



Consultation Paper

A NEW CONSUMER BUILDING FRAMEWORK

February 2008





Table of contents

Invitation to comment on proposed framework.....	3
Executive summary	4
Background.....	5
Current situation in Tasmania	6
Current Regulatory Arrangements	6
Recent Developments.....	7
Frameworks in other jurisdictions	9
Proposed Consumer Building Framework for Tasmania	10
Broad outline of framework.....	10
Improved dispute resolution.....	11
Rectification orders.....	14
Standard contract terms.....	15
Information for consumers.....	18
Benefits of proposed framework.....	19
Attachment 1: Legislation in different jurisdictions.....	20
Attachment 2: Jurisdictional analysis of regulatory frameworks.....	22
Attachment 3: Relevant Tasmanian Legislation	31
Attachment 4: Summary of stakeholder discussions	33



Invitation to comment on proposed framework

Comments are invited from stakeholders and interested parties on the proposed consumer building framework.

Respondents should address the following questions:

- Do you support the framework outlined in this paper?
- Are there any aspects of the proposed framework that you do not support and if so, why?
- Are there any issues that you believe are not addressed in this paper?

Comments on the proposed framework should be addressed to:

Consumer Building Framework Project
Consumer Affairs and Fair Trading
GPO Box 1244
Hobart TAS 7001; or
By email to consumer.affairs@justice.tas.gov.au

The closing date for submissions is: **Friday 29 February 2008.**

Executive summary

This paper details a new consumer building framework for Tasmania. This framework will form the basis for new consumer building legislation that will incorporate the existing *Housing Indemnity Act 1992*. The key elements of the new framework are:

- improved dispute resolution;
- enforceable rectification orders;
- standard contract terms (including statutory warranties); and
- the mandatory provision of information to consumers.

The new framework will be administered by Consumer Affairs and Fair Trading (CAFT) and will be separate from the administration of the *Building Act 2000*, which deals with standards of builders and buildings, rather than the relationship between consumers and builders.

The paper examines the current situation in Tasmania and outlines the benefits and problems associated with the existing environment.

The proposed new dispute resolution process will be a staged process. The initial response to a consumer enquiry is directed towards allowing consumers to resolve the issue themselves. On-site inspections will comprise an important part of the formal complaint management process and there will be a strong focus on mediation. Where the parties cannot agree, an enforceable rectification order can be made to achieve a resolution.

While the primary objective of the dispute resolution process is to provide an alternative to the court process, it will not replace the role of the courts in the determination of disputes that relate to fundamental issues of law, particularly contract law. The dispute resolution process will be directed towards resolving issues that are primarily technical in nature or where mutual agreement is possible.

The paper also explores interstate experiences to determine whether there are specific processes in those jurisdictions that might be adopted in this environment.

Finally, the paper details the proposed new framework for domestic building work in Tasmania.



Background

There has long been concern about the adequacy of processes to resolve domestic building disputes in Tasmania. These concerns were raised most recently during a 2004 review of the Housing Indemnity Act where a number of respondents argued that there is a need for a more effective process for resolving residential building disputes.

In 2006, the Minister for Justice and Workplace Relations gave an undertaking to develop an improved process for handling disputes.

There has also been long-standing concern about the adequacy of housing indemnity insurance. Initially, the insurance was a first resort scheme, which meant that insurers dealt with disputes between builders and consumers. Since the scheme was changed to a last resort scheme, consumers have not only been left with inadequate protection but the insurer's role in dispute resolution is now limited to last resort issues.

As a result of concern about the adequacy and cost of the scheme, Cabinet agreed in November 2007 to phase out mandatory housing indemnity insurance and to replace it with a dispute resolution process for consumers, standard contract provisions and mandatory consumer information. These provisions are detailed in this paper.

In addition, there will be some supervision of builder's financial management as a new component of the building licensing. This will be managed by Workplace Standards Tasmania.

Methodology used in developing this paper

The methodology used to develop the proposed framework is as follows:

- environmental scan - initial building industry research and informal meetings with selected peak industry bodies, primarily those who provided submissions to the 2004 review of housing indemnity;
- a review of legislation in other jurisdictions to determine their regulatory environment;
- a review of previous reports on building industry regulation reform in Australia;
- a review of relevant Tasmanian legislation to ascertain potential overlap or efficiencies;
- consultation with government agencies including Workplace Standards Tasmania, the Magistrates Court and the Local Government Association of Tasmania; and
- research and consultation with other jurisdictions to determine their approach to dispute resolution.



Current situation in Tasmania

Current Regulatory Arrangements

A number of Acts currently regulate the physical process of building in Tasmania.¹ The Housing Indemnity Act regulates mandatory, last resort insurance and establishes statutory warranties for domestic building work. The *Commercial Arbitration Act 1986* may assist in resolving building contract disputes but otherwise consumers must apply to the courts to resolve disputes with builders.

Builder Accreditation and Technical Standards

The key purpose of the *Building Act 2000* is to establish standards and oversee the performance of the building industry through accreditation and technical regulation. This assists consumers by improving the skills of builders and the overall standard of building work. The Building Act also deals with the conduct of builders, where unsatisfactory. However, this Act does not deal with poor or faulty workmanship.

Housing Indemnity

The Housing Indemnity Act currently provides last resort, compulsory, homeowner insurance.² This means that the insurance applies only where the builder is insolvent, has disappeared or died. The Act limits the value of deposits and the amount of progress payments that builders can ask for. The Act also imposes statutory warranties on all domestic building work. For example, there is a warranty that work will be carried out in a proper and skilled manner, and that the materials will be 'fit for purpose'.³

Dispute Resolution in Tasmania

The dispute resolution options available for consumers and builders are:

- industry association procedures such as the Master Builders Association complaints handling process;
- the Consumer Affairs advisory service;
- alternative dispute resolution;
- civil legal action through the Magistrates Court or the Supreme Court.

¹ See Attachment 3.

² Part 3 of the *Housing Indemnity Act 1993* details the insurance requirements.

³ Section 7 of the *Housing Indemnity Act 1993*.

Industry Associations

While not a formal part of the legal process, some industry bodies provide dispute resolution through their member complaints handling processes. However, all parties must agree to the process and the outcome is not legally binding. Threat of membership expulsion may provide some incentive for builders to comply but consumers may not have confidence in the independence of these processes, even though they may be quite rigorous.

Consumer Affairs and Fair Trading

CAFT provides a limited role in resolving consumer building disputes through its Compliance and Advisory Branch. A building investigation officer has recently been appointed to investigate disputes and to attempt mediation. However, apart from broad provisions under the *Consumer Affairs Act 1988* to act in the interests of consumers, CAFT has little ability to determine the outcome of a dispute.

Alternative Dispute Resolution

Alternative dispute resolution processes such as mediation can be a simple and cheaper alternative to court and are less intimidating. As a general rule, the sooner the parties are able to sit down and attempt a mutually agreeable resolution, the more successful the outcome.

The courts are increasingly encouraging parties to participate in mediation before formal hearings. Often mediation will remove the need for costly action even after disputes have been lodged with the courts.

Civil Action

Court action may be appropriate for disputes about large-scale commercial building contracts where there are significant amounts of money at stake. However, domestic building disputes are frequently about comparatively small amounts. From this perspective, there is often an imbalance of resources and consumers are generally not well equipped to pursue a well-resourced builder through costly court processes. Frequently, both parties lose where earlier resolution might have saved significant time, money and energy.

The Magistrates Court operates an effective and low cost process for parties. However, the nature of the court system is a significant deterrent for many individuals. An alternative dispute resolution process that removes the adversarial element and is informal and focussed on reaching a mutual agreement will increase access and enhance consumer protection in Tasmania.

Recent Developments

Security of Payments

In response to industry representations in 2006,⁴ the Minister commissioned an investigation into the need for 'security of payments' legislation in Tasmania.

The term 'security of payments' refers to the late payment or non-payment of progress payments to builders by contracting parties or by builders to sub-

⁴ Initiated by the Building and Construction Industry Council.

contractors. The investigation revealed that security of payments is a significant issue in Tasmania. Key recommendations included the introduction of standard form contracts and security of payments legislation⁵.

CAFT and Workplace Standards are currently considering the recommendations of the report and it is noted that the framework proposed in this paper will need to be consistent with any security of payments reform.

Summary

There is potential for improvement in a number of areas. Better mechanisms are needed for consumers to resolve disputes with builders. Similarly, it often arises that builders first become aware of a problem when the consumer refuses to make the final payment, triggering the dispute. Consequently, the dispute resolution process also needs to ensure that this final payment is made in the event that the issues are resolved.

Many disputes arise because of a lack of clarity in the written documentation. It is often the case that builders and consumers have a different view about what has been agreed. Disputes frequently occur about what precisely is to be built, the quality of the work, standards and the cost of the work.

Contract regulation in Tasmania is currently limited to the statutory warranties and maximum deposit provisions in the Housing Indemnity Act. Other jurisdictions have more detailed requirements and industry groups have suggested that establishing standard form contract terms would greatly assist consumers and builders by making agreements clearer and easy to understand. Greater clarity is likely to reduce the level of disputes about key contractual terms.

Housing Indemnity insurance has, with the advent of the last resort system, ceased to provide reasonable protection for consumers. Dispute resolution and standard contract terms are areas where gaps exist and need to be filled. A number of jurisdictions have successfully introduced legislative measures to assist in these areas. Some of these measures could be adopted successfully in Tasmania and the following section of this paper examines those measures.

⁵ Stenning and Associates and The Work Lab, *Security of Payment in the Tasmanian Building and Construction Industry*. June 2006, p3 & 4.



Frameworks in other jurisdictions

The processes for dealing with disputes about consumer building work vary around Australia. In developing this paper, the processes used in other jurisdictions have been examined, particularly those that are successful and can be readily adapted to the Tasmanian context.

A detailed analysis of each jurisdiction's characteristics was undertaken and the recommended processes are based on these observations. This analysis and a review of consumer building regulation in each jurisdiction are detailed in Attachment 1. The key legislative characteristics of each framework, including the benefits and disadvantages are detailed in Attachment 2.

In addition to examining the situation in other jurisdictions, CAFT officers visited New South Wales in 2007 and met with officers working in the building dispute resolution area.

The key observations that were made from these discussions were that:

- Disputes need to be dealt with as soon as possible. The sooner the parties are able to get together to discuss their problems, the greater the likelihood of a successful resolution.
- Officers need to do a site inspection. The nature of building issues is that it is imperative that an officer visits the site to be able to appreciate the issue.
- A large number of disputes are about standard and quality of workmanship. This means that the rectification order is a very powerful tool in establishing standards and resolving disputes.
- There is considerable value in making rectification orders enforceable.

The key finding from the visit to New South Wales and the discussion with officers was that it is important to clearly distinguish between disputes about the contract and disputes about the standard or quality of workmanship. In New South Wales, the services provided by the Department of Fair Trading are largely directed towards workmanship issues. The relevant Tribunal in New South Wales deals with issues about contracts. This will be reflected later in this paper in respect to recommendations about contract dispute issues.



Proposed Consumer Building Framework for Tasmania

Broad outline of framework

This section details the proposed new framework and will address the following key areas:

- improved dispute resolution;
- enforceable rectification orders;
- standard contract terms (including statutory warranties); and
- the mandatory provision of information to consumers.

Administration

The new framework will be administered by CAFT and will be separate from the administration of the Building Act, which has broader coverage and deals with standards of builders and buildings, rather than the relationship between consumers and builders.

Description of process

The initial response to a consumer enquiry is directed towards helping consumers and builders to resolve the issue themselves.

Initial inspection of building works will be conducted by Building Dispute Officers who have specific training and expertise in building and have received training in dispute resolution techniques. Officers will attempt to reach an agreed outcome guided by their expert understanding of contemporary building standards.

If agreement cannot be reached, the Building Dispute Officers will be able to make an order that a problem is rectified, where it is clear that the matter relates to faulty workmanship or building work of an inadequate standard. It is proposed that an order is to be enforceable in law and that there will be limited rights of appeal.

Dispute about contracts, rather than workmanship will be outside the scope of the framework and parties will need to consider normal legal options. More complex matters will remain the province of the courts and court processes are currently well equipped to deal with such matters. The New South Wales experience is that 80 percent of disputes relate to workmanship issues and can be resolved through either rectification orders or mediation at this coal face level.

Improved dispute resolution

Application

It is proposed that the framework will apply to all disputes involving consumer building works and will cover all building and related occupations including plumbing, electrical work and plastering. Where a dispute requires specialised technical expertise⁶ to determine an appropriate standard, the Director of CAFT may request a professional report on the matter before making a determination.

Where a Building Dispute Officer believes that a breach of other legislation may have occurred, the matter may be referred to the relevant authorities such as a building surveyor, the relevant permit authority or the Director of Building Control for further investigation.

In some cases, a person may be in breach of the relevant building regulations by virtue of not being accredited. In this event, CAFT will still attempt to mediate an outcome for the parties. However, it will not be possible, for example, to order the rectification of building works by a non-accredited builder.

Compulsory System

It will not be possible for the parties to opt out of the process. While CAFT will be unable to force the parties to agree, they will be able to require that the parties at least attempt to resolve the issue before either party can access a court.

Where the Director determines that a matter relates entirely to the standard of building work and a rectification order is made, a party will have a right of appeal (as discussed later) but cannot by-pass the process.

Access by both consumer and builder

The proposed system is directed towards giving consumers access to dispute resolution processes. However, a dispute often arises because a consumer has failed to make the final payment and may choose not to lodge a complaint. For this reason, a builder⁷ should also be able to lodge a complaint against a consumer. In the event that payment has been withheld, CAFT will be able to deal with the final payment as discussed on page 14.

Independent Adjudicator

A significant focus of the Building Dispute Officer will be towards the resolution of disputes through conciliation. Officers will attempt to conciliate an outcome and will possess relevant training to perform this role. However, officers might recommend independent mediation services, where this appears to be useful.

Mediation is a process where the parties to a dispute develop options and consider alternatives in an effort to reach an agreement. The role of a mediator is to assist the parties to explore options but has no advisory or determinative role and is independent of the dispute resolution process.

⁶ For example in providing professional services such as architecture, engineering or building surveyor related matters.

⁷ Note: builders will be able to lodge complaints against consumers *but not* subcontractors. These are commercial arrangements that will fall outside the scope of the framework.

In contrast, a conciliator is likely to have an advisory role and may make suggestions for terms of settlement, give expert advice and may actively encourage the parties to reach an agreement. From this perspective, and because of the specialist expertise of the Building Dispute Officer, this person will play a conciliation role and will actively work towards the resolution of the dispute.

A decision to make a rectification order will only be made where other avenues have been exhausted or where one of the parties is unwilling to compromise. This may be the builder who insists that the standard of work is adequate but it may be the consumer who unreasonably insists that it is not.

Where parties fail to reach agreement on their own the Director of CAFT may issue an enforcement order which sets out the works to be rectified or the monies to be paid if funds are being withheld by one of the parties.

A three stage dispute resolution process

The proposed dispute resolution process is outlined in Table 1 and comprises three key elements. The flowchart details how an enquiry progresses to a formal dispute and shows how the complaint develops, where the parties are unable to reach agreement.

Stage 1 Information and advice

The initial stage is the receipt and handling of a telephone enquiry by giving information. Other jurisdictions report that the provision of clear advice at this initial stage can resolve a number of enquiries and can assist in the resolution of disputes. In many cases, no further action is required. CAFT already operates an enquiry line and it is proposed that this service is refined with specific information being available for consumer and builders with building related enquires.

CAFT officers will initially identify the nature of the complaint and will follow guidelines set out in a documented procedure manual, including assisting the complainant to develop realistic expectations about the matter and ensure that they are informed about the dispute resolution process.

In some cases the Director will refer the matter to another organisation. For example, in the event of a professional conduct issue, the matter would be referred to Workplace Standards.

The focus of the consumer enquiry line is to encourage consumers to resolve matters themselves. This will continue to be the focus for building disputes. If a complainant is unable to resolve the issue they will be required to make a written complaint outlining the specific details of the dispute and enclosing any relevant documentation.

On receiving a complaint, a CAFT officer will notify the other party of the dispute and provide them with an opportunity to respond, provide additional information or rectify the problem.

Stage 2 Formal complaint handling Conciliation and Enforcement

Where a formal complaint is received by completing the relevant 'building dispute complaint form' and paying the requisite fee, a Building Dispute Officer will inspect the work.

The primary role of the Building Dispute Officer is to facilitate the resolution of disputes that relate to:

- Defective work;
- Incomplete work; or
- Where damage has resulted from work.

The Building Dispute Officer will generally arrange to inspect the work on-site in the presence of all interested parties. During the inspection the Building Dispute Officer will assess the items listed on the complaint form and attempt to conciliate the matter by providing an opinion and discussing the workmanship issues with the parties. Where the parties reach an agreement the Building Dispute Officer will issue a 'complaint inspection advice' (CIA), which sets out the agreement that has been reached between the parties.

Non-compliance with the CIA will result in the Director of CAFT issuing a rectification order.

Similarly, where the parties cannot reach agreement a rectification order will then be issued.

Building Dispute Officers may identify breaches of law during an inspection and will in this event refer that matter to the appropriate authority. In many cases the office will continue to deal with a dispute although a serious breach may require from time to time that a matter is put on hold until other legal issues are resolved.

Stage 3 Courts process and appeals

There will be provision to appeal to the Magistrates Court (Administrative Appeals Division) on the grounds that procedural fairness was not afforded to the parties.

It was earlier proposed that a dedicated tribunal or a panel of adjudicators be established. The purpose of this process was to establish a process where people with specialist expertise could determine disputes about building matters. However, other jurisdictions have advised that 80 to 90 percent of disputes are resolved through structured dispute resolution processes.⁸ Further, Tasmania's size and the relatively small number of complaints mean that such a system is unlikely to be viable. Consequently, it is

⁸ This is based on evidence received from interstate jurisdiction annual reports.

intended that the court system should continue to perform its existing functions.

Withholding of payments - trust account

Where a payment has been withheld CAFT may require the party withholding the payment to pay the amount in dispute into a trust account until the matter is resolved. The Director will have legal authority to require payment to be made in some circumstances.

Rectification orders

An integral part of the dispute resolution process is the ability to make a rectification order. A rectification order will set out the matters to be rectified and will specify the time by which such matters are to be completed. A rectification order will be enforceable and non-compliance with the order will be an offence for which a penalty will apply.

Where there is evidence of a breach of a code of conduct then the matter may be referred to the relevant body for investigation and possible disciplinary action. Non-compliance with a rectification order will not, in itself, result in a referral for disciplinary action.

If the rectification order is against a non-accredited builder or other person to whom the framework applies then the Director will have the power to order rectification by an accredited third party and the non-accredited builder or other person will bear the cost.

Referral of contract dispute

Where a matter relates to a complex contractual issue and cannot be resolved by CAFT, the parties will be able to make an application to a court. Generally only complex contractual matters requiring specialised legal expertise would be excluded from the jurisdiction.

Owner Builders

Complaints by owner builders against sub-contractors will be dealt with through the framework in the same manner as other consumers. The reason for this is that owner builders are consumers when engaging sub-contractors and experience the same problems as other consumers. This means that an owner builder will be able to lodge a complaint about a sub-contractor.

Strata Title properties

Strata title complaints can be complex if multiple dwellings are involved. The definition of consumer building work will limit the application of the framework in relation to certain types of strata title complaints.

Common property issues are often a component of a strata title complaint and in nearly all instances the complaint will need to be made by the appropriate owner being:

- body corporate;
- managing agent appointed by the body corporate; or
- an individual with written authorisation from the body corporate.

Procedure Manual

The experience of other jurisdictions is that the success of the system is improved by having a clearly written procedure manual for the dispute resolution and rectification order processes. It is important that people know what to expect from the process. To promote accountability a publicised procedure manual will be developed detailing issues such as timing for resolving disputes and complaint handling procedures.

Limitation of Actions

Action must be taken to register a dispute within 6 years from when the work is completed. This requirement is consistent with provisions in existing legislation.

Complaint Handling Fee

To minimise vexatious or frivolous complaints it is proposed that a fee is charged for the making of a formal complaint. Other jurisdictions charge fees although these vary.⁹ It is suggested that the fee in Tasmania should be between \$80 and \$150.

Standard contract terms

Application

One of the key features in other jurisdictions is a requirement that a builder enters into a written contract before commencing building work. As many disputes arise because of arguments about what has been agreed between the parties, a requirement to have a contract may assist in reducing disputes in this area.

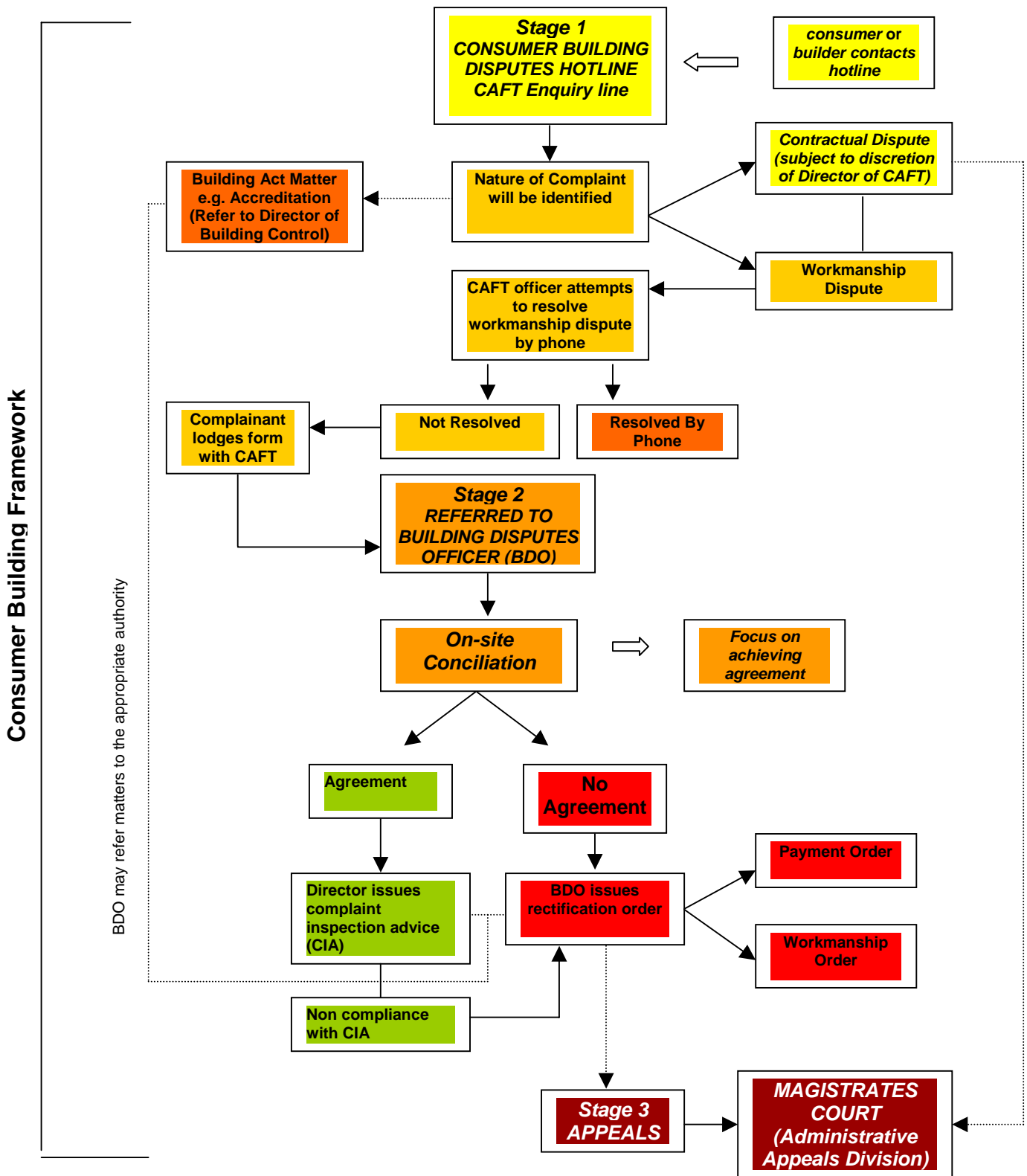
It is proposed that a contract be required before commencing any residential building work valued at \$500 or more. While the proposed threshold is relatively low, the experience in other jurisdictions has been that this has provided benefits as many disputes occur at the lower price end of the market.¹⁰

It will be an offence to commence building work without having a compliant contract and a penalty will apply. Building Dispute Officers will undertake random checks of contracts to determine compliance with this requirement.

⁹ Refer to Attachment 3 for further details.

¹⁰ The legislation will also reserve a power to change the financial threshold from time to time.

Table 1 : Consumer Building Dispute Flowchart



Mandatory Contractual Provisions

In addition to a requirement that there is to be a contract, it is also proposed that the contract contain certain elements. A contract must be in writing and signed and dated by the parties. The contract must also contain:

- the full names of the parties;
- the licence number of builder (where applicable);
- a description of the works;
- the contract price and payment schedule;
- a completion date; and
- any other requirements set out in the regulations.

Copies of any relevant plans and specifications must also be appended to the contract.

Additional requirements in the regulations may include:

Cost Plus Contracts *Certain rules will apply in relation to these contracts and they will generally only be permissible in renovation contracts*

Prime Cost and Provisional Sums *The costs must not be understated in the contract and the builder may be fined or prosecuted if this occurs. The estimate must be at or above the lowest amount the item could reasonably cost*

Rise and Fall Clauses *These clauses will be prohibited*

Variations *Variations must be in writing and signed by both parties. The consumer must be given a copy prior to the work commencing*

For minor works a detailed written quotation may be sufficient to comply with the Act. To assist industry in adapting to the new requirements standard form contracts will be developed.

Statutory Warranties and Deposits

It is intended that the current statutory warranties and provisions relating to deposits that are contained within the Housing Indemnity Act be contained in the proposed new regulation. These provisions would form part of the broad processes of contractual regulation and are consistent with the practice in other jurisdictions.

Under the new framework proceedings for breach of a statutory warranty must be commenced within 6 years after completion of the building work. This is consistent with the existing requirements in the Housing Indemnity Act.

Warranties will 'run with the building' so that subsequent purchasers of a property have the same rights against both builders and owner builders for breach of warranties as if they were a party to the building contract. For example, where an owner-builder renovated property is sold and 3 years later the purchaser discovers faults, then a claim may be made against the owner-builder to rectify those faults (provided it falls within the limitation of action period). Such disputes may also fall within the alternative dispute resolution framework set out in this paper.

Information for consumers

The provision of accurate and useful information to consumers will help them to make the right decisions when a problem arises. A consumer guide will be developed by CAFT, in consultation with Workplace Standards Tasmania and the Local Government Association of Tasmania. The guide will contain all relevant regulatory information, as well as details about the building process.

Builders will be required to provide consumers with a copy of the guide prior to any contract being signed and building works commencing.



Benefits of proposed framework

The framework proposed in this paper offers a range of benefits to consumers and builders.

Quick and Cost Effective

- The framework will ensure that litigation is avoided in 80 – 90% of disputes
- The framework will provide a low cost, non-adversarial option for consumers and builders
- Written complaint handling procedures will assist in ensuring disputes are handled quickly and efficiently
- Processes will be streamlined through regulation being contained in one Act

Equitable Process

- The framework will provide for the maintenance of proper standards in the carrying out of consumer building work in a way that is fair to both builders and consumers
- Standard form contracts will ensure consistency and balance between builder and consumer

Accessible

- Both builders and consumers will have access to the dispute resolution process
- Legal representation and court processes will be removed from the framework (in most circumstances) which will open the system up to a wider range of consumers and builders

Enforceable

- The framework will be legally binding and penalties will apply for non-compliance

Technical Competence

- Strong technical expertise will be a pre-requisite for appointment to the Building Disputes Officer position
- Training (including conciliation and building regulation) will be an ongoing priority
- Specialised technical expertise will be sought where required prior to making a determination

Attachment 1: Legislation in different jurisdictions

Jurisdiction	Current Legislation	Administration	Operation
NSW	<p><i>Home Building Act 1989 (HBA)</i></p> <p><i>Consumer Trader and Tenancy Tribunal Act 2001(CTTT)</i></p>	<p>NSW Office of Fair Trading</p> <p>Home Building Advisory Service</p>	<p>The HBA includes provisions on contracts, licensing, registration, insurance and dispute resolution.</p> <p>The CTTT resolves disputes that cannot be resolved through the <i>Home Building Act 1989</i> provisions.</p>
QLD	<p><i>Domestic Building Contracts Act 2000 (DBCA)</i></p> <p><i>Queensland Building Services Authority Act 1991 (BSAA)</i></p> <p><i>Commercial and Consumer Tribunal Act 2003 (CCT)</i></p>	<p>Queensland Building Services Authority (BSA)</p>	<p>Under the DBCA building work valued at more than \$3,300 must be written in a contract which complies with the DBC Act.</p> <p>The BSAA establishes a statutory authority (Building Services Authority) that regulates the building industry. BSA's charter includes, licensing, handling disputes and provides a statutory home warranty insurance scheme.</p> <p>The Commercial and Consumer Tribunal (CCT) deals with domestic and commercial building disputes as well as handling disciplinary matters relating to builders.</p>
VIC	<p><i>Domestic Building Contracts Act 1995 (DBCA)</i></p> <p><i>Building Act 1993 (BA)</i></p>	<p>Building Commission</p>	<p>The main purpose of the DBCA is to regulate contracts for the carrying out of domestic building work, to provide for the resolution of domestic building disputes and to require builders carrying out domestic building work to be covered by insurance.</p> <p>The BA provides for the regulation of building and building standards.</p>

Jurisdiction	Current Legislation	Administration	Operation
WA	<i>Builders' Registration Act 1939 (BRA)</i> <i>Home Building Contracts Act 1991 (HBCA)</i>	Builders' Registration Board Building Disputes Tribunal	The BRA establishes the Builders' Registration Board who oversees the qualification, registration and regulation of builders in Western Australia. The Board also provides administrative support to the Building Disputes Tribunal that determines workmanship and contractual complaints. The HBCA regulates contracts between builders and consumers for the performance of certain domestic building work. It also provides for home indemnity insurance.
NT	<i>Building Act 2005</i>	Department of Planning and Infrastructure Building Advisory Services Branch (BASB)	Regulation of building and building standards.
SA	<i>Building Work Contractors Act 1995 (BWCA)</i>	Office of Consumer and Business Affairs (OCBA)	OCBA regulates building work contractors under the BWCA. The Act includes provisions relating to licensing and contract regulation. OCBA also provides a dispute resolution service for consumers.
ACT	<i>Building Act 2004</i> <i>Construction Occupations Licensing Act 2004 (COLA)</i>	ACT Planning and Land Authority Construction Occupations Regulation Team (CORT)	The BA regulates building and building works. CORT regulates licensing for a range of occupations including builders. It includes complaints handling procedures and provisions relating to the issue of rectification orders where the registrar is satisfied there has been a breach of the Act.

Attachment 2: Jurisdictional analysis of regulatory frameworks

Dispute Resolution								
Key Elements of Framework	Comment	Pros and Cons	NSW	QLD	VIC	WA	SA	NT/ACT
Scope	This relates to the application of the Act i.e. who is included/ excluded from its jurisdiction	<p>Advantages</p> <ul style="list-style-type: none"> Upper threshold targets assistance to most vulnerable Lower threshold limits regulatory burden on industry Limiting application to licensed contractors provides incentive to comply <p>Disadvantages</p> <ul style="list-style-type: none"> Thresholds can increase regulatory burden on governments & provide industry with avenues for avoidance Most vulnerable may be excluded from system Tasmanian Position Wide approach to dispute resolution preferred as Tribunal not sustainable and court is only other option 	Home Building Act 1989 ADR provisions apply to building claims up to \$500,000 and involving licensed contractors	Complaints above \$1,100 and involving licensed contractors (some exceptions apply)	Domestic Building Contracts Act 1995 applies to domestic building work. No monetary limit applies to dispute resolution.	No jurisdictional limits (but complaints under \$7,500 may be referred to Dept Consumer and Employment Protection)	There is no specific dispute resolution regulation in SA.	<p>There is no specific dispute resolution regulation in NT.</p> <p>ACT has no ADR process but ACT Planning and Land Authority has power to make RO's under COLA (scope limited to "building work" under Building Act 2004)</p>
Compulsory System	All disputes referred to ADR and "contracting out" of process is prohibited	<p>Advantages</p> <ul style="list-style-type: none"> Forces parties to discuss problem in non threatening environment Creates level playing field and reduces litigation & pressure on court system <p>Disadvantages</p> <ul style="list-style-type: none"> ADR may be inappropriate for certain disputes <p>Tasmanian Position</p>	Yes (unless Tribunal directs otherwise)	No (but cannot access statutory insurance unless BSA involved)	No (parties can go directly to VCAT)	No		ACT Yes (rectification orders only)

		<ul style="list-style-type: none"> Implementation of compulsory system with discretion for Director of CAFT to refer matter to courts 						
Access	Who can lodge a complaint? Certain jurisdictions prohibit builders from lodging a complaint.	<p>Advantages</p> <ul style="list-style-type: none"> Recognises that a builder may have a legitimate complaint against a consumer Creates level playing field <p>Disadvantages</p> <ul style="list-style-type: none"> Conflict of interest may arise if both parties lodge complaint Rogue “owner builders” can lodge complaint against subcontractors <p>Tasmanian Position</p> <ul style="list-style-type: none"> Level playing field approach is equitable for all parties. Legitimate owner builders are consumers and should be given access. System will filter out “rogue” owner builders. 	Consumers and Owner Builders	Consumers, Owner Builders and Builders	Consumers, Owner Builders and Builders (in most circumstances)	Consumers. Builders (including owner builders) can only lodge complaint for contractual issues.		N/A
ADR Model	Alternative dispute resolution processes for building disputes have been implemented to varying degrees across Australia	<p>Advantages</p> <ul style="list-style-type: none"> Rapid adjudication Relatively quick and low cost Independent adjudicator approach encourages mediation but also allows for enforcement if necessary Cost effective to implement on small scale <p>Disadvantages</p> <ul style="list-style-type: none"> Outcomes can be a compromise rather than legally based (but this can also be an advantage) 	Yes <ul style="list-style-type: none"> Independent Adjudicator approach (Intervention by Fair Trading Centre followed by Home Building Service)	Yes Independent Adjudicator (Intervention by BSA)	Limited Building Commission conducts inspection reports but no enforcement mechanism. Building Advice and Conciliation Victoria (BACV) provides a conciliation service.	Yes Independent Adjudicator (Inspector prepares report and parties are given 9 days to object)	No The Office of Consumer and Business Affairs handles building consumer complaints.	ACT – no ADR Process

		<ul style="list-style-type: none"> In some jurisdictions enforcement is weak and easy to appeal <p>Tasmanian Position</p> <ul style="list-style-type: none"> Independent adjudicator approach with strong enforcement mechanism is favoured approach as it encourages mediation but can result in binding decision with significant penalty. 						
Rectification Orders (RO)	An order for works to be rectified or monies paid	<p>Advantages</p> <ul style="list-style-type: none"> Results in a binding decision <p>Disadvantages</p> <ul style="list-style-type: none"> May result in an aggrieved party High level technical skill required across building industry to ensure correct decisions Issuing and enforcement may create significant regulatory burden <p>Tasmanian Position</p> <ul style="list-style-type: none"> RO's must be legally binding and correct Professional reports will be called upon if necessary to ensure accurate decisions 	Yes	Yes	No (recommendations only) However report may be used as evidence in VCAT and/or possible disciplinary action.	Yes (Registrar of Builder's Registration Board makes order – parties may be invited to a hearing before order made)	No	Yes (ACT)
Penalties	Punitive measures e.g. financial, disciplinary, offence may be imposed upon a party for non-compliance with requirements set out in legislation	<p>Advantages</p> <ul style="list-style-type: none"> Strong enforcement mechanism if significant penalty <p>Disadvantages</p> <ul style="list-style-type: none"> Regulatory burden can be significant Court sanctions for non-compliance can be significantly less than 	Builder non-compliance with RO may be referred for disciplinary action	Failure to comply with RO is an offence (max 80 penalty units)	Discretion to refer builder for disciplinary action	Failure to comply with an order is an offence (max \$10,000 penalty)		ACT Failure to comply with an order is an offence (max \$20,000 penalty). May also issue infringement notice up to \$1250

		penalty Tasmanian Position <ul style="list-style-type: none"> Significant penalty and offence will apply (including daily penalties) for non-compliance with RO- 						
Fees	A fee may apply for lodging a complaint, building inspection etc	Advantages <ul style="list-style-type: none"> Encourages user pays Removes minor and frivolous claims from system Reduces financial burden on tax payer Disadvantages <ul style="list-style-type: none"> Impost on consumers – may limit access Tasmanian Position <ul style="list-style-type: none"> Reasonable cost to apply for inspections only (\$80 - \$150) 	No cost for report Scale of fees apply for CTTT matters (max \$172 for claims over \$25,000)	No cost for report	Yes (\$300 for building inspection report) Fees also apply for VCAT (filing fee plus legal costs).	\$30 for lodging complaint		No cost to consumer (ACT)
Trust Account	An account where monies are held in trust pending an outcome in the matter	Advantages <ul style="list-style-type: none"> Ensures payment distributed in accordance with orders Disadvantages <ul style="list-style-type: none"> Can create regulatory burden if a party is non-compliant May disadvantage a party in poor financial circumstances from having matter heard Tasmanian Position <ul style="list-style-type: none"> Outstanding monies may be ordered to be paid into trust account but at Directors discretion CAFT may seek order for payment for non-compliance 	No	No	No	Yes (Where payment is in issue BDT may order monies be paid into a trust fund)		No (ACT)

Contractual Disputes	Disputes which occur over the provisions in a building contract	<p>Advantages</p> <ul style="list-style-type: none"> Contractual issues are referred to a tribunal or court who have legal expertise and can properly determine the dispute <p>Disadvantages</p> <ul style="list-style-type: none"> May involve legal representation which can be cost prohibitive <p>Tasmanian Position</p> <ul style="list-style-type: none"> Framework will attempt to resolve some contractual matters but discretion for Director to refer complex matters to court system 	Referred to CTTT if not related to workmanship.	Disputes over contractual terms and non payment are referred to legal advice	Referred to VCAT if non-quality issues	Contractual complaints (between \$7500 and \$100,000) are referred to BDT		Contractual issues referred to ACT Fair Trading
Limitation of Actions	Claims are only actionable if lodged within the time period specified in law.	<p>Advantages</p> <p>Limits liability to an identifiable time period</p> <p>Disadvantages</p> <ul style="list-style-type: none"> No single national approach Latent defects may not surface until after time period expires <p>Tasmanian Position</p> <ul style="list-style-type: none"> Time period should be consistent with existing legislation – 6 year time period. 	7 years for breaches of statutory warranty 3 years for all other matters (excluding home warranty insurance claims)	6 months for “category 2” defects 6 years 3 months for “category 1” defects	VCAT only 10 years	6 years from the time when the building work was completed 3 years for contractual complaints		10 years (ACT)
Appeals	Where a party believes that an order or decision was wrong they may appeal to a court or tribunal for formal hearing	<p>Advantages</p> <ul style="list-style-type: none"> Escalating system allows parties full opportunity to have matter heard Tribunals can be specialised and low cost (in most cases) <p>Disadvantages</p> <ul style="list-style-type: none"> Significant regulatory burden Appeals can prolong disputes unnecessarily e.g. 	Yes Consumer Trader and Tenancy Tribunal (CTTT)	No Consumer is compensated directly from BSA insurance fund if non-compliance with RO. BSA may commence disciplinary action in the CCT or Magistrates court	Yes Victorian Civil and Administrative Tribunal (VCAT)	Yes Building Disputes Tribunal (BDT)		Yes Administrative Appeals Tribunal (ACT)

		<p>one party may use this mechanism to “buy time” in payment or rectification</p> <p>Tasmanian Position</p> <ul style="list-style-type: none"> • Tribunal unlikely to be viable in Tasmania • Appeals only permissible for natural justice or procedural fairness reasons 						
--	--	--	--	--	--	--	--	--

Contract Regulation

Cooling Off Period		Advantages	Yes	Yes	Yes	No	Yes	No legislation in ACT or NT
Scope	This relates to the application of the Act i.e. who is included/ excluded from its jurisdiction	<p>Advantages</p> <ul style="list-style-type: none"> • Lower threshold limits regulatory burden on industry • No threshold prevents deliberate avoidance strategies by industry <p>Disadvantages</p> <ul style="list-style-type: none"> • Thresholds can increase regulatory burden on governments & provide industry with avenues for avoidance • Most vulnerable may be excluded from system • No single national approach <p>Tasmanian Position</p> <ul style="list-style-type: none"> • Wider application favoured as ensures whole market captured and limits regulatory burden on small economy • Will reserve power to impose threshold should industry burden prove too significant 	Contracts required for all consumer building work over \$1000	Contracts required for all domestic building work over \$3,300	Contracts required for all domestic building work over \$5000	Act applies to works between \$6000 and \$200,000.	Contracts required for all domestic building work over \$12,000.	
Mandatory	A set of	Advantages	Yes	Yes	Yes	Yes	Yes	

Requirements	compulsory requirements set out in legislation and regulations that ensure minimum standards in building contracts are met	<ul style="list-style-type: none"> Relatively consistent national approach Compulsory plain English consumer guide improves information symmetry Preventative strategy that decreases disputes Disadvantages Increases regulatory burden on government and industry <p>Tasmanian Position</p> <ul style="list-style-type: none"> Will adopt similar approach to other jurisdictions including developing consumer guide Specific industry provisions will be set out in regulations 	Written contract that complies with <i>Home Building Act 1989</i> requirements Consumer building guide must also be provided (some exceptions apply)	Written contract that complies with <i>Domestic Building Contracts Act 2000</i> . Contract information statement must also be provided within 5 days of date of agreement.	Written contract that complies with <i>Domestic Building Contracts Act 1995</i> . Contract must contain a checklist in prescribed form. Builder must give copy of contract within 5 days after entering contract.	Act states that there must be a contract in writing. Builder must provide "Notice to the Home Owner" before signing a contract.	Written contract that complies with the <i>Building Work Contractors Act 1995</i> . Notice in "prescribed form" must also be provided.	
Statutory Warranties	Statutory warranties require contractor to provide a product as agreed in a suitable state, fit for its intended purpose for a set time period.	<p>Advantages</p> <ul style="list-style-type: none"> Relatively consistent national approach Establishes clearly defined time period for liability <p>Disadvantages</p> <ul style="list-style-type: none"> Time period is rigid and may not be appropriate for all defects <p>Tasmanian Position</p> <ul style="list-style-type: none"> Refer to provisions in <i>Housing Indemnity Act</i> Warranties not extinguished on sale of property and will run with the land. 	Yes	Yes	Yes	No	Yes	
Maximum Deposits		<p>Advantages</p> <ul style="list-style-type: none"> Relatively consistent national approach Effective consumer protection mechanism <p>Disadvantages</p> <ul style="list-style-type: none"> Limits funds that builders receive up-front 	Yes 10% for work costing \$20,000 or less or 5% for work costing more than \$20,000.	Yes 10% for work costing \$20,000 or less or 5% for work costing more than \$20,000.	Yes 10% for work costing \$20,000 or less or 5% for work costing more than \$20,000.	Yes The builder cannot demand a deposit in excess of 6.5% of the total cost of the building work (penalty \$10,000).	Limited Builder can request payment in advance for money for third party (e.g. council fees) but cannot take a deposit of	

		Tasmanian Position <ul style="list-style-type: none"> Refer to existing provisions in <i>Housing Indemnity Act</i> 					more than \$1000.	
Cost Plus Contracts	Consumer pays for works on the basis of the actual cost to the builder plus an agreed fee (usually a percentage of that sum)	Advantages <ul style="list-style-type: none"> Prohibition on “cost plus” limits financial risk to consumer All jurisdictions permit “cost plus” for renovations (provided strict criteria met) Disadvantages <ul style="list-style-type: none"> Restricts builders ability to charge for actual cost incurred Tasmanian Position <ul style="list-style-type: none"> Cost plus only permissible where the cost of a substantial part of the work cannot reasonably be calculated without some of the works first being carried out (e.g. renovation) and strict criteria complied with in relation to the contract. 	Not specified	Prohibited under Act unless certain strict criteria are satisfied.	Prohibited under Act unless certain criteria are satisfied.	Contract must be headed “cost plus” contract and contain statement (signed by both parties) that Act does not apply.	Permitted provided margin does not exceed 15%	
Provisional sums	This is an amount included in the contract to cover works proposed as part of the contract but for which there is insufficient detail at the time of entering contract to specify actual amount.	Advantages <ul style="list-style-type: none"> Provisions requires builder to provide reasonable estimates including specifying profit margins Some jurisdictions apply penalties where costs are underestimated Disadvantages <ul style="list-style-type: none"> Additional regulatory burden on government (ensuring compliance) and industry Tasmanian Position <ul style="list-style-type: none"> Provisions relating to PS will be included in Act. Penalties will apply if cost understated in contract 	Actual cost plus margin. Margin “should not” exceed 20%	Margin must be specified. Contractor must not state an amount that is less than reasonable cost of the contracted service to which the sum relates.	Must be set out in writing. Builder to warrant that provisional sums are calculated with reasonable skill and care. Penalties may apply.	Builder must estimate cost at or above the lowest amount that that they could reasonably cost and the cost must not be understated. Penalties may apply.	Must be fair and reasonable estimates in the circumstances in which they are provided	

Prime Cost Items	This is the amount included in the contract to cover a specified item such as a fixture or fitting.	Refer to provisional sum comments above	Actual cost plus margin. Margin "should not" exceed 20%	Margin must be specified. Contractor must not state an amount that is less than reasonable cost of supplying and delivering item.	Must be set out in writing. Builder to warrant that provisional sums are calculated with reasonable skill and care. Penalties may apply.	Builder must estimate cost at or above the lowest amount that they could reasonably cost and the cost must not be understated. Penalties may apply.	Actual cost plus margin. Margin can be up to 15% of cost of the item.	
Variations	A variation is a change or adjustment to what has already been agreed in the contract.	<p>Advantages</p> <ul style="list-style-type: none"> Relatively consistent national approach Consumers aware of cost prior to works being carried out. <p>Disadvantages</p> <ul style="list-style-type: none"> Additional regulatory burden on government (ensuring compliance) and industry <p>Tasmanian Position</p> <ul style="list-style-type: none"> Provisions relating to variations (similar to other jurisdictions) will be include in the Act Penalties may apply for non-compliance. 	Variations must be in writing and attached to the contract and signed by both parties.	Variations must be in writing (prescribed format and timing applies). Consumer only liable to pay if additional work not reasonably foreseen.	Different provisions for builder and consumer. Builder must provide notice and get signed consent to variation.	Variations must be in writing and signed by both parties. The consumer must be given a copy prior to work commencing.	No requirements under Act.	
Disputes	There are various methods for handling contractual disputes. Some jurisdictions specify how they can/ cannot be dealt with.	<p>Advantages</p> <ul style="list-style-type: none"> Arbitration can be costly and time consuming. Jurisdictions with Tribunals can avoid the inefficiencies of this process <p>Disadvantages</p> <ul style="list-style-type: none"> Market mechanisms are restricted. <p>Tasmanian Position</p> <ul style="list-style-type: none"> "Contracting out" of framework will be prohibited Complex contractual disputes may be referred directly to Magistrates Court 	Arbitration clauses are void. Consumer to contact Fair Trading if it cannot be resolved.	Arbitration clauses are void. Building Services Authority assist in handling disputes.	Arbitration clauses are void.	Court or Disputes Tribunal may order the matter be transferred to the other jurisdiction.	No requirements under the Act.	

Attachment 3: Relevant Tasmanian Legislation

Statute	Purpose	Administration	Relevant Provisions
Building Act 2000	This Act introduced a system for mandatory accreditation and insurance for building practitioners. The Act is focused on improving standards and regulation within the industry.	Department of Justice Workplace Standards Tasmania (Building Standards and Regulation)	Key legislation in relation to this project. Building Dispute Officers will need to be conversant in provisions of entire Act. Provisions that may have impact on development of legislative model are as follows: Interpretation Provisions (section 3) Division 2 – Building Regulation Advisory Committee (BRAC) Part 3 – Duties of persons Division 2 – Accreditation (section 23 – Offences relating to accreditation) Division 4 – Complaints Division 5 – section 35 & 36 – investigations Section 46 – Appeals to court Part 6,7& 8 – Compliance with Building and Plumbing standards Section 229 – Supreme Court opinion Part 14 (Division 1 – 4 Offences, infringement notices, liability and Authorised persons)
Housing Indemnity Act 1992	The Act established an indemnity scheme to provide security for consumers in the event of a builder not being able to complete building work or to rectify defects following completion. Claims are limited to circumstances where the builder has died, disappeared, or become insolvent	Department of Justice Consumer Affairs and Fair Trading	Key legislation in relation to this project. Building Dispute Officers will need to be conversant in provisions of entire Act. Interpretation Provisions (section 3) Section 5 – Exclusion of certain building works Part 2 – Statutory warranties Part 3 – Housing Indemnity Part 4 – Payments under Contracts
Electrical Industry Safety and Administration Act 1997		Department of Justice	Section 4 – Defective electrical work Division 6 – Investigation and rectification of electrical work Division 7 – Disciplinary proceedings Section 63 – Power of entry and inspection Section 64 – Power to order rectification Section 70 – Power of authorised officer in emergency Sections 97 - 101
Local Government (Building and Miscellaneous Provisions) Act 1993		Department of Justice	General
Occupational Licensing Act 2005		Department of Justice	

Plumbers and Gasfitters Act 1951		Department of Justice	
Commercial Arbitration Act 1986	The Act provides parties with an alternative process to the court system whereby a third party (arbitrator) is mutually appointed by the parties. The Act applies to parties who agree to be bound by its jurisdiction e.g. by contract.	Department of Justice	It was once common for building contracts to include a requirement that consumers agree to use this Act to resolve disputes. This is no longer common practice. One of the matters to be considered is whether the proposed new legislation will prohibit such arrangements.
Architects Act 1929	The Act regulates the professional standards of the profession.	Department of Justice	Section 16 – Disciplinary powers of the Board Section 19 – Prohibited practices

Attachment 4: Summary of stakeholder discussions

Stakeholder Consultation

Comments made in submissions received during the 2005 review of the *Housing Indemnity Act* and recent discussions with representatives from a range of peak organisations have been considered in the development of the proposed framework.

Detailed below is a summary of the main issues raised by stakeholders in relation to consumer building regulation:

- The large majority of stakeholders indicated a definite need for a rigorous alternative dispute resolution framework for consumer building disputes
- A framework that avoids court jurisdictions and legal representation was seen as highly advantageous by many stakeholders.
- Generally it was agreed that the system should be compulsory as once a dispute has commenced it is difficult to get the parties to cooperate or agree to progress the issue in a particular manner.
- A number of respondents suggested a two stage system beginning with alternative dispute resolution (ADR) which if unsuccessful was followed by second stage, a binding ruling.
- Some stakeholders favoured the establishment of an appeals mechanism such as tribunal or expert panel, while others queried whether such a system could be viable and whether it was necessary given the volume of work it would have.
- Many respondents felt that the system needed to allow either party to lodge a dispute, not just the consumer, as circumstances arise where a builder can have a legitimate claim against a consumer that requires resolution.
- Several respondents noted that a Building Dispute Officer would need to have knowledge of the building industry as well as mediation and conciliation skills. Transparency and timeliness of Building Dispute Officer responses were seen as key factors in the development of an effective system.
- Information for consumers and improved contractual documentation was viewed by many as a key reform. A number of suggestions were made as to how this could occur including:
 - Development of a “one stop shop” for all building industry regulation (for example licensing, insurance, dispute resolution)
 - provision of information on the CAFT website
 - legislative requirement for pre contractual information statement to be provided to consumers
 - Introduction of mandatory standard form contracts and
 - development of a detailed consumer guide.