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Legal Bulletin

“Consumer Orientated Law: The Intricacies of the *Domestic Building Contracts Act 1995 (Vic)*”

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The major terms of domestic building contracts should conform with the DBCA, especially re:

- Variations
- Builder's Warranties
- Progress Payments

The DBCA governs residential building contracts in Victoria. Its primary purpose is consumer protection for OWNERS.

Consumer Focused

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

Examples

- 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;
- If the Contract is for more than \$12,000, the Builder must have compliant warranty insurance cover (fine of up to \$10K for a person and \$50K for a company).

Although Owners can also be guilty of contractual breach, e.g. refusal to pay, interfering with trades, the focus remains on the Builder.

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

For e.g. 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.

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

- the Builder is registered as a builder under the *Building Act 1993* (for natural persons);
- 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).

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 can withdraw from a Contract up until 5 business days after receiving a copy of the Contract.

Variations: s38 states 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 show a notice has been given, and that the owner has returned a notice advising to proceed.

Otherwise the Builder is not entitled to be paid unless they can show that it would be unconscionable or unduly harsh if not paid – and it would not be unfair on the Owner

Charging clauses: Builders are no longer allowed to lodge caveats upon an Owner's property.

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

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.

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).

The Builder must still not demand or receive an amount that is not directly related to the progress of the Works. [50 pts]

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

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 after completion or termination.

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.

Also, potential cost escalation clauses in contracts must be flagged to warn Owners (eg variations, PC sum increases).

Conclusion

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

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

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

Case Law

Director of Consumer Affairs Victoria v Glenvill Pty Ltd [2009] VSC 76

The Supreme Court found that the requirements of s31 of the DBCA (with modifications) must be included in preliminary design agreements for residential construction.

In this case the preliminary agreement included the preparation of plans and specifications, and the price was around \$20,000.

This overturned the Magistrates Court finding that the section only applied to the 'ultimate contract' for building.

Section 5 of the DBCA defines "domestic building work" and it includes *preparation of plans and specifications* preparatory to domestic construction.

As the price was over \$5,000 the SC found that it was a major domestic building works contract.

Justice Kay: when considering sections 31(1) and 8, just because some of the provisions are inapplicable to the type of contract does not mean that none of them can apply.

J-Corp Pty Ltd v Mladenis [2009] WASCA 157

If the schedule to a contract says "nil" as the rate for Liquidated Damages (for builder delay), does this mean the Owner cannot be compensated for delay?

The Court said: "*Clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of a contract arising....*"

By using a liquidated damages clause, the parties avoid the need to prove the actual loss, as they have a pre-estimate of the loss arising.

So there could be not liquidated damages for delay, but general damages could still be claimed (and proven).

*For further information, you can refer to Professor Kim Lovegrove's e-book available on our website (e-library), entitled "Building Laws for Builders" - or please contact **Lovegrove Solicitors**.
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