



Western Australia

## **Home Building Contracts Act 1991**

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# Home Building Contracts Act 1991

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## CONTENTS

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### **Part 1 — Preliminary**

1.	Short title	2
2.	Commencement	2
3.	Interpretation	2

### **Part 2 — Home building work contracts**

4.	Contracts to be in writing and statutory notice to be given	5
5.	Owner to be given copy of contract	5
6.	Proof of receipt of documents	6
7.	Variation of contract	6
8.	Exceptions to section 7 and related provisions	7
9.	Implied conditions as to necessary approvals	8
10.	Deposits and progress payments	10
11.	Minimum defects liability period	11
12.	Understatement of prime cost items etc.	12
13.	Rise-and-fall clause prohibited	13
14.	Cost plus contracts	14
15.	Conduct or terms of contract that are unconscionable etc.	14
15A.	Misleading or deceptive conduct	16

### **Part 3 — Remedies**

16.	Disputes Tribunal's jurisdiction limited	17
17.	Applications for relief, and orders	17
18.	Orders for payment while case pending	19

Contents

---

19.	How contract terminated	20
20.	Adjustment of rights in certain cases	20
21.	Remedy for breach of section 15	21
22.	Avoidance of concurrent proceedings	22
23.	Transfer of proceedings	22
24.	Settlement	23
 <b>Part 3A — Home indemnity insurance and corresponding cover</b>		
<b>Division 1 — Introduction</b>		
25A.	Interpretation	24
<b>Division 2 — Builders</b>		
25B.	Application of this Division	27
25C.	Offence if no insurance or no corresponding cover	28
25D.	Requirements of insurance policy	29
25DA.	Corresponding cover by an approved fund — builders	31
<b>Division 3 — Owner-builders</b>		
25E.	Application of this Division	32
25F.	Restriction on sale by owner-builder	32
25FA.	Further restrictions on sale by certain owner-builders	33
25G.	Requirements of insurance policy	33
25GA.	Corresponding cover by an approved fund — owner-builders	35
<b>Division 3A — Approved funds</b>		
25GB.	Minister's approval of a fund	35
25GC.	Minister's consent to changes to an approved fund	36
25GD.	Revocation of Minister's approval of a fund	36
<b>Division 4 — Review</b>		
25H.	Review of insurance scheme	37
<b>Division 5 — Provisions about non-application of sections 25C(1) and (2) and 25F(1)</b>		
25I.	Minister may make orders specifying periods	37
25J.	Notice requirements — builders	38
25K.	Notice requirements — owner-builders	39

25L.	Giving a copy of the notice to a subsequent purchaser	39
<b>Part 4 — General</b>		
26.	Access for inspection of building work	41
27.	Effect of breach of Act on contract	41
28.	Contracting out forbidden	42
29.	Saving	42
30.	Liability of directors etc.	42
31.	Prosecutions	42
31A.	Penalties and costs	43
31B.	Infringement notices	43
32.	Regulations	45
33.	Application not retrospective	46
34.	Review of Act	46
<b>Schedule 1 — Consequences of non fulfilment of conditions</b>		
1.	Failure by builder	47
2.	Failure by owner	47
3.	Failure by builder and owner	47
4.	Rights of builder and owner	47
5.	Right of review	48
<b>Notes</b>		
	Compilation table	49
	Provisions that have not come into operation	51



Western Australia

## **Home Building Contracts Act 1991**

**An Act for the regulation of contracts between consumers and builders for the performance of certain home building work, to make provision for home indemnity insurance and funds providing corresponding cover, and for connected purposes.**

*[Long title amended by No. 72 of 1996 s. 4; No. 37 of 2002 s. 4; No. 59 of 2004 s. 141.]*

## **Part 1 — Preliminary**

### **1. Short title**

This Act may be cited as the *Home Building Contracts Act 1991*<sup>1</sup>.

### **2. Commencement**

The provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation<sup>1</sup>.

### **3. Interpretation**

(1) In this Act unless the contrary intention appears —

**associated work** includes site works, swimming pools, spas, pergolas, carports, garages, sheds, fencing, retaining walls, paving, driveways, landscaping and other like works;

**builder** means a person who carries on, or 2 or more persons who together carry on, a business which consists of or includes the performing of home building work for others;

**Builders' Registration Board** means the Builders' Registration Board constituted under the *Builders' Registration Act 1939*;

**building licence** means a building licence under section 374 of the *Local Government (Miscellaneous Provisions) Act 1960*;

**construct** in relation to a dwelling means perform any work commencing with the preparation of the site and ending with the completion of the dwelling (including any associated work) and includes —

- (a) painting where that is part of the work included in a contract; and
- (b) the provision of lighting, heating, water supply, drainage, sewerage, gas and other like services;

**contract** means a home building work contract;

**cost plus contract** means a contract under which a builder is entitled to recover an amount excluding prime cost items and



provisional sums that is not determined at the time when the contract is entered into, being an amount that includes the actual cost to be incurred in —

- (a) acquiring materials; and
- (b) performing work,

specified in the contract, together with an additional amount that comprises either —

- (c) a sum calculated as a percentage of that cost; or
- (d) a specified sum,

or both;

***date of the contract*** or ***date of the variation*** means the day on which the contract or variation was signed by the last party to sign it;

***Disputes Tribunal*** means the Building Disputes Tribunal established by section 26 of the *Builders' Registration Act 1939*;

***dwelling*** means a building occupied or intended for occupation solely or mainly as a place of residence;

***home building work*** means the whole or part of the work of —

- (a) constructing or re-constructing a dwelling including an existing dwelling and/or strata-titled dwelling;
- (b) placing a dwelling on land;
- (c) altering, improving or repairing a dwelling, including a strata-titled dwelling; or
- (d) constructing or carrying out any associated work in connection with —
  - (i) any work referred to in paragraph (a) or (b); or
  - (ii) an existing dwelling, including a strata-titled dwelling;

***home building work contract*** means a contract between a builder and an owner for the performance by the builder of home building work, but does not include —

- (a) a cost plus contract;

**s. 3**

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- (b) a contract for the performance of home building work —
  - (i) for a builder who is in turn obliged to perform the work under another contract;
  - (ii) if the amount stated in the contract as being payable under the contract for the work is \$6 000, or such other amount as is prescribed, or less; or
  - (iii) if the amount stated in the contract as being payable under the contract for the work is \$200 000, or such other amount as is prescribed, or more;

**owner** in relation to a contract means the person for whom or which home building work is to be performed under the contract;

**perform** in relation to home building work includes —

- (a) causing the work to be performed; and
- (b) organizing or arranging for the performance of the work;

**prescribed** means prescribed by regulations;

**strata-titled dwelling** means a building or part of a building, occupied or intended for occupation solely or mainly as a place of residence, that is erected on a lot in respect of which a plan is registered under the *Strata Titles Act 1985*;

**working days** means Monday to Friday but excluding in respect of home building work to be carried out in any area a day that is a public holiday in that area or throughout the State.

- (2) It is immaterial, for the purposes of the definition of “home building work contract”, that a contract between a builder and an owner for the performance of home building work also includes work that is not home building work.

*[Section 3 amended by No. 58 of 1995 s. 97; No. 76 of 2000 s. 44; No. 37 of 2002 s. 5.]*

## **Part 2 — Home building work contracts**

### **4. Contracts to be in writing and statutory notice to be given**

- (1) A contract —
  - (a) must be in writing —
    - (i) setting out all of the terms, conditions and provisions of the contract; and
    - (ii) showing the date of the contract;and
  - (b) must be signed by the builder and the owner or their respective agents.
- (2) A notice containing an explanation of the relevant provisions of this Act is to be prescribed.
- (3) The owner must be given a notice referred to in subsection (2) before the owner signs a contract.
- (4) A builder who is a party to a contract must ensure that the requirements of subsections (1) and (3) are complied with in respect of that contract.  
Penalty: \$2 000.
- (5) If any requirement of subsection (1) is not complied with by the builder the contract may be terminated by the owner in accordance with section 19.

### **5. Owner to be given copy of contract**

- (1) The owner must be given a copy of the signed contract —
  - (a) as soon as is reasonably practicable after a contract has been signed by both parties; and
  - (b) before the home building work is commenced.
- (2) A builder who is a party to a contract must ensure that the requirements of subsection (1) are complied with in respect of that contract.

**s. 6**

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Penalty: \$500.

- (3) If —
- (a) subsection (1) is not complied with by a builder in respect of a signed contract; and
  - (b) the owner in writing requests the builder to give to the owner a copy of the contract,

the builder must comply with that request within 10 working days of receiving it.

Penalty: \$10 000.

*[Section 5 amended by No. 76 of 2000 s. 45.]*

**6. Proof of receipt of documents**

A document signed by the owner acknowledging receipt of a notice referred to in section 4(2) or of a copy of a signed contract, or both, and showing the date of receipt is evidence that the notice or copy of the contract was received by the owner on that day.

**7. Variation of contract**

- (1) A variation of a contract —
- (a) must be in writing —
    - (i) setting out all of the terms of, and the cost of, the variation;
    - (ii) showing the date of the variation;and
  - (b) must be signed by the builder and the owner or their respective agents.
- (2) The owner or his agent must be given a copy of the signed variation —
- (a) as soon as is reasonably practicable after it has been signed by both parties; and

- (b) before the work to which the variation relates is commenced.
- (3) A builder who is a party to a variation of a contract must ensure that the requirements of subsections (1) and (2) are complied with in respect of that variation.  
Penalty: \$500.
- (4) This section has effect subject to sections 8 and 13(4) and clause 5 of Schedule 1.
- (5) In this section and in section 8 *contract* includes any previous variation of the contract.

**8. Exceptions to section 7 and related provisions**

- (1) Section 7(1) and (2) does not apply to a variation of a contract that is made necessary by —
  - (a) any written direction lawfully given by a building surveyor or other person acting under a written law; or
  - (b) circumstances that could not reasonably have been foreseen by the builder at the time when the contract was entered into,if the builder gives to the owner, within the time allowed by subsection (2), a statement setting out the reason for, and the cost to be incurred on account of, the variation and a copy of any direction referred to in paragraph (a).
- (2) A statement under subsection (1) must be given within 10 working days after the builder —
  - (a) received notice of the direction under paragraph (a); or
  - (b) became aware, or should reasonably have become aware, of the circumstances referred to in paragraph (b),of that subsection, as the case may be.
- (3) Where a statement is given to the owner by the builder for the purposes of paragraph (b) of subsection (1) and the owner

considers that the variation is not one to which that subsection applies the owner cannot apply for relief in that respect under section 17 unless, notwithstanding subsection (2) of that section, he or she makes the application within 10 working days after the statement was given to the owner.

- (4) Subsection (1)(b) does not enable a builder to vary a contract, except in accordance with section 7(1) and (2) or 13(4) or clause 4 of Schedule 1, by reason only of an increase in the costs of labour (including related overhead expenses) or materials, or both, to be incurred by the builder.

- (5) In subsection (1)(a) —

**building surveyor** means the employee of the local government who exercises the powers of building surveyor in the local government district.

*[Section 8 amended by No. 14 of 1996 s. 4; No. 76 of 2000 s. 46.]*

## **9. Implied conditions as to necessary approvals**

- (1) Subject to subsection (5) every contract is conditional upon —
- (a) a building licence being issued, in respect of the home building work included in the contract, within 45 working days from the date of the contract;
  - (b) where a condition is attached to the licence which will result in a variation of the contract, the owner and the builder acknowledging in writing within that period that each of them accepts that condition;
  - (c) it becoming lawful under the Water Act, within 45 working days from the date of the contract, for the home building work to be commenced; and
  - (d) where a direction is given under the Water Act by the Water Corporation (established by the *Water Corporation Act 1995*) in connection with the carrying out of the work which will result in a variation of the contract, the owner

and the builder acknowledging in writing within that period that each of them accepts that direction.

- (2) It is a term of every contract that —
- (a) the builder will —
    - (i) do all things that are reasonably necessary to be done to ensure that any condition referred to in subsection (1)(a) and (c) applicable to the contract is fulfilled; and
    - (ii) not unreasonably decline to accept a condition or direction referred to in subsection (1)(b) or (d) that applies to the contract;
  - (b) the owner will —
    - (i) do all such things as may be required to be done by the owner to ensure that any condition referred to in subsection (1)(a) and (c) applicable to the contract is fulfilled; and
    - (ii) not unreasonably decline to accept a condition or direction referred to in subsection (1)(b) or (d) that applies to the contract.
- (3) If a builder properly submits to the relevant authorities within 20 working days after the date of the contract all necessary applications required for the purpose of having conditions referred to in subsection (1)(a) and (c) fulfilled, the builder is to be taken to have complied with the builder's obligations under subsection (2)(a)(i).
- (4) If a condition implied by subsection (1) is not fulfilled the consequences to, and the rights and remedies of, the parties are as set out in Schedule 1.
- (5) A condition referred to in a paragraph of subsection (1) does not apply to a contract —
- (a) to the extent that the subject matter of the condition was completed before the contract was entered into;

**s. 10**

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- (b) where the only work to be performed under the contract is the construction or carrying out of associated work; or
  - (c) for any other prescribed home building work.
- (6) In this section *the Water Act* means the *Metropolitan Water Supply, Sewerage, and Drainage Act 1909*, the *Country Towns Sewerage Act 1948*, the *Country Areas Water Supply Act 1947* or any Act passed in substitution for those Acts or any of them and any subsidiary legislation made under any of those Acts, but does not include any provision of any such written law that requires a licensed plumber to give notice of intention to commence any work to the Water Corporation (established by the *Water Corporation Act 1995*).

*[Section 9 amended by No. 73 of 1995 s. 188; No. 14 of 1996 s. 4; No. 76 of 2000 s. 47; No. 37 of 2002 s. 6.]*

**10. Deposits and progress payments**

- (1) A builder must not enter into a contract which provides that the builder is entitled to demand or receive from the owner any payment —
- (a) before the commencement of the home building work to which the contract relates unless the payment is —
    - (i) a deposit of not more than 6.5% of the total amount payable to the builder under the contract for the home building work; or
    - (ii) of a prescribed kind;
  - (b) after the commencement of the home building work unless the payment is —
    - (i) a genuine progress payment for work already performed or materials or services already supplied; or
    - (ii) is of a prescribed kind.

Penalty: \$10 000.



- (2) Where a contract provides for the purchase by the owner of materials for a dwelling in a prefabricated form or of a dwelling that is transportable or for a similar arrangement, a payment for the materials or dwelling and associated work is a genuine progress payment for the purposes of subsection (1)(b)(i) —
- (a) if property in the materials or dwelling passes absolutely to the owner on the payment being made; and
  - (b) notwithstanding that the materials or dwelling are not placed on or affixed to the land of the owner.
- (3) Where —
- (a) a contract sets out a schedule of payments due at specified stages of the home building work; and
  - (b) a payment is demanded or required in accordance with that schedule,
- the payment is to be taken to be a genuine progress payment for the purposes of subsection (1)(b)(i) until the contrary is shown.
- (4) If a builder enters into a contract in breach of subsection (1), the contract may be terminated by the owner in accordance with section 19.
- (5) A builder under a contract must not demand or receive from the owner any payment after the commencement of the home building work unless the payment is a genuine progress payment for the purposes of subsection (1)(b)(i) or of a prescribed kind under subsection (1)(b)(ii).

Penalty: \$10 000.

*[Section 10 amended by No. 76 of 2000 s. 48.]*

## **11. Minimum defects liability period**

- (1) It is a term of every contract that the builder is liable to make good at the cost of the builder defects in the home building work notified in writing to the builder within the period of 4 months commencing on the day of practical completion.

**s. 12**

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- (1a) Nothing in subsection (1) prevents a contract from providing for a period greater than 4 months as the period within which the notification referred to in that subsection must be given.
- (2) In subsection (1) —
- defect** means a failure —
- (a) to perform the home building work in a proper and workmanlike manner and in accordance with the contract; or
  - (b) to supply materials that are of merchantable quality and reasonably fit for the purpose for which the owner required the home building work to be performed,
- not being a failure for which the builder is specifically declared by the contract to be not liable;
- practical completion** means brought to the stage where the home building work is completed except for any omissions or defects which do not prevent the home building work from being reasonably capable of being used for its intended purpose.
- (3) The regulations may provide for exemptions from the requirements of this section.

*[Section 11 amended by No. 76 of 2000 s. 49.]*

**12. Understatement of prime cost items etc.**

- (1) A builder must not enter into a contract that contains an amount or an estimated amount for a prime cost item or a provisional sum if the amount or estimated amount is misstated by being less than the least amount that it could reasonably cost to supply the item or perform the work to which the amount relates.
- Penalty: \$10 000.
- (2) In determining whether an amount is misstated for the purposes of subsection (1) regard is to be had to the matters or contingencies that were known (which may be set out on the contract), or ought reasonably to have been known, to the builder at the date of the contract.

**13. Rise-and-fall clause prohibited**

- (1) A builder must not enter into a contract that contains a rise-and-fall clause.  
Penalty: \$10 000.
- (2) A rise-and-fall clause in a contract is void.
- (3) In this section ***rise-and-fall clause*** means, subject to subsection (4), a provision under which a price stipulated for the performance of home building work may change to reflect changes in the costs of labour (including related overhead expenses) or materials, or both, to be incurred by the builder.
- (4) A provision of a contract is not within the definition in subsection (3) by reason only that it allows a builder to increase the stipulated price to reflect further costs actually imposed on or incurred by the builder —
  - (a) as a direct consequence of a written law of the State or the Commonwealth;
  - (b) on account of an increase in any tax, duty or other charge imposed under any such law after the date of the contract; or
  - (c) by reason of a delay in the commencement of home building work beyond 45 working days after the date of the contract being a delay —
    - (i) that is caused solely by the failure of the owner to comply with a condition imposed on the owner by the contract, including a condition to the effect that the owner produce satisfactory evidence of the owner's ability to pay the contract price or of the owner's title to the land on which the work is to be performed; or
    - (ii) that occurs without any failure on the part of either the owner or the builder to comply with his or her obligations under the contract.

**s. 14**

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- (5) Where subsection (4)(c) applies the consequences to, and the rights and remedies of, the parties are as set out in clauses 4 and 5 of Schedule 1.

**14. Cost plus contracts**

- (1) A builder must not enter into a cost plus contract with an owner for the performance of home building work unless the contract is in writing and the written contract —
- (a) has a heading at the beginning that includes the words “cost plus contract”; and
  - (b) contains an acknowledgment by the parties that the contract is a cost plus contract and that this Act, apart from this section and Part 3A, does not apply to the contract.

Penalty: \$10 000.

- (2) Subsection (1) does not apply to a cost plus contract that comes within paragraph (b) of the definition of “home building work contract” in section 3.
- (3) If a builder enters into a cost plus contract in breach of subsection (1), the contract may be terminated by the owner in accordance with section 19.

*[Section 14 amended by No. 37 of 2002 s. 7.]*

**15. Conduct or terms of contract that are unconscionable etc.**

- (1) A builder must not —
- (a) in connection with the formation or execution of a contract or negotiations to vary a contract after execution, or the circumstances in which the contract or variation of contract is entered into, engage in conduct that is unconscionable, harsh or oppressive; or
  - (b) enter into a contract that contains any provision that is unconscionable, harsh or oppressive.

- (2) Without limiting the generality of subsection (1) regard may be had to the following for the purposes of that subsection —
- (a) the relative strengths of the bargaining positions of the builder and the owner;
  - (b) whether, as a result of conduct engaged in by the builder, the owner was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the builder;
  - (c) whether the owner was able to understand the contract; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the owner or a person acting on behalf of the owner by the builder or a person acting on behalf of the builder.
- (3) A provision of a contract must not be called in question under subsection (1)(b) by reason only that it entitles the builder —
- (a) by notice in writing given at any time before the commencement of the home building work to require the owner to satisfy the builder —
    - (i) that the owner has title to the land on which the work is to be performed; and
    - (ii) by production of evidence in writing, that the owner is able to pay the contract price;
  - (b) by notice in writing given at any time before the commencement of home building work that is to be performed by way of a variation of a contract to require the owner to satisfy the builder, by the production of evidence in writing, that the owner is able to pay the price agreed for that work;
  - (c) if the owner fails to satisfy the builder as mentioned in paragraph (a) or (b) within 10 working days of receipt of a notice under that paragraph, to terminate the contract or the variation, as the case may be, by notice in writing given to the owner within a further 10 working days.

**s. 15A**

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- (4) The Disputes Tribunal may approve a form of contract submitted to it for its opinion on whether any provision is in breach of subsection (1)(b) and a provision in a form so approved must not be called in question under that subsection.
- (5) Forms of contract for various kinds of home building work may be prescribed which are to be taken to comply with all the requirements of this Act.
- (6) This section is enforceable under section 21 and not otherwise.  
*[Section 15 amended by No. 76 of 2000 s. 50 and 57; No. 37 of 2002 s. 20.]*

**15A. Misleading or deceptive conduct**

A person who is a builder or an owner must not, in connection with —

- (a) the formation or execution of a contract;
- (b) negotiations to vary a contract after execution; or
- (c) the circumstances in which a contract or variation of contract is entered into,

engage in conduct that is misleading or deceptive.

*[Section 15A inserted by No. 76 of 2000 s. 51.]*

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## Part 3 — Remedies

### 16. Disputes Tribunal's jurisdiction limited

- (1) The Disputes Tribunal does not have jurisdiction under this Part to order —
  - (a) any work to be done of a value exceeding the prescribed amount; or
  - (b) any amount exceeding the prescribed amount to be paid,unless the party to be bound by the order consents to it being made.
- (2) In subsection (1) *the prescribed amount* is \$100 000 or such greater amount as may be prescribed.

[Section 16 amended by No. 76 of 2000 s. 57.]

### 17. Applications for relief, and orders

- (1) Where an owner or a builder under a contract claims that —
  - (a) there has been a breach of —
    - (i) the contract, not being a breach in respect of which an order may be made under section 12A of the *Builders' Registration Act 1939*; or
    - (ii) a provision in Part 2;
  - or
  - (b) the owner or the builder is entitled to compensation under Schedule 1,he or she may apply to the Disputes Tribunal for relief.
- (2) An application under subsection (1) cannot be made —
  - (a) before the applicant has given to the other party a preliminary notice under subsection (3); or
  - (b) after the expiry of 3 years from the time when the cause of action arose.

**s. 17**

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- (3) A preliminary notice is a notice in writing in the prescribed form setting out the matters of which the intending applicant complains and calling on the other party to —
  - (a) rectify them; or
  - (b) otherwise attempt to settle any matters that are in dispute.
- (3a) A copy of the preliminary notice is to be given to the Disputes Tribunal at the time an application is made under subsection (1).
- (4) Upon the making of an application under subsection (1) the Disputes Tribunal may —
  - (a) by such order as it considers appropriate in the circumstances —
    - (i) restrain any action in breach of the contract or of a provision in Part 2; or
    - (ii) require any work to be done in performance of the contract or to ensure compliance with a provision of Part 2 or to remedy a breach of the contract or of a provision of Part 2;
  - (b) order the payment of any amount payable under the contract;
  - (ba) by order declare that an amount is not payable to a person under the contract and, if already paid, order the repayment of that amount;
  - (c) order the payment of compensation for loss or damage —
    - (i) caused by any breach of the contract or of a provision of Part 2; or
    - (ii) referred to in Schedule 1;
  - (d) by order declare that a specified amount of money claimed or money claimed for specified work is not payable by a person;



- (e) make such ancillary or incidental orders as the Disputes Tribunal considers appropriate.
- (5) An order under subsection (4) may require that the terms of the order be complied with within a specified time.
- (6) A person must not, without reasonable excuse, fail to comply with an order under subsection (4).  
Penalty: \$10 000.
- (7) If a person fails to comply with an order under subsection (4)(a) the Disputes Tribunal may, upon further application, make an order against the person for the payment of a sum of money as compensation for the failure.

*[Section 17 amended by No. 76 of 2000 s. 52 and 57.]*

**18. Orders for payment while case pending**

- (1) Where an owner or a builder has applied to the Disputes Tribunal for relief under this Act the Disputes Tribunal may, if it considers it just and expedient to do so, order an amount of money to be paid to the Disputes Tribunal by either the owner or the builder or by both of them.
- (2) An order must not be made under subsection (1) against a party merely on account of the poor financial position of that party.
- (2a) The Disputes Tribunal may, at any time before a final decision is made on the application for relief, review and vary or cancel an order made under subsection (1).
- (3) An amount paid to the Disputes Tribunal under this section must be placed by it in an interest-bearing account, as it thinks fit, and the amount and any interest must, on determination of the application for relief, be paid in accordance with the order of the Disputes Tribunal.
- (4) If a person fails to comply with an order under subsection (1) the Disputes Tribunal may strike out the application for relief or the defence, as the case requires, of that person.

**s. 19**

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*[Section 18 amended by No. 1 of 1997 s. 18; No. 76 of 2000 s. 53 and 57; No. 37 of 2002 s. 20.]*

**19. How contract terminated**

- (1) Where under section 4(5), 10(4) or 14(3) or Schedule 1 a party to a contract may terminate the contract the party may give notice of termination to the other party and the contract is terminated at the time when the notice is given.
- (2) A notice given by a party under subsection (1) must be in writing signed by the party and must be given to the other party before the completion of the home building work under the contract.

**20. Adjustment of rights in certain cases**

If a contract is terminated under section 4(5), 10(4) or 14(3) or Schedule 1, the Disputes Tribunal may, upon application by the owner or the builder, make such orders as it thinks just providing for —

- (a) the return or repayment of the whole or part of any consideration, or the value of any consideration, given by the owner under or in relation to the contract; or
- (b) payment to the builder in respect of —
  - (i) any materials supplied by the builder;
  - (ii) any home building work or other services performed by the builder; or
  - (iii) costs, including overhead expenses and loss of profit, incurred by the builder,under or in relation to the contract.

*[Section 20 amended by No. 76 of 2000 s. 54 and 57.]*

**21. Remedy for breach of section 15**

- (1) Where an owner claims that a builder has committed a breach of section 15, the owner may apply to the Disputes Tribunal for relief under this section.
- (2) An application under subsection (1) in respect of a contract must be made within 3 years from the time when the contract was entered into or the breach first occurred, whichever is the later.
- (3) The Disputes Tribunal may, in granting relief under this section —
  - (a) declare the contract or any provision of the contract against which relief is sought to be void from the beginning;
  - (b) modify the provisions of the contract in such manner as it considers just;
  - (c) order the repayment to the owner of any amount paid by the owner under a contract or a provision that has been declared void or modified under this section,

and for the purposes of carrying out this section may make such orders and give such directions as the Disputes Tribunal considers necessary or expedient.

- (4) Where it appears to the Disputes Tribunal in any proceedings, that any person is an associate of a party to the proceedings and has or may have —
  - (a) shared in the profits of; or
  - (b) a beneficial interest in,the transaction in question, the person may be joined as a party to the proceedings and the Disputes Tribunal may make such orders against, or in respect of, that person as it considers just.
- (5) For the purposes of subsection (4), a person is an associate of another person if —
  - (a) the person is a partner of the latter person; or

**s. 22**

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- (b) where the latter person is a company, the person is a shareholder or officer of the company.
- (6) In subsection (5) *officer* has the same meaning as in the *Corporations Act 2001* of the Commonwealth but does not include an employee of the company unless he or she was concerned in the management of the company.

*[Section 21 amended by No. 76 of 2000 s. 57; No. 10 of 2001 s. 220.]*

**22. Avoidance of concurrent proceedings**

Subject to section 23, where an application is made to the Disputes Tribunal claiming, under section 17(1)(a)(i) that there has been a breach of a contract, the matter to which the application relates (whether as shown in the application or as emerging in the course of the determination of the application) is not justiciable by a court unless —

- (a) that matter was before that court at the time when the application was made to the Disputes Tribunal; or
- (b) the application to the Disputes Tribunal is withdrawn or not pursued.

*[Section 22 amended by No. 76 of 2000 s. 57.]*

**23. Transfer of proceedings**

- (1) Where a matter that the Disputes Tribunal has jurisdiction to determine under this Act is before a court, the court may order that the matter be transferred to and determined by the Disputes Tribunal.
- (2) Where a matter that a court has jurisdiction to determine is before the Disputes Tribunal that Tribunal may order that the matter be transferred to and determined by that court.

*[Section 23 amended by No. 76 of 2000 s. 57.]*

**24. Settlement**

- (1) If before or during the hearing of any proceedings under this Part it appears to the Disputes Tribunal either from the nature of the case or from the attitude of the parties that —
- (a) one or each of the parties has not made sufficient attempt to settle the matters in dispute; or
  - (b) there is a reasonable possibility of the matters in dispute being settled,

the Disputes Tribunal may —

- (c) interview the parties in private (either with or without a person who may be representing any party) and endeavour to bring about a settlement of the matters in dispute on terms that are fair to all parties; or
  - (d) require the parties themselves to attempt to bring about a settlement of the matters in dispute.
- (2) Nothing said or done in the course of any attempt to settle proceedings under this section may subsequently be given in evidence in any proceedings under this Part.
- (3) Subject to the rules of natural justice, neither the Disputes Tribunal or any member is disqualified, by reason of anything done under subsection (1), from hearing or continuing to hear the proceedings if the Disputes Tribunal thinks fit to do so.
- (4) Where proceedings are settled under this section, the Disputes Tribunal may embody the terms of the settlement in an order.
- (5) Where proceedings are settled under this section, the Disputes Tribunal may not impose any penalty provided for by this Act.

*[Section 24 amended by No. 76 of 2000 s. 57.]*

*[25. Deleted by No. 76 of 2000 s. 55.]*

## **Part 3A — Home indemnity insurance and corresponding cover**

*[Heading inserted by No. 72 of 1996 s. 5; amended by No. 37 of 2002 s. 8.]*

### **Division 1 — Introduction**

*[Heading inserted by No. 72 of 1996 s. 5.]*

#### **25A. Interpretation**

In this Part —

***approved fund*** means a fund that is approved under section 25GB;

***builder*** includes, in addition to the meaning given by the definition in section 3(1), a person who is registered under the *Builders' Registration Act 1939*, whether or not the person carries on a business referred to in that definition;

***building contract*** means —

- (a) a residential building work contract; or
- (b) a cost plus contract between a builder and another person for the performance by the builder of residential building work but does not include a contract for the performance by a builder of residential building work for another builder who is in turn obliged to perform the work under another contract;

***corresponding cover*** —

- (a) in relation to residential building work performed by a builder, means the cover referred to in section 25DA; and
- (b) in relation to residential building work performed by an owner-builder, means the cover referred to in section 25GA;

**cost of the building work** means —

- (a) in relation to residential building work performed by a builder under a residential building work contract, the amount payable under the contract; or
- (b) in relation to residential building work performed —
  - (i) by a builder on behalf of another person where the work is not performed under a residential building work contract;
  - (ii) by a builder on the builder's own behalf; or
  - (iii) by an owner-builder,the estimated cost of construction specified in the application for a building licence under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960*;

**developer** means a person for whom residential building work is performed under a building contract in relation to 4 or more dwellings;

**insolvency** means —

- (a) in relation to a natural person, insolvent under administration as that expression is defined in the *Corporations Act 2001* of the Commonwealth;
- (b) in relation to a body corporate, subject to external administration under the *Corporations Act 2001* of the Commonwealth;

**minimum amount** means \$10 000 or such other amount as is prescribed to be the minimum amount for the purposes of this section;

**owner-builder**, in relation to a dwelling, means —

- (a) a person who constructs the dwelling under a building licence issued to that person in accordance with section 4A(1)(c) of the *Builders' Registration Act 1939*;  
or

- (b) a person who —
  - (i) is registered under the *Builders' Registration Act 1939*;
  - (ii) constructs the dwelling for himself or herself as his or her principal place of residence and not for immediate sale; and
  - (iii) was issued a building licence for the residential building work for the dwelling when no policy of insurance that complies with Division 2 was in force, or no corresponding cover (of the type referred to in section 25DA) was provided by an approved fund, in relation to the residential building work;

**rescind**, in relation to a contract, means to avoid the contract as from its beginning;

**residential building work** means home building work that is —

- (a) home building work described in paragraph (a), (b) or (c) of the definition of that term in section 3; or
- (b) home building work described in paragraph (d) of the definition of that term in section 3, when —
  - (i) it is to be performed under a contract which also includes the performance of home building work described in paragraph (a), (b) or (c) of that definition; or
  - (ii) it is associated work of a prescribed kind;

but does not include home building work where the cost of the building work is the minimum amount or less;

**residential building work contract** means a contract, other than a cost plus contract, between a builder and another person for the performance by the builder of residential building work but does not include a contract for the performance by a builder of residential building work for another builder who is in turn obliged to perform the work under another contract;



***sale contract***, in respect of residential building work performed by a builder or owner-builder, means a contract to sell or otherwise dispose of —

- (a) a dwelling constructed by the builder or the owner-builder; or
- (b) the land on which the building is constructed;

***settlement*** means the time at which the obligations under a sale contract are completed to the extent that the purchaser under the contract is entitled to be registered as the proprietor of the dwelling or land.

*[Section 25A inserted by No. 72 of 1996 s. 5; amended by No. 10 of 2001 s. 220; No. 37 of 2002 s. 9.]*

### **Division 2 — Builders**

*[Heading inserted by No. 72 of 1996 s. 5.]*

#### **25B. Application of this Division**

- (1) Subject to this section, this Division applies to residential building work that is, or is to be, performed by a builder on behalf of another person or on the builder's own behalf.
- (2) This Division does not apply to residential building work for which a building licence was issued before the commencement of the *Home Building Contracts Amendment Act 1996*.
- (3) This Division does not apply to residential building work that is, or is to be, performed by a builder who is a natural person, if —
  - (a) the residential building work is to construct a dwelling for the builder as his or her principal place of residence and not for immediate sale; and
  - (b) the builder has given the Builders' Registration Board a statutory declaration verifying that he or she has not, within the last 6 years, obtained a building licence for residential building work in respect of which no insurance was required because of this subsection.

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance and corresponding cover

**Division 2** Builders

**s. 25C**

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- (4) The Minister may order that subsection (3)(b) has effect in relation to particular residential building work as if the 6 year period referred to were reduced to the lesser period specified in the order, if the Minister is satisfied that —
- (a) the application for the order arises from a change in the circumstances of the person; and
  - (b) the person would suffer hardship if the application were refused.
- (5) In subsection (3) —
- insurance** means a policy of insurance that complies with Division 2, or corresponding cover provided by an approved fund.

*[Section 25B inserted by No. 72 of 1996 s. 5; amended by No. 37 of 2002 s. 10.]*

**25C. Offence if no insurance or no corresponding cover**

- (1) A builder must not perform residential building work to which this Division applies unless —
- (a) a policy of insurance that complies with this Division is in force in relation to the residential building work; or
  - (b) corresponding cover is provided by an approved fund in relation to the residential building work.

Penalty: \$10 000.

- (2) A builder must not perform residential building work to which this Division applies under a residential building work contract unless the owner has been furnished, prior to a demand from the builder for any payment in relation to the residential building work including any deposit payable under the residential building work contract, with a certificate in a form approved by the Minister, that evidences the taking out of the policy referred to in subsection (1)(a) or the provision of the cover referred to in subsection (1)(b).

Penalty: \$10 000.

- (3) Subsections (1) and (2) do not apply to a builder who performs residential building work to which this Division applies if —
- (a) the builder performs the residential building work during a period specified in an order made under section 25I for the purposes of this subsection; or
  - (b) the builder performs the residential building work —
    - (i) after the end of a period specified in an order made under section 25I for the purposes of this subsection; and
    - (ii) under a building licence issued before or during that period.
- (4) A builder is not entitled to cancel a policy of insurance that complies with this Division, or corresponding cover provided by an approved fund, in relation to residential building work solely on the basis that subsections (1) and (2) do not apply, because of subsection (3), to the builder in relation to the residential building work.

*[Section 25C inserted by No. 72 of 1996 s. 5; amended by No. 37 of 2002 s. 11 and 20.]*

**25D. Requirements of insurance policy**

- (1) A policy of insurance complies with this Division if —
- (a) in the case of residential building work to be performed by a builder on behalf of another person, other than a developer, under a residential building work contract, it insures that person and that person's successors in title against —
    - (i) the risk of losing an amount paid by way of deposit under the residential building work contract, up to a limit of \$13 000 or such other limit as is prescribed; and
    - (ii) the risk of loss, other than indirect, incidental or consequential loss, resulting from non-completion of the residential building work,

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance and corresponding cover

**Division 2** Builders

**s. 25D**

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by reason of the insolvency or death of the builder or by reason of the fact that, after due search and enquiry, the builder cannot be found;

- (b) in the case of residential building work to be performed by a builder on behalf of another person (whether under a residential building work contract or not), it insures that person and that person's successors in title against the risk of being unable to take advantage of an entitlement to, or to enforce or recover under, a remedy under section 12A of the *Builders' Registration Act 1939* by reason of the insolvency or death of the builder or by reason of the fact that, after due search and enquiry, the builder cannot be found;
- (c) in the case of residential building work to be performed by a builder on the builder's own behalf, it insures the builder's successors in title against the risk referred to in paragraph (b);
- (d) it provides that claims may be made under it at any time before the expiration of a period of 6 years from the day of practical completion within the meaning of that term in section 11;
- (e) it provides for insurance cover of —
  - (i) at least \$100 000 or such other amount as is prescribed; or
  - (ii) the cost of the building work,whichever is the lesser;
- (f) it is issued by or on behalf of an insurer who is —
  - (i) authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance business; and
  - (ii) approved in writing by the Minister;and
- (g) it complies with any other prescribed requirements.

- (2) Subject to subsection (3), where the policy of insurance relates to work described in paragraph (b) of the definition of “home building work” in section 3, the cost of the residential building work for the purposes of subsection (1)(e) is only the cost of —
- (a) placing the dwelling on the land including siting, stumping and any other work in connection with that placement; and
  - (b) any building work to the dwelling after placement.
- (3) Where the policy of insurance relates to the placement of a transportable dwelling on land for the first time after its construction, the cost of the residential building work for the purposes of subsection (1)(e) is the cost of —
- (a) the dwelling;
  - (b) placing the dwelling on the land including siting, stumping and any other work in connection with that placement; and
  - (c) any building work to the dwelling after placement.
- (4) An insurer is not entitled to avoid liability under a policy of insurance on the ground that the policy was obtained by misrepresentation or non-disclosure —
- (a) by the builder; or
  - (b) in the case of a claim by a successor in title to the person on whose behalf the residential building work was performed, by that person.

*[Section 25D inserted by No. 72 of 1996 s. 5; amended by No. 37 of 2002 s. 12.]*

**25DA. Corresponding cover by an approved fund — builders**

- (1) Corresponding cover is provided by an approved fund in relation to residential building work performed by a builder if the person for whom the residential building work is performed, and that person’s successors in title, are in the same position that they would be if a policy of insurance that complies with

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance and corresponding cover

**Division 3** Owner-builders

**s. 25E**

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this Division were in force in relation to the residential building work.

- (2) Any discretion that a person has to approve a claim on the fund is to be disregarded for the purposes of subsection (1).

*[Section 25DA inserted by No. 37 of 2002 s. 13.]*

**Division 3 — Owner-builders**

*[Heading inserted by No. 72 of 1996 s. 5.]*

**25E. Application of this Division**

- (1) Subject to subsection (2), this Division applies to residential building work that is performed by an owner-builder.
- (2) This Division does not apply to residential building work for which a building licence under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960* was issued before the commencement of the *Home Building Contracts Amendment Act 1996*.

*[Section 25E inserted by No. 72 of 1996 s. 5; amended by No. 74 of 2003 s. 66; No. 8 of 2009 s. 75.]*

**25F. Restriction on sale by owner-builder**

- (1) An owner-builder must not, within 7 years of the date of issue of the relevant building licence to the owner-builder, enter into a sale contract unless —
- (a) either —
- (i) a policy of insurance that complies with this Division is in force in relation to the residential building work; or
- (ii) corresponding cover is provided by an approved fund in relation to the residential building work;
- and
- (b) the purchaser has been given a certificate, in a form approved by the Minister, that evidences the taking out

of the policy referred to in paragraph (a)(i) or the provision of the cover referred to in paragraph (a)(ii).

Penalty: \$10 000.

- (2) Subsection (1) does not apply to an owner-builder if the owner-builder enters into a sale contract during a period specified in an order made under section 25I for the purposes of this subsection.

*[Section 25F inserted by No. 37 of 2002 s. 14.]*

**25FA. Further restrictions on sale by certain owner-builders**

- (1) A person to whom paragraph (b) of the definition of “owner-builder” applies in relation to a dwelling must not, within 3 years of the date of issue of the building licence to the person for the dwelling, sell or otherwise dispose of the land on which the dwelling was constructed unless the Minister by order otherwise consents.

Penalty: \$10 000.

- (2) Before making an order under subsection (1), the Minister is to be satisfied that —
- (a) the application for the order arises from a change in the circumstances of the person; and
  - (b) the person would suffer hardship if the application were refused.

- (3) Subsection (1) does not apply to a person in relation to a dwelling if the building licence for the dwelling was issued to the person during a period specified in an order made under section 25I for the purposes of section 25C(3).

*[Section 25FA inserted by No. 37 of 2002 s. 14.]*

**25G. Requirements of insurance policy**

- (1) A policy of insurance complies with this Division if —
- (a) it insures the purchaser and the purchaser’s successors in title against the risk of being unable to take advantage of

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance and corresponding cover

**Division 3** Owner-builders

**s. 25G**

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- an entitlement to, or to enforce or recover under, a remedy under section 12A of the *Builders' Registration Act 1939* by reason of the insolvency or death of the owner-builder or by reason of the fact that, after due search and enquiry, the owner-builder cannot be found;
- (b) it provides that claims may be made under it at any time before the expiration of a period of 7 years from the date of issue to the owner-builder of the relevant building licence for the building work;
- (c) it provides for insurance cover of —
- (i) at least \$100 000 or such other amount as is prescribed; or
  - (ii) the cost of the building work, whichever is the lesser;
- (d) it is issued by or on behalf of an insurer who is —
- (i) authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance business; and
  - (ii) approved in writing by the Minister;
- and
- (e) it complies with any other prescribed requirements.
- (2) Where the policy of insurance relates to work described in paragraph (b) of the definition of “home building work” in section 3, the cost of the building work for the purposes of subsection (1)(c) is only the cost of —
- (a) placing the dwelling on the land including siting, stumping and any other work in connection with that placement; and
  - (b) any building work to the dwelling after placement.
- (3) An insurer is not entitled to avoid liability under a policy of insurance on the ground that the policy was obtained by misrepresentation or non-disclosure by the owner-builder.



*[Section 25G inserted by No. 72 of 1996 s. 5.]*

**25GA. Corresponding cover by an approved fund — owner-builders**

- (1) Corresponding cover is provided by an approved fund in relation to residential building work performed by an owner-builder if the purchaser, and the purchaser's successors in title, are in the same position that they would be if a policy of insurance that complies with this Division were in force in relation to the residential building work.
- (2) Any discretion that a person has to approve a claim on the fund is to be disregarded for the purposes of subsection (1).

*[Section 25GA inserted by No. 37 of 2002 s. 15.]*

**Division 3A — Approved funds**

*[Heading inserted by No. 37 of 2002 s. 16.]*

**25GB. Minister's approval of a fund**

- (1) The Minister may, by order published in the *Gazette*, approve a fund for the purposes of this Part.
- (2) The Minister is not to approve a fund unless —
  - (a) the fund is, or is similar to, a mutual fund;
  - (b) the rules of the fund (however described) are approved by the Minister;
  - (c) each person responsible for the management of the fund is approved by the Minister in relation to the fund;
  - (d) the Minister is satisfied that there is, or will be, adequate insurance or other provision for excess losses of the fund; and
  - (e) each insurer providing the insurance referred to in paragraph (d) is authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance

business, and is approved by the Minister in relation to the fund.

- (3) In deciding whether to approve a fund, the Minister may take into account —
- (a) the independence of the persons involved in, or responsible for, the management, provision for excess losses and auditing of the fund;
  - (b) matters that do not necessarily relate to the particular fund but which relate to the building or insurance industries generally; and
  - (c) any other relevant matter.
- (4) The Minister may impose conditions on the approval and vary those conditions at any time.

*[Section 25GB inserted by No. 37 of 2002 s. 16.]*

**25GC. Minister's consent to changes to an approved fund**

The matters set out in section 25GB(2)(a), (b) and (c), as they apply to an approved fund, must not change in respect of the fund without the Minister's written consent.

*[Section 25GC inserted by No. 37 of 2002 s. 16.]*

**25GD. Revocation of Minister's approval of a fund**

The Minister may, by order published in the *Gazette*, revoke the Minister's approval of a fund if —

- (a) a matter, as it applies to an approved fund, has changed in contravention of section 25GC;
- (b) the Minister is no longer satisfied that there is adequate insurance or other provision for excess losses of the fund as referred to in section 25GB(2)(d); or
- (c) an insurer referred to in section 25GB(2)(e) —
  - (i) is not, or is no longer, authorised; or
  - (ii) is not, or is no longer, approved,

as required by that provision.

*[Section 25GD inserted by No. 37 of 2002 s. 16.]*

#### **Division 4 — Review**

*[Heading inserted by No. 72 of 1996 s. 5.]*

#### **25H. Review of insurance scheme**

- (1) The Minister must carry out a review of the operation and effectiveness of this Part as soon as is practicable after the expiration of 2 years from the commencement of the *Home Building Contracts Amendment Act 1996*, and in the course of that review must consider and have regard to —
  - (a) the effectiveness of the scheme of insurance under this Part; and
  - (b) such other matters as appear to the Minister to be relevant to the operation and effectiveness of this Part.
- (2) The Minister must prepare a report based on the review made under subsection (1) and must, as soon as is practicable after the preparation thereof, cause the report to be laid before each House of Parliament.

*[Section 25H inserted by No. 72 of 1996 s. 5; amended by No. 37 of 2002 s. 20.]*

#### **Division 5 — Provisions about non-application of sections 25C(1) and (2) and 25F(1)**

*[Heading inserted by No. 37 of 2002 s. 17.]*

#### **25I. Minister may make orders specifying periods**

- (1) For the purposes of section 25C(3) or section 25F(2), or both, the Minister may, by order published in the *Gazette*, specify a period of up to 6 months, which is not to commence before the day on which the order is published.

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance and corresponding cover

**Division 5** Provisions about non-application of sections 25C(1) and (2) and 25F(1)

**s. 25J**

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- (2) The Minister may make no more than 4 orders for the purposes of section 25C(3) and no more than 4 orders for the purposes of section 25F(2).

*[Section 25I inserted by No. 37 of 2002 s. 17.]*

**25J. Notice requirements — builders**

- (1) In this section —

*specified period* means a period specified in an order made under section 25I for the purposes of section 25C(3).

- (2) A builder must not, during a specified period, enter into a building contract or sale contract in respect of residential building work unless the builder has given the other party to the contract a notice in the form prescribed by the regulations.

Penalty: \$10 000.

- (3) A builder must not, after the end of a specified period, enter into a building contract or sale contract in respect of residential building work performed by the builder under a building licence issued before or during that specified period unless the builder has given the other party to the contract a notice in the form prescribed by the regulations.

Penalty: \$10 000.

- (4) A failure to provide a notice in accordance with subsection (2) or (3) does not, of itself, invalidate a contract.

- (5) If —

(a) at a time that is not during a specified period, a builder enters into a building contract or sale contract in respect of residential building work; and

(b) a specified period commences before a building licence for the residential building work is issued,

the builder must give the other party to the contract a notice in the form prescribed by the regulations as soon as practicable after the specified period commences.

Penalty: \$10 000.

- (6) If the party to whom a notice must be given under subsection (5) is not a developer, the party may rescind the contract.
- (7) To rescind the contract, the party must give notice of the exercise of the right to rescind to the builder before the earlier of —
  - (a) the expiration of one month after the day on which the notice referred to in subsection (5) is received by the party; or
  - (b) settlement (in the case of a sale contract) or practical completion (in all other cases).

*[Section 25J inserted by No. 37 of 2002 s. 17.]*

**25K. Notice requirements — owner-builders**

- (1) In this section —  
*specified period* means a period specified in an order made under section 25I for the purposes of section 25F(2).
- (2) An owner-builder must not, during a specified period, enter into a sale contract in respect of residential building work unless the owner-builder has given the purchaser a notice in the form prescribed by the regulations.

Penalty: \$10 000.

- (3) A failure to provide a notice in accordance with subsection (2) does not, of itself, invalidate a contract.

*[Section 25K inserted by No. 37 of 2002 s. 17.]*

**25L. Giving a copy of the notice to a subsequent purchaser**

- (1) If a person to whom a notice is given under section 25J is a developer in respect of the residential building work, the person (the *developer*) must, before entering into a sale contract in respect of the residential building work, give a copy of the

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance and corresponding cover

**Division 5** Provisions about non-application of sections 25C(1) and (2) and 25F(1)

**s. 25L**

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notice to the other party to the sale contract (the *purchaser*) if settlement for the sale contract is, or is likely, to occur within 6 years of practical completion of the residential building work.

Penalty: \$10 000.

- (2) A failure to provide a notice in accordance with subsection (1) does not, of itself, invalidate a contract.

*[Section 25L inserted by No. 37 of 2002 s. 17.]*

## Part 4 — General

### 26. Access for inspection of building work

- (1) A builder under a contract or a person acting on behalf of the builder must not prevent the owner or an authorised person from inspecting the home building work to which the contract relates if the owner or authorised person is acting in accordance with —
  - (a) the contract; and
  - (b) such provisions as are prescribed.Penalty: \$1 000.
- (2) A provision in a contract that prohibits or restricts inspection of home building work is void except to the extent that it —
  - (a) restricts inspection to the builder's normal working hours; or
  - (b) precludes inspection that would unreasonably impede or interfere with the building work.
- (3) In subsection (1) *authorised person* means —
  - (a) a person acting on behalf of the owner under an authority in writing; and
  - (b) a person who is providing finance for the home building work or a person acting on behalf of such a person.

### 27. Effect of breach of Act on contract

- (1) Except as provided in section 13(2), 21(3)(a) or 26(2), a contract or a provision of a contract is not illegal, void or unenforceable only because a requirement of this Act is not complied with.
- (2) Nothing in subsection (1) affects the operation of section 28.

**s. 28**

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**28. Contracting out forbidden**

- (1) An agreement or arrangement that purports to exclude or restrict the operation of any provision of this Act or to modify any such provision to the disadvantage of an owner is to that extent void.
- (2) A purported waiver of a right conferred by or under this Act is void.
- (3) A person must not enter into any agreement or arrangement with intent either directly or indirectly to defeat, evade or prevent the operation of this Act.  
Penalty: \$10 000.

**29. Saving**

- (1) The provisions of this Act are in addition to and do not derogate from the provisions of any other written law.
- (2) This Act does not limit or derogate from any civil remedy at law or in equity.

**30. Liability of directors etc.**

- (1) Where a body corporate has committed an offence against this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any person who was an officer or was purporting to act as an officer of the body corporate, that person, as well as the body corporate, commits that offence.
- (2) In subsection (1) *officer* has the same meaning as in the *Corporations Act 2001* of the Commonwealth but does not include an employee of the body corporate unless he or she was concerned in the management of the body corporate.

*[Section 30 amended by No. 10 of 2001 s. 220.]*

**31. Prosecutions**

- (1) Prosecutions for offences against this Act —
  - (a) may be instituted by the Registrar of the Builders' Registration Board appointed under the *Builders'*



*Registration Act 1939* or a person authorised by that Board to do so, and may not be instituted by any other person;

- (b) may be commenced within 3 years after the alleged commission of the offence.
- (2) A statement in a prosecution notice that a person is the Registrar of the Builders' Registration Board or is authorised by that Board under subsection (1)(a) is to be taken as proved in the absence of evidence to the contrary.

*[Section 31 amended by No. 84 of 2004 s. 80.]*

**31A. Penalties and costs**

All penalties or costs paid or recovered under this Act must be paid to the Builders' Registration Board.

*[Section 31A inserted by No. 76 of 2000 s. 56; amended by No. 37 of 2002 s. 20; No. 84 of 2004 s. 80.]*

**31B. Infringement notices**

- (1) A reference in subsection (2), (3), (5) or (7) to an **authorised person** is a reference to a person appointed under subsection (10) to be an authorised person for the purposes of the subsection in which the term is used.
- (2) An authorised person who has reason to believe that a person has committed a prescribed offence against this Act may, within 21 days after the alleged offence is believed to have been committed, give an infringement notice to the alleged offender.
- (3) An infringement notice is to be in the prescribed form and is to —
  - (a) contain a description of the alleged offence;
  - (b) advise that if the alleged offender does not wish to be prosecuted for the alleged offence in a court, the amount of money specified in the notice as being the modified penalty for the offence may be paid to an authorised

**s. 31B**

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person within a period of 28 days after the giving of the notice; and

- (c) inform the alleged offender as to who are authorised persons for the purposes of receiving payment of modified penalties.
- (4) In an infringement notice the amount specified as being the modified penalty for the offence referred to in the notice must be the amount that was the prescribed modified penalty at the time the alleged offence is believed to have been committed.
- (4a) The modified penalty that regulations may prescribe for an offence is not to exceed 20% of the maximum penalty for that offence.
- (5) An authorised person may, in a particular case, extend the period of 28 days within which the modified penalty may be paid and the extension may be allowed whether or not the period of 28 days has elapsed.
- (6) Where the modified penalty specified in an infringement notice has been paid within 28 days or such further time as is allowed and the notice has not been withdrawn, the bringing of proceedings and the imposition of penalties are prevented to the same extent as they would be if the alleged offender had been convicted by a court of, and punished for, the alleged offence.
- (7) An authorised person may, whether or not the modified penalty has been paid, withdraw an infringement notice by sending to the alleged offender a notice in the prescribed form stating that the infringement notice has been withdrawn.
- (8) If an infringement notice is withdrawn after the modified penalty has been paid, the amount is to be refunded.
- (9) Payment of a modified penalty is not to be regarded as an admission for the purposes of any proceedings, whether civil or criminal.
- (10) The Builders' Registration Board may, in writing, appoint persons or classes of persons to be authorised persons for the

purposes of subsection (2), (3), (5) or (7) but a person who is authorised to give infringement notices under subsection (2) is not eligible to be an authorised person for the purposes of any of the other subsections.

- (11) The Builders' Registration Board must issue to each person who is authorised to give infringement notices under this section a certificate stating that the person is so authorised, and the authorised person is to produce the certificate whenever required to do so by a person to whom he or she has given or is about to give an infringement notice.

*[Section 31B inserted by No. 76 of 2000 s. 56; amended by No. 37 of 2002 s. 20; No. 84 of 2004 s. 80.]*

### **32. Regulations**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to the purposes of this Act.
- (2) Without limiting the generality of subsection (1), regulations made for the purposes of Part 3A may provide for home indemnity insurance or corresponding cover generally and in particular may —
- (a) exempt any specified home building work or any specified class of home building work from the requirements of that Part, either unconditionally or subject to such conditions as are specified in the regulations;
  - (b) exempt any person or builder or any specified class of persons or builders from the requirements of that Part, either unconditionally or subject to such conditions as are specified in the regulations; and
  - (c) require the provision of information about home indemnity insurance or corresponding cover in the circumstances and manner set forth in the regulations.

**s. 33**

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- (3) The regulations may provide that a contravention of a regulation or a provision of a regulation constitutes an offence and provide for penalties not exceeding a fine of \$5 000.

*[Section 32 amended by No. 72 of 1996 s. 6; No. 37 of 2002 s. 18.]*

**33. Application not retrospective**

A provision of this Act (other than section 25J(5), (6) and (7)) does not apply to any contract entered into before the commencement of that provision.

*[Section 33 amended by No. 37 of 2002 s. 19.]*

**34. Review of Act**

- (1) The Minister must carry out a review of the operation and effectiveness of this Act as soon as is practicable after the expiration of 2 years from its commencement.
- (2) Without limiting subsection (1), in carrying out a review under that subsection, the Minister must consult with and have regard to the views of the Housing Industry Association Western Australian Division, the Master Builders Association of Western Australia, the Institute of Arbitrators Australia (WA Chapter) and the Royal Australian Institute of Architects (WA Chapter), and persons who are representative of owners.
- (3) The Minister must prepare a report based on the review made under subsection (1) and must, as soon as is practicable after the preparation thereof, cause the report to be laid before each House of Parliament.

*[Section 34 amended by No. 37 of 2002 s. 20.]*

*[35. Omitted under the Reprints Act 1984 s. 7(4)(e).]*

## **Schedule 1 — Consequences of non fulfilment of conditions**

[s. 7(4), 8(4), 9(4), 13(5), 19 and 20]

*[Heading amended by No. 19 of 2010 s. 4.]*

### **1. Failure by builder**

If any condition set out in subsection (1) of section 9 is not fulfilled solely because the builder has failed to comply with the builder's obligations under subsection (2) of that section, the contract is not affected but remains in force on the same terms and conditions except as otherwise agreed between the parties.

*[Clause 1 amended by No. 19 of 2010 s. 51.]*

### **2. Failure by owner**

If any condition set out in subsection (1) of section 9 is not fulfilled solely because the owner has failed to comply with the owner's obligations under subsection (2) of that section, the contract remains in force on the same terms and conditions until the parties agree otherwise, but subject to the provisions of clause 4.

*[Clause 2 amended by No. 19 of 2010 s. 51.]*

### **3. Failure by builder and owner**

If any condition set out in subsection (1) of section 9 is not fulfilled and both the owner and the builder have, or neither the owner nor the builder has, failed to comply with their respective obligations under subsection (2) of that section, the contract remains in force on the same terms and conditions until the parties agree otherwise, but subject to the provisions of clause 4.

*[Clause 3 amended by No. 19 of 2010 s. 51.]*

### **4. Rights of builder and owner**

Where clause 2 or 3 or section 13(4)(c) applies —

- (a) the builder may by notice in writing to the owner —
  - (i) increase the price stipulated in the contract by an amount set out in the notice; and

- (ii) specify when any increased amount is payable, which must be either —
  - (A) not later than 10 working days after the notice is given; or
  - (B) at the time of a progress payment;
- (b) if the amount of an increase exceeds 5% of the price stipulated in the contract, the owner may terminate the contract in accordance with section 19 within 10 working days after receipt of notice under paragraph (a); and
- (c) if the owner so terminates the contract, the owner is liable to compensate the builder for the reasonable costs incurred by the builder up to the date of termination.

*[Clause 4 amended by No. 19 of 2010 s. 51.]*

**5. Right of review**

- (1) If the owner considers that the amount of a price increase notified under subclause (a) of clause 4 is excessive or unjustified the owner may apply to the Disputes Tribunal, within 10 working days after receipt of a notice under that subclause, for a review of that amount.
- (2) On a review under this clause the builder is required to show that the price has been increased to reflect actual increases in costs between the date of the contract and the date of the notice under clause 4(a).
- (3) On a review under this clause the Disputes Tribunal may confirm, vary or disallow the amount of the price increase, and the contract must have effect in accordance with the Disputes Tribunal's decision.

*[Clause 5 amended by No. 19 of 2010 s. 51.]*

*[Schedule 1 amended by No. 57 of 1997 s. 73; No. 76 of 2000 s. 57 and 58; No. 37 of 2002 s. 20; No. 19 of 2010 s. 4 and 51.]*

**Notes**

<sup>1</sup> This is a compilation of the *Home Building Contracts Act 1991* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any reprint.

**Compilation table**

Short title	Number and year	Assent	Commencement
<i>Home Building Contracts Act 1991</i>	61 of 1991	30 Dec 1991	4 Apr 1992 (see s. 2 and <i>Gazette</i> 3 Apr 1992 p. 1461)
<i>Strata Titles Amendment Act 1995</i> s. 97	58 of 1995	20 Dec 1995	14 Apr 1996 (see s. 2 and <i>Gazette</i> 15 Mar 1996 p. 981)
<i>Water Agencies Restructure (Transitional and Consequential Provisions) Act 1995</i> s. 188	73 of 1995	27 Dec 1995	1 Jan 1996 (see s. 2(2) and <i>Gazette</i> 29 Dec 1995 p. 6291)
<i>Local Government (Consequential Amendments) Act 1996</i> s. 4	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)
<i>Home Building Contracts Amendment Act 1996</i>	72 of 1996	13 Nov 1996	1 Feb 1997 (see s. 2 and <i>Gazette</i> 24 Jan 1997 p. 543)
<i>Trustees Amendment Act 1997</i> s. 18	1 of 1997	6 May 1997	16 Jun 1997 (see s. 2 and <i>Gazette</i> 10 Jun 1997 p. 2661)
<i>Statutes (Repeals and Minor Amendments) Act 1997</i> s. 73	57 of 1997	15 Dec 1997	15 Dec 1997 (see s. 2(1))
<b>Reprint of the <i>Home Building Contracts Act 1991</i> as at 30 Oct 1998</b> (includes amendments listed above)			
<i>Building Legislation Amendment Act 2000</i> Pt. 3 and s. 59 and 62 <sup>2</sup>	76 of 2000	7 Dec 2000	s. 43, 44, 48, 49(2), 50(1), 51-53, 55-57, 58(c), 59 and 62: 1 Aug 2001 (see s. 2 and <i>Gazette</i> 31 Jul 2001 p. 3907); s. 45-47, 49(1), 50(2), 54, 58(a) and (b): 1 Nov 2001 (see s. 2 and <i>Gazette</i> 31 Jul 2001 p. 3907)

## Home Building Contracts Act 1991

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Short title	Number and year	Assent	Commencement
<i>Corporations (Consequential Amendments) Act 2001</i> s. 220	10 of 2001	28 Jun 2001	15 Jul 2001 (see s. 2 and <i>Gazette</i> 29 Jun 2001 p. 3257 and <i>Cwlth Gazette</i> 13 Jul 2001 No. S285)
<b>Reprint of the <i>Home Building Contracts Act 1991</i> as at 9 Nov 2001</b> (includes amendments listed above)			
<i>Home Building Contracts Amendment Act 2002</i>	37 of 2002	20 Nov 2002	20 Nov 2002 (see s. 2)
<i>Statutes (Repeals and Minor Amendments) Act 2003</i> s. 66	74 of 2003	15 Dec 2003	15 Dec 2003 (see s. 2)
<i>Courts Legislation Amendment and Repeal Act 2004</i> s. 141	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)
<i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004</i> s. 80	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53))
<b>Reprint 3: The <i>Home Building Contracts Act 1991</i> as at 10 Feb 2006</b> (includes amendments listed above)			
<i>Statutes (Repeals and Miscellaneous Amendments) Act 2009</i> s. 75	8 of 2009	21 May 2009	22 May 2009 (see s. 2(b))
<i>Standardisation of Formatting Act 2010</i> s. 4 and 51	19 of 2010	28 Jun 2010	11 Sep 2010 (see s. 2(b) and <i>Gazette</i> 10 Sep 2010 p. 4341)

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<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.



**Provisions that have not come into operation**

Short title	Number and year	Assent	Commencement
<i>Caravan Parks and Camping Grounds Act 1995</i> s. 33 <sup>3</sup>	34 of 1995	29 Sep 1995	To be proclaimed (see s. 2)
<i>Building Services (Complaint Resolution and Administration) Act 2011</i> Pt. 10 Div. 1 <sup>4</sup>	16 of 2011	25 May 2011	To be proclaimed (see s. 2(a))

<sup>2</sup> The *Building Legislation Amendment Act 2000* s. 59 and 62 read as follows:

“

**59. References to Committee in other written laws**

A reference in any written law to the Building Disputes Committee constituted under the *Builders' Registration Act 1939* is to be read and construed as a reference to the Building Disputes Tribunal under that Act as amended by this Act.

**62. Review**

- (1) The Minister is to carry out a review of the operation and effectiveness of the amendments made by this Act as soon as is practicable after the expiration of 3 years from the commencement of section 1 of this Act.
- (2) The Minister is to prepare a report based on the review made under subsection (1) and, as soon as is practicable after the report is prepared, is to cause it to be laid before each House of Parliament.

”

<sup>3</sup> On the date as at which this compilation was prepared, the *Caravan Parks and Camping Grounds Act 1995* s. 33, which gives effect to Sch. 2, had not come into operation. It reads as follows:

“

**33. Consequential amendments**

The Acts referred to in the first column of Schedule 2 are amended in the manner set out in the second column of that Schedule.

”

Schedule 2 item 3 reads as follows:

“

3. *Home Building* In the definition of “dwelling” in section 3(1),

*Contracts Act 1991* insert after “residence” the following —

“ , but does not include a park home, as defined in the *Caravan Parks and Camping Grounds Act 1995* ”.

<sup>3</sup> On the date as at which this compilation was prepared, the *Building Services (Complaint Resolution and Administration) Act 2011* Pt. 10 Div. 1 had not come into operation. It reads as follows:

## **Part 10 — Consequential amendments and transitional provisions**

### **Division 1 — *Home Building Contracts Act 1991* amended**

#### **112. *Home Building Contracts Act 1991* amended**

This Division amends the *Home Building Contracts Act 1991*.

#### **113. Section 3 amended**

- (1) In section 3(1) delete the definition of *Disputes Tribunal*.
- (2) In section 3(1) insert in alphabetical order:

***Building Commissioner*** means the officer referred to in the *Building Services (Complaint Resolution and Administration) Act 2011* section 85;

#### **114. Section 8 amended**

Delete section 8(3) and insert:

- (3) Where —
  - (a) a statement is given to the owner by the builder for the purposes of subsection (1)(b); and
  - (b) the owner considers that the variation is not one to which subsection (1) applies,

the owner cannot make a complaint as provided in section 17 unless the owner makes the complaint within 10 working days after the statement was given to the owner.

**115. Section 15 amended**

- (1) In section 15(4) delete “Disputes Tribunal may approve a form of contract submitted to it for its” and insert:

State Administrative Tribunal may approve a form of contract submitted to the Building Commissioner for an

- (2) In section 15(6) delete “under section 21” and insert:

as referred to in section 17

**116. Section 16 deleted**

Delete section 16.

**117. Section 17 replaced**

Delete section 17 and insert:

**17. Complaint in respect of breach or entitlement to compensation**

If an owner or builder under a contract claims that —

- (a) there has been a breach of —
- (i) the contract, not being a breach in respect of which a building remedy order may be made under the *Building Services (Complaint Resolution and Administration) Act 2011*; or
  - (ii) a provision in Part 2;
- or
- (b) the owner or builder is entitled to compensation under Schedule 1,

then, subject to the *Building Services (Complaint Resolution and Administration) Act 2011*, the owner or builder may make a complaint under section 5(2) of that Act.

**118. Section 18 deleted**

Delete section 18.

**119. Section 20 replaced**

Delete section 20 and insert:

**20. Adjustment of rights in certain cases**

If a contract is terminated under section 4(5), 10(4) or 14(3) or Schedule 1, the owner or builder may make a complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* section 5(2) claiming that the owner or builder is entitled to —

- (a) the return or repayment of the whole or part of any consideration, or the value of any consideration, given by the owner under or in relation to the contract; or
- (b) payment to the builder in respect of —
  - (i) any materials supplied by the builder; or
  - (ii) any home building work or other services performed by the builder; or
  - (iii) costs, including overhead expenses and loss of profit, incurred by the builder, under or in relation to the contract.

**120. Sections 21, 22, 23 and 24 deleted.**

Delete sections 21, 22, 23 and 24.

**121. Section 25D amended**

In section 25D(1)(b) delete “remedy under section 12A of the *Builders’ Registration Act 1939*” and insert:

building remedy order under the *Building Services (Complaint Resolution and Administration) Act 2011*

**122. Section 25G amended**

In section 25G(1)(a) delete “remedy under section 12A of the *Builders’ Registration Act 1939*” and insert:

building remedy order under the *Building Services (Complaint Resolution and Administration) Act 2011*

**123. Section 27 amended**

In section 27(1) delete “21(3)(a) or 26(2), a” and insert:

or 26(2) or by an order referred to in the *Building Services (Complaint Resolution and Administration) Act 2011* section 41(3)(a), a

**124. Section 31 replaced**

Delete section 31 and insert:

**31. Prosecutions**

- (1) A prosecution for an offence against this Act can only be commenced by the Building Commissioner or a person authorised to do so by the Building Commissioner.
- (2) Subsection (1) does not limit the functions of the Director of Public Prosecutions under the *Director of Public Prosecutions Act 1991* section 11.
- (3) A prosecution for an offence against this Act may be commenced within 3 years after the date on which the offence was allegedly committed, but not later.
- (4) All prosecutions for offences against this Act are to be heard by a court of summary jurisdiction constituted by a magistrate.
- (5) In the absence of evidence to the contrary, proof is not required in any proceeding for an offence against this Act —
  - (a) of the authority of a person to take the proceeding; or
  - (b) that a signature on a prosecution notice alleging the offence is the signature of a person authorised to take the proceeding.

**125. Section 31A deleted**

Delete section 31A.

**126. Schedule 1 amended**

- (1) Delete Schedule 1 clause 5(1) and insert:
  - (1) If the owner considers that the amount of a price increase notified under clause 4(a) is excessive or unjustified, the owner may make a complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* section 5(2).

- (2) In Schedule 1 clause 5(2) delete “review under this clause” and insert:

complaint referred to in subclause (1)

- (3) Delete Schedule 1 clause 5(3).