Reform of the Home Building Act 1989

Issues Paper

NSW GOVERNMENT | Fair Trading

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July 2012

“Minister’s Message”

Home building and renovating is one of the biggest expenses a homeowner will ever make. It is therefore crucially important for the home building industry to function effectively.

Some amendments to the *Home Building Act 1989* were passed by Parliament in October 2011. These were an important and vital step in improving the operation of the home building legislation. However, the regulation of the home building industry needs further reform and this discussion paper is aimed at addressing these broader issues.

The NSW Liberals & Nationals Government is committed to improving the home building legislation to ensure that consumers are appropriately protected and industry can function efficiently.

One of my highest priorities as Minister for Fair Trading is to undertake further reform of the home building legislation to benefit both homeowners and the industry.

The NSW Government wants broad stakeholder input to ensure that the law in this area takes a balanced approach that provides appropriate protection for homeowners while also cutting red tape and paperwork for the industry.

I encourage you to take this opportunity to have your say, whether it is on all the matters raised in this issues paper or on one or two issues of particular interest to you. All submissions received will be given careful consideration.

I look forward to your contributions.

Anthony Roberts MP
Minister for Fair Trading

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Introduction

Background to this review

This paper is the first consultation phase in the review of the *Home Building Act 1989* (Home Building Act). The Home Building Act is the pivotal piece of legislation in the regulation of the home building sector and the NSW Government has committed to undertake a broad review of the legislation. The issues raised in this paper reflect views and issues that have been raised with Fair Trading by industry, homeowners and other stakeholders.

Last year the NSW Government carried out a number of urgent amendments to the Home Building Act. These reforms were introduced to improve the operation of the home building legislation in the short term by addressing unexpected court decisions, cutting red tape and helping to stimulate home building and construction work in NSW. On 19 October 2011, Parliament passed the *Home Building Amendment Act 2011*. The changes commenced in two stages, with the first tranche taking effect on 25 October 2011 and the second tranche commencing on 1 February 2012.

However, at the same time as making these immediate changes, the Government acknowledged that a broader, more comprehensive examination of the legislation needed to take place, and that further reform was necessary in order to properly address the full range of issues raised by industry, homeowners and other stakeholders.

National Licensing

Under the Council of Australian Governments' agreement to deliver a seamless national economy, jurisdictions have agreed to the creation of a national occupational licensing system. The electrical, refrigeration and air-conditioning, plumbing and gas fitting and building occupations will be included in the new national system.

For this reason, there is no consideration of issues or proposals to change any of the Home Building Act provisions directly related to the processes or qualifications for issuing licences in this paper. However, this paper will consider issues related to licensee conduct and compliance.

State of the Sector

In the 2009/2010 financial year, the building and construction sector contributed $24.5 billion to the NSW economy, representing 7.6 percent of the total State economy (note: this figure includes both commercial and residential building work). In addition to providing a strong contribution to the State's economy in dollar terms, the building and construction sector is also a major employer. This sector employed 292,600

people in 2009/2010, representing 8.5 percent of the NSW workforce.[1]

Given the extent of this activity, it is clear that the building and construction sector plays a key role in the NSW economy. Construction and related trades also provide the single largest source of training for apprentices and trainees in trade related occupations with 6,200 apprentices and trainees commencing training in 2010.[2]

A subset of overall employment in the residential building sector is shown in **Table 1**, which indicates that as at the end of the 2011 financial year there were 178,890 individuals, partnerships and companies holding contractor licences under the Act. This table shows that the number of licensees is growing overall, particularly in the individual and company categories.

Table 1 – Individuals, partnerships and companies holding licences under the Home Building Act, 2000/01 to 2010/11

Year	Individuals[3]	Partnerships	Companies	Total
2000/01	130,127	5,703	14,478	**150,308**
2001/02	130,538	6,071	15,368	**151,977**
2002/03	134,431	6,513	16,123	**157,067**
2003/04	136,981	6,757	16,665	**160,403**
2004/05	137,289	7,032	17,464	**161,785**
2005/06	135,811	6,881	17,778	**160,470**
2006/07	137,931	6,811	18,508	**163,250**
2007/08	139,407	6,529	19,005	**164,941**
2008/09	144,748	6,424	20,820	**171,992**
2009/10	143,892	6,276	21,086	**171,254**
2010/11	148,131	5,908	21,851	**178,890**

The contribution made by the building and construction sector in the NSW economy is forecast to be even more significant in the future.

A report to the NSW Innovation Council prepared by Access Economics Pty Ltd in late 2010 stated that:

[1] Sydney and NSW – Construction and Infrastructure profile – July 2011 from *Industry and Investment*
[2] Australian Government, Department of Education, Employment and Workplace Relations, Australian vocational education and training statistics, Apprentices and trainees, Annual 2010, p.12.
[3] Due to the way that data has been historically recorded those holding Qualified Supervisor Certificates are also included within the figures for individual licensees.

The NSW construction industry's share of the NSW economy is projected to rise to 8.4% in 2020 compared with 7.6% in 2010. Engineering construction will benefit from greater infrastructure requirements into the future, while strong population growth will support demand for new dwelling construction.[4]

This report also forecasts that the construction sector will employ 9.18 percent of the NSW workforce by 2019/2020. One of the major influences on the make up of the State's economy in the next 10 years is demographic change. Much of this demographic change will be the result of a growing and ageing population, which is expected to drive housing demand and also change the type of housing and related infrastructure required. The report forecasts that growth within the State's construction sector will outpace the overall growth of the national economy.

However, it should be noted that recent figures indicate that the home building industry in NSW is contracting at a significant rate and if this continues, industry will struggle to meet housing demand and its full growth potential.

The NSW Government has acknowledged that ensuring an adequate supply of housing is one of the key policy challenges for NSW, particularly as building approvals and housing starts are at near multi-decade lows. In NSW, on average, 2,744 dwellings were approved per month in the December 2011 quarter, down by 14 percent, while the Australian average is down by 16 percent.

Housing starts paint an even gloomier picture for the residential building industry in NSW with the Australian Bureau of Statistics reporting that the seasonally adjusted number of new homes started in NSW was just 5158 for the March 2012 quarter. This was 37.4% less than the number of housing starts in NSW in the December 2011 and half the number of housing starts in Victoria in the March 2012 quarter.

In the face of the challenges confronted by this sector, a close examination of the regulatory framework governing home building in NSW is a timely and necessary step in securing the future of this industry.

Purpose of the issues paper

The purpose of this paper is to generate discussion on the current issues in the regulation of home building work in NSW, the need for change and possible proposals for reform.

The NSW Government is seeking comments on the issues raised and proposals presented in this paper, as well as more general comments on the operation of the current regulatory framework.

[4] Access Economics, *The NSW Economy in 2020 – A foresighting study*, September 2010

Previous correspondence and complaints received by NSW Fair Trading, relevant decisions from the Consumer, Trader and Tenancy Tribunal and the approach taken to issues by interstate and overseas jurisdictions were considered in preparing this paper. Advice received from the Minister for Fair Trading's Home Building Advisory Council was also incorporated.

The Home Building Act is only one of a number of regulatory frameworks which operate in the building and construction sector. Other relevant regulation includes the planning laws, which are currently being reviewed by the NSW Government, and the *Building and Construction Industry Security of Payment Act 1999*, which deals with contractor to contractor disputes. The building certification process is also a key factor affecting the home building industry. This is governed by the planning legislation. This review is focussed on matters directly relating to the Home Building Act.

Submissions close at **5pm on 18 August 2012**

How to have your say

You are invited to read this discussion paper and provide comments/submissions.

To assist you in making a submission, an optional submission form is provided at Appendix A and is also available online at www.fairtrading.nsw.gov.au However, this form is not compulsory and submissions can be made in any written format.

You may wish to comment on only one or two matters of particular interest or on all of the issues raised in this discussion paper.

We would prefer to receive submissions by email to: policy@services.nsw.gov.au

You can also send submissions by fax to (02) 9338 8990, or by mail to:

Home Building Act Review
Fair Trading Policy
PO Box 972
PARRAMATTA NSW 2124

Please take careful note of the deadline for submissions:

Submissions close at 5pm on 18 August 2012.

All submissions will be made publicly available in due course. If you do not want your personal details or any part of your submission released, please indicate this clearly in your submission together with reasons. You should be aware, however, that even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that

information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*).

Next steps

All submissions received will be acknowledged.

Once the consultation period has closed, feedback will be analysed and all potential options assessed. Preferred options for reform will be selected based on the following criteria:

- Cost benefits: will any change provide more benefits than the costs involved?
- Efficiency: will any change result in greater consistency, clarity and certainty in the law leading to fewer disputes?
- Effectiveness: Will any change strengthen the industry, adequately protect homeowners and meet the NSW Government's policy objectives now and in the future?

It is anticipated that NSW Fair Trading will make recommendations on the most appropriate way forward to the NSW Government for consideration later in 2012.

More information about the progress of the review will be made available from time to time on NSW Fair Trading's website at www.fairtrading.nsw.gov.au

Key Issue 1: Home building contracts

Background

Nearly all jurisdictions regulate home building or "domestic building" contracts. This is an important protection mechanism for homeowners and licensees as it removes many causes of disputes and assists both parties in the event of a dispute.

Any licensees contracting to carry out home building work directly with a homeowner must provide a written contract for that work if the contract price, or the value of total work, is over $1,000 (including GST).

As a result of the 2011 amendments to the Home Building Act, jobs worth between $1,001 and $5,000 require a written "small job" contract with minimum basic information, while building jobs worth more than $5,000 must be covered by more extensive written contracts.

All home building work over $1,000 requires a written contract.

The Act does not require the use of a standard contract but rather prescribes some of the matters that must be included in home building contracts.

Contracts for jobs over $5,000

Home building work worth more than $5,000 requires a more extensive home building contract than the contract required for less expensive work. This type of contract is suitable for new homes, major alterations and additions and home swimming pool installations. These contracts must contain certain provisions as required by the legislation.

A licensee or homeowner may use their own contract or one purchased from an industry association, provided the contract contains all of the required items as well as a mandatory homeowner checklist. To assist homeowners and licensees, NSW Fair Trading produces standardised home building contracts that fulfil all the legislative requirements and can be downloaded from the NSW Fair Trading website for free.

A contract for work worth more than $5,000 must contain:

- the date and signatures of both the licensee and homeowner;
- the homeowner's name and the exact name on the licensee's licence and licence number;
- a sufficient description of the work to be carried out;
- attached plans and specifications;
- relevant warranties required by the Home Building Act;
- the contract price, which must be prominently displayed on the first page and a warning with an explanation if the contract price is not known or is subject to change;
- a clause that states that any agreement to vary the contract or any plans and specifications to be done under the contract (including variations):

i) are taken to form part of the contract
ii) must be in writing and signed by both the homeowner and licensee;

- a check list of 12 items and a caution about signing the contract if the homeowner cannot answer yes to all items in the check list;
- a note about the homeowner's entitlement to a copy of the signed contract within five days of signing;
- a note about the licensee's obligation to give a certificate of home warranty insurance if the contract value is over $20,000 (or $12,000 if the contract was entered into before 1 February 2012);
- a clear statement setting out the cooling-off period of five clear business days within which the homeowner may cancel the contract, applicable to contracts valued at over $20,000 (or $12,000 if the contract was entered into before 1 February 2012);
- a statement by the homeowner that they acknowledge they have:
  i) read and understood the *Consumer building guide* which explains procedures for the resolution of contract and insurance disputes;
  ii) completed the checklist and answered yes to all items on it;
- a "work compliance clause" that states the work will comply with:
  i) the Building Code of Australia, to the extent required under the *Environmental Planning and Assessment Act 1979*;
  ii) all other relevant codes, standards and specifications that the work is required to comply with under any law;
  iii) the conditions of any relevant development consent or complying development certificate; and
- a clause that states that the contract may limit the liability of the licensee for failure to comply with the above work compliance clause if the failure relates solely to:
  i) a design or specification prepared by or on behalf of the homeowner; or
  ii) a design or specification required by the homeowner if the licensee has advised the homeowner in writing that they go against the "work compliance clause".

In addition, the licensee must provide the homeowner with a copy of the *Consumer building guide,* an information guide produced by NSW Fair Trading.

New small job contracts category

From 1 February 2012 a new category of written contracts for "small jobs" worth between $1,001 and $5,000 came into effect for new building jobs. This type of contract is suitable for trade work, maintenance and repair work as well as smaller alterations or improvements.

A small job contract must be in writing, dated and signed by or on behalf of both of the parties and contain the following minimum information:

- names and signatures of both parties;
- the licensee's licence number;
- a description of the work, including any plans and specifications; and
- the price (if known).

Issue 1 – Current contract requirements

Since the recent introduction of the small jobs contract, it has been suggested that this less onerous form of contract would be suitable for work up to $20,000 in value. This would align with the current home warranty insurance threshold of $20,000.

Comment is therefore sought on whether it would be appropriate to increase the monetary threshold of the small jobs contract up to $20,000. This would mean that the more detailed contract requirements would only apply to jobs worth more than $20,000 in value. This proposal would still provide protection for homeowners at the same time as reducing the regulatory burden on licensees.

Issue 2 – Progress payments

There are risks when homeowners make payments in advance of the actual progress of building work. Accordingly, the size of advance deposits is capped under the Act specifically to address this issue. However, there are no requirements for, or regulation of, the progress payments made throughout the course of the contract.

Advance deposits

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

- if the contract price is $20,000 or less, you cannot be asked to pay more than 10 percent deposit; and
- if the contract price is more than $20,000, you cannot be asked to pay more than 5 percent deposit.

Progress payments

If building work is several thousand dollars or more, it is reasonable for the licensee to ask the homeowner to make progress payments. This is usually so the licensee can pay for materials and labour as the work progresses.

If the building work is being financed by a bank loan, banks often impose their own requirements on the schedule of payments to the licensee, particularly where large sums of

money are involved. A clause covering the process for making such progress payments may need to be included as an additional clause in the contract.

A homeowner's home warranty insurance policy does not provide coverage for losses suffered by a homeowner as a result of additional or forward payments made to the licensee which are not made in accordance with the contract or which exceed the legally allowable advance deposits. In addition, if progress payments made by a homeowner far exceed the actual value of work done, the homeowner runs of the risk of any home warranty insurance payout not meeting the full cost of completing the building work.

Disputes over payment issues between licensees and homeowners remain relatively common, particularly where the contract does not contain a progress payment schedule. In addition, many homeowners remain susceptible to demands for additional or forward payments to ensure work continues on their particular building project, even where these payments exceed the staged milestones for payment set out in the contract.

Ensuring that payments match the progress of building work is a fundamental precaution for homeowners, given that the cost of home building work is often one of the largest outlays an individual will ever make.

One reform proposal to address this issue is to require all contracts for home building work to contain payment schedules showing the initial advance deposit and agreed payment milestones. A prescribed list of what these payments must be could be included in the legislation, however this may not accommodate the great variations in home building work.

Another possible proposal is to amend the legislation to require that building contracts contain a progress payment schedule with details of the works contained in the milestone to be claimed and for it to be an offence for a licensee to demand payment for work not carried out (other than the allowable deposit). Under this approach, there could be exemptions for certain matters like payments for bespoke building elements created off-site.

Issue 3 – Termination clauses

Currently there is no legislative requirement for a termination clause in home building contracts. While some contracts may voluntarily include a termination clause, the content of any such clause is not regulated. A termination clause in a contract is good business practice and provides guidance on the process that will be followed should the contracting arrangement come to an end, at the request of one or both of the parties, before the full scope of work is finished.

Consumer advocates have suggested that there may be merit in introducing a requirement for mandatory termination clauses in home building contracts. Termination clauses could be introduced for both types of contracts or just the major works contract (presently contracts for work more than $5,000 in value).

The items to be contained in a termination clause and the processes for termination are matters which could be considered for inclusion in a legislative requirement. It is important that a regulated termination clause be balanced, equitable and fair to both the homeowner and the licensee.

Issue 4 – Cost-plus contracts

Under a cost-plus contract, a homeowner is charged for the actual cost of construction plus profit, which is normally expressed as a percentage of the cost of construction. This may in fact save the homeowner money as there may be a significant difference between actual cost incurred and speculative contingencies included in the fixed price quote. However, there is also the risk that the licensee may have underestimated costs and underpriced the job.

One of the most frequent causes of disputes arising from work carried out under a cost-plus contract occurs when the cost of doing the work exceeds the homeowner's initial expectations. Sometimes it is the licensee's initial "guesstimates" on costs that set a homeowner's expectations. Cost-plus contracts have been widely criticised for being heavily weighted in the licensee's favour.

Cost-plus contracts are generally used when it is not possible to give final costings, for example, when excavations are needed before the scope of the job may be determined. Although cost-plus contracts must contain a warning that the contract price is not known, a poorly calculated estimate may expose the licensee to liability under the Australian Consumer Law as it may be considered to be misleading and deceptive practice.

At present, the use of cost-plus contracts in NSW is subject to the same fixed-price contract requirements under the Home Building Act.

The Victorian and Queensland Governments have passed legislation regulating the use of cost-plus contracts. In those States, a licensee must not enter into a cost-plus contract for home building works unless certain conditions are met.

In Victoria, cost-plus contracts may only be used in two instances. The first instance is where the reasonable estimate of the cost of the work is $500,000 or greater. This is because it is considered that contracts of this value are more likely to be for unusual or special work where it is commonly difficult to cost the work at the outset. The second instance is if the work

to be carried out involves renovation, restoration or refurbishment of an existing building, and it is not possible to calculate the cost of a substantial part of the work without carrying out some building work.

In Queensland, cost-plus contracts may only be used where the cost of a substantial part of the work cannot be reasonably calculated without some of the work first being carried out – for example, for rectification of termite or fire damage where the extent of the damage cannot be accurately determined until after the work has started. In addition, cost-plus contracts in Queensland must contain a fair and reasonable estimate of the total amount that the licensee is likely to receive under the contract to ensure that the licensee does not underbid and later charge the homeowner more.

Cost-plus contracts in NSW could be subject to similar controls to minimise any adverse impacts on homeowners. Such regulation should achieve balance, fairness and equity between licensees and homeowners.

1. **What aspects of the regulation of home building contracts could be improved and why?**
2. **Should the threshold for large contracts be raised from $5,000 to $20,000?**
3. **Will further regulation of progress payments provide greater clarity and certainty in home building contracts?**
4. **What items, if any, should be included in a termination clause?**
5. **If cost-plus contracts are to be regulated, in what situations should they be allowed and what controls should apply?**

Key Issue 2: Statutory Warranties

Background

Even though statutory warranties do not have to be written into the contract between a homeowner and licensee, the law says they still apply to all home building work.

Under the legislation, statutory warranties are implied in all contracts for home building work carried out by "the holder of a contractor licence, or a person required to hold a contractor licence" (section 18B of the Home Building Act). This means that a licensee is warranting that the work they perform will comply with the following requirements:

a) the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
b) all material supplied by the licensee will be good and suitable for the purpose for which they are used and, unless otherwise stated, 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, the making of alterations or additions or the repairing, renovation, decoration or protective treatment of a dwelling, the work performed will result in a dwelling that is reasonably fit for occupation as a dwelling; and
f) the work and any materials used will be reasonably fit for the specified purpose or result (where the homeowner expressly informs the licensee or their agent of the particular purpose for the work or the desired result of the work).

As a result of the 2011 amendments to the Home Building Act, statutory warranty periods are now aligned with the current periods of cover for home warranty insurance of six years for structural work and two years for non-structural work. Prior to this amendment, the period for statutory warranties was a blanket seven years for all types of work.

The changes provide consistency and equity and reflect the time periods in which the vast majority of complaints about defects are made to NSW Fair Trading. It is important to note that the new time periods commenced on 1 February 2012, and only apply to work done under new contracts entered into on or after this date. This means that work carried out under contracts entered into before 1 February 2012 continues to be subject to a seven year statutory warranty period.

The 2011 amendments also provided a clear definition of when home building work is considered to be "complete". The date of completion plays a key role in the regulatory framework, as this determines the beginning of the time periods for both statutory warranties and home warranty insurance.

Definition of "completion"

The 2011 amendments inserted a definition of "completion" providing that home building work is "complete" when it is completed in accordance with the requirements of the contract. If there is no contract, or the contract does not specify "completion", the work is regarded as "complete" when it can be used for its intended purpose and is free of major defects.

The earliest of the following events can be used to determine when this occurs:

- the date the licensee "handed over" the project to the homeowner;
- the date the licensee last carried out work (other than remedying minor defects);
- the date of the issue of an occupation certificate; or
- 18 months after the owner-builder permit was issued (in the case of an owner-builder).

Providing a single definition of "completion" of building works for home warranty insurance and statutory warranties will help reduce litigation in this area.

Issue 1 – Subsequent purchasers

The Home Building Act bestows rights on subsequent purchasers that are not available under ordinary law. In that regard, subsequent purchasers have the benefit of the statutory warranties in the same way as if they had entered into the contract with the licensee.

By definition, subsequent purchasers did not actually enter into the contract for work with the licensee and were not involved in the undertaking of the work. They are people who have bought a property after home building work was carried out on that property by a previous owner.

Extending the benefits provided to homeowners by statutory warranties to subsequent purchasers affords them strong consumer protections. However, their position as a subsequent purchaser also places them in a materially different position from the original homeowner. This unique position has both advantages and disadvantages, and gives rise to the question of whether the legislation should reflect this different position.

One advantage that the subsequent purchaser has stems from their ability to negotiate with the original homeowner through the property sale process. For instance, if, at the time of purchase, the subsequent purchaser detects any defective work, they can use this information to either not proceed with the sale or, as is often the case, bargain on price with the homeowner and secure the property for less than the asking

price. The money saved can then be used by the subsequent purchaser to remedy the identified defects.

However, subsequent purchasers are also at a relative disadvantage to the original homeowner in that they generally do not have access to the original building contract. This can make establishing the date that the work was completed, and therefore the commencement of statutory warranties, very difficult.

One way to address this issue would be to further amend the definition of completion so that there is a separate definition of completion for subsequent purchasers. For example, completion for subsequent purchasers could be the date of issue of the occupation certificate in the first instance. Another possible resolution is to create a legislative requirement for owners to provide subsequent purchasers with the relevant details in the contract at the time of sale, or in the case of a strata building, require the builder or developer to provide this information at the first meeting of the owners corporation, similar to the requirement for owner-builder insurance under section 95 (2A) of the Home Building Act.

Issue 2 – Sub-contractors responsibility for statutory warranties

Even though it is clear that the licence holder who contracted for the work is responsible for statutory warranties, it is not always clear whether any sub-contractors employed by the head contractor hold similar responsibilities.

The 2011 amendments specify that when a homeowner takes action against a licensee for defective or incomplete work, the licensee cannot limit their responsibility to the part of the work for which they were directly responsible, regardless of the provisions contained in the *Civil Liability Act 2002*. This does not mean that the licensee cannot use the provisions contained in the Civil Liability Act in separate legal proceedings with sub-contactors or other relevant parties.

The policy intent of the statutory warranties scheme is to ensure that a homeowner is protected against any defective or incomplete building work, and to provide that, where work is defective or incomplete, the homeowner need only pursue the licensee (person or entity) with whom the homeowner had a direct, contractual relationship. In most instances, this party will be the principal contractor. This framework prevents homeowners from having to pursue multiple parties for substandard work, substantially reducing costs and uncertainty for homeowners.

While the statutory warranties scheme places direct responsibility for ensuring home building work will be properly carried out on the principal contractor, this does not mean that sub-contractors can operate free from responsibility for performing their duties to a proper standard.

However, the duty of the sub-contractor to perform their work properly is owed to the principal contractor rather than to the homeowner, given that the sub-contractor is in a direct contractual relationship with the principal contractor and not the homeowner. As such, principal contractors are free to pursue sub-contractors for defective or incomplete work which they actually carried out. Usually, the way this would be pursued at law would be through a breach in contract claim.

There appears to be uncertainty in the industry as to whether or not sub-contractors are liable for statutory warranties. Accordingly, the question that has been raised is whether it is necessary to clarify in the legislation that it is the principal contractor who is ultimately responsible for the statutory warranties to the homeowner and in any disciplinary action taken by NSW Fair Trading. If this were to be done, the responsibilities of sub-contractors may need to be clarified as well.

Issue 3 –Maintenance schedule for strata buildings

One suggestion that has been made by stakeholders is that new strata buildings would benefit from being required to establish and comply with a programmed maintenance of the building. Such a requirement may help in the reduction of statutory warranty claims relating to non-structural defects that result from “fair wear and tear” and inadequate maintenance, and also provide a body of evidence for owners corporations to rely upon in cases where adequate maintenance has been carried out.

The Minister for Fair Trading’s Home Building Advisory Council has supported the idea of maintenance schedules on the basis that they may be beneficial for strata schemes.

The Government is currently carrying out a separate review of the strata and community title laws. That review is also considering issues relating to maintenance by owners corporations. Accordingly, if supported, this suggestion would need to be considered as part of that review. However, it should be noted that if this suggestion was to be adopted, it would be necessary to define the term “maintenance” to ensure it does not include repairing or altering the contract work, as this may affect a homeowner’s rights to enforce the statutory warranty.

Issue 4 - Refining existing statutory warranties including requiring homeowners to mitigate losses

At common law, homeowners have a legal duty to take reasonable steps to maintain their property and mitigate their losses to avoid situations where minor defects become a much bigger problem over time. These duties and other related

limitations on rights, such as damage resulting from fair wear and tear, which currently apply to home warranty insurance claims, are codified in clause 58 of the Home Building Regulation 2004.

It has been suggested that the obligations on homeowners regarding maintenance, fair wear and tear and the obligation to mitigate losses should be clarified more generally in relation to the statutory warranties scheme. One option would be to codify certain common law duties and exclusions within the Act's statutory warranty provisions.

These proposed changes would not reduce the rights of homeowners to claim against statutory warranties, but would clarify the obligations they are under. This could help ensure that all homeowners, including those who own individual dwellings, are aware of their obligations to adequately maintain their property and reduce litigation in this area.

Issue 5 – Definition of "structural defects"

Statutory warranty and home warranty insurance time periods have been aligned and are now six years for structural defects and two years for non-structural defects for consistency and equity. These reflect the time periods in which most complaints about defects are made to NSW Fair Trading.

Clause 71 of the Home Building Regulation prescribes what is considered to be a structural defect for the purposes of the statutory warranty and home warranty insurance periods. Overall, the definition is broad and refers to the effects of the defect on the building rather than listing specific defects which would be considered to be structural defects. The specific definition is set out in **Appendix B**. It is considered reasonable for owners to be delivered a building that will perform the basic functions for at least 6 years including keeping out water and not requiring significant unexpected restorative work.

Non-structural defects are defined by default as anything else that is not covered by the structural defect definition. This means that non-structural defects are those that do not affect the structural integrity or weatherproofing of the property, or the strength and capacity of a load bearing component of a dwelling.

Some stakeholder groups have proposed that the definition of structural defect should be made less general and particularised through the insertion of an exhaustive list of potential structural defects. One concern with this approach is it could result in important defects being potentially omitted or, on the other hand, the inclusion of defects which, in a particular scenario, may not have structural repercussions on the building. The current high level approach is intended to allow for a degree of flexibility to take into account the circumstances of a particular case.

Some stakeholders have suggested that most homeowners would not regard leaking windows or loose tiles as structural defects because they do not present the same degree of risk as defects with the building's foundations, floors, walls, roofs, columns or beams. It has been argued that this latter group of defects is more serious, and that this distinction should be reflected in the legislation. However, as the current definition stands, these defects are only considered to be structural defects if they result in, or are likely to result in, the destruction of, or physical damage to, the building or any part of the building.

In addition, there is a concern that the existing definition does not focus solely on the structural integrity of a dwelling, and instead allows such defects as: ill-fitting doors; cosmetic waterproofing issues; cracks in plaster etc, to be considered structural defects.

An argument has also been made that it would be more appropriate for the definition of structural defect to be included in the Act, rather than the Regulations, on the basis that this would provide more certainty.

It has been suggested that a more appropriate definition for the most serious form of structural defect would be:

A defect in an element that provides essential supporting structure to the whole, or any substantial part of, a dwelling (for example, a footing, beam, column or a suspended slab):

a) that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these); and

b) which renders the element inadequate for its structural purpose.

The Minister for Fair Trading's Home Building Advisory Council has also considered the adequacy of the current definition for structural defect. The Advisory Council suggested that Queensland's system of categorising defects be adopted in NSW. In Queensland, defects are divided into two categories: Category 1 (leaking roof, shower, health and safety issues, structural inadequacy etc); and Category 2 (poor finishing detail, minor cracking of plasterboard, cornice etc).

The Advisory Council also considered that key terms such as 'non-structural', 'defect' and 'maintenance' should be further defined in the legislation.

6. Should the definition of "completion" include a specific definition for subsequent purchasers?

7. Is it necessary to clarify that the principal contractor is ultimately responsible for the statutory warranties to the home owner?

8. Do you think maintenance schedules should be required for strata schemes and why?

9. **Should home owners' obligations relating to maintenance be further clarified in the legislation? Why?**
10. **Should "structural defect" and other terms be further defined in the Act? If so, which ones and what would be the definition?**
11. **In what ways could the statutory warranties be improved (if at all)?**
12. **Are the statutory warranty defences currently contained in the legislation adequate?**

Key Issue 3: Dispute Resolution

Background

Despite the best intentions and efforts of licensees and homeowners, disputes over home building work do occur. In NSW, the Home Building Act provides legislative protections for homeowners in the form of the statutory warranties scheme, a mandatory licensing regime and dispute resolution mechanisms.

Despite the best intentions of licensees and homeowners, disputes over home building work do occur.

Informal dispute resolution assistance is provided by NSW Fair Trading to assist in resolving home building disputes between homeowners and licensees. Part 3A of the Home Building Act provides for NSW Fair Trading to receive and investigate complaints about home building work and to resolve disputes. NSW Fair Trading is empowered to deal with disputes about incomplete and/or defective home building work, and/or damage caused to other structures as a result of home building work completed in NSW.

Both homeowners and licensees can lodge a dispute with NSW Fair Trading and access its free dispute resolution service. Initially, once a homeowner or licensee has lodged a dispute with NSW Fair Trading, a Customer Service Officer will attempt to negotiate a suitable outcome between the parties. If negotiation is not successful, then Home Building Service Inspectors will attempt to mediate an outcome suitable to all parties concerned. The Inspector will arrange to meet with the parties on-site to inspect the work under dispute and discuss the issues reported in the complaint. NSW Fair Trading Building Inspectors do not undertake a general inspection of the work. They look at the specific items that are the subject of the dispute.

If agreement between the parties is reached, the Inspector will complete a Complaint Inspection Advice which records what has been agreed upon and what each party is to do in order to resolve the identified issues. If agreement cannot be reached, the Inspector will assess the alleged defective or incomplete work. If it is their opinion that the work is the responsibility of the licensee, they may issue a Rectification Order directing the licensee to undertake rectification work by a due date. Both a Complaint Inspection Advice and a Rectification Order can include things that the homeowner has agreed to do to assist in resolving the dispute. If there is no defective work or materials and the matter is solely contractual in nature, the parties may be advised of the option to lodge an application with the Consumer, Trader and Tenancy Tribunal (CTTT) as NSW Fair Trading has no power to intervene in contractual disputes.

There is no monetary limit to the matters that NSW Fair Trading may deal with under Part 3A. However, NSW Fair Trading's process primarily caters to disputes with a value of less than $500,000. This matches the $500,000 jurisdictional limit that applies to disputes that the CTTT may deal with. In matters where the dispute exceeds this amount, the dispute still may be brought to NSW Fair Trading for assistance and resolution or dealt with in the District or Supreme Court. A significant portion of NSW Fair Trading's involvement in disputes over $500,000 relate to strata developments.

If a Rectification Order is complied with and the parties are satisfied with the outcome, the dispute is resolved. If the Rectification Order is not complied with, or the parties are not satisfied with the outcome, they may lodge a claim with the CTTT or court. Furthermore, if a Rectification Order is not complied with, the licensee may be subject to disciplinary action by NSW Fair Trading. However, it is not currently one of the offences under the Act that can be dealt with by way of a penalty notice. The disciplinary action is in the form of a "show cause" process where the Commissioner for Fair Trading requires a licensee to "show cause" as to why the Commissioner should not take disciplinary action against the licensee concerned. The licensee is then given a period of time in which to present their case, and if not accepted by the Commissioner, a disciplinary determination is then made. Such disciplinary action could range from a caution or reprimand to cancellation or disqualification of licence. A licensee can apply for an internal review of the determination and a review by the Administrative Decisions Tribunal.

Part 3A of the Home Building Act enables homeowners and licensees to lodge building claims with the CTTT. When parties first appear before the CTTT, they are encouraged to actively participate in a range of alternative dispute resolution processes including conciliation to try and resolve the dispute. If parties reach an agreement during conciliation, the terms of the agreement will be made into an enforceable CTTT order.

If parties are unable to reach an agreement, the matter will proceed to a hearing presided over by a CTTT member. Parties will be given the opportunity to present their evidence and ask questions of each other. After both parties have given evidence, the member will make binding orders.

In more complex home building matters, a conclave of experts may be used to help resolve the dispute. A conclave is a joint meeting between experts engaged by the applicant and the respondent which is held on-site and facilitated by a CTTT member with home building expertise. During a conclave, the experts discuss the issues on which they have prepared reports with a view to clarifying the matters in dispute and to reduce as far as possible the number of issues to be determined at the final hearing.

Statistics compiled by NSW Fair Trading indicate that in most cases, the current dispute resolution processes are effective and efficient at resolving disputes. In 2010-11 NSW Fair Trading received over 42,000 complaints, of which over 9,000 relate to home building matters. NSW Fair Trading Centres resolved 3,529 of these complaints. While many of the complaints were resolved by the parties themselves, withdrawn or dealt with in another way, some were referred straight to the CTTT because they related to contractual or monetary matters. Of these complaints, over 2,500 were referred to the Home Building Service for mediation, investigation and/or inspection. Of the matters that came to the Home Building Service, only 8 per cent were subsequently referred to the CTTT.

The CTTT has a similar success rate. In 2010-2011, the Home Building Division of the CTTT received 3,475 applications. Some of these would have been the approximately 1,350 matters that were referred by NSW Fair Trading and others would be where the applicants decided to proceed directly to the CTTT as it was a contractual matter or monetary dispute. Of the 3,475 applications, 606 were claims worth over $30,000. Just under 60 percent of these claims were resolved prior to, or at, the first hearing. The other 40 percent were resolved at the second or subsequent hearings.

In October 2011, the NSW Government commenced a review of all NSW Tribunals. The review includes consideration of opportunities for consolidation. The report of the Legislative Council's Standing Committee on Law and Justice was tabled in March 2012. The Government has six months to respond to the recommendations outlined in the Report. There were no specific recommendations made in the Report to alter the arrangements in the CTTT's Home Building Division.

Table 2 – Complaints and disputes received by NSW Fair Trading [5]

Year	2007/08	2008/09	2009/10	2010/11	2011/12 (to date)
Number of complaints and disputes received by NSW Fair Trading	8,258	7,781	10,754	11,617	9,255

[5] Source: Customer Services performance report July 2010 page 2
Home Building Service Monthly Status Report July 2010 – page 7 Dispute Resolution

The Queensland approach

Some stakeholders have requested that the Queensland model of dispute resolution be considered for introduction in NSW. The Queensland system operates in a very similar way to the current NSW system, with a couple of notable differences.

In Queensland, large and complex disputes may be outsourced to a specialist Building Inspector for resolution. There are also penalties for non-compliance with a 'Direction to Rectify' (the equivalent of a NSW Rectification Order). Owners are compelled to allow licensees back on site to rectify defects, and there is no monetary jurisdictional limit to Queensland's Civil and Administrative Tribunal.

Issue 1 – Compel homeowners to allow licensees back on site to rectify defects

In some instances when there is a dispute between a homeowner and licensee, the licensee is willing to perform rectification work, however the homeowner will not allow them access to the property. NSW Fair Trading Building Inspectors currently deal with this by encouraging homeowners to allow access. However, there is no legislative requirement for homeowners to allow licensees onto the property to carry out the rectification work.

It has been suggested that the dispute resolution process could be improved if homeowners were compelled to allow licensees back onto the property to comply with a Complaint Inspection Advice and/or Rectification Orders. This could resolve disputes in their early stages and prevent them from becoming complex and protracted.

It is noted that Queensland's home building legislation already contains a similar provision. If a Direction to Rectify is issued by a Queensland building inspector, the homeowner must allow the licensee access to the property to comply with the Direction.

If a similar requirement was to be introduced in the NSW legislation, it could also provide for circumstances where a homeowner would not be compelled to provide that access, such as when there has been an issue with violent or threatening behaviour.

Issue 2 – Complaint Inspection Advices and Rectification Orders

In the first instance, the dispute resolution process encourages both parties to negotiate their own agreement to resolve the dispute. If this is successful, Building Inspectors will document the agreement in the form of a Complaint Inspection Advice.

This is an informal process that assists both parties to mutually agree to a resolution without proceeding immediately to a Rectification Order. If parties are unable to reach their own agreement, a Building Inspector may issue a Rectification Order if there is work that the licensee is required to rectify or complete. A Rectification Order can also be issued in circumstances where the licensee has failed to fulfil a voluntary agreement reached in a Complaint Inspection Advice.

It has been suggested that issuing Complaint Inspection Advices can prolong the dispute resolution process unnecessarily. Building Inspectors have the ability to determine whether a Complaint Inspection Advice or a Rectification Order is more appropriate, depending on the individual case. However, the question that has arisen is whether the issuing of a Complaint Inspection Advice assists or detracts from the dispute resolution process. If there was no Complaint Inspection Advice, Rectification Orders would be issued by Building Inspectors in their place.

Another issue that has arisen is whether the inclusion of stages or time schedules in Rectification Orders relating to larger jobs would make the dispute resolution process more effective. This could include specifying a date that certain works have to be completed by. The number of stages and the time required to comply with the stages would take into account how complex the job is, the time period required to complete the job, and the licensee's other work commitments.

The implementation of this suggestion would allow the dispute resolution process to be expedited to the next level, such as the CTTT or disciplinary action, if stages are not reached by the specified date. This would provide increased homeowner protection as they would not have to wait until the final date of the Rectification Order to find that the work may not have been completed.

It is currently not an offence to fail to comply with a Rectification Order and therefore a penalty notice cannot be given for non-compliance. Some stakeholders, including those representing consumers, have suggested that allowing penalty notices to be given for non-compliance with a Rectification Order would give the Orders greater force and resolve many disputes more quickly.

Issue 3 – Disputes over $500,000

Various stakeholders have raised concerns about a perceived lack of alternative dispute resolution options for home building disputes over $500,000 and have submitted that the costs and delays associated with pursuing such matters through litigation are excessive. As noted above, NSW Fair Trading's dispute resolution powers do not have a jurisdictional limit, while the CTTT's jurisdiction is limited to matters of $500,000.

Stakeholders have argued that these factors result in matters over $500,000 tending to end up in the courts. Some stakeholders have also argued that a culture of litigation is deeply entrenched in NSW, in particular within the strata sector.

NSW Fair Trading has identified three options to address these concerns, as set out below. Some options would likely have significant resource implications, and there would need to be consideration of how these costs would be met.

1. **Strengthen the promotion of dispute resolution processes**

NSW Fair Trading could more prominently advertise the services currently provided to parties in dispute. Under this proposal, NSW Fair Trading would encourage parties, particularly owners corporations, to explore NSW Fair Trading dispute resolution services before proceeding to a court or CTTT.

There is no limit to the monetary value of a dispute that NSW Fair Trading can deal with under Part 3A of the Home Building Act. Although NSW Fair Trading would not be able to refer disputes involving more than $500,000 to the CTTT, Building Inspectors could provide parties with information on the options available to them and encourage take up of alternative dispute resolution pathways.

2. **Provide an expert referral service for parties to a dispute**

NSW Fair Trading could offer a service under which parties seeking an early resolution to a dispute would contact NSW Fair Trading requesting the appointment of an appropriate alternative dispute resolution practitioner, where they are unable to agree on an appointment. NSW Fair Trading would then appoint an appropriate practitioner, possibly from a pre-approved panel. The parties would jointly bear the costs of the practitioner.

This service could either be limited to “technical” issues (i.e. establishing what is and is not a ‘defect’ in relation to the building work) or could be available for consideration of contractual issues as well. Consideration as to whether the determinations made by such an expert would be binding would also be required.

3. **Establish a Building Disputes Adjudicator**

In Queensland, the dispute resolution process for large and complex matters may be outsourced to a specialist building inspector. The Building Services Authority has access to different panels for specialist work, such as an engineering panel. A similar model could be adopted in NSW.

Alternatively, another possible option would be to establish a new Building Disputes Adjudicator. This would be a statutory position with access to an independent panel of experts. It could operate in a manner similar to the joint expert report model whereby the Adjudicator appoints a single expert or experts to provide advice on matters in dispute rather than having competing reports from each party. This could reduce the costs to parties and remove some adversarial aspects of disputes.

Under this model, consideration could be given to requiring parties to be bound by the Adjudicator's decision.

The Adjudicator could be established as a separate function or office of the CTTT or NSW Fair Trading. It is possible that a position like this may also be able to leverage existing expertise within government such as Public Works and NSW Procurement's pre-qualification panels and building experts.

Alternatively, the Adjudicator could refer parties to privately provided services (e.g. by law firms) and could have powers to appoint a service provider in cases where parties cannot reach agreement. The parties would bear the cost of these services. Whether such a service would focus on technical issues only and whether decisions would be binding would require further consideration.

Another possible proposal not included in the above list would be to disallow disputes to proceed to Court without having first been through an Alternative Dispute Resolution process.

13. **Should home owners be required to allow licensees back on site to rectify defects? In what circumstances would this be inappropriate?**
14. **Are Complaint Inspection Advices useful in the dispute resolution process?**
15. **Should a penalty notice offence be created for non-compliance with a Rectification Order?**
16. **Which option, if any, do you support for disputes over $500,000 and why? Do you have any other suggestions?**
17. **What are your thoughts about alternative dispute resolution?**
18. **Can the current dispute resolution processes be improved? How?**

Key Issue 4: Owner-builders

Background

The Home Building Act's owner-builder provisions allow homeowners to build, extend or do work on their own home. Owner-builder work is defined in the legislation as any work (including supervision and co-ordination) involved in the construction of, or alterations, repairs or additions to a home where the reasonable market cost (including labour and materials) exceeds $5,000 and for which a Development Application is required. This can be for a single dwelling or dual occupancy where one of residences is the principal place of residence for the owner-builder.

These provisions allow homeowners to undertake minor building work around their home without having to be licensed under the Home Building Act. Owner-builders are not in the business of building. However, for their project, an owner-builder is responsible for activities licensees would normally undertake such as supervising tradespeople, ordering and obtaining necessary materials, and making sure that occupational and workplace safety laws are complied with.

The three main principles of the NSW owner-builder scheme are that:

1. the scheme is not to be used as a means of avoiding the licensing requirements of the Act by allowing people to carry on a business of home building work without holding the appropriate licence;
2. homeowners who purchase dwellings upon which owner-builder work has been carried out are aware of this prior to the purchase and have access to recourse in the event that the work is defective; and
3. homeowners continue to have a right to work on their home as long as that work does not put themselves or others in an unsafe situation.

To obtain an owner-builder permit, the applicant must be 18 years or older, own the land or have a prescribed interest in the land, and live or intend to live in the completed home or single dwelling of the dual occupancy as a principal place of residence. The application must also include a description of the proposed work with a copy of the plans and council development application number. If the value of the proposed work is over $12,000, applicants must provide evidence they have completed an approved owner-builder course or can satisfy the approved equivalent qualifications. There are no exemptions from the need to complete the approved course unless the applicant holds an approved equivalent qualification.

While the actual amount of owner builder permits fluctuate from year to year, over the past 6 years approximately 10,000 owner builder permits have been issued each year in NSW. The only licensees that can undertake the type of work authorised by an owner builder permit are licensed building contractors. There are currently 29,580 licensees who are licensed as building contractors. Some of these licenses have conditions on them, for example only being able to undertake work that does not require home warranty insurance, however, in general, these are the licensees that would undertake the type of work that is the subject of an owner builder permit.

Currently, one owner-builder permit will only be issued to one person within a five year period unless exceptional circumstances exist or the new application and the earlier permit both relate to the same land and to related owner-builder work.

A new standardised owner-builder permit course was introduced in 2010 as a result of a number of deaths on owner-builder worksites between 2006 and 2009. Investigations by NSW Fair Trading and WorkCover found that some owner-builders were not fulfilling all of their legal responsibilities. Consequently, NSW Fair Trading developed a new standardised course that must be completed prior to the permit being issued. The course better prepares people who are not trade trained for the range of legal responsibilities, including workplace safety and construction compliance in accordance with approved council plans. The introduction of the course was supported by industry.

A new standardised owner-builder permit course was introduced in 2010 as a result of a number of deaths on owner-builder worksites from 2006 to 2009

The Minister for Fair Trading's Home Building Advisory Council has suggested that where owner-builder work exceeds $50,000 in value, there should be greater regulation of, and assistance provided to, owner-builders.

Issue 1 – Home warranty insurance for owner-builders

Owner-builders are subject to different home warranty insurance requirements than other licensees. Licensees who contract directly with an owner-builder to do home building work must still provide home warranty insurance when the total contract sum for the element of work exceeds $20,000. Secondly, the owner-builder is only required to take out home warranty insurance for the entire project if they decide to sell the house within six years of the work's completion. Home warranty insurance must be obtained by an owner-builder where the market value of the whole project was greater than $20,000 for work completed after 1 February 2012 or greater than $12,000 for work completed prior to 1 February 2012. It is the subsequent purchaser who is the beneficiary under this policy.

Some stakeholders have raised concerns about providing a homeowner with a permit to do building work on their own home, which essentially allows them to act as a builder for that project, at the same time as requiring sub-contractors to obtain home warranty insurance for portions of work done under the project. Sub-contractors working for licensed builders are not required to take out home warranty insurance, as the principal contractor bears this responsibility.

The contract for the sale of a property with owner-builder work must include a note that an owner-builder permit was issued. The home warranty insurance certificate must also be attached. If home warranty insurance was not obtained, the purchaser can void the sale contract before settlement. The home warranty insurance scheme provides protection to a subsequent homeowner where the homeowner is unable to have any defective owner-builder work that was not apparent at the time of purchase rectified due to the death, disappearance or insolvency of the owner-builder.

Queensland's owner-builder permit system takes a different approach to the NSW system. In Queensland, by becoming an owner-builder, an applicant forfeits the right to home warranty insurance on the building work performed. Owner-builders are personally responsible for dealing with individual licensees if problems in workmanship occur and are responsible for payment to rectify any defects or to complete any incomplete work left by a licensee.

Furthermore, in Queensland, subsequent purchasers of homes with owner-builder work do not have home warranty insurance coverage. If the property where owner-builder work was performed is to be sold within six years after completion, in Queensland the prospective homeowner must be provided with a notice which contains:

- details of the work performed;
- the name of the person who performed the work;
- a statement confirming the work was performed under an owner-builder permit; and
- a warning that the building work is not covered by home warranty insurance.

Another detail of the Queensland system which is worth noting is the fact that if an applicant is issued with an owner-builder permit, a notification is entered onto the land title for a minimum period of seven years. The purpose of the notification is to ensure that any future prospective homeowners are aware that owner-builder work has been performed on the property.

The Home Building Advisory Council supports recording the issuing of an owner-builder permit on the land title. The Council also considers that owner-builders should take out home warranty insurance at the beginning of the project, regardless of whether they intend to sell the property.

This certificate of insurance would also cover work carried out by sub-contractors, meaning that sub-contractors would not require separate cover.

Issue 2 – Threshold for obtaining owner-builder-permits

Owner-builders undertaking home building work that is to the value of $5,000 or more are required to obtain an owner-builder permit. A number of stakeholders have voiced their support to have the threshold increased.

Given that building costs have increased since the current threshold was introduced in 2001, it would seem reasonable that the threshold should be raised in line with the increase in the cost of building since the threshold was last raised. If the variation in the Producer Price Index[6] since 2001 is applied to the current threshold of $5,000, the figure would increase to approximately $6,500. Industry stakeholders have long held the belief that the threshold for requiring an owner-builder permit should match the threshold for requiring a contractor's licence under the Act. This is currently set at $1,000.

Issue 3 – Threshold for undertaking owner-builder permit course

The threshold for requiring completion of the owner-builder permit course is currently $12,000. This value was chosen as, at the time, it was the same as the value at which home warranty insurance is required. However, under the *Home Building Amendment Act 2011*, the threshold for requiring home warranty insurance increased to $20,000.

In line with the proposal to raise the threshold for work requiring an owner-builder permit, it would seem reasonable and consistent with the original intent, that it also be raised to remain aligned with the current threshold for home warranty insurance. Any proposed increase would need to be balanced against the risk of encouraging abuse of the system.

Issue 4 – Owner-builder permits for leaseholds

In order to be eligible for an owner-builder permit, applicants must have a prescribed interest in the land to which the permit would apply. NSW Fair Trading is aware of instances where people who hold a 99 year lease have been unable to obtain owner-builder permits as they do not own the land. It has been suggested that the legislation could be amended to provide that a long term leasehold arrangement can be taken to mean a prescribed interest in the land, under certain circumstances.

[6] Producer Price Index shows the difference in the cost of production. This index has been used as a measure when increasing the minimum amount of home warranty insurance cover and as such has been used to amend other thresholds in the legislation.

Issue 5 – Owner-builder work that has already commenced

Occasionally owner-builders commence work on their property before obtaining an owner-builder permit. If this occurs, unlicensed, illegal work is essentially being performed. Although the Act requires that a permit be obtained prior to work commencing, there is no penalty or prohibition on obtaining a permit after work commences.

If an owner carries out work on their home without an owner-builder permit, they are not able to then obtain the permit retrospectively, regardless of how much of the work they have already done. It has been suggested that, in addition to this prohibition, a penalty could be introduced for owner-builders who commence home building work prior to taking out an owner-builder permit.

If a specific penalty was imposed for owners not having a permit when it is required, it would not be as great as a penalty for unlicensed building work and it would not prevent prospective owner-builders from completing the planning, design and development assessment processes associated with the work.

Issue 6 – Five year rule

One of the most important means of preventing abuse of the owner-builder permit system is to ensure that a permit can only be issued for another piece of land every five years. The Act only allows individuals, not corporations, to obtain a permit.

However, there are concerns that some people are still managing to abuse the system, primarily in situations where several people are joint owners of the land. This is a concern echoed by the Home Building Advisory Council. This sometimes leads to a consortium using the owner-builder permit system to avoid the restrictions on the number of permits that can be issued to one person. A husband, then a wife, then any adult children can take out owner-builder permits within the five year period.

This potential loophole is not in keeping with the Act's intent and, as such, should be addressed. This could be done by ensuring that where land is owned by more than one person, the owner-builder permit is obtained in all the owners' names. None of these people would then be able to obtain an owner-builder permit in their own right or as the joint owner of any other piece of land for five years. There would be an exemption power for exceptional circumstances and the legislation could include an appeal mechanism to the Administrative Decisions Tribunal to maintain fairness.

Issue 7 – Single detached dwellings

Under the legislation, owner-builders are permitted to undertake owner-builder work that relates to a single dwelling or a dual occupancy. A dual occupancy can mean an additional dwelling where a single dwelling is already constructed or it can mean the construction of two dwellings. Section 31(2)(c) of the Act states that an owner-builder permit can be rejected if the Director-General is not satisfied that the single dwelling or one of the dwellings comprising the dual occupancy will be occupied as the principal residence of the applicant.

Owner-builder permits are intended to enable individuals who are not trade trained as builders to carry out a project which requires approval and certification under planning legislation. The policy intent of the legislation is to allow a person to build their own home for their own personal use, not for financial gain. There is a concern that by allowing owner-builders to build dual occupancies this creates a loophole which can allow the use of these provisions for commercial reasons. However, the permit is fair provided that it does not allow any undermining of the licensing regime.

It has been suggested that it should not be possible to obtain an owner-builder work permit where the work relates to the construction of a dual occupancy. This proposal is supported by the Home Building Advisory Council.

19. **Do you think that owner-builders should be required to take out home warranty insurance at the beginning of the project? Should sub-contractors be required to take out home warranty insurance when working for owner-builders?**
20. **Should the Queensland provisions, or a variation of those provisions, be adopted in NSW? Why?**
21. **Should the threshold for obtaining an owner-builder permit be increased? If so, to what value and why?**
22. **Do you have any objection to recognising a leasehold arrangement as a prescribed interest in the land?**
23. **Can you see any problems with raising the threshold for the owner-builder permit course in line with the current home warranty insurance threshold? If so, what problems arise and how can they be addressed?**
24. **Do you think a penalty should be introduced for owner-builders who commence work prior to obtaining a permit? If so, what penalty do you think is appropriate?**
25. **Will obtaining an owner-builder permit in all the owners' names close the current loophole? Do you have any other suggestions?**
26. **Do you think that owner-builders should not be able to build dual occupancies? Why?**

Key Issue 5: Disciplinary Provisions

Background

In the course of administering the Home Building Act and related consumer protection legislation, NSW Fair Trading may be required to take enforcement action against individuals or businesses that contravene those laws. Enforcement action is designed to stop unlawful conduct, reduce the likelihood of its re-occurrence, act as a general deterrent and maintain a high standard of competency amongst licensees.

Fair Trading aims to promote a fair marketplace for consumers and traders.

NSW Fair Trading aims to promote a fair marketplace for homeowners and licensees by maximising licensees' compliance with regulatory requirements. Compliance efforts include a commitment to working with licensees and industry groups to promote voluntary compliance. Compliance options can include guidance and advice on self-regulation, education and warnings.

If there are reasonable grounds to believe that a licensee has been involved in breaches of the law, then NSW Fair Trading may take enforcement action. Enforcement options include: penalty notices; public naming and shaming; prosecution; civil penalties; court orders; enforceable undertakings; notices to show cause; criminal penalties; disciplinary action; and disqualification orders.

The vast majority of licensees act in accordance with the legislation. However, there are a small number of licensees who operate outside the scope of the legislation and cause significant homeowner detriment and damage the reputation of responsible members of the industry.

Issue 1 – Restricting phoenix company activity

A "phoenix" company typically involves a licensed building company which is deliberately established as a short term venture only. The company markets and receives funds from homeowners, but then defaults on its obligations and extinguishes its liabilities through insolvency. The business is then re-established through another corporate structure, under the control of the same individuals, to repeat the fraudulent behaviour.

The Commonwealth Government has responsibility for regulating companies under the *Corporations Act 2001* and has made reforms in this area in an effort to curb the ability for companies to 'phoenix' and to minimise the fallout for those who deal with these companies. In the 2010/11 Federal Budget, the Commonwealth announced that it would strengthen tax laws to counter fraudulent phoenix activity.

Phoenix companies not only have the potential to cause immense homeowner detriment, they also affect the legitimate and responsible operators. As phoenix companies often offer lower quotes, they effectively take work away from other genuine licensees.

There are existing powers in the NSW home building legislation which can help reduce phoenix activity in the sector, for instance controls on the issuing of licences. Nonetheless, it has been suggested that more legislative power may be necessary in order to prevent such companies from continually trading and to provide a larger disincentive to act fraudulently.

Legislative amendments could be made which might help strengthen existing powers. For example, existing licensing provisions could be strengthened and clarified as part of the "fit and proper person" test to ensure that NSW Fair Trading has the ability to disqualify licensees and/or refuse to issue licences on the grounds of past conduct which has resulted in loss or detriment to homeowners and sub-contractors.

However, it should be noted that with the creation of a national occupational licensing system, electrical, refrigeration and air-conditioning and plumbing and gas fitting occupations are be regulated nationally in the near future (the current commencement timeframe is 2013). It is anticipated that all other building related occupations will be included in the national system some time after that. This new system will replace the existing state and territory based licensing arrangements. Accordingly, it is the Commonwealth National Occupational Licensing Authority who will determine which building related occupations will be licensed under the national system and what requirements must be met in order to obtain a licence.

The current requirements in NSW do not capture an individual who may resign as a director only months before the company is placed into administration. Such an individual is not captured by the existing provisions because they were not a director when the company went into external administration. Individuals may have a history of being repeatedly involved in entities that trade and then become insolvent causing loss and detriment to others.

Prior to the commencement of national licensing, the NSW Home Building Act provisions could be strengthened to provide that certain applications for a licence could not be approved unless each relevant person in relation to the application for an authority was not a director or person in a position to control or substantially influence the company's conduct or affairs in the 12 months prior to the company being placed into external administration. In addition, such a person would not be able to continue to hold any other licences either individually or as a director of another company.

It must be noted that sometimes, due to certain circumstances, a company may end up in financial difficulties. If this occurs, the company can be put into voluntary administration. This can be a legitimate choice for the director/s while they employ an independent person who can assess all the options available to generate the best return for creditors. Any proposal to include individuals who were directors in the 12 months leading up to the company being placed into external administration from being able to hold another contractors licence must be able to take this into consideration.

Issue 2 – Non-compliance with Rectification Orders

As mentioned earlier, currently, any failure by a licensee to comply with a Rectification Order issued by a NSW Fair Trading Building Inspector can only be dealt with through a complex and lengthy disciplinary process under Part 4 of the Act.

It has been suggested that a power be introduced to issue penalty notices where licensees fail to comply with Rectification Orders issued by building inspectors. The establishment of an offence for failure to comply with a rectification order and placing the offence on Schedule 6 of the Regulation would create an effective way of dealing with non-compliance in this area. In terms of appeal, licensees would be able to request an internal review and, if unsatisfied with this outcome, take the matter to the Administrative Decisions Tribunal.

This would encourage building disputes to be resolved quickly and at a local level rather than escalating into a potentially complex and expensive litigation process. It would provide greater incentive for licensees to comply with rectification orders.

Issue 3 – Qualified Supervisors

If the Directors of a building company are not licensees themselves, they need to employ a Qualified Supervisor, i.e. a person with building qualifications.

There are currently no fixed controls over the turnover or number of jobs a single qualified supervisor is responsible for. A Qualified Supervisor may be unaware of all the projects the company is undertaking and may not be supervising them all but can be issued with a show cause notice for defective work. In addition, there are concerns that NSW does not require that one of the directors of a building company be a qualified builder.

There is no readily available data which can assist in determining how often this lack of control over the work undertaken by qualified supervisors contributes to certain licensees undertaking defective work. However, it has been suggested that, at a minimum, best practice guidelines should be developed on the use of Qualified Supervisors. Many qualified supervisors will be contract managers with total oversight of building operations and some will provide direct supervision of specific projects.

27. Do you agree with the possible proposals to help prevent phoenix company activity in the building industry? Is there anything else that can be done, bearing in mind NSW Fair Trading's jurisdiction?

28. Should NSW Fair Trading building inspectors be able to issue Penalty Infringement Notices for non-compliance with a Rectification Order? Do you think that this will improve compliance with the legislation and Rectification Orders?

29. Do you think that qualified supervisors should be limited in the number of projects that they can oversee? If so, how many projects would be appropriate?

30. Do you think that the current disciplinary provisions provide an effective deterrent from errant conduct?

Key Issue 6: Home warranty insurance

The NSW home warranty insurance scheme is underwritten by the NSW Government and provides important protections for homeowners.

Overview of current scheme

Home warranty insurance provides a safety net for homeowners for when certain things go wrong. The home warranty insurance scheme currently operating in NSW is a mandatory government scheme which is run and underwritten by a branch of NSW Treasury within policy conditions required under the Home Building Act. It is known as a "last resort" scheme, however since 2009 it has effectively operated as a "second-last resort" scheme, as claims can be made when a licensee's licence is suspended because of non-compliance with a money order from a Court or Tribunal, or, if the licensee dies, disappears or becomes insolvent.

As a result of amendments made in 2011, home warranty insurance provides a minimum cover of $340,000 (regardless of the contract price). In practice, this minimum cover also operates as a maximum level of coverage. Homeowners can make a claim when a licensee fails to rectify defective work, and can also claim any legal deposit taken by a licensee if work fails to commence and up to 20 percent of the contract price when a licensee fails to complete work.

The period of cover is six years from completion for structural defects and two years from completion for non-structural defects (**Appendix B** contains a definition of structural work as provided by clause 71 of the Home Building Regulation). An additional six months of cover is provided if the defect is identified in the last six months of the insurance period.

There are a number of exemptions from the home warranty insurance requirements. In particular, the construction of a new multi-unit residential building with a rise of more than three storeys is not required to be covered by home warranty insurance.

The exclusion of high-rise developments from the home warranty insurance scheme was a key recommendation of the NSW Home Warranty Insurance Inquiry in 2003. The view was widely held that high-rise constructions are commercial projects and the risks involved are materially different to those of individuals who are building a home. NSW also fell into line with other states in exempting high-rise residential developments from these requirements.

As a result of this exclusion, the number of licensees able to tender for high-rise developments increased as previous difficulties in obtaining home warranty insurance had reduced the number of licensees who could bid for residential projects.

Evolution of the current home warranty insurance scheme

Home warranty insurance was first introduced in NSW in 1972. It was a government scheme which was run by the same government agency – the Building Services Corporation – that also regulated builders through a licensing regime with disciplinary powers and a role in resolving disputes.

The scheme was privatised in 1997 after a number of inquiries into the operation of the insurance scheme (known at the time as the Building Services Corporation Insurance Scheme) as well as the Building Services Corporation itself. In 2002, following the collapse of HIH, the privatised scheme was changed significantly. The period of cover was changed from a blanket seven years to six years for structural defects and two years for non-structural defects, and a 20 percent cap on completion costs was introduced. The most notable change was that the scheme became a "last resort" scheme. This meant that claims on a policy could only be made when one of three "triggers" occurred, namely when the licensee died, became insolvent or disappeared.

In 2009, a "fourth trigger" for making claims was introduced. This meant that claims could now be made when a licensee's licence was suspended because of a failure to comply with a money order from a Court or the CTTT.

Home warranty insurance must be provided when the value of the work exceeds $20,000.

On 1 July 2010, after years of instability over the continuing market participation of private insurers, the then NSW Government became the sole underwriter/provider of home warranty insurance in NSW through the Home Warranty Insurance Fund operated by the NSW Self Insurance Corporation (SICorp), a branch of the NSW Treasury. **Appendix C** contains a full history of the scheme.

Current home warranty insurance requirements

Under the current scheme, home warranty insurance needs to be provided when the contract price, or if the contract price is not known, the value of the work, exceeds $20,000. The insurance needs to be obtained by:

- a licensee before taking any money from a homeowner or owner-builder under a home building contract and before starting any work under the contract;
- a "spec" builder before starting any work on a property owned by the builder (a "spec" builder is a licensed individual, company or partnership who carries out home building work on land that they own. The building work is speculative, meaning the property is generally intended to be sold at completion);
- a developer before entering into a contract for the sale of a property on which a licensee is doing, or has done, home building work for the developer; and

- an owner-builder before entering into a contract for the sale of a property on which home building work has been done in the past six years.

Issue 1 – Need for a mandatory home warranty insurance scheme

The home warranty insurance scheme is a fundamental consumer protection provided under the home building legislation. While it does not provide coverage in all situations, it provides significant recourse for homeowners whose ability to seek redress for incomplete or defective building work would otherwise be severely compromised by a licensee's death, insolvency, disappearance, or failure to comply with money orders. Particularly in times of economic uncertainty, the value of such protections should not be underestimated.

Nevertheless, some stakeholders have called for the home warranty insurance scheme to be scrapped altogether. There is a strongly held view by some that the scheme does not provide consumers with effective cover and that it amounts to little more than "junk insurance".

Claims data kept by SICorp and Fair Trading provides a strong argument in favour of the scheme and demonstrates that it is continuing to provide relief to homeowners who have suffered losses caused by defective and incomplete building work. Between 2002 and 2011, 2,500 home warranty claims were accepted by insurers[7]. The average value of each claim was $45,200. The vast majority – 94 percent – of home warranty insurance claims arise from building company insolvencies.

A disbanding of the scheme is therefore an unlikely scenario. However, a number of options towards a better scheme are being contemplated and stakeholder feedback on the identified issues, and any other suggestions, is called for.

Issue 2 – How the NSW scheme compares to schemes in other Australian jurisdictions

Every Australian jurisdiction, with the exception of Tasmania, operates a mandatory home warranty insurance scheme. These schemes vary widely in terms of the type, duration and amount of cover, what can be claimed and whether the schemes are government run or privately operated. **Appendix D** provides a comparison of the schemes across Australian jurisdictions.

While there are many differences, there are some notable consistencies across the jurisdictions. For example, all these schemes exempt multi-unit residential buildings that have a rise of more than three storeys.

[7] Minty, D & Hurst, M - Supplement to Quarterly Home Warranty Insurance Reports – Overview to 30 June 2011. Available: http://www.fairtrading.nsw.gov.au/pdfs/Tradespeople/Overview_of_HWI_report_Jun11.pdf

Comparison with the Queensland Scheme

Some stakeholders have called for home warranty insurance scheme in NSW to be replaced by a scheme that emulates the Queensland scheme.

In Queensland, the Building Services Authority is both the insurer and the regulator. A detailed comparison of the schemes is at **Appendix E**. The most significant points of comparison are as follows:

- Home warranty insurance is required in Queensland for work over $3,300 in value. This is the same threshold amount for when a licence is required under the Queensland legislation.
- In NSW, the threshold for requiring home warranty insurance was recently raised and currently any home building work that exceeds $20,000 in value is required to be covered by home warranty insurance. In NSW, home building work (not specialist work) over $1,000 in value requires a licence.
- The Queensland scheme provides cover to a homeowner if the reason they are not covered is because of a fraudulent act by the builder, whereas NSW does not provide such cover.

An argument can be made that the current NSW scheme – with the inclusion of a fourth trigger for lodging claims and government underwriting – adopts the best aspects of the Queensland scheme while avoiding the conflict created by a single body acting as both the insurer and regulator. This was an issue identified during the Inquiry into the NSW Building Services Corporation in 1993, conducted by Peter Dodd, when NSW had a similar scheme to Queensland. Dodd noted that, "*The current one stop shop approach is inappropriate. There is a need to separate the key functions of industry regulation and consumer advice, dispute resolution and insurance.*"

The NSW scheme provides a number of homeowner benefits that are not available under the Queensland scheme. For example, the period of cover in NSW is greater for non-structural defects. Non-structural defects are known in Queensland as "Category 2" defects and homeowners can only lodge a complaint about these between six and seven months after completion of the work. In NSW, they are covered for two years from completion (with an additional six months if the defect appears in the last six months of that period).

Another area where the NSW scheme provides greater benefits for homeowners is the period of time in which a homeowner has to lodge a claim. Queensland homeowners only have 90 days from the event that gives rise to the loss in which to lodge a claim. NSW homeowners have six months to lodge a claim after becoming aware of the defect.

The Queensland scheme has been coined a “first resort” scheme because a homeowner can lodge an insurance claim if the licensee does not comply with a Rectification Order issued by a Building Services Authority Inspector (the equivalent agency to NSW Fair Trading). However, if a licensee does not agree with a Rectification Order, the matter can be taken to Queensland’s Civil and Administrative Tribunal (QCAT). If QCAT rules that the licensee is at fault and the licensee does not rectify the work, then the homeowner can lodge an insurance claim.

The NSW scheme is referred to as a “last resort” scheme. This is because in 2002, the scheme was amended to provide that a claim could only be lodged if the licensee had died, disappeared or become insolvent. However, since the introduction of the fourth trigger in 2009, the NSW scheme now effectively operates as a “second-last resort” scheme. If a licensee does not rectify defective work, a homeowner can apply to the CTTT for a work order. If the licensee fails to comply with the work order from the CTTT, the homeowner can go back to the CTTT for a money order. If this is not complied with, the licensee’s licence is suspended and the homeowner can lodge an insurance claim.

In Queensland, a homeowner is compelled to allow the licensee back on site to rectify the defect if the licensee wishes to fulfil the rectification order. If a homeowner refuses entry to the licensee the homeowner cannot lodge an insurance claim. It has been argued that this requirement to compel a homeowner to allow the licensee back on site to rectify work should be adopted in NSW (see **Key Issue 3 – Dispute Resolution**).

Queensland also provides homeowners with cover if a failure to have insurance in place is due to fraudulent activity by the licensee. NSW does not provide such cover.

Issue 3 – Improvements to current NSW scheme

Some stakeholders have raised specific issues about the operation of the scheme, and, in some cases have suggested options for dealing with these issues. These matters are examined individually below.

Clarification of insurance coverage for rectification work

Concerns have been raised by consumer advocates that the legislation is not clear about whether further insurance cover should be taken out when rectification work is undertaken by the original licensee to fix a defect. This issue arises where the value of the rectification work exceeds $20,000 in value. The argument given is that this essentially comprises “new” work and therefore should be covered by a further certificate of insurance.

However, rectification work undertaken by the original licensee is work arising out of the original contract. When a licensee rectifies agreed defective work, they do not enter into a new contract with the licensee for an additional contract sum. A homeowner would not be expected to pay for this rectification work if the licensee agrees it is to remedy defective work.

Public register for home warranty insurance certificates

The NSW home warranty insurance scheme does not provide a homeowner with cover if their certificate of insurance is not valid, even if this is due to fraudulent behaviour by the licensee. While there is no readily available data about how often this occurs, there is a risk to the homeowner that they may be in possession of an invalid certificate and, as a result, may not have the benefit of home warranty insurance cover.

There is currently no easy way for a homeowner to check the validity of their certificate. A possible way of resolving this concern is to establish a home warranty insurance certificate register where a homeowner can carry out a straightforward online check to find out if the certificate provided by the licensee is valid. Such a register could be available on the NSW Fair Trading website, similar to the licensing register. It should be noted however, that privacy concerns arising from this proposal would require further consideration.

Alternatively, the certificate of insurance could be issued directly to the homeowner by SICorp, rather than through the builder.

20 percent cap for incomplete work

The home warranty insurance scheme has a number of exclusions and limitations. In particular, claims for incomplete work are capped at 20 percent of the contract price.

The intention of the cap is to limit the exposure of insurers to the costs of completing insured homes in situations where licensees disappear or collapse and cannot complete the building work. The cap was intended to protect insurers against under-pricing of contracts by (subsequently insolvent) licensees. It should be noted that the 20 percent cap applies to the final varied contract price, not the original contract price.

Cover for any loss for non-completion is only one aspect of the cover provided by the scheme. Separately and additionally, claims may be received and accepted for other related losses such as rectifying pre-existing defects in the building, and accommodation and relocation costs incurred as a result of the licensee collapse. The loss amounts, if accepted by the insurer, will be added up to the total value of the cover provided by the insurance.

The risk for homeowners is that if payments made during the building project exceed the true value of the building work undertaken by more than 20 percent, and the licensee collapses, the scheme will not cover the homeowner's loss for any advance or additional payments they have made. A homeowner's loss may also arise if the licensee has provided a particularly cheap quote or deliberately under-quoted for the cost of the contract, and following the licensee's collapse, the cost of another licensee completing the home is more than 20 percent greater than the original contact cost.

It remains the case that some level of cap is necessary to influence the behaviour of homeowners to take some responsibility for the risk of accepting cheap or under-priced tenders, and/or agreeing to schedule progress (or informal licensee requests for) payments well in advance of actual construction activity and value. However, some stakeholders have suggested that the cap should be greater than the current 20 percent.

Issue 4 – Renaming the scheme

There is some uncertainty among homeowners as to the nature of the home warranty insurance scheme. A relatively common misconception is that the scheme is a "first resort" scheme that operates much like a car insurance or home insurance scheme. In fact, the scheme can only be accessed after other options for recourse in relation to a breach of statutory warranties have been exhausted.

It has been suggested that the current name of the scheme may contribute to this misunderstanding, particularly through its use of the word "insurance". The intention of the home warranty insurance scheme is to provide a safety net for homeowners where a licensee is unable to fulfil their contractual obligations to a homeowner to complete the contracted work, or to rectify defective home building work because of their death, disappearance or insolvency.

For home warranty insurance policies issued on or after 19 May 2009, homeowners are also able to make a claim under the policy where the licensee's licence is suspended because the licensee failed to comply with a money order of a Court or the CTTT in favour of the homeowner.

The scheme is not an "insurance" scheme in the commonly understood sense; in fact its operation more closely resembles that of a "safety net". Professionals operating in the building industry, such as certifiers, architects, engineers and building consultants may also obtain professional indemnity insurance. This product operates differently to the home warranty scheme and provides cover against claims arising from professional services provided for such matters as professional advice, design, certification, contract administration and project management.

This issue was examined by the Commonwealth Parliament's Standing Committee on Economics in 2008, which noted similar public misconceptions around last resort schemes. The Committee recommended that the scheme's name be changed on the basis that the present title is not effective and "may mislead homeowners in relation to its level of coverage"[8].

One way of addressing these concerns is to change the name of the home warranty insurance scheme to a name such as the "Homeowner Safety Net" or "Completion Guarantee" to better reflect the true nature of the scheme as it currently stands.

Issue 5 – Exemptions from home warranty insurance (including high-rise exemption)

As discussed previously, multi dwelling residential buildings more than three storeys in height are exempt from the home warranty insurance requirements of the legislation. This exemption exists in all other Australian jurisdictions with mandatory home warranty insurance. The application of this exemption can be confusing in cases where multi-storey developments involve a mix of residential and commercial uses.

This exemption was introduced after a 2003 inquiry[9] into home warranty insurance recommended that high-rise buildings be removed from the scheme. The inquiry found that high-rise construction of buildings greater than three storeys are "fundamentally commercial projects … [and] … risks are materially different to those of an ordinary house construction."

The rationale for excluding multi-storey developments is that they are undertaken by developers and therefore it isn't a homeowner that goes into contract with the licensee but rather it is a large commercial undertaking. These building projects are also subject to greater involvement by industry professionals. As such, there should be less need for a last resort homeowner safety net for this segment of the housing market.

Some stakeholders have called for the current exemption to be clarified or for investigations to be undertaken into whether the current structure of the exemption remains appropriate. For example, it has been suggested that refurbishment of existing high rise buildings for re-use as residential buildings be included in the exemption.

One of the suggestions is for NSW Fair Trading to develop guidelines to better explain the application of the exemption to homeowners and industry and to explain when renovation and maintenance of previously constructed multi-storey buildings would require home warranty insurance.

[8] Standing Committee on Economics, *Australian's mandatory Last Resort Home Warranty Insurance scheme*, November 2008, p 62

[9] Grellman, Richard - Final report of the *NSW Home Warranty Insurance Inquiry* – October 2003

Clarification of definition of "storey" for the purposes of determining the high rise exemption

The HWI insurance exemption is based on the proposed building having a rise in storeys of more than 3 and containing 2 or more dwellings. The Regulations also provide that "a *rise in storeys* has the same meaning as it has in the *Building Code of Australia"* and that **"***storey* does not include a space within a building if the space includes accommodation only intended for vehicles."

The drafting of the definition of "storey" has been questioned during a recent court case. This begs the question whether the present definition provided by the legislation is sufficiently clear.

Issue 6 – Section 92B of the Act

Section 92B of the Home Building Act was introduced in 2003. The section extends a home warranty insurance contract between an insurer and a licensee to include any home building work undertaken at the address stated in the certificate of insurance, whether the work is done by the licensee or some other person. It also provides that an insurer can recover money for any paid claims from the insured licensee or the licensee named in the contract.

The intent of section 92B was to ensure that home warranty insurance covered circumstances where work under a contract was undertaken by somebody other than the person holding insurance cover for the work, for instance where a licensee obtains home warranty insurance in his or her name, but enters into a home building contract in the name of a related entity, such as a family company. It was not, however, intended to apply where a completely different entity carried out the building work; i.e. where one licensee obtained the insurance cover and passed, or sold it on, to another licensee, who had been unable or unwilling to obtain their own insurance cover.

Following the introduction of section 92B, insurance stakeholders raised strong concerns with the provision, arguing that, if applied, it would significantly increase their risk and consequently lead to increased premiums. To address these concerns, an exemption from the operation of the provision was given through the Home Building Regulation 2004. The exemption has been re-issued on an annual basis since 2004.

It has been suggested that the problem with section 92B is not necessarily its intent, but rather the drafting, which inadvertently increases the level of risk for the insurer.

Accordingly, the question that has been raised is whether section 92B is actually necessary and that the concerns it was meant to address could be overcome by a more rigorous

certificate evidence regime. There is also no readily available evidence to suggest that many homeowners have found they have a valid certificate of insurance but cannot claim because the licensee has entered into the contract in a different trading name.

Issue 7 – Eligibility criteria

As the sole provider of home warranty insurance in NSW, SICorp is responsible for establishing the eligibility criteria for builders wishing to obtain insurance cover. In addition, SICorp determines the maximum value of work that a builder may undertake, whether this comprises a single job or multiple jobs. Insurance policies are refused for work over and above this cap.

The eligibility criteria are not set in the Home Building Act directly, but they do form part of the market practice guidelines under section 91A of the Act. Similar requirements were placed on builders by the former private insurers. Applications for insurance require detailed financial information including recent balance sheets, profit and loss statements or tax returns, statement of personal assets and liability and declaration of jobs undertaken in the last 12 months.

While it is understood that the number of builders who have not been able to obtain eligibility for insurance cover is relatively low, some stakeholders are concerned about the current criteria. However, the existing criteria were designed to reduce the level of risk to the scheme, while at the same time keeping the premiums low. Any removal of that risk protection would in all likelihood result in an increase in premiums.

SICorp has a scaled eligibility criteria and frequency of review based on the perceived exposure to the fund. For example, small renovation builders, once they have been deemed eligible, do not require further review of that eligibility. If these builders were to apply for increased insurance cover, then they would be subject to the relevant requirements and review for that risk exposure. A detailed explanation of SICorp's eligibility criteria is available on its website at www.homewarranty.nsw.gov.au

Former private insurers often required licensees to provide them with a deed of indemnity or bank guarantees. SICorp does not require bank guarantees at all and the use of deeds of indemnity for small builders has been reduced. In addition, unlike the former private insurers, SICorp does not require unconditional deeds, rather they are limited to a set period and amount and are generally only required when the licensee is generating profits but not keeping those profits in the business.

There is a "managed builder" program in place to assist those who are finding it difficult to obtain eligibility for insurance on grounds other than their finances, such as new builders, builders who struggle with profit margins, or builders who are new to contracting with home owners.

The current eligibility criteria are based on the experience of the operation of the scheme and consultation with key industry associations. For example, exponential growth in turnover has been shown to be a common feature amongst failed builders. The current eligibility criteria are designed to ensure businesses grow in accordance with their management expertise and financial strength.

Some stakeholders have expressed concern that this is unnecessarily inhibiting their ability to grow as a business. On the other hand, many licensees are eligible to undertake more work than they choose to carry out.

Issue 8 – Definition of "disappeared" for the purposes of lodging a claim

One of the triggers for access to the home warranty insurance scheme is provided when a licensee or owner-builder has disappeared. An insurance contract must indemnify homeowners under the insurance contract for the following losses or damage in respect of home building work covered by the insurance contract:

- loss or damage due to non-completion of work because of insolvency, death or disappearance of the licensee; or
- loss or damage arising from a breach of a statutory warranty in which the homeowners cannot recover compensation from or have rectification work done by the licensee or owner-builder because of the insolvency, death or disappearance of the licensee or owner-builder.

NSW Fair Trading can assist homeowners by conducting investigations as to the whereabouts of the licensee or owner-builder and provide the homeowner with advice if they cannot be located. An insurer can make its own enquiries and not approve a claim if it has been able to locate a licensee or owner-builder.

A recent appeal in the District Court ruled that "disappeared" related to NSW, that is, the licensee or owner-builder could not be found "in NSW". The insurer had appealed on the basis that the whereabouts of the owner-builders was known, ie they had not disappeared but they were living overseas. The Court having regard to the *Interpretation Act 1987* imported the words "in NSW" into its reading of clause 52(3) of the Home Building Regulation.

The meaning of the word 'disappeared' in clause 56(4) of the Home Building Regulation may need to be better defined. It is proposed that an appropriate definition would be that disappeared means that the licensee or owner-builder cannot be found in Australia.

Issue 9 – Providing optional "top-up" cover

The current requirement in the legislation is for all building work, no matter what the value of the work, to be covered by a minimum amount of cover. Currently this is $340,000. Since the scheme commenced the minimum cover has also operated as the maximum cover. Accordingly, a home warranty insurance policy for a $2 million home has the same cover as a policy to cover the construction of a $25,000 pool.

One of the suggestions that has been made is for an additional or adjunct scheme to be created, which would allow a homeowner to "purchase" additional home warranty insurance cover. For example, if a homeowner was building a home where the contract value was $1 million, then, as long as their builder had the appropriate eligibility, the homeowner could choose to pay additional premiums to get additional cover. It should be noted that such a scheme would need to operate independently and not function so as to increase premiums in general.

31. **How does the NSW home warranty insurance scheme compare with other jurisdictions? What model do you think would work best and why?**
32. **Should new rectification work of a significant value be covered by a further certificate of insurance? Why?**
33. **Is there a need for a searchable public register of home warranty insurance policies?**
34. **Does the current 20 percent cap for incomplete work provide enough consumer protection? Should the cap be increased to 40 percent? Why?**
35. **Do you think the scheme should be renamed? Do you have any suggestions for such a name?**
36. **Should the current exemption from home warranty insurance requirements for the construction of multi-storey buildings be retained? Why?**
37. **Does the high rise exemption require further clarification? If so, what would you clarify?**
38. **Is the current definition of "storey" in the Act sufficiently clear? Should any changes be made?**
39. **Do you think that section 92B should be repealed? Why?**
40. **What are your thoughts on the current eligibility criteria? Can the process be made easier, keeping in mind the level of risk taken on by the insurer and the possible ramifications on the cost of premiums?**
41. **Does the definition of "disappeared" for the purposes of lodging a claim need to be clarified? Do you agree with the proposal put forward in this paper?**
42. **What are your thoughts around home owners being able to purchase top-up cover? Is this necessary?**

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Reference Material

The following were used to inform this discussion paper:

- Access Economics, The NSW Economy in 2020 – A Foresighting Study – September 2010
- Legislative Council, Standing Committee on Law and Justice, Report of the Home Building Amendment (Insurance) Act 2002 – September 2002
- Legislative Council General Purpose Standing Committee No. 2, Inquiry into the operations of the Home Building Service – December 2007
- NSW Parliamentary Library Research Service, E-Brief: Home Warranty Insurance – March 2010
- Parliament of NSW South Wales, Joint Select Committee on the Quality of Buildings, Report on the Quality of Buildings – July 2002
- Peter J. Tyler Associates, Research Consultants, A review of the NSW Home Warranty Insurance Inquiry – March 2004
- Queensland Building Services Authority, Organisation Review Project; Final Report – June 2011
- Senate Standing Committee on Economics, Australia's Mandatory Last Resort Home Warranty Insurance Scheme; Australian Parliament, November 2008
- Victorian Legislative Council, Standing Committee on Finance and Public Administration; Inquiry into Builders Warranty Insurance, Final Report – October 2010

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Appendix A: Consultation Submission Form

Have your say

The NSW Government values your feedback on the issues and options presented in this discussion paper. This questionnaire can also be filled in over the internet and submitted electronically, please go to www.fairtrading.nsw.gov.au

This questionnaire has been designed to get your quick feedback on some of the key issues facing the home building industry in NSW. It will take around 10 - 15 minutes to complete. You do not need to answer every question and you are welcome to fill out only the areas which interest you the most.

If you would like to provide more in-depth feedback, we invite you to send us a detailed submission.

The deadline for submissions is **5:00pm on 18 August 2012**

Please complete and return this submission form, or any other type of written submission, by the closing date, by one of the following methods:

Email to: policy@services.nsw.gov.au

Post to: Home Building Act Review
Fair Trading Policy
PO BOX 972
PARRAMATTA NSW 2124

Fax to: (02) 9338 8990

All submissions may be made publicly available under the *Government Information (Public Access) Act 2009* or for other purposes. If you do not want your personal details released, please indicate this clearly in your submission.

Fair Trading thanks you for your interest in this issue.

ABOUT YOU

1. What is your involvement in the home building industry?
   - ☐ I am a home owner
   - ☐ I work in the industry
   - ☐ I am an owner-builder
   - ☐ I am a legal practitioner
   - ☐ I am a developer
   - ☐ Other (please specify) ……

HOME BUILDING CONTRACTS

2. Should the threshold for large home building jobs be increased from $5,000 to $20,000 to match the current home warranty insurance threshold?

   Yes ☐ No ☐

Comments/Reasons:……
……

3. Do you think all contracts should have a progress payment schedule?

   Yes ☐ No ☐

Comments/Reasons:……
……

4. Should the law only allow cost plus contracts to be used in certain circumstances?

   Yes ☐ No ☐

Comments/Reasons:……
……

STATUTORY WARRANTIES

5. Do you think the definition of 'completion' should be amended to allow subsequent purchasers to use the occupation certificate as the main point when completion occurs?

   Yes ☐ No ☐

Comments/Reasons:……
……

6. Do you think 10-year maintenance schedules should be required for strata schemes?

   Yes ☐ No ☐

Comments/Reasons:……
……

7. Do you think 'structural defects' should be further defined in the Act?

   Yes ☐ No ☐

Comments/Reasons:……
……

DISPUTE RESOLUTION

8. Should licensees who do not to comply with a rectification order be given a penalty notice?

   Yes ☐ No ☐

Comments/Reasons:……
……

9. Should home building disputes worth more than $500,000 be required to first attempt a formal dispute resolution process before the matter is heard by a court?

   Yes ☐ No ☐

Comments/Reasons:……
……

10. Which option/s do you prefer to increase the up-take of dispute resolutions in the home building industry (see the discussion paper for more information)?

☐ Strengthen the promotion of dispute resolution processes

☐ Provide an expert referral services for parties to a dispute

☐ Establish a building disputes adjudicator

☐ None of these

☐ Other (please specify) ……

OWNER-BUILDERS

11. Owner-builders undertaking home building work worth more than $5,000 that requires a development application from Council must get a permit. What do you think is the right monetary threshold for obtaining an owner-builder permit?

☐ $1,000 (current threshold for contracting to do home building work)

☐ $5,000 (current owner-builder permit threshold introduced in 2001)

☐ $6,500 (owner-builder permit threshold plus building cost increases since 2001)

☐ $20,000 (current home warranty insurance threshold)

☐ Other (please specify): ……

Comments/Reasons:……
……

12. The threshold for undertaking an owner-builder course is currently $12,000. Do you think this should be the same as the threshold for home warranty insurance (i.e. $20,000)?

Yes ☐ No ☐ Other ☐ (please specify): ……
Comments/Reasons:……
……

13. Do you think owner-builders should be allowed to build dual occupancies?

Yes ☐ No ☐
Comments/Reasons:……
……

DISCIPLINARY PROVISIONS

14. Do you think there should be stricter controls around the number of qualified supervisors a builder needs?

Yes ☐ No ☐
Comments/Reasons:……
……

15. Do you think the licensee should be required to notify their qualified supervisors of all projects the licensee is undertaking?

Yes ☐ No ☐
Comments/Reasons:……
……

HOME WARRANTY INSURANCE

16. Do you think there is a need for a searchable public register of home warranty insurance policies?

    Yes ☐ No ☐

Comments/Reasons:……
……

17. Do you think the home warranty insurance scheme should be renamed to better reflect the role of the scheme?

    Yes ☐ No ☐

    If yes, which do you prefer?

    ☐ Homeowner Safety Net

    ☐ Completion Guarantee

    ☐ Other (please specify) ……

18. Do you think the current 20% cap for incomplete work should be increased to 40% to provide better consumer protection?

    Yes ☐ No ☐ Other ☐ (please specify)……

Comments/Reasons:……
……

YOUR RIGHTS AND RESPONSIBILITIES

19. How well do you feel you understand your rights and obligations under the Home Building Act?

    Extremely well ☐ Somewhat well ☐ I know the basics ☐ Very poorly ☐

Comments/Reasons:……
……

20. By law, builders must give consumers a copy of the *Consumer building guide* issued by Fair Trading before they enter into a contract for residential building work worth more than $5,000. Are you aware of this requirement?

    Yes ☐ No ☐

Comments/Reasons:……
……

21. What do you think about the *Consumer building guide?* In my opinion the Guide:

    ☐ has too much information

    please specify what you would like to see deleted: ……
    ……
    ……

    ☐ has too little information

    please specify what you would like to see added: ……
    ……
    ……

    ☐ is just right

    ☐ other (please specify) ……

    Comments/Reasons:……
    ……

OTHER COMMENTS

22. Are there any other comments you would like to make?

……
……
……
……
……
……
……
……
……

Appendix B: Definition of “structural defect”

(1) For the purposes of sections 18E (1) (b) and 103B (2) of the *Home Building Act 1989*,

structural defect means any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:

(a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used, or

(b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building, or

(c) results in, or is likely to result in:

(i) the destruction of the building or any part of the building, or

(ii) physical damage to the building or any part of the building, or

(d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.

(2) In subclause (1):

structural element of a building means:

(a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams, and

(b) any component (including weatherproofing) that forms part of the external walls or roof of the building.

Appendix C: Home Warranty Insurance Overview

1972
Home Warranty Insurance first introduced as a first resort government-run scheme with a maximum cover of $40,000.

1972 - 1987
Two insurance schemes commenced operating under the “House Purchasers Agreement” and “Trade Indemnity Agreement” and were administered by the Builders Licensing Board. Both schemes initially provided cover of up to $40,000 for building and trade work respectively

1987-1990
The Board was abolished and replaced by the Building Services Corporation (BSC). The BSC was a merger of the former Builders Licensing Board and the Plumbers, Gasfitters and Drainers Board. The BSC subsequently also assumed the responsibility for the licensing of electrical contractors and electrical mechanics formerly under taken by the Department of Minerals and Energy.

March 1990
The Schemes were replaced with the Comprehensive Insurance Scheme and the Special Insurance Scheme. The Comprehensive Insurance Scheme provided a maximum cover for defective work of $100,000 and $25,000 for incomplete work. Major structural defects were covered for seven years, and general defects for three years, from the date of substantial commencement of the building work. The Special Insurance Scheme applied to other residential building work, being single trade or specialist trade work. The maximum level of cover was $10,000 for one year.

1992- 1993
The Royal Commission into the Building Industry report released (Gyles report), and the Inquiry into the Building Services Corporation report (Dodd report), which recommended the disbanding of Building Services Corporation and a move toward private underwriting.

1997
1 May 2007, the private Home Warranty Insurance scheme commenced, all defects were required to be covered for seven years. The minimum cover required was $200,000. This applied to both defective and incomplete building work.

2001
HIH Casualty and General Insurance Limited and FAI General Insurance Company Limited (with approximately 40% of the market) were placed into liquidation.

2002
The Home Warranty Insurance market was affected by the withdrawal of certain reinsurers. Royal & Sun Alliance (now Vero) and Reward are the only insurers.

The National Review of Home Builders Warranty Insurance and Consumer Protection (the Allan report) and the Joint Select Committee on the Quality of Buildings (the Campbell report) released. The home warranty scheme moves from a “first resort” to “last resort” scheme. Cover only for the death, insolvency or disappearance of the builder for six years for major structural defects and 2 years for all other defects.

2003
Home Building Service within NSW Fair Trading commences providing early intervention dispute resolution service including on-site inspection and mediation services.

Final report of the *NSW Home Warranty Insurance Inquiry* (Grellman Inquiry) released. The Inquiry found that home warranty insurance should continue to be provided by the private sector and made seven primary recommendations for reform of the scheme including removal of high rise developments from the scheme.

2004
CGU Insurance Limited (part of the IAG Group) and Lumley General Insurance Limited become home warranty insurance providers. The Home Warranty Insurance Scheme Board was established to monitor the scheme's operation and provide advice to the Minister.

2005
QBE Insurance (Australia) Limited and Calliden Limited commenced providing home warranty insurance.

2007
Report of the Review of Home Building Licensing released. Former Government announces the Home Building Act is to be re-drafted taking into account the Report's recommendations.

The minimum level of cover provided under the scheme increased from $200,000 to $300,000. Cover for incomplete work set at 20% of the contract price (including variations).

The Legislative Council's General Purpose Standing Committee No. 2 tabled its report of its *Inquiry into the Home Building Service*. The Committee made 21 recommendations to improve the regulation of home building in NSW.

2009
Home warranty insurance policies issued from 19 May 2009 onwards also enables home owners to be able to make a claim when the contractor's licence 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.

Wesfarmers General Insurance Limited (trading as Lumley General) announces its withdrawal from the market by 1 January 2010. CGU Insurance Limited advises it will withdraw from the home warranty insurance market at 30 November 2009.

In November, the former NSW Government announces it will underwrite the scheme, utilising an outsourced model managed by the NSW Self Insurance Corporation, from 1 July 2010.

2010
New Home Warranty Insurance arrangements commence on 1 July 2010 when the NSW Self Insurance Corporation took over as the sole provider of home warranty insurance within NSW. The NSW Self Insurance Corporation trades as the NSW Home Warranty Insurance Fund.

Since 1 July 2010 certificates of insurance have been issued on behalf of the Home Warranty Insurance Fund by its insurance agents, Calliden Insurance Limited and QBE Insurance (Australia) Limited. Between 1 July and 30 September 2010, Vero Insurance Limited also issued certificates of insurance as an agent on behalf of the Home Warranty Insurance Fund.

Home warranty insurance policies issued before the commencement of the new Government underwritten scheme remain in force, and the insurer that issued the policy remains on risk for the duration of the period of cover.

Appendix D: Home Warranty Insurance Comparison

	NSW	**QLD**	**VIC**	**ACT**	**SA**	**Tas**	**WA**	**NT** (still being developed)
Mandatory HWI scheme	Y	Y	Y	Y	Y	N	Y	Y
Govt Statutory HWI scheme	Y	Y	Y	Fidelity Fund	N	N	N	Insurance/Fidelity Fund
Private HWI cover	Y	N	Y	Y	Y	N	Y	Y
Last resort	Second-last	N	Y	Y	Y	N/A	Y	Y
First resort	N	Y	N	N	N	N/A	N	N
Threshold for Insurance	$20,000	$3,301	$12,000	$12,000	$12,000	-	$20,000	$12,000
Sum Insured	$340,000	$200,000 before completion, $200,000 post completion $200,000 ancillary cover	$200,000	Value of the contract work to maximum $85,000	$80,000 minimum	-	Maximum $100,000 or the value of the building work whichever is less	$200,000 less any non-completion payment
Excess	$250	Nil	$500	$500	$400	-	$500	Nil
Deposits	10% of contract value $20,000 or less; 5% of contract value > $20,000	10% of contract value between $3,300 and $20,000; 5% of contract value $20,000 or above	10% of contract value < $20,000; 5% of contract value > $20,000	Maximum $10,000	Up to $1,000 of contracts between $12,000 and $20,000 or 5% of contract value if $20,000 or above, plus any extra cost to complete	-	6.5% of the contract – maximum $20,000	5 % of contract price
Periods of Cover	6 years 6 months from completion	6 years 6 months from contract or payment of premium or commencement	6 years from completion	5 years from certificate of occupancy	5 years from completion	-	6 years from completion	6 years from certificate of occupancy
Non-Completion Cover (cap) amount and claim period	20% of the contract value; within 12 months of contract, commencement or cessation of, the work	Up to $200,000	20% of contract value	N/A	N/A		N/A	20% of the contract price up to a maximum of $200,000
Time Limit for Claim Lodgement	6 months of becoming aware of the problem	90 days from event	180 days from event	90 days from event	90 days from event	-	6 years from completion	N/A

Appendix E: Home Warranty Insurance – NSW and Queensland Schemes

NSW SCHEME	QUEENSLAND SCHEME	COMMENT
Type of insurance		
"Last resort" – Death, disappearance, insolvency or failure to pay a court or tribunal money order. Mandatory.	"First resort" – Failure to comply with a direction to rectify, death, disappearance or insolvency. Mandatory.	With the introduction of the fourth trigger in 2009, NSW now resembles a second last resort scheme rather than last resort.
Underwriter		
Government. The NSW Self Insurance Corporation (SICorp) is the sole provider of insurance. Certificates are issued on behalf of SICorp by its insurance agents Calliden Insurance and QBE Insurance.	Government. The Queensland Building Services Authority (BSA) is the sole provider of insurance. It also carries out builders licensing, dispute resolution, education and disciplinary and enforcement functions.	
Scope of insured work		
Residential building work, single trade work, swimming pools and spas, kit homes. NSW also covers reasonable legal costs incurred in seeking to recover compensation from the builder.	Residential construction work, outbuildings, extensions, renovations. Associated building work is not covered.	Associated building work is covered under section 5, 11 and 12 of the QBSA Reg 2003 (see below). Under the legislation and insurance policy many items are not covered by hwi.
Minimum insured value		
$20,000	$3,301	
Period of cover		
Six years from completion for structural defects and two years from completion for non-structural defects, plus an additional 6 months if the defect is identified in the last six months of the cover.	6.5 years for Category 1, major structural defects. The BSA is only liable to pay for loss for a category 2 defect where it first becomes evident within 6 months after the date of practical completion and a complaint lodged after that 6 months and before 7 months.	NSW scheme has a longer period of cover for non-structural defects
Sum insured		
Minimum $340,000. Limited to 20% of contract price for claims of incomplete work.	Maximum of $600,000. This includes up to $200,000 for pre-practical completion, $200,000 for pre-practical completion relating to vandalism, forced removal, fire, storm or tempest and up to $200,000 for post practical completion.	The QLD cover includes a maximum of $5,000 for alternate accommodation, removal and storage costs whereas there is not a limit for NSW.

Premiums		
Minimum of $160 for all projects. Premiums calculated on an assessment of factors including location, value and type of work.	Premium calculated on the value of work. Minimum of $184.50. Maximum of $4,796.25.	
Time limit for claim lodgement		
Six months (equivalent to 180 days) from becoming aware of defect.	90 days from event. 14 days from event if claim relates to non-completion due to vandalism or forcible removal or fire, storm or tempest and must also include a statement to the police.	
Subsidence		
Cover provided if a result of defective work.	Cover provided if builder tested the ground in accordance with Australian Standards.	
Uninsured consumers		
No cover.	Cover if failure to have insurance policy is due to fraudulent activity by the builder.	
Lodging a claim		
Homeowners must lodge a claim form to their insurer as a separate application to any dispute resolution application made to Fair Trading or the CTTT.	Homeowners submit a Residential and Commercial Construction Work Complaint Form to the BSA and if the work is covered under the Queensland Home Warranty Insurance scheme they will consider any insurance entitlement under the scheme as part of the resolution process	
Eligibility		
SICorp determines eligibility requirements. Applications for insurance require detailed information including recent balance sheet, profit and loss statement or tax returns, statement of personal assets and liabilities and declaration of jobs undertaken and currently insured for the past 12 months.	If a builder fulfils the licensing requirements, they are automatically eligible for insurance as the licensing and insurance arms of the BSA are linked. Builders may be subject to a financial soundness test, but do not need to provide a financial guarantee. System of demerit points leading to possible loss of licence for infringements.	

Exemptions and exclusions		
Construction of multi-storey dwellings with 3 or more storeys. Director-General can grant exemption if there are exceptional circumstances. Other exclusions include losses or damage relating to war, terrorism, unrest, a nuclear event, failure to maintain appropriate pest control, consequential loss, malfunction in mechanical or electrical equipment that was not due to the poor workmanship of the builder, failure to mitigate fair wear and tear and others.	Construction of multi-storey dwellings with 3 or more storeys. Where the insured purchased the land on which the work has been performed, they are not covered where damage, destruction, defect or subsidence was evident prior to completing the contract to purchase the land. The insured is not entitled to payment for loss where the loss is caused by or contributed to by defective design, the gradual deterioration of the work caused by fair wear and tear or by the lack of maintenance or neglect. Fire and tempest exclude earthquake, erosion, landslip, tidal wave, change of water course, failure of artificial devices for the storage or conveyance of water or gas. Storm excludes persistent bad weather or heavy persistent rain by itself, water rising from the ground and an increase in sea level. The policy does not cover carpet and vinyl floor coverings irrespective of whether they are defective, damaged or improperly installed.	NSW policy will cover people for defective design if it was designed by the builder.

Queensland Building Services Authority Regulation 2003 – Associated Building Work

The following may be "associated" building work:

- Fencing
- Landscaping
- Painting
- Installation, renovation, repair or replacement of any of the following:
    - Air-conditioning
    - Driveways, paths or roads
    - Units for heating water, regardless of the source of energy for heating, and including units for heating swimming pools
    - Refrigeration
    - Roller shades and shutter screens
    - Security doors and grills
    - Solar power units and associated electrical components
    - Swimming pools, or spas that are not part of a bathroom
    - Water tanks that are not part of a primary water supply for the residence or related roofed building
- Work of a value of $3,300 or less
- Electrical work under the Electrical Safety Act 2002
- Inspection, testing installation or general repair by a person who holds an electrical mechanic licence, of a fire detection system, alarm system or emergency warning and communication system for a building
- Erection of scaffolding
- Hanging of curtains or blinds or laying of carpets, floating floorboards or vinyl
- Work consisting of earthmoving and excavating
- Laying of asphalt or bitumen
- Work consisting of the preparation for, or installation of insulation for acoustic or thermal control