

BUILDING
PERFORMANCE

Building Consumer Protection Review

DECEMBER 2022



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful

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Executive summary

The residential consumer protection measures in the *Building Act 2004* and associated regulations have not been reviewed since significant changes came into force in 2015. The Building Consumer Protection Review (the Review) examined whether the measures are meeting the overarching objectives of the Building System Reforms that aim to:

- lift the performance of the building regulatory system
- get building work done right first time
- provide fairer outcomes if things go wrong.

Effective consumer protection measures are needed to support the success of the building control system, which aims to ensure that building work is done right the first time. Consumers can be significant agents of change for the building system, as they can shape change in builders', suppliers' and designers' behaviour through their questions and choices.

Consumer protection measures are needed in order to:

- support consumers to make informed decisions, to ensure consumers are aware of and able to manage the risks associated with building work,
- ensure consumers are aware of their rights and builders are aware of their obligations, and
- ensure consumers can enforce those rights.

These roles are difficult for many consumers because they generally have significantly less information than builders and can face significant transaction costs to seek redress when things go wrong.

What the Review found

The Review found that:

1. Consumers are still unable to easily access and understand appropriate information that educates them on their rights and builders' obligations. This makes it difficult for consumers to have the requisite knowledge to be empowered agents of change and enforce their legal rights when things go wrong.
2. Overall written contract use is high but are less likely to be used for renovations. The written contracts used can be complex and weighted towards the builder and it is difficult for consumers to know if the contract is fair and balanced, and if they are adequately protected.
3. Seeking redress is still difficult, complex and costly for consumers, which allows some builders to avoid being held to account when things go wrong.

A summary of all the recommendations can be found in **Annex Two**.

While the recommendations aim to help empower consumers by ensuring that they have a good understanding of the consumer protection measures, much responsibility still rests with consumers to be proactive and willing to enforce their rights.

The overarching recommendation of the Review is that there should be ongoing work to increase consumers' and builders' awareness and understanding of the existing residential consumer protection mechanisms available. The Review recommends supplementing the education and awareness-raising initiatives with development of a centralised, trusted consumer hub of unbiased information, which would improve consumers' ability to easily access unbiased information that clearly suits their needs.

Section One: Information and awareness (Page 12 to 17)

There is typically an imbalance in information between consumers commissioning residential building work and their builders. As such, ensuring that consumers have access to and use reliable information is an important consumer protection measure that allows consumers to understand the risks associated with undertaking building work. The more consumers use reliable information, the more they are aware of the risks they face and what they can do to make informed decisions.

The building checklist and disclosure statement are the existing regulatory measures that aim to ensure consumers have good information about risks. The Review recommends improving the format and useability of the building checklist and disclosure statement. These improvements would make the documents more engaging and useable for consumers. To maximise their effectiveness, the Review also recommends that the Ministry of Business, Innovation and Employment (MBIE) work with other trusted advisors and networks to improve uptake of these measures.

The Review also recommends:

- possible regulatory changes, such as amending the building checklist and disclosure statement settings and looking at ways to address the limitations to effectiveness of the current compliance and enforcement regime.
- for consideration to be given to opportunities to improve builders' compliance with their obligations to provide the required information to consumers through occupational regulation of licensed building practitioners.

Section Two: Shared understanding and communication (Page 18 to 25)

Good communication between builders and consumers can help prevent small issues from escalating into bigger problems or disputes. Good communication allows all parties involved in commissioning building work – the consumer, and the builder or developer – to have a shared understanding of what will be delivered.

The requirement to have a written contract for residential building work over \$30,000, or if requested by a consumer, is the existing regulatory measure that aims to ensure that both consumers and builders have a shared understanding of the building work. The Review recommends improving builders' and consumers' awareness of the written contract requirements and uptake of written contract use for lower value building work. Initiatives to increase awareness and uptake of contract use could be complemented by working with the Construction Sector Accord and industry bodies such as Master Builders and Certified Builders to improve builders' understanding of their legal obligations.

The Review also recommends:

- possible regulatory changes, including considering whether the written contract requirements should be strengthened, whether the \$30,000 threshold for residential written building contracts should be reduced, and changes to address the limitations to effectiveness of the current compliance and enforcement regime.
- more work to better understand the current work underway that may developer/on-seller contracts, as they relate to building work, are being used and if protections are needed for them.

Section Three: Problem resolution (Page 26 to 35)

It is important for builders to build it right the first time. While there are consumer protection measures that provide consumers with support if they spot an issue or defect with the building

work, consumers are not well placed to identify defects in the first place (as they often have no building expertise) and the Review found they are often reluctant to use formal dispute resolution processes to enforce their rights if things do go wrong.

The 12-month defect liability period and 10-year implied warranty period are the existing regulatory measures aimed at strengthening consumers' ability to get redress from builders. The Review recommends improving consumers' understanding of the mandatory warranty periods, and what these measures mean for them. Subsequent owners may face additional challenges in enforcing some of the 12-month defect liability period and the 10-year implied warranty period. The Review recommends that work is done to increase information for subsequent owners on the consumer protection measures available to them and dispute resolution processes should a defect arise.

The Review also recommends:

- that work should be done to highlight that dispute resolution processes are not only services to use as a last resort, and it can be beneficial to use them earlier. In particular, the development of an 'early intervention service' should be explored; an independent third party to help parties problem solve their issues could improve outcomes for consumers.
- that more work is done to understand the barriers that consumers face using the current dispute resolution processes when trying to hold builders to account. This work includes a watching brief on any improvements in builder behaviour as a result of changes that will be introduced to occupational licensing.

Private guarantee products are available and can provide consumers additional protection over the mandatory warranty periods, but consumers have raised some concerns about them. The Review found that there may be a potential case for regulating private guarantee products if these concerns cannot be addressed through non-regulatory means. To determine if regulation is necessary, the Review recommends that more work to understand the barriers faced by consumers, and to work with private guarantee product providers to improve the transparency and effectiveness of their products, be undertaken first.

It can be hard for consumers to get redress if the builder is no longer in business. Insurance or warranty products can provide protection for this scenario, however limited options currently exist, which can make it difficult for consumers to protect themselves if the builder goes into liquidation. The Review recommends work is done to increase information for consumers on the importance of consumers doing due diligence into a builder's track record, including the implication of any previous liquidations.

Purpose of the Report

This report details findings of the Building Consumer Protection Review (the Review). The Review examines whether the current consumer protection measures set out in the *Building Act 2004* and associated regulations are effective at preventing things going wrong in the first instance, and lead to fair outcomes if they do. The Review also examines whether the consumer protection measures are still fit-for-purpose now and into the future.

This report makes recommendations to address gaps and opportunities to improve outcomes for consumers¹. These recommendations fall into three categories for action:

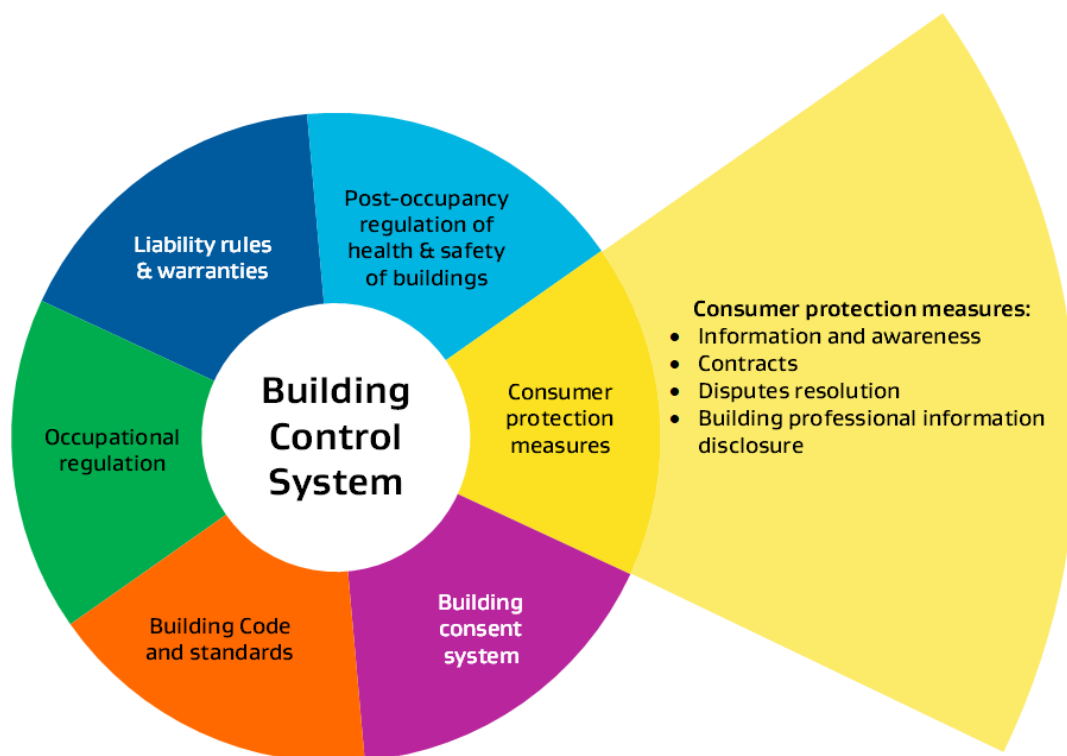
1. A proactive information and education campaign aimed at consumers and builders.
2. Adjusting the existing regulatory settings.
3. Further work to better understand new and emerging issues.

Why do we need consumer protection measures?

Consumer protection is a key element to a successful building control system

The building control system encompasses many critical elements that, together, aim to ensure building work is done right the first time. This includes quality building standards that are effectively monitored and enforced, a skilled and competent building workforce, a building consent system, and informed and empowered consumers.

Consumer protection measures sit alongside, and support, the other building control system measures to lift the performance of the building regulatory system, get building work done right the first time and provide fairer outcomes if things go wrong. This is visualised in the image below.



¹ In the report, 'consumers' is referring to people commissioning building work. This is often a homeowner.

Consumer protection mechanisms, if working well, can deliver substantial improvements to the building control system. This is because consumers have the potential to be significant agents for transformation in the building control system and could be key drivers of system change by asking the right questions of their designers and builders.² The interface between designers, builders³ and their clients (consumers) is a critical one.

Without informed consumers there is an over-reliance on other parts of the building control system to manage risk. This unduly places pressure on the other elements of, and participants in, the building control system.

Consumer protection measures support consumers to participate confidently in the building system

Effective consumer protection measures are necessary to help consumers to make well-informed decisions when faced with choices about builders and building work, and provide access to effective redress mechanisms within the building context.

A lack of consumer knowledge is regarded as a significant barrier to potential improvements to our housing stock. If consumers are aware of the risks and how to manage them, this can lead to better outcomes and improve the quality of building work in New Zealand.⁴

Building safe, healthy and durable homes in a cost-effective way requires consumers to be equipped to participate confidently in the building and construction market and to be able to hold builders to account. Participating confidently means consumers are able to make informed decisions, are aware of and able to manage risks, are aware of their rights and obligations, and are able to enforce those rights.

However, as discussed below, this is difficult for many consumers because consumers commissioning residential building work can have significantly less information than builders and consumers face significant transaction costs to seek redress when things go wrong.

Consumers commissioning residential building work can have significantly less information than builders

Consumers are infrequent purchasers of residential building services, which means they are poorly placed to understand what a good build process looks like, are less able to identify risks and are less likely to be aware of options available for managing those risks.

For most people, commissioning building work is a rare event, so they have little experience to draw on. This lack of experience makes it more difficult for consumers, when making decisions, to take into account risks in choosing builders, building design, materials and the risk of unexpected cost. Without knowing these risks, it is difficult for consumers to know whether to, for example, purchase insurance or whether there is value in paying a little extra for a licensed site manager to monitor quality and manage risks during the build process.

Building work can be technically complex and requires an understanding of the responsibilities of many different parties. Consumers' lower levels of understanding can make it harder for them to assess the quality and cost of the building services they are commissioning and understand how their choices can impact the final 'product'.

² BRANZ (2020) *Mapping the consumer landscape*.

³ The Report's reference to 'builders' is reference to the 'building contractor'. A building contractor is the person (building contractor) who has a client (consumer) has asked to do building work. A building contractor might be a plumber, electrician or any other tradesperson that the consumer is dealing with directly.

⁴ BRANZ (2020) *Mapping the consumer landscape*.

Despite this, consumers still bear the onus to make the right choices when commissioning building work. This is why it is so important that consumers undertake due diligence and seek expert advice when they commission building work or buy a new home.

Consumers (especially residential building consumers) are more inclined to purchase services that cost less without realising this may mean they are of less quality. For example, research has found that a consumer's decisions about features of a building, including the type of insulation, the orientation of the building and many fittings are primarily based on upfront cost, which are more influenced by the builder who will have less regard to lifetime operating costs.⁵

Consumers face significant transaction costs to seek redress when things go wrong

Poor building work can negatively impact a homeowner's wellbeing, including their financial wellbeing, and physical and mental health. Given consumers' lower level of understanding of the risks and processes involved with building work, these negative impacts can be significant if things go wrong.

If risks are properly managed, then the likelihood of things going wrong is reduced.

Consumers find it difficult to enforce their rights against a builder, which can result in high transaction costs when things go wrong. Problems that occur during or subsequent to a build may be a result of failures by any one or more of many people involved in the whole process. As consumers have difficulty holding builders to account, they can end up unfairly bearing the costs of issues or defects instead of building practitioners that should be fixing their defective work.

Why do we need a review?

Residential consumer protection mechanisms do not appear to be working as intended

A number of residential building consumer protection measures came into force in 2015. They were aimed at helping consumers to make well-informed decisions, transact with confidence, and to assist consumers to hold building contractors (and other parties) to account in practice. These measures have not been reviewed since they took effect.

Research commissioned by the Ministry of Business, Innovation and Employment (MBIE) and undertaken by Colmar Brunton in 2018 found that, despite these consumer protection measures, homeowners were still unaware of the risks they face in the build process, steps to manage risk, and avenues for redress when things go wrong. For example, homeowners know little about the Building Act and are even less aware of consumer protection measures contained in the Building Act.

This finding is supported by research undertaken by BRANZ in 2020. For this research, BRANZ reviewed over 30 research projects that asked consumers for their opinions and experiences in building and explored consumers' level of knowledge. This research found that homeowners have a low level of knowledge about building, and that information is ad hoc, hard to find and piecemeal. Another recurring theme from the research is that homeowners have a poor understanding of their rights and responsibilities, who does what, and what is the primary channel of communication during the build.

⁵ BRANZ (2020) *Mapping the consumer landscape*.

There are changes in the market and consumer choices since the measures were implemented

There have been significant changes in the building sector and environment since the 2015 consumer protection measures came into force.

The measures' design was based on a number of assumptions that may no longer be appropriate, particularly in light of a changing market with different consumer preferences and a shortage of builders. For example, the assumption that providing consumers with more information will help them make informed decisions or make builders more accountable for fixing defects may not be correct.

More work is needed to consider a range of consumer journeys that are common in today's market, such as a building renovation, purchasing a land and home package or purchasing a completed house.

What approach have we taken to the Review?

MBIE's Building System Reforms are a whole-of-system approach that aim to:

- lift the performance of the building regulatory system
- get building work done right first time
- provide fairer outcomes if things go wrong.

The Building System Reforms have three current areas of focus: the review of the building consent system, occupational regulation reform and the review of consumer protection measures.

Scope of the Review

The Review assessed whether New Zealand's existing consumer protection system for people undertaking building work is achieving the overarching objectives of the Building System Reforms. This included assessing:

- the extent to which the current measures are working as intended and whether the measures are still fit for purpose in the current environment (Part 4A of the Building Act); and
- opportunities to improve settings to better achieve desired consumer protection outcomes.

The Review involved extensive research and gathering evidence about how the current consumer protection measures are working. The Review has identified several limitations and reasons why the consumer protections measures may not be working as intended. These span the measures' design including the assumptions that informed the measures, how they were implemented, and limitations with the current compliance and enforcement mechanisms.

The current residential building consumer protection measures are:

- Builders must provide consumers with a **simple checklist** and **disclosure statement** before the contract is signed.
- Builders must have a **written contract** for residential building work above \$30,000, or when requested by a consumer.
- When the build is complete, builders must provide the client (consumer) with **information they need to maintain the building**.
- Builders must **fix defective building work with no questions asked within one year of completion**. This reverses the burden of proof and the builder must prove that the defective work or products are not their fault.

- In addition to the 12-month defect repair period, residential building contracts have **implied warranties**⁶ that a consumer can rely on for up to 10 years after completion. The burden of proof reverts back to the consumer to prove there is a defect and there is a pathway for consumers to pursue **remedies for breaching** the implied warranties.

Approach to evaluating consumer protection measures

In order to evaluate whether the current consumer protection mechanisms are achieving the overarching objectives of the Building System Reforms, MBIE first identified the specific outcomes we would expect to see if the consumer protection measures were working as intended (see the 'outcomes framework' in **Annex One**).

MBIE then sought a range of evidence to assess the extent to which these outcomes were occurring. This evidence includes:

- **A review of New Zealand's existing building consumer protection system, and supporting disputes resolution process**, which included a review of existing research relating to the consumer protection measures and internal MBIE data.
- **Research into building consumer protection measures in other jurisdictions**, including how they differ from New Zealand's building consumer protection system.
- **Discussions with key internal and external stakeholders** to get a better understanding of how the measures are working in practice and where there may be issues. External stakeholders included Consumer NZ, HOBANZ, The Building Disputes Tribunal, BRANZ, Citizen's Advice Bureau, The Law Society, the Government Centre for Disputes Resolution, New Zealand Master Builders Association (Master Builders) and New Zealand Certified Builders.
- **Formal research undertaken by an external research agency (The Research Agency/TRA)**⁷ into homeowners' and builders' awareness, understanding and use of consumer protection measures and dispute resolution processes, and the steps they take to manage risks when undertaking building work. This work also considered the reasons why the system was, or was not, working as intended. TRA conducted a quantitative survey of homeowners and builders, and then conducted in-depth qualitative interviews and group sessions to further understand individuals' behaviour, motivations and challenges.

Structure of the Report

Consumer law relies to a significant extent on consumers taking action for themselves. Accordingly, the findings of the Review and the recommendations have been organised in the three main areas where consumers can take action for themselves, which all contribute to the overarching objectives of the Building System Reforms. These are:

1. **Information and awareness:** This section assesses whether consumers are gathering the information they need to understand and manage the risks they face.
2. **Shared understanding and communication:** This section assesses what steps consumers are taking to reduce misunderstandings and ensure the build process goes smoothly.
3. **Problem resolution:** This section assesses how builders are incentivised to build it right the first time and what consumers can do if something goes wrong.

⁶ The implied warranties were introduced in the 2004 legislation, the remaining consumer protection measures were introduced in 2015.

⁷ This report can be found at <https://www.building.govt.nz/getting-started/building-system-reforms/resources/>

Section One: Information and awareness

Context: Providing access to reliable information is an important consumer protection mechanism. Information can increase consumers’ awareness of the risks they face and assist consumers to identify the information that they need to make informed decisions about the building work they are commissioning.

The level of information, and the type of risk that a consumer may require information on, will differ depending on the type of building project and where they are in the build process.

Overview

What we expect to see

Consumers should be well-informed and aware of the risks associated with building work and take action to minimise the risks they identify.

Current measures in place to support this outcome

Builders must provide consumers with a **prescribed building checklist and disclosure statement** if:

- the work is over \$30,000, or
- the consumer asks for it, regardless of the total cost of the work.

Measure	What the measure does	Intended effect
Building checklist	<p>The checklist gives consumers tips and information about the build process and the minimum requirements of a contract.</p> <p>It is designed to help consumers with the seven key steps in the build process.</p>	<p>Owners can distinguish between building contractors’ and practitioners’ records.</p> <p>Over time, more difficult for poor performers to get work and stay in the market. Leads to improved building quality.</p>
Disclosure statement	<p>The disclosure statement must cover key information about the builder’s business, including:</p> <ul style="list-style-type: none"> • their name and/or legal name of the entity • the key contact person for the project • insurance details • any guarantees or warranties they offer. <p>This information can be provided as part of the contract, instead of in a separate document.</p>	<p>Regulations to require businesses to disclose particular information are often used to enable consumers to get the information they need to make decisions.</p> <p>Compulsory disclosure requirements have the objectives of promoting transparency and accountability and reducing information search costs where the product, service or the relevant consumer information is complex, or the consumer information is difficult to gather.</p>

MBIE can issue a **\$500 infringement fee to builders** who do not provide consumers with the building checklist and disclosure statement before entering into a residential building contract. This must be issued within six months of the offending occurring.

What the Review found

Based on research undertaken by BRANZ in 2020 and the findings of the TRA research, the Review found that **consumers have a low level of awareness of the risks involved in building work and how to protect themselves**. Many are still not taking the necessary steps, or know how to access reliable information to mitigate their risks. As a result, these consumers are not undertaking the necessary due diligence steps they should be doing. The TRA research found that many consumers are also not provided with the building checklist and disclosure statements available, or do not understand what to do with the information if they do receive it. Based on feedback from internal stakeholders, the Review found that is difficult to enforce the requirements for builders to provide the building checklist and disclosure statement for building work over \$30,000.

The Review found that the main causes of low consumer awareness are:

- 1.1 Consumers become overwhelmed trying to find the information that they need and often do not know where to look. Often, they prefer to rely on informal sources like friends and family to educate them on the risks. However, this may not always be the best information in terms of accuracy or relevance to different types of building work.
- 1.2 Consumers, particularly those who engage builders to undertake renovations, often place high trust in the builder. They rely on the builder to navigate the build process, including any issues, and to provide them with information. Over-reliance on the builder may leave the consumer vulnerable to being misled about their rights.
- 1.3 The building checklist and disclosure statement are not being widely used. However, the effectiveness of these tools are tempered by the fact that they are often not provided and are difficult to understand.
- 1.4 There are limitations in the effectiveness of the current monitoring and enforcement regime which makes it difficult to penalise builders who do not provide the building checklist and disclosure statement.

Discussion

Finding 1.1 Consumers can become overwhelmed by all the different and varying information sources available and are still relying on information from informal sources

Based on the TRA research and feedback from a variety of stakeholders, the Review found that most consumers have no or limited experience with building work. This can make it difficult for consumers to know the right questions to ask or know what to look for when commissioning building work. The TRA research also found that, because of their limited experience, many consumers rely on recommendations from friends and family for builders. While informal sources of information can be helpful, the TRA research found that that this advice can vary in accuracy and relevance to a consumer's particular project, and therefore may not be suitable or accurate.

The TRA research also found that consumers often rely on informal sources of information about risks and how to manage them. If consumers are not made aware of risks and consumer protection measures from these informal sources, they are likely to remain unaware and unprotected.

The findings from the TRA research highlighted that there is information available for consumers, but it is ad hoc, in many different places and therefore difficult to find and navigate. Some online resources are biased and provided by interested parties, or are generic and do not give consumers enough information about their specific circumstances.

BRANZ research noted that, overall, there is a great deal of information about building work available.⁸ The problem is that it is scattered very widely. It is very difficult for consumers to judge whether they have found the best or most up-to-date information available. In other words, the problem is around ease of access and convenience

TRA also found that while unbiased information can be found on multiple government websites, it is not always accessible, up-to-date, or tailored to consumers' needs.

MBIE recommends:

Rec 1.1	To make consumer protection information more accessible, ongoing work to increase consumers' awareness and understanding of the existing residential consumer protection mechanisms available to support them. This could be done by undertaking an ongoing information and education campaign to actively engage consumers with unbiased content that helps raise awareness of the importance of due diligence and what tools are available to them . Information would target the different consumers commissioning residential building work. This will help consumers have the information and tools they need to proactively manage the risks and improve outcomes.
Rec 1.2	To support the ongoing work to increase consumers' awareness and understanding, consider the development of a centralised, trusted consumer hub of unbiased information for consumers. The hub would serve as the first port of call for consumers during the whole build process.
Note	These recommendations would make available to consumers the knowledge that is needed for them to become empowered consumers who are agents of change, but responsibility still rests with consumers to be more proactive and seek out this information.

Finding 1.2 Most consumers are still passive in their due diligence and put a lot of trust in their builder, particularly consumers who are engaging builders to undertake renovations

BRANZ research identified that consumers generally place a lot of trust in builders and rely on them for information.⁹ This may be due to consumers' lack of experience undertaking building work and therefore having limited knowledge of the build process, the risks involved and that they 'do not know what they do not know'. This high trust in the builder may contribute to the lack of written contracts for some types of building work as discussed in **Section Two** of this Report.

The Review found that high trust in, and reliance on, the builder for information was particularly the case for people engaging a builder to undertake renovations, who have a lower perception of risk and therefore are more likely to be casual in their approach to due diligence and contracting. For example, the TRA research found that only three per cent of consumers undertaking minor renovations, and seven per cent of consumers undertaking major renovations viewed the process as risky.

⁸ BRANZ (2020) *Mapping the Consumer Landscape*.

⁹ BRANZ (2020) *Mapping the Consumer Landscape*.

TRA research highlights that those with connections to the sector and those who have previously engaged in building work before are most likely to be more aware of, and use, formal protection measures. The TRA research also found that consumers who have not built before are more likely to place greater trust in their builder without seeking or accessing independent information or advice. Consumers who have not built before are more likely to be at risk of being misled. Stakeholders interviewed as part of the Review including the Law Society and HOBANZ, and consumers interviewed through TRA research, highlighted examples where builders or developers had misrepresented statutory protections in contracts. Examples included charging a client extra for a 12-month defect repair agreement (even though this is already a legal requirement) and offering only a 3-month defect repair period (even though the legal requirement is 12 months).

Further, the TRA research found that consumers generally do not have a good understanding of what different brands stand for in the building sector. For example, some people who took part in the TRA research thought a Master Builders membership is a form of government accreditation, or that the Master Build Guarantee is backed by government.

MBIE recommends:

Rec 1.3	As part of the recommended ongoing work to increase consumers’ awareness and understanding , include information about the importance of using a licensed building practitioner and how this may help to reduce risks for the consumer when undertaking building work. This could also include information to clarify what the different building sector organisations and brands (such as Master Builders and Certified Builders) mean. For example, while Master Builders is a well-recognised brand, its members do not have to be licensed to be a Master Builder, and despite some people’s perception, the Master Build Guarantee is not backed by government.
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Finding 1.3 The building checklist and disclosure statement are not being widely used

While the building checklist and disclosure statement were intended to help consumers do proper due diligence and make better decisions about who to engage, its effectiveness has been tempered by the Review’s finding that these tools:

- are often not provided
- are often not provided early enough
- are difficult for consumers to understand.

The TRA research shows that many consumers are not provided with the building checklist and disclosure statement. Despite the requirement to provide this information if building work is over \$30,000, or the consumer asks for it, TRA research showed that only 43 per cent of people surveyed were provided with the disclosure statement and only 32 per cent were provided with the prescribed checklist. For builders, only 18 per cent surveyed reported that they provided the checklist to consumers, and only 26 per cent provided the disclosure statement. Some builders are not aware that they are legally required to provide this information under the Building Act.

TRA research found that for those consumers who were provided with the building checklist and disclosure statement, it is common for this information to be:

- lost with all of the other paperwork given at the beginning of the build process.
- provided at a stage too late in the process – e.g. when the contract is being signed – to influence a consumer’s decision about who to employ and how to protect themselves.

The required text for building checklists and disclosure statements is set out in the *Building (Residential Consumer Rights and Remedies) Regulations 2014*. Consumer feedback has been that the current building checklist and disclosure statement are difficult for people to understand as the

text is too dense and technical. In addition, many consumers do not know what to do with disclosure statement when they receive it. For example, consumers often do not understand what insurance product referred to in a disclosure statement means, and how that insurance product may or may not protect them should something go wrong.

MBIE recommends:

Rec 1.4	Improve the format and useability of the building checklist and disclosure statement and make them easier to access and understand. This includes making the documents more visual and engaging, and considering whether the documents should be tailored to suit the different types building work consumers commission.
Rec 1.5	To maximise the effectiveness of the building checklist and disclosure statement, MBIE should work with other trusted advisors and networks (such as such as lawyers, banks, lenders and mortgage brokers) to determine if these groups have a role to play in providing the building checklist to homeowners and helping them to understand how to use it, as well as helping clients to understand the purpose and content of disclosure statements.
Rec 1.6	MBIE also recommends considering regulatory changes to the building checklist and disclosure statement settings , including whether the threshold is still appropriate and whether similar obligations should be made for on-sellers/developers.

Finding 1.4 There are limitations in the effectiveness of the current monitoring and enforcement regime, which makes it difficult to penalise builders who do not provide the building checklist and disclosure statement

The Building Act requires that the builder provides the consumer with a building checklist and disclosure statement before a residential building contract is entered into. While builders can be issued infringement fees for not providing the building checklist and disclosure statement when required, this is currently difficult for MBIE to enforce.

Limitations in the current enforcement settings include:

- **Low penalties:** the infringement fee for non-compliance is \$500 and may not effectively act as a deterrent for builders who do not provide this material
- **Time limitations:** MBIE cannot enforce an infringement notice because an offender must be notified of a hearing request within six months of the offending occurring. Complaints about offending are typically raised after this six-month period and as a result MBIE is practically unable to enforce infringement notices.

MBIE recommends:

Rec 1.7	To improve compliance, look into ways to address the limitations to effectiveness of the current compliance and enforcement regime . This may include things like addressing the time limitation issue, examining whether offences in this are best dealt with by way of infringements and whether the current penalties could be strengthened.
Note	Opportunities to strengthen the accountability of builders providing the required information to consumers will be considered as part of MBIE’s occupational regulation reforms. For example, once the new Licensed Building Practitioner Code of Ethics (the

Code of Ethics) comes into effect,¹⁰ licensed builders will be subject to clear behavioural standards that will be clear to consumers. If a licensed builder does not comply with the building checklist and disclosure statement obligations, this will be a breach of the Code of Ethics¹¹. A consumer can make a complaint against the builder that may result in disciplinary action by the Building Practitioners Board.

¹⁰ The Code of Ethics comes into effect on 25 October 2022.

¹¹ This will be a breach of the obligation to 'Comply with Law'.

Section Two: Shared understanding and communication

Context: Ensuring that everyone involved in commissioning building work – the consumer, and the builder or developer – has a shared understanding of what is being asked is an important part of the build process.

Good communication with the builder from the outset around timeframes, cost escalation and roles and responsibilities can help ensure that consumers have realistic expectations of the build process. Misunderstanding or disagreement over the cost and timeframes for completing building work are two of the most common reasons for disputes arising.

Given the complexity of building work and the risks involved, it is important that consumers have a written contract in place. The contractual approach only works if builders and developers are accurate when budgeting the cost and scheduling the activities for the build process, and the terms and conditions are fair.

Overview

What we expect to see

Consumers should be well-informed and aware of the risks associated with building work and take action to minimise the risks they identify.

Current measures in place to support this outcome

It is **mandatory to have a written contract for residential building work over \$30,000**, but consumers may choose to have a written contract for smaller projects.

Measure	What the measure does	Intended effect
Mandatory written contract for work over \$30,000	Written contracts are useful for ensuring that all parties to the transaction have a shared understanding of what is to be delivered, by when, the costs associated, and what will happen in the event of a dispute.	A well written contract can help to minimise the risk of disputes during or after the completion of the building work as it reduces the likelihood of misunderstandings.

What the Review found

The Review found the following:

- 2.1 Good communication can help the building project to run smoothly and can prevent issues and disputes once the project has begun. This communication is ideally supported by a written contract.
- 2.2 Overall, there is high use of contracts for work over \$30,000, however contracts are used less for renovations, which may leave some homeowners exposed to risk.
- 2.3 There are opportunities to improve awareness and compliance with mandatory contract requirements. There is room to improve builders' awareness of their legal obligations.
- 2.4 Some homeowners and builders have indicated a desire to change the written contract threshold. New Zealand's written contract threshold is higher than similar thresholds in many other jurisdictions.

- 2.5 While overall written contract usage is high for new builds, many consumers do not seek legal advice on their residential building contract. Where there are written contracts, there are quality issues with some of them.
- 2.6 A growing number of people are purchasing new builds directly from developers and there may be a gap in protection for this group. Consumers often have limited ability to negotiate terms in the written contracts used.

Discussion

Finding 2.1 Good communication can help the building project to run smoothly and can prevent issues and disputes once the project has begun

A mismatch in expectations can lead to disagreements and disputes

Research undertaken by BRANZ found that if there is a mismatch of expectations between consumers and builders, or if consumers' expectations are not realistic, it can lead to disagreements or disputes.¹² This research also found that homeowners' advance expectations were vastly different to what actually occurred. Examples of mismatched or unrealistic expectations include homeowners not having the same understanding as the builder about how a design will look once it is finished, through to expectations around timeframes slipping or product costs increasing due to external market forces.

Builders' good communication with consumers, that improves consumers' understanding of the building project as it progresses, fundamentally determines the consumer's overall experience. BRANZ also found that builders who had a habit of communicating honestly with their client and who kept clients informed of problems were more likely to be able to maintain a functional and healthy relationship with the consumer.

Builders may face barriers to good communication

The TRA research found:

- Amongst builders, there is a clear understanding that managing homeowner expectations and clear communication is what determines whether a build will go smoothly.
- Not all builders are well equipped to consistently provide clear communication throughout the build. Many are small companies or sole traders who are time poor. They are often focusing 'on the tools' and this can result in project administration and communication falling by the wayside. For larger building companies, communication is also crucial. Communication barriers can often come in the form of miscommunication between the multiple different parties involved in the process, including project managers, sales representatives, architects and homeowners.
- Builders can face pushback from consumers if they charge for administrative tasks and communications. Not all consumers see the value in paying builders to discuss, plan and communicate; they would rather see builders hard at work on their home.

Current sector pressures can make it hard to set clear, up-front expectations

Uncertainty created by recent sector pressures has made it harder to have clear, up-front expectations. The TRA research highlighted that, current pressures on the sector including COVID-19 lockdowns and the resulting disruptions to supply chains, are leaving consumers exposed to uncertainty around timelines and price increases. Likewise, with supply issues and escalating prices creating uncertainty and significantly pushing timelines for a build, it is more difficult for builders to

¹² BRANZ (2020) *Mapping the Consumer Landscape*.

manage client expectations and to manage increasing costs without creating price disputes with the client.

Some building contracts are evolving to reflect the current market pressures. For example, Master Builders has indicated that they are no longer using fixed-price contracts because of the high likelihood of cost increases and delays for the foreseeable future.

In this environment of market uncertainty, upfront communication about the market context and a shared understanding of what this means for the building project is key.

There is a role for greater use of tools to help facilitate project management and communication between the builder and consumer. Examples highlighted in the TRA research include content provided by building companies that sets out what to expect in the different stages of the build, and apps like Co-Construct that have all the plans, timelines, financials and variation decisions recorded for both homeowner and build team. MBIE notes that BRANZ is currently working to develop a resource called 'Building Together', which will support builders to have good communications and relationship management with their clients.

MBIE recommends:

Rec 2.1	As part of the recommended ongoing work to increase consumers' awareness and understanding of the consumer protection measures, include information to improve consumers' understanding of the build process, the risks involved, consumers' legal rights, the importance of good communication and how to manage expectations.
Rec 2.2	Investigate options to improve builders' competency around client communication and managing expectations. This could include working with the Construction Sector Accord and industry bodies such as Master Builders and Certified Builders.

Finding 2.2 Overall, there is high use of written contracts for work over \$30,000, however written contracts are used less for renovations, which may leave some homeowners exposed to risk

The Review found that overall written contract usage appears to be high, but the extent to which consumers use a written contract varies across build types.

TRA research found that 82 per cent of people surveyed who directly commissioned building work over the value of \$30,000 had a contract in place, indicating a high level of compliance with the requirement to have a written contract for building work over \$30,000.

However, people commissioning renovations were less likely to have a contract in place, particularly for lower value work. Of the participants surveyed by TRA, only 58 per cent who were undertaking minor renovations had a contract and 72 per cent who were undertaking major renovations had a contract in place. The lower level of contract use in renovations was further confirmed by homeowners who took part in in-depth interviews with TRA. All five participants interviewed did not have contracts in place, instead relying on quotes even for higher value renovation work.

Reasons cited for the low level of written contract use for those who are renovating included:

- Consumers engaging builders for renovations tend to have lower risk perception, which contributes to their casual attitude with setting up building work.
- Getting quotes, estimates and getting the builder to agree to the work can feel like a formal process for some homeowners, who may assume quotes offer the same level of protection as a contract.

- A perception that the need for a written contract is often linked to whether work requires structural changes, rather than linked to a \$30,000 threshold.
- Contracts can be seen as a complex formal step that can ‘spook’ the opposite party – for smaller work, builders and homeowners often prefer a less formal approach based on trust.
- Contracts can be seen as a step in the process that can slow things down, particularly in a market where labour shortages mean securing a builder can be difficult.

While smaller renovation jobs are likely to be less risky than large new builds, rising building costs increase the likelihood of price increases and can mean even small renovations tip over the \$30,000 threshold and require a contract. Quotes typically do not include the same level of detail as a contract and in particular, may not be explicit about the process for managing variations and disputes. Relying on quotes over formal contracts may mean that those commissioning renovation work may find it more difficult to navigate a change in agreed price or timeframe and may find it more challenging to obtain redress if things go wrong.

Homeowners interviewed by TRA who had commissioned renovations mentioned that having a standard contract in place (if they were to do bigger renovations) that was used universally and did not require too much time and effort for the builder or homeowner would make using a contract more appealing.

MBIE recommends:

Rec 2.3	<p>As part of the recommended ongoing work to increase consumers’ awareness and understanding of the consumer protection measures, raise awareness and uptake of written contracts for homeowners commissioning renovations.</p> <p>This could include:</p> <ul style="list-style-type: none"> • helping people to understand why written contracts are important, • clarifying the difference between quotes and contracts, and • providing a simple renovation contract.
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Finding 2.3 There are opportunities to improve awareness and compliance with mandatory contract requirements

The TRA research found there is high awareness of, and confidence in, contracts in general. Their survey found 98 per cent of consumers are aware of written contracts as a tool to manage their risk in building work and 87 per cent have confidence that their contracts are protecting them. However, amongst consumers there appears to be a lower level of awareness of the requirement for mandatory written contracts for work over \$30,000.

For builders, 70 per cent were aware that they need to provide a written contract for work over \$30,000, indicating there is room to improve overall builder awareness of their legal obligations in relation to contracts.

While it appears overall compliance with the mandatory contract requirement is good, limitations with the current settings make it difficult for MBIE to enforce builders’ non-compliance. Limitations in the current enforcement settings include low penalties and time limitations:

- The fee for non-compliance is only \$500 and may not effectively act as a deterrent for builders who do not enter into written contracts for work over \$30,000.
- MBIE must issue an infringement notice within six months of the offending occurring. Complaints about offending are typically raised after this six-month period and as a result MBIE is unable to issue an infringement notice. Furthermore, low levels of homeowner

awareness of the written contract requirements means that if people are not aware of their builder’s obligations, then they are less likely to report non-compliance.

MBIE recommends:

<p>Rec 2.4</p>	<p>As part of the recommended ongoing work to increase consumers’ and builders’ awareness and understanding of the consumer protection measures, include information aimed at improving uptake of written contract use for building work. This could include:</p> <ul style="list-style-type: none"> • actively engaging consumers (including homeowners engaging builders to undertake renovations) about the risks involved in building work, the importance of having a contract in place and education about what a good contract looks like. • considering the provision of standardised small job contracts or ‘build your own’ small contract tools for builders. • increasing awareness of mandatory contract requirements for residential building work over \$30,000. • Increasing builders’ awareness and understanding of their legal obligations in relation to building contracts and the penalties for non-compliance.
<p>Rec 2.5</p>	<p>To improve compliance, look into ways to address the limitations to effectiveness of the current compliance and enforcement regime. This may include things like addressing the time limitation issue, looking at whether enforcement is best dealt with by way of an infringement offence and whether the current penalties could be strengthened.</p>

Finding 2.4 Some homeowners and builders have indicated a desire to change the written contract threshold

The TRA research asked both homeowners and builders about what they thought the threshold should be for requiring a mandatory written contract. The survey found that 65 per cent of homeowners thought that contracts should be required for work less than \$30,000 in value (40 per cent thought that contracts should be required for written work of any value, 6 per cent thought the threshold should be \$5,000, 11 per cent thought it should be \$10,000 and 8 per cent thought it should be \$20,000).

While nearly a third of builders (32 per cent) thought the threshold for mandatory written contracts should be raised from the current \$30,000 value, almost half of builders surveyed (48 per cent) thought that written contracts should be required for lower value work, or for any building work.

Like New Zealand, several other jurisdictions have measures in place requiring contracts for building work over a certain monetary threshold. The threshold for mandatory written contracts is relatively common in Australian states and territories, although it is generally triggered at a much lower level than in New Zealand. For example, New South Wales requires written contracts for all work above AU\$5,000, while Victoria and South Australia are set at AU\$10,000 and AU\$12,000 respectively. The Australian Capital Territory is an outlier in having no mandatory contract requirement.

The relatively strong level of support in the TRA survey for written contracts to be required for lower value work indicates that it may be worth reconsidering the current \$30,000 threshold.

MBIE recommends:

Rec 2.6	As part of ongoing work to increase consumers’ and builders’ awareness and understanding of the consumer protection measures, raise awareness of the benefit of written contracts for small jobs . This could be done by supporting the use of existing small job contracts, providing standardised small job contracts or ‘build your own’ small contract tools for builders.
Rec 2.7	MBIE also recommends considering whether the \$30,000 threshold for residential written building contracts in the current regulations should be reduced to capture lower value building work in the requirements for written contracts and implied terms.

Finding 2.5 While overall written contract usage is high for new builds, many consumers do not seek legal advice on their residential building contract

The Review found that while overall written contract usage is high for new builds, contracts can vary in quality. They are complex and often weighted towards the builder and are hard for consumers to understand. This can make it difficult for consumers to know if the contract is fair and balanced, and if they are adequately protected.

Building contracts are complex because building work itself is very complex. The Building Disputes Tribunal (a private dispute resolution service) and the NZ Law Society have highlighted that because building contracts are the most complex and important document that a consumer will ever enter into, it is critical that consumers seek legal advice to make sure they understand what they are signing.

These groups also noted that many consumers are putting themselves at risk because they do not seek legal advice on their residential building contract. TRA research highlighted that homeowners might choose not seek legal advice due to the costs and time involved and overall low perceptions of risk. The Review also found that if consumers do seek legal advice, it can often be after the building work has begun or is completed but something has gone wrong.

There are issues with the quality of some written residential building contracts

The Review also found that there is wide variation in the quality of written residential building contracts – they are often complex, not in plain English, can be unbalanced and do not always set out the required information. This means that despite having a written contract in place, it is often difficult for consumers to understand what is in the contract, if it is fair and balanced and if they are adequately protected. This creates a disadvantage for homeowners and can lead to issues as the work progresses if the contract is not balanced and there is not a shared understanding of the scope of the work to be done, timeframes, costs and other similar matters.

There are also many of different types of contracts and the level of clarity (and subsequently quality) varies. Different firms, independent builders and trade associations have different practices and use different types of contracts.

Stakeholders, including the Law Society and the Building Disputes Tribunal have advised that the range of contracts in use can create confusion over which type to use, where to get one from and what a good/compliant contract should look like. Based on feedback from the Building Disputes Tribunal, the Review found that it is quite common for consumers to be given the wrong type of contract for their building work and as a result they may have insufficient or irrelevant information. Further, there is no one, universal set of contract templates that everyone can easily access without too much effort, can easily understand and which contain all of the required information.

Many builders who belong to a trade association use their association’s standard template. The Review has found that some of the wording in these contracts means that the contract may be weighted toward the builder. For example, one of the standard contracts used by builders does not require the builder to provide any evidence of cost escalation should the cost of materials increase. This new cost is automatically applied, and consumers are expected to pay for this without supporting evidence from the builder.

MBIE recommends:

Rec 2.8	As part of the recommended ongoing work to increase consumers’ awareness and understanding , ensure that consumers understand their contracts . This could include ensuring that consumers are aware of what good contracts look like, and are confident to amend or update unfavourable clauses with support from a lawyer or trusted advisor/information.
Rec 2.9	MBIE also recommends considering whether the current regulatory requirements around written contracts should be strengthened .

Finding 2.6 A growing number of people are purchasing new builds directly from developers and there may be a gap in protection for this group

Buying off the plans, or through a land and home package, provides a different building pathway than buying a completed house or contracting a builder directly to build or renovate a home.

There has been a large increase in the number of consumers buying a home off the plans or through a land and home package over the last five years. Data from Statistics NZ shows that in the year to November 2021, over half of all new builds consented were multi-unit dwellings including apartments and townhouses.¹³ However, while people buying off the plans are a growing group, there is a gap in protection for them because the consumer protection measures do not apply equally to them. For example, for consumers who are purchasing homes from on-sellers/developers there are only limited protections available for them under the Building Act. While on-sellers/developers are required to include information about the 12-month defect period and implied warranties in sale and purchase agreements, there are not required to meet the minimum contract requirements for builders as set out in the Building Act.

The TRA research found that 100 per cent of consumers surveyed who bought from a developer or on-seller had a contract in place. In these cases, the contract was likely to be a sale and purchase agreement¹⁴ or a turnkey contract for a house and land package, as people buying through a developer generally do not have a contract with the builder themselves. This is a positive sign given that on-sellers/developers are not subject to the Building Act requirements requiring a contract for building work over \$30,000.

Some sale and purchase agreements that MBIE has reviewed have also been found to provide inaccurate information about the 12-month defect period and implied warranties (for example stating that there is only a 3-month period to notify the builder of any defects, or not setting out the required information at all).

Based on feedback from the Law Society, the Review found that sale and purchase agreements can lack clarity and fail to set out enough information for a shared understanding of the work. The Law

¹³ <https://www.stats.govt.nz/information-releases/building-consents-issued-november-2021/>.

¹⁴ There are a number of different contracts that a consumer buying off the plan or a land and home package may receive. These contracts can include a contract to agree to enter into a sale and purchase agreement, a turnkey contract for a land and home package, and sale and purchase agreements. Most of the contracts that the Review saw examples of were sale and purchase agreements.

Society emphasised that these agreements can favour the developer, and many consumers fear pushing back on unfair agreements due to high demand in the market to purchase new builds from developers. In addition, they highlighted there is also an increasing amount of first home buyers being encouraged to purchase new builds who have very limited knowledge or experience going through the process and do not know what a fair and reasonable agreement looks like or what to ask. All of this has created a significant power imbalance between consumers and developers. TRA interviews noted examples where the purchaser is kept at arm's length during the build process, limiting their ability to have any oversight of how the build is progressing.

It is often difficult for consumers to negotiate terms in sale and purchase agreements and to make sure they are fair and balanced

Based on feedback from the Law Society as well as other anecdotal feedback, the Review found that often consumers have limited ability to negotiate terms in a sale and purchase agreement.

The Law Society highlighted that the clauses in these sale and purchase agreements can be so wide that the builder or developer can easily change the details on what will be purchased. In this case, homeowners can be misled on the details of the build including what will be delivered. They emphasised that developers and group home providers can be reluctant to change any of the contract terms due to wanting to retain consistency across their contracts. Terms can also be pre-approved by developers' lenders and there it can be difficult for developers to substantially alter the terms.

However, there are often sunset clauses in sale and purchase agreements when buying from a developer. While there has been a lot of concern recently from consumers about sunset clauses when they are used unfairly by developers, these clauses, when used properly, also allow the consumer to withdraw from the contract if they are not happy with what is being delivered.

MBIE recommends:

Rec 2.10	There are a number of departments with appropriate interests and the ability to regulate developers/on-sellers. As there is no bespoke regulatory regime responsible for developers/on-sellers, to inform next steps more work needs to be done to better understand the current work underway that may impact developer/on-seller contracts (sale and purchase agreements) .
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Section Three: Problem resolution

Context: There is an onus on consumers to identify issues with building work; this must happen before they can ask a builder to remedy it. However, consumers are not always well placed to do this.

Most consumers do not have the expertise to know what good building work looks like, so they are not well placed to identify potential issues during the build process. Further, the latent nature of some building defects also means problems may not become apparent until well after building work is complete. At this point it can be hard for consumers to get redress because it may be difficult to determine what caused the defect and therefore who is at fault, or the builder may no longer be in business.

Ideally, building work should be done right the first time so defects do not occur. Transferring some of the risks associated with defects back to the builder can incentivise them to build right the first time. For example, by requiring the builder to fix any defects discovered within the first 12 months. However, because building defects may not become apparent until well after the building work is complete and may not always reasonably be discovered at inspection, it is important that consumers also have avenues for redress for latent defects.

Mandatory repair periods and warranties can place consumers in a stronger position hold builders accountable for the quality of their building work. However, the effectiveness of these measures is reliant on consumers (including subsequent owners) being aware of, understanding, and being willing and able to enforce their legal protections.

Overview

What we expect to see

Builders are able and incentivised to build it right first time, issues or defects are identified and addressed in a timely way, and the consumer gets redress where appropriate.

Current measures in place to support this outcome

There are two main consumer protection measures aimed at ensuring that things are built right the first time: the 12-month defect period and the 10-year implied warranty period. If they are used effectively by an informed and empowered consumer, builders are incentivised to fix issues or defects. The 12-month defect period and the 10-year implied warranty period apply to both oral and written residential building contracts.

Measure	What the measure does	Intended effect
12-month defect period	<p>Gives consumers an automatic 12-month repair period from the date of completion.</p> <p>If the consumer provides the builder written confirmation of the defect within that defect period, the builder must make it right within a reasonable timeframe.</p>	<p>Defects are identified quickly.</p> <p>Early defects are fixed promptly.</p>

	If there is a dispute it is the builder's responsibility to prove that the defective work or products are not their fault.	
10-year implied warranty period	<p>All residential building work is covered by implied warranties.</p> <p>The warranties apply automatically for up to 10 years regardless of whether there is a written contract or what the contract terms are, and regardless of the cost of the building project.</p> <p>The implied warranties are:</p> <ul style="list-style-type: none"> • all building work will be done properly, competently and according to the plans and specifications in your approved consent. • all the materials used will be suitable and, unless otherwise stated in the contract, new. • the building work will be consistent with the Building Act and the Building Code. • the building work will be carried out with reasonable care and skill, and completed within the time specified or a reasonable time if no time is stated. • the home will be suitable for occupation at the end of the work. 	<p>Latent defects are more likely to be remedied by the building contractor.</p> <p>The extent of damage (resulting from building defects are lower).</p> <p>The costs of repair are lower.</p>

Consumers also have the option of purchasing a **private guarantee product** if they wish to have additional protections above the above legislated measures. The current private guarantees available are the:

- Master Build Guarantee from Master Builders, and
- Halo Guarantee from New Zealand Certified Builders.

There are currently no third-party building warranty insurance products since Lloyd's of London left the building warranty insurance market in 2019.

There are also consumer protection measures aimed at informing subsequent owners of their rights

As subsequent owners do not have a contractual relationship or previous contact with the original builder, they may face additional challenges in enforcing some of the consumer protection measures, in particular the 12-month defect liability period and the 10-year implied warranty period.

The Building Act requires builders to provide information to the consumer following the completion of the building work. The information that must be given consumer includes information about:

- who did the building work,

- how to maintain the products used in the building, including how any guarantees or warranties could be affected by maintenance,
- the builder’s insurance policies relating to the building work,
- any guarantees or insurance the builder obtained relating to the building work, and
- any guarantees or warranties that apply to the materials or services used in the building work, including detail about if they are transferrable, how claims are made, if anything needs to be done in order to make them valid.

The Building Act also allows for prescribed information to be provided to subsequent owners on the Land Information Memorandum (LIM), for example, the main builder and the insurer for the build. However, this is not in effect as no regulations have been made.

Measure	What the measure does	Intended effect
Currently unused: Ensure that critical information is available to subsequent owners on the LIM	Assist subsequent owners to hold contractors to account.	Subsequent owners are protected. Accountability is reinforced.

The findings of the Review emphasised the importance of consumers having this information, including about guarantees and warranties, in order to better hold builders and on-sellers to account, which they can then pass on to the subsequent owner. This helps ameliorate some of the difficulties that subsequent owners may face in enforcing their rights if they do not know the builder.

If a dispute arises due to the identification of a defect by a subsequent owner, the subsequent owner can seek to address the problem if they have the required information about the builder. Section 362J of the Building Act makes it clear that subsequent owners can enforce the implied warranty provisions through court action.

What happens if something goes wrong

One important aspect for consumers to understand is what is considered a defect. MBIE has published the *Guide to Tolerances*, which provides information on what should be specified in the contract to minimise the risk of a dispute, maintenance and consumer obligations to minimise the risk of the problem.¹⁵ The guide also provides information on what a defect is. A defect includes:

- anything that does not comply with the Building Code
- variations from consented drawings that have not been agreed
- failure to meet specifications agreed in the contract
- product failure earlier than anticipated
- failure to achieve acceptable industry levels of quality or performance on items not covered by the first four bullet points.

If the builder refuses to fix an issue or defect, the table below covers the possible **dispute resolution processes** that a consumer can use try and get a satisfactory resolution.

¹⁵ See <https://www.building.govt.nz/assets/Uploads/projects-and-consents/guide-to-tolerances/guide-to-tolerances.pdf>.

Measure	What is involved
Self-resolution	Parties involved in a dispute should attempt to resolve it themselves. An agreement or compromise can often be reached talking an issue through.
Checking the contract	The contract may set out what happens in the event of a dispute. If there is no contract, or the contract has no relevant clauses, default clauses within the Building Act might apply.
Consumer rights	This is outlined above – in the Building Act there are two measures applicable here (12-month defect period and 10-year implied warranty period). There are also other general consumer rights that may be available under other laws, such as the <i>Construction Contracts Act 2002</i> , <i>Consumer Guarantees Act 1993</i> and <i>Fair Trading Act 1986</i> .
Formal complaints	Complaints about the conduct and competency of builders can be made to the appropriate professional bodies if the builder is a member of one: <ul style="list-style-type: none"> • Licensed Building Practitioner is a Government-administered licence that recognises building practitioners who have been assessed as competent to carry out restricted building work essential to the structure or weathertightness of residential buildings. • Master Builders is an independent trade organisation. • Certified Builders is an independent trade organisation.
Mediation, arbitration and adjudication	Consumers can as an independent third party to help resolve the problem through mediation, arbitration and adjudication.
Tribunals and courts	There is no specialist court or tribunal for building disputes unless the owner is eligible for the Weathertight Homes Tribunal ¹⁶ . Consumers have the following tribunal and court options available if they have an issue that cannot be resolved with the builder: <ul style="list-style-type: none"> • For issues around payment, invoicing, retentions and breach of construction contracts, the Construction Contracts Act allows consumers to use a fast-track adjudication system that can operate in parallel to the court system. • The Disputes Tribunal considers claims under \$15,000 (or \$20,000 by agreement). • The District Court hears claims under \$350,000. • The High Court hears claims that are complex or over \$350,000.

What the Review found

The Review found that, for many consumers, things do not go wrong with building work, and if they do, the issue or defect is fixed by the builder. Only 23 per cent of consumers surveyed by TRA

¹⁶ The Weathertight Homes Tribunal is not accepting any new applications and is focused on resolving all outstanding claims.

reported having something go wrong in their build and, of that group, 57 per cent of consumers surveyed by TRA were able to get the builder to fix the issue or defect.

While many people are getting the builder to fix the issue, the survey found one in five people who had encountered an issue did nothing to resolve it. This indicates that some consumers are facing barriers to getting redress when things go wrong.

The Review identified the following barriers that consumers face to getting problems resolved:

- 3.1 Consumers are still unclear about roles and responsibilities when building a house, have a shallow understanding and 'blind trust' in protection measures. This leaves consumers exposed to misunderstanding or misinformation about their legal rights and what privately provided products offer in comparison.
- 3.2 There is low awareness amongst builders of their legal obligations in relation to consumer protection. This includes a lack of awareness around the defect period and implied warranty period.
- 3.3 Subsequent owners are unlikely to understand what legal protections are available to them if they discover a defect, but often receive enough information that allows them to resolve issues.
- 3.4 Dispute resolution processes are complex, expensive and take a long time. Most dispute resolution processes are not tailored to the build process.
- 3.5 Many consumers still do not know what to do if things go wrong. However, even if consumers are aware of their rights, they are conflict avoidant and, in many instances, unwilling to use formal dispute resolution processes.
- 3.6 Consumers have indicated concerns around private guarantee products, and the level of protection offers can vary between products. More work needs to be done to understand the barriers consumers face.
- 3.7 Consumers can struggle to get redress if a builder is no longer in business and there is little that consumers can do to ameliorate this due to a lack of insurance/warranty products available. This limits the effectiveness of the minimum legal protections.

Discussion

Finding 3.1 Consumers are still unclear about roles and responsibilities when building a house and have a shallow understanding and 'blind trust' in protection measures, leaving them exposed to misunderstanding or misinformation

The Review found that consumers' awareness of their rights and how to enforce them is highly variable. Consumers' ability to get resolution when problems arise often depends on factors like having had prior experience with the build process or having friends or family in the sector.

Research undertaken by BRANZ in 2020 noted that consumers have relatively little knowledge about building and place a large degree of trust in their builder and building consent authority. BRANZ cited research that found consumers often misperceive building consent authority inspections as a quality control or quality assurance mechanism. This lack of understanding about roles and responsibilities in building work and poor understanding of what consumer protection measures actually offer, means consumers may be assuming they have protection where they do not, leaving them overly exposed to risk.

The TRA research found that some homeowners have low or shallow awareness of what they are protected by and how to refer to the formal protection measures to help get the build back on track when problems arise. The research noted there can be a 'blind trust' in consumer protection measures such as the 10-year implied warranty period and 12-month defect repair period, with

people having a low understanding of what the statutory warranties include and how they would bring this to action if they needed to.

The shallow awareness and blind trust in protection measures can make consumers vulnerable to misunderstanding or misinformation about their legal rights and what privately provided products offer in comparison. While the Fair Trading Act prohibits businesses misleading or giving their customers false information, and breaches of this can be pursued by the consumer or the Commerce Commission, this still requires consumers to be aware of their rights in order to seek a remedy.

The TRA research noted that due to high awareness of the Master Build Guarantee product, many homeowners assumed it is backed by government. The research found examples where builders would promote their company offering a 12-month defect repair period as a point of difference for rather than a legal requirement. MBIE also heard of examples where people had been charged for warranties that provided no extra protection than the legal minimum or were offered defect repair periods that were shorter than the legal minimum.

MBIE recommends:

Rec 3.1	As part of the recommended ongoing work to increase consumers' awareness and understanding , ensure improved understanding of: <ul style="list-style-type: none">• the 12-month defect repair period and 10-year implied warranty period, what they cover, and how to engage their legal rights, and• formal consumer protection measures as universal rights, so consumers know what additional value they are actually paying for in products they purchase.
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Finding 3.2 There is low awareness amongst builders of their legal obligations in relation to consumer protection

The Review found that builders' awareness of their obligations in regard to the consumer protection measures was also very low. For example, only 37 per cent of those builders surveyed by TRA were aware of their obligations to repair defective building work within 12 months, and only 34 per cent were aware of the implied warranties.

If builders have low awareness of the consumer protection measures and their legal obligations, they are will not know that they have to comply, or may only comply in part. If consumers are also unaware of the consumer protection measures there to protect them (as discussed in the previous finding), consumers will be exposed to additional risk and may struggle to get redress from the builder.

MBIE recommends:

Rec 3.2	<ul style="list-style-type: none">• As part of the recommended ongoing work to increase builders' awareness and understanding, ensure that builders are more aware of their legal obligations in relation to the 12-month defect repair period and 10-year implied warranty period.
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Finding 3.3 Subsequent owners are unlikely to understand what legal protections are available to them if they discover a defect, but often receive enough information that allows them to resolve issues

Although the original owners are not required to pass on relevant information to subsequent owners, the TRA survey found that subsequent owners are not having issues with getting relevant information from the original owners. In the rare instances where the subsequent owner did not

have the information they needed, the subsequent owner contacted the original owner for the information about the builder/developer and any warranties they were covered by.

The TRA research found that, if issues emerge, subsequent owners often refer back to the information they received from the previous owner – about the builder/developing company and any warranties they are covered by. However, subsequent owners were less likely to have awareness of implied warranties and the 12-month defect period.

The TRA research also found that for many subsequent owners there is a perception that a newer home is less risky than purchasing an older home. This is due to perceptions that new homes require less work and less renovations. Consumers’ knowledge of the 12-month defect period and 10-year implied warranty period is often dependent on:

- their prior experience,
- family or real estate agents making them aware, or
- if the previous owner has made them aware.

Based on feedback from stakeholders, the Review found that consumers are often only aware of the 12-month defect period and 10-year implied warranty period as a special product that their specific builder or the private guarantee product that was purchased offers. Most consumers are unaware that these are legal protections that all builders must offer.

There can be an issue if subsequent owners are unaware of the 12-month defect period and 10-year implied warranty period and they discover a defect. 31 per cent of subsequent owners surveyed by TRA found something wrong with the build after they moved in and often did not have full comprehension of what’s in place to protect them. As subsequent owners are not involved in the build process, they are less likely to have awareness of formal measures that can protect them should an issue arise.

However, buying a new home requires formal processes and often involves a lawyer, building inspectors and lenders. Therefore, there are also checks and balances involved that can help protect subsequent owners along the way. TRA research found that many subsequent owners are using sale and purchase agreements, seeking out LIM reports, building inspections and getting legal advice to help inform them of the full picture.

MBIE recommends:

Rec 3.3	As part of ongoing work to increase consumers’ awareness and understanding , include targeted information for subsequent owners on the consumer protection measures available and dispute resolution processes should a defect arise.
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Finding 3.4 Dispute resolution processes are complex, expensive and take a long time

The TRA research found that formal dispute resolution processes can be costly and time-consuming, and builders and consumers see them as a last resort.

MBIE’s research has shown that there are multiple avenues of dispute resolution processes available, but they are generally not tailored specifically to the build process (with the exception of Master Builders and the Building Disputes Tribunal). The TRA survey highlighted a lack of data on how effective the dispute resolution processes are at providing redress to consumers given the low uptake of dispute resolution processes to resolve issues.

MBIE recommends:

Rec 3.4	As part of the recommended ongoing work to increase consumers’ awareness and understanding , increase awareness of existing dispute resolution processes. This
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	includes highlighting that they can be used at an earlier to get things back on track, what the process is, what to expect, what support services are available. This helps consumers become more empowered and gives them a better ability to understand what to do if they have an issue that needs to be resolved.
Rec 3.5	Undertake more work to better understand the barriers consumers face using the current dispute resolution processes holding builders to account and whether changes to the current settings are required. This includes a watching brief on any improvements in builder behaviour as a result of changes that will be introduced to occupational licensing.
Note	These recommendations would make available to consumers the knowledge that is needed for them to become empowered consumers who are agents of change, but responsibility still rests with consumers to be more proactive and seek out this information.

Finding 3.5 Consumers are conflict avoidant and do not know what to do if things go wrong

The Review found that consumers and builders view dispute resolution processes as formal, timely, costly and the last resort. The TRA research found that consumers may know that there are formal disputes processes but not know the details, how to access them, what the process is like and have low confidence to proceed.

Further, the research highlighted that both consumers and builders tend to avoid using formal dispute resolution processes as they view them as time-consuming, costly and emotionally-draining. Instead, both parties want to keep things moving and have the building work completed.

A culture of avoiding dealing with problems due to conflict avoidance, combined with lack of understanding of how to navigate a dispute, may increase the likelihood that small problems will escalate. Resolving issues earlier can avoid costly and time consuming disputes processes, therefore there is an opportunity here to better position consumers to deal with issues early.

Parties' unwillingness to use the formal dispute resolution processes and consumers' low understanding of how the formal mechanisms work is likely to be negatively impacting consumers' ability to get redress if something goes wrong. This suggests that more work needs to be done to help consumers resolve issues before they reach the stage of needing formal dispute resolution. The TRA research highlighted that there is a gap in the current system for a service that is available to consumers earlier in the process.

MBIE recommends:

Rec 3.6	Explore the development of an 'early intervention service' , for example, a service that could be used by consumers at an earlier point in time than the current dispute resolution processes are used. This service would aim to get things back on track if there have been issues during the build process, rather than having to wait to the end to try and resolve disputes through formal dispute resolution processes. Having an independent third party help the parties' problem solve their issues could improve outcomes for consumers.
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Finding 3.6 Consumers have indicated concerns around private guarantee products, and the level of protection offers can vary between products

As part of the Review, concerns were raised about the private guarantee/warranty products available in the market. This includes:

- how they may be misunderstood by or misrepresented to consumers (as discussed in Finding 1), and
- concerns about whether the products favour the builder, how easy it is to actually get redress using them, and whether they actually provide value for money in resolving issues that have arisen.

MBIE recommends:

Rec 3.7	Undertake more work to better understand the barriers faced by, and concerns of, consumers around private guarantee products.
Rec 3.8	Work with private guarantee product providers to improve the transparency and effectiveness of their products for consumers.
Rec 3.9	If recommendations 3.7 and 3.8 are not effective , MBIE should consider whether there is a case for regulating private guarantee products .
Note	There may be some remedies for consumers for breaching the Fair Trading Act if a builder or trade organisation misleads or gives their customers false information.

Finding 3.7 Consumers can struggle to get redress if a builder is no longer in business and there is little that consumers to do to ameliorate this due to a lack of insurance/warranty products available

A consumer can rely on 12-month defects period and 10-year implied warranty period if the builder is still trading. However, consumers face difficulties getting redress using the consumer protection mechanisms if their builder is no longer trading. In this regard, it is important for consumers to understand how long a builder has been business; a builder with a history of being the director of building companies that only operate for a few years could indicate that the current company may not be around at the end of the 10-year implied warranty period to honour it.

Consumer rights group HOBANZ highlighted to MBIE concerns with the impact of builder insolvency on consumers. The extent to which builders are deliberately liquidating companies to avoid meeting their legal obligations is not well understood. There is currently not enough evidence that construction companies are being liquidated at a higher rate than other sectors in the economy; there has been a marginal increase in construction company insolvencies over the same time period.¹⁷

Transferring assets to a new company and liquidating the original company in order to circumvent creditors is known as “phoenixing” and is governed by the *Companies Act 1993*. There is currently a lack of data around the directors of liquidated companies, however, a Bill will be introduced this Parliamentary term that will require directors to have a unique identifier number, which will link to all the companies and limited partnerships with which the director has been associated over time.

¹⁷ In the period January-June 2022, 102 companies in the building sector entered liquidation, which represents 19.2 per cent of all liquidations. This is a slightly higher percentage of total liquidations for the same time period (18.5 per cent for January-June 2021).

This will allow for better data on whether or not this is an issue of particular concern to the building and construction sector.

Regardless of the extent that voluntary liquidations may be a concern for the building sector, recent media coverage has indicated that with increasing market pressures on building firms, involuntary liquidations may be a growing risk to consumers.

There is currently a gap for completion cover in the market, offering homeowners a product that if purchased, would protect the consumer in the event that the builder became insolvent. Only one of the privately provided guarantee products – the Master Build Guarantee – offers this level of coverage. This product does not offer protection for all consumers in that it is only available to Registered Master Builders Association members and is only available for certain types of building work.

Other jurisdictions can require mandatory insurance for residential building work to provide protection in the event of non-completion. For example, Victoria (Australia) requires mandatory insurance on work over \$16,000 which protects the consumer in the event that the builder cannot finish the work due or fix defects due to death, disappearing or insolvency.

In April 2019, as part of the Building System Legislative Reform Programme consultation, MBIE sought feedback from building sector stakeholders on a proposal requiring that a guarantee and insurance product for building defects be put in place for all residential new builds and significant alterations. While most people were supportive of the idea of requiring a guarantee or insurance product for residential new builds, significant concerns were raised about the ability and capacity of the insurance market to offer such a product, and the potential impact on the building sector.

The absence of a building warranty insurance market in New Zealand raises the policy question as to what the government’s role is in developing and supporting a warranty insurance scheme. MBIE recently released a document titled *Risk, Liability and Insurance in the Building Sector – Policy Position Statement*¹⁸, which further explores the potential for a government-provided warranty or insurance scheme. The paper concludes that there is a weak case for establishing a publicly provided insurance scheme for building defects after weighing up the costs, risks and potential benefits. However, the paper notes that while the public policy case for a government provided insurance scheme is currently not justified, this situation could change in the future to the extent the policy problem becomes clearer and where there are material changes in the costs, risks and potential benefits of such a significant public policy intervention.

MBIE recommends:

Rec 3.10	As part of the recommended ongoing work to increase consumers’ awareness and understanding , raise awareness of importance of doing due diligence into a builder’s track record , including the implication of any previous liquidations.
Note	<ul style="list-style-type: none"> • MBIE will continue to keep abreast of the rate of construction company insolvencies in order to understand any trends in builder insolvency. The passage of a bill requiring directors to have a unique identifier number will help provide better data on whether or not this is an issue of particular concern to the building and construction sector. • The findings of the building consent system review on the roles and responsibilities in the building control system may have an implication on the Government’s position on insurance products.

¹⁸ <https://www.mbie.govt.nz/dmsdocument/22842-risk-liability-and-insurance-in-the-building-sector-policy-position-statement>.

Conclusion

The Review found that most of the consumer protection mechanisms are not working as intended. To improve outcomes, the Review report details several recommendations. **Annex 2 contains a summary of the recommendations** and assesses them against the three main areas where consumers can take action for themselves.

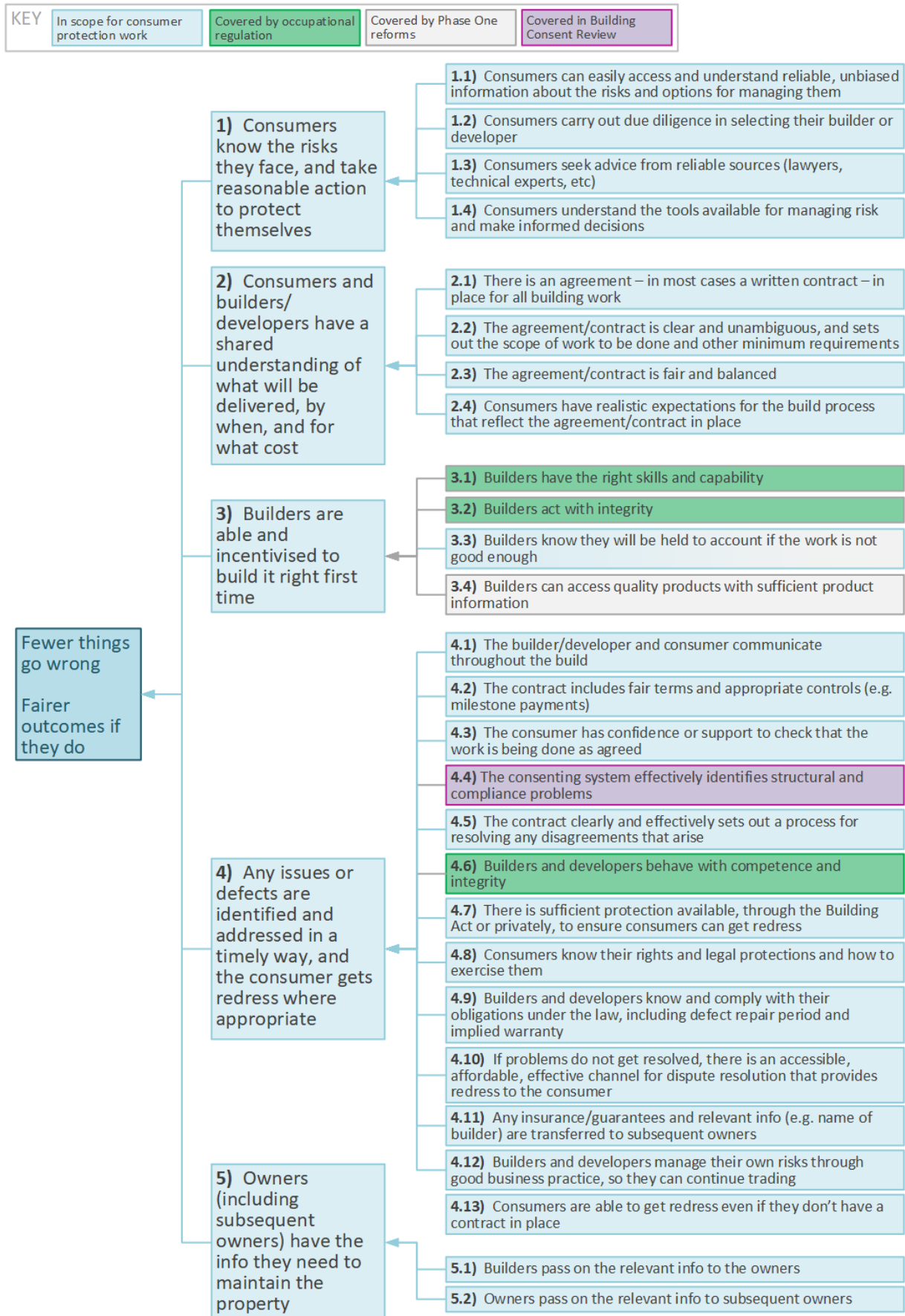
There are three main categories to these recommendations:

1. A proactive information and education campaign aimed at consumers and builders.
2. Adjusting the existing regulatory settings.
3. Further work to better understand new and emerging issues.

Giving people information by itself not enough to change behaviour. Interventions to change behaviour must consider the social environment people live in and their attitudes and skill levels and must provide people with support and resources. Importantly, people need to be empowered, rather than just told what to do. Encouraging improved building performance will require the engagement of multiple levers.

While many of these recommendations have MBIE at the centre as the main change maker, consumers must also accept accountability and will need to make behaviour changes in order to act as agents of change. If armed with the right skills, a consumer can be empowered to act with confidence, a good understanding of the process and understand what laws are available to fall back on if there are any issues. The recommendations that are detailed in this report aim to give consumers the tools that they need, but the onus is on the consumer to use them.

Annex One: Outcomes framework



Annex Two: Summary of recommendations

Recommendation	Outcome Consumers should be well-informed and aware of the risks associated with building work and take action to minimise the risks they identify	Consumers, builders and developers have a shared understanding of what will be delivered, by when and at what cost to ensure the build process goes smoothly and that disputes do not arise	Builders are able and incentivised to build it right first time, issues or defects are identified and addressed in a timely way, and the consumer gets redress where appropriate
A proactive information and education campaign aimed at consumers and builders			
Ongoing work to increase consumers' and builders' awareness and understanding of the existing residential consumer protection mechanisms, including targeted content for different types of consumers, supported by proactive outreach to promote updated information and educate consumers	✓	✓	✓
Consider the development of a centralised, trusted consumer hub of unbiased information for consumers	✓		
Improve the format and useability of the building checklist and disclosure statement and make them easier to access and understand	✓		
Work with other trusted advisors and networks to determine if they may be better place to give consumers earlier access to the building checklist and information about how to understand disclosure statements	✓	✓	
Investigate options to improve builders' competency around client communication and managing expectations, including possibly working with the Construction Sector Accord and industry bodies		✓	✓
Work with private guarantee providers to improve the transparency and effectiveness of their products for consumers	✓	✓	✓
Adjusting the existing regulatory settings			
Consider changes to the checklist and disclosure statement tested through trusted advisors and networks	✓		
Look into ways to address the limitations to effectiveness of the current compliance and enforcement regime	✓	✓	
Consider opportunities to strengthen the accountability of builders providing the required information to consumers through current and future work to strengthen occupational regulation	✓		✓
Consider whether the \$30,000 threshold for residential written building contracts in the current regulations should be reduced			✓
Consider whether the current regulatory requirements around written contracts should be strengthened		✓	✓
If required, consider whether there is a case for regulating private building guarantee products			✓
Further work to better understand new and emerging issues			
Work to better understand the current work underway that may impact developer/on-seller contracts (sale and purchase agreements).		✓	✓
Undertake more work to better understand the barriers consumers face holding builders to account			✓
Explore the development of an 'early intervention service'			✓
Undertake more work to better understand the barriers faced by, and concerns of, consumers around private guarantee products			✓

