

ARE YOU READY TO ENTER INTO A DOMESTIC BUILDING CONTRACT?

Legal fact sheet

Before entering into a domestic building contract, builders should ensure they have obtained all necessary information in relation to plans, specifications and foundations data.

Do you know what you are agreeing to build?

The *Domestic Building Contract Act 1995* (Vic) (“DBCA”) aims to reduce the risk of a dispute between the builder and owner about the scope of work by requiring a minimum standard of information to be included in a major domestic building contract before signing.

Builders that enter into a major domestic building contract without the required information risk not being able to pass on additional costs incurred in building the works.

For example, a building surveyor, ahead of issuing a building permit, may require changes to the drawings and specifications to enable compliant construction of the proposed building. Such changes can significantly increase the cost of the works. Another common example is additional costs for excavation or foundations due to site conditions.

Whether or not a builder can increase the contract price to allow for the cost of these additional works will depend upon whether or not the builder obtained adequate information prior to entering the contract.

What the law says

The DBCA imposes a number of requirements that must be met by the builder before entering into a major domestic building contract.

Section 31(1)(d) states that a builder must not enter into a major domestic building contract unless the contract:

- includes plans and specifications for the work, and;
- those plans and specifications contain sufficient information to enable the obtaining of a building permit.

Even if the contract specifies that the owner is responsible for providing the plans and specifications, the builder should ensure that they contain sufficient information to obtain a building permit prior to entering into the domestic building contract.

Vigilante case

National Builders Group Pty Ltd v Vigilante [2007] VSC 339 (19 September 2007) provides an example of the consequences of failing to comply with section 31(1)(d).

The case involved a builder who had entered into a major domestic building contract without sufficient plans and specifications and who sought to pass on the cost of additional work required to raise the height of a slab when they discovered that the land was flood prone.

Without this change to the works, no building permit could be obtained. The owner refused to

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agree to a price increase and commenced proceedings in VCAT.

The central issue before the Tribunal was whether the owner was obliged to pay for the additional works or whether the builder had to perform this work as part of the original contract price.

The Tribunal ordered that the builder refund the owner's deposit, as well as pay damages for the increase in the cost of building on the land and delays totalling a sum of approximately \$47,000.

The VCAT decision was appealed in the Supreme Court, who upheld the Tribunal's application of s 31(1)(d) to the facts of the case stating that, "the Builder, having provided no plans at all in the contract, had failed to provide in the contract plans containing sufficient information to enable the obtaining of a building permit".

In finding the builder had breached section 31 by entering a contract without plans to enable the obtaining of a building permit, the Court also found the builder had breached section 37(3) of the DBCA by seeking an increase to the contract price when it was not entitled to do so.

Section 37(3) provides that, "a builder is not entitled to recover any money in respect of a variation unless—

- (a) the builder—
 - (i) has complied with this section; and
 - (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into".

The Court, in support of the Tribunal's decision, stated that, "the need to raise the floor to avoid

the flood problem was reasonably foreseeable because it would have been discovered if the Builder had done what it was obliged to do".

The Court also found that the builder's demand for an increase in the contract price was a repudiation of the building contract and dismissed the appeal with costs.

Builder's obligation to obtain foundations data

The construction of footings and slabs can, depending on the site, involve additional work increasing the cost of the works.

The DBCA specifically requires a builder to obtain "foundations data" to reduce the risk of unexpected contract price increases.

Section 30 of the DBCA requires builders to obtain all reports, surveys, plans or specifications necessary for the preparation of a proper footings design and an adequate estimate of the cost of constructing those footings.

The parties can agree that the owner will provide foundations data (e.g. the owner commissions a geotechnical report), however the builder must ensure that it is reasonable to rely upon that data.

A builder cannot claim an amount of money not already provided for in the contract (i.e. the cost of unexpected works) if this additional amount could reasonably have been ascertained had the builder obtained all necessary foundations data prior to entering into the contract.

The DBCA does not prevent the builder from exercising a right to claim additional amounts not already provided for in the contract if this additional amount could not reasonably have been ascertained from the foundations data.

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Other useful fact sheets

- Domestic building contract variations (FS-09)

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