

Recent Amendments to the Home Building Act 1989
“A De-construction”

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Introduction

The *Home Building Act 1989*, (“**The Act**”) is a statutory regime, governing contracts for residential building works¹. It imposes strict statutory provisions upon both homeowner and builder² setting out the respective rights and responsibilities of each party from pre-contract requirements through to post-contract remedies and limitation periods. It is therefore important that the technical detail of this Act is thoroughly understood before commencing or defending any claim.

There were a number of significant changes to the HBA in 2011, which have been followed by a number of further significant amendments earlier this year. In this paper I will set out a summary of the most important changes that have occurred.

Overview of the Main Changes

1. Contract Requirements

¹ *Prescribed categories of Residential Building works are set out in Clause 13 of the Home Building Regulations 2014*

² *and I use this term to include developers and owner builders*

Contracts, (whether fixed price or cost plus) are for the main part divided into 2 categories according to their value. Contracts with a value of less than \$20,000 are referred to as small works contracts.³ These contracts still have statutory requirements as set out in s7AAA of the Act but they are less onerous than for contracts above the prescribed amount of \$20,000. For that reason, this paper will not specifically look at the detail of small works contracts.

A. Form of contracts

Contracts in excess of \$20,000 must comply with a rigorous number of statutory provisions. These are set out in s7 of the Act and Clause 8 of the accompanying Home Building Regulations 2014.

S7 Form of contracts (other than small jobs)

(1A) This section applies to a contract only if the contract price exceeds the prescribed amount or (if the contract price is not known) the reasonable market cost of the labour and materials involved exceeds the prescribed amount. The "prescribed amount" is the amount prescribed by the regulations for the purposes of this section and is inclusive of GST⁴.

(1) A contract must be in writing and be dated and signed by or on behalf of each of the parties to it.

(2) A contract must contain:

(a) the names of the parties, including the name of the holder of the contractor licence shown on the contractor licence, and

(b) the number of the contractor licence, and

(c) a sufficient description of the work to which the contract relates, and

(d) any plans and specifications for the work, and

(e) the contract price if known, and

³ Previously the threshold for small works contracts was \$1,000 - \$5,000.

⁴ \$20,000 - Home Building Regulations Clause 5

- (f) *any statutory warranties applicable to the work, and*
 - (g) *in the case of a contract to do residential building work-a conspicuous statement setting out the cooling-off period that applies to the contract because of section 7BA, and*
 - (h) ***in the case of a contract to do residential building work (other than a construction contract to which the Building and Construction Industry Security of Payment Act 1999 applies)-details of any progress payments payable under the contract,⁵ and***
 - (i) ***In the case of a contract to do residential building work-a statement that the contract may be terminated in the circumstances provided by the general law and that this does not prevent the parties agreeing to additional circumstances in which the contract may be terminated,⁶ and***
 - (j) ***any other matter prescribed by the regulations for inclusion in the contract.⁷***
- (3) *The contract must comply with any requirements of the regulations.*
 - (4) *If the contract price is known, it must be stated in a prominent position on the first page of the contract.*
 - (5) *If the contract price is not known or may be varied under the contract, the contract must contain a warning to that effect and an explanation of the effect of the provision allowing variation of the price. The warning and explanation must be placed next to the price if the price is known.*
 - (6) *A contract must not include in the contract the name of any person other than the holder of a contractor licence as, or so it may reasonably be mistaken to be, the holder's name.*

8 Requirements for contracts to do residential building work

A contract to do residential building work to which section 7 of the Act applies must include a checklist:

(a) ...

⁵ *This is a new provision not previously required in any building contract. I will address this later in the paper.*

⁶ *This is a new provision not previously required in any building contract.*

⁷ *Again, a new inclusion.*

(b) *for contracts entered into on or after 1 March 2015 in the form set out in Schedule 2.*

B. Deposits

Builders are now able to obtain a 10% deposit on works over \$20,000, up from 5% in the old provisions. This means that 10% deposits apply to all building contracts.

C. Progress Payments

S8A of the Act makes new specific provisions in relation to the progress claims, which a builder can make during the term of the works. Two types of progress claims can be made:

- Where there is a fixed price contract, progress claims can either be a specified amount or a percentage of the contract works and they are payable following completion of a specified stage of the work, with the work contained within that stage to be set out in clear and plain language.
- Where there is a costs plus contract, progress claims are to be made at intervals fixed by the contract and are to include all invoices, receipts and other documentation as reasonable necessary to support the claim.

Builders are not entitled to demand or make payment claims under the contract other than through either of the authorised progress claim methods set out above.

D. Failure to comply with any of the Contractual Requirements

In addition to the hefty fines payable by builders who contract without a licence,

or demand more deposit or payment than allowed under the Act⁸, it would appear that a term of imprisonment of up to 12 months could be imposed upon those found guilty of two or more offences.

2. Statutory Warranties

The nature of the statutory warranties has again been changed. The old “structural defects”, for which a 6-year warranty was in place, has been replaced this year by a new “major defects” provision.

The old structural defects was defined in the Home Building Regulations 2004 as follows:

71 Meaning of “structural defect”

(1) *For the purposes of sections 18E (1) (b) and 103B (2) of the Act, **structural defect** means any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:*

(a) *results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used, or*

(b) *prevents, or is likely to prevent, the continued practical use of the building or any part of the building, or*

(c) *results in, or is likely to result in:*

(i) *the destruction of the building or any part of the building, or*

(ii) *physical damage to the building or any part of the building, or*

(d) *results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.*

(2) *In subclause (1): **structural element of a building** means:*

(a) *any internal or external load-bearing component of the building*

⁸ 1,000 penalty units for corporations and 200 for everyone else.

that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams, and

- (b) any component (including weatherproofing) that forms part of the external walls or roof of the building.*

The new provision of “major defects” is defined as follows:

- (a) A defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:
 - (i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or*
 - (ii) the destruction of the building or any part of the building, or*
 - (iii) a threat of collapse of the building or any part of the building, or**
- (b) a defect of a kind that is prescribed by the regulations as a major defect.*

Major element of a building means:

- (a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or*
- (b) a fire safety system, or*
- (c) waterproofing, or*
- (d) any other element that is prescribed by the regulations as a major element of a building.*

This new definition of “major defect” narrows and restricts the claims now able to be made, in two ways:

- First the definition of “major element” is much more narrow than the previous “structural element.” The structural element definition included “any

component (including waterproofing) that forms part of the external walls or roof of the building⁹". This definition enabled a range of defects to be captured including for example, cracking to the external façade. The new definition restricts the defects in this category to either the fire safety system or the waterproofing.

- Second, the effect of the defects must be more severe than before. Previously damage to the building or any part of it was sufficient to trigger a claim. This is now gone and a much higher threshold is needed being that the building must be unable to be inhabited, or that the defect is likely to cause the destruction or collapse of the building.

Given this new provision it is clearly of the utmost importance that homeowners and in particular Owners Corporations carry out a detailed inspection of new works before the 2 year warranty period expires, otherwise they will be left with little to claim after that time.

3. New Defence for Builders

The amendments have widened the defence available for builders under s18F of the Act. Previously the only defence a builder could raise for defective work was a written instruction from the homeowner to carry out an item of work, which the builder had advised against.

Now the scope of the defence has widened. If a builder can show reasonable reliance on written instructions from a professional¹⁰, who is either acting on behalf of the homeowner or otherwise independent of the builder, this may defeat a claim.

⁹ *My emphasis.*

¹⁰ *For example an Architect administering a contract or a Private Certifier.*

4. New Obligations for Homeowners

The amendments impose new obligations for homeowners or those otherwise entitled to the benefit of the statutory warranties¹¹. These are summarized as follows:

- The homeowner must make reasonable efforts to notify the builder in writing within 6 months of when the defect becomes apparent.
- The homeowner must mitigate any loss arising from the defect.
- The homeowner must not unreasonably refuse access to the builder to rectify the breach.
- If the homeowner fails to comply with these duties the tribunal can take it into account in making its determination, so it could affect any award of damages.

5. Time for When the Warranties Run:

- i) Non Strata schemes – Building Work¹²
 - Either within the meaning of the contract
 - Or, if the contract doesn't provide for one:
 - On practical completion - which is determined as occurring as soon as one of the following occurs:
 - When the builder hands over possession.
 - When the builder last attended the site.
 - The date of issue of an occupation certificate (NB - The Act doesn't distinguish between an interim

¹¹ s18BA The Act.

¹² S3B The Act.

occupation certificate or a final occupation certificate.)

- NB – if there are 2 or more buildings which can be used separately – e.g. a duplex, practical completion can occur at different times

It is very important to determine the relevant date as it starts the clock for the statutory warranties. As there is only 2 years to bring what will be, in effect, the majority of building claims, any miscalculation could be very costly for the homeowner.

ii) Date of Completion of New Building in Strata Schemes¹³

- Completion starts on the date of issue of an occupation certificate that authorises the use of the whole building. Again the Act doesn't say whether this is an interim or final occupation certificate so assume it is the former.
- Again if there are 2 or more buildings, the date of completion is to be determined as if there were a separate contract for each building. Therefore each building will have a separate completion date

Assuming that time starts running from the issue of interim occupation certificate, it may well be the case that by the time a new homeowner takes possession and actually moves into a new unit, that a number of months may have already passed. It is therefore vital that Owners Corporations understand these amendments and make sure they are aware of the relevant completion dates for each building within their complex.

¹³ s3C The Act.

6. Other Changes

A number of other changes are to take effect as follows:

- A change of name to the Home Warranty Insurance. This will now be called the Home Building Compensation Fund.
- A new public register will be set up to show:
 - Details of insurance certificates that have been issued.
 - Details of insurance claims successfully made.

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