

Risk and liability

Homeowners face significant risks when building. Their home may not be finished if their builder goes out of business. There might be a problem with the building work or the products used.

We want your feedback on a range of proposals for building products and methods and occupational regulation so things go right the first time. But building work doesn't always go right. We also want feedback on some proposals aimed at fairer outcomes when things do go wrong.

Eighty-five per cent of owners of new homes have to call their builder back to fix problems.

MBIE wants your feedback on two proposals

1

Require guarantee and insurance products for residential new builds and significant alternations, and allow homeowners to actively opt out.

2

Leave the liability settings for building consent authorities (BCAs) unchanged.

1. Require guarantee and insurance products

Many homeowners are not fully aware of the risks with building. Case study research suggests that there is low awareness of the risks of building work and the availability and benefits of guarantee and insurance products.

A guarantee and insurance product would arrange for problems to be fixed or for compensation.



Around 40 per cent of homeowners take out a guarantee and insurance product to protect themselves if something goes wrong.





How it would work

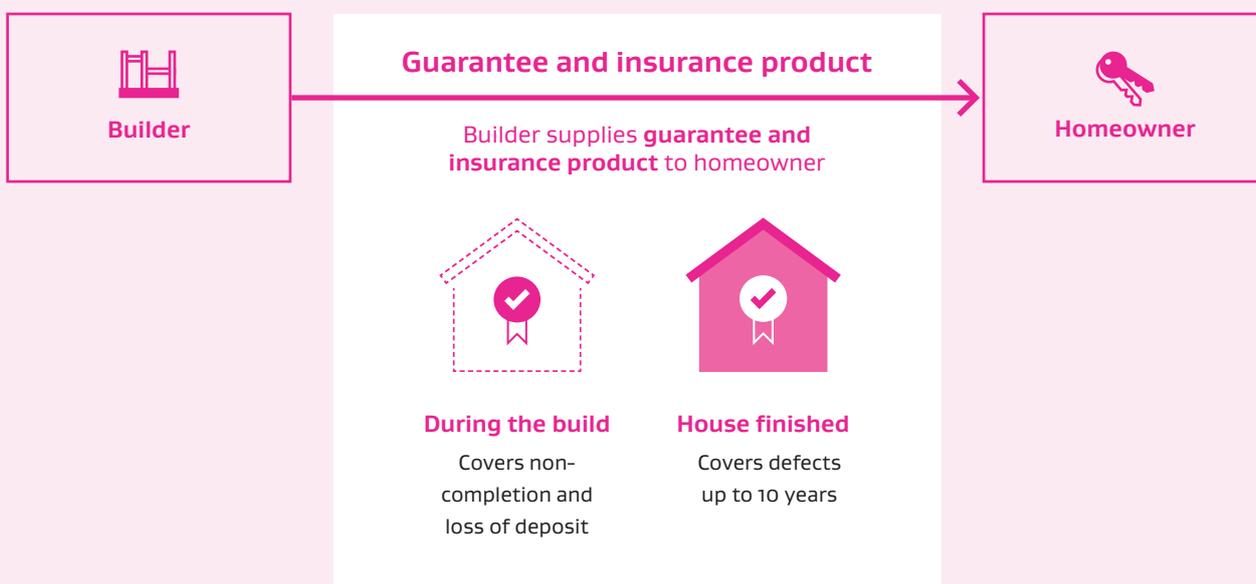
A builder would be required to offer a homeowner a guarantee and insurance product before starting work on a new home or significant alteration. The homeowner could actively opt out of having a guarantee and insurance product.

Homeowners would either pay the premium directly through their builder or the builder would incorporate the premium into the overall cost of the build.

The homeowner would be the 'policy holder' of the guarantee and insurance product allowing them to make a claim directly with the guarantee and insurance provider. Homeowners would still be able to take a claim for negligence through the courts whether or not they have a guarantee and insurance product.

If the house was sold, the guarantee and insurance product would transfer to the new owners. Information about the guarantee and insurance product would be recorded on the LIM so potential new owners would know if their home is covered.

MBIE proposes that the guarantee and insurance product would be in place for 10 years once the building work is completed, to align with the implied warranties in the Building Act.



This proposal would protect homeowners. It would further incentivise builders to do quality work so they are able to offer a guarantee and insurance product to their clients. Some builders may not be eligible to offer a guarantee and insurance product. Guarantee and insurance providers would determine who can do residential building work. This is balanced by greater certainty for homeowners.

The success of this proposal is dependent on being able to grow the insurance market to meet increased demand.



Tell us what you think

What do you think the impacts of this proposal would be?

How should this proposal work? – what types of buildings should it apply to, when should it be required, and what types of cover do homeowners need?

2. Leave the liability settings for BCAs unchanged



When things go wrong in the building process, liability settings affect who pays and how disputes are resolved.

New Zealand has joint and several liability. This means that if two or more people have contributed to a defect in a building, each of these people can be held liable for the full costs of that defect.

Between 2008 and 2018, the total value of consents issued by BCAs was approximately \$75 billion. Over the same period, BCAs paid out an estimated \$1 billion to settle building disputes – around a third of this covered the contributions other people should have paid. We've heard concerns that joint and several liability leads to risk averse consenting.

Between 2008 and 2018, around 2.5 per cent of residential building consents resulted in disputes settled in the courts or another way.

MBIE is seeking feedback on whether changes are needed to address concerns that BCAs may face a disproportionate share of damages when other parties are absent.

MBIE considered the option of a 20 per cent cap on BCA liability. Where BCAs have contributed to a building defect they would not have to pay more than 20 per cent of the total damages.

A cap would provide certainty and have a range of advantages and disadvantages as set out below.

Advantages	Disadvantages
<ul style="list-style-type: none">✓ BCA liability would be better aligned with their intended role in the building process.	<ul style="list-style-type: none">✗ A BCA's actions may cause more than 20 per cent of the damages – others would have to pick up some of the BCA's contribution.
<ul style="list-style-type: none">✓ May increase incentives on designers and builders to put in place more risk assurance and management tools (eg quality assurance, professional indemnity insurance).	<ul style="list-style-type: none">✗ Designers and builders may become more risk averse if they have to pick up a greater share of the costs. This may have negative impacts on the building process.
<ul style="list-style-type: none">✓ BCAs may have greater confidence to be less risk averse when consenting leading to faster and more efficient consenting processes.	<ul style="list-style-type: none">✗ There may be no change in consenting behaviour if other factors (eg occupational regulation, products) are more influential on BCAs' practices.
	<ul style="list-style-type: none">✗ Building owners may face greater losses if they don't have other protections in place. A guarantee and insurance product may help to mitigate this risk for homeowners, but a cap might have a chilling effect on the insurance market.
	<ul style="list-style-type: none">✗ There may be increased use of contracts to shift risks on to other parties who cannot manage the risks. This may increase the risk of insolvencies in the building sector.

It may be unnecessary to cap BCAs' liability because the other proposals in the reform package will make people more accountable for their work and products, thereby reducing BCAs' potential liability. MBIE has received feedback that the other changes matter more for how BCAs approach consenting.

Based on our initial assessment, MBIE proposes not to change the liability settings for BCAs, but this is a finely balanced assessment. It depends on whether greater weight is given to the impact on BCAs, homeowners or the wider building sector. A cap on liability would only support BCAs, it wouldn't support others in the system. Our assessment relies on the other proposals in the package being successful to make sure risks in the building process are well managed. We are seeking your feedback on whether our assessment is correct and what other factors we should take into account when we provide advice to the government.

Tell us what you think



If the government decides to make all the other changes in this discussion paper, do you agree that the liability settings for BCAs will not need to be changed? What area of work do you think will have the biggest impact on BCA consenting behaviour?

What do you think would be the impacts of placing a cap on BCA liability?



**Submissions close
on 16 June 2019**



Have your say

Find out more about the risk and liability proposals and have your say at:

www.MBIE.govt.nz/building-reform