

DEALING WITH DEFECTS UNDER THE HOME BUILDING CONTRACT: A Guide for Home Owners

Building your dream home is supposed to be an exciting time in your life. But when you inspect the property at the hand over, and over time you live in the property, you identify defects in the house.

This article is for home owners who had their construction project done under the NSW Fair Trading Home Building Contract for Work Over \$20,000, and would like to know how to address defective and incomplete works.



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What is a defect?

A [building defect](#) may be anything from substandard quality in design and construction, faulty workmanship, or early deterioration in the works. Incomplete works are also considered a defect.

Your NSW Fair Trading Home building contract for work over \$20,000 contains a clause listing the Statutory Warranties that a builder/contractor is required to comply with. If they violate any of those, that's considered a defect.

<p>Note: Any legal action for a breach of statutory warranties must be taken before the end of the warranty period for the breach ie. 6 years for a breach resulting in a major defect (as defined in the Home Building Act 1989) or 2 years in any other case.</p> <p>The warranty period starts on completion of the relevant work to which it relates (but this does not prevent proceedings from being commenced before completion of the work). However, if the work is not completed, the warranty period starts on:</p> <ul style="list-style-type: none"> (i) the date the contract is terminated, or (ii) if the contract is not terminated – the date on which work under the contract ceased, or (iii) if the contract is not terminated and work under the contract was not commenced – the date of the contract. <p>Other than in the case of non-completion of work, if the breach of warranty becomes apparent within the last 6 months of the warranty period, proceedings may be commenced within a further 6 months after the end of the warranty period. A breach becomes apparent when the owner of the property becomes aware (or ought reasonably to have become aware) of the breach</p>	<h3 style="text-align: center;">Clause 9</h3> <h4 style="text-align: center;">Statutory warranties</h4> <p>The contractor warrants that:</p> <ul style="list-style-type: none"> (a) the work will be done with due care and skill and in accordance with the plans and specifics 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 (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. <p>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.</p> <p style="text-align: right; font-size: small;">10 of 28</p>
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Statutory Warranties are imposed by law

They basically say that:

1. the building works should be:

- done with due care and skill
- in accordance with the plans and specifications
- done within the stipulated time (or within a reasonable time)
- reasonably fit for occupation as a dwelling

2. and the materials used should be:

- good and suitable for the purpose (and new, unless otherwise stated)

When and how can you check for defects?

You can check for defects by inspecting the premises at the time of completion of work.

Completion of work

O *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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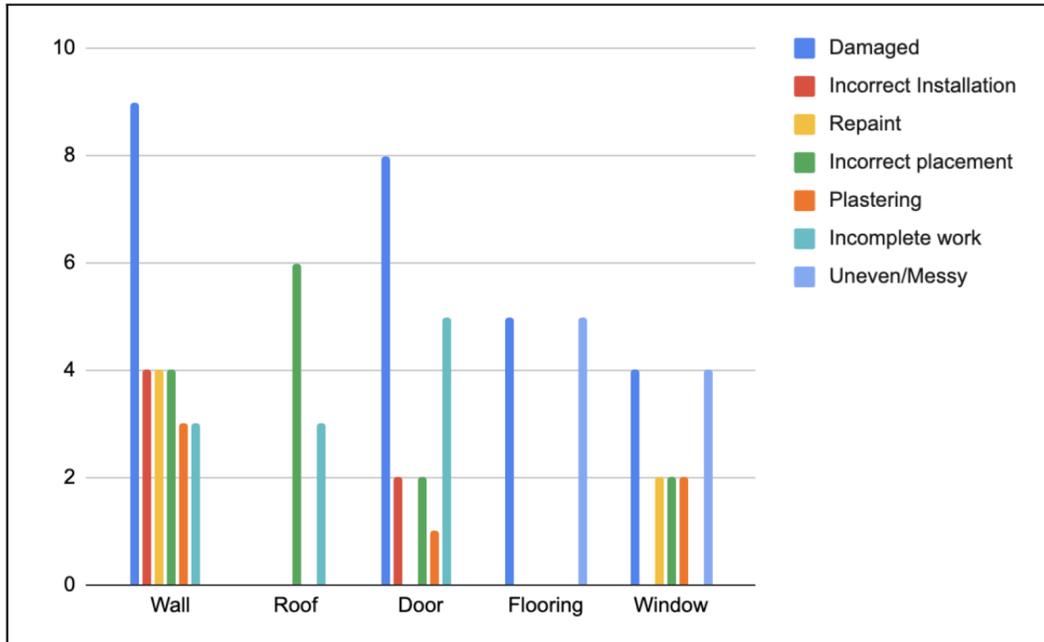
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Once the builder/contractor believes the work is complete, they will notify you in writing. You will then have 10 business days to inspect the works and provide them with a list of defects and incomplete works.

Common home building defects

Notably, there are building defects that similarly occur in residential construction projects in NSW. From our research, we have identified the following to be the [most commonly occurring defects](#) for the past year:

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



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Rectifying the defects

Once you've given your list of defects and incomplete works to the builder/contractor, they need to rectify said defects at no cost to you, within 30 business days from receipt of notice.

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.

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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When defects turn into dispute

If the builder/contractor contests any item on your list, or for any reason refuses to rectify the defects or complete the incomplete works, you may take that as a dispute.

Clause 27 of the Fair Trading contract lays out the procedure of settling disputes, including those arising out of defects and incomplete works.

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***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.*

F If the dispute cannot be resolved informally the owner may contact Fair Trading for information.

***Note:** A copy of any notice given under the contract should be kept. Where a notice is given other than by handing to the other party, the person who gave notice should follow up to ensure it is received.*

Clause 27 Disputes

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.

Clause 28 Giving of notices

If the contract requires or permits a party to give a notice, consent, or other communication in writing to the other party, it must be given by either:

- handing it to the other party
- leaving it with a person, apparently over the age of 16, at the other party's business or residential address, or
- by registered post to the last known address of the other party.

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Dispute resolution typically involves the following steps:

1. Sending the other party a written notice of the items of dispute, followed by efforts to amicably settle the dispute internally.
2. Involving a third party to mediate, or engaging an expert to inspect the works, if the matter cannot be resolved internally.
3. Seeking the assistance of the Office of Fair Trading if the above two steps fail.
4. 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.
5. You have further recourse with the courts if the above fail.

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How we can help

The Office of Fair Trading's contracts are home owner friendly, especially compared to other standard form contracts. Nonetheless, building disputes are often inevitable. Engaging a specialist construction lawyer for [Contract Review and Advice](#), allows you to manage your risks and administer your contract well. Additionally, a specialist construction lawyer can help you if you are in the middle of a building dispute.

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