CONSUMER AND EMPLOYMENT PROTECTION

CE301*

Home Building Contracts Act 1991

Home Building Contracts Amendment Regulations 2003

Made by the Governor in Executive Council.

1. Citation

These regulations may be cited as the *Home Building Contracts Amendment Regulations 2003*.

2. The regulations amended

The amendments in these regulations are to the *Home Building Contracts Regulations 1992**.

[* *Reprinted as at 7 June 2002.*
For amendments to 7 May 2003 see Gazette 8 April 2003.]

3. Regulation 4 repealed

Regulation 4 is repealed.

4. Regulation 4A repealed

Regulation 4A is repealed.

5. Schedule 1 replaced

Schedule 1 is repealed and the following Schedule is inserted instead —

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Schedule 1

[r. 3]

Home Building Contracts Act 1991

NOTICE FOR THE HOME OWNER

This notice

A builder must give a copy of this notice to you, as the owner, before you sign a contract for home building work that is covered by the *Home Building Contracts Act 1991*.

This notice explains relevant provisions of that Act as required by section 4(2). The Act itself should be referred to for the exact text. A copy of the Act can be obtained from the State Law Publisher (check the White Pages for the current address).

Who are "owners" and "builders"?

In this notice "owner" means the person for whom the home building work is to be done and "builder" means the person who, in the course of business, is to do the work or arrange for it to be done.

What the Act covers

The Act deals with contracts for home building work where the contract price is above $6 000 and below $200 000. The Act also applies to contracts, within that price range, for associated work (e.g. swimming pools, carports and landscaping) and for alterations. It makes some provisions that are implied in all contracts, and also states what is not allowed in any contract.

Under the Act a builder must not do anything in connection with a contract that is "unconscionable, harsh or oppressive". Furthermore, neither you nor the builder may do anything that is "misleading or deceptive".

The Act deals with "cost plus" contracts only to a limited extent — see later in this notice under **"Special rules for cost plus contracts"**.

You may seek appropriate redress through the Building Disputes Tribunal for breaches of the contract and the Act, including for unconscionable or misleading conduct — see later in this notice under **"Disputes"**. The builder's rights are similar, but do not extend to any unconscionable behaviour by you.

A person can be prosecuted or fined for not complying with some provisions of the Act. Some of these provisions apply to owners as well as builders.

Rights conferred by the Act cannot be taken away, diminished or waived and it is forbidden to make any agreement or arrangement to by-pass the Act.

Home indemnity insurance

It is compulsory for all home building work except associated work alone (e.g. swimming pools, carports, pergolas and landscaping), the cost of which is above $12 000, to be covered by home indemnity insurance.

Home indemnity insurance is also compulsory for associated work if that work is performed under a contract that includes construction or renovation of a residence and the total cost of all the building work is above $12 000.

Before commencing work or demanding any payment (including a deposit) from you, the builder must take out home indemnity insurance and give you a certificate confirming the existence of the insurance cover.

There may be periods when a builder is exempt from the requirement to take out home indemnity insurance. During, and in some circumstances after, one of these periods a builder must give you a notice in a prescribed form.

Home indemnity insurance will protect you and any successive owners against financial loss due to the insolvency, death or disappearance of the builder that results in —

(a) loss of deposit (up to a limit of $13 000);

(b) the non-completion of the building work; or

(c) the failure to rectify faulty or unsatisfactory building work.

Home indemnity insurance generally does not cover an owner for any money paid in advance other than a deposit. In any event it is a breach of the Act for a builder to request and receive such a payment — see later in this notice under **"Provisions that are not allowed"**.

Note that, with building work carried out under a cost plus contract, the builder is required to take out home indemnity insurance to cover only the risk specified in (c) above — see later in this notice under **"Special rules for cost plus contracts"**.

Claims may be made under a home indemnity insurance policy at any time before the end of a period of 6 years after the day of practical completion of the building work.

Some home building work is exempt from the requirement to obtain home indemnity insurance. If your work is exempt your builder should give you a notice informing you that this is so. Either the Builders' Registration Board or the Department of Consumer and Employment Protection can provide you with further information in this respect.

Contract — steps to be followed

Everything agreed to between you and the builder must be set out in a written contract. The contract must be dated and signed by both you and the builder or your respective representatives. If this is not done you may terminate the contract — see later in this notice under **"Termination of contract"**.

You must be given a copy of the contract as soon as is practicable after it has been signed and before the building work starts.

It is the builder's duty to see that all these steps are taken.

Special rules for cost plus contracts

A "cost plus" contract is one under which the builder is entitled to recover actual costs incurred plus an extra amount for profit. A costs plus contract —

(a) must be headed "cost plus contract"; and

(b) must contain a statement in which both you and the builder acknowledge that it is a cost plus contract and that the Act does not apply to it, except in relation to the requirement for a builder to take out home indemnity insurance in the situation explained just below.

If the contract does not comply with these requirements you may terminate the contract — see later in this notice under **"Termination of contract"**.

As mentioned above, the Act does not in general apply to a cost plus contract. However, if you have a complaint about the building work carried out under such a contract, you can apply to the Building Disputes Tribunal under the Builders' Registration Act for an order that the builder rectify the work or pay a sum of money for failing to rectify the work — see later in this notice under **"Disputes"**.

The builder is required to take out home indemnity insurance in relation to a cost plus contract to cover you and any successive owner against financial loss where an order made by the Building Disputes Tribunal under the Builders' Registration Act is not enforceable due to the insolvency, death or disappearance of the builder.

Provisions that are not allowed

The builder cannot include in a contract a requirement for you to make a payment other than —

(a) a deposit before the work begins of no more than 6.5% of the contract price; and

(b) progress payments after the work begins for work done or goods supplied.

If any such provision is included you may terminate the contract — see later in this notice under **"Termination of contract"**.

The builder may also be prosecuted and fined for demanding, or receiving, any payment after the work begins other than a progress payment as set out in (b) above.

The builder must not include provisions in the contract that are "unconscionable, harsh or oppressive". If you think this has occurred, you may refer the matter to the Building Disputes Tribunal — see later in this notice under **"Disputes"**.

Prime cost/Provisional sum

Where a contract refers to "prime costs" it means fittings or equipment that may vary in price (e.g. bathroom tiles). The builder must estimate the cost of such items at or above the lowest amount that they could reasonably cost and the cost must not be understated in the contract. If it is, the builder may be prosecuted and fined. This also applies to estimates for "provisional sums" such as site works.

Contract price must be fixed

A contract must not contain a "rise and fall" clause. A rise and fall clause allows the builder to pass on price increases for labour or materials that occur after the contract is signed.

However, the builder can include a clause in the contract that allows for a price increase to cover an increase in actual costs that results from —

(a) government taxes or charges increasing after the contract is signed;

(b) the builder having to comply with a State or Commonwealth law; or

(c) work not starting within 45 working days after the contract is signed if the delay is not caused by the builder.

If (c) applies and the price rise is more than 5%, you may terminate the contract within 10 working days of receiving written notice of the increase — see later in this notice under **"Termination of contract"**. You can also choose to apply to the Building Disputes Tribunal within this period to assess whether the price rise is justified.

Varying the contract

1. *Steps to be followed*

   All changes to the building work to be carried out under a contract, including the cost of the change, must be put in writing and be dated and signed by both you and the builder or your respective representatives.

   A copy must be given to you as soon as is possible after both you and the builder have signed, and before the start of the work that results from the change.

   The builder must ensure that these steps are taken.

2. *Exceptions*

   Certain changes may be made without these steps being taken, namely —

   (a) changes resulting from directions given by a building surveyor or other person acting under a written law;

   (b) changes arising from unforeseen circumstances (but this does not include unforeseen labour or material cost increases).

   Note also the changes by way of price increase that are referred to above under the heading **"Contract price must be fixed"** and below under the heading **"Where approvals are delayed"**.

3. *Protection that you have as an owner*

If any change referred to in paragraph (a) or (b) immediately above occurs, the builder must give you certain information in writing — see section 8(1), (2) and (3) of the Act. Note that, if you and the builder have a dispute about whether particular circumstances are "unforeseen circumstances" and you wish to apply to the Building Disputes Tribunal, you must do so within 10 working days after this information is given to you.

Where approvals are delayed

A contract is conditional on —

(a) a building licence and the Water Corporation's approval being obtained within 45 working days from the date of the contract; and

(b) the written acceptance within that period by both you and the builder of any condition attached to the building licence or the Water Corporation approval that will vary the contract.

Note that contracts that are only for associated work (e.g. swimming pools, carports and landscaping) are not subject to these conditions.

Both you and the builder must do what you reasonably can to ensure that these conditions are met. If they are not met, the rights of the parties depend on whose fault it was that the condition was not met within the 45 day period.

Builder at fault	**Owner at fault or neither or both parties at fault**
Contract remains in force on the same terms and conditions unless you and the builder agree otherwise.	Contract remains in force on the same terms and conditions until you and the builder agree otherwise but — (i) the builder may by written notice increase the contract price; (ii) if the increase exceeds 5% you may terminate the contract within 10 working days after receiving the notice provided you compensate the builder for all reasonable costs incurred up to the date of termination — see below under "**Termination of contract**"; (iii) you may apply, within 10 working days after receiving the notice, to have the increase reviewed by the Building Disputes Tribunal.

Defects - making good

Any defect in work done or materials supplied under a contract must be made good by the builder if the builder is notified of the defect within 4 months (or a greater period if provided for in the contract) after practical completion of the building work.

However, you and the builder may agree in the contract that particular defects are excluded from this provision.

Inspection

A builder must not prevent you (or a person authorised in writing to represent you) or your lending institution from inspecting the building work as allowed by the contract or by regulations under the Act. A contract cannot restrict inspections except by limiting them to normal working hours or forbidding inspections that would unreasonably impede or interfere with the building work.

Termination of contract

In various places above it is stated that you can terminate the contract for a particular reason. To do this you must give notice in writing to the builder before the building work is finished.

If a contract is terminated, the Building Disputes Tribunal can make financial adjustments between you and the builder.

Disputes

1. Contracts generally

Disputes between owners and builders about contracts that fall within the Act can be referred to the Building Disputes Tribunal for a legally binding determination. Such an application to the Tribunal must be made within 3 years from when you became entitled to take legal action.

The Act also imposes a monetary limit on the Tribunal's powers. The Tribunal cannot (unless the parties agree to it doing so) order work to be done exceeding $100 000 in value, or order the making of a payment above that amount.

2. Standard of work

Where a remedy is sought for below-standard building work, an application to the Tribunal must be made under the *Builders' Registration Act 1939* and not the *Home Building Contracts Act 1991*.

Please note that disputes can be brought before the Tribunal under the *Builders' Registration Act 1939* within 6 years from the time the building work is completed. The building work is completed when the building to which the work relates becomes fit for occupation in a free and uninterrupted manner. There is no monetary limit on the orders the Tribunal can make under that Act.

3. Procedure

Before you or the builder apply to the Building Disputes Tribunal, a notice in the prescribed form must be given to the other party outlining the complaint and asking that it be put right or that a settlement be agreed to. You must keep a copy of that notice to give to the Tribunal at the time of making an application.

Parties to proceedings before the Tribunal must represent themselves except as set out in section 45A of the *Builders' Registration Act 1939*.

Advice on how a dispute may be placed before the Building Disputes Tribunal and related matters may be obtained from the staff of the Tribunal.

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6. Schedules 2 to 8 repealed

Schedules 2, 3, 4, 5, 6, 7 and 8 are repealed.

By Command of the Governor,

M. C. WAUCHOPE, Clerk of the Executive Council.