

Guidance Statement – Confidential – For Internal Use Only



Liability Amount

The QBCC has historically used the term ‘retention’ when referring to a consumer’s remaining liability under a contract i.e. the amount they still hold/owe under the contract.

The term ‘retention’ is not correct in the context of a claim assessment under the Queensland Home Warranty Scheme. The Queensland Building and Construction Commission Regulation 2018 (QBCC Regulation) Schedule 6 Terms of cover for statutory insurance scheme (Terms of cover), section 73(3) provides:

“retention amount, for a contract, means an amount—

- (a) payable as part of the contract price that, under the contract, may be withheld from payment to the licensed contractor—***
 - (i) during the progress of the residential construction work the subject of the contract; or***
 - (ii) for a period after the completion of the residential construction work the subject of the contract; or***
 - (iii) both during the progress of the residential construction work the subject of the contract and for a period after the completion of the residential construction work the subject of the contract; and***
- (b) withheld for the purpose of giving financial protection to the consumer in relation to the need to correct defects in the residential construction work, or otherwise to secure, wholly or partly, the performance of the contract.”***

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A retention amount is therefore an amount retained by a consumer out of the money, which is payable by them to the contractor, as security for performance of the obligations of the contractor under the contract. For example, a building contract may provide that a certain percentage of each progress claim (often 2.5 to 5%) may be retained by the consumer until certain conditions are met. Often these conditions concern the completion of the contract works and rectification of any defective works during the defects liability period. A provision for retention amount **is not** typically a feature of residential construction contracts and is more typically included in standard form commercial construction contracts. However, it is not unheard of for such contracts to be used for a large residential construction project.

‘Liability amount’ is the term used in the legislation in relation to a consumer’s remaining liability under the contract. This is the correct term to be utilised when referring to the amount the consumer still holds/owes under the contract and when assessing their entitlement to a claim.

The QBCC Regulation states:

“2 Definitions

liability amount, for a consumer for residential construction work—

- (a) *means the amount of the consumer’s remaining liability under—*
 - (i) *if the contract for carrying out the work has ended—the contract immediately before the contract ended; or*
 - (ii) *otherwise—the contract for carrying out the work; but*
- (b) *does not include—*
 - (i) *any amount for liquidated damages or damages for delay that the consumer may be entitled to set-off against the remaining liability; or*

- (ii) *an amount for which the licensed contractor who carried out the work has waived payment for valuable consideration, or is liable to the consumer in relation to the contract.”*

NON-COMPLETION CLAIMS

The QBCC’s position is that part (a)(i) of the above definition applies to non-completion claims i.e. where a contract has ended. Section 4 of the QBCC Regulation Terms of cover defines when a fixed priced contract ends:

- “ (1) *A fixed price residential contract ends if—*
- (a) *the contract is validly terminated on the default of the licensed contractor; or*
 - (b) *the licensed contractor dies; or*
 - (c) *the licensed contractor is a company and the company no longer exists; or*
 - (d) *both of the following apply—*
 - (i) *the licensed contractor is bankrupt or insolvent, or takes advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1966 (Cwlth) or a similar law of a foreign jurisdiction;*
 - (ii) *the licensed contractor’s licence is cancelled.”*

The QBCC Regulation further states:

“7 Assistance for completion of work

- (1) *The consumer is entitled to claim assistance for the reasonable cost of completing the residential construction work.*
- (5) *The assistance mentioned in subsection (1) or (3) the consumer is entitled to claim in relation to the residential construction work must be reduced by—*

- (a) *for assistance mentioned in subsection (1)—the consumer’s liability amount for the work;...”*

Liability amount in relation to a **non-completion claim** is therefore the amount of the consumer’s remaining liability under the contract (the amount the consumer would have been required to pay to fulfil their obligations in order to bring the contracted work to completion) immediately before the contract *ends*.

This means that the consumer’s remaining liability could not take into account payments they made **after** the contract has been terminated, including payments made to complete incomplete works, to reduce the consumer’s remaining liability.

DEFECTS CLAIMS

The QBCC’s position is that part (a)(ii) of the definition of *liability amount* applies to defects claims. For a defects claim, the contract does not have to have *ended* as defined in section 4 of the Terms of cover contained in schedule 6 of the QBCC Regulation.

The QBCC Regulation Terms of cover provides:

“15 Assistance for defective work

- (1) *The consumer of the residential construction work is entitled to claim assistance for the reasonable cost of the following work (rectification work)—*
- (a) *rectifying the defective work;*
 - (b) *any other building work reasonably required to be carried out to a relevant building as a consequence of the defective work.*
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- (4) *The assistance the consumer is entitled to claim under this section in relation to the residential construction work must be reduced by the consumer’s liability amount for the work.”*

As per the above clause, the amount the consumer is entitled to claim for defective work must be reduced by the consumer's *liability amount*.

A consumer's *liability amount* in relation to a defects claim is then simply their remaining liability under the contract (any amount they have not paid the contractor for the work which has been completed under the contract), at the time the claim assessment is being carried out. That is, the remaining liability amount is considered based on the state of the contract at the time of the insurance assessment.

The following scenarios aim to provide some guidance on the various situations that may arise where the consumer's *liability amount* is to be determined when assessing their entitlement to a claim.

Scenario 1 – Works complete but consumer has not paid in full

The contractor has completed the contracted work and all payments under the contract are due and should have been paid to the contractor.

The consumer has not paid the contractor the contract amount in full.

The QBCC's position

As outlined above, we are not concerned with the definition of a contract that has ended in section 4 of the Terms of cover and will consider the remaining liability as per the liability amount definition (a)(ii), at the time of the claim assessment.

The remaining liability is the amount the consumer is still liable to pay under the contract at the time of the claim assessment. This is considered based on the state of the consumer's contractual liability at the time of the insurance assessment.

The consumer's entitlement must be reduced by this amount.

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Where the estimated cost of rectification provided by the Building Inspector is substantially less than the consumer's remaining liability, you can rely on a Cordell Estimate for the cost of rectification when calculating the consumer's entitlement to a claim, rather than having to obtain quotes via the Service Provider.

Where the consumer's remaining liability exceeds the estimated cost of rectification, a \$0 approval should be advised and the case closed. This option must be discussed with your Senior Lead/Manager prior to being applied. Refer to the Claims Procedures Manual section 7.5 Claim \$0 Approval for full details.

Scenario 2 – Non-completion claim declined but defects accepted

A consumer's claim for non-completion is declined as the contract has not been *validly terminated*; lodged out of time for non-completion etc.

A claim for defects is being assessed.

The QBCC's position

The contract is not at an end, so we will consider the remaining liability as per the liability amount definition (a)(ii), at the time of the claim assessment.

While the contract may not have ended pursuant to section 4, if the contract has been terminated, the contractor no longer has a legal obligation to complete the work.

If the consumer has made payment for the work up to the stage of works that have been reached, they have no remaining liability under the contract i.e. their liability amount would be \$0.

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If the consumer has not made full payment for the works that have been completed, for example the works have reached fixing stage but the consumer has only made payment to enclosed stage, the remaining liability will be the difference between the amounts owing under the contract for the fixing and enclosed stages.

The consumer's entitlement must be reduced by this amount.

Scenario 3 - Consumer completes a portion of the incomplete work and claims assistance for the remaining incomplete work

The contract is terminated and there is a liability amount owing for incomplete work.

The consumer proceeds to make a non-completion claim and also arranges independently to complete some of the works e.g. engages another contractor to install windows on site and bring the house to lock-up.

The consumer does not seek prior written approval from QBCC to complete some of the incomplete work as required under the **QBCC Regulation, Schedule 6, Section 64 Demolition, rectification or reinstatement without approval** and has prejudiced the QBCC by their actions.

The consumer expends some of the money they would have had to pay under the original contract in order to complete the work.

The QBCC's Position

The claim will need to partially decline the works carried out independently by the consumer for which prior written approval was not sought. Refer to Section 9.1 Completion or Rectification Without Approval and GS – Completion or Rectification with Approval for further information.

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For any remaining incomplete work under the contract and as outlined above, we will consider the remaining liability as per the liability amount definition (a)(i), being at the time immediately before the contract ended.

The definition makes it clear that the consumer's remaining liability where a contract for the carrying out of the work has ended, is determined **at the time immediately before the contract was ended**.

That being the case, the consumer's remaining liability could not take into account payments they made **after** the contract had been terminated, including payments made to complete incomplete works, to reduce the consumer's remaining liability.

The calculation by the QBCC of the consumer's remaining liability would not take into account any payments made by the consumer in completing incomplete works and the consumer's entitlement must be reduced by this amount.

Scenario 4 - Consumer completes incomplete work but later claims defects

The contractor does not complete the work and the consumer does not pay the full contract amount to the contractor.

The consumer does not make a non-completion claim, but proceeds to have the works completed e.g. another contractor, owner-builder permit etc.

The consumer expends some or all of the money they would have had to pay under the original contract in order to complete the work.

At a later date, the consumer makes a claim for defective work in relation to the works performed under the original contract.

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The QBCC's Position

Similar to Scenario 2, if the consumer has no remaining liability under the contract, i.e. they paid the required amount to the contractor for the works that had been completed prior to the contract being terminated, their liability amount would be \$0.

Similar to Scenario 3, if the consumer had not made full payment to the contractor for the work that had been completed prior to the contract being terminated, their liability amount would be the amount that would have been owing for the completed work immediately before the contract was terminated.

Scenario 5 – Non-completion claim finalised and later claim for defects

A consumer lodges a claim for non-completion; the claim is approved and the consumer's entitlement is reduced by the full value of the consumer's liability amount. The works are completed and the claim is finalised.

At a later date, the consumer lodges a claim for defects in the original work.

The QBCC's Position

Whilst the QBCC's stance is that the entitlement for a defective work claim is required to be reduced by the liability amount, this should not include any amounts which have already been fully accounted for in the calculation of the liability amount to reduce the entitlement of an earlier claim i.e. where there was a previous non-completion claim for the same work.

For example if the consumer's liability amount under the non-completion claim was \$100,000 and their entitlement was reduced by that amount, this amount should not be considered in a later claim for defects.

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