

Construction Contracts Act 2002

1 What is the purpose of the Construction Contracts Act 2002 and what does it have to do with a building contract?

The Construction Contracts Act 2002 comes part and parcel with a building contract in that the builder cannot contract out of this Act under section 12. The main purpose of this Act is “to reform the law relating to construction contracts and, in particular:

- to facilitate regular and timely payments between the parties to a construction contract; and
- to provide for the speedy resolution of disputes arising under a construction contract; and
- to provide remedies for the recovery of payments under a construction contract”.

The Act applies to all contracts when construction work is carried out, whether it is residential or commercial.

2 What is a Residential Construction Contract?

The Act defines Residential Construction Contract as a contract for the carrying out of construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract.

3 What is a Payment Claim?

A payment claim is a claim for a payment due under a construction contract. It can be a progress payment or a final payment. The Act provides that a payee (the builder) may serve a “payment claim” on a payer (the owner) requiring the payer to make a progress payment. A payment claim must:

- be in writing;
- identify the construction contract to which it relates;
- identify the work to which the claim relates;
- indicate the claimed amount and the due date for payment;
- indicate the manner in which the payer calculated the amount; and

- state that it is a payment claim under the Construction Contracts Act 2002.

4 What is a Payment Schedule and what happens if the Payee does not provide a Payment Schedule to the Payer?

A payment schedule is a document of response from the payer to a payment claim received from the payee. This must:

- be in writing;
- identify the payment claim to which it relates; and
- indicate a scheduled amount and if that amount is less than the claimed amount, it must indicate how the scheduled amount has been calculated.

Under the Act the payer has twenty (20) working days (or such other period as may be specified in the contract) to respond to the payment schedule. This requirement must be followed exactly. If you respond in the proper way and within the timeframe then the matter should be referred to adjudication but if you don't respond within the timeframe you will be called upon to pay the full amount in the schedule to the builder. You still have your rights under the Act to dispute or raise any further matters of concern at any time, but under the Act you must pay the builder in the meantime. Always seek advice immediately if you are ever unsure.

5 What are the remedies for failure to pay the Builder and can the work be suspended?

If you do not pay the builder the amount due in accordance with your payment schedule (or if you do not serve a payment schedule in time) the builder can recover the amount as a “debt due” from you in Court together with the “actual and reasonable” costs incurred in doing so. The builder is also entitled to cease work. If a proper payment schedule is served indicating that the payment claim is in dispute, the dispute can then be referred to adjudication under the Act.

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Important facts about Building Contracts

1 Do I need a written Building Contract or is an oral agreement enough?

When arranging for building works, there should be a written contract with a builder. The contract should clearly state all of the terms and conditions associated with the works. Both parties must sign the contract.

2 What do I need to look for in a Building Contract?

Some matters which you should consider are:

What is the contract price?

The contract price is the price listed in the contract for the goods and/or services that are to be provided. It is important to check whether the contract has a fixed price or if there is an escalation clause. An escalation clause enables the builder to pass on increases in the cost of wages and materials, which could substantially increase the contract price. In times of low inflation there should be less need to have an escalation clause or at least limit price escalation to the period prior to the contract becoming unconditional.

Why are the plans and specifications so important?

The builder is required to carry out the work in accordance with the plans and specifications. These should have been carefully considered together by you and your architect or draftsman. It is essential that both the plans and specifications accurately and comprehensively show everything that you intend to have incorporated into the building. For example the specifications should indicate building materials, the type of plumbingware and electrical fittings to be used

as well as specifying the colours and/or textures to be used for tiles, painting and wallpapering.

What is a Prime Cost (PC) Sum?

The Prime Cost Sum is an allowance for the cost of goods/and or services that are yet to be bought or completed. This is important because sometimes the cost of goods/and or services are not available at the time of signing the contract, e.g. cost of stove or floor coverings.

Ensure that the PC sum is not too low as this can give a false impression of the true cost of the building. The final cost could end up being significantly greater. We advise that too many PC sums are to be avoided as they can leave the ultimate price quite uncertain.

What is the payment structure i.e. progress payments?

The building contract will specify the amount of each progress payment and when payment is due. A common form of payment is by way of progress payments. This is intended to assist the builder in funding costs during construction. A way of controlling the payments is to ensure that the payments are structured so that the cost to complete the remaining work is no less than the difference between the contract price and the payments made to date. This should ensure that if the builder cannot complete the work it is still possible to have the work completed by another builder without exceeding the original agreed cost. If you are relying upon a bank loan which is to be advanced to you by progress payments ensure that the amounts are sufficient to meet your obligations under the building contract.

What do I need to know about insurance for Building Contracts?

From the commencement date of the works, full replacement contractors all risk insurance should be arranged. This can be arranged either by you or the builder but you are advised to ensure that it is arranged. The insurance policy should be in the joint names of yourself and the builder. Remember to make arrangements for permanent cover to take effect from the expiry date of the contractors all risks policy before you take possession.

Can variations be made to a contract and can you purchase extras for the building?

Variations/extras may increase the original cost of the building. If there is a need to have a variation or extra make sure that you are advised of any additional costs before agreeing. Any agreed variations should be recorded in writing. Also be aware that the builder may add a "margin" on the actual cost of the extras.

What is a maintenance clause?

A standard building contract will normally include a maintenance clause. This requires the builder to make good any defects in the work which arise from materials or workmanship that are not in accordance with the plans and specifications. Normally the builder would be required to fix the defects within a specified time after the house is completed but check the wording carefully. We recommend a maintenance period of not less than 60 days. Also, we recommend that you investigate availability of a building guarantee.

What are retentions?

A retention is when an owner withholds a percentage of each progress payment for a period of time following completion of the contract to provide a degree of protection should any of the work provided be defective. We would recommend that a retention clause be included in all building contracts.

When is the possession date?

This is the date when you are able to take possession of the property/building, often called the completion date. At this point the builder's responsibilities come to an end subject to any maintenance clause. Possession and completion dates should always be subject to the builder providing you with a Code of Compliance Certificate issued by the local authority.

3 Do I need a building consent?

Most building works require the consent of the territorial authority to the proposal. The Council will need plans and specifications before issuing the consent to ensure that the proposal conforms to the Building Code. When the building work is completed, we would recommend that you obtain a Code Compliance Certificate under which the Council certifies that the work has been completed in accordance with the Building Consent.