

CLAUSE NOTES

Residential Building Work Quality (Warranties and Disputes) Bill 2012

PART I PRELIMINARY

- Clause 1:** Sets out the name (also called the short title) of the proposed Act.
- Clause 2:** Provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
- Clause 3:** Defines certain words and expressions that are used in the proposed Act. These include the core concepts of *major residential building work contract* (which means a contract for residential building work where the contract price is \$5000 or higher), *residential structure* (which is defined at clause 4), *residential building work* (which is defined at clause 5) and *statutory warranty* (which is defined under part 3).
- Clause 4:** Defines the expression *residential structure* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.
- Clause 5:** Defines the expression *residential building work* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.
- Clause 6:** Defines the expression *contract price* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.
- Clause 7:** Defines the expression *clear day* for the purposes of the proposed Act.
- Clause 8:** Provides that the proposed Act is to bind the Crown.

Clause 9: Provides for the manner in which the contract price and costs of residential building work are to be calculated. The clause takes into consideration the splitting of contracts to avoid the legislation.

Clause 10: Determines when a civil action is considered to have been commenced.

Clause 11: Provides that the provisions of this Act do not apply to a residential building work agreement made before the proposed Act commences and that the Housing Indemnity Act 1992 continues to apply until the proposed Act commences.

PART 2 MAJOR RESIDENTIAL BUILDING WORK CONTRACTS.

Division 1 – Offence to carry out certain residential building work without major residential building work contract

Clause 12: Provides that a contractor must not carry out residential building work valued at more than \$5000 unless they have entered into a major residential building work contract that contains mandatory information.

Division 2 – Requirements relating to major residential building work contracts

Clause 13: Provides for the format and content of a major residential building work contract.

Clause 14: Provides for the process that must be followed for parties wishing to enter into a cost-plus contract. This includes the requirements that estimates be fair and reasonable of the total cost of the building work, that the client provide a statement that they are aware of the risks and pitfalls and limitations of a cost-plus contract and that they have obtained either a valuation or further estimate for the building work.

Clause 15: Provides that estimates for prime cost items and provisional sum estimates must be reasonable. However, considers what documentation the builder had when they

made these estimates. The more information provided by the client the closer the estimate is expected to be.

Clause 16: Provides that the party that has been responsible for developing the contract must provide a copy of the final executed contract within 10 clear days of the signing of the contract.

Clause 17: Provides that the contractor must keep documents associated with a major residential building work contract for 7 years. This will mean that there will be documentation available to support the Statutory Warranty period of 6 years and 6 months.

Division 3 – Restrictions relating to major residential building work contract

Clause 18: Provides for a restriction on the amount of money a contractor can demand during a building project including restricting the amount of deposit to 5% of the contract price.

Division 4 – Variations of major residential building work contract if residential building work varied.

Clause 19: Provides for the mandatory variation of a contract when a change occurs to the quality or quantity of residential building work.

Clause 20: Provides that a contract variation must be in writing and signed before work is commenced. The clause provides some latitude where the contract is varied because the work is urgent or because putting the variation in writing beforehand was not practicable in the particular circumstances.

Clause 21: Provides for the format and content of a contract variation document.

Clause 22: Provides that the contractor must provide a copy of a variation to the owner within 10 clear days after the variation is signed.

Clause 23: Provides a process for recovering costs if a contractor fails to comply with any requirement under this division.

Clause 24: Provides that the division does not apply if the contractor is responding to a written direction of a building surveyor or another person acting lawfully.

PART 3 STATUTORY WARRANTIES

Clause 25: Provides that a contractor that carries out residential building work is taken to have given their client a series of warranties. The warranties include a warranty that the work will be carried out in a proper and skilled manner, with reasonable care and skill and in accordance with the plans and specifications agreed to by the contractor and client.

Clause 26: Provides that the same rights for a breach of statutory warranty pass from one owner to the next.

Clause 27: Provides that a civil proceeding for a breach of statutory warranty must be commenced within 6 years and six months after the completion of the residential building work.

PART 4 CONSUMER GUIDE

Clause 28: Provides that the Building Dispute Commissioner must prepare a consumer guide. The clause further provides for the content of the consumer guide and the promotion necessary following the preparation of the consumer guide.

Clause 29: Provides for the replacement of the consumer guide.

Clause 30: Provides that the Commissioner is to make all reasonable steps to make the consumer guide available.

Clause 31: Provides that the contractor must provide a client with a copy of the consumer guide before carrying out building work valued at more than \$5000.

Clause 32: Provides that the consumer guide is not a statutory rule or subordinate legislation.

PART 5 DISPUTE RESOLUTION

Division 1 - Disputes

Clause 33: Provides for a client or subsequent owner to refer a dispute in relation to residential building work if certain grounds apply. The grounds include that there has been an alleged breach of statutory warranty.

Clause 34: Provides for a contractor to refer a dispute if that dispute is affecting their ability to meet the requirements of a statutory warranty.

Clause 35: Provides for the format of a referral of dispute, including the fee for referring a dispute.

Clause 36: Provides for the Building Dispute Commissioner to advise the parties that a dispute has been referred.

Clause 37: Provides for the assessment of the referral of dispute, including an assessment of whether the dispute referrer has taken reasonable steps to resolve the dispute themselves.

Clause 38: Provides for the decision to investigate or dismiss a referral.

Clause 39: Identifies the parties to a dispute.

Clause 40: Provides for the early resolution of a dispute through conciliation and mediation.

Clause 41: Provides for written notification to the parties of a determination made under clause 37.

Clause 42: Enables the Building Dispute Commissioner to determine parts of a referral and to release other aspects so that parties can consider pursuing resolution by other means, such as civil action.

Clause 43: Enables the Commissioner to combine referred disputes from a number of parties into one investigation. An example would be where multiple disputes were referred by owners of units built by the same contractor.

Clause 44: Provides for the amendment of the referred dispute. An example of why the Commissioner might decide to amend a referred dispute is where the home owner simply doesn't understand the reason for a defect. Such as when a home owner reports that there is cracking in a concrete slab, this cracking may be caused by insufficient reinforcement. In most cases a home owner would not be aware of this at the time of referring their dispute.

Clause 45: Provides for the withdrawal of a referred dispute.

Division 2 – Investigation of disputes

Clause 46: Provides for the Building Dispute Commissioner to levy a fee to investigate a dispute.

Clause 47: Provides that the Commissioner may delay the investigation until the fee is paid.

Clause 48: Enables the Commissioner to amend a referred dispute after an investigation has commenced.

Clause 49: Provides the grounds under which the Commissioner can dismiss a referred dispute. The grounds include expiry of the time period established in sections 33 and 34, not providing information in support of the dispute, failing to provide access to the site, not taking reasonable steps to resolve the dispute.

Clause 50: Provides for the Commissioner to obtain professional advice during an investigation.

Clause 51: Provides for a report from the Officer that has investigated the referral to the Commissioner.

Division 3 – Rectification Orders and dismissing referrals of disputes

Subdivision 1 – Determination following investigation

Clause 52: Provides for a variety of outcomes that could occur during an investigation. These outcomes include referring the dispute to a mediator, making a Rectification Order, dismissing a matter referred and any combination of these actions.

Clause 53: Provides for a six month time limit for the Commissioner to issue a determination.

Clause 54: Provides that the Commissioner must advise each party in writing of a determination.

Clause 55: Provides that each party is bound by a determination.

Subdivision 2 – Procedure if parties to attend mediation

Clause 56: Provides for an extension of the time limit where a matter was referred for mediation.

Subdivision 3 – Rectification Order

Clause 57: Establishes a Rectification Order which can be issued by the Commissioner and considered by the parties before they make a decision to comply or pursue a review of the order. The Rectification Order is critical to the success of engagement of parties in the earlier conciliation and mediation processes. Without the Rectification Order the parties are unlikely to engage in meaningful discussions over solutions to their dispute. The Rectification Order can require all parties to the dispute to take necessary action to resolve a dispute. This action could include

rectifying defective building work or paying an outstanding amount of money. The Rectification Order can specify conditions such as providing access to the building site.

Clause 58: Provides for the grounds that must exist in order for the Commissioner to make a Rectification Order.

Clause 59: Provides for the publication of a rectification order.

Clause 60: Provides that each party is bound by the determination of the Building Dispute Commissioner. Also provides for notification of the Director of Building Control and the Administrator of Occupational Licensing of a failure to comply with a rectification order so that the statutory officers can consider disciplinary action under the *Building Act 2000* or *Occupational Licensing Act 2005*.

Clause 61: Provides that a person who has the benefit of a Rectification Order may notify if another party has failed to comply with any aspect of that order.

Subdivision 4 – Dismissal of referral of dispute

Clause 62: Provides that certain disputes must be dismissed if they do not relate to matters specified in clause 58 or if the dispute referrer has failed to take reasonable steps to resolve the dispute.

Division 4 – Dispute Records of Agreement

Clause 63: Provides for the development and format of a written record of the terms the parties in dispute have agreed to in order to resolve their dispute. It is estimated that up to 90% of disputes will result in an agreement of this nature.

Clause 64: Provides that it is an offence not to do anything that a party previously agreed to do when they signed the agreement. The clause also establishes reasonable defences for a party that may not have been able to

comply with the agreement due to circumstances out of their control.

- Clause 65:** Provides that parties to a dispute can advise the Commissioner if a party fails to do anything that a party previously agreed to do when they signed the agreement.
- Clause 66:** Provides for the variety of outcomes possible following the parties signing a Dispute Record of Agreement. These outcomes include extending a time period, failure of a party to comply with a term of the agreement, progression from a Record of Agreement to an investigation and then possibly to a Rectification Order.
- Clause 67:** Provides that the Building Dispute Commissioner may notify the Director of Building Control and the Administrator of Occupational Licensing of a failure to comply with a Dispute Record of Agreement so that the statutory officers can consider disciplinary action under the *Building Act 2000* or *Occupational Licensing Act 2005*.

Division 5 – Appeals from determinations

- Clause 68:** Provides for a review of a determination of the Building Dispute Commissioner or an Officer to Resource Management and Planning Appeal Tribunal.

Division 6 – Miscellaneous

- Clause 69:** Enables the Commissioner to request written evidence verified by a statutory declaration.
- Clause 70:** Enables the Commissioner to order building work to stop on the basis that evidence relevant to a dispute may be lost.
- Clause 71:** Provides for that a contractor must comply with a Dispute Record of Agreement or Rectification Order as well as the original residential building work agreement.

Clause 72: Provides for a delay to parties seeking civil action regarding a dispute referred to the Building Dispute Commissioner. The intention is to put on hold reactionary civil action until such time as the parties have the opportunity to assess the outcome of the Building Disputes Commissioners determination. It is hoped this will reduce the costs incurred in parties leaping into litigation before they have had a chance to consider whether the outcome of the disputes process is fair.

Clause 73: Provides for the Building Dispute Commissioner to issue a certificate of exemption if it is determined that it is not appropriate for a particular matter referred to be a subject of a referral. For instance if a matter is particularly complex and a damages claim is the only likely outcome from the matter it could be exempted in order to allow the parties to litigate an outcome. Another situation would be where attributing fault is very complex and considered best left to a court process.

Clause 74: Provides for documents signed by an Officer or Commissioner to be considered evidence of the matters specified in the documents. The clause has been established in order to allow parties to utilise the documents produced by the Commissioner to be used as evidence in a court.

PART 6 INVESTIGATIONS

Clause 75: Provides for the two circumstances for conducting an investigation. The first is to assess the dispute and the second is to determine if the legislation has been contravened.

Clause 76: Provides that natural justice is to be observed during an investigation.

Clause 77: Provides for the powers necessary for the Commissioner or their delegate to conduct investigations for the purposes of assessing a referral or to determine whether the legislation has been contravened. These powers are

restrained where the investigation is for the purposes of assessing a dispute. In which case questions must be asked in writing to allow parties time to consider their answers and if necessary obtain legal advice before answering.

Clause 78: Provides the powers for a delegate of the Commissioner to apply to a justice for a warrant for entry.

Clause 79: Establishes an offence for a person that does not comply with a requirement under clause 77. The clause provides a defence for a person in relation to answering questions or providing documents that are the subject to legal professional privilege. The clause provides an escape from self-incrimination. For instance evidence cannot be used against a person if a person is asked to answer a question despite having advised that the answer may incriminate them.

Clause 80: Provides for the reporting of information to the Director of Building Control if evidence is identified of a contravention of the Building Act during an investigation.

PART 7 ADMINISTRATION AND FINANCIAL MATTERS

Division 1 – Building Dispute Commissioner

Clause 81: Establishes a Building Dispute Commissioner. The Building Dispute Commissioner is initially intended to be the Director of Building Control established under the Building Act but may be another person appointed under the *State Service Act 2000*.

Clause 82: Provides for the functions and powers of the Building Dispute Commissioner.

Clause 83: Provides for State Servant officers to be made available to the Building Disputes Commissioner.

Clause 84: Provides for the Building Dispute Commissioner to issue guidelines, such as a guideline to standards and tolerances

in order to communicate expected standards to both contractors and consumers.

Clause 85: Provides for the delegation of the Building Dispute Commissioner's functions or powers.

Clause 86: Provides for the grounds on which the Commissioner must rely in making a determination.

Division 2 – Building Dispute Officers

Clause 87: Enables the Commissioner to appoint Building Dispute Officers who are Tasmanian State Servants or with the approval of the Secretary of the Department a person employed in the public service of the Commonwealth, a Territory or another State. This clause is intended to provide for specialist interstate investigators.

Clause 88: Enables the Commissioner to establish qualification requirements for Officers.

Clause 89: Outlines the functions and powers of Officers.

Clause 90: Provides for offences in relation to Officers.

Division 3 – Approved mediators

Clause 91: Provides that the Building Dispute Commissioner may determine the maximum number of mediators to be approved.

Clause 92: Provides for the approval process for mediators. Further provides for the appointment of mediators subject to conditions.

Clause 93: Provides for the variation of matters to which approval as a mediator relates.

Clause 94: Provides for the Commissioner to maintain and publish a register of mediators.

- Clause 95:** Provides for the revocation of approval and appeal to the Magistrates Court (Administrative Appeals Division).
- Clause 96:** Provides for the appointment of a mediator who is entitled to mediate a matter of that type.
- Clause 97:** Provides that mediators are to comply with the regulations and any guidelines issued by the Commissioner.
- Clause 98:** Allows parties to withdraw from mediation.
- Clause 99:** Provides that the mediator may recommend cessation of mediation if the mediator considers that there is unlikely to be a result, it would be unfair to a party or for any other reason.
- Clause 100:** Provides for the Commissioner to conclude mediation.
- Clause 101:** Provides the grounds under which it is considered that mediation is concluded.
- Clause 102:** Provides for a report from the mediator to the Building Dispute Commissioner. The report is limited to certain information and must not contain details of offers or admissions made during mediation. This is to provide a separation between the role of the mediator and the role of the Building Dispute Commissioner. In effect it provides for protection from investigation and possibly prosecution for matters admitted during mediation.
- Clause 103:** Provides for action following the conclusion of mediation where agreement has not yet been reached to action to resolve the dispute.
- Clause 104:** Provides for the disqualification of an approved mediator in circumstances such as where the mediator has a material personal interest in the residential building work agreement.
- Clause 105:** Provides for the costs and charges for mediation.
- Clause 106:** Provides that mediators must not disclose any information obtained in conducting mediation sessions unless it is to

the Commissioner or with consent of all parties or where required to do so by a court.

Division 4 – Residential Building Administration Fund

Clause 107: Provides for the establishment of the Residential Building Administration Fund. The fund is to be used to partially finance the administration and implementation of the legislation.

Clause 108: Provides for the investment of funds in the Residential Building Administration Fund.

Division 5 – Residential Building Trust Fund.

Clause 109: Provides for the establishment of a Residential Building Trust Fund to handle the monies ordered to be paid under a rectification order or under a dispute record of agreement. This function will provide confidence to contractors that they will be paid if they comply with a rectification order or dispute record of agreement.

Clause 110: Provides for the investment of funds in the Residential Building Trust Fund.

Division 6 – Infringement notices

Clause 111: Provides for the Building Dispute Commissioner to issue infringement notices. It is not envisaged that there will be many infringement notice offences. But in some instances infringement notice offences are seen as an appropriate and a cost effective manner of responding to minor contraventions of the legislation.

Clause 112: Enables the Minister to issue guidelines for the purposes of administering the legislation. These guidelines may provide for the qualifications and experience necessary to be a mediator or for making of a Rectification Order.

PART 8 - MISCELLANEOUS

- Clause 113:** Provides that it is an offence to contract out of the legislation.
- Clause 114:** Provides that it is an offence to provide false or misleading statements or supply a document that a person knows to be false or misleading.
- Clause 115:** Provides that any proceedings for an offence must be commenced within 3 years of the offence occurring.
- Clause 116:** Provides that an officer of a body corporate is guilty of an offence if it is proved that the offence occurred with the consent of that officer.
- Clause 117:** Provides that a partner is guilty of an offence if it is proved that the offence occurred with the consent of that partner.
- Clause 118:** Provides that certain people associated with administrative roles and functions under the legislation are protection from personal liability while performing those roles and functions.
- Clause 119:** Provides for Governor to make regulations for the purposes of the legislation. The regulations can provide for fees, a model contract, establish what a contract can contain, establish what a variation must contain and provide for procedures for making a rectification order.
- Clause 120:** Provides that the administration of the legislation is assigned to the Minister for Workplace Relations and the Department of Justice.
- Clause 121:** Repeals the *Housing Indemnity Act 1992*, *Housing Indemnity Amendment Act 2008* and rescinds the *Housing Indemnity Regulations 2004*, *Housing Indemnity Amendment Regulations 2005*, *Housing Indemnity Amendment Act 2008*.
- Clause 122:** Provides for the consequential amendment of legislation listed in Schedule I.

SCHEDULE I CONSEQUENTIAL AMENDMENTS

Building Act 2000

Section 271(3) is amended to allow for funds raised through the permit levy to be used to administer the *Residential Building Work Quality (Warranties and Disputes) Act 2012*.

Housing Indemnity Act 1992

Provides for a transition from the *Housing Indemnity Act* to the *Residential Building Work Quality (Warranties and Disputes) Act 2012*.

Judicial Review Act 2000

Schedule 1 is amended to include a decision by the Building Dispute Commissioner or a Building Dispute Officer made under the *Residential Building Work Quality (Warranties and Disputes) Act 2012*.