

2 October 2026

Mr James Sherrard
NSW Building Commissioner
Building Commission NSW
PO Box 226
PARRAMATTA NSW 2124

Sent to: bcnsw_comms@customerservice.nsw.gov.au

Dear Commissioner Sherrard

Dispute Resolution Scheme: Discussion Paper

I write in response to the discussion paper that was circulated on a targeted consultation basis by the NSW Building Commission exploring issues that might need to be addressed as part of a new dispute resolution system.

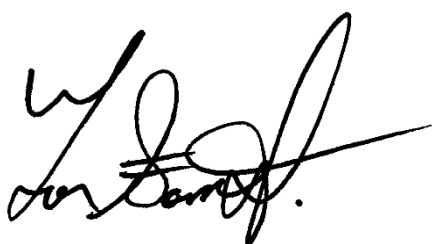
Urban Taskforce Australia strongly supports the introduction of dispute resolution practices to deal with building defects and is willing to contribute to the current consultation. We welcome the Parliament's decision to have the regulatory framework developed prior to the end of this year and the work undertaken by the Building Commission to facilitate this.

We have consulted a select group of our members to seek feedback on the proposals and provide a summary of their responses in the attachment.

We look forward to further collaboration with the Building Commission on the structure of the proposed pilot program, the conditions managing dispute resolution processes, and the role that will be played by Building Commission employees.

Should you wish to discuss any aspect of this submission further, please contact Paul Waterhouse, Head of Policy, on 0411-875-366 or via email paul@urbantaskforce.com.au

Yours sincerely



Tom Forrest
Chief Executive Officer

Attachments:

- *Responses to Discussion Paper Questions*
- *Possible elements of a dispute resolution scheme*

Responses to Discussion Paper Questions

1. Building Commission NSW role

What role do you envisage BCNSW will play in helping to resolve disputes between owner corporations and builders/developers? Are there particular functions, for example mediation, conciliation or arbitration, you think BCNSW should perform as part of dispute resolution? The table below provides a framework to support your response.

Feature	Mediation	Conciliation	Arbitration
Role of Third Party	Facilitates communication and helps parties find their own solution.	Facilitates discussion and actively suggests or proposes solutions.	Acts like a private judge, hears evidence, and decides the outcome.
Decision Maker	The parties themselves.	The parties themselves (with advice).	The neutral arbitrator.
Binding Nature	Non-binding unless a formal settlement is signed.	Non-binding unless a formal agreement is reached and signed.	Generally binding and legally enforceable.
Formality	Low formality, highly flexible.	Low to moderate formality.	High formality.

We acknowledge the descriptions outlined in the table above.

The Building Commission should provide mediation, conciliation, and arbitration services.

Undergoing at least one of these process must be mandatory, and there needs to be a clear obligation on the court to consider any recommendations made through mediation or conciliation. Arbitrated matters should be binding unless there is an appeal on a matter of law.

The Building Commission should be responsible for determining the most appropriate pathway on a case by case basis, after considering the history of the dispute, the value of the rectifications sought, the results of efforts made to resolve the dispute, and the likelihood of success through the selected pathway.

Once a pathway is determined, the Building Commission (or its delegate) will take on the role of the third party, as defined in the table.

If a decision is made by the parties, or if the Building Commission makes a ruling, and the case is subsequently escalated to a court or the Tribunal, the details of that decision/ruling should be taken into account in the latter's deliberations. Matters that are arbitrated should be binding, as is the case in industrial relations law.

The processes undertaken through the Queensland Building and Construction Commission (QBCC) and its arbitration process are an important working model for that pathway.

2. Definition of a 'dispute'

How would you define a dispute that should be accepted into the scheme? Are there any criteria we should consider for acceptance of the dispute into the pilot scheme, for example:

- *acceptable timeframes with reference to statutory warranty periods,*
- *applicability of other schemes such as the Strata Building Bond and Inspections Scheme (SBBIS);*
- *the type of defects covered (e.g. only major or serious defects);*
- *whether litigation has already commenced;*
- *and any others?*

A dispute should relate to a genuine building defect that affects a Class 2 building.

All disputes relating to building quality or defects must be accepted into the scheme, provided that they fall within certain conditions.

- **timeframes**

For minor defects, a report must be made within 12 months of the final OC, for major defects, within 10 years of the final OC, but within 12 months of the first report or knowledge of that defect (to facilitate early rectification).

An owner or any developer/builder must take at least six months after the identification of the defect to try to resolve the issues in good faith before approaching the Building Commission.

- **other schemes**

The scheme should not overlap with any other schemes, such as the SBBIS.

- **the type of defects covered**

Any defects that can't be resolved through negotiation between the owner and the developer should be eligible for consideration.

Subcontractors should be responsible for claims under the dispute resolution scheme where they may be liable.

- **whether litigation has already commenced**

Pre-existing litigation should not preclude mediation, conciliation, or arbitration, if one or other party wants to involve the Building Commission.

However, any existing court matter should be put on hold until the dispute resolution process has run its course.

- **other**

During the investigation stage, where defects are being inspected by either party, or when rectification works are being carried out there should be a 3-strike rule implemented.

If a builder or developer cannot access part of the building to investigate or rectify a defect, they should not continue to be held liable for any defect in that space.

3. Roles and responsibilities

What do you envisage the role of BCNSW, the owners' corporation, the developer and builder to be in the following steps? Should an independent, external party be involved in any of the steps? If so, what qualifications or experience should this person have?

	BCNSW	Owners Corporation	Builder	Developer	Independent party (optional)
Lodging a dispute		Yes	Yes	Yes	
Providing evidence		Yes	Yes	Yes	Expert
Identifying defects		Yes			OC Expert
Agreeing on the defects	Yes	Yes	Yes	Yes	
Resolving a failure to agree on defects	Yes				
Agreeing on a plan to rectify defects	Yes		Yes	Yes	If not agreed, expert
Overseeing the execution of a plan to rectify defects	Yes				Experts, if needed
Providing assurance and sign-off of rectification works	Yes		Yes	Yes	Experts, if needed

Lodging a dispute

Either party should be able to seek the intervention of the Building Commission, but any claims must be detailed, and participants must be authorised representatives. No new claims can be added to a submitted complaint.

Evidence gathering

A claim should fully identify all alleged defects, and the builder or developer should have up to six weeks to respond in writing.

A site meeting should then be organised within 12 weeks of that response to inspect the identified issues, after which a joint report prepared by both parties' experts should be prepared to deal the scope of required rectification works.

Confidentiality should be protected until such as time as the dispute resolution process has run its course, with nothing being recorded on strata records until a defect has been confirmed.

Site inspections and access

As noted earlier, reasonable access must be provided to the premises to investigate and respond to a claim.

If a builder or developer cannot access part of the building to investigate after repeated attempts, the first recourse is through the Building Commission. If unsuccessful in obtaining access for inspection, the developer/builder should not continue to be held liable for any defect in that space.

Rectification

The Building Commission will have the final say over whether something is a genuine construction defect or caused by other factors.

Any agreement, regardless of the pathway chosen, should identify the defects being addressed and the rectification works required to resolve them, informed by a rectification methodology provided by the builder.

A Building Work Rectification Order may be issued, if required, but damages should not be awarded unless a party is refusing to participate or engage, because the Home Building Act requires builders to rectify their own defects.

Up to 9 months should be allowed for rectification works, and consumers must provide access for the works to be carried out.

Completion of matters

A Building Commission inspector should review the works, once finished, and issue a certificate confirming completion.

The consumer should then provide legal confirmation that releases the respondent from any further claims relating to the complaint, as occurs with developer undertakings.

Appeals

Appeals by either party against a decision can be made within 28 days to the Land and Environment Court.

The right of appeal should not be confined to procedural fairness or jurisdictional issues but should include appeals against substantive findings where disagreement persists about whether something is a defect or the scope of works extends beyond what is necessary.

4. Mediation or independent support role

Is there a role for an independent third party to work with the parties to facilitate an outcome and ensure the objective of rectifying defects is achieved throughout the process? At what points in the above process would dispute resolution, such as mediation, be most helpful? What do you see as the purpose of the mediation?

Independent third-party facilitation should only be carried out by the Building Commission (or authorised parties representing the Building Commission, not by external parties. That means that the Building Commission can coopt expertise to assist with that work in the form of specialist inspectors, mediators, conciliators or arbitrators.

Dispute resolution should occur when one of the parties involved seeks the Commission's support to close out a disagreement and the rectification of any relevant defects.

5. Experts

What do you see as the role of external experts or consultants in the above process?

Is there a role for them to play, for example in developing reports, providing evidence, or providing oversight/assurance?

If needed, we agree that external consultants could be used to provide support in reporting, evidence collection, oversight, and assurance.

However, the veracity of expert reports needs to be assessed, and consultants should be held responsible for any incorrect, erroneous, or unreasonable claims of defects.

Ideally, the Building Commission should build up its own resources to be able to carry out the mediation, conciliation, and arbitration roles itself, rather than outsourcing those functions. The Building Commission, where possible, should rely upon reports prepared by experts representing each party.

6. Regulatory intervention

When would regulatory intervention by BCNSW be most helpful and effective? What existing legislative tools do you see being used and what, if any, additional powers does BCNSW need? BCNSW's existing regulatory tools include:

- *Building Work Rectification Orders*
- *Rectification Orders*
- *Stop Work Orders*
- *Written Direction Notices*
- *Developer Undertaking.*

The Building Commission's current powers are sufficient to support its normal activities in relation to mediation, conciliation, and arbitration. BRWOs are a particularly effective tool to ensure compliance.

Any intervention must be before the expiry of applicable statutory warranty periods, with claims being submitted 12 months before that date. Such early intervention would reduce the need for proceedings by addressing issues more expeditiously.

The Commission's powers should allow for making binding decisions that cannot be challenged, or to oversee binding agreements between parties. The only pathway to overturning a decision should be an appeal to the Land and Environment Court.

7. Exclusion from the pilot

Do you envisage any scenarios where a matter should proceed directly to the court or tribunal without first going through the dispute resolution pilot process?

Should there be any scenario where an applicant can exclude itself from BCNSW's dispute resolution scheme?

In our view, dispute resolution must be mandatory. There should be no option available to applicants or respondents to bypass the dispute resolution pilot process. Any dispute arising about building defects must be run through the pilot scheme before any further legal action can be taken.

It should also be possible to divert disputes that are already the subject of legal proceedings into the dispute resolution processes, including major defects occurring within two years of the end of the statutory warranty period.

As noted earlier, buildings that are the subject of SBBIS should be excluded.

8. Cost recovery and penalties

Would you support the charging of:

1. *Fees to cover the cost of a dispute resolution service? If so, should these fees be levied equally between building owners and developers?*
2. *Fees to recover the cost of any external services that need to be engaged (for example, an independent mediator)? and/or*
3. *Penalties for non-participation or engagement in the dispute resolution process?*

Urban Taskforce accepts that fees may need to be charged to cover the cost of the Building Commission's dispute resolution activities and any external support it needs. A user-pays system will ensure that all participants are committed to ensuring the success of the negotiations.

There should be an upper cap applied to costs and costs should be shared equitably.

We also support the issue of penalties for non-participants or non-engagement.

If dispute resolution is to have any success, the Building Commission must be able not only to fine aggrieved parties who are only going through the motions so that they can then escalate the case to a Tribunal, but to dismiss the case in favour of the other party. Legitimate limitation, jurisdictional, or other threshold issues that may dispose of the claim should, however, be exceptions.

9. Support is critical

To ensure the success of the dispute resolution pilot, support from owners' corporations, builders and developers is critical. What can BCNSW do to garner support from these key groups?

This will require a promotional campaign through representative bodies, to share the message about the pilot.

Urban Taskforce Australia is willing to share information about the pilot with our membership through our weekly newsletters.