

# REVIEW OF THE DOMESTIC BUILDING CONTRACTS ACT 1995

VICTORIAN DEPARTMENT OF GOVERNMENT SERVICES

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Australian  
Institute of  
Architects



Association  
of Consulting  
Architects  
The Business of Architecture

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## INFORMATION ABOUT OUR ORGANISATIONS

The Australian Institute of Architects (the Institute) is a single professional voice for 14,500 members and has been present in Australia (and internationally) for more than ninety years.

- The Institute's vision is: *Everyone benefits from good architecture.*
- The Institute's purpose is: *To demonstrate the value of architecture and support the profession*

The Victorian Chapter of the Australian Institute of Architects represents more 4000 members in this state with a commitment to a high quality and sustainable built environment, professional and ethical practice, and social justice.

The Association of Consulting Architects was founded in 1987 as the national peak body representing the interests of employers in industrial matters, including workplace conditions and Award negotiations. The association has a responsibility to positively influence practice management in architecture and to engage in the wider industry.

The ACA helps architectural firms navigate the changing world of practice by providing regular advice and information on business and employment matters, by promoting awareness of and discussion about business issues, and by advocating for better business practices and legislative frameworks.

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# 1 INTRODUCTION

This submission has been prepared on the following assumptions:

- The Domestic Building Contracts Act (DBCA) 1995 concerns residential buildings (Class 1 & 2) only.
- The purpose of the legislation is to provide protection for consumers building a new home or renovating their existing home.
- It is estimated that almost 90% of residential buildings in Victoria are undertaken directly between builders and owners with no (or very little) involvement by an architect.
- In recent (post-Covid) times there has been an unprecedented number of financial failures including unfinished projects and consumers being left with inadequate practical or financial remedy to complete their project.
- The provisions set out in the Domestic Building Contracts Act need to be reviewed to consider if those matters regulated by the Act, and especially Major Domestic Building Contracts regulated by the DBCA could be improved to more adequately protect building owners
- Media reports suggest the residential sector appears to incur large numbers of projects with bad workmanship, poor quality of finish and numerous building defects. However, there is no readily available public data that accurately and comprehensively reports the defects or complaints arising from work under Major Domestic Building Contracts.

The paper includes several recommendations for changes to the Act and recommendations for a revised Model Domestic Building Contract. Many of these changes have been derived from experience gained by the architect profession's use of the Australian Building Industry Contract-Housing Vic. (the "ABIC" contract) form of contract.

The Australian Institute of Architects and the Master Builders Association are jointly responsible for the contract suite called the Australian Building Industry Contracts (ABIC).

The Australian Institute of Architects and the Association of Consulting Architects are of the strong view that "progress payments by percentage complete" performed under an independently administered contract such as the ABIC-Simple Works-Housing (SW-H) and ABIC Major Works - Housing (MW-H) contracts, with an independent contract administrator /superintendent such as an architect should be positioned as a more positive alternative in the legislation and the regulations. This would enable consumers to make an assertive choice about the best means to protect their interests.

*For the purposes of this submission, deposit payments are those made by the building owner to the builder and retention amounts are those amounts held by the building owner from payments to the builder. The exception is where referring to deposits paid by a builder to a supplier for "expensive fixtures and plant" under that same heading in Section 2.2 of this submission.*

Our responses are made following the structure of the discussion paper and its grouped questions. Each response is provided in the form of recommendations and then follows with the rationale.

## 2 DETAILED RESPONSE

### 2.1 Contracts under the MDBC threshold

*Q 1: Should there be any changes to the monetary threshold for a Major Domestic Building Contract (MDBC) which is currently \$10,000?*

*Q 2: Should there be additional requirements for domestic building contracts that fall under the MDBC threshold? For example, extending any of the MDBC requirements to apply to all domestic building contracts.*

### **RECOMMENDATIONS**

The Institute and the ACA recommend that:

- the monetary threshold for a Major Domestic Building Contract (MDBC) should be revised from the current amount of \$10,000 that was set in the Domestic Building Contracts Regulations 2017,
- an index such as the Australian Bureau of Statistics (ABS) Index for House Construction for Victoria should be used to calculate the re-based amount, and
- the same index should be used to adjust the threshold every 12 or 24 months or when the index increments by greater than 10% since the last adjustment and this is communicated by registration and licensing authorities to the relevant practitioner classes.

### **Rationale**

- The current threshold of \$10,000 was established in the Domestic Building Contracts Regulations 2017<sup>1</sup> (*Regulation 6 - Major domestic building contract—contract price*). From December 2017 to December 2023 the ABS' index for House Construction for Victoria<sup>2</sup> increased from 120.4 to 158.9 representing an increase of 31.97% (calculated as  $I_1/I_0$ ). This would suggest that logical re-basing of the threshold to \$13,970 (rounded to \$14,000).
- Legislated powers could be given to the Director to issue a threshold every 12 or 24 months or when the index increments by greater than 10% since the last adjustment. This would be communicated to the Victorian Building Authority and the Architects Registration Board of Victoria to communicate directly to relevant registered practitioners.

<sup>1</sup> Domestic Building Contracts Regulations 2017 S.R. No. 18/2017 Authorised Version as at 22 April 2017

<sup>2</sup> Index Number ; 3011 House construction Victoria in 6427.0 Producer Price Indexes, Australia Table 17. Output of the Construction industries, subdivision and class index numbers.

## 2.2 Limitations on deposit amounts

*Q 3: Should there be any changes to the requirements around deposits, including to the monetary thresholds?*

- *For contracts with a price of \$20,000 or more, the deposit can be no more than 5% of the contract price.*
- *For contracts with a price less than \$20,000, the deposit can be no more than 10% of the contract price.*

*Q 4: Should there be any changes to requirements around insurance as it relates to deposits or other payments taken prior to the commencement of domestic building work?*

### **RECOMMENDATIONS**

The Institute and the ACA recommend that:

- the current threshold requirements for deposits have a proper method to maintain relativity to the price of undertaking projects similar to the Institute's and the ACA's recommendation regarding the application of the ABS' index for House Construction for Victoria to threshold levels for contracts.
- Under the recently passed Building Legislation Amendment (Domestic Building Insurance New Offences) Act 2024, that the regulations are subsequently amended to prescribe mandatory requirements before a deposit is paid by an owner to a builder. The Institute and the ACA further recommend these requirements shall include that the builder has provided to the building owner:
  - a building contract that has been executed between the parties,
  - a certificate of currency for all insurances required under the terms of the contract, and
  - a building permit if the builder has obtained the building on behalf of the building owner.
- the DBCA is amended to include a requirement for a builder to provide a bank guarantee or security to the building owner against its default during the construction of the works with the following provisions:
  - that a security be in the form of cash retention
  - the amount of security be limited to 5% of the contract price.
  - the MBDC terms to include:
    - how security is paid
    - when security is returned to the builder.
    - how the security may be accessed by the building owner in the event of the builder's default.
- the government considers options for contract terms for a MDBC require the deposit to be returned to the building owner no later than a set number of progress payments – preferably being the first one or two, and definitely not the final payment – in order to retain the effect of the security payment for the building owner's protection, when the contract includes:

- monthly progress by percentage complete payments,
  - a security payment, and
  - a defects liability period working in conjunction with a retention amount.
- legislated maximum deposits settings are maintained so that there is always an option to negotiate the deposit as a lower or zero percentage.
- there be consideration of additional deposit amounts for expensive fixtures and plant over a specified value (e.g. \$50,000), when undertaken as a purchase by the builder, if:
    - intended ownership by the building owner is made clear in the contract clauses and confirmed in writing by the supplier and the builder,
    - the building owner only pays the additional deposit to the builder after the builder has paid the deposit and evidence is provided to the building owner of the builder's payment of the deposit to the supplier, and
    - there is evidence of insurance coverage for the expensive fixtures and plant while in storage and during transportation.

## **Rationale**

### *Purposes of deposits*

- The Institute and the ACA note that deposits can be seen to facilitate two outcomes. One is to enable early purchase of materials. The other is to secure cashflow for builders in the event of payment default.
- We note two provisions which of the Act which serve to protect builders' interests.
  - Subsection 67A of the Act in conjunction with the provisions set out in Part 4 Division 6, enables VCAT to order the building owner to pay a sum of money to the builder,
    - (a) for work performed under the contract; and*
    - (b) by way of damages for loss of work as a result of the ending of the contract.*

However, this only applies in respect of the conditions set out in Section 41 for the building owner ending the contract and provides no specific mechanism for a simple default.

- Under subsection 49(1)(c)(v), the chief dispute resolution officer may issue a dispute resolution order to a building owner who is a party to a domestic building work dispute, under given conditions which include,
  - an alleged failure to pay money for domestic building work performed under the contract;*
- Under both provisions, in order for the builder to be paid money owed by the building owner, under the circumstances when a building owner ends the contract, or defaults on

a payment, the builder needs to engage with DBDRV and possibly also the Victorian Civil and Administrative Tribunal (VCAT).

#### *Thresholds*

- The current threshold requirements for deposits are acceptable but also need to have a proper method to maintain relativity with the prices of undertaking projects similar to what is proposed above for threshold levels for contracts.

#### *Deposits and insurances*

- The Institute and the ACA note that the new Building Legislation Amendment (Domestic Building Insurance New Offences) Bill 2023, passed into law on February 22<sup>nd</sup> 2024. It creates new offences for a builder to demand or receive money under a major domestic building contract if the builder has not ensured that the domestic building work to be carried out under the contract is covered by insurance. However, the amendments do not prescribe the assurances required to demonstrate evidence of this. These should be prescribed in the regulations.

#### *Security payments*

- Apart from the ABIC standard forms of building contracts, most building contracts currently in use for residential projects contain no provision for protection of the owner in the event of default by the builder.
- In contrast most standard forms of contract used in non-residential construction contain some form of security provided to the building owner by the builder. Security is normally in the form of cash retention or bank guarantees. Section C of the ABIC contract provides a good example of how the concept of security could be included in a MDBC.

#### *Deposits and builders' security payments.*

- Under certain contracts using monthly progress payment models the deposit is effectively returned to the building owner after a set number of progress payments (practice varies between one and four) rather than being deducted sequentially through all of the progress payments up to the last payment. This provides a mechanism to protect the building owner as not to do so would have the effect of cancelling the builder's original security payment if made (often also 5%).
- In contracts where there is a defects liability period working in conjunction with a retention amount (derived from the security payment), then the deposit should be returned to the building owner no later than when payments made by the building owner to the builder reach 20% of the contract price. The key purpose is to retain the effect of the security payment as a retention amount.

#### *Deposits for expensive fixtures and plant.*

- Deposits are required by suppliers of expensive fixtures and plant in domestic building projects which require installation as part of the build. Examples include a heat pump hydronic central



heating system or lift. Sometimes the building owner organises the purchase separately (as they may also do in the case of bespoke kitchen appliances).

- For security and protection purposes these items may also be kept in storage by the supplier until delivered to the site at the time of installation. Usually progress payments are for works completed – i.e the plant and equipment are supplied and installed.
- In the situations where the builder makes the purchase for these items, then it would be possible to consider additional deposit amounts for expensive fixtures and plant over a specified value (e.g. \$50,000) if prospective ownership by the building owner is confirmed in writing by the supplier and builder. In most current residential contracts the relevant clauses state these items are not owned by the building owner until on-site.
- This would mean that in the event of the builder entering liquidation or exiting the contract (e.g death of the builder) the building owner would have the right be refunded the deposit, or pay the balance, and take the fixture and/or plant into their possession. That is to say, the fixture or plant cannot be sold nor the deposit refunded to the builder to pay the builder’s creditors in the situation of a liquidation.

## 2.3 Cost escalation clauses

Q 5: Should cost escalation clauses be permitted in Victoria? Please provide further information about your answer.

Q 6: Is the current \$500,000 contract price threshold for cost escalation clauses appropriate? Please provide further information about your answer.

Q 7: Should any changes be made to the operation of cost escalation clauses? Please provide further information about your answer.

*Section 15(2) of the DBC Act prohibits the use of cost escalation clauses in domestic building contracts, unless:*

- *the contract price is more than \$500,000; or*
- *the clause is in a form approved by the Director, CAV and complies with relevant requirements in the DBC Regulations.*

*Section 15(3) of the DBC Act provides that a cost escalation clause in a domestic building contract is void unless:*

- *before the contract is entered into, the builder gives the building owner a notice in a form approved by the Director, CAV, which explains the effect of the clause, and*
- *the building owner places their signature, seal or initials next to the clause.*

## **RECOMMENDATION**

The Institute and the ACA recommend that:

- **cost escalation clauses not be permitted in residential building contracts in Victoria.**

### **Rationale**

- Builders already have access to provisional sums being able to be included in contracts subject to the requirements set out in Sections 21-23 of the DBC Act. The current cost-escalation provisions only provide a further undesirable mechanism that reduces restraint on prices.
- Set out below in the response to fixed-price contracts are more extensive considered arguments as to why both cost-plus contracts and cost-escalation clauses should be avoided altogether.

## **2.4 Fixed price contracts**

*Q 8: Should there be any changes to the restrictions on cost-plus contracts, prime cost items or provisional sums? Please provide further information about your answer.*

*Q 9: Should there be any changes to the requirement for domestic building contracts to be a fixed price? Please provide further information about your answer.*

## **RECOMMENDATION**

The Institute and the ACA recommend that:

- **any form of a Model Domestic Building Contract (MDBDC) should be for a fixed lump sum price and a fixed time for completion of construction i.e. a Fixed Lump Sum Contract**
- **a limit is established for the overall percentage and separate percentages of a MDBDC that is comprised of prime costs and provisional items.**

### **Rationale**

- The Institute and the ACA acknowledges the “perfect storm of events” from late 2019 to 2023 which have created labour and supply shortages and led to cost escalations including:
  - Covid 19 Pandemic and associated government stimulus spending on infrastructure and building projects.
  - the Ukrainian war and more recently the Gaza war
  - increasing frequency and impact of climate change driven natural disasters across Victoria and Australia which have required major rebuilding programs.
- The previously referenced<sup>3</sup> ABS index for House Construction for Victoria shows that from December 2019 to December 2023 there was a 30.25% increase in house construction prices in Victoria and other residential construction prices increased by 22.4%.

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<sup>3</sup> in the previous sections on contract thresholds and indexation

- Over the same period there has been several increases in interest rates restricting the ability of building owners to obtain finance at affordable rates.
- In December 2023 the ABS reported<sup>4</sup> that for house construction,

*House construction prices rose this quarter, driven by increases in Western Australia, New South Wales and Victoria. Ongoing labour shortages for finishing trades and price rises for end stage materials have resulted in cost escalations which have been applied to base prices this quarter.*

and for other residential construction,

*Continued labour shortages for skilled tradespeople are the primary cause for price increases this quarter.*

- Housing affordability is almost the number one major socio-economic policy concern for all governments across Australia. It is important that governments use all levers they can to control continued house price escalation and worsening affordability.
- Relinquishing fixed price contracts, reducing the restrictions to use cost-plus contracts, or permitting cost escalations in a MDBC would:
  - be discarding important controls that, despite house price increases, would enable the current crisis to become worse,
  - send the wrong signal to the market that encourages overpricing or profiteering, especially where demand exceeds supply in a market for an inelastic product such as housing,
  - result in increased domestic building disputes arising from situations where the building owner cannot meet the contract payment, and
  - bring about situations where building owners are forced to increase borrowings to cover costs with the subsequent risk of later loan defaults.
- Banks have demonstrated a strong preference for fixed price contracts, and on the evidence of the architect profession, are sometimes averse to financing new builds or home alterations being performed under administered monthly payment by percentage complete contracts (in all Australian jurisdictions), **despite these contracts being fixed price contracts.**
- The major banks and other financial institutions have always demanded a form of construction contract that will protect their interests and those of their customers (the building owner as borrower) The banks are therefore not interested in contracts where the price and the time to complete are not defined with a high degree of certainty as in a fixed price contract.
- Under these circumstances of a housing construction market constrained for the supply of trades and builders, building owners could simply fail to obtain finance to build or alter their home to their household's needs, while self-financed projects would continue unabated.

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<sup>4</sup> <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/producer-price-indexes-australia/latest-release>

- Through a socio-economic policy lens there are many cascading risks. Further reduction in house price constraint is likely to reduce home ownership. A greater number of households will be prevented from buying a home. A greater number of households with higher incomes will compete against lower income households in the residential tenancy market and thereby increase long term population homelessness risk for low to middle income households.
- Victoria is the Australian state with the lowest number of social housing dwellings per capita<sup>5,6</sup>. In 2022, Victoria with 82,010 social housing dwellings (combined public and community housing dwellings) had just 122 social housing dwellings per 10,000 persons compared to the national average of 170.4 dwellings per 10,000 persons. Australia, among its peers of developed nations sits well below the OECD average of 7.0% of all dwellings being comprised of social housing, at only 4.4%<sup>7</sup>.
- In June 2022, Victoria had a waiting list of 54,857 households for its 63,987 public housing dwellings. Victoria's public housing waiting list in June 2022 was 83 households per 10,000 persons, the second highest in Australia (South Australia 84.6/10,000) and well above the national average of 67.2 households per 10,000 persons.
- In a state with a demonstrated shortage of social housing dwelling stock, and large waiting lists for its public housing dwellings, it is a risk to create further demand for the public and community housing stock comprising its social housing. It underscores the imperative to ensure that rising unaffordability in the private market is not driven by uncontrolled prices to create a new dwelling.
- It may be argued that builders will inflate their tender price for a fixed price lump sum contract to manage the risk of construction costs increases over the life of the project. Cost increases are likely for projects with a duration of 12 months or longer. A cost-plus contract or contract which permits cost-escalations does not prevent cost-increase as in these contracts the increases will simply be passed on to the building owner.
- Tendering for a project where a cost-plus contract is proposed can only be for the margins/fees charged by different tenderers. By its very nature a tender process for a project using a cost-plus contract cannot be a tender for the cost of the works.
- The Institute and the ACA have considered a possible hybrid approach where a cost-plus contract fixes the builder's price component and then provides flexibility for subcontracted trades to reduce risk to the builder. This still has many risks such as premium prices being quoted by trades. Possible mitigations could include:

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<sup>5</sup> Australian Institute of Health and Welfare (AIHW) Housing assistance in Australia 2023 Social housing dwellings. Supplementary data tables: Social housing dwellings.  
<https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia/contents/social-housing-dwellings>

<sup>6</sup> Australian Bureau of Statistics. National, state and territory population. Reference period June 2022.  
<https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/jun-2022>

<sup>7</sup> In their 2020 report on housing Australia reported 4.4% of its dwelling stock to be social housing compared to the OECD average of 7.0% and percentages as high as 34.1% in the Netherlands, 23.6% in Austria, 21.4 % in Denmark and 16.7% in the UK. Source: PH4-2-Social-rental-housing-stock

- the requirement for multiple competitive written quotes by subcontractors
  - the building owner reserving the right to obtain their own quotes for a specific trade in response to a brief prepared by the builder.
  - legislation to ensure that quotes offered and accepted in writing become the terms for the subcontractor agreements.
- Overall, the preferred approach of the Institute and the ACA is for fixed lump sum contracts with provision for the inclusion of some prime cost and provisional items and a limit on these amounts as a fixed lump sum contract effectively ceases to be fixed if the overall provisional items or prime costs form a large percentage.

## 2.5 Progress payment stages

*Q 10: Are the progress payment provisions in the DBC Act fit for purpose for all types of construction methods? Please provide further information about your answer.*

*Q 11: Should any changes be made to the limitations on progress payments including the % paid for each stage? Please provide further information about your answer.*

*Q 12: Should any changes be made to the building stages, including to their definitions? Please provide further information about your answer.*

### **RECOMMENDATIONS**

The Institute and the ACA recommend that:

- **the current progress payment provisions in the DBC Act are not the optimum for purpose for all types of construction methods and the “payment by percentage complete” model, where the works have been assessed and estimated by an independent contract administrator/ superintendent such as an architect prior to certifying that the builder can make a progress payment claim, is a superior method to manage risks for building owners.**
- **if the Payment by stages system is to be retained it should be increased from the current five stages to ten to include completion of the following parts of the works:**
  - **Waterproofing & insulation**
  - **Rough-in of services**
  - **Tiling & wall linings**
  - **Roof system including flashings, gutters, and downpipes.**
  - **Testing and commissioning of all services & equipment**

**Suitable definitions of each of these stages will need to be included in the DBCA to ensure the completion of the stage is clearly understood by owner, builder and if included in the contract, the independent contract administrator.**

- the Victorian Government considers a separate inquiry into a feasible economic method to more quickly deliver needed homes using Design for Manufacture and Construction (DfMA)/ modular building techniques. This inquiry should include economic modelling, risk analysis and feasibility studies to develop appropriate consumer protections in MDBC's when a project is delivered through DfMA/ modular methods.

## **Rationale**

- The Australian Institute of Architects and the Master Builders Association are jointly responsible for a contract suite called the Australian Building Industry Contracts (ABIC).
- The Institute and the ACA are of the strong view that progress payments performed under an independently administered contract such as the ABIC–Simple Works–Housing (SW-H) and ABIC Major Works – Housing (MW-H) contracts, administered by an independent contract administrator an independent contract administrator /superintendent such as an architect, should be positioned as a more positive alternative in the legislation and the regulations. This would enable building owners to make an assertive choice about the best means to protect their interests.
- The structure of the current legislation and the regulations establishes prescribed completion stages for progress payments as the default.
- Schedule 1 of the regulations (pursuant to Regulation 13(1)(a)) creates a false impression that “payment by percentage complete” of a fixed price contract, “*where an architect is engaged to independently assess the value of completed work for progress payments*”<sup>8</sup> presents a greater risk for consumers than the stage completion based progress payments method set out in Section 40 of the act (Limits on progress payments). Form 1 in Schedule 1 of the regulations commences with,

### **“WARNING TO OWNER—CHANGE OF LEGAL RIGHTS”**

It implies that these rights are diminished when, generally, they are enhanced. For example, under both Sections 44 and Section 54 of the Act, disputes between a building owner and an architect in relation to a domestic building contract or the carrying out of domestic building work are disputes for the purposes of Part 4 of the act (Domestic building work disputes). This is not simply limited to the design work performed by the architect.

- Set out below, in this submission’s response to the discussion paper’s questions 19 and 20, are those recommended processes to strengthen consumer protection using a monthly payment by percentage complete method under an independently administered contract. Our response also outlines the increased consumer protection benefits which result from this model.
- With regard to the current progress payments based upon stage completion (“stage payments”) as set out in Section 40 of the Act, the model could be strengthened to create greater

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<sup>8</sup> Dot point 5, third paragraph, in FORM 1 per Schedule 1 of Domestic Building Contracts Regulations 2017 S.R. No. 18/2017

protections and benefits for building owners and also builders, as described in our response to Questions 19 and 20. This would be insofar as approximating the monthly payment by percentage complete method under the ABIC model by introducing a greater number of stage payments. This could reduce the risk of under or overpayment by the building owner to the builder.

- The model of monthly payment by percentage complete has a key advantage for building owners over the stage completion progress payments. The key advantage is that the works have been assessed and proportion of the total cost of works of the fixed price has been estimated and certified for a claim, by an independent contract administrator an independent contract administrator /superintendent such as an architect. Standard stage payments involve no such independent assessment.
- Most building owners do not have the required skills to assess if the works had been completed in accordance with the endorsed building permit plans and specifications. Building owners must rely completely on the builder to appraise completion or otherwise of a stage where there is no independent contract administrator.
- If a greater number of increments to stage payments were to be introduced, the Victorian Government could also introduce a corresponding greater number of mandatory notifications into Part 12 of the Building Regulations 2018 to be carried out by a building surveyor for projects being performed under a stage payments contract. These inspections would ensure that the construction has accurately followed the endorsed building permit plans and specifications to avoid the most frequent defects such as lack of insulation, water shedding and waterproofing.
- In addition, the incorrect installation or the disruptions by trades of installed insulation is a hidden defect that affects a home's thermal performance and should be also inspected by a third party prior to "drywalling" with plasterboard or other finishing materials. It should also form part of the mandatory notifications under Regulation 167 of the Building Regulations.
- Stage payments should then be aligned to these inspections. Stage payments need to be brought into line with the increased demands of current regulations that creates more durable, defect-free and energy efficient buildings. The current model of stage payments is no longer suitable to meet the requirements of the National Construction Code in 2024.
- The Institute and the ACA further add that the Australian Standards, relevant building regulations and the National Construction Code are only minimum codes. One large area of building quality, which can lead to consumer dissatisfaction and disputes, is the fixing & finishes stage after the lock up stage and prior to the completion stage. Faults, defects and incomplete parts of this stage are of little or no interest to the building surveyor as they do not form part of the National Construction Code. Examples of problem areas in the fixing and finishing stage include:
  - cupboards and doors that open and shut cleanly, with even gaps to specifications,
  - joins and reveals have been finished to an acceptable standard,
  - fittings such as door, window furniture, floor coverings and cabinetry and fixtures such as lights and tapware have been correctly supplied and installed
  - internal and external paintwork and finishes to all surfaces including floors have been proficiently applied to correctly prepared surfaces.

- Only a payment by percentage complete model, where the works have been assessed by an independent contract administrator an independent contract administrator /superintendent, such as an architect, prior to certifying that the builder can make a progress payment claim, addresses these matters of building quality. Furthermore, as this model includes a security payment which acts as a retention amount during a specified defects liability period, there is far greater protection to building owners. The current stage payment model affords no such protections.

#### *DfMA/ Modular building methods*

- Some architects are working on projects which deliver homes using Design for Manufacture and Assembly (DfMA) building methods. This is also termed “modular building”. This can involve whole three-dimensional elements fabricated offsite, such as bathrooms, or two-dimensional elements comprising wall sections which have been framed, insulated and clad and may even have services such as cabling and water lines.
- There are advantages that include, higher quality fabrication in a factory setting, production efficiencies which reduce fabrication time and materials waste, and reduced delays brought about by weather.
- In jurisdictions such as the United Kingdom and Singapore, these methods are being pursued due to trades shortages.
- As payments in any progress payments model are based upon completed works on site, the question arises as to when the builder and the manufacturer are paid, especially if a very large percentage of the cost of works takes place off-site (anecdotally as high as 80%).
- This raises questions about cashflow and solvency for the builder and manufacturer juxtaposed to protecting building owners.
- There is no single answer, but consideration of systems of guarantees or amounts held in trust might be part of a solution.
- This issue is beyond the scope of this review and therefore warrants a separate dedicated enquiry with expert economic modelling, risk analysis and feasibility studies.

## 2.6 What is domestic building work?

*Q 13: Should single trades work (or certain types of single trades work) be considered domestic building work, to be made subject to DBC Act restrictions and to fall within Domestic Building Dispute Resolution Victoria (DBDRV)'s jurisdiction?*

*Q 14: Should there be any changes to what is considered domestic building work under the DBC Act?*

**The Institute and the ACA make no specific recommendations for this section.**



## 2.7 Statutory warranties

Q 15: Do the implied warranties need to be updated, including through the removal or addition of any warranties, or expanding their application to all developers? Please provide further information about your answer.

These warranties require that the builder:

- carries out the work in a proper and workmanlike manner, in accordance with the plans and specifications set out in the contract
- ensures all materials supplied are good and suitable for the purpose and are new, unless otherwise stated in the contract
- carries out the work in accordance with all laws and legal requirements
- carries out the work with reasonable care and skill and completes works by the date (or within the period) specified by the contract
- ensures new homes, extensions, renovations, repairs and kit homes (or similar) are suitable for occupation when completed
- ensures other types of work and the material used are reasonably fit for the intended purpose.

## RECOMMENDATIONS

The Institute and the ACA recommend that:

- the current wording is amended as follows:
  - “*Workmanlike*” is replaced by terms such as “*proficient*” or “*competent*”
  - “*Plans and specifications*” includes the additional wording of “*applicable industry codes and standards for trade work including the installation and application of materials and the required preparation works*”.
- an additional warranty is applied to any future MDBC that warrants if defects or unsatisfactory performance of the building or its components become evident in the first 12 months after practical completion and arising from the matters covered by the warranties set out in Section 8 (subsections a-f) that the defect or unsatisfactory performance will be remediated by the builder.
- a two-stage completion process be introduced into the DBCA and be incorporated in the MDBC which mandates contract provisions for practical completion, defects liability period and final certificate.

## Rationale

### Wording

- “Workmanlike” is a gendered term that requires a more specific and relevant definition in 2024.
- There are applicable standards to building quality that are not addressed in the National Construction Code. Therefore, “Plans and specifications” should also include “and other relevant documents including applicable industry codes and standards for trades work including the installation and application of materials and the required preparation works”.
- An example of a relevant standard not addressed in the National Construction Code is AS/NZS 2133: 2017 Guide to the painting of buildings.

### Additional warranty

- The Australian Competition and Consumer Commission advises<sup>9</sup> that,  
*“Extra promises about what a business will do if something goes wrong with a product or service are known as a manufacturer’s warranties or warranties against defects.”*
- MDBC’s should include warranties that define the responsibility for a builder to effectively remediate defects, unsatisfactory performance of the building or its components that become evident in the first 12 months after practical completion. This pertains to those matters arising from the matters covered by the warranties set out in Section 8 (subsections a-f).
- This warranty should not be limited by any warranties provided by suppliers, installers or manufacturers of fixtures, fittings plant or equipment.
- The builder, must warrant that the works, including all the parts of the works provided by subcontractors and suppliers, will be defect free when completed.
- As per our responses to Q. 10. 11 and 12 above and Q.19 and Q.20 below, an alternate mechanism is a defects liability period and a retention amount for that period. Ordinarily when using the ABIC contracts the retention amount is 2.5% of the contract price. In the situation of an independent contract administrator /superintendent such as an architect, the architect/superintendent is required to actively inspect the home in the post-occupancy period for defects. This is a far more pro-active arrangement to protect building owners.

### Two-stage completion process

- Currently the DBCA contains no provision for a two-stage completion process. The assumption appears to be that when the final payment is made the works are complete. This is reflected in both HIA & MBA residential contracts where the building owner makes the final payment and in return the builder provides the keys to the completed residence.

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<sup>9</sup> <https://www.accc.gov.au/consumers/buying-products-and-services/warranties>

- In contrast most building contracts used in the non-residential sector include a concept of “practical completion” where all major components of the works are complete but minor aspects of the works that do not affect the use of the building may remain incomplete. This is followed by a period (normally 12 months) known as the “defects liability period” (DLP) where the builder remains responsible for rectification of defects and completion of any outstanding incomplete parts of the works.
- At the end of the DLP when all defects have been rectified the final certificate is issued and the final payment made by the building owner to the builder.
- This concept of practical completion, DLP and final certification is incorporated in the ABIC residential contracts.
- There are advantages of the two-stage completion process as it allows the building owner to identify any problems (defects) that may not have been known at the time of hand-over and occupation.
- There is also a monetary incentive (retention) under the security provisions (discussed elsewhere in this submission) to ensure the builder does rectify the defects reducing the need for the parties to get involved in DBDRV disputes and subsequent applications to VCAT.
- The two-stage completion process is well known and understood in the non-residential sector. Its introduction into residential contracts would provide a mechanism for a better building process with less defects and consequential disputes between building owner and builder.

## 2.8 Consumer information products

*Q 16: Are the consumer information products effective? If not, how can they be improved?*

*Q 17: Should there be a requirement for a standard form contract to be used for some or all domestic building contracts? For an example, see the prescribed residential rental agreements made under the Residential Tenancies Act 1997.*

*Q 18: Are there other changes or requirements that would help consumers and builders understand their legal obligations and rights? Please provide further information about your answer.*

### **RECOMMENDATIONS**

The Institute and the ACA recommend that,

- a standard form contract should not be established as a requirement,
- the Victorian Government continues to provide a model contract for building owners to use, subject to revising the contract to ensure there is also provision for this contract to be use the progress payments by percentage complete method and where the works have been assessed and estimated by an independent contract administrator an independent contract

**administrator /superintendent, such as an architect, prior to certifying that the builder can make a progress payment claim,**

- **the Victorian Government considers prescribing minimum contract requirements in the regulations instead of the Act to enable more regular review.**

## **Rationale**

- A standard form contract should not be established as a requirement as it would not be capable of scoping all types of domestic building work from single residential to multi-residential projects nor more complex single residential projects that can take much longer to construct than a volume builder home to a set design offering.
- A standard form contract would also have to be capable of being used under conditions of either stage completion progress payments or monthly payment by percentage complete method where the contract is administered by an independent contract administrator such as an architect.
- The Australian Institute of Architects and the Master Builders Association have a joint contract suite called the Australian Building Industry Contracts (ABIC). In addition, the Master Builders Association and the Housing Industry Association also have standalone contracts. As noted above, the ABIC suite contains two contracts for domestic building works, the ABIC-Simple Works-Housing (SW-H) and ABIC Major Works – Housing (MW-H). These are primarily intended for monthly payment by percentage complete method and administration by an architect. ABIC includes separate contract suites for each state and territory which accord with their respective regulatory requirements.
- We note that there is no Australian Standard (AS series) domestic building contract maintained by Standards Australia. As contracts have been developed and then regularly reviewed and maintained by industry member bodies at their own considerable cost, the contracts are only commercially available for actual use. We note that even Standards Australia charges for their standard contracts such as AS 2124, AS 4000, various consulting and works contracts.
- Maintaining a model contract(s) enables building owners to understand building contracts more generally, ahead of engaging a builder under a particular industry standard contract. It could include extensive explanatory guidance for consumers, and the government could even develop authoritative learning material to be delivered on the internet.
- The Victorian Government would also need to commit the expert and legal resources to regularly undertake consultation and revise the contract, similar to the way this is undertaken by industry bodies.
- The Institute and the ACA recommend that-rather than developing a standard form contract it is more appropriate to maintain a set of minimum contract requirements as currently established for a major domestic building contract as set out in Section 31 of the Act.

- One possible means to improving the minimum contract requirements on a more regular basis is to prescribe these in the regulations instead of the Act itself. Maintaining minimum requirements rather than providing a government standard form contract also means that other contract terms can continue to be established and used which improve consumer protections for building owners and /or allow for any changing construction and procurement methods.
- The ABIC contracts, for example, provide for liquidated damages to be claimed by the building owner from the builder for time delays for the entire works (or separable part of the works where these are specified in the contract schedule) at a specified daily rate. This is an example of a consumer protection mechanism well above the minimum requirements specified in Section 31 of the Act.

## 2.9 Contents of a MDBC

*Q 19: Should there be any changes to what must be included in a MDBC? If yes, please provide further information about your answer.*

*Q 20: What else can be provided to a consumer to help them to understand a contract including the rights and obligations of the parties to the contract?*

### **RECOMMENDATIONS**

The Institute and the ACA recommend that,

- **Domestic Building Contract Act establishes settings and contract provisions for MDBC that,**
  - **by default, establishes independent contract administration with a monthly payment by percentage complete method include a provision for the administration of the contract provisions by an independent contract administrator (the “Superintendent”).**
    - **that the Superintendent be registered with the Architects Registration Board of Victoria or the Victorian Building Authority (VBA) and subject to selection based on similar requirements to those that are established for architects to:**
      - **hold appropriate qualifications (e.g. AQF-9),**
      - **have verified assessment as competent in contract administration,**
      - **be subject to a statutory code of conduct, and**
      - **hold professional indemnity insurance,**
  - **the Superintendent would be appointed by and paid for by the owner but subject to a clearly defined set of criteria to determine there would be no conflict of interest between the Superintendent and the builder and the building owner,**
  - **includes provision for the building owner and the builder to acknowledge and agree upon the independent role of the Superintendent to assess value and certify,**
  - **includes a security payment by the builder to the building owner at the commencement of the contract,**
  - **includes a defects liability period with a retention amount held over from the total contract during this period,**

- during the defects liability period, the security payment operates as a retention amount, and
- reverts the deposit back to the building owner at the first or second monthly progress payment.

This could be established as the default setting and building owners could elect to opt out to a staged payment contract where there is no superintendent/ independent contract administrator.

- the Act and or the regulations could prescribe the automatic conditions imputing force majeure clauses in all MDBC's similar to the way this is done for warranties by Section 8 of the Act. The triggers could include:
  - pandemic or natural disaster emergency declared by a relevant Victorian or Commonwealth authority, delegated public servant or Minister
  - human-made disaster with a declared state of local or regional emergency (e.g. tower block collapse, major aircraft crash, extensive building or industrial fire creating hazardous work conditions or an exclusion zone
  - major acts of terrorism, civil uprising or external sovereign threat.

## Rationale

- The increased consumer protection benefits resulting from these recommended default settings for a model building contract include:
  - more frequent payments being made to builders closely approximating the cost of works performed under the contract which therefore preventing overpayment to the builder but also provide cashflow to the builder.
  - independent oversight of the work being undertaken in accordance with the design / construction documentation (*if administration is performed by a superintendent/ architect*).
  - a mechanism to incentivise the timely remediation of defects without resorting to the Domestic Building Disputes Resolution process including conciliation or a more adversarial claims process conducted through the Victorian Civil and Administrative Tribunal.

### *Force majeure provisions*

- It is important to acknowledge the contract risk during the shutdown of much of domestic construction under certain restrictions during the Covid-19 pandemic crisis, especially in 2020 and 2021. The delays were particularly pertinent to building works in premises that continued to be occupied by the building owners, restrictions in the number of persons in a given enclosed area, acute supply chain constraints and labour shortages due to workers being affected by Covid-19.

## 2.10 Allowances for delays

*Q 21: Should any changes be made to the allowances a builder must make for delays in time estimates?*

### **RECOMMENDATION**

The Institute and the ACA recommend that:

- no changes are required to general allowances a builder must make for time estimates where these do not entitle the builder to claims for adjustment of time costs.

### **Rationale**

- The provisions do not need to be recalibrated to reduce protections for consumers.

## 2.11 Cooling-off period

*Q 22: Should the number of days allowed for a cooling-off period be amended? Please provide further information about your answer.*

*Q 23: Are the outcomes when a building owner withdraws from a MDBC during the cooling-off period fair? If not, why and what changes could be made?*

### **RECOMMENDATIONS**

The Institute and the ACA recommend that:

- no changes are required to the current duration of five days cooling off period.
- if a builder subsequently seeks to retain the cost of any other out-of-pocket expenses that they incurred before the withdrawal then evidence of these expenses should be provided.
- subsection 34(3)(a) is revised to clarify whether the phrase, “with the approval of the building owner” pertains to the retaining of money or the out-of-pocket expenses”

### **Rationale**

- Evidence of costs should be similar those required for variations.
- Subsection 34(3)(a) of the Act is not clear in the way it states,

*the builder may retain out of any money already paid to the builder \$100 plus the cost of any other out-of-pocket expenses the builder incurred before the withdrawal with the approval of the building owner;*

It is not clear whether the phrase, “with the approval of the building owner” pertains to the retaining of money or the “out-of-pocket expenses”

## 2.12 Variations to plans and specifications

Q 24: Should any changes be made to the requirements for variations to a MDBC? Please provide further information about your answer.

### **RECOMMENDATION**

The Institute and the ACA recommend that:

- the Act is amended so that a builder must not give effect to any variation unless the building owner gives the builder a signed consent or a building owner's authorised representative, such as an architect or superintendent, approves the variation attached to a copy of the notices required by subsections 37 (1) (builder initiated) or 38(3) (owner initiated).

### **Rationale**

- Currently, signed consent by a building owner to a variation attached to a copy of the notices per subsections 37 (1) (builder initiated) or 38(3) (building owner initiated) is only required where variations:
  - are greater than 2% of the contract price,
  - will require a change to a permit, or
  - will cause delay.
- Sections 37 also provides for builder variations arising from an order or notice by a building surveyor or authority.
- 2% is no longer a safe threshold as it amounts to a substantial \$5,000 even on a modest \$250,000 building contract and proportionally larger increments on larger contracts.
- First homeowners as building owners are likely to be borrowing very large percentages of the contract price from banks who generally do not factor variations into their domestic loan product.
- It is could also jeopardise building owners' tight budgets where more than one variation matter arises. Keeping tight controls in this manner reduces the risk of a variation matter proceeding to a dispute.

## 2.13 Ending the contract

Q 25: Should any changes be made to when or how a building owner can end a MDBC?

Q 26: Should any changes be made to when or how a builder can end a MDBC?

### **RECOMMENDATION**

The Institute and the ACA recommend that:

- the concept of a "reasonable price" needs to be expanded in Section 41 of the Act including defining the processes to determine a reasonable price.



## **Rationale**

- The Institute and the ACA have noted extensively in this submission that there are important benefits to be gained by building owners from a monthly payment by percentage complete model where the proportion of the contract price is estimated by an independent contract administrator or an independent contract administrator /superintendent such as an architect.
- Section 41 of the Act addresses ending a contract if completion time or cost blows out for unforeseeable reasons. Subsection 41(5) establishes that,

*If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.*

- Subsection 41(7) further qualifies that Section 39 **does not apply** to the whole of Section 41. Section 39 specifies that the contract price is to be read as a reference to the contract price as varied in accordance with Sections 37 (builder variations) or 38 (building owner variations).
- Therefore, only the original contract price is considered for the entire purposes of Section 41, not variations.
- Problematic with this provision is the concept of a “reasonable price” and how this is to be determined in the absence of an independent contract administrator.
- The concept of a “reasonable price” needs to be expanded in Section 41 and the processes to determine this. Principles that should be considered include:
  - that time is critical as building works can deteriorate and the recommencement of works by another builder may require costly remediation work or partial demolition and rebuild (e.g. mould establishes itself in an unprotected timber frame).
  - prompt resolution by the parties and thereby preventing referrals to further disputes resolution processes.
  - an independent assessor such as an architect, quantity surveyor or superintendent to determine reasonable costs.

## **2.14 Dispute resolution framework**

*Q 27: Is the current dispute resolution framework fit for purpose? Please provide further information about your answer.*

*Q 28: What improvements, if any, could be made to strengthen domestic building dispute resolution?*

## **RECOMMENDATION**

- **The Institute and the ACA urge the Victorian Government through the Victorian Government Auditor General (VAGO) to undertake a review of the performance of Domestic Building Dispute Resolution Victoria including:**

- number and types of matters contained in disputes
  - percentages of disputes, by types of matters, resolved through the conciliation process
  - percentages of disputes referred to VCAT
  - percentage of disputes that remain unresolved and open
  - percentage of disputes that are closed without resolution or referral
  - time taken disputes to reach their respective conclusion (resolved, unresolved/open, referred or closed)
- Subject to the finding of a performance indicator review a subsequent review is undertaken of the arrangements by which DBDRV delivers dispute resolution and whether these arrangements and the processes to execute the arrangements are fit for purpose.

### **Rationale**

- The discussion paper has not provided any evidence about the performance of Domestic Building Dispute Resolution Victoria since it was established seven years ago. The Institute and the ACA have been unable to locate publicly available data. Therefore, in the public interest, the Victorian Government Auditor General (VAGO) is the best agency to undertake a review and uncover evidence of DBDRV's performance.

## **2.15 Additional comments on the DBC Act**

*Q 29: Do you have any other comments on Parts 1, 2, 3 4 or 6 of the DBC Act? Is the Act achieving its purposes and is it flexible enough to apply to protect consumers in the context of modern construction practices?*

- **The Institute and the ACA do make any not specific recommendations for this section. However, our organisations would welcome the opportunity to provide further input into the review and into any aspects of this submission that may require further explanation.**
- **The Institute and the ACA has no further comments and thanks the Victorian Government for being able to participate in the review of the DBCA.**

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