispute.

35.2 The **builder** and the **owner** must meet within **10 working days** of the giving of the notice to attempt to resolve the dispute or to agree on methods of so doing.

35.3 If the dispute is resolved the parties must write down the resolution and sign it.

35.4 The parties agree that anything done or said in the negotiation cannot be revealed in any other proceeding.

If you're using the MBA contract
Clause 26 Dispute Resolution

26. Dispute Resolution

Reference to NSW Fair Trading Guide to Standards & Tolerances

(a) The parties agree that where a property of an item of work performed by the **Builder** satisfies the requirements of the Guide to Standards and Tolerances that property will not cause that item of work to be defective. However if the item of work does not satisfy the requirements of the Guide to Standards and Tolerances that alone will not be sufficient to determine such item to be defective, being a matter to be determined in the context of the Works.

Notify the other party of matters in dispute

(b) If any dispute or difference (a dispute) concerning this Agreement or work arises between the **Owner** and the **Builder** then the party saying there is a dispute **must** give the other **written notice of the dispute**.

Parties must meet and seek to resolve dispute

(c) Within **ten (10) business days** after the giving of such a notice the parties must confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means such as mediation, expert determination or arbitration. The mediator, expert or arbitrator is set out at **Schedule**

2 item 8. At any such conference each party must be represented by someone having authority to settle the dispute.

(d) Any agreement reached at the above meeting is to be recorded in **writing** and a copy kept by both parties. An agreement may be relied upon as an addendum to this contract and used as a response to any subsequent action or inaction by a party to this agreement.

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If you're using the Fair Trading contract
Clause 27 Disputes

Clause 27 Disputes

Note: If you have a dispute you should first discuss the matter with the other party. Serious disputes can often be avoided by good communication between owner and contractor. It is suggested that in the event of a dispute the parties meet as soon as possible and by discussion endeavour to resolve the matter. Make sure you understand your obligations under the contract. If necessary, obtain independent advice. The dispute resolution procedure is aimed at reducing the need for possible costly litigation. Fair Trading can investigate a complaint from an owner and may issue an order requiring a contractor to rectify or complete work or to rectify any damage. For further details refer to Part 3A Division 2 Home Building Act 1989.

If the owner or contractor considers that a dispute has arisen in relation to any matter covered by this contract, either during the progress of the work, after completion of the work or after the contract has been terminated, that person must promptly give to the other party written notice of the items of dispute.

If the dispute is not resolved informally following such notification, the parties may confer with a mutually agreed third party whose role will be to assist in the resolution of the dispute by mediation or expert appraisal of the work.

If the parties do not agree to confer with a third party to assist in the resolution of the dispute, or if the dispute is not resolved following the assistance of such a third party, the owner may notify Fair Trading that a building dispute exists and seek the assistance of Fair Trading to resolve the dispute.

Even if a dispute has arisen the parties must, unless acting in accordance with an express provision of this contract, continue to perform their obligations under the contract so that the work is completed satisfactorily within the agreed time.

If the dispute remains unresolved despite undergoing Dispute Resolution

1. If, despite attempting to settle the matter between yourselves, the dispute persists, you may opt to bring the matter to the [Office of Fair Trading](#), where you and the builder may be instructed to undergo [ADR \(Alternative Dispute Resolution\)](#).
2. If the dispute still remains unresolved after taking it to Fair Trading, you will be given a certification to lodge a complaint with [NCAT](#), where the matter will undergo [directions hearings](#). A final hearing may be had where the disposition of the tribunal will be made.
3. If, after NCAT, the dispute is still unresolved, or if you are not satisfied with the tribunal's decision, then you may file a complaint in court.

How We Can Help

While the HIA and MBA contracts contain clauses on defects rectification, they are written to favor builders, as opposed to the Fair Trading contract, which is more objective. Hence, it may be a good idea to engage a specialist construction lawyer for [Contract Review and Advice](#), so that you may be apprised of what your best course of action may be when faced with defective or incomplete works, whichever contract you're using. Contracts Specialist has expert building and construction lawyers who can help with that.

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