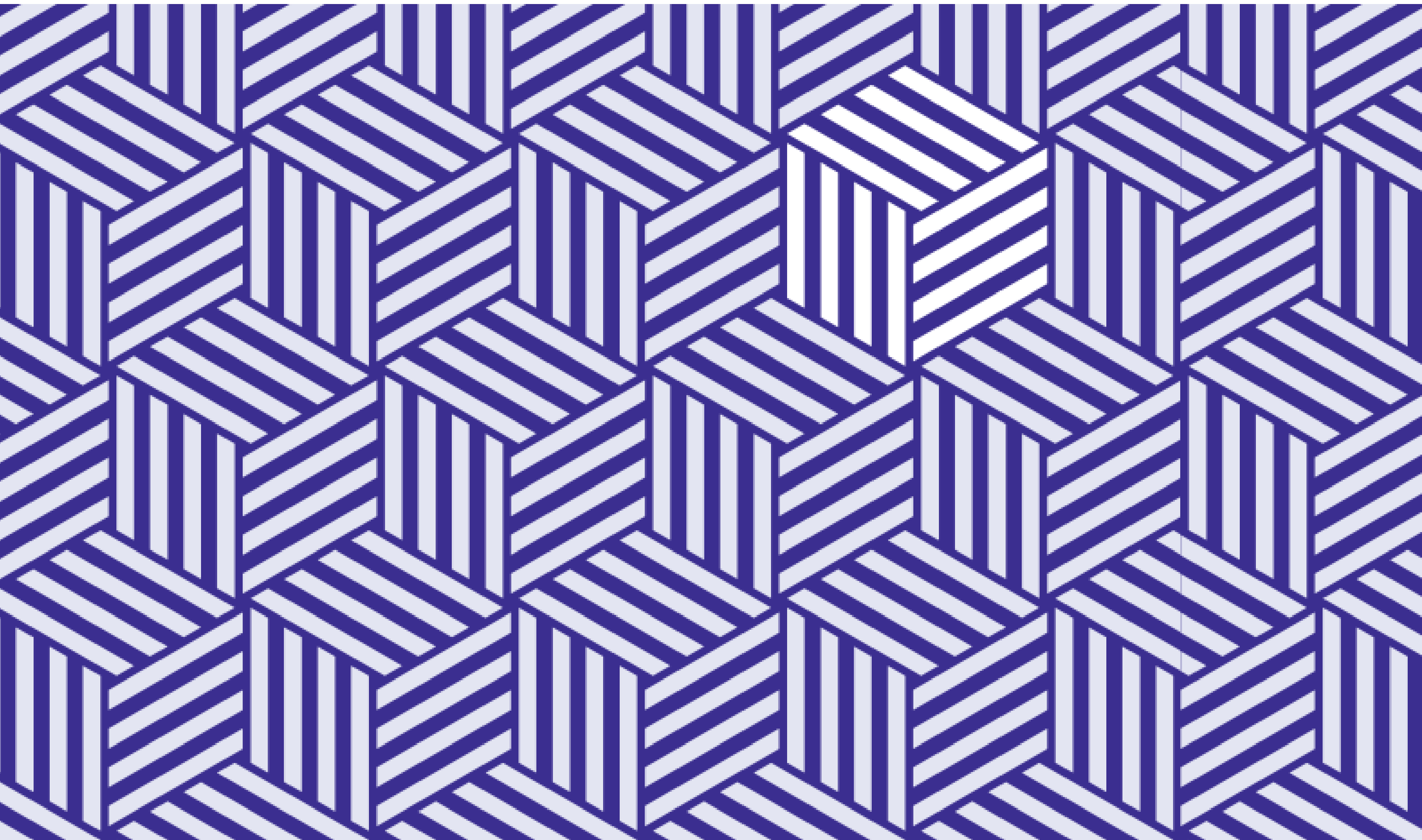
Singapore Academy of Law
Law Reform Committee

Proposal for Legislative Reform for Residential Property Defects in Singapore

November 2023



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About the Law Reform Committee

The Law Reform Committee of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Subcommittee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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I. EXECUTIVE SUMMARY

A. Introduction

1 Strata living is essential to Singapore's dense urban landscape. But the realities of strata living can be challenging, particularly when faced with potentially complex and stressful conditions such as building defects and their associated costs of rectification.

2 Meaningful recovery for residential property defects is thus crucial to homeowners in land scarce Singapore. The seminal Court of Appeal decisions in *Ocean Front*[1] and *Eastern Lagoon*[2] held that developers[3] and architects[4] owe a duty of care to the MCST[5], permitting the MCST – even without privity of contract with the developer or architect – to claim in tort for what had traditionally been deemed unrecoverable 'pure economic loss'. That recognition of liability for construction defects in the tort of negligence thus potentially opened the door for subsequent purchasers to recover from the developer, main contractor or architect.

3 Whilst *Ocean Front* and *Eastern Lagoon* recognised a duty of care allowing tortious recovery, the Court of Appeal in *Seasons Park*[6] and *Seaview*[7] considered that tortious duty to be a *delegable* one. Tortious recovery is thus now precluded if an "*independent contractor*" had been appointed with due care.

4 The consequence is that the MCST of a development (or any subsequent purchaser) is now confined to claiming against the relevant sub-contractor or even 'sub-sub-contractor', who may have limited financial resources for compensation. Pinning down the correct negligent defendant by identifying the

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[1] *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] 3 SLR(R) 653.

[2] *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No. 1075 & Anor ("Eastern Lagoon")* [1999] 2 SLR 449.

[3] In *Ocean Front*.

[4] In *Eastern Lagoon*.

[5] The management corporation of a strata title plan of a development: see the Land Titles (Strata) Act 1967; Building Maintenance and Strata Management Act 2004.

[6] *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR 613.

[7] *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] 4 SLR 521.

specific sub-contractor(s) responsible might also prove challenging. It has been observed that *"this contemporary professional services landscape, characterised by layers of service providers and independent contractors, creates an artificial buffer between the service provider and the service receiver"*[8].

B. Objectives

5 Against the present burgeoning private residential property market in Singapore[9], the Building & Construction Sub-Committee considers whether there is a need for reform in relation to avenues of redress for property defects.

6 This report is confined to concerns as regards private residential properties, in particular strata developments. The position as regards public housing, luxury housing or commercial properties is outside the scope of review.

C. Methodology

7 The Sub-Committee first examines the concerns that have been voiced over residential property defects in Singapore, as outlined at Section II of this report.

8 A comparative survey of how other jurisdictions have approached the thorny subject is set out at Schedule 1 hereto.

9 Drawing from the aforesaid analysis of the surveyed jurisdictions and their mechanisms for addressing property defects, the Sub-Committee's broad recommendations thereby are set out at Section III of this report.

10 This report is intended as a concept paper. Upon publication, the Sub- Committee proposes consultation with the relevant industry stakeholders on

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[8] Kumaralingam, Amirthalingam, "Case Note: The Non-Delegable Duty, Some Clarifications, Some Questions, *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 (2017) 29 SAcLJ 500 (Case Note: The Non-Delegable Duty), at [35].

[9] See the Urban Redevelopment Authority (URA) website for information on the pipeline supply of private residential units by market segment, development status and expected year of completion as at end of 3rd Quarter 2022.

the broad proposal for reform, so that each point may be more closely scrutinised.

11 Should the proposal for reform be deemed appropriate in whole or in part, the legislative reforms may be drafted by the Attorney-General's Chambers whether by means of amendments made to the Building Control Act, Housing Developers legislation or by such other means as Parliament might deem fit.

D. Summary of other jurisdictions' approaches

1. United Kingdom

12 Recovery for construction defects in the UK was traditionally governed by the Defective Premises Act 1972 (the **1972 Act**), under a *statutory duty of care* model for or in connection with the provision of dwellings.

13 Purchasers are entitled to rely on the diligence and skills of those whose work has gone into the provision of the dwelling[10], and they in turn are obliged to original and subsequent purchasers to carry out the work in a good and workmanlike manner, to supply proper materials, and in such a way that the dwelling will be reasonably fit for human habitation.[11]

14 Insofar as it operates in the home building market, the National House- Building Council Scheme (NHBC) is the most notable scheme in the UK, which involves two principal aspects. The first is that builders who participate in the NHBC scheme proffer "home warranties" under the "Buildmark" scheme to purchasers of new homes (and subsequent purchasers within applicable warranty periods) so that the purchased home will be of a particular quality, that is, meeting the NHBC's published requirements.[12]

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[10] London, The Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 15 December 1970) at [21].

[11] London, The Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 15 December 1970) at [25].

[12] Bailey, Julian, *Construction Law,* Vol III (London: London Publishing Partnership, 2020), at [19.09] – [19.12].

15 The second aspect of the NHBC scheme is an indemnity from the NHBC in favour of the purchaser or subsequent purchaser in respect of failure by participating members of the NHBC to comply with their contractual obligations. The indemnity provided by the NHBC is in the nature of insurance which endures for a period of ten years in respect of each home. It is open to other operators in the private sector to provide indemnity schemes similar to that operated by the NHBC.[13]

16 Stemming from the Grenfell Tower fire in 2017, the Building Safety Act received Royal Assent on 28 April 2022. The Act is intended to expand existing rights under the 1972 Act and significantly change the liability landscape in relation to the construction of new buildings.

2. France

17 The French regime broadly involves two statutory regimes of strict liability applicable to builders under Article 1792 of the Civil Code:

17.1 A 'decennial' (ten-year) guarantee of construction for building latent defects; and

17.2 A 'biennial' (two-year) guarantee of good working order for 'dissociable' elements of equipment.

18 Both regimes apply to 'builders', which term is widely defined to include architects, contractors, technicians or other persons bound to the building by a contract of hire of work; any person who sells, after completion, a work that he or she built or had built; and any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a hirer-out of work.

19 These regimes attach to the building and protect owners and subsequent owners.

[13] Bailey, at [19.13].

20 In parallel, the French Insurance Code requires builders to hold compulsory insurance coverage for the scope of their statutory liabilities. French law does not limit contractors' liability for damages.

3. Australia

21 The states and territories of Australia have, in a large part, protected homeowners under a *statutory warranty* model, for instance, under section 18B of the NSW Home Building Act 1989. The warranties are owed by developer and anyone doing work on behalf of the developer.

22 In addition to warranties of fitness for occupation and reasonable workmanship, the Home Building Act also imposes warranties that work will be done with due diligence, suitable materials, in compliance with the regulations, and that any work and material will be reasonably fit for their specified purpose or result.

23 In NSW, the courts found that the statutory framework militated against any concurrent common law duty of care (*Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* [2014] HCA 36 (hereinafter ***"Multiplex"*** where appropriate) [2014] HCA 36 at [22]), holding no duty of care owing by the builder and sub-contractors to the owner corporation.

24 *Multiplex* and similar decisions have however recently been statutorily overruled by the introduction of the Design and Building Practitioners Act 2020 (NSW). The statute imposes a *non-delegable statutory duty of care* owed by builders to exercise reasonable care to avoid economic loss.

25 Most Australian states require the builder to undertake compulsory insurance to guard against financial loss of the owner flowing from any failure to complete the works or from faulty workmanship.

4. New Zealand

26 New Zealand likewise employs *statutory implied warranties* to protect homeowners, including warranties of fitness for purpose, and for work and materials to be of a nature and quality suitable to achieve that result.

27 The legislative control has not hampered the courts' robust advancement of common law duties owed by construction players. The courts have developed a separate category of non-delegable duties for developers with legal control of a residential development and who sell the same for profit, owed to both original as well as subsequent owners.

28 There is no mandatory insurance, but in cases over a threshold, the government has prescribed compulsory disclosure statements to be made by a building contractor to a client.

5. United States

29 Whilst the approach varies across the different states, US court decisions largely involve implied warranties under common law that the property is fit for habitation and that the property was built in a reasonably workmanlike manner.

30 New Jersey has a mandatory insurance scheme under the New Jersey's New Home Warranty and Builder's Registration Act.

6. Canada

31 Under Ontario's present New Home Warranties Plan Act, there are three periods in which various warranty claims can be made. This distinction is scaled according to the gravity of the defects. Owners are entitled to make a claim for breach of statutory warranty under the New Home Warranties Plan Act during:

31.1 the first-year warranty claim period;

31.2 the second-year warranty claim period; and

31.3 the major structural defect warranty claims period.

32 A brief comparison of the insurance schemes in the UK, British Columbia (Canada), Ontario (Canada), New Jersey (USA) is annexed hereto at Schedule 2.

33 A brief overview of the insurance schemes in Australia and New Zealand is annexed hereto at Schedule 3.

E. Summary of recommendations

34 Each of the surveyed jurisdictions adopt a robust approach towards the homeowners' protection for defects, whether under common law or by way of legislation. Drawing from the approaches in the surveyed jurisdictions, the Sub-Committee recommends exploring reforms in the following broad vein:

34.1 **Statutory duties of care or statutory warranties.** The creation of a statutory regime imposing *non-delegable duties-of-care* or *requiring statutory warranties* to owners and/or parties having an interest in the residential property may be considered. Statutory warranties might be more straightforward and could take effect from completion or handover of the residential property. The statutory warranties should extend beyond safety concerns and should also address issues of quality; albeit any requirements for "fitness for purpose" would require consideration of the insurability of the same and be subject to industry consultation. The imposition of a transmissible statutory warranty (by analogy to contract) would necessarily involve strict liability.

34.2 **Types of defects.** The statutory warranty should address all major issues that have been identified as persistent issues common to residential developments. These would include structural cracks or concerns, fire safety defects, and deficient waterproofing. Provisions in relation to less major defects in a tiered-system may also be considered.

34.3 **Tiered system of protection.** This Sub-Committee recommends that the proposed system of protection should extend beyond *safety* concerns and also address issues of *quality*. A tiered-approach (as seen in Australia, British Columbia, Ontario and New Jersey) may be adopted and modified as appropriate. The first-tier provisions would apply to major defects and other specified defects of sufficient gravity with enhanced protection in the form of an extended limitation period of, for instance, 15 years. The second-tier provisions might cover all other defects and issues of quality and workmanship with a limitation period aligned with the 6-year limitation period under the Limitation Act for actions for breach of contract or tort.

34.4 **All players in the construction field.** Non-delegable obligations should be owed by the primary players taking on work for or in connection with a residential development, which should include the developers, contractors, and professional consultants.

34.5 **Subsequent owners.** In addition to direct purchasers of residential properties, the statutory regime should extend to subsequent owners, or "*every person who acquires an interest (whether legal or equitable)*" in the property (see the UK approach at [87] herein, the Australian approach at [162], and the New Zealand approach, at [206]).

34.6 **Mandatory insurance.** Compulsory insurance as part of the statutory regime may be explored, to cover the full duration and extent of all builders' statutory liabilities for defects after the completion of works. Such insurance might be akin to contractors' all risks insurance, insuring for the risk of damage from all parties performing work in all tiers, including the various sub-contractors and sub-sub-contractors.

II. CONCERNS ON REDRESS FOR RESIDENTIAL PROPERTY DEFECTS IN SINGAPORE

35 Meaningful recovery for residential property defects is a question of significance to all homeowners, particularly in Singapore, where land is not only scarce but expensive. Investment in real property likely represents a significant, if not *the most significant* investment in an individual's lifetime: *Eastern Lagoon* at [43].

36 Typically, a developer of a new condominium enters into a contract of sale & purchase with each home-buyer (that is, an **original purchaser**). Each purchaser becomes a subsidiary proprietor. All subsidiary proprietors of a development eventually form the MCST. The MCST may *"sue and be sued in respect of any matter affecting the common property"*: section 24(2)(b) of the Building Maintenance and Strata Management Act 2004.

37 The original purchaser may sell to another person (the **subsequent purchaser**). Whilst an original purchaser may commence an action in *contract* against the developer, a subsequent purchaser (having no contract with the developer) may generally only maintain an action against the developer in *tort*. Actions against the project architect or main contractor by *any* purchaser also lie in tort.

38 Historically, the cost of rectifying residential property defects is considered 'pure economic loss' for which recovery in tort is barred. *'Pure economic loss'* refers to purely financial loss without, and not consequent upon, physical injury to person or property. The rule recognises the fundamental distinction between the *law of contracts* – which enforces the expectancy interests created by agreement between the parties, and the *law of torts* – which enforces duties imposed by law to protect against personal injury or property damage. Simply stated, '*pure economic loss*' is not usually recoverable outside of contract: Richard J Bednar and others, *Construction Contracting*, (Washington DC: The George Washington University Press, 1991), at 180.

39 The spectre the courts always had in mind was the avoidance of the opening of the '*floodgates*' to admit any kind of tortious liability: Neil F. Jones, *Professional*

Negligence in the Construction Industry (London: LLP Reference Publishing, 1998), at 14. The classic exposition of the policy is found in the words of Cardozo J in *Ultramares Corporation v Touche* (1931) 174 N.E.441, explaining that the law of torts is concerned to not permit *"liability in an indeterminate amount for an indeterminate time to an indeterminate class. This would confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise …".*

40 In Singapore, the tides changed with the seminal *Ocean Front* case, where our Court of Appeal adopted a robust attitude towards recovery for economic loss, recognising that even if the only loss arising from the negligent construction of a building is pure economic loss, such loss is nonetheless recoverable.

41 In *Ocean Front*, a key question was whether the MCST had a cause of action against the developers for the cost of making good defects in common property. This would have been loss not consequent on any injury to person or damage to property; it was therefore pure economic loss. The Court examined the English position from *Anns & Ors v Merton London Borough Council* [1978] AC 728 (***Anns***) to *D&F Estates & Ors v Church Commissioners for England & Ors* [1989] AC 177 (***D&F Estates***) to *Murphy v Brentwood District Council* [1990] 2 All ER 908 (***Murphy***) and declined to follow *D&F Estates* and *Murphy.*

42 Endorsing the Australian case of *Bryan v Maloney* (1995) 128 ALR 163, the Court of Appeal permitted the MCST's recovery against the developers.

43 In *Eastern Lagoon*, the Court of Appeal was invited to overrule *Ocean Front.* The Court declined and instead *extended* the scope of recovery for economic loss, allowing the *MCST* to sue the *architect*, finding the requisite assumption of responsibility and known reliance.

44 *Ocean Front* and *Eastern Lagoon* thus opened the doors to the developer, main contractor and architect of a construction project being liable to the MCST for defects in common property.

45 The practical effect of the imposition of such tortious duty of care (owed by the developer, main contractor and architect to the MCST) has however been somewhat implicitly eroded by the subsequent Court of Appeal decisions in

Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd [2005] 2 SLR 613 (***Seasons Park***) and more recently, *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] 4 SLR 521 (***Seaview***).

46 In *Seasons Park,* the Court of Appeal was confronted with the question of whether the developer of a condominium could rely on the *'independent contractor'* defence to defeat the MCST's claim in tort. The Court answered the question in the affirmative, observing at [37] that the *"general principle is that an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of his contract … It would be different if it could be shown that the employer did not exercise proper care in appointing an independent contractor".*

47 The question became more nuanced in *Seaview,* where the Court of Appeal was invited to consider whether the architect and main contractor owe the MCST *non-delegable* duties to ensure that the condominium's common property were designed and built with reasonable care. Counsel for the MCST ably contended that compelling policy reasons for recognising the proposed non-delegable duty included industry practice and expectations for architects and main contractors to be liable in spite of the works being performed by sub-contractors, and simplifying the legal process for the MCST. Counsel further contended that recognition had to be given to the fact that larger well-insured organisations have started outsourcing their duties to poorer uninsured sub-contractors (*Seaview,* at [83]).

48 Rejecting the MCST's arguments, the Court of Appeal observed at [78] – [82] that the features elucidated in *Woodland v Swimming Teachers Association* [2014] AC 537 for a non-delegable duty to arise were not present. The MCST was not in the "*custody, care and charge*" of the architect and main contractor; nor was the MCST especially *"vulnerable or dependent"* on them. Moreover, the transaction was wholly commercial and the contract entered into between the developer and the main contractor contemplated that the latter would engage sub- contractors.

49 Whilst alive to the possibility that the MCST may have to take out additional applications to ascertain the correct defendant sub-contractor to sue, or end up suing a defendant unable to meet the judgment sum, the Court at [89]

considered that *"this was part and parcel of any litigation and was an ordinary risk endemic in any investment, including the purchase of property"*.

50 Thus, whilst *Ocean Front* and *Eastern Lagoon* are good authority for the proposition that there exists a requisite degree of proximity and assumption of responsibility between the MCST and a developer, main contractor or architect to found a tortious duty of care in negligence, the decisions of *Seasons Park* and *Seaview* establish that such a duty of care is a *delegable* one.

51 The 'independent contractor' defence is available for tortious claims, meaning that for instance, a main contractor is not vicariously liable for the negligence of its sub-contractor in the execution of its contract.

52 The ultimate result is that as regards tortious claims, the MCST is confined to claiming against the relevant sub-contractor or even 'sub-sub-contractor'. Such parties may have limited financial resources to compensate the MCST.

53 Concerns have been aptly summarised in an essay by Sinh Vuong Nguyen, *"Negligence liability for construction defects: Illusory protection?"* [14], including the contention that increased specialisation in the construction industry ought to *support*, not *oppose* the creation of a non-delegable duty, and that *Seaview* may have *'undermined the law's focus on distributive justice'*.

54 Another author opines that Seaview '*appears not to have engaged the most significant policy argument that large contractors are increasingly outsourcing work to "poorer and under- insured subcontractors" … There may be something to be said for a new category of non- delegable duties for professionals. By virtue of their expertise and special qualifications, professionals are in a position to exercise control and authority over others who are generally dependent on the professionals and are in a position of vulnerability. The healthcare industry is a classic example, as is the construction industry: both are increasingly structured on a network of independent contractors or involve complex systems to deliver services. This diffuse structure does not conduce to higher standards of safety for two reasons: the inherent risks in complex systems and the dangers of outsourcing. The more complex the system, the greater the threat from systemic risks due to gaps in communication and management …*'[15].

[14] Society of Construction Law (Singapore) - Negligence liability for construction defects: Illusory protection? (scl.org.sg)

[15] Kumaralingam, Amirthalingam, "Case Note: The Non-Delegable Duty", at [26] – [27].

55 The same author observes that *'[o]utsourcing to independent contractors risks a race to the bottom in terms of pricing, as tenders are generally awarded to the lowest bid. This has a flow-on effect in terms of quality and safety standards as contractors cut costs. Perversely, the "independent contractor defence" serves as an incentive to outsource work, pushing responsibility for quality and safety down the chain of contractors to the smaller companies that may be inadequately insured or under-capitalised, leading to an inability to satisfy claims successfully brought against them. So, not only is it difficult for claimants to identify the correct defendant in the milieu of independent contractors, they still face the risk of a pyrrhic victory should the contractor be insolvent. This "race to the bottom" ought to be a valid policy consideration to support a non-delegable duty or, at least, to recognise that part of the duty to take care in appointing an independent contractor includes a duty not to appoint a financially irresponsible subcontractor'*[16].

56 The pool of affected claimants is considerable: the Singapore second-hand property market is substantial, and there are roughly 3000 management corporations in Singapore. Coupled with the possibility that the parties to whom the relevant duties have been delegated might have limited financial resources, the unavailability of recovery against contractors and developers may thus subvert tort law's role, which should be *"a tool for the redistribution of economic wealth fairly between tortfeasors and their victims"* (*Spandeck Engineering (S) v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [29]).

[16] *Ibid,* at [28].

III. RECOMMENDATIONS

57 Against the backdrop of the increasing number of large residential strata developments for Singapore's growing population and the plethora of difficulties in seeking meaningful redress for residential property defects, the time now seems ripe for law reform in this area.

58 The Sub-Committee's comparative survey of various jurisdictions[17] reveals a generally vigorous approach towards homeowners' protection for defects, whether under the common law or by way of legislation.

59 In New South Wales, recent legislation like the Design and Building Practitioners Act 2020 (NSW) has legislatively overruled court decisions and imposed a non-delegable statutory duty of care owed by designers and builders to exercise reasonable care to avoid economic loss, to supplement existing protections under the NSW Home Building Act. In the United Kingdom, the recent Building Safety Act overhauls the way residential buildings are constructed and maintained following the Grenfell Tower disaster, making crucial changes to amongst others, the way fire safety is regulated.

60 The global trend appears to be tilting the balance in favour of ensuring safe, quality homes for an enduring urban landscape.

61 Drawing from how homeowners' protection is dealt with in other jurisdictions, the Sub-Committee recommends that reform in the following broad vein should be considered:

61.1 **Statutory duties of care or statutory warranties.** The creation of a statutory regime imposing *non-delegable duties-of-care* or *requiring statutory warranties* to owners and/or parties having an interest in the residential property may be considered. The test would be reasonableness and not perfection (see for instance, the US approach at [231] herein). Statutory warranties might be more straightforward and could take effect from completion or handover of the residential property. The

[17] See Schedule 1 hereto.

statutory warranties should extend beyond safety concerns and should also address issues of quality; albeit any requirements for "fitness for purpose" would require consideration of the insurability of the same and be subject to industry consultation. The imposition of a transmissible statutory warranty (by analogy to contract) would necessarily involve strict liability.

61.2 **Types of defects.** The statutory warranty should address all major issues that have been identified as persistent issues common to residential developments. These would include structural cracks or concerns, fire safety defects, and deficient waterproofing. Provisions in relation to less major defects in a tiered-system may also be considered.

61.3 **Tiered system of protection.** The Sub-Committee recommends that the proposed system of protection should extend beyond *safety* concerns and also address issues of *quality*. A tiered-approach (as seen in Australia, British Columbia, Ontario and New Jersey may be adopted and modified as appropriate. The first-tier provisions would apply to major defects and other specified defects of sufficient gravity (for instance, structural issues, fire safety, watertightness) with enhanced protection in the form of an extended limitation period of, for instance, 15 years. The second-tier provisions might cover all other defects and issues of quality and workmanship with a limitation period aligned with the 6-year limitation period under the Limitation Act for actions for breach of contract or tort.

61.4 **All players in the construction field.** Non-delegable obligations should be owed by the primary players taking on work for or in connection with a residential development, which should include the developers, contractors, and professional consultants.

61.5 **Subsequent owners.** In addition to direct purchasers of residential properties, the statutory regime should extend to subsequent owners, or "*every person who acquires an interest (whether legal or equitable)*" in the property (see the UK approach at [87] herein, the Australian approach at [162], and the New Zealand approach, at [206].

61.6 **Mandatory insurance.** Compulsory insurance as part of the statutory regime may be explored, to cover the full duration and extent of all builders' statutory liabilities for defects after the completion of works. Such insurance might be akin to contractors' all risks insurance, insuring for the risk of damage from all parties performing work on the project in every tier, including the various sub-contractors and sub- sub-contractors. As stated in this report, compulsory insurances presently adopted under French law (see [152] herein) and in the majority of the Australian states (see [170] herein). Compulsory insurance, together with the imposition of liability on major players in the construction industry, might better allocate risk across the contractual chain of residential construction projects and afford more effective recourse to homeowners. Insofar as the introduction of greater statutory protection for homeowners might give rise to concerns for industry stakeholders, the mechanism of mandatory insurance coverage – implemented with due consideration of the development and availability of the necessary insurance policies – may assist with the pricing of such risks in residential construction projects.

62 The Sub-Committee appreciates that proposing legislative reform in the form of a non-delegable duty of care or statutory warranty for greater homeowners' protection might meet with resistance from certain stakeholder groups.

63 Naturally, there is a 'motivational mismatch' between the 'consumers' and the 'producers'. For the 'consumers', either individually as lot owners or collectively in owners' corporations, unremedied defects are a social and economic burden on home ownership. It can be a protracted, expensive and stressful enterprise. For the 'producers', i.e. the builders or developers, lengthy liability exposure to defects without further financial compensation is a project risk that affects viability.[18] Being required to rectify or compensate for defects, particularly those that only arise a delayed time after completion, would be an additional burden on developers and builders as they reduce project profitability to the extent of re-work required (or damages payable).

[18] Bryony Cooper and K. Michael Brown, "Dealing with Defects", City Futures Research Centre, Faculty of the Built Environment, University of New South Wales, 2014, at [2.4]; [7.2].

64 But a few points may be made in relation to this contest:

64.1 Our Courts have already recognised what a significant economic commitment people are making when purchasing real property (*Eastern Lagoon* at [43]).

64.2 Aligned with this, the Sub-Committee notes that the doctrine of *caveat venditor* has to an extent also already been recognised as a feature in the way residential property has been dealt with (see *Management Corporation Strata Title Plan No. 1166 v Chubb Singapore Pte Ltd* [1999] 2 SLR(R) 1035 at [94][19], followed in *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 at [82]), and even to a certain extent, commercial property (see *Oxley Consortium Pte Ltd v Getex Enterprises Singapore (Pte) Ltd* [2020] SGHC 235 at [134][20]).

64.3 It has been observed that "*developers as a class have greater transactional power than purchasers as a class … And from a purchaser's perspective, it remains the case that a purchase of commercial property in Singapore, just like the purchase of residential property, is likely to be the most substantial financial transaction that any Singaporean will make in a lifetime. Purchasers are generally less able to bear or mitigate the magnitude of that financial risk than developers generally are.*"[21]

64.4 This report is concerned with and confined to the imbalance of bargaining power in the middle of the bell curve, where the individual purchaser is caught in a difficult position if compelled to fork out for potentially lengthy and costly litigation to clarify the law in a manner that could otherwise be swiftly done by legislation and thereby giving greater comfort to purchasers.

64.5 High density residential developments are a form of social and economic infrastructure. Costly yet poor quality housing will waste economic resources that might otherwise be directed towards more

[19] In the context of a contract for work and materials in the supply and installation of a security and communications system for a condominium complex.

[20] Appeal from the decision allowed in part on unconnected points.

[21] Per the Honourable Vinodh Coomaraswamy J in *Oxley Consortium,* at [74] – [75]. Whilst the High Court's observations were in the context of a dispute over commercial property, the observations are equally applicable to residential property.

productive enterprises[22]. It is thus in everyone's interest to take steps towards seeing that those who are responsible for creating residential homes are incentivised to ensure the safety and quality of those dwellings that are expected to endure as homes for decades.

65 The Sub-Committee thus considers that legislative intervention might be appropriate here to strike the right balance across the spectrum of interests in the strata living sphere. Judicial intervention would likely entail much time and costs to be expended to effect reform in this area.

66 The Sub-Committee echoes the sentiments expressed during the parliamentary debates for the Ontario New Home Warranties Plan Act: key construction players should be "*concerned about the kind of product they put out and what they put into the product and what they sell to the people*". At the end of the day, we "*want an industry which makes a small percentage of poor builders come up to the proper standards of workmanship because as in any profession, one bad apple does cast a dark shadow on everyone*
… and secondly, because the customer will have a better understanding of his rights and responsibilities when purchasing a home".

67 Legislation that sets clear boundaries of liability and that translates into managed project risks can also help translate to greater profitability. Moreover, a developer who desires to acquire and/or maintain a good reputation would have added incentive to exert the optimal level of effort so as to increase his revenue from subsequent projects.[23]

68 The Sub-Committee recognises that a healthy building sector is a key component for a strong Singapore economy and any legislative reform should respond to the needs of both the industry and homeowners. Ultimately, any legislative reform will need to achieve a suitable balance between competing interests, but the Sub-Committee is of the view that there is here a real social interest in offering some degree of protection to homeowners, without stifling incentives for developers to continue to build housing.

[22] Bryony Cooper and K Michael Brown, *op cit.,* [7.6].

[23] Seow Eng Ong, (1997), Building defects, warranties and project financing from pre-completion marketing, Journal of Property Finance, Vol. 8 Issue 1 pp. 35 – 51.

69 As for the proposal for insurance, consultation with the insurance industry would be required to see if there is room for such products and/or how any mandatory insurance may be implemented.

70 Upon publication of this report, the Sub-Committee proposes consultation with the relevant industry stakeholders on the broad proposal for reform, so that each point may be more closely scrutinised. Major stakeholders in the strata living framework would include:

70.1 Developers;

70.2 Designers/consultants;

70.3 Project managers;

70.4 'Consumers' (i.e. homeowners, MCSTs);

70.5 Strata managing agents;

70.6 Insurers;

70.7 Financiers;

70.8 The authorities; and

70.9 Legal advisers.

71 Consultations may thus be made with the BCA[24], members of the Construction Industry Joint Committee (CIJC) (i.e. ACES, IES, REDAS, SCAL, SGBC, SIA, SIBL, SISV, SPM) [25], SCL, SIARB[26] insurance associations and/or the general public.

72 If the proposal for reform is thereafter accepted in whole or in part, the appropriate legislative reforms may be drafted by the Attorney-General's Chambers whether by means of amendments made to the Building Control Act, Housing Developers legislation or by such other means as Parliament might deem fit.

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[24] Building and Construction Authority of Singapore.

[25] Association of Consulting Engineers Singapore, Institution of Engineers Singapore, Real Estate Developers' Association of Singapore, Singapore Contractors Association Ltd, Singapore Green Building Council, Singapore Institute of Architects, Singapore Institute of Building Surveyors and Valuers, Society of Project Managers respectively.

[26] Society of Construction Law, Singapore Institute of Arbitrators respectively.

IV. SCHEDULE 1: A COMPARATIVE SURVEY

A. United Kingdom

73 In the United Kingdom, the 1972 Act imposes statutory duties of care for or in connection with the provision of dwellings, and was intended, among other things, to award greater protection to purchasers of newly-built dwellings.[27]

74 In this regard, purchasers are entitled to rely on the diligence and skills of those whose work has gone into the provision of the dwelling,[28] and they in turn are obliged to original and subsequent purchasers to carry out the work in a good and workmanlike manner, to supply proper materials, and in such a way that the dwelling will be reasonably fit for human habitation.[29]

1. Types of properties

75 The 1972 Act applies to impose duties in respect of the provision of or in connection with dwellings.[30]

76 Section 1(1) of the 1972 Act imposes duties in respect of "*work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building)*". For the purposes of the 1972 Act, a "*dwelling*" is a "*place where a person or household lived to the exclusion of members of another household*". This includes the individual apartments in a block of flats or condominium, along with its balcony and any other part of the building to which the occupier of the apartment has exclusive access for living.

[27] London, The Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 15 December 1970) at [20]. See also United Kingdom, House of Lords, *Parliamentary Debates* (16 May 1972) vol 330 at col 1361 <https://api.parliament.uk/historic-hansard/lords/1972/may/16/defective-premises-bill>.

[28] London, The Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 15 December 1970) at [21].

[29] London, The Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 15 December 1970) at [25].

[30] Section 1(1) of the 1972 Act. N.B. Statutory exclusions to the 1972 Act also apply where the dwelling is constructed or first sold with the benefit of the UK National House Building Council Scheme (Section 2 of the 1972 Act). Statutory duties in relation to the work of construction, repair, maintenance or demolition or any other work done on or in relation to premises, and premises let under a tenancy fall outside the scope of this report (Sections 3 and 4 of the 1972 Act).

77 While common parts of each block of apartments do not form part of any dwelling, work done to the structural and common parts of the blocks is work done "*in connection with the provision of a dwelling*" and comes within the meaning of the 1972 Act.[31]

78 Works to an existing dwelling fall within the Act if the works are so extensive that they result in the creation of a new dwelling of a wholly different identity from the existing one.[32]

2. Types of defects

79 In respect of work for or in connection with the provision of a dwelling, the duty imposed is limited to defects in the work done (including the failure to carry out necessary work)[33] and the materials used which makes the dwelling unfit for habitation on completion. It is not enough for claimants to prove that defects arose because of the defendants' failure to carry out their work in a professional manner and with proper materials.[34]

80 It seems that the 1972 Act only protects major structural defects, rather than minor ones such as a defect in features which are merely decorative or for convenience.[35] This is consistent with the distinction made in the Law Commission's Report between defects of quality under a contract and dangerous defects giving rise to tortious liability,[36] and the 1972 Act's focus on "*liability for injury or damage caused to persons through defects in the state of premises*".[37]

81 An example of a major defect that would be protected under the 1972 Act would be "*widespread cracking*" leading to inadequacy of foundations of the building.[38] Where there are a number of defects, the test is whether the dwelling

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31 *Rendlesham Estates Plc & Others v Barr Limited* [2015] 1 WLR 3663.

32 *Jenson v. Faux* [2011] 1 WLR 3038.

33 *Andrews v Schooling* [1991] 1 WLR 783 at 792.

34 *Thompson v Alexander* [1992] 59 BLR 77 at 610.

35 Robyn Martin, "Tortious Liability for Defective Premises in English Law after Murphy v Brentwood: Learning from the Commonwealth" (1997) 2 Newcastle L. Rev. 82 at 98.

36 London, The Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 15 December 1970) at [2]

37 Long title of the 1972 Act.

38 *Bole and Another v. Huntsbuild Limited* [2010] All ER (D) 84.

"*as a whole*" is fit for habitation, notwithstanding the fact that the damage to the properties themselves are relatively minor.[39]

82 A dwelling is unfit for habitation where it is without some essential attribute on completion of the works, for example a roof or a damp-proof course. It does not matter that the problems resulting from the lack of that attribute have not at the time of completion become patent.[40] Similarly, it cannot be said that the building is fit for habitation simply because the claimant has lived there satisfactorily and safely for a period of time. Defects leading to inadequacy of foundations that is "*inevitably going to produce a situation in which the house would collapse*" makes the building unfit for habitation.[41]

83 Where a defect is fundamental to the stability of the dwelling and is not merely a cosmetic or stylistic issue, the fact that it is necessary for the claimant to vacate for a long period while the remedial work is carried out is a highly relevant indicator of whether the defect has rendered the dwelling unfit for habitation.[42]

84 This has been defined by the English courts as setting out two requirements to fulfil this standard – (1) the dwelling must be capable of occupation for a reasonable time without risk to the health or safety of the occupants; and (2) the dwelling must be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants.[43]

3. Parties owing duties

85 Section 1(1) of the 1972 Act imposes the statutory duty on any person "*taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building)*", which includes contractors, sub-contractors, and professional men (e.g., engineers, architects, electricians, surveyors, consultants).[44]

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39 *Harrison & Ors v Shepherd Homes Ltd & ors* [2011] All ER (D) 140.

40 *Andrews v Schooling* [1991] 1 WLR 783 at 790.

41 *Mirza v. Bhandal* [1999] All ER (D) 435.

42 *Bole and Another v. Huntsbuild Limited* [2010] All ER (D) 84.

43 *Rendlesham Estates Plc & Others v Barr Limited* [2015] 1 WLR 3663 at [68].

44 P.M. North, "Defective Premises Act 1972" (1973) 36 Modern L.Rev 628 at 629.

86 Section 1(4) of the 1972 Act extends the section 1(1) duty to persons who "*in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings*", or "*in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment*", arrange for another to take on work for or in connection with the provision of a dwelling:[45] that is, developer-builders, property developers, and public or local authorities.[46]

4. Parties to whom duties are owed

87 Original owners[47] and "*every person who acquires an interest (whether legal or equitable) in the dwelling*"[48] enjoy the benefit of the statutory duties set out in section 1(1) of the 1972 Act, and section 1(1)(b) of the 1972 Act includes subsequent purchasers, a building society, a bank (where the purchaser has obtained a mortgage on the security of the building), and any other purchaser with no privity of contract but have either a legal or equitable interest.

5. Nature of duties, limitations and defences

88 The statutory duties in the 1972 Act are in addition to any duty a person may owe (section 6(2)) and cannot be contracted out of (section 6(3)).

89 Section 1(1) of the 1972 Act imposes a single statutory duty, such that the obligation to do work "*in a workmanlike …with proper materials*" must be read subject to the requirement that the "*dwelling will be fit for habitation when completed*".[49] This means that the requirement of fitness for habitation is not a separate obligation, but a measure of the standard required in performance of the duty imposed by section 1(1).[50]

90 The duty under section 1(1) of the 1972 Act is discharged if a person takes on work on terms that he is to do it in accordance with particular instructions, and

[45] Section 1(4)(a) & (b), 1972 Act.

[46] United Kingdom, House of Lords, *Parliamentary Debates* (16 May 1972) vol 330 at col 1364 <https://api.parliament.uk/historic-hansard/lords/1972/may/16/defective-premises-bill>.

[47] Section 1(1)(a), 1972 Act

[48] Section 1(1)(b), 1972 Act

[49] *Harrison & Ors v Shepherd Homes Ltd & ors* [2011] All ER (D) 140 at [143] –[153].

[50] *Thompson v Alexander* [1992] 59 BLR 77 at 610.

properly carries out the work in accordance with the instructions given to him (section 1(2)). However, he may still incur liability under the 1972 Act if he owes a duty to warn of any defects in the instructions and fails to do so (section 1(3)).[51]

91 The limitation period for the statutory duty is six years from the time the dwelling is completed.[52] Where after completion further work is carried out by a person who has done work for or in connection with the provision of the dwelling to rectify the work already done, the cause of action in respect of that further work is deemed to have accrued at the time when the further work was finished.

92 The 1972 Act thus excludes claims that are discovered much later after completion, such as for latent structural defects.[53] However, the UK Limitation Act 1980 alleviates this by extending the limitation period for latent defects (for negligence actions not involving personal injuries) to either (a) six years from the date on which the cause of action accrued or (b) three years from the earliest date on which the claimant or any person in whom the cause of action was vested before him first had both the knowledge required to bring an action for damages in respect of the relevant damage and a right to bring such action, whichever period expires later.[54] The time limits provided under s 14A of the UK Limitation Act 1980 are subject to an overriding time limit of 15 years from the date on which the negligent act or omission to which the damage in respect of which damages are claimed to be attributable (in whole or in part) occurred.[55]

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[51] Michael F. James, *Liability for the Construction of Defective Buildings* (Palgrave, 2nd Ed, 2002) at p 105.

[52] Defective Premises Act 1972 (c 35) (UK) s 1(5).

[53] John Timothy Cheung, "Defective Premises: Rethinking *Murphy v Brentwood*" (2017) OUULJ 8 at 14; e.g. *Rimmer v. Liverpool City Council* [1984] 1 All ER 930.

[54] UK Limitation Act 1980 (c 58), s 14A (4). See also ss 14A (5) – (10)

[55] UK Limitation Act 1980 (c 58), s 14B.

6. NHBC scheme

93 Various warranty providers participate in the UK housing market, including Checkmate,[56] LABC Warranty,[57] National House-Building Council ('**NHBC**'),[58] and Premier Guarantee,[59] which are available to owners of newly- built residential property to offer cover against construction defects.

94 Warranty cover is not legally required on the construction of a new home – however where a property is purchased with mortgage finance it is common for mortgage lenders to require warranty cover for property built or converted in the past ten years.[60]

95 Section 2 of the 1972 Act excludes the right of a person having or acquiring an interest in a dwelling to bring action for breach of the duty imposed by section 1 of the 1972 Act in relation to the dwelling if, *inter alia*, that dwelling is covered by a scheme that confers rights on such persons in respect of defects in the state of the dwelling[61] which is approved by the Secretary of State.[62] In practice, this means that policyholders of approved warranty schemes cannot rely on the statutory duties under section 1 of the 1972 Act, while policyholders of unapproved warranty schemes can make policy claims as well as bring action in reliance on statutory rights conferred under section 1 of the 1972 Act.

96 The terms of warranty offered by each provider vary, and coverage typically is for physical damage to new build homes for specified defects by reference to mandatory requirements for construction as set out in the policy. The most commonly used warranty provider for residential property is NHBC Buildmark,[63] which offers various policies depending upon the type of property development, i.e., homes for private sale, affordable rent or shared ownership, build to rent, major projects, mixed use developments, conversions, custom

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56 Checkmate - Home

57 Self Build & New Home Warranty | LABC Warranty

58 About | NHBC

59 Structural Warranty & Building Control | Premier Guarantee

60 *UK Practical Law Property, "New Home Warranties" Practice Note 5-624-4565.*

61 Section 2(2)(b), 1972 Act.

62 Section 2(1)(a) read with section 2(3) of the 1972 Act.

63 *UK Practical Law Property, "New Home Warranties" Practice Note 5-624-4565.*

build, and high value private homes.[64] The NBHC Buildmark scheme for newly built and newly converted homes is elaborated on below by way of illustration.

NHBC Buildmark Policy for Newly Built and Newly Converted Homes

97 The NHBC provides a deposit, warranty and insurance scheme, Buildmark, for newly built and newly converted homes – the present policy for homes registered with the NHBC from 1 April 2021 ("**NHBC Buildmark Policy**"),[65] provides (a) pre-completion deposit protection ("**section 1**" cover), and (b) 10 years' cover from the date of legal completion comprising a builder warranty period of typically 2 years [66] ("**section 2**" cover), and (c) a further 8-year insurance cover by the NHBC against damage caused by defects in the structure of the property after the end of the 2-year warranty ("**section 3**" cover).[67]

98 **Types of coverage, section 1 cover.** Prior to the legal date of completion, section 1 cover under the NHBC Buildmark Policy provides insurance cover in the event that the builder becomes insolvent before the completion date of the home. Coverage includes payment by the NHBC for (i) the loss of amounts paid to the builder in accordance with the contract, and (ii) the reasonable additional amount over the contract price the purchaser has to pay to complete the building of the home because of the builder's insolvency, subject to claim requirements, limits and exclusions.

99 **Types of coverage, section 2 cover.** The first 2-year period after the legal date of completion (or '**builder warranty period**') falls under section 2 cover, and under which warranty the builder is responsible for defects or physical damage caused by defects arising from the builder's failure to meet defined NBHC Technical Requirements when building the home or preparing the land. The builder's warranty for "*defects*" is limited to breaches of any mandatory NBHC Technical Requirement by the builder or anyone employed by or acting for the builder, and the builder's warranty for "*physical damage*" is limited to damage "*that is clearly visible and impairs performance, as well as being more than purely*

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64 Warranties and Cover | NHBC

65 NHBC (2021) Buildmark Policy Document (for newly built and converted homes registered with NHBC from 1 April 2021).

66 The builder warranty period is 3 years for matters involving defined "shared parts", which is elaborated on further in this report.

67 *PLC Construction, "Developer's liability under sales contracts, consumer protection regulation, Defective Premises Act and NHBC cover" 20 July 2011 at pg 4*

cosmetic". [68] The builder's warranty does not include wear and tear or maintenance issues. Concerns raised about defects or physical damage notified during the builder warranty period remain the builder's responsibility even after the end of this period.

100 Where the matter involves defined "shared parts", the building warranty period is 3 years starting from the completion date of the first home that shares those parts (i.e. defined parts for which responsibility to contribute towards cost of repair came with the home at the completion date and is shared between the owner and other people, e.g., the structure of the building containing a flat or maisonette, the drainage system serving the dwelling, garages, retaining walls and boundary walls, external handrails, etc).

101 The NBHC Technical Requirements are updated in successive editions of the NHBC Standards, which contains the Technical Requirements, performance standards and guidance for the design and construction of homes acceptable to NHBC, and the applicable NHBC Standards that apply to NHBC registered homes are those in force at the time the foundations were started. The NHBC Buildmark Policy also sets out the applicable mandatory NHBC Technical Requirements, which are defined as "*NBHC requirements*" in the NHBC Buildmark Policy: [69]

> *"R1. Work shall comply with all relevant Building Regulations and other statutory requirements relating to the completed construction work. Please note this does not include statutory requirements for planning permission, which are not covered by the NHBC Standards*
>
> *R2. Design and specification shall provide satisfactory performance*
>
> *R3. All materials, products and building systems shall be suitable for their intended purpose*
>
> *R4. All work shall be carried out in a proper, neat and workmanlike manner*

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[68] NHBC (2021) Buildmark Policy Document (for newly built and converted homes registered with NHBC from 1 April 2021), Part B, pages 8 - 9.

[69] NHBC (2021) Buildmark Policy Document (for newly built and converted homes registered with NHBC from 1 April 2021), Part B, page 8.

R5. Structural design shall be carried out by suitably qualified persons in accordance with British Standards and Codes of Practice
R6. (For newly converted properties only) Survey requirement for conversions and renovations. Existing buildings shall be surveyed to determine their condition and the work required to bring them in to a durable and habitable state."

102 At time of this report, the NHBC Standards 2023 is the newest edition and contains performance standards and guidance on meeting the Technical Requirements for the following:

102.1 Part 3 - General

102.2 Part 4 - Foundations

102.3 Part 5 - Substructure, ground floors, drainage and basements

102.4 Part 6 - Superstructure (excluding roofs)

102.5 Part 7 - Roofs

102.6 Part 8 - Services

102.7 Part 9 - Finishes

102.8 Part 10 - External Works

103 The builder warranty is backed by a NBHC resolution service and guarantee in the event a dispute arises during the builder warranty period about what work needs to be done by the builder to meet its responsibilities under the builder warranty. As part of its resolution service, the NHBC will contact the builder about the problems reported by the owner, and as required, carry out investigation whether the builder has failed to meet the NHBC Technical Requirements and issue a written resolution report. In the event the builder has failed to meet the NHBC Technical Requirements and has not put things right after the resolution service, the NHBC will under the NHBC guarantee pay the owner or its managing agent what it would have cost the NHBC to have done what the builder should have done to meet their responsibilities under the builder warranty limited to what is contained in the NHBC's written resolution report, an alternative dispute resolution report, a court judgment, or the NHBC's claims investigation and report (in event of builder insolvency).

104 **Types of coverage, section 3 cover.** After the builder warranty period, NHBC will provide insurance coverage for the 3rd to 10th year after legal completion limited to the following:

104.1 Physical damage resulting from defects because the builder failed to meet specified NHBC Technical Requirements when building the following parts of the newly built or newly converted home, namely:

(i) Foundations, external cladding, curtain walling, external render, external vertical tile hanging, roofs, ceilings, balconies, load-bearing floors (i.e. the structural parts of the floors in the home, but not including the floor coverings such as floor tiles and their fixings for example, grout and adhesive), flues, chimneys and the main access steps to the home;

(ii) Staircases, floor decking (for example, floorboards) and screeds (for example, a cement-based top layer applied to the structural floor) to the inside of the home;

(iii) Walls, but only where they form part of, or provide support to, the structure of the home;

(iv) Double- or triple-glazing panes to outside windows and outside doors of the home; and

(v) Drainage below the ground which serves the home, if the homeowners are legally responsible for it.

104.2 Alternative accommodation in the event the house is uninhabitable because of a failure to meet NHBC Technical Requirements; and

104.3 Contaminated land.

105 **Parties owing obligations.** NHBC registered builders and developers apply and pay for Buildmark when they register their building plots with NHBC.[70] The NHBC Buildmark policy imposes obligations on both the NHBC registered builder and the NHBC, with applicable obligations defined by the relevant period of coverage. Where the first owner acquires the new home from a developer, the builder's obligations are imposed jointly and severally on the developer also. In respect of defects that arise during the builder warranty period, both the builder and the NHBC have obligations under the Buildmark

[70] FAQs | NHBC

Policy's section 2 coverage as above-stated for rectification of works, and to provide a resolution service and guarantee, respectively. After the end of the builder warranty period, NHBC provides cover during the subsequent 8-year policy period under the Buildmark Policy's section 3 coverage.

106 The NBHC's liability and overall liability for policy claims under any Buildmark policy is capped as provided in the policy schedule. Applicable financial limits for each policy apply across changes of ownership, and policy limits are used up as the NBHC pays claims under the policy. Where a liability cap under the applicable policy is reached by the current owner, the owner and subsequent owners cannot receive further payments from the NBHC.

107 **Parties having benefit of Buildmark Policy.** The warranty and/or insurance contract is as between the owner (i.e. the person who entered into the contract for the home, or any subsequent owner including mortgagee in possession), and the builder and NHBC, entered into on the owner's behalf. The Buildmark policy is fully transferable during the life of the policy. All current and subsequent owners automatically have the benefit of the protection provided by the policy.

7. New Building Safety Act 2022

108 Stemming from the Grenfell Tower fire in 2017, the Building Safety Act 2022 received Royal Assent on 28 April 2022. The Building Safety Act 2022 makes profound changes to the liability landscape in the UK construction industry. A number of new rights of action have been introduced, extended and retrospective limitation periods now apply and liability can now be extended across corporate structures by order of the court in certain circumstances.

109 The Building Safety Act 2022 expands the avenues available to stakeholders to bring parties responsible for construction defects to account, particularly in the residential sphere. To achieve this, three new legal avenues of claim have been introduced: a direct right of action against manufacturers and suppliers of construction products; the expansion of existing rights under the 1972 Act, and a general right of action for breach of the Building Regulations.

Construction Products

110 Sections 147 to 151 of the Building Safety Act 2022 introduces a freestanding cause of action against construction product manufacturers which cannot be excluded by contract. The new cause of action is available to persons with a legal or equitable interest in a dwelling which is unfit for habitation. The manufacturer of a construction product used in the dwelling will be liable to pay damages in such a case if unfitness for habitation has been caused by one of the following failings: the product fails to comply with a statutory requirement; the product is inherently defective; or a misleading statement has been made in relation to the product. Liability in relation to misleading statements also applies to anyone who "markets or supplies" a construction product. Recoverable losses include damage to property and economic loss, The burden is on the claimant to evidence that one of the failings noted above has rendered the dwelling uninhabitable.

1972 Act

111 As above-discussed, the 1972 provides a course of action against those involved in the construction of a dwelling that is determined to be unfit for habitation upon completion. The Building Safety Act 2022 amends the 1972 Act so that work to an existing dwelling (provided it is done in the course of a business) is also included and introduced extended limitation periods for rights of action under the Act.

Section 38 of the Building Act 1984

112 Section 38 of the Building Act 1984 provides for a statutory right of action to anyone suffering damage as a result of a breach of the Building Regulations. The scope of section 38 may potentially be very broad for a number of reasons:

112.1 Schedule 1 to the Building Regulations contains specific requirements in relation to construction work, but more general duties are imposed in the body of the regulations. Regulation 7,

for example, imposes a general duty that building work be carried out *"in a workmanlike manner"* and with *"adequate and proper materials"*. Section 38 allows parts of the Building Regulations to be excepted from its scope by regulation, but short of that both the general and specific requirements will become actionable.

112.2 The section does not restrict the class of persons who can bring a claim and appears therefore to permit claims to be made outside the contractual structure of a project (i.e. a contractor against a sub-sub-contractor) or by third parties uninvolved with the original construction work.

112.3 The rights given by the section may not be capable of exclusion or limitation by contract. This is likely to depend on the extent to which there is held to be a public interest in upholding the right of action conferred by the section (in accordance with the House of Lords' decision in *ICI v Shatwell* [1965] AC 656). It is notable that sections 147 to 151 of the Building Safety Act 2022 relating to construction products discussed above include an express prohibition against contracting out whilst section 38 is silent on the topic.

112.4 The scope of damages recoverable under the section is open to debate. The Government's *"Redress: factsheet"* states that *"purely financial loss is not covered by section 38"* but the section itself refers to *"damage"* without qualification. An interesting comparison can be made with the Nuclear Installations Act 1965 which imposes a duty to avoid *"damage to any property"*. Cases in England and Scotland have reached different conclusions as to whether this language requires physical damage (see *Blue Circle Industries Plc v Ministry of Defence* [1998] EWCA Civ 945 and *Magnohard Ltd v United Kingdom Atomic Energy Authority* (2004) SC 247). A similar debate seems likely under section 38.

Limitation Periods

113 The Building Safety Act 2022 has introduced extended limitation periods for the rights of action discussed above, some of which apply retrospectively. A summary of these periods is set out in the table below.

Claims under	Claims for	New limitation period
1972 Act	Work in relation to new dwellings already completed (i.e. section 1 only).	30 years, retrospective.
	Future work.	15 years, prospective.
Sections 147 to 151, Building Safety Act 2022	Dwellings rendered unfit for habitation as a result of a construction product being inherently defective, mis-sold or where there has been a breach of existing construction product regulations.	15 years, prospective – all construction products. 30 years retrospective – cladding products only.
Section 38, Building Act 1984	Damage caused by breach of the Building Regulations	15 years, prospective.

Building Liability Orders

114 Sections 130 to 132 of the Act contain highly significant provisions which allow liability for construction work to be extended to associated entities such as parent or sibling companies. Ordered at the court's discretion if it is considered "*just and equitable to do so*", a Building Liability Order can be made in relation to any liability arising under the 1972 Act (as amended), section 38 of the Building Act 1984 or any other claim arising from a "*building safety risk*".

115 The concept of an associated entity under the Act is very broad and includes companies which have been parents or siblings of the company primarily liable "at any time" since the works in question were commenced.

116 The Act also provides a right for certain persons (to be prescribed by regulation) to apply for information orders requiring the disclosure of information as to persons who are or have at any time since the commencement of the relevant work been associated with the company primarily liable. Such orders will allow claimants to obtain the information necessary to piece together any complex ownership structures or dispositions which will in turn allow Building Liability Orders to be made in relation to associated entities.

117 Complementing these rights is the passing earlier this year of the Economic Crime (Transparency and Enforcement) Act 2022 which provides for an Overseas Entities Register requiring beneficial owners of "overseas entities" who own property in the UK to be registered with Companies House. This raises the prospect of claims against foreign entities in relation to UK properties although jurisdictional and enforcement issues may arise.

118 In essence, Building Liability Orders disrupt many historic legal norms – including the doctrines of privity of contract and lifting of the corporate veil. It will no longer be possible for parties to utilise sophisticated corporate structures to insulate themselves entirely against liability.

B. France

119 Whilst France is a civil law regime standing in contrast to our common law system, the Sub-Committee was of the opinion that in taking a functional approach to the subject, it might nonetheless be helpful to survey how various regimes across the world deal with the matter, including civil law regimes.

120 Strict statutory regimes of decennial and biennial liability in France apply to protect building owners and purchasers for latent defects, and good operation of 'dissociable' elements of equipment. The different types of liabilities are:

120.1 decennial guarantee of construction for building latent defects,

120.2 biennial guarantee of good working order for equipment, and

120.3 guarantee of building work completion lasting one year.

121 The system of liability and warranty is set around the notion of acceptance, which is the act through which the contracting owner acknowledges receipt of work. This can be done with or without reservation.

122 Certain entities are statutorily bound to procure mandatory construction insurance. Building insurance in France guarantees all damage repair works for which contractors are held responsible in conformity with Article 1792 of the Civil Code, and there are optional civil liability policies to cover contractual, tort and quasi-tort liabilities.

1. French approach generally

123 Real estate in France is governed by different codes:

123.1 The Planning Code provides rules harmonising the use of French territories, which are considered common space of the nations,[71]

123.2 The Construction and Housing Code consolidates construction, development and social housing rules,[72]

123.3 The Civil Code contains rules, definitions of ownership, transfer of ownership for consideration, by gift or by death, and use and lease of real estate properties,[73] and

123.4 The Trade Code and Rural Code apply specific rules to real estate used for commercial and/or agricultural purposes.[74]

124 There are no standard forms of contract for construction and design of residential premises, and the choice of law and venue for dispute resolution are open to parties' choice, subjected to public policy considerations.[75] Some public works contracts and employment contracts are required to be in

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[71] *Id*, "*Code de l'urbanisme*" at 1.1.
[72] *Ibid*, "*Code de la construction et de l'habitation*".
[73] *Ibid*, "*Code Civil*".
[74] *Ibid*, "*Code de commerce"* and "*Code Rural*".
[75] Lexology, Construction in France (Law stated 16 April 2020), at Contracts and Insurance p. 7. (***Lexology, Construction in France***).

French.[76] In both private and public sectors, construction contracts are generally bespoke but are often inspired by standard forms.[77]

2. Types of defects covered

125 Under Article 1792 of the French Civil Code, defects or "damages" are defined as defects that either endanger the strength of the building or, affecting it in one of its constituent parts or one of its elements of equipment, render it unsuitable for its purposes.[78] French case law has resisted attempts to limit the statute by interpreting the provisions widely.[79]

126 Under decennial liability, an example of "*damage*" intended by Article 1792 could refer to a wall that has been built but later falls down, while visible defects like cracks in, or discolouration of the plaster, would not.[80] The defect must exist, be real and certain in order for a project owner to be able to rely on the builders' decennial warranty.[81] The damage must also meet the standard of seriousness imposed under Article 1792 of the French civil code to fall within the guarantee.[82]

127 "Works" (as clarified by French case law) could be the building of a retaining wall or a tennis court, major renovations of an existing structure, and building of new structures.[83] The acceptance of work without reservations is the point where warranties apply.[84] Acceptance of work without reservations refer to instances where visible defects are not mentioned. Only "hidden defects" not

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[76] *Ibid*, with reference to Law No. 94-665 dated 4 August 1994.
[77] International Comparative Legal Guides, France: Construction & Engineering Law 2020 (11 August 2020), <https://iclg.com/practice-areas/construction-and-engineering-law-laws-and-regulations/france> (accessed 11 May 2021) (***ICLG Construction***) at 1.3.
[78] Squire Patton Boggs, French Construction Law: make sure you are insured (30 November 2009) at <https://larevue.squirepattonboggs.com/french-construction-law-make-sure-you-are-insured_a1800.html#:~:text=Under%20Article%201792%20of%20the,it%20unsuitable%20for%20its%20purposes.> (accessed 12 May 2021) (***Squire Patton Boggs, French Construction Law***).
[79] *Ibid.*
[80] *Ibid.*
[81] CMS Francis Lefebvre, "Future defects may be covered by the builder's decennial warranty" (30 August 2017) <https://cms.law/en/fra/publication/future-defects-may-be-covered-by-the-builders-decennial-warranty> (accessed 12 May 2021) (***CMS FL Future Defects***).
[82] *Ibid.*
[83] *Squire Patton Boggs, French Construction Law.*
[84] *Ibid.*

observable at the time of acceptance will allow a building owner to claim for repairs on a non-fault basis.[85]

128 Decennial warranties may also cover "future defects" where applications are made under warranty of defects that have yet to be serious enough to be covered by the builders' decennial warranty but – based on findings of fact – will certainly have the seriousness of defect to justify the application of the decennial warranty within the ten-year period from acceptance of the works.[86]

129 Article R. 111-27 of the Building and Housing Code applies to defects covered under the biennale (two-year) liability for elements separable from the structure. [87] Parquet flooring, suspended ceilings, water heaters, moving partitions and electric cooking plates are considered dissociable from the large works.[88] Other instances of defects covered under the biennale liability in French case law include the failure of work done for heating systems (boilers, radiators), floor and wall coverings (bathroom fittings, wallpaper, tiling, carpets), doors, windows and shutters.[89]

130 The building work completion guarantee covers defects raised by building owners at the handover meeting after making a full inspection of works that have been carried out. Builders would normally carry out rectifications on an agreed timeline noted in formal handover minutes.[90] If defects are of an important nature, building owners may refuse to sign the minutes of the handover, and must give formal notice to the builders (or instructed third-

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[85] *Squire Patton Boggs, French Construction Law.*

[86] *CMS FL Future Defects*. See Line of cases with the precedents entered by the Cour de cassation according to which any damage that will certainly occur within ten years from acceptance of the works and that is serious enough in the meaning of Article 1792 of the French Civil Code is covered by the builders' decennial warranty (Cass. 3rd Civ., 3 December 2002, No. 01-13.855; Cass. 3rd Civ., 29 January 2003, No. 00-21.091; Cass. 3rd Civ., 31 March 2005, 03-15.776; Cass. 3rd Civ., 21 October 2009, No. 08-15.136). in *CMS FL Future Defects.*

[87] Legifrance, "Building and Housing Code" in *Section 8: Construction Work Insurance* (Articles L111-27 to L111-39). <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074096/LEGISCTA000006176242/#LEGISCTA000006176242> (accessed 12 May 2021) (***LegiFrance, Section 8: Building and Housing Code***).

[88] Litigation.fr, Biennial warranty: legal definition and principles (updated 27 January 2020) <https://www.litige.fr/definitions/garantie-biennale-assurance-construction-maison-constructeur> (accessed 12 May 2021) (***Litigation.fr, Biennial Warranty***).

[89] Aubyn Avocats, "French regime of building construction insurance: The statutory 10 year mandato9ry construction guarantee and other guarantee and time bars" <http://www.aubyn.fr/texte.php?id=55> (accessed 12 May 2021) (***Aubyn Avocats, French building construction insurance***).

[90] *ibid.*

parties) to deliver the repair works or replacements in conformity with the applicable terms and deadlines.[91]

3. Parties owing duties

131 "Builders" are widely defined under Article 1792-1 of the French Civil Code to include:

131.1 Architects, contractors, technicians or other persons bound to the building by contract of hire of work,

131.2 Any person who sells, after completion, a work which he built or had built,

131.3 Any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a hirer out of work.[92]

132 Architects are responsible for reviewing every contractor's certificate of insurance but are not obliged by French law to advise building owners to have insurance against damage.[93]

133 When a property subject to earlier building or renovation works is purchased, notaries (who act in a similar capacity to conveyancing solicitors) check whether vendors hold the required insurance.[94]

134 The French Insurance Federation lists the following vendors for buildings yet to be built as subject to decennial liability: project vendors with respect to forward operations or for the sale of one or several properties for future completion; a professional property developers who commission building projects; a single-home builders, and technical project managers.

[91] *Ibid.*
[92] *Squire Patton Boggs, French Construction Law.*
[93] *Ibid.*
[94] *Ibid.*

4. Parties to whom duties are owed

135 There are two main statutory regimes of strict liability that apply to builders under Article 1792 of the civil code – decennial liability and biennial liability. These regimes attach to the building and protect owners and subsequent owners irrespective of whether a contractual relationship exists.[95] They do not protect tenants.

5. Nature of duties, limitation and defences

136 The strict statutory regimes of decennial liability and biennial liability apply to building latent defects, and good operation of 'dissociable' elements of equipment, respectively.[96]

137 Contractual limitations are not effective against statutory strict liability,[97] and the only exceptions to statutory liability are damage caused by an extraneous event (eg, force majeure).[98]

138 The acceptance of work without reservations is the point where warranties start to apply (Article 1792-6).[99] Where parties do not execute a formal acceptance, French case law recognises "tacit acceptance" for work.[100] Examples of tacit acceptance include accepting payment for the work, entry into possession of the work and a variety of other circumstances.[101]

139 French construction law has incorporated a system that mainly consists of a protective decennial liability, with mandatory warranties and insurances attached to it, and its application, has been widely extended by case law.[102]

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[95] *Lexology, Construction in France.*
[96] *Ibid.*
[97] *Ibid*, at Tort claims and indemnity p. 9.
[98] *Ibid.*
[99] Article 1792-6: Reception is the act by which the owner of the building declares that he accepts the work with or without reservations.
[100] *Squire Patton Boggs, French Construction Law.*
[101] *Ibid.*
[102] *Ibid.*

6. Decennial liability: The ten-year rule

140 The Spinetta Statute was enacted in 1978 to protect the interests of building owners and purchasers.[103]

141 Under Articles 1792 and 1792-4-1, builders are liable for repair claims for a period of ten years from acceptance of the construction works, where the building suffers from damage of a certain gravity, and without any requirement for the claimant to prove fault.[104] It is a statutory requirement for builders to take out a 10-year insurance cover for construction work undertaken for new buildings and partial work on existing structures.[105] The absolute obligation to take out insurance cover also applies to non-French entities which undertake work in France.[106]

142 The statutory decennial liability cannot be contractually excluded, whether as between a building owner and the builders, or between them and their insurers.[107]

143 Decennial liability also survives change of ownership, and benefits successive purchasers of the property.[108]

144 The decennial liability does not extend to all forms of building defects. For example, non-conformance with contractual specifications *per se* are not covered by the decennial liability.[109] As an illustration,[110] an application brought in respect of a commercial building found to be built in non-conformance with contractual specifications was nonetheless dismissed, as the project owner

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103 *Ibid.*
104 *Squire Patton Boggs, French Construction Law.*
105 *Aubyn Avocats, French building construction insurance.*
106 *Ibid.*
107 *Squire Patton Boggs, French Construction Law.*
108 *Squire Patton Boggs, French Construction Law.*
109 CMS Francis Lefebvre, "Statutory Liability of Builders" (accessed 10 June 2015) <https://cms.law/en/fra/publication/statutory-liability-of-builders> (accessed 12 May 2021) (***CMS FL Statutory Liability***).
110 Cass.3rdCiv.,20January2015,No.13-26.085, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000030144039/> (accessed 12 May 2021).

failed to prove damage to the disputed building either impairing its solidity or to its constitutive elements so as to make it unfit for its intended use.[111]

7. Biennale liability: The two-year insurance guarantee

145 In addition to the more widely known decennial liability, Article 1792-3 provides for a separate statutory guarantee relating to building construction.[112] The biennale liability is a guarantee of good operation[113] aimed at insuring the proper functioning of the fixtures and fittings which are held to be separable from the structure, for elements which may be removed or replaced without deterioration to the structure.[114]

146 The biennale liability runs for two years from reception, or formal written handover of the work carried out.[115] It is applicable to works that are found to be defective or faulty.[116] If the builder fails or refuses to undertake the requisite repairs or replacement, the building owner must commence proceedings within two years of the date of the reception or formal handover.[117]

147 In cases where fixtures and fittings render the building unfit for its intended purpose, decennial liability may also apply in certain circumstances. [118] Decennial liability can apply when the elements are inseparable from the body of the structure;[119] the malfunctions affect the items' solidity[120] which cannot be repaired without damaging the structure of the building;[121] or where the building itself has been rendered unfit for its intended use.

148 The decennial liability does not extend to defects related to separable equipment items "not intended to be operated".[122]

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[111] *CMS FL Statutory Liability.*
[112] *Aubyn Avocats, French building construction insurance.*
[113] *Litigation.fr, Biennial Warranty.*
[114] *Aubyn Avocats, French building construction insurance.*
[115] *Ibid.*
[116] *Litigation.fr, Biennial Warranty.*
[117] *Aubyn Avocats, French building construction insurance.*
[118] *Ibid.*
[119] Article 1792-2 of the French Civil Code provides the separability test
[120] *CMS FL Statutory Liability.*
[121] *Litigation.fr, Biennial Warranty.*
[122] *Ibid.*

8. Building work completion guarantee

149 Article 1792-6 indent 2 of the Civil Code, is a statutory obligatory guarantee binding upon the builder and/or any other construction/building professional involved to ensure that the completion of the building work is duly and fully achieved.[123] The guarantee is applicable to all entities carrying out building and construction work in France, even if the entity is incorporated in another country.[124]

150 The building work completion guarantee is binding for one year from the date of reception or formal written handover of the work carried out and may not be excluded or limited contractually as it is provided by French public policy.[125] Defects covered tend to be those identified by the building owner during the handover meeting, or issues which may arise within the one year period of the guarantee (excluding instances of normal wear and tear).[126] Defects which were apparent but not identified at the handover meeting will not be covered by the building work completion guarantee.[127]

151 Builders and building owners would normally agree on a timeline for the necessary repairs to be carried out. [128] In the event of failure to reach an agreement, and subject to the builder's formal written notice, works may be carried out by third parties at the cost and risk of the undertaking which had failed to respond (Article 1792-6 indent 4 of the Civil Code[129]).[130]

9. Compulsory insurance

152 The French Insurance Code provides that compulsory insurances need to be purchased by both building owner and builders.[131] Breach of these provisions are punished by a prison sentence and/or a monetary fine.[132]

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[123] *Aubyn Avocats, French building construction insurance.*
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] In the absence of such an agreement or in the event of an unenforcement within the fixed time frame, the work may, after unsuccessful notice, be carried out at the expense and risk of the failing contractor.
[130] *Aubyn Avocats, French building construction insurance.*
[131] *Squire Patton Boggs, French Construction Law.*
[132] *Ibid.*

153 Compulsory liability insurance (Article L 241-1) is required to be taken out by builders.[133] Insurance coverage tends to guarantee (1) the solidity of the insured built, (2) the fitness or otherwise of the insured for its purpose (3) solidity of the inseparable fixtures and fittings, and (4) partial or complete collapse flowing from a construction defect.[134]

154 Compulsory insurance against defects (Article L 242-1)[135] is required to be taken out by building owners.[136]

155 The French construction insurance system in place is a "double-barrelled" system.[137] As both parties are insured by compulsory insurance, immediate payment for repairs can be made to prevent any deterioration of defects, without the need to establish liability prior.[138] The building owner's insurer can subsequently take action against the builder's insurers on a proven fault basis, as appropriate, to be reimbursed for the repairs.[139]

10. Statutory liability insurance policies

156 Every builder is required to carry decennial liability insurance.[140] Decennial liability insurance covers building repairs when fault is attributed to the insured, and covers material damage of obvious severity irrespective of cause and origin, which did not become manifest by the date of the joint acceptance of work (by builder and client) and that appear within the ten-year period.[141] Damage must be beyond doubt, with the consequence that building solidity is compromised and the building is rendered unsuitable for its purposes for which it was built.[142]

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[133] *Squire Patton Boggs, French Construction Law.*

[134] *Aubyn Avocats, French building construction insurance.*

[135] *Ibid.*

[136] *Squire Patton Boggs, French Construction Law.*

[137] French Insurance Federation, "Decennial liability insurance in France" (10 November 2015) (***French Insurance Federation, Decennial liability insurance***).

[138] *Squire Patton Boggs, French Construction Law.*

[139] *Ibid.*

[140] *French Insurance Federation, Decennial liability insurance*, page 5/9.

[141] *Ibid*, page 4/9.

[142] *Ibid.*

157 There is no limit as to coverage amount for decennial liability insurance policies. The scope of repairs and coverage amounts is determined by the insurer for the building in question. Purchasers may be required to pay a share of compensation, subject to the terms of the insurance agreement and contract.[143]

158 Civil liability policies are not mandatory for builders nor building owners and are divided into policies for contract liability and tort/quasi-tort liability. Examples of optional civil liability insurance are insurance for bodily injury, and tangible or intangible damages caused to third parties and client during the completion of tasks related to their activities.[144]

C. Australia

1. Statutory regime

Implied warranties

159 Turning to Australia, the primary and secondary legislation targeted at residential work and the preservation and enhancement of consumers' rights in relation to such work have been noted to operate "*in varying circumstances and varying ways*" in all the Australian States and Territories (Julian Bailey, ***Construction Law*** (2nd Ed, 2016) at Chapter 19, 19.39.

160 Most state-based statutes prescribe implied warranties by the builder into contracts to do residential building work. There is some variance between the statutes as regards the scope of persons who are bound by the warranties. Some implied warranties are listed as follows[145]:

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[143] *Ibid.*

[144] AXA France, Construction site coverage and insurance in France, "Civil Liability" <https://www.decenal-seguros-francia.com/civil-liability.html> (accessed 12 May 2021) (***AXA France, Civil Liability***).

[145] See also the Queensland Building and Construction Commission Act 1991 (Schedule 1B, Division 2), SA Building Works Contractors Act 1995, Tasmania Residential Building Work Contracts and Dispute Resolution Act 2016 (previously, Housing Indemnity Act), Building Act (Northern Territory) 1993 and Building Act 2004 (Australian Capital Territory), which prescribe substantially the same implied warranties as the NSW Home Building Act 1989 to contracts regulated by the Act, with some variation to the scope of warranties.

160.1 NSW Home Building Act 1989:

a. Section 18B(1)(a): to perform the work in a proper and workmanlike manner and to ensure that work conforms to relevant plans and specifications;

b. Section 18B(1)(b): that materials supplied will be good and suitable for the purpose for which they are used, and that those materials will be new (unless otherwise agreed);

c. Section 18B(1)(c): that materials will be done in accordance with the Act and any other law;

d. Section 18B(1)(d): that work will be done with due diligence and within time stipulated, or otherwise, a reasonable time;

e. Section 18B(1)(e): in relation to dwelling houses, that the work will result in a dwelling that is reasonably fit for occupation as a dwelling; and

f. Section 18B(1)(f): that works and any materials will be reasonably fit for their specified purpose or result, if the purpose is made known.

160.2 Domestic Building Contracts Act 1995 (Vic):

a. Section 8(a): that the work will be carried out in accordance with the relevant plans and specifications;

b. Section 8(b): that the materials supplied will be good and suitable for the purpose for which they are used and that those materials will be new (unless otherwise agreed);

c. Section 8(c): that the work will be carried out in accordance with, and will comply with, all laws and legal requirements;

d. Section 8(d): that the work will be carried out with all reasonable care and skill and on time;

e. Section 8(e) that the home will be suitable for occupation when completed;

f. Section 8(f): that works and any materials will be reasonably fit for their specified purpose or result, if the purpose is made known.

161 A comparative table of the statutory warranties is conveniently set out in Bell M., Jocic W. (2017), "***Negligence claims by subsequent owners: Did the life of Bryan end too soon?***", Melbourne University Law Review, at page 26:

Table 1: Statutory Warranties[115]

	ACT	NSW	NT	QLD	SA	TAS	VIC
Due care and skill	88(2)(b)	18B(a)	54B(1)(a), (e)	20, 22	32(2)(a)	23, 25	8(a)
Plans and specifica-tions	88(2)(b)(i)	18B(a)		23	32(2)(a)	27	8(a)
Materials	88(2)(c)	18B(b)	54B(1)(b)–(c)	20	32(2)(b)	23	8(b)
Law	88(2)(a)	18B(c)	54B(1)(d)	21	32(2)(c)	24	8(c)
Diligence and time	88(2)(d)	18B(d)	54B(1)(f)	25	32(2)(d)	29	8(d)
Fitness for occupation		18B(e)		24	32(2)(e)	28	8(e)
Fitness for purpose	88(2)(e)	18B(f)		20	32(2)(f)	23	8(f)

162 These statutes generally provide that the statutory warranties accrue for the **benefit of the subsequent purchaser** of the property, either by express reference to successors-in-title and/or by providing that the warranties run with the property.

163 Any action based on a breach of warranty will be subject to the applicable limitation period (discussed below).

Limitation period for statutory warranties

164 In the **NSW Home Building Act**, statutory warranties will cover for different durations depending on the type of defect. A warranty period of six years[146] will apply in the case of a "major defect" that makes a building uninhabitable or under a threat of collapse, which is defined as follows[147]:

> *"(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:*
> *(i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or*
> *(ii) the destruction of the building or any part of the building, or*
> *(iii) a threat of collapse of the building or any part of the building, or*
> *(b) a defect of a kind that is prescribed by the regulations as a major defect, or*
> *(c) the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act."*

165 For all other defects, the statutory warranty period will be limited to two years[148].

166 In **Australian Capital Territory**, the Building Act 2004 (ACT) distinguishes between "non-structural element" and "structural element". The warranties expire two years and six years respectively in the case of defects (Regulation 38, Building (General) Regulation 2008 (ACT)). A structural element is defined in Regulation 38 as:

[146] NSW Home Building Act Section 18E(1)(b).
[147] NSW Home Building Act Section 18E(4).
[148] Section 18E(1)(b), Home Building Act (NSW).

"(a) a load-bearing component of the building (whether internal or external) that is essential to the stability of the building or part of it; or
(b) a component (including weatherproofing) forming part of the external walls or roof of the building.
Examples—par (a)
a foundation, floor, wall, roof, column or beam"

167 In **Queensland**, there is a warranty period of 6 years for structural defects or one year in any other case[149]. The definition of structural defect prescribed in the Building and Construction Commission Regulation is as follows:

"(a) if the work is for a residence or related roofed building—
(i) a defect in the work that causes or contributes to deflection or movement of the footing or slab of the residence or building so the residence or building no longer complies with the building assessment provisions under the Building Act 1975; or
(ii) the work does not comply with a performance requirement under the Building Code of Australia, part B1 or part 2.1 for the residence or building; or
(iii) a defect in the work that causes the residence or building to be uninhabitable or not reasonably accessible; or
(b) if the work is for a swimming pool—a defect in the work that allows water to escape through the shell of the swimming pool; or
(c) if the work is on or for a residence, related roofed building or swimming pool—a defect in the work that adversely affects the health or safety of persons who occupy or use the residence, building or swimming pool; or
(d) if the work is on or for a residence or related roofed building—a defect in the work that allows water penetration of the residence or building."

168 In **South Australia**, the (Building Work Contractors Act 1995 (SA)) provides that proceedings for breach of a statutory warranty must be commenced within five years after completion of the building works.

[149] Queensland Building and Construction Commission Act 1991, Section 29(3).

169 In **Tasmania**, the Tasmania Residential Building Work Contracts and Dispute Resolution Act 2016 provides that proceedings for a breach of a statutory warranty are to be commenced within 6 years after the date of practical completion of the residential building work to which the proceedings relate.

Compulsory insurance for contractors

170 In addition, most Australian legislation regulating contracts for residential building works require the builder to take out compulsory insurance to guard against financial loss of the owner flowing from any failure to complete the works or from faulty workmanship:

170.1 **NSW Home Building Act 1989**: Section 92(3) requires a person performing residential building work or demanding the payment of money under a contract, where the contract price is AUD 20,000 (inclusive of GST) or more, to take out "home warranty insurance".

170.2 **The Domestic Building Insurance Ministerial Order** (made pursuant to Sections 135, 137A and 137D of the Domestic Building Contracts Act 1995 (Vic)) requires a builder to take out insurance for works over AUD 16,000 to cover against losses flowing from, *inter alia*, breach of the statutory warranties under Section 8 of the Domestic Building Contracts Act 1995 (Vic), and defective work.

170.3 **WA Home Building Contracts Act 1991** imposes requirements for home indemnity insurance in respect of residential building work. The insurance is intended to guard the person for whom the builder is performing work, and subsequent owners, from financial loss flowing from any failure to complete the work or faulty workmanship.

170.4 **SA Building Work Contractors Act 1995** requires a building work contractor to take out insurance to, among other things, cover the beneficiary of any statutory warranty implied by the Act against the risk of being unable to recover money from the building work contractor for breach of such a warranty owing to the insolvency, death or disappearance of the contractor.

170.5 **Building Act (Northern Territory) 1993** requires a residential builder carrying out residential building work to obtain an authorised Residential Building Insurance ("RBI"). An RBI is defined at Section 54C as an insurance, or a similar kind of indemnity, that indemnifies the beneficiary of the residential building insurance against financial loss incurred in relation to prescribed residential building work, including because a builder has failed to complete the work or contravened a consumer guarantee. The details relating to the RBI, including the scope of an authorized RBI policy, are set out in Part 5A, Division 3 of the Building Act (Northern Territory) 1993.

171 Unlike other Australian states, the legislative regime in Queensland does not require that a building contractor who carries out domestic building work take out insurance to cover the owner against losses. Instead, the insurance scheme in Queensland [150] known as the Queensland Home Warranty Scheme (discussed below) requires building contractors to pay insurance premiums into a government-run insurance scheme that ensures for the benefit of consumers who enter into contracts with building contractors.

172 The only state in Australia without the requirement of compulsory housing indemnity insurance is Tasmania, where mandatory insurance was made voluntary in 2008, replaced with a "consumer guide" that a builder is required to give an owner before building work is performed. However, following the collapse of two construction firms in 2021 and 2022 that left approximately 50 property owners with incomplete construction projects, the government is now looking to reintroduce home warranty insurance[151]. It is estimated that the home warranty legislation would be introduced to Parliament in the first six months of 2022 and to pass through both houses by the end of the year.[152]

[150] Section 67X of the Queensland Building and Construction Commission Act 1991.

[151] https://www.premier.tas.gov.au/site_resources_2015/additional_releases/financial_assistance_for_consumers_affected_by_construction_company_failures

[152] https://www.premier.tas.gov.au/site_resources_2015/additional_releases/further_protections_for_tasmanians_building_homes, https://www.examiner.com.au/story/7594140/home-warranty-insurance-legislation-expected-to-be-released-soon/

Compulsory insurance for contractors in the state of Victoria

173 In Victoria, the Domestic Building Insurance Ministerial Order (Clause 7) requires builders to take out domestic building insurance ("DBI") for domestic building work valued at more than AUD 16,000. Given that it is generally necessary for the builder to have arranged insurance cover before they start any work (Clause 7(1) of the Domestic Building Insurance Ministerial Order, in practice it is therefore the responsibility of the builder to purchase the insurance for the building project.[153] According to Sections 8(3) and 9(3) of the Domestic Building Insurance Ministerial Order read with Clause 6 and 7 of the Variation to the Domestic Building Insurance Ministerial Order, the insurance policy may provide that homeowners can only claim against their policies in limited circumstances where the builder is dead, insolvent or missing, or if the policy was issued after 1 July 2015, where the builder has failed to comply with a final order made by the Victorian Civil and Administrative Tribunal or a court. As such, the insurance scheme has been referred to as a "last resort" scheme.[154] This is contrasted to a "first resort" insurance scheme which can be accessed by homeowners in the case of incomplete or defective work even if the builder is still trading.[155]

174 The Victoria Domestic Building Insurance Ministerial Order provides as follows:

174.1 The policy must indemnify the building owner in respect of loss or damage resulting from non-completion of the domestic building work (Clause 8(1));

174.2 The policy must indemnify the building owner in respect of loss or damage resulting from defective work, a breach of the implied warranties under Section 8 of the Domestic Building Contracts Act 1995, a failure to maintain a standard or quality of building work

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153 See https://www.duncanthompson.com.au/the-importance-of-domestic-building-insurance.

154 Essential Services Commission, "*Domestic Building Insurance Premium Validation Review*", Summary Report 2016-2018 dated 30 April 2019 at p 1; Parliament of Victoria, 13th Report to the Legislative Council on "Inquiry Into Builders Warranty Insurance", October 2010, at para 15.

155 See Parliament of Victoria, 13th Report to the Legislative Council on "Inquiry Into Builders Warranty Insurance", October 2010, at pp. 7–8.

specified in the contract, or conduct by a builder that contravenes a trade practices provision (Clause 8(2));

174.3 The policy must indemnify the building owner in respect of any loss of part of the deposit or loss of any progress payment under the domestic building contract (Clause 9(1));

174.4 The policy must indemnify the building owner in respect of the costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred as a result of the non-completion of works or an event referred to in Clause 9(2);

174.5 The policy must state that the indemnities include an indemnity in respect of the acts or omissions of *all persons* who were contracted by the builder to perform the domestic building work which resulted in the same kind loss or damage referred to in Clause 8 or 9 (Clause 10);

174.6 The policy cover must extend to anyone who becomes entitled to the benefit of the implied warranties under Section 8 of the Domestic Building Contracts Act 1995 and to the owner for the time being of the building or land in respect of which the domestic building work is or was being carried out (Clause 11);

174.7 In relation to **loss or damage due to non-structural defects**, the policy must indemnify during the period commencing on the commencement day (i.e. the earlier of the date that the domestic building contract was entered into, or the date of issue of the building permit for the domestic building work) and ending not earlier than 2 years after the earlier of the completion date of the domestic building work and the date of termination of the domestic building contract (Clause 12(1)); and

174.8 In relation to **all other loss or damage**, the policy must indemnify during the period commencing on the commencement day and ending

not earlier than 6 years after the earlier of the completion date of the domestic building work and the date of termination of the domestic building contract (Clause 12(2)).

175 Although the Victorian Managed Insurance Authority (VMIA) is a significant provider of DBI in Victoria, there are now a several other commercial providers from which builders can purchase the insurance from.[156]

176 The DBI scheme has proven relatively unprofitable for insurers. In a 2019 report by the Essential Services Commission on the performance on DBI insurers titled "Victoria's domestic building insurance scheme"[157] it was reported that insurers may have incurred DBI losses from 2007 to 2010, in that the cost of claims made on certificates and policies issued in each of these years exceeds the premium revenue collected for those certificates and policies. While the data analysed may not account for income insurers may have earned from investment returns on the premium revenue they collected, it could act as an indicator of the profitability of the DBI scheme from the perspective of the insurers. One critical factor to consider would be whether such a scheme may be unsustainable in the long-run and/or whether private companies may be disincentivized from issuing such insurance, leaving the government to take over the whole market.

Queensland Home Warranty Scheme

177 The DBI scheme can be contrasted to the Queensland Home Warranty Scheme. Under the Queensland Home Warranty Scheme, a consumer can claim for losses and damages where construction work is incomplete or defective, even where the builder is still trading,[158] making Queensland the only Australian state with a "first resort" insurance scheme. Further, the mandatory insurance applies to all building works valued at more than AUD 3,300,[159] a much lower threshold than the AUD 16,000 in Victoria.

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[156] See https://www.consumer.vic.gov.au/licensing-and-registration/builders-and-tradespeople/running-your-business/warranties- and-insurance/domestic-building-insurance.

[157] Essential Services Commission, "*Victoria's domestic building insurance scheme*" Performance Report dated 29 November 2019.

[158] Part 2 and Part 3 of Schedule 6 of the Queensland Building and Construction Commission Regulation 2018.

[159] Section 67WC of the Queensland Building and Construction Commission Act 1991.

178 Nevertheless, it should not necessarily be concluded that the protection afforded by states with a "last resort" scheme is always insufficient or inferior. Often, "last resort" insurance is intended by the government to be limited, because it merely forms part of a much broader consumer regime that includes "front end" measures aimed at *preventing* problems in the first place, or resolving them quickly and affordably should they arise.[160]

179 Indeed, the government of Victoria has noted that its insurance scheme is intended to act only as a "safety net",[161] and have to be seen together with "front end" measures such as dispute resolution mechanisms offered through the Building Advice and Conciliation Victoria ("BACV") and the Victorian Civil and Administrative Tribunal ("VCAT"). BACV offers free advice and conciliation, while VCAT offers conciliation and mediation and can make a determination in domestic building cases.[162]

Other measures

180 In 2020, New South Wales also introduced the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (the **RAB Act 2020**) to address serious defects identified in residential apartment buildings. The RAB Act 2020 provides the Department of Customer Service with powers to manage building developments *during* the construction phase which will therefore minimise the occurrence defective buildings being on-sold to consumers.

181 In summary, the RAB Act 2020 does this by (i) imposing an obligation on developers to put the Department of Customer Service on notice before completion so that the latter has time to inspect the building (Section 7), and (ii) conferring on the Department of Customer Service an extensive list of powers to facilitate inspection and remedying of defects. For example, the Department of Customer Service may issue a "building work rectification

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160 Parliament of Victoria, 13th Report to the Legislative Council on "Inquiry Into Builders Warranty Insurance", October 2010, at para. 111.
161 Parliament of Victoria, 13th Report to the Legislative Council on "Inquiry Into Builders Warranty Insurance", October 2010, at para. 111.
162 Parliament of Victoria, 13th Report to the Legislative Council on "Inquiry Into Builders Warranty Insurance", October 2010, at paras. 95-101.

order" to a developer, which will require a developer to eliminate, minimise or remediate a serious defect or a potential serious defect.

182 As contrasted to the measures of statutory warranties, it can be said that the measures under the RAB Act 2020 are *preventive* in nature. Instead of introducing avenues for compensation and remedies to aggrieved home owners by way of the statutory warranties, the RAB Act 2020 aims to tackle the root cause of the problem by reducing the occurrence of defective buildings in the first place, even before the property is passed to the buyer.

2. Common law

183 It is worth noting that since the imposition of statutory warranties under relevant state legislation, Australian courts have been hesitant to find that a common law duty of care is owed in relation to subsequent owners. In this regard, several recent cases have held that legislative protections precluded or weighed heavily against a duty of care arising (*Owners Strata Plan No. 74602 v Brookfield Australia Investments Pty Ltd* [2015] NSWSC 1916 (***Brookfield***), at [131]; *James v The Owners Strata Plan No 11478* (2016) 18 BPR 36389 at [111].

184 In *Brookfield* [2016], the court in holding that no duty of care was owed by the builder and sub-contractors to the owners corporation noted that there was a lack of "vulnerability" to the risk of economic loss arising from the breach of the alleged duty of care. "Vulnerability" is a central factor in establishing the imposition of a duty of care to avoid pure economic loss in Australia (see *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* [2014] HCA 36 (***Multiplex***) [2014] HCA 36 at [22]), which is equivalent to the concept of "proximity" in other Commonwealth jurisdictions. The court took into account the fact that the plaintiff owner corporation had the benefit of statutory warranties, which made it a stronger case for denying the existence of a duty of care.

185 Similarly, in *The Owners – Units Plan No 1917 v Koundouris* (2016) 307 FLR 372, the judge was called upon to decide whether the builder owed a duty of care in negligence to subsequent purchasers via their Owner's Corporation in respect of defects in an apartment building. He observed at [555] that:

> *"[h]aving regard to the decisions in [**Bryan, Woolcock and Multiplex**], there are a variety of ways in which the absence of a duty of care can be rationalised in a case such as the present: the **presence of statutory warranties or contractual provisions inconsistent with a general duty of care,** the removal of the element of vulnerability by reason of the existence of statutory warranties or the confinement of the decision in [**Bryan**] to the limited class of case described in the judgment of Gageler J in [**Multiplex**] ..."*

186 It should be noted that this position has been *statutorily overruled* in New South Wales following the introduction of the Design and Building Practitioners Act 2020 (NSW) (the **DBP Act 2020**) recently in 2020.

187 The DBP Act 2020 **i**mposes a *statutory duty of care* owed by builders to exercise reasonable care to avoid economic loss caused by defects, owed by builders, designers, manufacturers and project managers. The nature and scope of this duty of care are extensive:

187.1 The duty is imposed on building practitioners *retrospectively* (for loss that became apparent within the 10 years immediately prior to 11 June 2020) (Schedule 1, Section 5(2));

187.2 The duty is owed to the owner of the land and *subsequent* owner of the land (including owners corporation) (Section 37(2) and Section 38);

187.3 The duty of care is *non-delegable* (Section 39); and

187.4 The duty of care owed is *in addition* to duties, statutory warranties or other obligations imposed under the Home Building Act 1989, other Acts or the common law and do not limit the duties, warranties or other obligations imposed under that Act, other Acts or the common law (Section 41(1)).

188 The effect of this statutory duty of care was explained by the Minister in the Second Reading Speech for the Design and Building Practitioners Bill 2019 (NSW):

> *"Clause 30 [now Section 37] makes it clear that a beneficiary of the duty will be entitled to seek damages for the breach of the duty as though the duty was established by the common law. This means that while a duty of care will be automatically owed, any person who wants to proceed with litigation will be required to meet the other tests for negligence established under the common law and the Civil Liability Act 2002 . This includes determining that a breach of the duty occurred and establishing that damage was suffered by the owner as a result of that breach. The hurdle of establishing that a duty is owed, however, will no longer be required, saving valuable court time and expense for the owner."*
> [emphasis added]

189 The court in the recent case of *Owners - Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068 also made the following observations at [35] with regard to this statutory reform:

> *"The DBP Act was enacted to alleviate the need for a party like the Owners Corporation to prove a duty of care owed to it by the Builder. This reform was seen as being needed in light of the building failures at Opal Tower and Mascot Tower and High Court decisions in cases such as Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and Woolcock Street Investments v CDG Pty Ltd in which the High Court found that builders and engineers did not owe a duty of care to subsequent purchasers of commercial property."*

190 Evidently, this development is a substantial departure from the test of "vulnerability" that was held to be central to the imposition of a duty of care in *Multiplex* – indeed, it was introduced precisely to *reverse* the effect of the decisions in *Multiplex* and *Woolcock* that left subsequent owners of commercial property with effectively no remedy.

191 Similar to the position that has now been adopted by New South Wales and as will be discussed further below, the New Zealand Supreme Court has rejected the argument that statutory warranties exclude the imposition of a tortious duty of care (*Carter Holt Harvey Ltd v Minister for Education* [2017] 1 NZLR 78).

192 The ordinary limitation period for claims for the tort of negligence in Australia is 6 years.

'Independent contractor' defence & non-delegable duties

193 The position at common law adopted by Australia is largely the same as in Singapore. Australia upholds the builder's defence that it has employed competent independent sub-contractors (*Sweeney v Boylan Nominees Pty Limited* [2006] HCA 19). Also similar to Singapore, Australia does not recognise and does not impose a non-delegable duty on a building contractor in respect of its sub-contractor's negligence (*Zumpano v Montagnese* [1997] 2 VR 525).

194 Therefore, insofar as the tort of negligence is concerned, a main contractor may in effect divest itself of responsibility by appointing a competent independent contractor to carry out works.

195 The position in *Multiplex* has been effectively statutorily overruled in New South Wales following the introduction of the DBP Act in 2020. The DBP Act 2020 imposes a statutory duty of care owed by builders to exercise reasonable care to avoid economic loss caused by defects, owed by builders, designers, manufacturers and project manager – and **this duty is non-delegable** (Section 39). This means that a main contractor **<u>cannot</u>** discharge this duty even it entrusted its performance to a competent independent contractor.

Subsequent purchasers

196 Unlike in Singapore, the High Court of Australia has held that the builder of an apartment complex does not owe a duty of care in negligence to protect the management corporation from pure economic loss arising from latent defects in the common property of the building (*Multiplex).*

197 *Multiplex* departs from the earlier position taken by the High Court in *Bryan v Maloney* (1995) HCA 17), where the court upheld a subsequent purchaser's claim in negligence against a builder for the cost of repairing defective foundations. It has been noted by commentators that the departure from the

liberal position in *Bryan* with regard to the availability of common law remedies, as witnessed by the *Multiplex* decision, is motivated in part by the fact of legislative intervention (Bell M., Jocic W. (2017)).

198 In *Multiplex*, the court held that purchasers of commercial property are considered to be sophisticated and in a position to control their risk through the terms of their purchase contract, and can hardly be said to have the "vulnerability" which was required to sustain a claim in negligence. On the facts of the case, the builder had constructed a development for a property developer who then leased some of the lots to a serviced apartment management company which sold those lots to investors.

199 The only category left open by the HCA in *Multiplex* where pure economic loss claims in negligence may be permitted is limited to <u>vulnerable homeowners</u> who are "incapable of protecting themselves from the consequences of the builder's want of reasonable care" (*per* Gageler J at [185]). Therefore, buyers of commercial properties will not succeed in claiming for pure economic losses caused by builder's negligence (*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16).

200 It was noted in *Bell and Jocic*, 2017 that very few construction-related pure economic loss cases have imposed a duty of care in negligence in the light of *Multiplex*'s conception of vulnerability. *Multiplex* appears to have severely limited the ambit of negligence in defective work by stating that non-vulnerable parties are able to protect themselves through contractual clauses and are sufficiently covered by legislation. While *Bryan v Maloney* was not overruled by *Multiplex*, the fact that statutory warranty schemes are now part of legislation (which was not the case at the time *Bryan* was decided), it would be difficult to argue that a homeowner in Australia is vulnerable in the *Bryan* sense.

201 As stated above, the position in *Multiplex* has however been effectively statutorily overruled in New South Wales following the introduction of the DBP Act in 2020. The DBP Act 2020 imposes a statutory duty of care owed by builders to exercise reasonable care to avoid economic loss caused by defects, owed by builders, designers, manufacturers and project manager – and

this duty is owed to the owner of the land and subsequent owner of the land (including owners corporation) (Section 37(2) and Section 38).

D. New Zealand

1. Statutory regime

Implied Warranties

202 Since November 2004, all residential building work in New Zealand is covered by implied warranties. Under the Building Act 2004, "*Consumer rights and remedies in relation to residential building work*", a builder is required to ensure the following[163]:

202.1 All building work[164] will be done properly, competently and according to the plans and specifications in the approved consent.

202.2 All the materials used will be suitable and, unless otherwise stated in the contract, new.

202.3 The building work will be consistent with the Building Act and the Building Code.

202.4 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.

202.5 The home will be suitable for occupation at the end of the work.

202.6 If the contract states any particular outcome and the homeowner relies on the skill and judgement of the contractor to achieve it, the building work and the materials will be fit for purpose and be of a nature and quality suitable to achieve that result.

[163] New Zealand Building Act Part 4A, Section 362I.

[164] The definition of "building work" does not include design work: New Zealand Building Act Section 362B.

203 The implied warranties under the New Zealand Building Act 2004 apply to (i) a residential building contract, whether written or oral; or (ii) a contract for the sale of 1 or more household units by, or on behalf of, an on-seller[165].

204 An "on-seller" is a person who does any of the following things in relation to a household unit for the purpose of on-selling the household unit[166]:

204.1 builds the household unit by himself or herself or with the assistance of others;

204.2 in trade arranges for the household unit to be built or acquires the household unit from a person who built it or arranged for it to be built; or

204.3 acquires the household unit in a transaction that is intended to defeat the purpose and effect of subsection (2).

205 Thus, under the New Zealand Building Act 2004, a residential developer would be bound by the implied warranties.

206 Subsequent owners of dwellings can bring proceedings for a breach of any of the implied warranties notwithstanding the lack of contractual privity.[167]

207 In addition to the statutorily implied warranties, there is a 12-month defect period[168]. If any defects in the building work emerge within 12 months of the completed build date, the builder has an obligation to fix them.

Limitation period for statutory warranties

208 The New Zealand Building Act prescribes a limitation period of 10 years[169] from the "date of the act or omission on which the proceedings are based",

[165] New Zealand Building Act Section 362H(1).

[166] New Zealand Building Act Section 362H(3).

[167] New Zealand Building Act Section 362J.

[168] New Zealand Building Act Section 362Q.

[169] New Zealand Building Act Section 393(2).

regardless of the cost of the building project, are automatic and are intended to cover almost all aspects of building work from compliance with the Building Code to good workmanship and timely completion of building work. A breach of these warranties is a breach of contract and entitles the owner to require the builder to remedy the breach, have the breach remedied by someone else with reasonable costs to be paid by the original builder, terminate the contract or otherwise sue in contract[170].

Non-mandatory insurance

209 Unlike the statutory regime in Australia, mandatory warranty insurance is not required in New Zealand.

210 However, there is an approach of industry self-regulation based on insurance products developed by the New Zealand Certified Builders and the Registered Master Builders Association. In this regard, the Government has prescribed compulsory disclosure statements that must be disclosed by a building contractor to a client prior to contract for building work that costs NZ$30,000 (inclusive of GST) or more or if the client requests[171] . One of disclosure statements in the checklist that the builder is required to give persuades the owner to "*determine whether the building contractor has sufficient insurance to cover the work while it is being carried out*".

2. Common law

211 The legislative control of building work in New Zealand has not hindered the courts' advancement of common law duties owed by those who participate in the construction process.

212 The Court in *Bowen v. Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 held that the builder was liable to the subsequent purchaser for various economic losses. In *Mount Albert Borough Council v. Johnson* [1979] 2 NZLR 234, the Court

[170] New Zealand Building Act Section 362M.

[171] Regulation 5, Schedule 1 and 2 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

held that the Council owed a duty of care and was liable to a subsequent purchaser for negligence in the inspection of foundations.

213 In this regard, New Zealand courts have taken a robust approach to builders' responsibilities. The statutory regime of implied warranties is not treated to exclude tortious remedies available to an aggrieved owner. Instead, a building contractor's tortious duty of care is well established, and it is consistent with the implied warranties in the Building Act.

214 The Limitation Act defines the normal limitation period for negligence claims to be 6 years from when the defective work was done.

'Independent contractor' defence & non-delegable duties

215 In New Zealand, the conventional starting point is that a principal is not vicariously liable for a consultant's negligence, where the consultant is independent to, rather than agents of, the principal (*Cashfield House Ltd v David & Heather Sinclair* [1995] 1 NZLR 452 (HC)).

216 A separate category of non-delegable duty has been created in New Zealand: upon developers who have legal control of the development and sells residential buildings for profit. It has been held that developers of residential buildings could owe a non-delegable duty of care to the first and subsequent owners to ensure that care is taken by others in building work (*Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)). There are two key factors which form the basis of this non-delegable duty: (i) direct involvement or control of the building process; and (ii) the development process is undertaken for the purpose of profit (*Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC)).

217 This was applied in *Morton v Douglas Homes Limited (Morton)* [1984] 2 NZLR 548 (HC)), where the High Court upheld the owners' claims against various parties

involved in the creation of latent defects in the foundations of flats, including the company that developed and built the flats.[172]

Subsequent purchasers

218 Subsequent purchasers of residential property have a valid cause of action against a builder for economic losses arising from defective construction (*Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA)).

219 New Zealand Supreme Court has recently confirmed in *Carter Holt Harvey Ltd v Minister for Education* [2016] 1 NZLR 78 that there are significant points of divergence between the Australian and New Zealand approaches to the imposition of duties of care for pure economic loss in negligence. Specifically, the court rejected the approach in *Multiplex* and refused to draw a distinction between vulnerable and non-vulnerable or commercial and non-commercial property owners, because according to the court, the question of vulnerability must be looked at not in relation to the plaintiff in the case at hand but in relation to likely plaintiffs as a class (see [54]).

E. United States

220 In the United States, any premises unsafe, unsanitary, or unfit for living purposes are generally covered by an implied warranty.[173] The warranties vary across the states and generally arise not due to express legislative provision, but through judicial determinations.

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[172] Also see ***Mount Albert*** (***Body Corporate 188273 v Leushcke Group Architects Limited*** (2007) 78 NZCPR 914 (HC); ***Body Corporate 202254 v Taylor*** [2008] NZCA 317; ***Body Corporate 346799 v KNZ International Co Ltd*** [2017] NZHC 511 and ***Body Corporate 381372 v Heron Point Projects Ltd*** [2017] NZHC 597).

[173] Lee R. Connell, Jr. and Michael T. Callahan, *Construction Defect Claims and Litigation* (Wiley Law Publications,1995) at p 174.

1. Types of defects

221 Defects which impair the use and enjoyment of the premises could include defective heating systems,[174] defective air-conditioning systems,[175] and a malfunctioning fireplace.[176] The general tenor from case law seems to be that once basic shelter from the elements and reasonable comfort are not provided, there could be a breach of the implied warranty.[177]

222 There are broadly two limbs to the warranty:

222.1 Whether the dwelling is fit for habitation (**habitability**); and

222.2 Whether the building is constructed in a reasonably workmanlike manner (**workmanship**).

Implied warranty of habitability

223 A home that is unsafe because it does not substantially comply with the pertinent provisions of the applicable building codes [178] or because its structural foundation is damaged [179] breaches the implied warranty of habitability.

224 The implied warranty of habitability is breached if a defect renders the premises unsafe, unsanitary, or unfit for living purposes.[180] Notably, most courts have adopted a broader view and had held that the purchaser of a new home does not need to prove that the defect has rendered the house unfit for human

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174 *Kriegler v. Eichler Homes, Inc.,* 239 Cal.App.2d 244 (Cal. 1969).

175 *Gable v Silver,* 258 So.2d11 (Fla. App. 1972).

176 *Humber v. Morton,* 426 S.W.2d 554 (Tex. 1968).

177 Justin Sweet, *Legal Aspects of Architecture, Engineering, and the Construction Process* (West Publishing Company, 3rd Ed, 1988) at p 634.

178 *Jack Spring, Inc. v Little,* 280 N.E.2d 208 (Ill. 1972).

179 *Legacy Builders, LLC v. Andrews,* 335 P.3d 1063 (Wyo.2014).

180 Lee R. Connell, Jr. and Michael T. Callahan, *Construction Defect Claims and Litigation* (Wiley Law Publications,1995) at p 174.

habitation, but the defect has impaired the use and enjoyment of the premises for its intended purpose as a residence.[181]

225 A breach of the implied warranty of habitability could occur when: (i) the residence does not substantially comply with the pertinent provisions of the applicable buildings codes[182]; (ii) the structural foundation is damaged[183]; (iii) presence of defects that affects the structural foundation of a home include faulty roofs,[184] collapsing stairways,[185] water seepage,[186] and cracked walls.[187] Based on the broader doctrine, there could also be a breach of the warranty of habitability if there are defects that impair the use and enjoyment of the premise including but not limited to (i) defective heating systems;[188] (ii) defective air- conditioning systems;[189] and (iii) a malfunctioning fireplace.[190]

226 The above circumstances are non-exhaustive and the courts could likely broaden its ambit via an incremental approach.

227 To determine whether a particular defect makes a home inhabitable, courts consider: (i) the nature of the defect; (ii) the effect of the defect on the usage of the home; (iii) the length of time the defect has persisted; (iv) the age of the structure; (v) the location of the habitat; (vi) the existence of a waiver in relation to defects; and (vii) whether the defect had resulted from use by the tenant.[191]

228 The implied warranty to subsequent purchasers applies to latent defects that were not discoverable by reasonable inspection before purchase and manifest after purchase.[192]

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[181] Mark S. Dennison, J.D., "Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability" *American Jurisprudence Proof of Facts, 3d* (April 2018 Update) at p 12.

[182] *Jack Spring, Inc. v Little,* 280 N.E.2d 208 (Ill. 1972).

[183] *Legacy Builders, LLC v. Andrews,* 335 P.3d 1063 (Wyo.2014).

[184] *Vanderschrier v. Aaron,* 140 N.E.2d 819 (Ohio. App. 1957).

[185] *Rogers v. Scyphers ,* 161 S.E.2d 81(S.C. 1968).

[186] *MILO, LLC v. PROCACCINO, et al.,* 2018 WL 1426599.

[187] *Oliver v City Builders, Inc.,* 303 So.2d 466 (Miss. 1974).

[188] *Kriegler v. Eichler Homes, Inc.,* 239 Cal.App.2d 244 (Cal. 1969).

[189] *Gable v Silver,* 258 So.2d11 (Fla. App. 1972).

[190] *Humber v. Morton,* 426 S.W.2d 554 (Tex. 1968).

[191] Lee R. Connell, Jr. and Michael T. Callahan, *Construction Defect Claims and Litigation* (Wiley Law Publications,1995) at p 175.

[192] *Richards v. Powercraft Homes, Inc.,* 678 P.2d 427 (1984).

229 Most courts have found that the purchasers of a new home need not prove that the defect has rendered the house unfit for human habitation, but that the defect has impaired the use and enjoyment of the premises for its intended purpose as a residence.[193]

Implied warranty of reasonable workmanship

230 The second limb of the implied warranty concerns reasonable workmanship. It is not uncommon that an inhabitable residence is plagued with workmanship issues. US case law reveals the following distinction: the implied warranty of habitability is concerned with the final product of construction, while the implied warranty of reasonable workmanship is concerned with the workmanship provided during the process of construction; the overlap in the concepts might however render any distinction superficial in any event.

231 A contractor and/or builder is not required to construct a perfect house, but rather, a reasonable one. In determining whether a house is defective, the test is reasonableness and not perfection.[194] The standard of reasonableness can be determined with reference to industry standards in construction or work done with average skill and intelligence, and which comply with applicable building codes.[195] This is referred to as "workmanlike manner" which is "the way work is customarily done by other contractors in the community".[196]

232 A sensible framework is set out by the Supreme Court of Iowa in *Speight v. Walters* in relation to when original purchases and subsequent purchasers can claim for a breach of an implied warranty of workmanlike construction:[197]

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193 Mark S. Dennison, J.D., "Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability" *American Jurisprudence Proof of Facts, 3d* (April 2018 Update) at p 12.

194 *Gable v. Silver*, 258 So.2d 11 (Fla. Dist. Ct. App. 1972).

195 Mark S. Dennison, J.D., "Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability" *American Jurisprudence Proof of Facts, 3d* (April 2018 Update) at p 21; citing *Shaffer v. Debbas,* 21 Cal.Rptr.2d 110 (4th Dist. 1993).

196 *Jones v Davenport, Unpublished Decision,* C.A. Case No. 18162 (Ohio Ct. App. Jan 26, 2001).

197 *Speight v. Walters Development Co., Ltd.,* 744 N.W.2d 108 (Iowa. 2008) citing *Kirk v. Ridgway,* 373 N.W.2d 491 (Iowa. 1985).

232.1 that the house was constructed to be occupied by a warrantee as a home;

232.2 that the house was purchased from a builder-vendor, who had constructed it for the purpose of sale;

232.3 that when sold, the house was not reasonably fit for its intended purpose or had not been constructed in a good and workmanlike manner;

232.4 that, at the time of purchase, the buyer was unaware of the defect and had no reasonable means of discovering it; and

232.5 that by reason of the defective condition the buyer suffered damages.

233 Thus, the court will not adopt a pure consumer-protection approach. Where the party is not an "experienced" builder, the theory of implied warranty of workmanlike construction cannot apply.[198]

2. Parties owing duties

234 As seen in subsection (c) below, whether there is a non-delegable duty owed by contractors vary from state to state. Generally, contractors have an implied duty to build in accordance with the plans and specifications filed. If the permitted plan and specifications deviates, the contractor may be liable for the deviation.

3. Parties to whom duties are owed

235 Not all states extend the implied warranty to subsequent purchasers who lack privity to the contract with the developers and/or contractors. The states that do had premised their decision on predominantly public policy considerations and at times, whether the implied warranties are of tortious or contractual nature.

236 The table below illustrates the position in certain US states:

[198] *Sokol v. Morrissey* 909 N.W.2d 230 (Iowa. 2017).

State	Party Scope and Ambit of Warranties	Nature of warranties
Arizona	The Supreme Court held that **subsequent purchasers with no privity to the builder** can sue for breach of the implied warranty of workmanship and habitability, but is limited to latent defects which become apparent after the subsequent owner's purchase, and were not discoverable had a reasonable inspection been made prior to purchase. [199] "Reasonable inspection" does not refer to inspection by an expert or professional home inspection service.	The warranty is imputed into the residential construction contract, it is a term of the contract, and any claim for breach of that term arises from the contract.[200]
California	Court will not extend the implied warranty of reasonable workmanlike manner to **parties who lack privity to the contract with the original sellers or contractors**.[201]	Implied warranty of workmanship is of a contractual nature. - The court implies the warranty of reasonable workmanlike manner because builders and sellers of new construction should be held to what they impliedly represented.[202] Representations are part of contract law and thus, the warranty is grounded in contractual concepts.
Illinois	An implied warranty of habitability applies to **subsequent purchasers**. In order to show breach of an implied warranty of habitability, a subsequent purchaser must show: (1) there are latent defects in the house; (2) those latent defects interfere with the	Implied warranty of habitability is independent of contract. - The warranty of habitability exists independently and privity of contract is not required. Subsequent purchaser are like initial purchasers in that neither is knowledgeable in construction practice and must rely on the builder's expertise to a substantial degree. Public policies underlying the implied warranty of

[199] *Richards v. Powercraft Homes, Inc.,* 678 P.2d 427 (1984).

[200] *Sirrah Enterprises, LLC v. Wunderlich,* 399 P.3d 89 (Ariz. 2017) at [20].

[201] *Windham at Carmel Mountain Ranch Association v. Superior Court,* 135 Cal.Rptr.2d 834 (2003).

[202] *Pollard v. Saxe & Yolles Dev. Co.,* 525 P.2d 88 (Cal. 1974) at [2].

State	Party Scope and Ambit of Warranties	Nature of warranties
	reasonably intended use of the house; and (3) those latent defects manifested themselves within a reasonable time after the house was purchased.[203] However, the implied warranty will not extend to subsequent purchasers after first purchasers have waived the warranty.[204]	habitability should not be hindered by the short intervening ownership of the first purchaser; the implied warranty of habitability survives a change in the ownership.[205] Implied warranty of workmanship is contractual in nature - One who contracts to perform construction work impliedly warrants work in a reasonably workmanlike manner. Failure to do so is a breach of contract.[206]
Iowa	An implied warranty of workmanlike construction extends to **subsequent purchasers** since subsequent purchasers are in no better position than the original purchaser.[207]	Implied warranty of workmanlike construction is independent of contract. - The implied warranty of workmanlike construction originates from the contract for sale but it exists independently of the contract by its very nature as a judicial creation.[208]
New York	The claims for breach of implied warranties of workmanlike construction and habitability were properly dismissed for **plaintiffs who lacked privity with defendants**.[209]	Since the court declined extending implied warranties to purchasers who are not privy to a contract, it can be reasoned that the nature of implied warranties of habitability and workmanship are contractual in nature.
Pennsylvania	The Supreme Court in *Conway v. The Cutler Group*[210] refused to extend the implied covenant of	Implied warranties are of a contractual nature.

[203] *John Fattah v. Mirek Bim and Alina Bim,* 31 N.E.3d 922 (Ill App. 1 Dist. 2015) at [14] – [15].

[204] *John Fattah v. Mirek Bim et al.,* 52 N.E.3d 332 (Ill. 2016).

[205] *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982).

[206] *Zielinski v. Miller,* 660 N.E.2d 1289 (Ill. App. 3 Dist. 1995) at [10] – [12].

[207] *Speight v. Walters Development Co., Ltd.,* 744 N.W.2d 108 (Iowa 2008).

[208] *Speight v. Walters Development Co., Ltd.,* 744 N.W.2d 108 (Iowa 2008) at [3] and [5].

[209] *Butler v. Caldwell & Cook, Inc.,* 122 A.D.2d 559 (N.Y. App. Div. 1986).

[210] *Conway v. The Cutler Group, Inc.*, 99 A.3d 67 (Pa. 2014).

State	Party Scope and Ambit of Warranties	Nature of warranties
	habitability to **subsequent purchasers with no privity to the contract with the builder/contractor**. The Supreme Court in *Manor Junior Coll. v. Kaller's Inc.,*[211] denied the College's to claim against the subcontractor for breach of implied warranty of workmanlike performance where there was no privity of contract.	- The Supreme Court's reasoning is based on "its firm grounding in contract law". An action for breach of the implied warranty thus requires contractual privity between the parties.[212] - In *Manor Junior*,[213] the Supreme Court did not allow the purchaser to claim against a sub-contractor for breach of the implied warranty of workmanlike performance as the purchaser was not in privity of contract with the subcontractor.
Rhode Island	An implied warranty of good workmanship extends to **subsequent purchasers of homes** against a builder or contractor, but only for latent defects existing at the time of the home's original sale that were not known or reasonably discoverable by the buyer at the time of purchase, which become apparent after the subsequent owner's purchaser and which were not discoverable through a reasonable inspection of the structure prior to the purchase. Both the implied warranties of habitability and of workmanlike quality covers only latent defects that subsequent owners discover within a reasonable period of ten years after home contractors have substantially completed their work on the improvement at issue.	Claims of breach of implied warranties of habitability and workmanlike quality is premised primarily "in breach of contract".[214]

[211] *Manor Junior Coll. v. Kaller's Inc.,* 507 A.2d 1245 (Pa. Super. 1986).

[212] *Conway v. The Cutler Group, Inc.*, 99 A.3d 67 (Pa. 2014).

[213] *Manor Junior Coll. v. Kaller's Inc.,* 507 A.2d 1245 (Pa. Super. 1986).

[214] *Nichols v. Beaufort & Associates, Inc.,* 727 A.2d 174 (R.I. 1999) citing *Leon Boghossian et al. v. Ferland Corporation*, 600 A.2d 288 (R.I. 1991) at 290.

State	**Party Scope and Ambit of Warranties**	**Nature of warranties**
South Carolina	An implied warranty of constructing the home in a workmanlike manner extends to **both the original purchasers of the home and subsequent purchasers** who may pursue a cause of action in contract or tort against the builder for a reasonable period after the home's construction.[215] The court does not to extend liability on an implied warranty of habitability to those not parties to the contract of sale.[216]	As seen from the two court decisions, while the implied warranty of workmanship seems to be of both a contractual and tortious nature, the implied warranty of habitability appears to be of a contractual nature.
Texas	Implied warranties of habitability and good workmanship are extended to **subsequent purchasers** for latent defects not discoverable by inspection at the time of the sale.[217]	The implied warranties are of a contractual nature. - Implied warranty of habitability and good workmanship is implicit in the contract between the builder/vendor and original purchaser, and is automatically assigned to the subsequent purchasers. This interpretation is consistent with the holding in the landmark case of *Humber v. Morton*[218] and recent holding in *G.W.L. v. Robichaux* [219] where the implied warranty of habitability was discussed as contract law and, could be waived.

[215] *Fields v. J. Haynes Waters Builders, Inc.,* 658 S.E.2d 80 (S.C. 2008) at [14].

[216] *Holder v. Haskett,* 321 S.E.2d 192 (S.C. App. 1984).

[217] *Gupta v. Ritter Homes, Inc.,* 646 S.W.2d 168 (Tex. 1983).

[218] *Humber v. Morton*, 426 S.W.2d 554 (Tex.1968).

[219] *GWL, Inc. v. Robichaux*, 622 S.W.2d 461 (Tex.App.1981).

237 Notably, courts in Arizona had held that the extension of the implied warranty is in line with the public policy of the state[220]:

237.1 Purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work;

237.2 Homebuyers including subsequent buyers are generally not skilled or knowledgeable. Homebuilders should also anticipate that the houses they construct may change ownership, perhaps frequently;

237.3 The builder-vendor is better positioned than a subsequent owner to prevent major problems, so the cost of poor workmanship should be his to bear; and

237.4 The effects of latent defects are just as catastrophic on a subsequent owner as on an original buyer.

238 Courts in Rhode Island had justified the extension based on the following public policy considerations[221]:

238.1 Requiring privity would defeat the purpose of the implied warranty of good workmanship and could leave homeowners without a remedy;

238.2 The essence of implied warranty is to protect innocent buyers which applies to both first and to subsequent purchasers;

238.3 Intervening sales alone should not, by any standard of reasonableness, effect an end to an implied warranty, or in that matter, a right of recovery on any other ground, upon manifestation of a defect;

238.4 Latent defects take a considerable period of time to manifest; and

238.5 As people become more mobile, builder-vendors should know that a houses built might be resold quickly and should not limited the warranty by the number of days that the original owner holds onto the property.

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[220] *Richards v. Powercraft Homes, Inc.,* 678 P.2d 427 (1984).

[221] *Nichols v. Beaufort & Associates, Inc.,* 727 A.2d 174 (R.I. 1999).

4. Remedy for breach of implied warranties

239 There are various remedies available for the breach of the implied warranties, with damages typically being claimed. However, where the defect has rendered the premises unsafe and/or unfit for habitation, it might be too costly to correct the problem and rescission might be preferable instead.[222]

F. Canada

240 In Canada, Ontario has in place the New Home Warranties Plan Act. The New Home Warranties Plan Act is "*repealed on a day to be named by proclamation of the Lieutenant Governor*". The new Protection for Owners and Purchases of New Home Act is not yet in force. The New Home Warranties Plan Act Administration of the Plan (R.R.O 1990, Reg 892) sets out a tiered warranty system. The statutory warranties are separated into three different classes, each with a different warranty period.

1. Types of properties

241 The statute distinguishes between buildings[223] and the shared facilities and/or areas of a condominium (referred to as "common elements"). In this regard, the owner of the common element facilities of a condominium refers specifically to the condominium corporation. [224] In contrast, in relation to buildings (residential dwellings), it is the individual homeowners who make the warranty claims. The date of possession to determine the warranty period, is the date on which the building is completed for possession by an owner as specified in the applicable certificate of completion and possession.[225]

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[222] Mark S. Dennison, J.D., "Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability" *American Jurisprudence Proof of Facts, 3d* (April 2018 Update) at p 44.

[223] *Administration of the Plan*, O Reg. 892/90, s 1 -"building" means, in respect of a post June 30, 2012 home, the principal structure in which one or more residential dwellings are located, including in the case of condominiums, common element facilities, but excluding in all cases any structure or appurtenance used in connection with a dwelling such as a fence, deck, sauna, swimming pool, spa, antenna, canopy, patio, sidewalk, driveway, utility shed or storage tank.

[224] *Administration of the Plan*, s 5.2(1).

[225] *Administration of the Plan*, s 1.

2. Types of defects

242 In summary (which shall be elaborated in the subsequent sections), the statutory warranties are as follows:

242.1 One-year warranty:

(a) Home is fit for habitation;

(b) Home is free from defect in material and built in a workmanlike manner; and

(c) Home is built in compliance with Ontario Building Code.

242.2 Two-year warranty:

(a) No water penetration;

(b) Home is constructed in a workmanlike manner and is free from defects in materials such that the building envelope of the home prevents water penetration;

(c) The electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;

(d) All exterior cladding of the home is free from defects;

(e) No violation of Ontario Building Code regulations, affecting health and safety; and

(f) Home is free of major structural defects.

242.3 Seven-year warranty: Home is free of major structural defects as defined in the statute.

3. Parties owing duties

243 Generally, contractors have an implied duty to build in accordance with the plans and specifications filed with the local building authority. If a contractor deviates from the permit set of plan and specifications, the contractor may be liable for the deviation.

244 In addition, statutory warranties are applicable often to builders/contractors, developers and sub-contractors.[226]

4. Parties to whom duties are owed

245 Original purchasers and subsequent purchasers with no privity of contract to the contractor[227] are entitled to the benefit of the statutory warranties. However, only the current owner of the property can enforce the warranty.[228]

5. Nature of duties, limitation & defences

Three-Tier Warranty System

246 Under the present New Home Warranties Plan Act, there are three periods in which various warranty claims can be made. This distinction is sound and is scaled according to the gravity of the defects. Owners are entitled to make a claim for breach of statutory warranty under the New Home Warranties Plan Act during:

246.1 the first-year warranty claim period;

246.2 the second-year warranty claim period; and

246.3 the major structural defect warranty claims period.

247 We shall now first examine the defects falling within the first-year warranty claim period.

First Year Warranty Claim Period

248 The first year warranty claim period encompasses the following claims:-

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[226] *Ontario New Home Warranties Plan Act,* s 1.

[227] *Ontario New Home Warranties Plan Act,* s 13(5).

[228] *Liddiard et al. v. Tarion Warranty Corporation et al.* 99 O.R. (3d) 656.

248.1 the home is constructed in a workmanlike manner and free from defects in material;

248.2 the home is fit for habitation;

248.3 the home is constructed in accordance with the Ontario Building Code;[229] and

248.4 there is no unauthorised substitutions.[230]

249 The warranty in relation to workmanship is largely similar to that in the United States. While workmanlike manner is not a standard of perfection,[231] work done in a "*slipshod manner*", such as patching a wall when the plaster is rotten, fails to meet this requirement.[232] Importantly, the workmanship obligation requires care and skill in the physical execution of the specified work.[233] The commonly accepted industry practice also serves as reference for an indication on what "*workmanlike manner*" requires.[234]

250 Specific examples of defects covered by the first year of warranty include "a bad paint job, poor carpet laying, squeaky floors, a whole range of things … go wrong with a new home".[235]

Second Year Warranty Claim Period

251 The second year warranty claim period encompasses the following claims:[236]

251.1 there is no water penetration through the basement or foundation of the home;

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[229] *Ontario Building Code*, O Reg 332/12.

[230] *Administration of the Plan* s 20(b) read with s 18.

[231] *BSC Animal Nutrition Inc. v. CoEm-Tek International Inc* 2007 CarswellOnt 6566 at [16].

[232] *Agostini v Burstow* 1988 CarswellOnt 2378 at [3].

[233] *Halsbury's Laws of Canada*, vol. "Construction" (LexisNexis Canada, 1st Ed, 2008) at HCU-52.

[234] *729806 Ontario Ltd v. 796105 Ontario Ltd* 1994 CarswellOnt 2890.

[235] Ontario, Standing Committee on Social Development, *Committee Transcript* (3 Sep 1992) at p 1420 <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2017/2017-10/house-document-hansard-transcript-2- EN-30-OCT-2017_L112.pdf>.

[236] *Administration of the Plan,* s 14 and s 15.

251.2 the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope[237] of the home prevents water penetration;

251.3 the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;

251.4 all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;

251.5 the home does not violate the Ontario Building Code regulations, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and

251.6 the home is free of major structural defects.

252 In terms of timelines, for buildings, the second-year claim period begins immediately after the first anniversary of the date of possession and ends on the second anniversary of the date of possession. As for condominium's common elements, the period begins immediately after the first anniversary of the registration date of the declaration and description for the condominium project and ends on the second anniversary of the registration date.

Major Structural Defect Claim Period

253 The major structural defect claim period would last for 7 years.

254 Major structural defects with regards to homes built after 30 June 2012 refers to any defect in work or materials in respect of a building, including a crack, distortion or replacement of a structural load-bearing element of the building if it:

254.1 results in failure of a structural load-bearing element of the building;

254.2 materially and adversely affects the ability of a structural load-bearing element of the building to carry, bear and resist applicable structural loads for the usual and ordinary service life of the element; or

[237] "Building envelope" means the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits.

254.3 materially and adversely affects the use of a significant portion of the building for usual and ordinary purposes of a residential dwelling and having regard to any specific use provisions set out in the purchase agreement for the home.[238]

255 The following are excluded from the definition of a major structural defect:

255.1 flood damage;

255.2 dampness not arising from failure of a load-bearing portion of the building;

255.3 damage to drains or services; and

255.4 malicious damage or damage arising from acts of God, acts of the owners or their tenants, licensees or invitees, acts of civil or military authorities or acts of war, riot, insurrection or civil commotion.

[238] *Administration of the Plan,* s 1.

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

JURISDICTION	UNITED KINGDOM (UK)	BRITISH COLUMBIA (CANADA)	ONTARIO (CANADA)	NEW JERSEY (USA)
Legislation		Homeowner Protection Act	Ontario New Home Warranties Plan Act	New Jersey's New Home Warranty and Builders' Registration Act
Insurance Scheme	Major provider is NHBC (claims to supply 75-85% of the UK market)	New home guarantee	Ontario New Home Warranties and Protection Plan (Section 11(1))	State of New Jersey's New Home Warranty Program
Type of scheme	Voluntary, however, financial institutions require insurance to approve loan.	Mandatory	Mandatory	Mandatory
Insurance provider	NHBC (est. 1936) is a private company limited by guarantee (non-profit), governed by a Council comprising representatives from organisations or groups such as mortgage lenders, law societies, consumer groups, architects, surveyors and builder associations. Model includes NHBC setting own building standards for its insurance, inspecting insured work, and registration of builders and developers. Has parallel lines of business in private certification, WHS, and training.	Private insurers licensed and authorised by the provincial Financial Institutions Commission (Section 1).	Tarion will now focus solely on administering warranties and protections for the purchasers of new homes and assisting with dispute resolution between new home buyers and builders. (Home Construction Regulatory Authority (HCRA) was created on 1 February 2021 and acts as a separate regulator for all registration, licensing, and regulation for companies and people who build and sell new homes in Ontario.) Source: https://www.tarion.com/sites/default/files/2021-02/Tarion_HCRA_FAQ_02_2021.pdf	Third party insurance-backed warranty. Private warranty plans need to be enrolled in. Any builder not participating in an approved private warranty plan is automatically enrolled in the State Warranty Plan. Source: § 5:25-4.1 Private plans permitted https://www.nj.gov/dca/divisions/codes/offices/nhw_for_builders.html

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

Type of building covered	New homes or newly converted for private sale	All new buildings and building envelope renovations on multi-unit buildings after	New building (but not one built on existing footings)	All new homes (§ 5:25-1.3 Definitions)

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

JURISDICTION	UNITED KINGDOM (UK)	BRITISH COLUMBIA (CANADA)	ONTARIO (CANADA)	NEW JERSEY (USA)
		1999 when Act first introduced. (Section 1) Exemptions apply to owner- builders and those built for rent (after the imposition of covenant preventing sale for 10 years). Source: https://www.bchousing.org/licensing-consumer-services/new- homes/home-warranty-insurance- new-homes#:~:text=At%20a%20minimum%2C%20home%20warranty,the%20structure%20of%20the%20home Rental exception: https://www.bchousing.org/licensing-consumer-services/builders-developers/rental exemption		
Insurance cover amount	Pre-completion: cover is limited to 10% up to 100,000. Defects: Not a monetary limit. Builder must rectify in first 2 years. Builder encouraged to rectify in years 3-10 via incentives (see under Other below). NHBC will then try to get money back from builder if they have to step in and rectify because builder unable or unwilling.	The lesser of $200,000 or the purchase price for new primarily detached dwelling units, and the lesser of $100,000 or the purchase price for strata homes, where the owners own their individual strata lots and together own the common property and common assets. For common strata property, coverage is limited to the lesser of	The maximum statutory warranty coverage available for freehold homes and condominium units is $300,000. Additionally, for projects where the first Agreement of Purchase and Sale was signed on or	The purchase price of the home in the first good faith sale or the fair market value of the home on its completion date, if there is no good faith sale. Per § 5:25-3.8 Limit on liability Coverage extends to defective systems, workmanship, materials, plumbing, electrical and mechanical systems,

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

JURISDICTION	UNITED KINGDOM (UK)	BRITISH COLUMBIA (CANADA)	ONTARIO (CANADA)	NEW JERSEY (USA)
		$100,000 times the number of units, or $2.5 million per building. Source: Regulatory-Bulletin-03-2-5-10- Year-Home-Warranty-Insurance (attached document)	after February 1, 2021, these new warranty limits are in place: ● The maximum coverage for condominium common elements is $100,000 times the number of units, up to a maximum of $3.5 million. ● The maximum combined coverage for a condominium project (units and common elements) is $50 million. ● There is a maximum of $50,000 for warranted damage caused by environmentally harmful substances or hazards. For projects where the first Agreement of Purchase and Sale was signed before February 1, 2021, these warranty limits remain: ● The maximum coverage for condominium common elements is $50,000 times the number of units, up to a maximum of $2.5 million. ● The maximum combined coverage for a condominium project (units and common elements) is $50 million. ● There is a maximum of $15,000 for warranted damage caused by	appliances, fixtures, and equipment, and major structural defects. Source: https://www.nj.gov/dca/divisions/codes/offices/nhw_for_builders.html

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

JURISDICTION	UNITED KINGDOM (UK)	BRITISH COLUMBIA (CANADA)	ONTARIO (CANADA)	NEW JERSEY (USA)
			environmentally harmful substances or hazards and a maximum of $25,000 for coverage of septic systems. Source: https://www.tarion.com/homeowners/ your-warranty-coverage/warranty-outline	
Period of cover	● Two-year builder warranty period backed by the NHBC resolution service and guarantee ● Next eight years NHBC insurance policy for physical damage to certain parts of the home caused by a failure to build to the NHBC Technical Requirements.	● 2 years on specified labour and materials; ● 5 years on the building envelope (which includes the components that separate the indoors from the outdoors, such as exterior walls, foundation, roof, windows and doors), including water penetration; and ● 10 years on the structure itself. Source: Section 22(2) of the HPA	● 1 year – covers things such as that home is constructed in a workman-like manner and free from defects in material and protects from breaches of building code. ● 2 years – protects against water penetration ● 7 years – protects against structural problems. Source: https://www.tarion.com/homeowners/ your-warranty-coverage/warranty-outline	● From the commencement date of the warranty up to two (2) years from that date, the mechanical, electrical, and plumbing systems and major structural defects are covered. The builder is responsible for warranty coverage during the first two years. ● During the third through tenth years of coverage, only major structural defects are covered. Source: § 5:25-3.5 Performance standards https://www.nj.gov/dca/divisions/codes/offices/nhw_for_builders.html
Cost of cover and/or maximum excess payable	The cost of cover is dependent on premium rating and the selling price of the new homes being developed.		A scale starting from $330.00 + $42.90 = $372.90 for a home costing from 0 to $100,000 up to	The contributions towards the State Warranty Plan are based on a sliding scale starting from 0.17% per each new home registered, if no claims made against the

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

JURISDICTION	UNITED KINGDOM (UK)	BRITISH COLUMBIA (CANADA)	ONTARIO (CANADA)	NEW JERSEY (USA)
			$1,745.00 + $226.85 = $1,971.85 for a home costing > $1,500,000 Source: https://www.tarion.com/builders/build ing-and-selling-new-homes/warranty-enrolment-fees	builder in the last 10 years up to 0.595% if more than one payment (or a determination to pay) towards a claim in the last 2 years. Source: § 5:25-5.4 Warranty contributions, amount, date due https://www.nj.gov/dca/divisions/codes/offices/nhw_for_builders.html
Regulator	Authorised and regulated by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)	Financial Institutions Commission (Section 1)	New Home Buyer Ombudsperson Office (Section 5.7) Tarion decisions can be appealed to the License Appeal Tribunal (LAT), an impartial appeals process that was created for consumers by the Ontario government. (Section 14(14))	New Jersey Department of Community Affairs (DCA) Commissioner § 5:25-1.4 Administration and enforcement
Other things to note	• NHBC operates an integrated model of registering builders (through technical and commercial assessments), technical risk management (through setting technical requirements and standards, checking designs and inspecting work) and then providing a 10 year warranty on the completed home.	Private insurers are a mixture of large insurers and smaller Canadian warranty providers. It appears that a number of insurers have left the market.		Warranty providers all appear to be small private warranty providers and no large insurers appear to be in the the market.

SCHEDULE 2: BRIEF COMPARISON OF INSURANCE SCHEMES IN UK, BRITISH COLUMBIA, ONTARIO AND NEW JERSEY

JURISDICTION	UNITED KINGDOM (UK)	BRITISH COLUMBIA (CANADA)	ONTARIO (CANADA)	NEW JERSEY (USA)
	• NHBC incentivise builders to manage repairs in years 3-10 as much as possible through the Premium Rating system (a form of no claims arrangement) and premium refunds (a form of profit share for builders with good long term claims records). As a result larger builders tend to repair the majority of claims in years 3-10.			

SCHEDULE 3: BRIEF COMPARISON OF INSURANCE SCHEMES IN AUSTRALIA & NEW ZEALAND

JURISDICTION	**VICTORIA (AUSTRALIA)**	**NEW SOUTH WALES (AUSTRALIA)**	**QUEENSLAND (AUSTRALIA)**	**TASMANIA (AUSTRALIA)**	**NEW ZEALAND**
Legislation	Domestic Building Insurance Ministerial Order	Home Building Act 1989	Queensland Building and Construction Commission Act 1991	Housing Indemnity Act 1992	NA
Insurance Scheme	Domestic Building Insurance	Home Building Compensation Fund (HBCF) (formerly called the Home Warranty Insurance) (Section 141(1) of the Home Building Act 1989)	Queensland Home Warranty Scheme	NA	The absence of a mandatory statutory insurance scheme has led to the popularity of purchasing a **Master Build Guarantee**. This is a 10-year guarantee that can only be offered by Master Builders. Registration to be a Master Builder is regulated by Registered Master Builders Association, a private industry marketing and support association for builders, and its guarantee is designed to promote public confidence in its member building companies, including protecting them in case their builder goes bust before completing their homes.

SCHEDULE 3: BRIEF COMPARISON OF INSURANCE SCHEMES IN AUSTRALIA & NEW ZEALAND

Type of scheme	• Mandatory • "Last Resort" scheme	• Mandatory • "Last Resort" scheme	• Mandatory –building contractor is required to pay premiums into a government-run fund that ensures for the benefit of consumers. • "First Resort" Scheme (Part 5 of the Queensland Building and Construction Commission Act 1991)	Voluntary The Tasmanian government made builders warranty insurance voluntary for Justice), p. 45) Instead, a builder is only required to provide prospective consumers of building services with a "consumer guide" before the commencement of building work over $12,000. (Part 2A of the Housing Indemnity Act 1992) However, following the collapse of two construction firms in 2021 and 2022 that left approximately 50 property owners with incomplete construction projects, the government is now looking to reintroduce home warranty insurance.	Voluntary

SCHEDULE 3: BRIEF COMPARISON OF INSURANCE SCHEMES IN AUSTRALIA & NEW ZEALAND

JURISDICTION	VICTORIA (AUSTRALIA)	NEW SOUTH WALES (AUSTRALIA)	QUEENSLAND (AUSTRALIA)	TASMANIA (AUSTRALIA)	NEW ZEALAND
				Premier of Tasmania Mr Peter Gutwein has said that home warranty legislation would be introduced to Parliament in the first six months of 2022 and to pass through both houses by the end of the year. See news articles: ● https://www.examiner.com.au/story/7594140/home-warranty-insurance-legislation-expected-to-be-released-soon/ ● https://www.smartpropertyinvestment.com.au/finance/23572-tasmania-set-to-insure-homeowners-against-builder-insolvencies ● https://www.premier.tas.gov.au/site_resources2015/additionalreleases/further_protections_for_tasmanians_building_homes#	

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				:~:text=The%20Tasmanian%20Go	
Insurance provider	Mainly Victorian Managed Insurance Authority (VMIA), although there are several commercial providers (https://www.consumer.vic.gov.au/licensing-and-registration/builders-and-tradespeople/running-your-business/warranties-and-insurance/domestic-building-insurance)	Only through an approved broker distributor. List of approved broker distributors of HBCF insurance: https://www.icare.nsw.gov.au/builders-and-homeowners/builders-and-distributors/find-a-broker-distributor	Claims are paid out from the Insurance Fund established pursuant to Section 26 of the Queensland Building and Construction Commission Act 1991. (Section 26(3)(b) of the Queensland Building and Construction Commission Act 1991)	NA	The Master Build 10-Year Guarantee is provided by Master Builders.
Type of building covered	Any residential premises and includes any part of a commercial or industrial premise that is used as a residential premise, for works over $16,000. (Section 3(1) of the Domestic Building Contracts Act 1995, read with Clause 6 of the Domestic Building Insurance Ministerial Order and Clause 5 of the Variation to the Domestic Building Insurance	Any residential building works for more than $20,000. (Section 92 read with Clause 2 of Schedule 1 of the Home Building Act 1989, and Section 53 of the Home Building Regulations 2014)	Building works valued at more than $3,300 including, construction of a residence or related roofed building, building work within the building envelope of a residence or related roofed building, and associated insurable work such as fencing, landscaping, electrical work, air-conditioning, driveways or paths, solar power units and the like. (Section 67WC of the	NA	There are multiple levels of cover and not all products are the same.

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	Ministerial Order)		Queensland Building and Construction Commission Act 1991)		

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Losses Insured	● Loss or damage resulting from non-completion of the domestic building work, including costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred; ● Loss or damage resulting from all or any of the following events, including costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred: o defective building work breach of warranty implied by Section 8 of the Domestic Building Contracts Act 1995; o failure to	Generally, the insurance policy covers: ● loss or damage resulting from non-completion of the work, including the cost of alternative accommodation, removal and storage costs reasonably, and necessarily incurred and loss of deposit or progress payment; ● loss or damage arising from a breach of a statutory warranty, including the cost of alternative accommodation, removal and storage costs reasonably, and necessarily incurred and loss of deposit or progress payment; ● loss or damage resulting from faulty design, where the design was provided by the contractor;	● In a case where construction work is incomplete and work has not started, the consumer can claim for the loss of the amount of the insurable deposit for the contract that is not otherwise refunded to the consumer under the contract. ● In a case where construction work is incomplete and work has started, the consumer can claim for the reasonable cost of completing the residential construction work, including accommodation, costs incurred by the consumer during all or part of the claim period. Where such a claim is allowed, the consumer will also be insured against damage of property by fire, storm, vandalism or theft. ● In a case where	NA	The Master Build Guarantee generally covers: ● Loss of deposit resulting from builder being unable to complete the building work (Loss of Deposit cover); and ● Additional costs incurred to complete building work that builder was unable to complete, as well as costs for any remedial work that needs to be carried out on the work done by the builder (Non-Completion cover).

	maintain a standard or quality of building work specified in the domestic building contract; or ○ conduct by the builder that contravenes a trade practices provision; and ● Loss of any part of the deposit or loss of any progress payment. However, the policy may (and often does) provide that the indemnities above only apply if: ● the builder dies, becomes insolvent or disappears; or ● the policy was issued after 1 July 2015 and the builder has failed to comply with a final order made by the Victorian Civil and Administrative Tribunal or a court.	● loss or damage resulting from non-completion of the work because of early termination of the contract for the work because of the contractor's wrongful failure or refusal to complete the work; and ● any legal or other reasonable costs incurred by a beneficiary in seeking to recover compensation from the contractor for the loss or damage or in taking action to rectify the loss or damage. However, the indemnities above only apply if the loss and damage is one which the beneficiary cannot recover compensation from the contractor concerned, or have the contractor rectify, because of: ● the insolvency, death or disappearance of the contractor; or ● for policies issued on or after 19 May 2009, suspension of a contractor	construction work is defective, the consumer can claim for the reasonable cost of rectifying the defective work and any other building work reasonably required to be carried out to a relevant building as a consequence of the defective work. (Part 2 and Part 3 of Schedule 6 of the Queensland Building and Construction Commission Regulation 2018).		

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	Clauses 8 and 9 of the Domestic Building Insurance Ministerial Order, read with Clause 6 and 7 of the Variation to the Domestic Building Insurance Ministerial Order) See also: https://www.consumer.vic.gov. au/housing/building-and-renovating/defects-delays-and-insolvency/insurance-and- insolvency	license pursuant to section 42A of the Act. (Section 40 of the Home Building Regulation 2014)			
Insurance cover amount	The minimum insurance cover is $200,000 for policies issued before 1 July 2014 and $300,000	The minimum insurance cover is $340,000 in relation	The standard insurance cover is a maximum of $200,000. However, a	NA	There are multiple levels of cover and not all products are the same.

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	for policies issued on or after 1 July 2014. (Clause 35 of the Domestic Building Insurance Ministerial Order)	to each dwelling to which the insurance relates. (Section 102(3) of the Home Building Act 1989 read with Sections 45 and 46 of the Home Building Regulation 2014)	consumer may increase this cover to $300,000 by paying an additional premium to QBCC. (Sections 67Y and 67Z of the Queensland Building and Construction Commission Act 1991 read with Schedule 6 of the Queensland Building and Construction Commission Regulation 2018)		

Period of cover	In relation to loss or damage due to non-structural defects, the policy must indemnify during the period commencing on the commencement day and ending not earlier than 2 years after the earlier of the completion date of the domestic building work and the date of termination of the domestic building contract. In relation to all other loss or damage, the policy must indemnify during the period commencing on the commencement day and ending not earlier than 6 years after the	● For failure to commence or complete work, at least 12 months from the failure to commence or from the cessation of work (as the case may be); ● For major defects, at least 6 years from completion of the work. If the homeowner becomes aware of the defects in the last 6 months of the period of insurance, they may claim within 6 months of awareness of the defects; ● For non-major defects, 2 years from completion of the work. If the homeowner becomes aware of the defects in the last 6 months of the period of insurance, they may claim within 6 months of awareness of the defects. (Sections 103B, 103BA and 103BB of the Home Building Act 1989)	Structural defects are covered for 6 years 6 months from the date (whichever is earlier) the premium is paid, a contract is entered, or work is commenced. However, complaints must be lodged within 3 months of noticing the defect. Non-structural defects are covered if the consumer becomes aware, or ought reasonably to have become aware of the defect within 6 months after the day the work is completed. The complaint must then be lodged within 7 months of the completion date. (Section 16 of Schedule 6 of the Queensland Building and Construction Commission Regulation 2018)	NA	There are multiple levels of cover and not all products are the same. The Master Build 10-Year Guarantee covers the homeowner for ten years and starts at the time the contract is signed.

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Cost of cover and/or maximum excess payable	Premiums differ according to project type, builder risk rating and project value. Insurers calculate a premium for a specific project, taking into consideration the value of the work, the type of work and the builder's risk rating (as determined by the insurer). (See Essential Services Commission, "*Victoria's domestic building insurance scheme*" Performance Report dated 29 November 2019, p. 13)	Premiums vary across the approved broker distributors. Premiums also vary depending on factors such as category of work, builder risk and location. A list compiled by the NSW government agency *iCare* showing the maximum policy issuing fees that a broker may charge can be found at: https://www.icare.nsw.gov.au/builders-and-homeowners/builders-and-distributors/find-a-broker-distributor	Premiums are generally based on the insurable value of the work, and not the contract price of the work. The term "insurable value" is the amount which represents the reasonable cost of having the work carried out by a licensed contractor on the basis that all materials are to be supplied by the contractor – whether or not the work is carried out on this basis.	NA	There are multiple levels of cover and not all products are the same.

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	The maximum excess allowed is $1000 for a claim made after 5 years after the completion date, $750 for a claim made between 3 and 5 years after the completion date, and $500 for a claim made between 12 months and 3 years after the completion date. (Clause 46 of the Domestic Building Insurance Ministerial Order)		Section 67WA of the Queensland Building and Construction Commission Act 1991) The QBCC provides comprehensive Insurance Premium Tables setting out the premiums payable for various works: https://www.qbcc.qld.go v.a u/contractor-insurance-requirements/insurance-premium-fees (See also Section 68D of the Queensland Building and Construction Commission Act 1991)		
Regulator	Victorian Building Authority (Section 135(5) read with Section 3 of the Building Act 1993)	State Insurance Regulatory Authority (Section 92 read with Clause 1 of Schedule 1 of the Home Building Act 1989)	Queensland Building and Construction Commission (Part 2 of the Queensland Building and Construction Commission Act 1991)	NA	NA

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Other things to note	Following the exit of five private insurers from the DBI market in 2010, the VMIA began offering DBI following an official mandate from the Victorian government. The VMIA is the main provider of DBI. A new private insurer, AssetInsure, began offering DBI in late 2015. Another private insurer, Berkshire Hathaway Speciality Insurance (BHSI) also began offering DBI in 2018. No other private insurers provide DBI, although the insurers who exited the market are still responsible for claims made against the DBI they issued before leaving the market. (See Essential Services Commission, "*Domestic Building Insurance Premium Validation Review*", Summary Report 2016- 2018 dated 30 April 2019, p. iv)	The reformed NSW Home Building Compensation Scheme started on 1 January 2018. There is now an operational fund for administrative costs and a Home Building Insurers Guarantee Fund as a safety net in case of provider insolvency. (See Section 103OA of the Home Building Act 1989. See also https://www.sira.nsw.go v.a u/fraud-and-regulation/reforms/hom e- building-compensation- scheme-reforms)	Queensland is the only Australian state offering a "first resort" insurance scheme, as opposed to "last resort" scheme. This means that consumers are not required to take expensive and lengthy legal action against contractors. Instead, the QBCC pays a claim, and takes recovery action against the persons responsible. The QBCC is therefore the first port of call for consumers. (QBCC Claims Procedures Manual – July 2020 at para. 1.3) NB: "First resort" insurance schemes can be accessed by home owners in the case of incomplete or defective work even if the builder is still trading. In contrast, "last resort"	Following the collapse of two constructions firms that have left approximately 50 owners with incomplete construction projects, an assistance package is currently being rolled out to help property owners already impacted by builder insolvencies. It is modelled off the current projection for what the insurance scheme will look like once it's implemented. It allows for: ● Property owners with an incomplete building project to claim up to 20% of the contract price, up to a maximum of $200,000. ● Property owners who have paid deposits but where work is yet to commence to claim	

			insurance schemes can only be accessed by a home owner if the builder is unable to complete or rectify the work, for example because the builder has died, is insolvent or has disappeared. In other cases, home owners have to resolve concerns about incomplete or defective work with the builder. See Parliament of Victoria, 13th Report to the Legislative Council on "Inquiry Into Builders Warranty Insurance", October 2010, at pp. 7–8)	up to 5% of their contract price. This is in line with the statutory protections that already exist to prevent deposits beyond 5%. See news article and government announcement: • https://www.premier.tas.gov.au/site_resources2015/additional_releases/financial_assistance_for_consumers_affected_by_construction_company_failures • https://www.premier.tas.gov.au/site_resources2015/additional_releases/financial_support_package_already_delivering_results • https://www.examiner.com.au/story/7594140/home-warranty-insurance-legislation-expected-to-be-released-soon/