

Version No. 061
Domestic Building Contracts Act 1995
Act No. 91/1995

Version incorporating amendments as at 1 July 2006

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The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1. Purpose

The main purposes of this Act are—

- (a) to regulate contracts for the carrying out of domestic building work; and
- (b) to provide for the resolution of domestic building disputes and other matters by the Victorian Civil and Administrative Tribunal; and
- (c) to require builders carrying out domestic building work to be covered by insurance in relation to that work; and
- (d) to amend the **House Contracts Guarantee Act 1987**, and in particular, to phase out the making of claims under that Act.

S. 1(b)
substituted by
No. 52/1998
s. 37(1).

2. Commencement

- (1) Part 1 comes into operation on the day on which this Act receives the Royal Assent.
- (1A) Section 158 comes into operation on 1 May 1996¹.
- (2) The remaining provisions of this Act come into operation on a day or days to be proclaimed.

S. 2(1A)
inserted by
No. 2/1996
s. 3(1).

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- (3) If a provision referred to in sub-section (2) does not come into operation on or before 1 January 1997, it comes into operation on that day.

3. Definitions

- (1) In this Act—

"architect" means a person who is registered as an architect under the **Architects Act 1991**;

"builder" means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

"building" includes any structure, temporary building or temporary structure and also includes any part of a building or structure;

"building owner" means the person for whom domestic building work is being, or is about to be, carried out;

"building site" means a place where domestic building work has been, is being, or is about to be, carried out;

"business day" means a day that is not—

- (a) a Saturday or a Sunday; or
- (b) a day that is wholly or partly observed as a public holiday throughout Victoria;

"Commission" means the Building Commission established under the **Building Act 1993**;

S. 3(1) def. of
"Commis-
sion"
amended by
No. 68/2001
s. 17.

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"contract price" means the total amount payable under a domestic building contract and includes—

- (a) the amount the builder is to receive and retain under the contract; and
- (b) the amount the builder is to receive under the contract for payment to any other person; and
- (c) the amount any third person is to receive (or it is reasonably estimated will receive) directly from the building owner in relation to the domestic building work to be carried out under the contract—
 - (i) for conveying to the building site or connecting or installing services such as gas, electricity, telephone, water and sewerage; or
 - (ii) for the issue of planning or building permits—

but does not include any amount that the builder excludes in accordance with section 24;

"cost plus contract" means a domestic building contract under which the amount the builder is to receive under the contract cannot be determined at the time the contract is made, even if prime cost items and provisional sums are ignored;

"default penalty" has the meaning set out in section 128;

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"defective", in relation to domestic building work, includes—

- (a) a breach of any warranty listed in section 8;
- (b) a failure to maintain a standard or quality of building work specified in the contract;

"determination" means the orders and findings the Tribunal makes to conclude a proceeding;

"Director" means the Director within the meaning of the **Fair Trading Act 1999**;

S. 3(1) def. of "Director" substituted by No. 17/1999 s. 30(1).

"domestic building contract" means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor;

"domestic building dispute" has the meaning set out in section 54;

"domestic building work" means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

S. 3(1) def. of "home" amended by Nos 109/1997 s. 533(Sch. 2 item 2.1), 74/2000 s. 3(Sch. 1 item 37.1).

"home" means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include—

- (a) a caravan within the meaning of the **Residential Tenancies Act 1997** or any vehicle used as a residence; or
- (b) any residence that is not intended for permanent habitation; or

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- (c) a rooming house within the meaning of the **Residential Tenancies Act 1997**; or
 - (d) a motel, residential club, residential hotel or residential part of licensed premises under the **Liquor Control Reform Act 1998**; or
 - (e) a nursing home, hospital or accommodation associated with a hospital; or
 - (f) any residence that the regulations state is not a home for the purposes of this definition;

"insurer" means—

- (a) any person providing any required insurance under the **Building Act 1993** (whether or not that person has a direct contractual relationship with a builder); and
- (aa) any person providing any required insurance under the **Architects Act 1991** (whether or not that person has a direct contractual relationship with an architect); and
- (b) in relation to any domestic building work or domestic building contract that is subject to a guarantee under the **House Contracts Guarantee Act 1987** or to which Part 6 of that Act applies, the Victorian Managed Insurance Authority established by the **Victorian Managed Insurance Authority Act 1996**.

S. 3(1) def. of "insurer" amended by Nos 26/2001 s. 16(1), 35/2004 s. 38, 52/2005 s. 30.

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"major domestic building contract" means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$5000 (or any higher amount fixed by the regulations);

"prime cost item" means an item (for example, a fixture or fitting) that either has not been selected, or whose price is not known, at the time a domestic building contract is entered into and for the cost of supply and delivery of which the builder must make a reasonable allowance in the contract;

"proceeding" includes any application for the review of a determination;

"provisional sum" is an estimate of the cost of carrying out particular work (including the cost of supplying any materials needed for the work) under a domestic building contract for which a builder, after making all reasonable inquiries, cannot give a definite amount at the time the contract is entered into;

"sub-contractor" means a person who enters into a contract with a builder to carry out part of the work that is to be carried out under a domestic building contract;

"Tribunal" means Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

S. 3(1) def. of
"Tribunal"
substituted by
No. 52/1998
s. 37(2).

- (2) If a builder and a building owner agree that domestic building work is to be carried out on a home in stages by the builder under a series of separate contracts that are to be entered into after the initial agreement, then for the purposes of this

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Act the initial agreement and the subsequent contracts are to be considered to be a single contract.

- (3) If a provision of this Act requires or enables the giving of a document to a specified person, the provision is satisfied if the document is given to an authorised agent of that person.
- (4) A contract for the sale of land on which a home is being constructed or is to be constructed that provides or contemplates that the construction of the home will be completed before the completion of the contract is not, and is not to be taken to form part of, a domestic building contract within the meaning of this Act if—
- (a) the home is being constructed under a separate contract that is a major domestic building contract; or
 - (b) the contract of sale provides that the home is to be constructed under a separate contract that is a major domestic building contract.
- (5) Sub-section (4) does not apply to a contract for the sale of land that is the subject of proceedings commenced in a court or tribunal before 16 March 2004 but not completed before that date in which it was alleged, before that date, that the contract was, or formed part of, a domestic building contract.

S. 3(4)
inserted by
No. 37/2004
s. 3.

S. 3(5)
inserted by
No. 37/2004
s. 3.

4. Objects of the Act

The objects of this Act are—

- (a) to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners; and

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- (b) to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and
- (c) to enable building owners to have access to insurance funds if domestic building work under a major domestic building contract is incomplete or defective.

5. Building work to which this Act applies²

- (1) This Act applies to the following work—
 - (a) the erection or construction of a home, including—
 - (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
 - (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
 - (b) the renovation, alteration, extension, improvement or repair of a home;
 - (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
 - (d) the demolition or removal of a home;

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- (e) any work associated with the construction or erection of a building—
 - (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
 - (ii) in respect of which a building permit is required under the **Building Act 1993**;
 - (f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);
 - (g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);
 - (h) any work that the regulations state is building work for the purposes of this Act.
- (2) A reference to a home in sub-section (1) includes a reference to any part of a home.

6. Building work to which this Act does not apply

This Act does not apply to the following work—

- (a) any work that the regulations state is not building work to which this Act applies;
- (b) any work in relation to a farm building or proposed farm building (other than a home);
- (c) any work in relation to a building intended to be used only for business purposes;
- (d) any work in relation to a building intended to be used only to accommodate animals;
- (e) design work carried out by an architect or a building practitioner registered under the **Building Act 1993** as an engineer or draftsman³;

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- (f) any work involved in obtaining foundations data in relation to a building site;
- (g) the transporting of a building from one site to another.

7. This Act binds the Crown

This Act binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

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Part 2—Provisions that Apply to all Domestic Building Contracts

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**PART 2—PROVISIONS THAT APPLY TO ALL DOMESTIC
BUILDING CONTRACTS**

Division 1—General Warranties⁴

**8. Implied warranties concerning all domestic building
work**

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act⁵;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for

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occupation at the time the work is completed;

- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

9. Warranties to run with the building

In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract⁶.

10. Person cannot sign away a right to take advantage of a warranty

A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in section 8 is void to the extent that it applies to a breach other than a breach that was known, or ought reasonably to have been known, to the person to exist at the time the agreement or instrument was executed.

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Part 2—Provisions that Apply to all Domestic Building Contracts

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Division 2—Restrictions Applying to the Nature and Contents of Contracts

11. Limit on amount of deposit

- (1) A builder must not demand or receive a deposit under a domestic building contract of more than—
 - (a) 5% of any contract price that is \$20 000 or more;
 - (b) 10% of any contract price that is less than \$20 000—

before starting any work under the contract.

Penalty: 100 penalty units.

- (2) For the purposes of sub-section (1), the Governor in Council may make regulations fixing a higher dollar amount than that referred to in sub-section (1).
- (3) If a builder does not comply with sub-section (1), the building owner may avoid the contract at any time before it is completed.
- (4) However, sub-section (3) does not apply if the Tribunal believes it would be unfair in the particular circumstances of a case for a building owner to do this.
- (5) If a court finds proven a charge under sub-section (1) against a builder, it may order the builder to refund to the building owner some or all of the amount the building owner has paid the builder under the contract.
- (6) This power is in addition to the power the court has to impose any other penalty.

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Part 2—Provisions that Apply to all Domestic Building Contracts

s. 12

12. Contract for more than one sort of work must identify the domestic building work

- (1) This section applies to a contract that entitles a builder to be paid both—
 - (a) for carrying out domestic building work; and
 - (b) for carrying out other work or for any other reason.
- (2) The builder must not enter into such a contract unless the contract clearly identifies and distinguishes—
 - (a) the domestic building work from the other work or reason; and
 - (b) the amount of money the builder is to receive under the contract as a result of carrying out the domestic building work from the amount of money the builder is to receive under the contract as a result of carrying out the other work or for the other reason.

Penalty: 20 penalty units.

13. Restrictions on cost plus contracts

- (1) A builder must not enter into a cost plus contract unless—
 - (a) the contract is of a class allowed by the regulations for the purposes of this section; or
 - (b) the work to be carried out under the contract involves the renovation, restoration or refurbishment of an existing building and it is not possible to calculate the cost of a substantial part of the work without carrying out some domestic building work.

Penalty: 100 penalty units.

S. 12(2)
amended by
No. 74/2000
s. 3(Sch. 1
item 37.2).

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s. 13A

- (2) A builder must not enter into a cost plus contract that does not contain a fair and reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract.

Penalty: 100 penalty units.

- (3) If a builder fails to comply with this section—
- (a) the builder cannot enforce the contract against the building owner; but
 - (b) the Tribunal may award the builder the cost of carrying out the work plus a reasonable profit if the Tribunal considers that it would not be unfair to the building owner to do so.

13A. Effect of GST clauses on certain contracts

S. 13A
inserted by
No. 2/2000
s. 3.

- (1) Section 13(1) does not apply, and is deemed never to have applied, to a cost plus contract—
- (a) that was entered into on or before 8 November 1999; and
 - (b) that provides for the builder to be paid any amount in respect of GST (as that term is defined in the A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth); and
 - (c) that—
 - (i) does not contain any other provision that makes it a cost plus contract; or
 - (ii) is a contract referred to in section 13(1)(a) or (b).
- (2) Section 13(2) does not apply, and is deemed never to have applied, to a cost plus contract referred to in sub-section (1) to the extent that it relates to an estimate of the amount payable to the builder in respect of any GST (as defined in sub-section (1)(b)).

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(3) A cost plus contract—

- (a) that was entered into after 8 November 1999 and before 30 November 1999; and
- (b) that would have been allowed as a cost plus contract by the regulations for the purposes of section 13 if it had been entered into on or after 30 November 1999—

is deemed to be, and to have always been, a cost plus contract of a class allowed by the regulations for the purposes of section 13.

14. Arbitration clauses prohibited

Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void.

15. Restrictions concerning cost escalation clauses

- (1) In this section a "**cost escalation clause**" means a provision in a contract under which the contract price may be increased to reflect increased costs of labour or materials or increased costs caused by delays in carrying out the work to be carried out under the contract, but does not include a provision that enables the contract price to increase to reflect—
 - (a) unforeseeable cost increases resulting from changes to government taxes or charges⁷; or
 - (b) prime cost items or provisional sums.
- (2) A builder must not enter into a domestic building contract that contains a cost escalation clause unless—
 - (a) the contract price is more than \$500 000 (or any higher amount fixed by the regulations); or

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Part 2—Provisions that Apply to all Domestic Building Contracts

s. 16

- (b) the clause is in a form approved by the Director and complies with any relevant requirements set out in the regulations.

Penalty: 100 penalty units.

- (3) A cost escalation clause in a domestic building contract is void unless—
- (a) before the contract was entered into, the builder gave the building owner a notice in a form approved by the Director explaining the effect of the clause; and
- (b) the building owner places her, his or its signature or seal or initials next to the clause.

16. Builder must not seek more than the contract price

- (1) A builder who enters into a domestic building contract must not demand, recover or retain from the building owner an amount of money under the contract in excess of the contract price unless authorised to do so by this Act.

Penalty: 100 penalty units.

- (2) Sub-section (1) does not apply to any amount that is demanded, recovered or retained in respect of the contract as a result of a cause of action the builder may have that does not involve a claim made under the contract.

Division 3—Provisions Concerning Building Sites

17. Restrictions on builders' control of building sites

A domestic building contract does not give a builder a greater right to occupy a building site than that of a contractual licensee.

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Part 2—Provisions that Apply to all Domestic Building Contracts

s. 18

18. Contract does not entitle builder to put caveat on the title of building site land

A domestic building contract does not give a builder an estate or interest in any land for the purposes of section 89 of the **Transfer of Land Act 1958**.

19. Access to building site

- (1) A builder must permit the building owner (or a person authorised by the building owner) to have reasonable access to the building site and to view any part of the building works.

Penalty: 20 penalty units.

- (2) A person who is exercising a right of access granted under sub-section (1) must not interfere with the carrying out of the building works.
- (3) A builder is not liable for any costs or delays—
- (a) that result from any failure by a person to comply with sub-section (2); and
 - (b) that the builder notifies the building owner of in writing within 5 business days of the failure to comply occurring.

Division 4—Provisions Concerning Prime Cost Items or Provisional Sums

20. Warranty concerning provisional sums⁸

- (1) This section applies if a builder enters into a domestic building contract.
- (2) The builder warrants that any provisional sum included by the builder in the contract has been calculated with reasonable care and skill taking account of all the information reasonably available at the date the contract is made, including the nature and location of the building site.

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Part 2—Provisions that Apply to all Domestic Building Contracts

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21. Requirements concerning prime cost item and provisional sum estimates

- (1) A builder must not enter into a domestic building contract that contains an amount, or an estimated amount, for—
 - (a) a prime cost item that is less than the reasonable cost of supplying the item;
 - (b) a provisional sum that is less than the reasonable cost of carrying out the work to which the sum relates.

Penalty: 35 penalty units.

- (2) This section does not apply to items or sums that are to be supplied or specified by the building owner (or the building owner's agent).
- (3) In determining what is a reasonable cost, regard must be had to—
 - (a) the information that the builder had, or reasonably should have had, at the date the contract was made; and
 - (b) the nature and location of the building site⁹.

22. Details of prime cost items and provisional sums must be set out in writing

If a domestic building contract provides for any prime cost items or provisional sums, the builder must not enter into the contract unless—

- (a) in the case of a major domestic building contract, the contract contains a separate schedule for each item or sum that sets out—
 - (i) a detailed description of the item or of the work to which the sum relates; and
 - (ii) a breakdown of the cost estimate for each item or sum (showing at least the estimated quantities of materials that

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will be involved and the unit cost to the builder of the item or sum); and

(iii) if the builder proposes to charge any amount in excess of the actual amount of any increase to the item or sum, how that excess amount is to be determined;

(b) in the case of any other contract, the builder gives the building owner before entering into the contract a written document that sets out for each item or sum the information required by paragraphs (a)(i), (ii) and (iii).

Penalty: 50 penalty units.

23. Builder must supply evidence of cost of prime cost items and provisional sums

A builder must give the building owner a copy of any invoice, receipt or other document that shows the cost to the builder of any prime cost item, or that relates to any provisional sum, in a domestic building contract and must do so as soon as practicable after receiving the invoice, receipt or document.

Penalty: 20 penalty units.

Division 5—Other Matters

24. Builder may exclude certain items from contract price

(1) This section applies if a builder wishes to exclude from the contract price the amount any third person is to receive in relation to the work to be carried out under a domestic building contract—

(a) for the conveying, connection or installation of services such as gas, electricity, telephone, water and sewerage; or

(b) for the issue of planning or building permits.

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- (2) The builder may exclude any such amount by stating in the contract immediately after the contract price first appears in the contract—
- (a) that the cost of the work or thing to which the amount relates is not included in the contract price; and
 - (b) a reasonable estimate of how much the amount is likely to be.

25. Builder must give copy of contract to building owner

As soon as is practicable, but no later than 5 clear business days, after entering into a domestic building contract, the builder must give the building owner—

- (a) in the case of a major domestic building contract, a readily legible signed copy of the contract;
- (b) in the case of any other contract, a readily legible copy of any document that forms part of the contract.

Penalty: 20 penalty units.

Default penalty: 1 penalty unit for each day.

26. Builder must supply copies of relevant reports etc.

- (1) A builder must give to a building owner a copy of any report, notice, order or other document that the builder is given in relation to the building work being carried out by the builder for the building owner by any public statutory authority, provider of services such as gas, electricity, telephone, water and sewerage or person registered under the **Building Act 1993**, and must do so as soon as practicable after receiving the report, notice, order or document.

Penalty: 20 penalty units.

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- (2) Sub-section (1) does not apply if the builder knows that the building owner already has a copy of the report, notice, order or document.

27. Effect of payments and non-payments to builders

- (1) If a building owner fails to pay a builder any amount due to the builder under a domestic building contract by the date it is due, a domestic building dispute exists between the builder and the building owner.
- (2) A building owner may still dispute any matter relating to work carried out under a domestic building contract even though the building owner has paid the builder in relation to the work.

28. Fixtures and fittings are included in contract price

The cost of any fixture or fitting shown in the plans and specifications included in a domestic building contract is to be taken as having been included in the contract price unless—

- (a) the contract states that the fixture or fitting is not included in the contract price; and
- (b) the building owner places her, his or its signature or seal next to the statement.
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**PART 3—PROVISIONS THAT ONLY APPLY TO MAJOR
DOMESTIC BUILDING CONTRACTS**

**Division 1—Provisions That Apply Before a Contract Is
Signed**

**29. Builder must not enter into a contract unless
registered**

A builder must not enter into a major domestic building contract unless—

- (a) the builder is registered as a builder under the **Building Act 1993**, in the case of a natural person; or
- (b) in the case of a builder which is a partnership, at least one of the partners is registered as a builder under that Act; or
- (c) in the case of a builder which is a corporation, at least one of the directors is registered as a builder under that Act; or
- (d) in the case of a builder who is exempt under the **Building Act 1993** from the requirement to be registered, the domestic building work to be carried out under the contract is to be carried out by a builder who is registered as a builder under the **Building Act 1993**.

Penalty: 100 penalty units.

**30. Builder must obtain information concerning
foundations**

- (1) This section applies if proposed domestic building work under a major domestic building contract will require the construction or alteration of the footings of a building, or may adversely affect the footings of a building.

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- (2) Before entering into the contract, the builder must obtain foundations data in relation to the building site on which the work is to be carried out.

Penalty: 50 penalty units.

- (3) In this section "**foundations data**" means—
- (a) the information concerning the building site that a builder exercising reasonable care and skill would need to prepare—
 - (i) a proper footings design for the site; and
 - (ii) an adequate estimate of the cost of constructing those footings; and
 - (b) any reports, surveys, test results, plans, specifications, computations or other information required by the regulations for the purposes of this section.
- (4) In deciding whether he, she or it has obtained all the information required by sub-section (2), a builder must have regard to—
- (a) the relevant standards published by Standards Australia¹⁰; and
 - (b) the need for a drainage plan or engineer's drawings and computations; and
 - (c) the need for information on the fall of the land on the site.
- (5) It is not necessary for a builder to commission the preparation of foundations data under this section to the extent that such data already exists and it is reasonable for the builder to rely on that data.

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- (6) A builder must give a copy of any foundations data obtained by the builder to the building owner (unless the building owner supplied the data to the builder) on payment by the building owner of the amount owing in relation to the obtaining of that data by the builder.

Penalty: 10 penalty units.

- (7) After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section.
- (8) Nothing in this section prevents a builder from exercising any right given by this Act to the builder to claim an amount of money not already provided for in the contract if the need for the additional amount could not reasonably have been ascertained from the foundations data required by this section.

Division 2—What Contracts Must, and Must Not, Contain

31. General contents etc. of a contract

- (1) A builder must not enter into a major domestic building contract unless the contract—
- (a) is in writing; and
 - (b) sets out in full all the terms of the contract; and
 - (c) has a detailed description of the work to be carried out under the contract; and
 - (d) includes the plans and specifications for the work and those plans and specifications contain enough information to enable the obtaining of a building permit; and

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- (e) states the names and addresses of the parties to the contract; and
 - (f) states the registration number (as it appears on the registration certificate under the **Building Act 1993**) of—
 - (i) the builder, in the case of a natural person; or
 - (ii) in the case of a builder which is a partnership, the partners who are registered as builders under that Act; or
 - (iii) in the case of a builder which is a corporation, the directors who are registered as builders under that Act; and
 - (iv) in the case of a builder who is exempt under the **Building Act 1993** from the requirement to be registered, the builder who is to carry out the work;
 - (g) states the date when the work is to start, or how that date is to be determined; and
 - (h) if the starting date is not yet known, states that the builder will do everything that it is reasonably possible for the builder to do to ensure that the work will start as soon as possible; and
 - (i) states the date when the work will be finished, or, if the starting date is not yet known, the number of days that will be required to finish the work once it is started¹¹; and
 - (j) states the contract price or, in the case of a cost plus contract, how the amount that the builder is to be paid is to be determined; and
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- (k) states the date the contract is made; and
 - (l) sets out details of the required insurance under the **Building Act 1993** that applies to the work to be carried out under the contract (including any details required by the Director); and
 - (m) is in English and is readily legible; and
 - (n) has a conspicuous notice in a form approved by the Director advising the building owner of the right the building owner may have to withdraw from the contract under section 34 (the 5 day cooling-off period); and
 - (o) has a separate section that defines the key words and phrases used in the contract (for example, prime cost item and provisional sum); and
 - (p) indicates whenever a defined word or phrase is used that that word or phrase is defined in the definition section; and
 - (q) sets out the warranties implied into the contract by sections 8 and 20; and
 - (r) contains a checklist in a form approved, and containing the details required, by the Director; and
 - (s) complies with any other requirements set out in the regulations.

Penalty: 50 penalty units.

- (2) A major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their authorised agents).

32. Builder must make allowance for delays in time estimates

- (1) In calculating the date when work will be finished (or how many days will be required once it is started) under section 31(1)(i), a builder must make the following allowances—
- (a) an allowance for inclement weather and the effect of inclement weather that is reasonable having regard to the time of the year when the work is likely to be carried out; and
 - (b) a reasonable allowance for weekend days, public holidays, rostered days off and other foreseeable breaks in the continuity of the work; and
 - (c) an allowance for any other delays that is reasonable having regard to the nature of the contract.

Penalty: 50 penalty units.

- (2) A builder must ensure that the contract sets out how many days have been allowed under each category of allowance listed in sub-section (1).

Penalty: 50 penalty units.

- (3) If it is not possible for a builder to adequately estimate the period of a particular likely delay for the purposes of sub-section (1)(c), the builder may comply with that sub-section with respect to that likely delay by identifying the likely cause of delay in the contract and stating in the contract that it is not possible to adequately estimate the period of the delay.

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33. Contract must contain warning if price likely to vary

- (1) This section applies to a major domestic building contract that contains a provision—
 - (a) that allows for the contract price to change; but
 - (b) that is not a cost escalation clause as defined in section 15.
- (2) A builder must not enter into such a major domestic building contract unless there is a warning that the contract price is subject to change and that warning—
 - (a) is placed next to that price; and
 - (b) is in a form approved by the Director; and
 - (c) specifies the provisions of the contract that allow for the change.

Penalty: 50 penalty units.
- (3) If a warning is not included in a contract as required by sub-section (2), any provision in the contract that enables the contract price to change only has effect to the extent that it enables the contract price to decrease.

Division 3—Cooling-Off Period After Signing a Contract

34. Building owner may end a contract within 5 days without penalty

- (1) A building owner may withdraw from a major domestic building contract at any time before the expiration of 5 clear business days after the building owner receives a copy of the signed contract.

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- (2) To do this, the building owner must within that time—
- (a) give the builder; or
 - (b) leave at the address shown as the builder's address in the contract; or
 - (c) serve on the builder in accordance with any notice or service provision in the contract—
a written notice signed by the building owner that states that the building owner withdraws from the contract.
- (3) If a building owner withdraws from a contract under this section—
- (a) the builder may retain out of any money already paid to the builder \$100 plus the cost of any other out-of-pocket expenses the builder incurred before the withdrawal with the approval of the building owner; and
 - (b) the builder must refund all other money paid to him, her or it under the contract by (or on behalf of) the building owner on or since the time the contract was made; and
 - (c) the building owner is not liable to the builder in any way for withdrawing from the contract.
- (4) A building owner cannot withdraw from a contract under this section if—
- (a) the building owner and the builder have previously entered into a major domestic building contract that is in substantially the same terms for the carrying out of work in relation to the same home or land; or
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- (b) the building owner received independent advice from an Australian legal practitioner (within the meaning of the **Legal Profession Act 2004**) concerning the contract before entering into the contract.

S. 34(4)(b)
amended by
Nos 35/1996
s. 453(Sch. 1
item 23.1),
102/1997
s. 49(Sch.
item 1),
substituted by
No. 18/2005
s. 18(Sch. 1
item 34).

35. Building owner may withdraw from a contract if cooling-off warning not given

- (1) If a major domestic building contract does not contain a notice advising the building owner of the building owner's possible rights under section 34 (as required by section 31(1)(n)), the building owner may withdraw from the contract within 7 days of becoming aware that the contract should have contained such a notice.
- (2) To do this, the building owner must—
- (a) give the builder; or
 - (b) leave at the address shown as the builder's address in the contract; or
 - (c) serve on the builder in accordance with any notice or service provision in the contract—
- a written notice signed by the building owner that states that the building owner withdraws from the contract under this section.
- (3) The Director may specify that the notice is to be given in a form approved by him or her¹². If the Director does this, the building owner must give the notice in that form.

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- (4) If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.
- (5) However, a builder may not recover under sub-section (4) more than the builder would have been entitled to recover under the contract.

Division 4—Provisions Applying After the Contract is Signed

36. Builder must give copy of other documents to building owner

- (1) The Minister may, by Order published in the Government Gazette, require builders to give anyone with whom they enter, or are about to enter, into a major domestic building contract a copy of any document relating to building work specified in the Order.
- (2) A builder must comply with any such requirement within the time specified in the Order.
Penalty: 20 penalty units.
Default penalty: 1 penalty unit for each day.
- (3) Sub-section (2) does not apply if the builder knows that the building owner already has a copy of the document.

37. Variation of plans or specifications—by builder

- (1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—
 - (a) describes the variation the builder wishes to make; and
 - (b) states why the builder wishes to make the variation; and

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- (c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
 - (d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
 - (e) states the cost of the variation and the effect it will have on the contract price.
- (2) A builder must not give effect to any variation unless—
- (a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by sub-section (1); or
 - (b) the following circumstances apply—
 - (i) a building surveyor or other authorised person under the **Building Act 1993** requires in a building notice or building order under that Act that the variation be made; and
 - (ii) the requirement arose as a result of circumstances beyond the builder's control; and
 - (iii) the builder included a copy of the building notice or building order in the notice required by sub-section (1); and
 - (iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by sub-section (1) that the building owner wishes to dispute the building notice or building order.
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- (3) A builder is not entitled to recover any money in respect of a variation unless—
- (a) the builder—
 - (i) has complied with this section; and
 - (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or
 - (b) the Tribunal is satisfied—
 - (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.
- (4) If sub-section (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.
- (5) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

38. Variation of plans or specifications—by building owner

- (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.
- (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

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- (3) In any other case, the builder must give the building owner either—
- (a) a notice that—
 - (i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
 - (ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
 - (iii) states the cost of the variation and the effect it will have on the contract price; or
 - (b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.
- (4) The builder must comply with sub-section (3) within a reasonable time of receiving a notice under sub-section (1).
- (5) A builder must not give effect to any variation asked for by a building owner unless—
- (a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by sub-section (3)(a); or
 - (b) sub-section (2) applies.
- (6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—
- (a) the builder has complied with this section; or

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- (b) the Tribunal is satisfied—
- (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.
- (7) If sub-section (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.
- (8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

39. Effect of a variation on the contract price

Unless the contrary intention appears, if the plans or specifications set out in a major domestic building contract are varied in accordance with section 37 or 38, any reference in this Act, the regulations or the contract to—

- (a) those plans or specifications is to be read as a reference to them as varied; and
- (b) the contract price is to be read as a reference to the contract price as adjusted to take account of the variation; and
- (c) the completion date, or the number of days required to finish the work, is to be read as a reference to that date, or number of days, as adjusted to take account of the variation.

40. Limits on progress payments

(1) In this section—

"base stage" means—

- (a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;
- (b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;
- (c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;
- (d) in the case of a home with a concrete floor, the stage when the floor is completed;
- (e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;

"frame stage" means the stage when a home's frame is completed and approved by a building surveyor;

"lock-up stage" means the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary);

"fixing stage" means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

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- (2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.

Penalty: 50 penalty units.

TABLE

Column 1	Column 2	Column 3
<i>Type of contract</i>	<i>Percentage of contract price</i>	<i>Stage</i>
Contract to build to lock-up stage	20%	Base stage
"	25%	Frame stage
Contract to build to fixing stage	12%	Base stage
"	18%	Frame stage
"	40%	Lock-up stage
Contract to build all stages	10%	Base stage
"	15%	Frame stage
"	35%	Lock-up stage
"	25%	Fixing stage

- (3) In the case of a major domestic building contract that is not listed in the Table, a builder must not demand or receive any amount or instalment that is not directly related to the progress of the building work being carried out under the contract.

Penalty: 50 penalty units.

- (4) Sub-sections (2) and (3) do not apply if the parties to a contract agree that it is not to apply and do so in the manner set out in the regulations.

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- (5) If a court finds proven a charge under sub-section (2) or (3) against a builder, it may order the builder to refund to the building owner some or all of the amount the building owner has paid the builder under the contract.
- (6) This power is in addition to the power the court has to impose any other penalty.
- (7) Despite section 7, this section does not apply to a contract between a builder and the Crown or a public statutory authority.

Division 5—End of the Contract

41. Ending a contract if completion time or cost blows out for unforeseeable reasons

- (1) A building owner may end a major domestic building contract if—
 - (a) either—
 - (i) the contract price rises by 15% or more after the contract was entered into; or
 - (ii) the contract has not been completed within 1½ times the period it was to have been completed by; and
 - (b) the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the contract was made.
- (2) For the purposes of sub-section (1), any increased time or cost that arises as a result of a prime cost item or a provisional sum or that is caused by a variation made under section 38 is to be ignored in calculating any price rise or increase in time.

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- (3) To end the contract, the building owner must give the builder a signed notice stating that the building owner is ending the contract under this section and giving details of why the contract is being ended.
 - (4) The Director may specify that the notice is to be given in a form approved by him or her¹³. If the Director does this, the building owner must give the notice in that form.
 - (5) If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.
 - (6) However, a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract.
 - (7) Section 39 does not apply to this section.

42. When work is to be considered to have been completed

A builder must not demand final payment under a major domestic building contract until—

- (a) the work carried out under the contract has been completed in accordance with the plans and specifications set out in the contract; and
- (b) the building owner is given either—
 - (i) a copy of the occupancy permit under the **Building Act 1993**, if the building permit for the work carried out under the contract requires the issue of an occupancy permit; or
 - (ii) in any other case, a copy of the certificate of final inspection.

Division 6—Other Matters

43. Requirements concerning display home contracts

- (1) In this section "**display home**" means a home that is made available for inspection to encourage people to enter into contracts for the construction of similar homes.
- (2) A person who makes a display home available for inspection must ensure that the following documents are prominently displayed in the display home—
 - (a) a copy of the plans and specifications used for its construction; and
 - (b) a draft copy of the major domestic building contract that the builder on whose behalf the display home is displayed would be prepared to enter to construct a similar home.

Penalty: 50 penalty units.

Default penalty: 1 penalty unit for each day.

- (3) If—
 - (a) a display home is made available for inspection by or on behalf of a builder; and
 - (b) a building owner enters into a contract with the builder for the construction of a similar home—

the builder must construct the home using the same plans and specifications and to at least the same standards of work quality and quality of materials as were used for the construction of the display home.

Penalty: 50 penalty units.

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- (4) However, sub-section (3) does not apply to the extent that the contract specifically identifies how the construction of the home will differ from that of the display home.
 - (5) This section applies to any building suitable for use as a home, regardless of whether it is being used as a home at the time it is displayed.
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Part 3A—Conciliation of Disputes

s. 43A

PART 3A—CONCILIATION OF DISPUTES

Pt 3A
(Heading and
ss 43A–43F)
inserted by
No. 36/2002
s. 3.

43A. Definitions

S. 43A
inserted by
No. 36/2002
s. 3.

In this Part—

"building owner" includes a person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out;

"domestic building dispute" does not include a dispute or claim referred to in section 54(1)(b).

43B. Making a complaint

S. 43B
inserted by
No. 36/2002
s. 3.

- (1) A building owner who is a party to a domestic building dispute may complain to the Director about any matter concerning that dispute.
- (2) The complaint must be in writing.
- (3) The Director may ask a building owner who has made a complaint to give more information about the complaint within the time fixed by the Director.
- (4) A building owner who has made a complaint must give his or her name to the Director and such other information relating to his or her identity as the Director may require.
- (5) A building owner may not make a complaint under this section in respect of a domestic building dispute if an application has been made to the Tribunal to determine the domestic building dispute.

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Part 3A—Conciliation of Disputes

s. 43C

S. 43C
inserted by
No. 36/2002
s. 3.

43C. Conciliation

(1) If a complaint is made under section 43B, the Director may refer the dispute to a domestic building dispute conciliator for conciliation if the dispute is reasonably likely to be settled.

(2) In this section—

"domestic building dispute conciliator"

means—

- (a) a person employed under Part 3 of the **Public Administration Act 2004** in the administration of this Act; or
- (b) a person or body authorised by the Director for the purposes of this section.

S. 43C(2) def.
of "domestic
building
dispute
conciliator"
amended by
No. 108/2004
s. 117(1)
(Sch. 3
item 58).

S. 43D
inserted by
No. 36/2002
s. 3.

43D. Powers of the Director to institute and defend proceedings

(1) If a building owner is involved in a domestic building dispute, the Director may, subject to this section, institute proceedings on behalf of, or defend proceedings brought against the building owner if the Director is satisfied—

- (a) that the building owner has a good cause of action or a good defence to an action relating to the dispute; and
- (b) that it is in the public interest to institute or defend proceedings on behalf of the building owner.

S. 43D(2)
substituted by
No. 30/2003
s. 84(1).

(2) The Director must not, under sub-section (1), institute or defend proceedings on behalf of a building owner unless that building owner has given consent in writing.

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Part 3A—Conciliation of Disputes

s. 43E

- (3) After consent has been given under sub-section (2), the Director may institute or continue with a proceeding or defence on behalf of a building owner even if the building owner revokes the consent.

S. 43D(3)
inserted by
No. 30/2003
s. 84(1).

43E. Proceedings and costs

S. 43E
inserted by
No. 36/2002
s. 3.

- (1) If the Director institutes or defends proceedings on behalf of a building owner under section 43D—
- (a) the Director may settle the proceedings either with or without obtaining judgment in the proceedings; and
 - (b) if a judgment is obtained in the proceedings in favour of the building owner, the Director may take such steps as are necessary to enforce the judgment; and
 - (c) subject to sub-sections (1A) and (1B), an amount (other than an amount in respect of costs) recovered in the proceedings is payable to the building owner; and
 - (d) an amount in respect of costs recovered in the proceedings is payable to the Director; and
 - (e) subject to sub-section (1A), the building owner is liable to pay an amount (not being an amount of costs) awarded against the building owner in the proceedings; and
 - (f) the Director is liable to pay the costs of or incidental to the proceedings that are payable by the building owner.

S. 43E(1)(c)
amended by
No. 30/2003
s. 84(2)(a).

S. 43E(1)(e)
amended by
No. 30/2003
s. 84(2)(b).

- (1A) If the Director institutes, defends or continues proceedings on behalf of a building owner after the building owner revokes the consent to the proceedings—

S. 43E(1A)
inserted by
No. 30/2003
s. 84(3).

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Part 3A—Conciliation of Disputes

s. 43E

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- (a) the Director must compensate the building owner for—
 - (i) any loss suffered as the result of the loss of any settlement offer made to the building owner; and
 - (ii) out-of-pocket expenses incurred by the building owner during the proceedings after the revocation of consent; and
 - (b) the Director is liable to pay any amount awarded against the building owner in the proceedings.

S. 43E(1B)
inserted by
No. 30/2003
s. 84(3).

- (1B) If the Director institutes, defends or continues proceedings on behalf of a building owner after the building owner revokes the consent to the proceedings or defence, any amount recovered in the proceedings (including any amount for costs) that exceeds the amount payable to the building owner under sub-section (1A) may be applied to the payment of the costs of and incidental to the proceedings for which the Director is liable or that are incurred by the Director in relation to the proceedings.
- (2) If, in proceedings instituted or defended on behalf of a building owner under section 43D—
 - (a) a party to the proceedings files a counterclaim; or
 - (b) the building owner is entitled to file a counterclaim—

and the counterclaim is not or would not be related to the proceedings and to the interests of the building owner in the dispute, the Director may apply to the court or the Tribunal hearing the proceedings for an order that the counterclaim not be heard in the course of those proceedings.

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Part 3A—Conciliation of Disputes

s. 43F

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- (3) If the court or the Tribunal makes an order under sub-section (2), the court or the Tribunal may make those ancillary or consequential provisions (if any) that it thinks just.

43F. Director may ask for inspector to be appointed

S. 43F
inserted by
No. 36/2002
s. 3.

- (1) The Director may ask the Commission to appoint an inspector to examine any building work or any aspect of building work that is the subject of a domestic building dispute if—
- (a) the Director considers it necessary to resolve the dispute; or
 - (b) the Director is not able to resolve the dispute by conciliation.
- (2) A request under sub-section (1) may include a request for the appointment of an inspector to examine whether or not the domestic building work performed by the builder is defective.
- (3) A request under sub-section (1) must—
- (a) be in writing; and
 - (b) be accompanied by a copy of all documents held by the Director that relate to the request.
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Domestic Building Contracts Act 1995
Act No. 91/1995

Part 4—Inspectors

s. 44

PART 4—INSPECTORS

44. Party to dispute may ask for inspector to examine building works

- (1) This section applies if a dispute arises under a domestic building contract.
- (2) Any person who is a party to a dispute may ask the Commission to appoint an inspector to examine whether or not the domestic building work performed by the builder is defective.

S. 44(2)
substituted by
No. 36/2002
s. 4.

45. Appointment of inspectors

- (1) The Commission may appoint a prescribed building practitioner (as defined in section 137B of the **Building Act 1993**) to act as an inspector for the purposes of section 43F or 44.
- (2) If a request is made under section 44, the Commission must not appoint an inspector to attend a building site unless the appropriate fee determined in accordance with the guidelines issued under Division 1 of Part 12 of the **Building Act 1993** in respect of the appointment has been paid to the Commission by the person who asks for the appointment.
- (3) A person need not be an employee of the Commission to be eligible to be appointed as an inspector.
- (4) No fee is payable in respect of the appointment of an inspector at the request of the Director under section 43F.

S. 45(1)
amended by
No. 36/2002
s. 5(1).

S. 45(2)
amended by
No. 36/2002
s. 5(2).

S. 45(4)
inserted by
No. 36/2002
s. 5(3).

46. Inspector has right to enter building site

- (1) An inspector who is appointed to examine particular building work may enter the building site at which the work is being carried out at any reasonable time and may inspect any part of the building site.
- (2) However, if the site where the work is being carried out is still being used as a residence while the work is being carried out, an inspector may only enter the building site—
 - (a) between the hours of 8 a.m. and 6 p.m.; and
 - (b) after giving the occupier of the residence at least 24 hours notice that the inspector intends to enter the building site.
- (3) Sub-section (2) does not apply if the inspector enters the building site at the invitation of the occupier.
- (4) A person must not without reasonable excuse obstruct an inspector exercising any power conferred by this section.

Penalty applying to this sub-section: 10 penalty units.

47. Inspector may conduct tests

- (1) In conducting an examination, the inspector may conduct any test described in any regulations made under the **Building Act 1993**.
- (2) If a request is made under section 44, the person who asked for the appointment of the inspector is responsible for any costs necessarily incurred as a result of the conducting of any such tests.
- (3) No costs are payable under this section if the inspector conducting the test was appointed at the request of the Director under section 43F.

S. 47(2)
amended by
No. 36/2002
s. 5(4).

S. 47(3)
inserted by
No. 36/2002
s. 5(5).

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Act No. 91/1995

Part 4—Inspectors

s. 48

48. Reporting the results of an inspection

S. 48(2)
substituted by
No. 36/2002
s. 6(1).

- (1) After conducting an examination, the inspector must report the results of the examination to the parties to the dispute.
- (2) The report must be in writing and the inspector must give a copy of the report to each party to the dispute.

S. 48(2A)
inserted by
No. 36/2002
s. 6(1).

- (2A) If an inspector has been appointed at the request of the Director under section 43F, the inspector must also give a copy of the report to the Director and the Commission.

S. 48(2B)
inserted by
No. 36/2002
s. 6(1).

- (2B) A report must contain the prescribed information (if any).

S. 48(3)
substituted by
No. 36/2002
s. 6(2).

- (3) If the inspector believes that the building work is defective, he or she must include in the report recommendations as to what should be done to rectify the defective work.
- (4) If as a result of an examination the inspector is of the opinion that there has been a failure to comply with the **Building Act 1993** (or any regulations made under that Act) with respect to any building work, the inspector must—
 - (a) state that opinion to the parties to the dispute; and
 - (b) report the breach in writing to the relevant building surveyor responsible for enforcing that Act in relation to that building work.

49. Effect of complying with an inspector's recommendations

The carrying out of the recommendations contained in an inspector's report under section 48(3) does not absolve the builder from completing the contract in accordance with the plans and specifications set out in the contract.

50. Inspector's report and evidence may be used by any party

- (1) If an inspector produces a written report under section 48, the report is evidence before the Tribunal.
 - (2) If an inspector conducts an examination under this Part, any party to the dispute may call the inspector to give evidence during any proceedings before the Tribunal.
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Domestic Building Contracts Act 1995
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Part 5—Functions of Tribunal

s. 53

Pt 5 (Heading)
substituted by
No. 52/1998
s. 38(1)(a).

Pt 5 Div. 1
(Heading and
ss 51, 52)
repealed by
No. 52/1998
s. 38(1)(b).

PART 5—FUNCTIONS OF TRIBUNAL

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Division 2—What Can the Tribunal Do?

Subdivision 1—Domestic Building Disputes

53. Settlement of building disputes

- (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
- (2) Without limiting this power, the Tribunal may do one or more of the following—
 - (a) refer a dispute to a mediator appointed by the Tribunal;
 - (b) order the payment of a sum of money—
 - (i) found to be owing by one party to another party;
 - (ii) by way of damages (including exemplary damages and damages in the nature of interest);
 - (iii) by way of restitution;
 - (ba) order the payment of a sum of money representing a part payment under a major domestic building contract if—
 - (i) the requirement in paragraph (b) of section 42 has been met but the requirement in paragraph (a) of that section has not; and

S. 53(2)(ba)
inserted by
No. 101/1998
s. 6.

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Part 5—Functions of Tribunal

s. 53

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- (ii) the Tribunal is satisfied that the work required to complete the contract (including rectifying any defects) is minor in nature and not such as would prevent the owner from occupation and quiet enjoyment of the building;
- (bb) order payment of a sum of money representing the amount of any money in dispute (including an amount on account of costs) to be paid into the Domestic Builders Fund pending the resolution of the dispute; **S. 53(2)(bb) inserted by No. 101/1998 s. 6.**
- (bc) order payment of a sum of money to be paid out of the Domestic Builders Fund representing the amount of any sum paid into the Domestic Builders Fund in accordance with an order under paragraph (bb); **S. 53(2)(bc) inserted by No. 101/1998 s. 6.**
- (c) vary any term of a domestic building contract (including the completion date, the contract price, a provisional sum or the amount to be paid for any prime cost item);
- (d) declare that a term of a domestic building contract is, or is not, void under section 132;
- (e) declare void any unjust term of a domestic building contract, or otherwise vary a domestic building contract to avoid injustice;
- (f) order the refund of any money paid under a domestic building contract or under a void domestic building contract;
- (g) order rectification of defective building work;
- (h) order completion of incomplete building work.

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Part 5—Functions of Tribunal

s. 53

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- (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** or on any lesser rate it thinks appropriate.
- (4) In determining whether a term of a contract is unjust under sub-section (2)(e), the Tribunal may have regard to—
- (a) the intelligibility of the contract generally, and of the term in particular;
 - (b) the extent to which the term, and its legal and practical effect, was accurately explained to the building owner before the term was agreed to and the extent to which the building owner understood the term and its effect;
 - (c) the relative bargaining power of the parties to the contract;
 - (d) the consequences to the parties to the contract if the term is complied with or not complied with and the relative hardship of those consequences to each party;
 - (e) whether or not it was reasonably practicable for the building owner to reject, or negotiate for a change in, the term before it was agreed to;
 - (f) the relationship of the term to the other terms of the contract;
 - (g) whether the building owner obtained independent legal or other expert advice before agreeing to the term;
 - (h) whether unfair pressure, undue influence or unfair tactics were used to obtain the building owner's consent to the contract or the term;
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s. 54

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- (i) whether at the time the term was agreed to the builder knew, or could probably have found out by asking, that the term would cause the building owner hardship;
 - (j) the conduct of the parties to the contract after the term was agreed to;
 - (k) whether the term is usually found in domestic building contracts;
 - (l) the justification for the term;
 - (m) whether the term is unconscionable, harsh or oppressive;
 - (n) any other factor the Tribunal thinks is relevant.
- (5) Despite anything to the contrary in this section, in determining whether a term of a contract is unjust, the Tribunal is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the term was agreed to.

54. What is a domestic building dispute?

- (1) A "domestic building dispute" is a dispute or claim arising—
- (a) between a building owner and—
 - (i) a builder; or
 - (ii) a building practitioner (as defined in the **Building Act 1993**); or
 - (iii) a sub-contractor; or
 - (iv) an architect—
- in relation to a domestic building contract or the carrying out of domestic building work;
or

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s. 55

- (b) between a builder and—
- (i) another builder; or
 - (ii) a building practitioner (as defined in the **Building Act 1993**); or
 - (iii) a sub-contractor; or
 - (iv) an insurer—

in relation to a domestic building contract or the carrying out of domestic building work;
or

- (c) between a building owner or a builder and—
- (i) an architect; or
 - (ii) a building practitioner registered under the **Building Act 1993** as an engineer or draftsman—

in relation to any design work carried out by the architect or building practitioner in respect of domestic building work.

- (2) For the purposes of sub-section (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury.
- (3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.

55. Who can ask the Tribunal to resolve a building dispute?

The Tribunal may only make an order to resolve a domestic building dispute on the application of—

- (a) a party to the dispute; or

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Part 5—Functions of Tribunal

s. 57

(b) the Director acting on behalf of one or more building owners who are parties to the dispute.

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S. 56
repealed by
No. 52/1998
s. 38(1)(c).

57. Tribunal to be chiefly responsible for resolving domestic building disputes

(1) This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates' Court.

(2) The Court must stay any such action on the application of a party to the action if—

S. 57(2)
amended by
No. 52/1998
s. 38(1)(d)(i).

(a) the action could be heard by the Tribunal under this Subdivision; and

(b) the Court has not heard any oral evidence concerning the dispute itself.

(3) This section does not apply to any matter dismissed by the Tribunal under section 77 of the **Victorian Civil and Administrative Tribunal Act 1998**.

S. 57(3)
amended by
No. 52/1998
s. 38(1)(d)(ii).

(4) If an action is stayed under this section, any party to the action may apply to the Tribunal for an order with respect to the dispute on which the action was based.

S. 57(4)
amended by
No. 52/1998
s. 38(1)(d)(iii).

(5) If a person applies to the Tribunal under sub-section (4) the Tribunal must notify the Court and on such notification the Court must dismiss the action.

S. 57(5)
inserted by
No. 52/1998
s. 38(2).

(6) Sub-section (5) does not apply if the Tribunal refers the matter to the Court under section 77(3) of the **Victorian Civil and Administrative Tribunal Act 1998**.

S. 57(6)
inserted by
No. 52/1998
s. 38(2).

58. Tribunal may hear dispute while contract still in operation

The Tribunal may make an order to resolve a domestic building dispute even though the domestic building contract under which the dispute arises is still in operation.

59. Tribunal may hear dispute regardless of related criminal proceedings

If a domestic building dispute involves the failure, or the alleged failure, of a builder to comply with this Act or any other Act (or any regulations made under this Act or any other Act), the Tribunal may make an order to resolve the dispute even though the builder—

- (a) has not been charged with the offence; or
- (b) has been charged with the offence, but has not had the charge heard; or
- (c) has had the charge heard, but was not convicted of committing the offence; or
- (d) has had the charge heard and was convicted of committing the offence; or
- (e) has been sentenced in relation to the offence;
or
- (f) is the subject of pending disciplinary action;
or
- (g) may be, or has been, subject to disciplinary action.

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s. 59A

***Subdivision 2—Disputes involving insurance claims and
insurers' decisions.***

Pt 5 Div. 2
Subdiv. 2
(Heading)
substituted by
No. 52/1998
s. 38(3).

59A. Disputes concerning insurance claims

S. 59A
inserted by
No. 52/1998
s. 39.

- (1) The Tribunal has jurisdiction to hear and determine any dispute concerning an insurance claim concerning domestic building work or an insurer's decision on such a claim.
- (2) The Tribunal may make any order it considers fair to resolve a dispute referred to in sub-section (1).
- (3) The Tribunal may hear and determine a dispute under this section on the application of—
 - (a) a party to the dispute; or
 - (b) the Director acting on behalf of one or more building owners who are parties to the dispute.

60. Tribunal may review and change an insurer's decision

S. 60(1)
amended by
No. 26/2001
s. 16(2).

- (1) The Tribunal may review any decision of an insurer with respect to anything arising from any required insurance under the **Building Act 1993** that a builder is covered by in relation to domestic building work or from a guarantee under the **House Contracts Guarantee Act 1987** or from an indemnity under Part 6 of the **House Contracts Guarantee Act 1987**.
- (2) Despite sub-section (1), the Tribunal does not have any power to review a decision of an insurer—
 - (a) to refuse to insure, or to refuse to renew or extend the insurance of, a builder; or

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s. 61

(b) concerning premiums or charges to be paid for any insurance or the conditions under which any insurance will be offered, renewed or extended.

(3) After conducting a review, the Tribunal may confirm, annul, vary or reverse the decision, and may make any order necessary to give effect to its decision.

61. Who can ask the Tribunal to review an insurer's decision?

S. 61(1)
amended by
Nos 52/1998
s. 40(a),
26/2001
s. 16(3).

(1) Any person whose interests are affected by a decision of an insurer with respect to anything arising from any required insurance under the **Building Act 1993** that covers a builder in relation to domestic building work or from a guarantee under the **House Contracts Guarantee Act 1987** or from an indemnity under Part 6 of the **House Contracts Guarantee Act 1987** may apply to the Tribunal for a review of the decision.

S. 61(2)
amended by
No. 52/1998
s. 40(b).

(2) If the decision contains a direction that must be complied with within 27 days of the date the person receives notice of the decision, the application must be made before the date the decision must be complied with.

S. 61(3)
amended by
No. 52/1998
s. 40(b).

(3) In all other cases, the application must be made within 28 days of the date the person receives notice of the decision.

62. Tribunal may make decision if an insurer fails to make it in time

S. 62
amended by
Nos 52/1998
s. 40(c),
26/2001
s. 16(4).

The Tribunal may decide any claim made by a building owner with respect to any insurance or guarantee or indemnity referred to in section 60 if the insurer fails or refuses to decide the claim within a reasonable time of the claim being made and the building owner applies to the Tribunal to decide the claim.

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Part 5—Functions of Tribunal

s. 68

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S. 63
repealed by
No. 52/1998
s. 40(d).

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Pt 5 Div. 2
Subdiv. 3
(Heading and
ss 64–67)
repealed by
No. 52/1998
s. 40(e).

Subdivision 4—Miscellaneous matters

68. Exemptions from owner-builder restrictions on sale

- (1) A person may apply to the Tribunal to have a building exempted from the operation of section 137B of the **Building Act 1993**.
- (2) The Tribunal may exempt a building from the operation of section 137B of the **Building Act 1993** if it is satisfied that—
 - (a) there are exceptional circumstances; or
 - (b) full compliance with section 137B is impossible or would cause undue hardship.
- (3) In granting an exemption the Tribunal may impose any conditions it considers appropriate.

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Pt 5 Div. 3
(Heading and
ss 69, 70)
repealed by
No. 52/1998
s. 40(f).

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Pt 5 Div. 4
(Heading and
ss 71–86)
amended by
No. 35/1996
s. 453(Sch. 1
item 23.2),
repealed by
No. 52/1998
s. 40(f).

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s. 87

Pt 5 Divs. 5, 6 (Headings and ss 87–106) repealed by No. 52/1998 s. 40(f).	*	*	*	*	*
Pt 5 Div. 7 (Heading and ss 107–110) amended by No. 2/1996 s. 4(1)(2), repealed by No. 52/1998 s. 40(f).	*	*	*	*	*
Pt 5 Div. 8 (Heading and ss 111, 112) repealed by No. 52/1998 s. 40(f).	*	*	*	*	*
Pt 5 Div. 9 (Heading and ss 113–121) amended by No. 46/1998 s. 7(Sch. 1), repealed by No. 52/1998 s. 40(f).	*	*	*	*	*

PART 6—GENERAL

122. Publication of directions

The Director must publish in the Government Gazette—

- (a) any details which the Director requires under this Act to be provided in a domestic building contract; and
- (b) the approved form of any document or provision which is required under this Act to be in a form approved by the Director.

123. Additional functions of the Director

The Director may—

- (a) provide information and advice concerning the operation of this Act and other matters of relevance to builders and building owners in any manner the Director considers appropriate; and
- (b) prepare and publish suggested domestic building contracts, or terms suitable for inclusion in domestic building contracts.

123A. Director may provide information to the Commission

The Director may provide the Commission with any information held by the Director in relation to a domestic building dispute if the Director considers that the provision of the information will assist in the resolution of the dispute.

S. 123A
inserted by
No. 36/2002
s. 7.

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Part 6—General

s. 124

124. Domestic Builders Fund

(1) The Director must establish a fund to be called the Domestic Builders Fund.

(2) There must be paid into the Fund—

S. 124(2)(a)
amended by
No. 52/1998
s. 41(a).

(a) all fees received or recovered by or on behalf of the Tribunal in respect of proceedings under this Act; and

(b) all fines and penalties recovered under this Act; and

(c) all money paid out of the domestic building account in the Building Administration Fund under section 200(7)(ba) of the **Building Act 1993**; and

S. 124(2)(ca)
inserted by
No. 36/2002
s. 8.

(ca) all money paid to the Fund out of the domestic building dispute account in the Building Administration Fund under section 200(7E) of the **Building Act 1993**; and

(d) money appropriated by Parliament for the purposes of the Fund; and

S. 124(2)(da)
inserted by
No. 101/1998
s. 7(a).

(da) money ordered by the Tribunal to be paid into the Fund; and

(e) all other money authorised to be paid to the Fund by any body or person; and

(f) income from the investment of the Fund.

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Part 6—General

s. 124A

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- (3) There may be paid out of the Fund—
- (a) the costs and expenses incurred in the administration and enforcement of this Act and the regulations; and
 - (b) the costs and expenses of the Tribunal in respect of proceedings under this Act; and
 - (ba) money ordered by the Tribunal to be paid out of the Fund; and
 - (c) the costs and expenses incurred by the Director in carrying out his or her functions under this Act; and
 - (d) amounts determined by the Director for the purpose of providing education programs and advice to building owners and builders in relation to the carrying out of domestic building work and the operation of this Act.
- (4) The Director may invest any part of the Fund not immediately required for the purposes of the Fund in any manner approved by the Treasurer.

S. 124(3)(b) substituted by No. 52/1998 s. 41(b)

S. 124(3)(ba) inserted by No. 101/1998 s. 7(b).

124A. Application of provisions of Fair Trading Act 1999

- (1) Part 10 of the **Fair Trading Act 1999** (except sections 120 and 121) extends and applies (with any necessary modifications) to this Act as if any reference in that Part to the **Fair Trading Act 1999** were a reference to this Act.
- (2) Sections 106HA, 143 and 144 and Division 2 of Part 11 (except sections 151A, 151B, 151C, 153 and 155) of the **Fair Trading Act 1999** extend and apply (with any necessary modifications) to this Act as if any reference in those provisions to the **Fair Trading Act 1999** were a reference to this Act.

S. 124A inserted by No. 17/1999 s. 31, amended by No. 103/2004 s. 81(1) (ILA s. 39B(1)).

S. 124A(2) inserted by No. 103/2004 s. 81(1).

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Part 6—General

s. 125

S. 124A(3)
inserted by
No. 103/2004
s. 81(1).

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- (3) For the purposes of sub-section (2), section 154 of the **Fair Trading Act 1999** applies as if a reference to prescribed proceedings were a reference to—
- (a) proceedings for an offence against a provision of this Act (except an offence applied by sub-section (1)); or
 - (b) proceedings on an application for an injunction under section 149, 149A or 150 of the **Fair Trading Act 1999** (as applied by sub-section (2)) against a person alleged to have contravened a provision of this Act (except an offence applied by sub-section (1)); or
 - (c) proceedings on an application for an order under section 158, or for damages under section 159, of the **Fair Trading Act 1999** (as applied by sub-section (2)).

125. Infringement notice

S. 125(1)
amended by
No. 17/1999
s. 30(2)(a).

- (1) An inspector appointed under the **Fair Trading Act 1999** may serve an infringement notice on any person that the inspector has reason to believe has committed an offence listed in column 1 of Schedule 2.

S. 125(2)
substituted by
No. 32/2006
s. 94(Sch.
item 10(1)).

- (2) An offence referred to in sub-section (1) for which an infringement notice may be served is an infringement offence within the meaning of the **Infringements Act 2006**.

S. 125(3)
inserted by
No. 32/2006
s. 94(Sch.
item 10(1)).

- (3) For the purposes of sub-section (1), an infringement notice must be in the form required by the **Infringements Act 2006** and may contain any additional information approved by the Director.

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Part 6—General

s. 127

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- (4) The infringement penalty for an offence referred to in sub-section (1) is the penalty specified in column 2 of Schedule 2 in relation to that offence.

S. 125(4)
inserted by
No. 32/2006
s. 94(Sch.
item 10(1)).

* * * * *

S. 126
repealed by
No. 32/2006
s. 94(Sch.
item 10(2)).

127. Further proceedings concerning infringement notices

* * * * *

S. 127(1)
repealed by
No. 32/2006
s. 94(Sch.
item 10(2)).

- (2) If proceedings are taken against a person in respect of an offence for which an infringement notice was served on the person and a court finds the person guilty of the offence, the finding is not to be taken as a conviction for any purpose except—
- (a) the making of the finding itself; and
 - (b) any later proceedings that may be taken in respect of the finding itself (including proceedings by way of appeal or review).
- (3) Sub-section (2) does not apply to proceedings taken after the withdrawal of an infringement notice.

128. Continuing offences—default penalty

- (1) If a person is convicted of an offence against this Act in respect of which a default penalty is provided, or is served with an infringement notice in relation to such an offence, the person is guilty of a further offence in respect of each day the offence continues after the conviction or service of the notice and is liable to be fined up to the amount specified as the default penalty.
- (2) If an offence in respect of which there is a default penalty is committed by failing to comply with a provision of this Act within a period of time specified in the provision, for the purposes of this section the offence is deemed to continue even though that period of time has elapsed.
- (3) Sub-section (1) does not apply if, owing to a circumstance such as the loss of a document needed to comply with this Act, it is not possible for a person to comply with the provision in respect of which the offence was committed.
- (4) Sub-section (1) also does not apply if—
 - (a) an infringement notice is served; and
 - (b) one of the following occurs—
 - (i) the infringement notice is withdrawn and no further proceedings are taken; or
 - (ii) the offence in respect of which the infringement notice was issued is tried before a court and the court does not find the offence proven.

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s. 130

- (5) If an infringement notice may be served in respect of an offence in respect of which there is a default penalty, it may also be served in respect of the continuing offence if an infringement notice default penalty is listed in column 2 of Schedule 2 with respect to the offence.
- (6) If an infringement notice may be served with respect to a continuing offence—
- (a) there is no limit to the number of infringement notices that may be served with respect to the offence; and
 - (b) an infringement notice may be served with respect to a period of more than 1 day.
- (7) This section applies despite anything to the contrary in the **Infringements Act 2006**.

S. 128(7)
inserted by
No. 32/2006
s. 94(Sch.
item 10(3)).

* * * * *

S. 129
repealed by
No. 103/2004
s. 81(2).

130. Offences by partners

If this Act or a regulation made under this Act provides that a builder is guilty of an offence, that reference to a builder must be read as a reference to each member of a partnership if the builder is a partnership.

131. Time limit for criminal proceedings

Despite anything to the contrary in any Act, proceedings for an offence against this Act may be started within 3 years after the commission of the alleged offence.

132. Contracting out of this Act prohibited

- (1) Subject to any contrary intention set out in this Act—
 - (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
 - (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.
- (2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act.

133. Effect of failure to comply with a requirement of this Act

A failure by a builder to comply with any requirement in this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable, unless the contrary intention appears in this Act.

S. 134
substituted by
No. 52/1998
s. 42.

134. Supreme Court—limitation of jurisdiction

It is the intention of section 57, as amended by section 38 of the **Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998**, to alter or vary section 85 of the **Constitution Act 1975**.

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Part 6—General

s. 135

135. Regulations

(1) The Governor in Council may make regulations for or with respect to—

* * * * *

S. 135(1)(a)
repealed by
No. 52/1998
s. 43.

(aa) the exemption of persons or bodies or classes of persons or bodies, or buildings or classes of buildings, or contracts or classes of contracts, from all or any of the provisions of this Act or the regulations in any circumstances and subject to any conditions provided for in the regulations or determined by the Minister;

S. 135(1)(aa)
inserted by
No. 2/1996
s. 5.

(b) generally prescribing any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

(2) The regulations—

(a) may be of general or limited application; and

(b) may differ according to differences in time, place or circumstance.

* * * * *

Pt 7
(Heading and
ss 136–156)
repealed by
No. 74/2000
s. 3(Sch. 1
item 37.3).

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Act No. 91/1995

Part 8—Amendment of House Contracts Guarantee Act 1987

s. 157

**PART 8—AMENDMENT OF HOUSE CONTRACTS
GUARANTEE ACT 1987**

157. Definitions

In section 3(1) of the **House Contracts Guarantee Act 1987**—

(a) for the definition of "recognised person" **substitute**—

' **"recognised person"** means—

- (a) a person or body recognised by the Minister by order made under section 28 as in force immediately before the commencement of section 166 of the **Domestic Building Contracts and Tribunal Act 1995**; or
- (b) an architect registered under the **Architects Act 1991**; or
- (c) a building surveyor or engineer registered under Part 11 of the **Building Act 1993**;

(b) after the definition of "supervisor" **insert**—

' **"Tribunal"** means the Domestic Building Tribunal established under the **Domestic Building Contracts and Tribunal Act 1995**.'

158. Application of Act

In section 4 of the **House Contracts Guarantee Act 1987**—

(a) for "This Act" **substitute** "(1) This Act";

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s. 158

(b) at the end of that section **insert**—

"(2) This Act does not apply to—

- (a) work performed under a domestic building work contract that was entered into on or after the commencement of section 158 of the **Domestic Building Contracts and Tribunal Act 1995**; or
- (b) a domestic building work contract that was entered into on or after that commencement; or
- (c) work performed under a supervision contract that was entered into on or after that commencement; or
- (d) a supervision contract that was entered into on or after that commencement.

(3) Part 2 does not apply to the work of constructing a dwelling-house if that dwelling-house was first sold under a contract that was entered into on or after the commencement of section 158 of the **Domestic Building Contracts and Tribunal Act 1995** unless—

- (a) a guarantee had been given under that Part; or
- (b) a conditional certificate of guarantee had been issued under section 6(3); or
- (c) a certificate had been issued under section 25(3)(d)—

in respect of that dwelling-house before that commencement."

159. Complaints and claims

In section 13(6) of the **House Contracts Guarantee Act 1987**, for "appeals committee established by it under its rules and that committee" **substitute** "the Tribunal and the Tribunal".

160. Appeals

- (1) In section 16(1) of the **House Contracts Guarantee Act 1987**, for "60 days after the decision is made and on payment to the approved guarantor of the prescribed fee (if any), appeal to the appeals committee established by the approved guarantor under its rules" **substitute** "28 days after receiving notice from the approved guarantor of the decision, appeal to the Tribunal".
- (2) In section 16(2) of the **House Contracts Guarantee Act 1987**, for "reject" **substitute** "accept liability for".
- (3) For sections 16(4), (5), (6), (7) and (8) of the **House Contracts Guarantee Act 1987** **substitute—**
 - "(4) The approved guarantor may make an offer in respect of a claim if it has decided to accept the claim, whether or not a builder has appealed under sub-section (1)(ba) or (c) or a supervisor has appealed under sub-section (1)(f) in respect of the decision.
 - (5) An appeal by a builder under sub-section (1)(ba) or (c) or by a supervisor under sub-section (1)(f) is not affected by the making of an offer or any payment made by the approved guarantor in respect of the claim which is the subject of the appeal.

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s. 161

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- (6) If the Tribunal upholds an appeal by a builder under sub-section (1)(ba) or (c) or a supervisor under sub-section (1)(f), the approved guarantor—
- (a) is not entitled to recover any amount paid to the claimant under sub-section (4); and
 - (b) despite anything to the contrary in this Act or any document or instrument, is not entitled to recover from the builder or supervisor any amount paid to the claimant under sub-section (4) which exceeds the liability in respect of the claim determined on that appeal.
- (7) If a builder or supervisor appeals to the Tribunal under sub-section (1), the claimant is a party to the appeal.
- (8) If a claimant appeals to the Tribunal under sub-section (1), the builder or supervisor concerned is a party to the appeal."

161. Discretionary payments

Section 17(2)(a) of the **House Contracts Guarantee Act 1987** is repealed.

162. New section 17A inserted

After section 17 of the **House Contracts Guarantee Act 1987** insert—

"17A. Application of payments

- (1) If a claim relates to a failure to complete building work or a defect in building work and that claim is accepted by the approved guarantor or upheld on appeal, any payment made by the approved guarantor in respect of that claim may be made on condition that it is applied for the purpose of completion of that work or rectification of that defect.

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s. 163

- (2) The approved guarantor need not impose a condition under sub-section (1) if it considers that it is unreasonable or impracticable to apply the payments for that purpose.
- (3) The approved guarantor may make a payment which is subject to a condition imposed under sub-section (1)—
 - (a) to or at the direction of the claimant, if the claimant gives an undertaking to apply the payment for the purpose for which it is made; or
 - (b) to any person carrying out the building work in respect of which the payment is made.
- (4) If the claimant is dissatisfied with a decision of the approved guarantor to make a payment in accordance with sub-section (3)(b), the claimant may, within 28 days after receiving notice from the approved guarantor of the decision, appeal to the Tribunal against the decision."

163. New section 21A inserted

After section 21 of the **House Contracts Guarantee Act 1987** insert—

"21A. Arbitration provisions

- (1) If a provision of domestic building work contract requires any dispute to be referred to arbitration, that provision shall on and from the commencement of section 163 of the **Domestic Building Contracts and Tribunal Act 1995** be deemed to be a requirement to refer the matter for determination by the Tribunal.

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s. 164

- (2) Sub-section (1) applies despite anything to the contrary in the domestic building work contract.
- (3) Despite sub-section (1), if a dispute under a domestic building work contract had been referred to arbitration before the commencement of section 163 of the **Domestic Building Contracts and Tribunal Act 1995** and had not been determined before that commencement the arbitration may be continued and completed as if that section had not been enacted."

164. Approved guarantor

- (1) In section 22 of the **House Contracts Guarantee Act 1987**—
 - (a) in sub-section (1)(a)(i), for "7" **substitute** "not less than 5 and not more than 7";
 - (b) in sub-section (1)(a)(ii), for "one director is" **substitute** "two directors are";
 - (c) after sub-section (1)(a)(v) **insert**—

"(vi) up to 2 directors may be appointed by the Minister on the recommendation of the chairman of the meetings of directors; and".
- (2) In section 22 of the **House Contracts Guarantee Act 1987**—
 - (a) sub-sections (1)(f) and (g) are **repealed**;
 - (b) in sub-section (2)(a), **omit** "or (1)(f)".

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s. 164

(3) After section 22(1) of the **House Contracts Guarantee Act 1987** insert—

"(1A) The memorandum of association of Housing Guarantee Fund Limited is deemed to include the following clauses—

- A. To make funds available out of the net assets of Housing Guarantee Fund Limited at the direction of the Minister administering the **House Contracts Guarantee Act 1987** under section 22A of that Act for payment to the Domestic Builders Fund established under the **Domestic Building Contracts and Tribunal Act 1995**.
- B. If on the winding up or dissolution of Housing Guarantee Fund Limited there remain any assets of Housing Guarantee Fund Limited after satisfaction of all its debts and liabilities, those remaining assets shall be paid to the Domestic Builders Fund established under the **Domestic Building Contracts and Tribunal Act 1995**.
- C. No changes may be made to this memorandum without the prior approval of the Minister administering the **House Contracts Guarantee Act 1987**.
- D. Clauses A, B and C inserted in this memorandum by section 164 of the **Domestic Building Contracts and Tribunal Act 1995** apply despite anything to the contrary in the memorandum existing immediately before the commencement of that section."

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s. 165

(4) After section 22(5) of the **House Contracts Guarantee Act 1987** insert—

"(6) As from the date of commencement of section 164(1) of the **Domestic Building Contracts and Tribunal Act 1995** the articles of association of the approved guarantor are deemed to have effect as if they complied with sub-section (1)(a) as amended by that section."

165. New section 22A inserted

After section 22 of the **House Contracts Guarantee Act 1987** insert—

"22A. Administration of approved guarantor

- (1) The approved guarantor must administer its affairs for the purpose of—
 - (a) administering claims made to the approved guarantor under this Act; and
 - (b) winding up Housing Guarantee Fund Limited as soon as practicable on completion of all claims after the expiration of all guarantees given under this Act.
- (2) The approved guarantor may engage any consultants necessary to administer all or any part of its affairs.
- (3) The approved guarantor must not—
 - (a) enter into a contract of sale, agreement or understanding for the sale of any part of the assets of Housing Guarantee Fund Limited; or
 - (b) appoint a new director of Housing Guarantee Fund Limited—without the prior approval of the Minister.

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s. 165

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- (4) An approval under sub-section (3) may be granted subject to such terms and conditions as the Minister thinks fit.
 - (5) Subject to sub-section (6), the approved guarantor must not apply any of its funds for the purpose of meeting claims of any person (including any administrative and other costs associated with a claim) other than a person claiming in respect of a guarantee given under this Act.
 - (6) The Minister, with the approval of the approved guarantor and after consulting with the auditors of the approved guarantor, may, from time to time, direct the approved guarantor to pay a specified amount or specified amounts out of its net assets to the Domestic Builders Fund established under the **Domestic Building Contracts and Tribunal Act 1995**.
 - (7) If the Treasurer is satisfied that the funds of the approved guarantor are at any time insufficient to meet the claims on the guarantees given under this Act, there shall be paid out of the Consolidated Fund (which is hereby to the necessary extent appropriated accordingly) to the approved guarantor an amount or amounts necessary to meet the deficiency.
 - (8) The total amount paid out of the Consolidated Fund under this section must not exceed the total amount paid by the approved guarantor under this section to the Domestic Builders Fund.

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- (9) For the purposes of this section the approved guarantor's funds include—
- (a) funds set aside before the commencement of section 165 of the **Domestic Building Contracts and Tribunal Act 1995** for the purpose of meeting claims in respect of guarantees given under this Act; and
 - (b) any other net assets and reserves of the approved guarantor.
- (10) If any provision of this section is not complied with during any period during which Housing Guarantee Fund Limited purports to perform the functions of the approved guarantor, that non-compliance does not affect—
- (a) the liability of Housing Guarantee Fund Limited under a guarantee given under this Act during that period; or
 - (b) the liability of a builder or supervisor to any person, including Housing Guarantee Fund Limited."

166. Repeal of section 28

Section 28 of the **House Contracts Guarantee Act 1987** is repealed.

167. New section 32A inserted

After section 32 of the **House Contracts Guarantee Act 1987** insert—

"32A. Person cannot sign away right to take advantage of a guarantee

A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings in respect of a building defect to which a guarantee under

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s. 168

this Act applies is void to the extent that it applies to a defect other than a defect that was known or ought reasonably to have been known to the person to exist at the time the agreement or instrument was executed."

168. Appeals—Transitional

Despite the amendment of the **House Contracts Guarantee Act 1987** by this Part—

- (a) an appeals committee established by the approved guarantor under its rules may continue to hear any appeal commenced to be heard by the committee but not completed before the commencement of this section and that Act continues to apply to those appeals as if those amendments had not been made; and
- (b) the Victorian Civil and Administrative Tribunal may review—
 - (i) any decision in respect of which an application for review was made and not determined under that Act before the commencement of this section; or
 - (ii) any decision made on an appeal to which paragraph (a) applies—

and that Act continues to apply to those reviews and applications for review as if those amendments had not been made.

S. 168(b)
amended by
No. 52/1998
s. 44.

Pt 9 (Heading
and s. 169)
repealed by
No. 17/1999
s. 30(2)(b).

* * * * *

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Sch. 1

SCHEDULES

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Sch. 1
amended by
No. 46/1998
s. 7(Sch. 1),
repealed by
No. 52/1998
s. 45.

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Sch. 2

SCHEDULE 2

**OFFENCES FOR WHICH INFRINGEMENT NOTICES MAY BE
SERVED**

<i>Column 1</i> <i>Offences under section—</i>	<i>Column 2</i> <i>Infringement notice penalty</i>
12(2)	10 penalty units
22	25 penalty units
23	10 penalty units
25	10 penalty units ½ penalty unit per day (default)
26(1)	10 penalty units
29	50 penalty units
31	25 penalty units
32(1)	25 penalty units
36(2)	10 penalty units ½ penalty unit per day (default)
43(2)	25 penalty units ½ penalty unit per day (default)
67	25 penalty units (natural person) 2½ penalty units per day (natural person default) 50 penalty units (corporation) 5 penalty units per day (corporation default)
88(5)	12½ penalty units 2½ penalty units per day (default)
111	25 penalty units 2½ penalty units per day (default)

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Endnotes

ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 24 October 1995

Legislative Council: 15 November 1995

The long title for the Bill for this Act was "A Bill to regulate domestic building contracts and to establish a Domestic Building Disputes Tribunal and to amend the **House Contracts Guarantee Act 1987** and the **Building Act 1993** and for other purposes."

Constitution Act 1975:

Section 85(5) statement:

Legislative Assembly: 24 October 1995

Legislative Council: 15 November 1995

Absolute majorities:

Legislative Assembly: 14 November 1995

Legislative Council: 23 November 1995.

The **Domestic Building Contracts and Tribunal Act 1995** was assented to on 5 December 1995 and came into operation as follows:

Part 1 (sections 1–7) on 5 December 1995: section 2(1); section 158 on 1 May 1996: section 2(1A); Parts 4 (sections 44–50), 5 (sections 51–121), 8 (*except* section 158), Schedule 1 on 1 April 1996; rest of Act on 1 May 1996: Government Gazette 29 February 1996 page 445.

The name of this Act was changed from the **Domestic Building Contracts and Tribunal Act 1995** to the **Domestic Building Contracts Act 1995** by section 35 of the **Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998**, No. 52/1998.

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2. Table of Amendments

This Version incorporates amendments made to the **Domestic Building Contracts Act 1995** by Acts and subordinate instruments.

Domestic Building Contracts and Tribunal (Amendment) Act 1996, No. 2/1996

Assent Date: 18.6.96
Commencement Date: 18.6.96: s. 2
Current State: All of Act in operation

Legal Practice Act 1996, No. 35/1996

Assent Date: 6.11.96
Commencement Date: S. 453(Sch. 1 items 23.1, 23.2) on 1.1.97: s. 2(3)
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Legal Practice (Amendment) Act 1997, No. 102/1997

Assent Date: 16.12.97
Commencement Date: S. 49(Sch. item 1) on 16.12.97: s. 2(1)
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Residential Tenancies Act 1997, No. 109/1997

Assent Date: 23.12.97
Commencement Date: S. 533(Sch. 2 item 2.1) on 1.7.98: Government Gazette 18.6.98 p. 1512
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Public Sector Reform (Miscellaneous Amendments) Act 1998, No. 46/1998

Assent Date: 26.5.98
Commencement Date: S. 7(Sch. 1) on 1.7.98: s. 2(2)
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998, No. 52/1998

Assent Date: 2.6.98
Commencement Date: Ss 35–45 on 1.7.98: Government Gazette 18.6.98 p. 1512
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

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Licensing and Tribunal (Amendment) Act 1998, No. 101/1998

Assent Date: 1.12.98
Commencement Date: Pt 3 (ss 6, 7) on 1.2.99: Government Gazette 24.12.98
p. 3204
Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts Act**
1995

Fair Trading (Inspectors Powers and Other Amendments) Act 1999, No. 17/1999

Assent Date: 18.5.99
Commencement Date: Ss 30, 31 on 1.9.99: Government Gazette 19.8.99
p. 1901
Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts Act**
1995

Domestic Building Contracts (Amendment) Act 2000, No. 2/2000

Assent Date: 28.3.00
Commencement Date: 29.3.00: s. 2
Current State: All of Act in operation

Statute Law Revision Act 2000, No. 74/2000

Assent Date: 21.11.00
Commencement Date: S. 3(Sch. 1 item 37) on 22.11.00: s. 2(1)
Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts Act**
1995

House Contracts Guarantee (HIH) Act 2001, No. 26/2001

Assent Date: 7.6.01
Commencement Date: S. 16 on 8.6.01: s. 2(1)
Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts Act**
1995

Building (Amendment) Act 2001, No. 68/2001

Assent Date: 7.11.01
Commencement Date: S. 17 on 1.7.02: s. 2(5)
Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts Act**
1995

**Domestic Building Contracts (Conciliation and Dispute Resolution) Act 2002,
No. 36/2002**

Assent Date: 18.6.02
Commencement Date: Ss 3–8 on 1.7.02: s. 2(2)
Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts Act**
1995

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Fair Trading (Amendment) Act 2003, No. 30/2003

Assent Date: 27.5.03
Commencement Date: S. 84 on 28.5.03: s. 2(1)
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Architects (Amendment) Act 2004, No. 35/2004

Assent Date: 8.6.04
Commencement Date: S. 38 on 14.6.05: Government Gazette 5.5.05 p. 851
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Domestic Building Contracts (Amendment) Act 2004, No. 37/2004

Assent Date: 8.6.04
Commencement Date: 1.5.96: s. 2
Current State: All of Act in operation

Fair Trading (Enhanced Compliance) Act 2004, No. 103/2004

Assent Date: 21.12.04
Commencement Date: S. 81 on 22.12.04: s. 2(1)
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Public Administration Act 2004, No. 108/2004

Assent Date: 21.12.04
Commencement Date: S. 117(1)(Sch. 3 item 58) on 5.4.05: Government Gazette 31.3.05 p. 602
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

Legal Profession (Consequential Amendments) Act 2005, No. 18/2005

Assent Date: 24.5.05
Commencement Date: S. 18(Sch. 1 item 34) on 12.12.05: Government Gazette 1.12.05 p. 2781
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

House Contracts Guarantee (Amendment) Act 2005, No. 52/2005

Assent Date: 13.9.05
Commencement Date: S. 30 on 1.2.06: Government Gazette 25.1.06 p. 108
Current State: This information relates only to the provision/s amending the **Domestic Building Contracts Act 1995**

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Infringements (Consequential and Other Amendments) Act 2006, No. 32/2006

Assent Date: 13.6.06

Commencement Date: S. 94(Sch. item 10) on 1.7.06: Government Gazette
29.6.06 p. 1315

Current State: This information relates only to the provision/s
amending the **Domestic Building Contracts
Act 1995**

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Endnotes

3. Explanatory Details

¹ S. 2(1A): Section 3(2) of the **Domestic Building Contracts and Tribunal (Amendment) Act 1996**, No. 2/1996 reads as follows:

3. Correction of error in commencement

(2) The **Domestic Building Contracts and Tribunal Act 1995** is deemed to have been enacted as amended by sub-section (1).

² S. 5: As a result of the definition of "domestic building work" in section 3, this Act does not apply to anything listed in this section that is also listed in section 6.

³ S. 6(e): Although such design work is not domestic building work for the purposes of this Act, as a result of paragraph (c) of the definition of "domestic building dispute" in section 54, disputes concerning such design work may be dealt with by the Tribunal.

⁴ Pt 2 Div. 1: A warranty is a term of a contract that enables a person to seek compensation from the person who does not comply with the warranty for any loss that results from the failure to comply with the warranty. (Please note that this is not intended as an exhaustive definition.)

⁵ S. 8(c): Examples of laws that this provision applies to include the Building Regulations 1994 made under the **Building Act 1993** which in turn incorporate most of the Building Code of Australia which in turn incorporates a number of Australian Standards.

⁶ S. 9: Section 134 of the **Building Act 1993** imposes a 10 year limit on the bringing of building actions. It will apply to actions brought under section 9. The 10 years begins to run from the date the occupancy permit is issued. If no occupancy permit is issued, the 10 years runs from the date the certificate of final inspection is issued.

⁷ S. 15(1)(a): Section 33 imposes requirements on provisions such as those referred to in this paragraph if the provisions are in major domestic building contracts.

⁸ S. 20: See note 4.

⁹ S. 21(3)(b): The failure of a builder to comply with this section gives the building owner a right to apply to the tribunal under section 53(2)(c) for a reduction in the amount asked for a prime cost item or provisional sum.

¹⁰ S. 30(4)(a): Examples of relevant standards include AS 1726—1993 and AS 2870—1995.

¹¹ S. 31(1)(i): Section 32 imposes requirements on how these estimates are to be made.

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¹² S. 35(3): Section 122 requires the Director to publish in the Government Gazette the form of any such notice.

¹³ S. 41(4): See note 12.