

Home building

Home Building Contracts Act 1991

November 2007

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This brochure has been produced to help home owners, builders and tradespeople understand basic provisions of the *Home Building Contracts Act 1991* (the Act). The Act provides protection against unfair practices for both home owners and the persons undertaking home building work. It sets minimum requirements for contracts and prohibits certain arrangements. The brochure does not take the place of the Act nor does it cover all of the provisions of the legislation and should not be relied on for legal advice.

Copies of the Act and Regulations may be purchased from the State Law Publisher, 10 William Street, Perth, telephone 9321 7688.

For ease of reading, the terms 'builder' and 'tradesperson' have been used in this brochure. However, it should be noted that these are only examples of people doing the work. The information applies to all people contracted by a home owner to do building, renovations, improvements and associated work to a dwelling, provided the work is valued between \$7,500 and \$500,000.

When does the Act apply?

The Act applies to contracts for home building and associated work valued between \$7,500 and \$500,000. Refer also to the information given under the section: What the Act covers.

Examples of where the Act might apply include:

- a builder erects a new home;
- a swimming pool company installs a pool;
- a kitchen is renovated;
- a garage or shed is constructed; or
- a garden is landscaped.

The Act does not apply to the installation of fittings, such as carpets or curtains.

Who needs to comply with the Act?

The work may involve any of the following traders or tradespersons. Both they and the home owner who employs them must comply with the Act:

- registered builders;
- tradespeople such as carpenters, bricklayers, plasterers or tilers; or
- people who operate in a specific field, such as pool installation, shed construction or landscaping.



The Act does **not** apply to sub-contractors undertaking work for builders but it **does** apply if the work is undertaken directly for an 'owner-builder'.

What constitutes a contract?

A contract formally sets out the agreement between the home owner and the person doing the work. The Act requires that there must be a contract in writing signed by both the builder/tradesperson and the home owner, **before** the work begins.

For a small job, the contract may just be a detailed quotation signed and agreed by both parties. On the other hand, the contract for a new home, home additions and renovations or swimming pool should usually comprise a number of documents, including drawings and specifications.

Before signing any contract, home owners should make certain all the documents have been gathered together and are fully completed. There should be no blank spaces and the contract should include everything you've discussed.

IMPORTANT: Both parties should initial each page and every alteration or addition to the contract, when it is signed.

(Refer also to the section: Contract – steps to be followed.)

The main provisions of the Act

Set out below is a summary of some of the main requirements of the Act. As stated previously, this brochure does **not** cover all the requirements of the Act.

Notice to the home owner

A builder/tradesperson must provide the owner with a copy of a document prescribed under the Regulations to the Act entitled *Notice to the Home Owner* **before** signing a contract for home building work that is covered by the Act. Copies may be purchased from the State Law Publisher, 10 William Street, Perth, telephone 9321 7688.

The Notice summarises some relevant provisions of the Act but the Act itself should be referred to for the exact text.

Who are 'owners' and 'builders'?

The 'owner' is the person for whom the home building work is to be undertaken. The 'builder' is the person who performs the work or arranges for it to be done.

An 'owner-builder' is a person who takes out a building licence in their own name, instead of employing a registered builder.

For the purposes of the Act, a 'builder' is not necessarily a registered builder and the term includes tradespersons or any others contracted by an owner to undertake home building and/or associated work – refer to the section Who needs to comply with the Act?

What the Act covers

In addition to home building work, the Act applies to contracts for associated works between the price range of \$7,500 and \$500,000 (eg sheds, swimming pools, carports or 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 has a legal obligation not to do anything in connection with a contract that is 'unconscionable, harsh or oppressive'.

The Act deals with 'cost plus' contracts only to the extent that some special rules apply – see later in this brochure.

A builder or owner may be prosecuted and fined for not complying with some provisions of the Act. Rights provided by the Act cannot be taken away, diminished or waived and it is forbidden to make any agreement or arrangement to bypass the Act.

Building Disputes Tribunal

The Building Disputes Tribunal has the authority to deal with disputes between owners and builders about contracts that fall within the Act. Complaints can be lodged by either the builder or the home owner.

There is a monetary limit on the Tribunal powers over contractual issues. Unless the parties agree

Regional offices:

Goldfields/Esperance	(08) 9021 5966
Great Southern	(08) 9842 8366
Kimberley	(08) 9169 2811
Mid-West	(08) 9964 5644
North-West	(08) 9185 0900
South-West	(08) 9722 2888

National Relay Service: 13 36 77

Quality of Service Feedback Line: Tel: 1800 30 40 59

otherwise, the Tribunal cannot order work to be done exceeding \$100,000 in value, or order the making of a payment over that amount.

Home indemnity insurance

All home building work that costs more than \$20,000 must be covered by home indemnity insurance except if you are building only a pergola, fence or swimming pool, carrying out landscaping, or if similar 'associated work' is done in or around an existing dwelling, and you are not undertaking any residential construction work or placing a dwelling on land.

Registered builders are required to take out home indemnity insurance cover before obtaining a building licence from the local authority, even if they own the property they are building.

Home indemnity insurance is compulsory for associated work if that work is performed under a contract which includes the construction or renovation of a home and the total cost of all the building work is more than \$20,000.

Where applicable and before starting work or requiring any payment (including a deposit) the builder must take out home indemnity insurance and give the home owner a certificate confirming the existence of the insurance cover.

Home Indemnity Insurance is also required before local government issues a building license to a registered builder.

Home indemnity insurance helps to ensure that residential building work (except that undertaken under 'cost plus' contracts) will be finished at no additional cost to the home owner if the builder dies, disappears or becomes insolvent.

Except for 'cost plus' contracts, home indemnity insurance also protects the home owner during the period of the contract, against loss of deposit up to a limit of \$20,000.

NOTE: Claims under the home indemnity insurance policy must be made within a period of six years from the day of practical completion of the contract.

Before paying a deposit, owners should check with the builder to ensure that home indemnity insurance has been taken out or is not required.

Special rules apply to owner-builders and registered builders building for themselves. If the building licence was issued after 1 February 1997 they must take out a home indemnity insurance policy if they wish to sell or otherwise dispose of their property within seven years of a building licence being taken out.

Contract – steps to be followed

Everything agreed to between the owner and the builder must be set out in a written contract which must be dated and signed by both parties. If this is not done the owner may terminate the contract – see later in this brochure under the section: Termination of contract.

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

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

Special rules for 'cost plus' contracts

In general, the Act does not apply to '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. The following rules apply to these contracts:

- the contract must be headed 'cost plus contract'; and
- it must contain a statement in which both the owner and the builder acknowledge that it is a 'cost plus' contract and that the Act does not apply to it.

If not, the owner may terminate the contract - see the section: Termination of contract.

IMPORTANT: Requirements for the provision of home indemnity insurance DO apply to 'cost plus' contracts, although cover does not extend to the loss of deposits or the extra costs involved in completing the work if the builder dies, disappears or becomes insolvent.

Deposits and progress payments

Before work begins, the builder can require an owner to pay a deposit of **no more than 6.5 per cent** of the contract price. After work begins, the builder can only require an owner to make progress payments for work actually done or goods supplied.

Prime cost and provisional sums

Where a contract refers to 'prime costs' it means fittings or equipment which may vary in price according to the type selected by the owner, eg bathroom tiles. The builder must estimate the cost of any 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 rule also applies to estimates for 'provisional sums', often included in a new home building contract for items such as site works where the final cost of the work cannot be accurately known at the date the contract is signed.

IMPORTANT: Home owners should check that their builder has included in the contract price an allowance for fixing the items covered by prime cost sums, not just for supplying them. For tiles and tiling, home owners should check how many square metres are included and make certain this is stated in the contract.

Contract provisions that are unconscionable

The builder must not include in the contract any provisions that are 'unconscionable, harsh or oppressive.' If an owner believes this has occurred, he/she may refer the matter to the Building Disputes Tribunal.

The issue of unconscionability most often arises in relation to dealings with persons who are disadvantaged as a result of their age, mental health, or lack of understanding of the English language.

In determining whether or not a contract provision is 'unconscionable', the Building Disputes Tribunal would have regard to a number of factors, including the relative strength or bargaining positions of the parties.

Contract price must be 'fixed'

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

However, the builder can include a clause in the contract which allows for a price change to cover an increase in actual costs if:

- (a) government taxes or charges increase **after** the contract is signed; **or**
- (b) the builder has to comply with a new or changed State or Commonwealth law; **or**
- (c) work does not start within 45 working days after the contract is signed and the delay is not caused by the builder.

If (c) applies and the price rise is more than five per cent an owner may terminate – see the section: Termination of contract. In any case, an application may be made to the Building Disputes Tribunal within 10 working days, to assess whether the price rise is justified.

Variations (changes to a contract after it is signed)

The steps to be followed are:

- All changes to a contract, including the cost of the change, must be put in writing. These must be dated and signed by both the owner and the builder, or the parties' representatives.
- A copy must be given to the owner as soon as is possible after both parties have signed, and before the start of the work that results from the change.

It is the responsibility of the builder to ensure that the above steps are taken.

The only exceptions to the rules are:

- changes resulting from directions given by a local authority, building surveyor or other person acting under a written law; and
- changes arising from unforeseen circumstances (but this does **not** include unforeseen labour or material cost increases).



Please note also the changes by way of price increase that are referred to above under the section: Contract price must be fixed and below, in the section: Where approvals are delayed.

If changes covered by the exceptions noted above do occur, the builder must give the owner certain information in writing – see section 8 (1), (2) and (3) of the Act.

IMPORTANT: If there is any dispute about 'unforeseen circumstances' and either party wishes to apply to the Building Disputes Tribunal, this must be done within 14 days of the problem arising.

Where approvals are delayed

A home building work contract is conditional on a building licence and the Water Corporation's approval being obtained within 45 working days, on conditions that both parties accept. However, contracts that are only for associated work (eg swimming pools, carports and landscaping) or for a type of work prescribed by regulations are not subject to this time limit.

Both the builder and the owner must do whatever is reasonable to ensure that these conditions are met. If they are not met, the rights of the parties depend on whose fault prevented the conditions being met within the 45 day period:

- **Builder at fault** – the contract remains in force on the same terms and conditions unless the home owner and the builder agree otherwise.
- **Owner at fault OR neither party OR both parties at fault** – the contract remains in force on the same terms and conditions until both parties agree otherwise or either party terminates the contract under section 19 of the Act, **however:**
 1. The builder may increase the contract price by giving notice.
 2. If the increase exceeds five per cent the owner may terminate the contract within 10 working days (see section: Termination of contract) **provided** the builder is compensated for costs incurred.
 3. The owner may apply, within 10 working days of the notice of increase, to have the price increase reviewed by the Building Disputes Tribunal.

Making good defects

The builder is liable to make good, without additional cost to the home owner, defects in the home building work **notified in writing** within four months from practical completion.

This allows adequate time for the home owner to prepare a comprehensive list of any noticeable problems including minor omissions and it also makes it both convenient and cost effective for the builder to be able to deal with all minor issues in one single operation.

IMPORTANT: The builder's legal responsibility for faulty and unsatisfactory work does **NOT** end after four months. The Building Disputes Tribunal can accept a claim about faulty building work at any time within a period of six years from practical completion of the contract.

Inspections

A builder must not prevent an owner or a person representing the owner or his/her lender from inspecting the building work. A contract can only limit inspections to normal working hours and forbid inspections that cause unreasonable interference.

Termination of contract

In various places within this brochure it has been stated that an owner can terminate the contract for a particular reason. To do this, notice in writing **must** be given to the builder **before the building work is finished**.

OWNERS PLEASE NOTE: It may be in your interests to take legal advice before commencing action to terminate a contract.

Where a contract is terminated, the Building Disputes Tribunal can decide on any financial adjustments to be made between the owner and the builder.

Disputes

If there is a disagreement, the owner should first approach the builder to discuss the problem and try to resolve it. Often a disagreement can be sorted out simply by talking about it. If that fails, and a written complaint also fails, a complaint may be made to the Building Disputes Tribunal.

IMPORTANT: Before either party can apply to the Building Disputes Tribunal, a notice in writing should be given to the other party outlining the complaint and asking that it be put right or that a settlement be agreed to.

Complaints to the Building Disputes Tribunal should be lodged on a special form which can be obtained from the Builders' Registration Board. The Board's address and telephone number are given below.

Except for complaints relating to unsatisfactory building work, an application for relief from an order under the Act must be brought within three years of the date that the problem first arose.

Parties to most proceedings before the Building Disputes Tribunal may not be represented by legal practitioners, except under special conditions set out in the Act.

Disputes about the quality of building work may also be brought before the Building Disputes Tribunal under Section 12A of the *Builders' Registration Act 1939* within six years of practical completion of the work.

Advice on how a dispute may be placed before the Building Disputes Tribunal and on related matters may be obtained from staff at the Builders' Registration Board (see next column for address and telephone number). However, it should be noted that the Board is **not** able to provide advice about a specific case.

Currently there is a \$28 fee to lodge a claim with the Building Disputes Tribunal.

Help is available

The Consumer Protection Advice Line **1300 30 40 54** (for the cost of a local call) can provide information or refer you to the appropriate authority if you have any queries relating to home building or renovation work, or whether a trade or business name is registered. However, in the interests of fair and competitive trading, the department cannot recommend a particular trader or advise you who to avoid.

For enquiries about whether a trader's company name is registered, you should call the Australian Securities and Investments Commission on **(08) 9261 4200**.

The Builders' Registration Board is located at 18 Harvest Terrace, West Perth **(08) 9476 1200**. Board staff can inform you whether or not a builder is registered and can supply you with information on how to lodge a complaint with the Building Disputes Tribunal.

