

15 June 2010

By email: linda.m.duncan@justice.vic.gov.au

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Dear Ms Duncan

Consumer Affairs Victoria draft model domestic building contract

Thank-you for the opportunity to comment on the Consumer Affairs Victoria draft model domestic building contract (**Draft Contract**).

The Consumer Action Law Centre (**Consumer Action**) is aware that commonly used domestic building contracts often leave consumers at a disadvantage, and this can have negative consumer outcomes in the event of a dispute. Given the information asymmetry that exists between builders and consumers, it is not surprising that consumers often unwittingly enter contracts that do not always best serve their interests. The Draft Contract is therefore both necessary and timely, and Consumer Action hopes that it will be widely adopted by the domestic building industry.

Consumer Action's review of the Draft Contract focuses largely on issues of lay-out and communication, as we do not currently act in domestic building disputes and do not have extensive knowledge of underpinning case law and legislation in that area. We have, however, reviewed the Draft Contract with broader consumer protection principles in mind, and believe it is a sound document.

As requested, we have clearly identified the sections to which our comments relate.

1. Cooling-off period - Notice under section 31(1)(n) of the Domestic Building Contracts Act 1995

The cooling-off notice at page 6 could be enhanced by clearly explaining the concept of a cooling-off period, so that the provision may be more readily utilised by consumers unfamiliar with the concept.

In communicating the concept of a cooling-off period, it is important to emphasise that it is a legal right, and that there is no associated penalty or liability (or at least, pursuant to s 34(3)(a) of the *Domestic Building Contracts Act 1995 (Act)*, only a very minor penalty).

Unless this is clearly explained, some consumers may remain unaware that they have a right to change their mind within the cooling-off period, despite the provision of the cooling-off notice as it is currently presented.

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For example, the text on page 6 currently states:

The Building Owner may end this contract within 5 clear Business Days after receiving a signed copy of the contract...

This could be amended to state:

If the Building Owner changes their mind, or has reservations about the transaction, they have a legal right to withdraw from this contract provided they do so within 5 clear Business Days after receiving a signed copy of the contract.

Alternatively, the concept of a cooling-off period could be clearly explained in isolation, and placed in a highlighted separate text box so that it draws the eye.

The text currently goes on to state:

...by filling in the notice below the dotted line on this page, and giving it to the Builder in one of the following ways:...

The notice further down the page clearly fulfils the requirements of s34(2)(c) of the Act, and makes it very easy for the consumer to exercise their cooling-off right, but it could give the impression that unless that specific notice is used then exercise of the cooling-off right will not be valid. This could be overcome by amending the statement to read:

The Building Owner may exercise their right to withdraw from this contract within the cooling-off period, by filling out the notice below the dotted line on this page or by providing a similar signed notice that clearly states that they wish to withdraw from the contract.

The text should also make it clear that the Building Owner must refund the deposit and any other money paid to that point by the Building Owner, less \$100 and any out of pocket expenses. Further, the text should clearly state that the consumer is not liable in any way to the builder for withdrawing from the contract.

Finally, Consumer Action does not believe it is desirable that the consumer should lose their right to a cooling-off period if they have received independent legal advice before entering into the contract, although we of course understand that this simply reflects s 34(4)(b) of the Act. The reasons for exercising a cooling-off period may be many and varied, and not necessarily mitigated by independent legal advice prior to signing the contract, so it seems incongruous that such advice should negate all circumstances in which the cooling-off period may be utilised. This is a broader policy issue, however, and not necessarily a comment on the drafting of the Contract.

2. Page 7

The text on page 7 does an effective job of:

- explaining the role and purpose of the check-lists;
- advising the consumer to check the builder's registration details;
- advising the consumer to ensure that *Foundations Data* is sought;
- advising consumers to precisely specify building requirements and prices; and
- explaining the legal requirement for estimates when exact pricing isn't possible.

The text could possibly be enhanced, however, by the following additions or alterations:

- Currently, the first paragraph states: '*The checklist on page 12 is required by law...*' The page reference appears to be an error, as the checklist referred to appears on page 11.
- The text then goes on to state:

*...and must be completed and signed by the Building Owner (and not be the Builder) **before signing the contract.***

It ensures the Building Owner has considered important issues before signing the contract. It also helps the Building Owner to communicate with the Builder on those issues before finalising the contract. This will reduce potential disputes and misunderstandings between the Building Owner and the Builder on what was agreed.

This text presents the objective of the check-list (to reduce potential disputes) as a guaranteed outcome, and this language could be altered. Further, the purpose of the check-list could be stated earlier. This is done particularly well in the section on Foundations Data, where it is clearly explained why Foundations Data is so important.

The above text could be amended to state:

*...and must be completed and signed by the Building Owner (and not be the Builder) **before signing the contract.** The check-list is an important document, designed to reduce potential disputes and misunderstandings between the Building Owner and the Builder.*

It encourages the Building Owner to fully consider important issues before signing the contract. It also helps the Building Owner to clarify contentious or outstanding issues with the Builder before finalising the contract.

- The section under the heading '*1. Check the Builder is registered*' effectively advises the consumer to check the builder's registration and does a good job of explaining how to do so and what to expect. It does not, however, explain why it is important that consumers take this step - and what to do in the event that their builder is not registered. It is important that this information is included.
- The section under heading '*3. Be precise in requirements*' states '*It is best...*' that the Building Owner clearly specify finishes, colour codes, appliance models and other aspects of the build, in addition to ensuring that exact prices are provided in the contract.

Given the level of disputation that revolves around building specifications, it is suggested that this language could be strengthened to ensure that consumers give it due notice. The language could be amended to state:

Disputes arising from misunderstandings over building specifications are common. Therefore, it is very important that Building Owners be as clear and precise as possible when specifying every aspect of the build. This includes the type of finish, colour code and exact model of appliances, fixtures or fittings in the plans and specifications attached to this contract.

Further, Building Owners should be rigorous in ensuring that exact prices for all items in the build are included in the contract, whenever an exact price is possible. This is important in helping to avoid potential disputes.

3. Page 11 - Checklist for the Building Owner

The checklist for the Building Owner is an important and useful document, but does contain some ambiguities and could be enhanced.

First, each question on the checklist could be clearly numbered so that consumers can clearly tick each number as they go and ensure they have not mistakenly skipped a question - or answered the same question twice.

Second, some of the questions raise an issue but do not necessarily ensure that the consumer has fully understood it. These questions may require some re-working to ensure they achieve their desired purpose.

These questions are discussed below:

- The third question down states: "*Have you had this contract long enough to read and understand it?*" This has the disadvantage that a consumer who does not understand the Contract but believes they do, will of course answer 'yes'. It is suggested that a period of time be identified for the consumer to have had the Contract, during which the average consumer could reasonably be expected to have understood its terms. If, for example, that period of time was identified as two weeks, the questions could state: "*Have you had this contract for at least 14 days, prior to signing, in order to read and understand its terms?*", or alternatively, "*Have you had this contract for at least 14 days prior to signing? Do you believe that you fully understand its terms?*"
- The sixth question down states: "*Do you understand how the price is calculated and how it may be varied?*" Again, this question has the disadvantage that a consumer who does not understand how a price may be varied may well answer 'yes' in the false belief that they do. The question could be better put by asking:

"Have you read the warning regarding changes to contract prices at page 23 of this contract, beneath clause 6.1? Are you familiar with the terms Prime Cost Items, Provisional Sums, and Variations? Are you aware of the impact that interest on overdue payments, permit application costs and other compliance costs may have on the overall Contract Price? Please ensure you understand these terms before signing the contract."
- The thirteenth question states: "*Do you understand how an Extension of Time will be worked out?*" Again, this question could be better put by asking:

"Have you read clause 19 of this contract- "Extension of Time" - at pages 33-34? Are you aware that any Extension of Time must be fair and reasonable in the circumstances, and of the process for how it must be negotiated? Please ensure you understand these terms before signing the contract."
- The fifteenth question states: "*Do you understand the procedure for varying the contract including varying the plans or specifications?*" This question may be more effective if expressed:

"Have you read clause 20 of this contract - "Variations"- at pages 34 -35? Have you also read sections 37 and 38 of the Domestic Building Contracts Act (1995),

attached at pages 52 and 53 of this contract? Please ensure you understand these terms before signing the contract."

- The final question states: "*Do you understand the circumstances in which you can end this contract?*" This could be better expressed by asking:

"Have you read clause 34 of this contract - "Termination" - at pages 42-43? Have you also read section 41 of the Domestic Building Contracts Act (1995), attached at page 55 of this contract? Are you aware that if the Contract Price rises by 15% or more after the contract is entered into, that you have a right to terminate the contract? Please ensure you understand these terms before signing the contract. "

4. Other possible enhancements to the Draft Contract

In order to fully round out the 'package' of the Draft Contract and further address information asymmetry between consumers and builders, it may be useful to include a general information section addressing:

- Common pit-falls to avoid; and
- What to do in the event of dispute.

Outlining common areas of dispute could encourage consumers to focus particular attention on those aspects of the contract, and enter the transaction with their "eyes open". It must be remembered that the Draft Contract, although expressed as clearly as possible, will nevertheless remain an intimidating document for many consumers. For this reason, a brief addition to the Draft Contract "sign-posting" common pit-falls in the builder/consumer relationship could be extremely useful. It is anticipated that the most common areas of dispute would involve variations, unclear specifications, changes in contract pricing, and extensions of time.

Finally, despite all efforts to equip consumers to avoid contractual difficulties, it is inevitable that domestic building disputes will continue to arise. On that basis, it would be useful to have a brief addition to the Draft Contract advising consumers of the appropriate steps to take in the event of a dispute. This would help to develop the Draft Contract beyond a largely contractual document, into a broader 'package' assisting consumers to manage the domestic building process - including the possibility that a dispute may arise.

Thank you once again for the opportunity to comment on the Draft Contract. Please do not hesitate to contact me on 9670 5088, or at zac@consumeraction.org.au should you have any queries in relation to the above.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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