

Western Australia

Home Building Contracts Amendment Act 2002

As at 20 Nov 2002

No. 37 of 2002

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Home Building Contracts Amendment Act 2002

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Western Australia

Home Building Contracts Amendment Act 2002

No. 37 of 2002

An Act to amend the *Home Building Contracts Act 1991* in relation to home indemnity insurance and the approval of funds providing corresponding cover; and to amend the *Local Government (Miscellaneous Provisions) Act 1960* consequentially.

[Assented to 20 November 2002]

The Parliament of Western Australia enacts as follows:

1. Short title

This Act may be cited as the *Home Building Contracts Amendment Act 2002*.

2. Commencement

This Act comes into operation on the day on which it receives the Royal Assent.

3. The Act amended

The amendments in this Act, other than in section 21, are to the *Home Building Contracts Act 1991**.

[* Reprinted as at 9 November 2001.]

4. Long title amended

The long title is amended by inserting after “insurance” —
“ **and funds providing corresponding cover** ”.

5. Section 3 amended

Section 3(1) is amended by inserting the following definition in the appropriate alphabetical position —

“

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

”.

6. Section 9 amended

Section 9(1)(a) is amended by deleting “under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960*”.

7. Section 14 amended

Section 14(1)(b) is amended by inserting after “apart from this section” —

“ and Part 3A ”.

8. Heading to Part 3A amended

The heading to Part 3A is amended by inserting after “insurance” —

“ **and corresponding cover** ”.

9. Section 25A amended

- (1) Section 25A is amended by inserting the following definitions in the appropriate alphabetical positions —

“

“**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;

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

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

“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.

”.

- (2) Section 25A is amended by deleting the definition of “owner-builder” and inserting the following definition instead —

“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;
- (3) Section 25A is amended in the definition of “residential building work contract” by deleting “contract.” and inserting instead —
“ contract; ”.

10. Section 25B amended

- (1) Section 25B(1) is amended by deleting “subsection (2)” and inserting instead —
“ this section ”.
- (2) Section 25B(2) is amended by deleting “under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960*”.
- (3) After section 25B(2) the following subsections are inserted —
“
 - (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”

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in respect of which no insurance was required because of this subsection.

- (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.

”.

11. Section 25C amended

- (1) Section 25C(1) is repealed and the following subsection is inserted instead —

“

- (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) Section 25C(2) is amended by deleting “that policy” and inserting instead —

“

the policy referred to in subsection (1)(a) or the provision of the cover referred to in subsection (1)(b)

”.

- (3) After section 25C(2) the following subsections are inserted —

“

- (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.

”.

[Note: The heading to section 25C will be altered to read “**Offence of no insurance or no corresponding cover**”.]

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12. Section 25D amended

Section 25D(1)(a) is amended by inserting after “on behalf of another person” —
“ , other than a developer, ”.

13. Section 25DA inserted

After section 25D the following section is inserted in Division 2 —

“

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 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).

”.

14. Section 25F replaced by sections 25F and 25FA

Section 25F is repealed and the following sections are inserted instead —

“

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.

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

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issued to the person during a period specified in an order made under section 25I for the purposes of section 25C(3).

”.

15. Section 25GA inserted

After section 25G the following section is inserted in Division 3 —

“

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).

”.

16. Part 3A Division 3A inserted

Before section 25H the following Division is inserted —

“

Division 3A — Approved funds

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.

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.

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.

”.

17. Part 3A Division 5 inserted

After section 25H the following Division is inserted in Part 3A —

“

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

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.
- (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).

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).

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.

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 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.

”.

18. Section 32 amended

- (1) Section 32(2) is amended as follows:

- (a) by inserting after “home indemnity insurance” in both places where it occurs —

“ or corresponding cover ”;

- (b) in paragraph (b) by inserting after “Part” —

“

, either unconditionally or subject to such conditions as are specified in the regulations

”.

- (2) After section 32(2) the following subsection is inserted —

“

- (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.

”.

19. Section 33 amended

Section 33 is amended by inserting after “this Act” —

“ (other than section 25J(5), (6) and (7)) ”.

20. Various references to “shall” changed to “must”

Each provision of the Act listed in the Table to this section is amended by deleting “shall” in each place where it occurs and inserting instead —

“ must ”.

Table

s. 15(3) and (4)	s. 31A
s. 18(2) and (3)	s. 31B(11)
s. 25C(2)	s. 34(1), (2) and (3)
s. 25H(1) and (2)	Sch. 1 cl. 5(3)

21. Consequential amendment to the *Local Government (Miscellaneous Provisions) Act 1960*

- (1) The amendment in this section is to the *Local Government (Miscellaneous Provisions) Act 1960**.

[* *Reprinted as at 28 July 1999.*

For subsequent amendments see 2001 Index to Legislation of Western Australia, Table 1, p. 221.]

- (2) Section 374AAA is amended by deleting paragraph (b) and “or” before it and inserting the following instead —

“

- (b) corresponding cover, as defined in section 25A of that Act, is provided in respect of the work;
or
- (c) the policy of insurance referred to in paragraph (a) or the cover referred to in paragraph (b) is not required in respect of the work.

”.

