



## CITY FUTURES RESEARCH CENTRE

# WHO PAYS?

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It is important to clarify who will pay for rectification of the defects before starting works, as the answer may affect the extent of works that are undertaken, or if works are undertaken at all. In some instances, different parties will pay for some or all of the defect rectification. In emergencies note that clarifying this first may not be possible.

Rectification of building defects can be costly, and the party that pays for the rectification and associated works depends on a range of factors, including the cause of the defects (and therefore who is at fault).

### BUILDER OR DEVELOPER PAYS

If the builder's work is defective or incomplete, then the builder or developer may be required to either undertake the defect rectification at their cost or pay to rectify the defects. They may in turn pass this responsibility on to sub-contractors, suppliers and manufacturers if the defect arose from malfunctioning materials or poor installation. However, a case needs to be made that the defects arose as a result of the building practitioners' work or defective material. The earlier the defects are identified the easier it is to make this case. The later that claims are made, the more difficult it is to distinguish defective work or materials from expected wear and tear of the building over time, or the result of inadequate maintenance. As explained below, there are also time limits on the protections provided to consumers under NSW legislation, which make early identification of defects very important.

### Statutory Warranties

Under the Home Building Act 1989 (NSW), statutory warranties apply to residential building work. They include warranties requiring the holder of a contractor licence to ensure: that building work is done with due care and skill; the materials used are fit for purpose; and that work carried out on a dwelling results, to the extent of that work, in the dwelling being reasonably fit for occupation ([see section 18B](#) for details). These warranties require the contractor to rectify the works and/or cover the costs of rectification. However, these warranties are time-limited: for major defects, the warranty period is 6 years, while for other defects it is only 2 years (see [Major and Other Defects](#) for more on how major and other defects are defined).

## Strata Building Bond and Inspections Scheme

As of 1 January 2018, the developer of a new strata building of four or more storeys is required to pay a bond to NSW Fair Trading worth 2% of the contract price for the building work under the [Strata Building Bond and Inspections Scheme](#). The scheme applies if the contract relating to the building work was entered into on or after 1 January 2018 or, if there is no contract, the building work commenced on or after 1 January 2018.

Within 12 months after completion of the construction work, the scheme requires that the developer [appoint a building inspector](#) to undertake a defect inspection. The developer must appoint a building inspector from the strata inspection panel with the owners corporation's approval. The appointed building inspector will then undertake a visual inspection of the completed building to identify any defects, and prepare an interim defects report paid for by the developer. The interim defect report must be provided within 15 – 18 months of the completion of the works. The developer must then arrange for any defects identified in this report to be rectified.

The developer must then, within 18 months of completion of the construction work, appoint the building inspector to prepare a final defect report. The final defect report must be provided between 21 and 24 months after completion of the construction work. The items that will be reported on in the final report are limited. For instance, it will not include new defects that were not identified in the interim report unless they arise from rectification of the defects previously identified.

The bond amount can be used to rectify defects identified in the final defect report. It is important to note that there are strict time limits under the law for applying to access a bond. For more information on this process see the [NSW Fair Trading website](#).

This scheme is intended to provide an incentive for builders and developers to avoid defects during construction, and to help subsequent owners to identify defects as soon as possible and provide them with funds for rectification works.

## BUILDING INSPECTOR PAYS

In some instances, the local council or private building certifiers can be found liable for issuing an occupation certificate to a development with defects. A court may order the private certifier or council to compensate the owners corporation if they are found to be at fault.

## INSURANCE PAYS

All defects must be disclosed to your insurer as and when they are discovered. An insurer may limit cover to the building if known defects are not disclosed and/or rectified, and limiting cover may also mean no cover for particular events or damage. Most insurers will exclude coverage for building defects, however they may cover resultant damage that arises because of initial defects or defective rectification works. You should contact your insurer for more information about what is and is not covered under your insurance policy.

If the construction work is defective or incomplete, and the builder or developer is unable to pay, some buildings may be able to make an insurance claim to the Home Building Compensation Fund scheme to help cover the costs of rectification.

## Home Building Compensation Fund

Builders must be insured under the Home Building Compensation Fund if they do residential building work over \$20,000 (though original construction on buildings of four or more storeys is not covered). Residential building owners are then able to make a claim for this insurance through [icare](#).

The policy provides a maximum cover per dwelling of:

- \$300,000, if issued before 1 February 2012
- \$340,000 for all other policies.

You can check if your building is covered [here](#).

## IMPORTANT:

A claim for the Fund needs to be made within the statutory warranty period (six years for major defects and two years for other defects), so defects need to be identified and reported as soon as possible.



## OWNERS CORPORATION PAYS

If it is unclear that defects are the fault of the builder, developer, sub-contractors or suppliers, and no insurance claim can be made, the owners corporation must cover the cost of rectifying any defects in common property. This may also be the case if the defects were not identified within the statutory warranty period, or if it is proven that the defects arose as a result of poor maintenance. The funds used to rectify the defects may come from the [capital works fund](#), special levies, insurance or loans.

The owners corporation may also need to cover additional costs, such as experts fees, legal fees, and other costs that are not covered by insurance or the original builder. In some cases, it may make sense for the owners corporation to seek a loan to cover these costs from a specialist strata financing firm. The lender may request a defect report with the application for a loan.

## NO ONE PAYS

The owners corporation has a duty to maintain and repair common property ([see s106 of the Strata Schemes Management Act 2015 \(NSW\)](#)). However, there may be an exception to this duty ([see s106\(3\)](#)), if an owners corporation determines that a decision not to maintain or repair something “would not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme”. Given that owners corporations can be held liable for a failure to fulfil their duty to maintain and repair the common property and it may affect the building’s insurance, owners corporations should seek legal advice before relying on this exception and choosing not to repair a building defect. If choosing not to repair is an option, the owners corporation should also consider whether the cost and effort involved in rectifying the defect outweighs the benefit of having it fixed.

If the owners corporation opts to not rectify a defect on common property, it could be sued for damages if someone suffers loss or injury as a result of an un-remedied defect. Opting to not rectify a defect may also expose the individual members to liability that will not be covered by the owners corporation’s insurance and may not be insurable by the individual members.

If you are an owner and you opt not to rectify a defect on your lot, be aware of the effect this may have on your tenants (if applicable), or your future property prices if you decide to sell. If you have tenants you can be liable if they injure themselves or damage their personal property due to the defect, or if it affects their quality of life. See [this information](#) on your obligations as a landlord.

## ADDITIONAL RESOURCES:

- [Strata Building Bond and Inspection Scheme – NSW Fair Trading](#)
- [Home Building Compensation Fund – icare](#)
- [Best Practice Guide for Building Defects – Who pays? – SCA \(NSW\)/Bannermans Lawyers](#)
- [Managing Major Repairs in the Residential Strata Sector – City Futures, UNSW](#)

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Strata Community Association (NSW) is the peak industry body for Strata and Community Title Management in New South Wales. Membership includes strata managers, support staff, committee members and suppliers of products and services to the industry. SCA (NSW) has in excess of 3,000 members who represent over 75% of strata lots in NSW by way of helping to oversee, advise or manage a combined property portfolio with an estimated replacement value of over \$400 Billion. SCA (NSW) proudly fulfils the dual roles of a professional institute and consumer advocate. Contact: (02) 9492 8200 | [enquiries.nsw@strata.community](mailto:enquiries.nsw@strata.community) | <https://nsw.strata.community/>