SOME BUILDERS STILL USE CONTRACTS THAT ARE ILLEGAL DINOSAURS

New Property

By KIM LOVEGROVE

THE Domestic Contracts and Tribunal Act, which was introduced in May, has changed the face of residential contracting and contractual requirements. However, I am somewhat concerned that some contracts that I have sighted recently seem to be oblivious to the requirements of the new act. And people are still signing them up!

Of particular concern are the so-called home-grown contracts, often used by developers and contractors, some of which were drafted many years ago and have not been overhauled or updated since. Many of these will not comply with the new act, in which case they may generate dire consequences if put to the test before the tribunal.

Hence this article is aimed at all contracting parties, whether they be owners, developers, construction managers or builders and may serve as an audit to test the compliance of their building contracts.

First, domestic building contracts have to contain a number of statutory notices in respect of a "cooling-off period", "prime cost items", "progress payments", etc.

For example the cooling-off period is five days and a prominent cooling-off warning is required to be included. If the contractual payment schedule doesn't comply with the statutory proforma, then a bold warning to this effect has to be included in the contract.

A statutory check list has to be included at the beginning of every contract. This check list contains a number of questions designed to ensure that the owner is aware if important considerations exist. Has the owner read the contract? Is the price clearly stated? Is the time extension procedure clear? Has an insurance policy been taken out? Is insurance current? and so on. The owner has to answer and sign this check -list. Likewise, key terms in the contract have to be defined.

If a contract is for more than $5000 it is considered to be a major domestic contract and the builder has to be a registered builder with the BCC. Charging clauses, which in the past were standard conditions in industry contracts, are now also illegal. A builder no longer has a "cavetable" interest (which could be invoked in the event of payment default) in the owners property.

Contractual variations conditions likewise have to comply with the letter of the act, which is far more detailed than those of the House Contracts Guarantee Act.

The deposit provisions must comply with the act and there has to be a provision that allows an owner to end the contract if the price is varied by more than 15 per cent. Carolyn Lloyd, of the HIA, succinctly discussed this issue in her article last week.

The old cost-plus contracts, in real terms, are dead. If a builder enters into a cost-plus

contract, it has to contain a reasonable price estimate. Hence the term cost-plus is somewhat of a misnomer; it really should be called "reasonable price contract". Rise-and-fall or cost-adjustment provisions are permissible only for "top end of town" contracts that exceed $500,000.

Grounds for time extension have to be entered into the contract. What a lot of builders fail to appreciate is that they no longer have an "as-of-right ability" to claim time extensions for wet weather, public holidays and the like. They have to make an allowance in every contract for the anticipated duration of delays.

Builders and owners must sign the contract because, unless a contract is signed by both parties, it allegedly has no legal effect. This may mean that the builder cannot get paid or that the parties cannot have regard to the contract. Pending a judicial ruling, the position is unclear.

Until the act was proclaimed the overwhelming majority of residential building disputes had to be resolved at arbitration. It is now illegal for a domestic building contract to contain an arbitration clauses. Residential disputes must now be resolved at the Domestic Disputes Tribunal.

I believe that construction and project management contracts, which don't remotely comply with the new act, are still being signed up. The fact of the matter is that some of these contracts are dinosaurs. Having worked for developers in recent times, I can report their amazement at the extent to which the act impacts upon their traditional mode of contracting.

The Domestic Contracts and Tribunal Act has been designed to get people to put their houses in order contractually. The Master Builder's Association and the Housing Industry Association have produced two very good domestic building contracts. Both are succinct, comprehensive and in plain English. However, if you dont want to use the tried-and-true and prefer to stick to a home-grown, then get an experienced building lawyer to audit the contract.

For more information on the Domestic Building and Tribunal Act readers can also refer to the The User's Guide to the Domestic Contracts and Tribunal Act (available from Law Press), written by Pamela Jenkins and myself.

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