

# 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 advance payments	10
11.	Minimum defects liability period	11
12.	Understatement of prime cost items etc.	12
13.	Rise-and-fall clause prohibited	12
14.	Cost plus contracts	13
15.	Conduct or terms of contract that are unconscionable etc.	14

### Part 3 — Remedies

16.	Disputes Committee's jurisdiction limited	16
-----	---	----

**Contents**

---

17.	Applications for relief, and orders	16
18.	Orders for payment while case pending	18
19.	How contract terminated	18
20.	Adjustment of rights in certain cases	18
21.	Remedy for breach of section 15	19
22.	Avoidance of concurrent proceedings	20
23.	Transfer of proceedings	20
24.	Settlement	21
25.	Presentation of cases before Disputes Committee	21

**Part 3A — Home indemnity insurance**

**Division 1 — Introduction**

25A.	Interpretation	24
------	----------------	----

**Division 2 — Builders**

25B.	Application of this Division	25
25C.	Offence if no insurance	26
25D.	Requirements of insurance policy	26

**Division 3 — Owner-builders**

25E.	Application of this Division	29
25F.	Restriction on sale by owner-builder	29
25G.	Requirements of insurance policy	29

**Division 4 — Review**

25H.	Review of insurance scheme	31
------	----------------------------	----

**Part 4 — General**

26.	Access for inspection of building work	32
27.	Effect of breach of Act on contract	32
28.	Contracting out forbidden	33
29.	Saving	33
30.	Liability of directors etc.	33
31.	Prosecutions	33
32.	Regulations	34
33.	Application not retrospective	34
34.	Review of Act	35
35.	<i>Small Claims Tribunals Act 1974</i> amended	35

**Schedule 1**

**Notes**

**Defined Terms**

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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, to amend the *Small Claims Tribunals Act 1974*, and for connected purposes.**

*[Long title amended by No. 72 of 1996 s.4.]*

The Parliament of Western Australia enacts as follows:

## **Part 1 — Preliminary**

### **1. Short title**

This Act may be cited as the *Home Building Contracts Act 1991*.

### **2. Commencement**

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

### **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;

“**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 Committee”** means the Building Disputes  
Committee 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 payable under the contract for the work is \$6 000, or such other amount as is prescribed, or less; or
  - (iii) if the amount 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.]*

## **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.  
Penalty: \$500.

**s. 6**

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(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 14 days of receiving it.

Penalty: \$10 000.

**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 14 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)

**s. 9**

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of that section, he or she makes the application within 14 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.]*

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

- (1) Subject to subsection (5) every contract is conditional upon —
- (a) a building licence under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960* being issued, in respect of the home building work included in the contract, within 45 working days from the date of the contract;
  - (b) the owner and the builder acknowledging in writing within that period that each of them accepts any condition attached to the licence;
  - (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) the owner and the builder acknowledging in writing within that period that each of them accepts any direction that may be 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.

- (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 30 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;
  - (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.]*

**10. Deposits and advance 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.

**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 120 days commencing on the day of practical completion.

- (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

**s. 12**

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from being reasonably capable of being used for its intended purpose.

- (3) The regulations may provide for exemptions from the requirements of this section.

**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.
- (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, 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.

**s. 15**

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- (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.

**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 the circumstances in which it 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 shall 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 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 days.
- (4) The Disputes Committee 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 shall 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.

## **Part 3 — Remedies**

### **16. Disputes Committee's jurisdiction limited**

- (1) The Disputes Committee 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.

### **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 Committee 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.
- (3) A preliminary notice is a notice in writing 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.
- (4) Upon the making of an application under subsection (1) the Disputes Committee 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;
  - (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 Committee 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 Committee may, upon further application, make an

**s. 18**

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order against the person for the payment of a sum of money as compensation for the failure.

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

- (1) Where an owner or a builder has applied to the Disputes Committee for relief in the form of a payment of a sum of money the Disputes Committee may on the application of the person who has so applied order the other party to pay to the Disputes Committee an amount not exceeding the amount claimed.
- (2) An order shall not be made under subsection (1) against a party merely on account of the poor financial position of that party.
- (3) An amount paid to the Disputes Committee under this section shall be placed by it in an interest-bearing account, as it thinks fit, and the amount and any interest shall, on determination of the application for relief, be paid in accordance with the order of the Disputes Committee.

*[Section 18 amended by No. 1 of 1997 s.18.]*

**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 Committee 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 any materials supplied, or any home building work or other services performed, by the builder under or in relation to the contract.

**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 Committee 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 Committee 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 Committee considers necessary or expedient.

- (4) Where it appears to the Disputes Committee 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 Committee may make such orders against, or in respect of, that person as it considers just.

**s. 22**

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- (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
  - (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 Law but does not include an employee of the company unless he or she was concerned in the management of the company.

**22. Avoidance of concurrent proceedings**

Subject to section 23, where an application is made to the Disputes Committee 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 Committee; or
- (b) the application to the Disputes Committee is withdrawn or not pursued.

**23. Transfer of proceedings**

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

**24. Settlement**

- (1) If before or during the hearing of any proceedings under this Part it appears to the Disputes Committee 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 Committee 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 Committee or any member is disqualified, by reason of anything done under subsection (1), from hearing or continuing to hear the proceedings if the Disputes Committee thinks fit to do so.
- (4) Where proceedings are settled under this section, the Disputes Committee may embody the terms of the settlement in an order.
- (5) Where proceedings are settled under this section, the Disputes Committee may not impose any penalty provided for by this Act.

**25. Presentation of cases before Disputes Committee**

- (1) Except as provided in this section, a party to any proceedings before the Disputes Committee under this Part must present his own case and may not be represented by another person.

**s. 25**

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- (2) All or any of the parties to any proceedings before the Disputes Committee under this Part may be represented by legal practitioners or any other persons if —
- (a) all of the parties agree; or
  - (b) the monetary amount or value of work for which an order is sought by the applicant, as determined by the Disputes Committee, exceeds \$10 000; or
  - (c) the Disputes Committee is satisfied —
    - (i) that any party who is not so represented will not be unfairly disadvantaged; or
    - (ii) that one of the parties is unable to appear personally or conduct the proceedings properly himself or herself;
- or
- (d) one of the parties is a legally qualified person; or
  - (e) one of the parties is a body corporate and any other party elects to be so represented.
- (3) This section does not prevent —
- (a) a body corporate from being represented by an officer or employee of the body corporate (not being a legally qualified person) authorized to conduct the proceedings on its behalf (whether or not he is remunerated by the body corporate for representing it in the proceedings); or
  - (b) a person from acting as an interpreter for a party, if his fee does not exceed an amount fixed by the Disputes Committee at the hearing.
- (4) A person must not demand or receive any fee or reward for representing or assisting a party to proceedings before the Disputes Committee under this Part unless —
- (a) he is a legal practitioner;
  - (b) where the party is a body corporate, he is an officer or employee of the body corporate representing it under subsection (3); or

- (c) he is an interpreter for a party and the fee does not exceed the amount fixed under subsection (3)(b).

Penalty: \$5 000.

- (5) In this section —

**“legal practitioner”** means a “certificated practitioner” as defined in the *Legal Practitioners Act 1893*;

**“legally qualified person”** means a legal practitioner, an articulated law clerk, or any person who holds or had held legal qualifications under the laws of this State or any other place.

## **Part 3A — Home indemnity insurance**

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

### **Division 1 — Introduction**

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

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

In this Part —

**“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*;

**“insolvency”** means —

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

**“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”** means a person who constructs a dwelling pursuant to a building licence issued to that person under section 4A(1)(c) of the *Builders’ Registration Act 1939*;

**“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.

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

## **Division 2 — Builders**

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

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

- (1) Subject to subsection (2), 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.

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance

**Division 2** Builders

**s. 25C**

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- (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 25B inserted by No. 72 of 1996 s.5.]*

**25C. Offence if no insurance**

- (1) A builder shall not perform residential building work to which this Division applies unless a policy of insurance that complies with this Division is in force in relation to that residential building work.
- (2) A builder shall 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 that policy.

Penalty: \$10 000.

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

**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 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, 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) authorized under the *Insurance Act 1973* of the Commonwealth to carry on insurance business; and
  - (ii) approved in writing by the Minister;and

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance

**Division 2** Builders

**s. 25D**

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- (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.]*

### **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 *Home Building Contracts Amendment Act 1996*.

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

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

An owner-builder shall not, within 7 years of the date of issue of the relevant building licence to the owner-builder, enter into a contract to sell or otherwise dispose of the dwelling constructed by the owner-builder or the land on which the dwelling is constructed unless —

- (a) a policy of insurance that complies with this Division is in force in relation to the residential building work; and
- (b) the purchaser has been furnished with a certificate, in a form approved by the Minister, that evidences the taking out of that policy.

Penalty: \$10 000.

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

**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 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

**Home Building Contracts Act 1991**

**Part 3A** Home indemnity insurance

**Division 3** Owner-builders

**s. 25G**

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- 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) authorized 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.]*

**Division 4 — Review**

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

**25H. Review of insurance scheme**

- (1) The Minister shall 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 shall 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 shall prepare a report based on the review made under subsection (1) and shall, 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.]*

## **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 authorized person from inspecting the home building work to which the contract relates if the owner or authorized 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) "**authorized 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.

**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 Law but does not include an employee of the body corporate unless he or she was concerned in the management of the body corporate.

**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’*

**s. 32**

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*Registration Act 1939* or a person authorized 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 complaint that a person is the Registrar of the Builders Registration Board or is authorized by that Board under subsection (1)(a) is to be taken as proved in the absence of evidence to the contrary.

**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 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; and
  - (c) require the provision of information about home indemnity insurance in the circumstances and manner set forth in the regulations.

*[Section 32 amended by No. 72 of 1996 s.6.]*

**33. Application not retrospective**

A provision of this Act does not apply to any contract entered into before the commencement of that provision.

**34. Review of Act**

- (1) The Minister shall 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 shall 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 shall prepare a report based on the review made under subsection (1) and shall, as soon as is practicable after the preparation thereof, cause the report to be laid before each House of Parliament.

**35. *Small Claims Tribunals Act 1974 amended***

*[Section 35 omitted under Reprints Act 1984 section 7(4)(e).]*

**Schedule 1**

(Sections 7(4), 8(4), 9(4), 13(5), 19 and 20)

***Consequences of non-fulfilment of conditions***

1. 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.
2. 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 or either party terminates the contract in accordance with section 19, but subject to the provisions of clause 4.
3. 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 or either party terminates the contract in accordance with section 19, but subject to the provisions of clause 4.
4. 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.
- 5. (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 Committee, 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 Committee may confirm, vary or disallow the amount of the price increase, and the contract shall have effect in accordance with the Disputes Committee's decision.

*[Schedule 1 amended by No. 57 of 1997 s.73.]*

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**Notes**

- <sup>1.</sup> This reprint is a compilation as at 30 October 1998 of the *Home Building Contracts Act 1991* and includes all amendments effected by the other Acts referred to in the following Table.

**Table of Acts**

Act	Number and Year	Assent	Commencement	Miscellaneous
<i>Home Building Contracts Act 1991</i>	61 of 1991	30 December 1991	4 April 1992 (see <i>Gazette</i> 3 April 1992 p.1461)	
<i>Water Agencies Restructure (Transitional and Consequential Provisions) Act 1995</i> , section 188	73 of 1995	27 December 1995	Section 188 operative 1 January 1996 (see section 2 and <i>Gazette</i> 29 December 1995 p.6291)	
<i>Strata Titles Amendment Act 1995</i> , section 97	58 of 1995	20 December 1995	14 April 1996 (see section 2 and <i>Gazette</i> 15 March 1996 p.981)	
<i>Local Government (Consequential Amendments) Act 1996</i> , section 4	14 of 1996	28 June 1996	1 July 1996 (see section 2)	
<i>Home Building Contracts Amendment Act 1996</i>	72 of 1996	13 November 1996	1 February 1997 (see section 2 and <i>Gazette</i> 24 January 1997 p.543)	
<i>Trustees Amendment Act 1997</i> , section 18	1 of 1997	6 May 1997	16 June 1997 (see section 2 and <i>Gazette</i> 10 June 1997 p.2661)	

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Act	Number and Year	Assent	Commencement	Miscellaneous
<i>Statutes (Repeals and Minor Amendments) Act 1997, section 73</i>	57 of 1997	15 December 1997	15 December 1997 (see section 2)	

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**Defined Terms**

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**Defined Terms**

*[This is a list of terms defined and the provisions where they are defined.  
It is not part of the Act.]*

Defined Term	Provision(s)
associated work .....	3(1)
authorized person .....	26(3)
builder .....	3(1)
building surveyor .....	8(5)
construct .....	3(1)
contract .....	3(1), 7(5)
cost of the building work .....	25A
cost plus contract .....	3(1)
date of the contract .....	3(1)
date of the variation .....	3(1)
defect .....	11(2)
Disputes Committee .....	3(1)
dwelling .....	3(1)
home building work .....	3(1)
home building work contract .....	3(1)
insolvency .....	25A
legal practitioner .....	25(5)
legally qualified person .....	25(5)
minimum amount .....	25A
officer .....	21(6), 30(2)
owner .....	3(1)
owner-builder .....	25A
perform .....	3(1)
practical completion .....	11(2)
prescribed .....	3(1)
residential building work .....	25A
residential building work contract .....	25A
rise-and-fall clause .....	13(3)
strata-titled dwelling .....	3(1)
the prescribed amount .....	16(2)
the Water Act .....	9(6)
working days .....	3(1)