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Legal Bulletin

Consumer Orientated Law: The Intricacies of the *Domestic Building Contracts Act 1995*

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The major provisions of domestic building contracts should conform with the *Domestic Building Contracts Act* (DBCA), especially in relation to Variations, Extensions of Time and progress payments.

It is the Act of parliament that governs residential building contracts in Victoria. Its primary purpose is to afford consumer protection to property owners.

Consumer Focused

It is a consumer oriented Act – it is designed to protect Owners rather than Builders.

This is shown by the penalty provisions in the Act, that only provide for the Builder to be fined, not the Owner.

Examples

- (i) If the Contract is for more than \$5,000 and the Builder has not executed a “major domestic building works contract”, it is the Builder who can be prosecuted and fined;
- (ii) If the Contract is for more than \$12,000, the Builder must have compliant warranty insurance cover, or the Builder can be prosecuted and fined.

Although Owners can of course also be guilty of contractual breach, e.g. refusal to pay, interfering with trades, not recognising signed variations, the focus remains on the Builder.

Most of the protection mechanisms in the DBCA are also for the benefit of the Owner.

In some ways the intention is that Fixed Price or Lump Sum contracts become the norm in domestic building.

For example, there are restrictions on Cost Plus Contracts; this is where the final price of the works is calculated by the actual cost to the builder plus a builder’s margin.

The DBCA provides that Cost Plus Contracts cannot be entered into for an amount less than \$500,000.

Also, section 13(2) says the Cost Plus Contract must contain a “fair and reasonable estimate” by the Builder of the total amount the Builder is likely to be paid.

Mandatory Requirements / Prohibitions

The written Contract (MDBWC) must be compliant with the matters in section 31 of the Act.

If the value of the work is more than \$12,000 warranty insurance must be in force prior to commencement.

Failure to have insurance is a prosecutable offence, i.e. a fine of up to \$10,000 can be levied against a natural person and up to \$50,000 against a company.

clauses in contracts are void.

A Builder must not enter in a MDBWC unless (s29):

- (i) the Builder is registered as a builder under the *Building Act 1993* (for natural persons);
- (ii) for a company, at least one of the directors is registered as a builder under that Act. [Penalty 100 penalty units]

To obtain annual registration as a building practitioner, the builder must have warranty insurance.

If the proposed works require the construction of footings or may adversely affect footings, before entering the Contract the Builder must obtain foundations data for the site (s30).

(For eg, soil reports and information required to prepare a proper footings design)

The Builder does not need to do this if such data already exists and it is reasonable for the Builder to rely on it.

Cooling Off: an Owner is allowed to withdraw from a Contract up until 5 business days after they have received a copy of the Contract.

Variations: the Act at s38 provides that a variation must be in writing, describe the effect on the contract price and the contract period, and disclose the nature of the work.

The Builder must obtain evidence that such a notice has been given, and that the owner has returned a notice advising that works may proceed.

If this is not done, then the Builder is not entitled to be paid unless they can show that it would be unconscionable or unduly harsh for payment not to occur – and it would not be unfair on the Owner to make payment.

Charging clauses: Builders are no longer allowed to lodge caveats upon an Owner's property. Prior to the DBCA, Builders could include charging clauses in contracts.

Dispute resolution: the forum for dispute resolution in domestic building is now VCAT – ie not the Magistrates Court, and arbitration

If another party lodges a complaint at a Court, and it is a domestic building dispute as defined in the DBCA (at s5), then an application can be made to strike it out.

Payment claims: the Act (s40) defines the times when a Builder can lodge payment claims.

A Builder cannot claim payment in advance. Section 40 states that the following stages trigger payment claims ie:

Base Stage;
Frame Stage;
Lock-Up Stage;
Fixing Stage;

and then the final claim.

Contracts (and the Act) contain a definition for what completion of each stage means.

A Builder and Owner can contract out of section 40 by setting their own time and amounts for progress payments (e.g. using Method B tables).

However a Builder must still not demand or receive an amount that is not directly related to the progress of the Works. [50 penalty units]

Deposit: the Builder can collect no more than 5% of the contract price where it is \$20,000 or more, and no more than 10% where the contract price is for less than \$20,000.

Statutory Warranties

Section 8 contains statutory warranties that apply to all domestic building work. Generally these warranties are recited in the Contract; if not they are implied by law.

Via this section the Builder warrants to the Owner that:

- (i) The work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications;
- (ii) All the materials will be good and fit for purpose and, unless otherwise specified, will be new;
- (iii) The work will be carried out in accordance

with all laws, not limited to the *Building Act*. This extends to the BCA, building regulations and the *Disabled Discrimination Act 1992*;
(iv) The work is carried out with reasonable care and skill and in a fashion that is specified in the Contract; ...etc

[Refer to section 8 for a full recital]

These warranties run with the land and apply also for the benefit of subsequent owners (section 9).

You cannot “contract out” of the warranties, and they last for 10 years post the issue of an Occupancy Permit or certificate of final inspection, or the contract is terminated.

Section 31 requirements

The mandatory requirement for Contracts (for more than \$5K in value) include:

- (i) It must be in writing and set out all the terms;
- (ii) It must have a detailed description of the work and the contract price;
- (iii) Plans and specifications need to be included;
- (iv) Registration details of the Builder must be included;
- (v) Start date for work has to be evident in some form;
- (vi) The Contract has to spell out the statutory warranties contained in section 8, and section 20 (provisional sums to be estimated with reasonable care & skill);
- (vii) A conspicuous warning spelling out the cooling off period needs to be displayed prominently;
- (viii) The completion date or a formula to work out the contract period must be spelt out;
- (ix) Insurance details must be articulated in conformity with *Building Act* requirements for warranty insurance;
- (x) A checklist in the approved form must be incorporated for the benefit of owners to tick off.

In addition, potential cost escalation clauses in contracts, eg in relation to provisional sums/ prime costs and Variations, must be inserted to warn Owners.

Conclusion

When acting for Builders, always remember that the onus is heavily on Builders to comply with the DBCA.

Whilst it is separate from a civil, contractual claim, aggrieved owners have the ability to make misconduct complaints to the Building Practitioners Board (under the Building Act).

If a Builder complies with the DBCA requirements it will also stand the Builder in good stead contractually.

The trade associations (eg MBA, HIA, and Royal Australian Institute of Architects) have published contracts that are designed to comply with the DBCA.

These contracts mirror the Act in regard to such matters as the process for variations, provisional sums, staged progress payments, and the section 8 warranties.

The contracts enshrine the consumer protection in the Act, but also provide remedies for the Builder in the event of Owner breaches, e.g. the right to suspend, seek confirmation of capacity to pay, notices of default etc.

For further information, you can refer to Kim Lovegrove’s e-book available on our website (e-library), entitled “Building Laws for Builders”.

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