

## CLAUSE NOTES

### *Residential Building Work Contracts and Dispute Resolution Bill 2015*

- Clause 1:**        **Short title**  
Sets out the name of the proposed Act.
- Clause 2:**        **Commencement**  
The Act is to commence on proclamation, to enable administrative processes to be developed for implementation of this Act and for other related legislation that is part of the Government's Building Legislation Framework Review package.
- Clause 3:**        **Act binds the Crown**  
Requires the Crown to comply in the same way as everybody else in the community.
- Clause 4:**        **Definitions**  
Interpretation of the terms used in the Act. Some of the key terms include:
- “building contractor” – the person performing the work
  - “owner” – a person who is the beneficiary of the work
  - “date of practical completion” – the date at which the building work is completed to the agreed standard
  - “defects document” – a document list and minor omissions in residential building work
  - “variation” – an agreed change to the original contract
  - “variation document” – a document setting out the agreed change
- Clause 5:**        **Meaning of *residential building***  
Defines types of residential buildings to which this Act applies, including detached dwellings, conjoined dwellings and associated building work such as sheds and carports.
- Clause 6:**        **Meaning of *residential building work***  
Defines the types of residential building work to which this Act applies, including fire systems, plumbing systems and gas supply systems.  
Residential building work is taken to include any prefabrication of components manufactured off site. So if the owner purchases a kit home, they are still covered under this Act.

The Act includes residential improvements including driveways, fences, retaining walls and landscaping.

**Clause 7:       Meaning of *provisional sum***

The building contractor's estimate of the cost of the work.

**Clause 8:       Certain contracts taken to be one contract**

If several separate building contracts are made between the same parties relating to the same work, that could have been entered into as one contract, then they are to be treated as one contract. This is to prevent the splitting up of contracts so that each will fall outside the scope of this Act.

**Clause 9:       Application of Act**

This Act applies only to work on Residential Buildings, and Residential Building Work, costing the owner \$20,000 or more. The cost of the building work includes the cost of labour and materials used.

Demolition work, with no new building work, is excluded from the application of this Act.

**Clause 10:      Exemptions from application of Act**

The regulations made under the Act may provide that certain types of building work are excluded from the application of the Act, or from particular provisions of it.

**Clause 11:      Functions and powers of Director**

Details the general functions of the Director, including giving advice, investigations, facilitation of mediation, reviewing the operation of the Act and reporting to the Minister.

**Clause 12       Delegation**

The Director may delegate his or her powers or functions under the Act, except for the power of delegation.

**Clause 13:      Contracts must be in writing**

Contracts between the owner and the building contractor for the performance of residential building work must be in writing, or if verbal, are put into writing within 5 business days after being made.

**Clause 14:      General contents of contracts**

Provides the mandatory details that residential building contracts must contain, including that they be in legible English, and provide the names of the parties. They must include a contract price, or a method for calculating the contract price, specify the date of practical completion,

or a method for calculating it, and include a checklist and building consumer guide.

The Director may specify other items which must be included.

**Clause 15: Contracts must be signed**

Contracts are to be signed by the building contractor and the owner.

**Clause 16: Copy of contract for owner**

The building contractor is to provide a signed copy of the contract to the owner, with a copy of the Residential Building Consumer Guide, within 5 business days of entering the contract.

**Clause 17: Variations must be in writing**

Variations are additions or omissions from the signed contract agreed by the parties. They include changes to materials used or the scope of work performed under a contract. Variations are commonly the cause of cost overruns and building disputes.

All variations are to be put in writing before the varied work commences on site, unless it is not reasonably practicable to do so.

**Clause 18: General contents of variation document**

Variations of building contracts now require the observance of certain formal requirements, including that they be put into writing, recording of the reasons for the variation, the effects on the completion date, the revised costs of the contracted work, and subsequent revision of the scheduled progress payments.

**Clause 19: Variation document must be signed**

After a variation is made, the building contractor is to take all reasonable steps to ensure that the variation document is signed by the owner.

**Clause 20: Copy of variation document for owner**

Within 5 working days of an agreement for making a variation, the building contractor must give a copy of the variation document to the owner.

**Clause 21: Where variation requires consent by building surveyor or authorisation to be obtained**

A proposed variation to a residential building contract may materially affect the work permitted by approved plans. In that situation the variation is also to be approved by the relevant building surveyor (to ensure that the varied work is compliant with the National Construction Code) and the council permit authority (to ensure that

the variation work conforms to planning or building permits that may have already been granted for that work).

**Clause 22: Implied warranties**

Certain mandatory warranties are implied by law into every residential building work contract to which this Act applies, and are given by the building contractor to benefit the owner. Even if these warranties were not specifically mentioned in a contract agreed between the parties, they still apply as being “implied” by law as rights given by Parliament.

**Clause 23: Suitability of the materials used**

Materials used must be suitable for their intended purpose; and new unless otherwise agreed.

**Clause 24: Compliance with legal requirements**

The building contractor is to comply with all relevant laws codes and standards, including the *Building Act 2000*, and the National Construction Code.

**Clause 25: Standard of work and the exercise of care and skill**

The building contractor will use appropriate skill and care in the performance of the contracted work.

**Clause 26: Implied warranties**

Certain statutory warranties may only apply to specific types of contracts.

**Clause 27: Adherence to the agreed plans and specifications**

If plans and specifications form part of the contract they must be complied with.

**Clause 28: Suitability of the residential building for occupation**

If the residential building work is on the habitable parts of a house or unit, they must be suitable for occupation.

**Clause 29: Carrying out work with reasonable diligence**

The building contractor warrants that work will be completed on the agreed or estimated time.

**Clause 30: Calculation of the provisional sums and prime cost items**

If a provisional sum or prime cost item is used, the calculation must be reasonable. This cannot be used as a way to “under-estimate” a job and later increase the cost.

- Clause 31: Succession to statutory warranties**
- When an owner (who was a party to a building work contract) sells their residential building, the new owner (purchaser) can enforce any of the statutory warranties, up until they expire 6 years after the practical completion date. This right is given to a new owner, despite there not being a building contract between the building contractor and the new owner. This right extends to those who buy from owner builders, or from “speculative” builders who buy and sell land or buildings.
- Clause 32: Proceedings for breach of statutory warranty**
- An owner has a period of six years from the date of the practical completion of the building work, to commence proceedings to enforce those warranties. That may include adjudication under Part 10 of the Act or starting court proceedings.
- Clause 33: Right of owner to withdraw from contract in cooling-off period**
- The Act gives an owner a right to withdraw from a residential building work contract. They have 5 business days after the receipt from the building contractor of a signed copy of the contract with a copy of the Residential Building Consumer Guide. That period is referred to as the “cooling off” period.
- Clause 34: Restrictions affecting right of withdrawal in cooling-off period**
- Despite the provision of a “cooling off” period, the owner may not withdraw from their contract in certain circumstances:
- a) The parties had entered a prior residential building work contract and the terms for both contracts are substantially the same and refer to the same building or land; or
  - b) The owner has obtained legal advice from a practicing legal practitioner regarding that building work contract before signing it.
- Clause 35: Right of owner to withdraw from contract if cooling-off warning not given**
- The owner has a right to withdraw from a contract if the contract they signed did not have with it the Residential Building Consumer Guide, informing them of their rights to withdraw during the “cooling off” period.
- Clause 36: Withdrawal procedure**
- Outlines the procedures that an owner is to follow to withdraw from a contract, including giving a notice of withdrawal to the building contractor.

- Clause 37: Rights and obligations of parties following withdrawal in cooling-off period**
- Deals with the effect of withdrawals from a contract where there have been sums pre-paid to the building contractor. Generally, an owner withdrawing from the contract is not then liable to the builder in any way and a pre-paid amount must be refunded. The building contractor can retain an amount for covering their out of pocket expenses actually incurred before the owner withdrew, plus the nominal sum of \$100.
- Clause 38: Rights of building contractor following withdrawal for failure to give warning**
- If the building contractor did not notify the owner of there being a “cooling off” period, and the owner thereby withdrew from the contract, the builder is entitled to receive a reasonable amount for the contracted building services up to the date of the owner’s withdrawal.
- Clause 39: Building contractor must give owner copy of residential building consumer guide**
- A building contractor must give to an owner a copy of the Residential Building Consumer Guide before signing the contract or commencing any residential building work.
- Clause 40: Building contractor to give commencement notice**
- The building contractor is to notify the owner of the date work was started, and the estimated date of completion.
- Clause 41: Deposits**
- Sets out the permissible percentage of the contract price that can be requested as a deposit.
- Clause 42: Progress payments**
- Parties may negotiate progress payments, but the building contractor may only demand a payment in proportion to the amount of work actually performed at that time.
- Clause 43: Building contractor to give notice of practical completion**
- The building contractor is to notify the owner and the building surveyor (if one was engaged by the owner), of the date the work was completed.
- Clause 44: Correction of minor defects and omissions**
- Outlines a process for dealing with minor defects or omissions that the owner claims on or after completion day.

- Clause 45: Interpretation of Part 9**  
Definitions of certain terms used in Part 9, Dispute Resolution.
- Clause 46: Application of Part**  
This Part does not affect the rights of the parties to use other methods to resolve residential building disputes, including adjudication in Part 10 of the Act.
- Clause 47: Lodging of notice of dispute**  
Provides that either the owner, or the building contractor, may lodge a notice of dispute with the Director of Building Control, in relation to a residential building work contract. A notice of dispute is to specify the grounds of the dispute. The person lodging that notice of dispute is to serve a copy on the other party to the contract.
- Clause 48: Acceptance of notice of dispute lodged with Director**  
The Director must accept or reject the notice of dispute within 10 business days. Grounds for rejection include that there were no reasonable attempts to resolve the dispute, no substantive grounds for the claim, the claim is frivolous or vexatious, or proceedings relating to the matter in dispute have commenced under Part 10 of this Act, or under another Act.
- Clause 49: Director may require information to be provided**  
By service of a notice on a person the Director may seek additional relevant information from the parties to the contract or other persons.
- Clause 50: Establishment of mediation panel**  
If the Director accepts a dispute, he/ she then has two business days to establish a Mediation Panel to consider the dispute. The Panel may consist of one or more persons whom the director considers has suitable qualifications or experience to assist in mediation of residential building contract disputes. The Director facilitates this mediation process but is not a party to it.
- Clause 51: Director may join parties to a dispute**  
The Director may decide to join other parties to the mediation, where he/ she believes that they ought to be a party to a dispute.
- Clause 52: Panel to mediate dispute**  
The function of mediation is to encourage the parties to negotiate to reach a settlement. This is a role for the independent Mediation Panel.

- Clause 53: Director may issue practice directions**  
The Director may prepare directions for the guidance of the Mediation Panel in performing its functions, for example to take into account a Guide to Standards and Tolerances as a reference resource.
- Clause 54: Where parties reach settlement within relevant period**  
If the Director accepts the settlement, the settlement is binding and may be enforced in a court of law.  
  
Even if parties reach a settlement of their dispute, the Director might refuse to approve it if it was not entered into in good faith, was not a genuine attempt by parties to settle, or was the result of unconscionable conduct by a party.
- Clause 55: Where parties fail to settle dispute within relevant period**  
Parties to a dispute have a maximum of 20 business days after the establishment of the Mediation Panel to reach a settlement. If they cannot agree by that time, mediation will be terminated. Parties then need to consider other options to resolve the matters in dispute.
- Clause 56: Use of evidence obtained in the course of mediation**  
The purpose of mediation is to encourage parties to settle disputes and the information disclosed to the Director or the Mediation Panel may not be used in proceedings before a court, tribunal or other body, including matters regarding practitioner conduct and licensing.
- Clause 57: Interpretation of Part 10**  
Introduces definitions that apply to the adjudication of residential building disputes.  
  
A specific definition of **owner** is included here to extend the right to apply for adjudication to any subsequent owner of the residential building work.
- Clause 58: When work taken to not be satisfactorily completed**  
Explains what is meant by “not satisfactorily completed”. This included work that is incomplete, or has not been completed to the standard required under the contract, or breaches of statutory warranties.
- Clause 59: Application of Part**  
This Part does not affect the rights of the parties to use other methods to resolve residential building disputes, including mediation in Part 9 of the Act.



- Clause 60: Work-completion claims**
- An owner may serve a work-completion claim on the building contractor, specifying the work to be completed, or rectified and the date by which it should be completed.
- Clause 61: Contents of work-completion claims**
- Work completion claims must be in writing, addressed to the contractor and contain other specified information identifying the nature of the claim and the date that the work is required to be completed by.
- Clause 62: Time limit for making work-completion claims**
- Work completion claims cannot be served more than 12 months after any work under the contract was last performed, unless a longer period is specified in the contract.
- Clause 63: Application for adjudication of work-completion claim**
- If a contractor has not satisfactorily completed the work identified in a work-completion claim, the owner may apply to the Director for an adjudication application in relation to the claim. This must be made within 20 business days of the completion date specified in the work-completion claim.
- The adjudication application must be in writing and contain the details of the incomplete or unsatisfactory work that was referred to in the work completion claim.
- There is a fee for lodgement of this application.
- A copy of the adjudication application must be served on the building contractor.
- Clause 64: Respondent may respond to application**
- The respondent may lodge a response, in writing, with the Director, within 10 business days after being served, and also provide a copy to the applicant.
- Clause 65: Director to determine whether to accept or reject application**
- The Director must accept or reject the application within 10 days of it being served on the respondent.
- The Director may consult with both parties and take any other actions he or she thinks fit to assist in making the decision.
- The Director **may** reject the application if no work-completion claim has been served, the time to complete a work-completion claim has not expired, or the application is frivolous, vexatious or without substance.

The Director **may** also reject the application if there has been no reasonable attempt to resolve the matter, or if it would be more appropriately dealt with by mediation under Part 9 of this Act. The Director **must** reject the application if proceedings for the same matter in dispute have commenced before a court or under the *Building and Construction Industry Security of Payment Act 2009*.

**Clause 66: Withdrawal of application**

An applicant may withdraw an application at any time before an adjudication decision has been made by serving a notice on the Director and the respondent.

**Clause 67: Director may, on request of party, arrange for inspection of work**

Once the Director has accepted an application, he or she may – at the request of either party – arrange an inspection of the disputed work by a suitably qualified person.

**Clause 68: Conduct of inspection**

Parties must provide reasonable access to the relevant building site and will be jointly and severally liable for the inspection fees.

The inspector must provide a written report.

**Clause 69: Time to be given to enable consideration of inspection report**

Following an inspection, the applicant must notify the Director within 20 business days, or a longer time agreed with the Director, of their intention whether to proceed with their adjudication application.

If the applicant does not contact the Director, the application will be taken to have been withdrawn.

**Clause 70: Establishment of pool of experts**

The Director will consult with industry bodies and representatives to establish a pool of experts who can adjudicate on matters in dispute under this Act. This will be an external, independent group and will not include those State Service employees or officers who work under the supervision of the Director of Building Control.

**Clause 71: Appointment of expert panel**

The Director can appoint an expert panel from the pool of experts available.

The panel will have an uneven number of members to prevent deadlock on decisions.

Members will be chosen who have expertise relevant to the particular dispute.

Members must not have been part of a mediation process on the same matter.

The Director must not direct or attempt to influence the expert panel in the performance of its functions.

**Clause 72: Conduct of adjudication proceedings**

The expert panel is to make a decision as soon as practicable after being appointed.

It may inform itself in any manner it considers appropriate. Proceedings are intended to be informal and non-technical.

**Clause 73: Expert panel may join parties to adjudication**

An expert panel may join other parties to the adjudication proceedings, with the approval of the Director.

**Clause 74: Determination of adjudication application**

After determining a claim, an expert panel may decide to issue a work-completion order, or refuse to issue a work-completion order.

The determination will be in writing and will list the reasons for the determination.

An expert panel may also award costs against a party where their claim was unfounded, vexatious or frivolous.

**Clause 75: Work-completion orders**

To give effect to its adjudication determination, an expert panel may issue a work-completion order for work to be completed, to rectify defective work or order a party to pay a sum of money to enable the work to be completed by another.

**Clause 76: Other orders or declarations**

An expert panel may issue a declaration that the work is complete, and where appropriate may issue orders for the reimbursement of fees for obtaining tests or the advice of expert consultants.

**Clause 77: Orders relating to fees and expenses of expert panel**

An expert panel is entitled to remuneration for its services and expenses and it can make orders that bind both parties to the adjudication

All fees are payable to the Director who will then arrange payment to the panel.

The Director may consider hardship as the ground for waiving or reducing the fees.

**Clause 78: Compliance with orders**

A person who is served with an adjudication order must comply with it by the date specified.

Failure of a contractor, practitioner or building practitioner to comply with an adjudication order is improper conduct and the expert panel may provide a report of that failure to the Administrator of Occupational Licensing.

If a person fails to comply with an order to pay a sum of money, that sum of money will become a debt due to the other party.

**Clause 79: Avoidance of requirements of Act**

Any agreements that try to avoid or circumvent the requirements of this Act are void. This is to prevent one party attempting to induce the other party to sign away their legal rights.

**Clause 80: Director may approve residential building consumer guides**

A Residential Building Consumer Guide is a document prepared by the Director of Building Control to inform prospective consumers (owners) of their rights and obligations before they sign a residential building contract. In particular the Guide is to contain information on the operation of this Act. It will be published as a brochure, available to building contractors to give to clients, and also available on the Justice Department's website.

Building contractors are required by the Act to make this Guide available to owners.

**Clause 81: Guide to Standards and Tolerances**

A guide, or guides, approved by the Director, will allow the parties or panel members to determine whether a matter in dispute is actually a building defect.

**Clause 82: Remuneration of panel members**

Panel members will be paid the remuneration as determined by the Minister.

**Clause 83: Members of panels disqualified if interested**

Members of the panel must be independent. They are disqualified from being on the panel if they have a personal interest in the matter, and any decision made by that member will be void. No fees are payable to a disqualified member.

- Clause 84: Liability of Director and members of panels**  
Standard form of personal liability immunity clause. The Director and panel members do not incur personal liability for performance of functions under this Act.
- Clause 85: Fees payable to Fund**  
Fees received by the Director are paid into the Building Administration Fund established under the *Building Act 2000*.
- Clause 86: Regulation-making power**  
This clause provides that the Governor-in-Council may make any regulations necessary for this Act.
- Clause 87: Administration of this Act**  
Provides that until an Order under the *Administrative Arrangements Act 1990* is made to the contrary, the administration of the Act is assigned to the Treasurer. The Department responsible to that Minister in relation to the administration of this Act is the Department of Justice.
- Clause 88: Savings and transitional**  
Saves the rights of a residential home owner to enforce the statutory warranties granted by the *Housing Indemnity Act 1992* before its repeal by this Act.
- Clause 89: Principal Act**  
Amends the Judicial Review Act 2000.
- Clause 90: Schedule 1 amended (Decisions to which Act does not apply)**  
Decisions made by the Director of Building Control under section 48 of this Act are not subject to the *Judicial Review Act 2000*.  
This only affects mediation proceedings in Part 9 and it does not affect an adjudication decision made by an expert panel under Part 10.
- Clause 91: Legislation repealed**  
Repeals the legislation specified in Schedule 1 – the *Housing Indemnity Act 1992*.