

The Domestic Building Contracts Act 1995 (Vic)

By Nathan Abbott

This paper was prepared for a LexisNexis Professional Development Seminar in Melbourne in November 2011

Introduction

I am speaking today about the *Domestic Building Contracts Act 1995 (Vic)* (**Act**) and its application to building contracts and contracts of sale, particularly for larger developments.

We will commence with an overview of the application of the Act generally to domestic building in Victoria.

We will then overview the implications of the Act for building contracts, before digressing to examine in more detail one of the particular consumer protection provisions of the Act dealing with the cost of foundations work. It is an instructive example of a reasonable and sensible consumer protection but which has the potential to quite radically disrupt the normal commercial risk allocation between a developer and a builder if the Act applies strictly to larger developments.

We will then consider the implications of the Act for contracts of sale. This leads us to the least certain aspect of the subject, which we will examine in more detail, and that is the current state of the law as to the limits, if any, on the application of the Act to larger developments. We will not address owner-builder transactions as these have been limited for some years now to small, genuine owner-builder projects.

We will finish with some practical conclusions for managing the risks arising in light of the potential implications of the Act and the uncertainty as to the limits of its application to larger developments.

The Application of the Act to Domestic Building in Victoria

The purpose of the Act is described in section 1 as follows:

1 Purpose

The main purposes of this Act are —

- (a) to regulate contracts for the carrying out of domestic building work; and
- (b) to provide for the resolution of domestic building disputes and other matters by the Victorian Civil and Administrative Tribunal; and
- (c) to require builders carrying out domestic building work to be covered by insurance in relation to that work; and
- (d) to amend the **House Contracts Guarantee Act 1987**, and in particular, to phase out the making of claims under that Act.

The object of the Act is described in section 4 as follows:

4 Objects of the Act

The objects of this Act are —

- (a) to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners; and
- (b) to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and

- (c) to enable building owners to have access to insurance funds if domestic building work under a major domestic building contract is incomplete or defective.

Sections 5 and 6 of the Act describe the building work to which the Act applies as follows:

5 Building work to which this Act applies

(1) This Act applies to the following work—

- (a) the erection or construction of a home, including —
 - (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
 - (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
 - (b) the renovation, alteration, extension, improvement or repair of a home;
 - (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
 - (d) the demolition or removal of a home;
 - (e) any work associated with the construction or erection of a building —
 - (i) on land that is zoned for residential purposes under a planning scheme under the *Planning and Environment Act 1987*; and
 - (ii) in respect of which a building permit is required under the *Building Act 1993*;
 - (f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);
 - (g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);
 - (h) any work that the regulations state is building work for the purposes of this Act.
- (2) A reference to a home in subsection (1) includes a reference to any part of a home.

6 Building work to which this Act does not apply

This Act does not apply to the following work —

- (a) any work that the regulations state is not building work to which this Act applies;
- (b) any work in relation to a farm building or proposed farm building (other than a home);
- (c) any work in relation to a building intended to be used only for business purposes;
- (d) any work in relation to a building intended to be used only to accommodate animals;
- (e) design work carried out by an architect or a building practitioner registered under the *Building Act 1993* as an engineer or draftsman;
- (f) any work involved in obtaining foundations data in relation to a building site;
- (g) the transporting of a building from one site to another.

Section 3 of the Act includes the following critical definitional provisions:

3 Definitions

Builder means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

Domestic building contract means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor;

Domestic building work means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

Home means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include —

- (a) a caravan within the meaning of the *Residential Tenancies Act 1997* or any vehicle used as a residence; or
- (b) any residence that is not intended for permanent habitation; or
- (c) a rooming house within the meaning of the *Residential Tenancies Act 1997*; or
- (d) a motel, residential club, residential hotel or residential part of licensed premises under the *Liquor Control Reform Act 1998*; or
- (e) a nursing home, hospital or accommodation associated with a hospital; or
- (f) any residence that the regulations state is not a home for the purposes of this definition;

Major domestic building contract means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$5000 (or any higher amount fixed by the regulations).

- (4) A contract for the sale of land on which a home is being constructed or is to be constructed that provides or contemplates that the construction of the home will be completed before the completion of the contract is not, and is not to be taken to form part of, a domestic building contract within the meaning of this Act if —
 - (a) the home is being constructed under a separate contract that is a major domestic building contract; or
 - (b) the contract of sale provides that the home is to be constructed under a separate contract that is a major domestic building contract.

As a result, we can say the following as to the application of the Act generally to domestic building in Victoria:

- its main purposes include to regulate domestic building work and require it to be insured;
- its objects include the maintenance of proper standards in a way that is fair to both builders and owners and access to insurance for incomplete or defective work;
- it applies to the erection or construction of homes including associated work and renovations and extensions;
- it does not include farms or businesses or work specifically excluded by regulation;
- building and domestic building contracts include both carrying out of the building work and managing or arranging for it to be carried out;
- it does not apply to caravans, impermanent residences, rooming houses, motels, nursing homes or residences specifically excluded by regulation;
- a major domestic building contract is one for more than \$5,000; and
- a contract of sale will not be a domestic building contract if the home is being, or will be constructed under a separate contract which is a domestic building contract.

The Implications of the Act for Building Contracts

These are the provisions of the Act having the greatest relevant implications for building contracts in the present context.

Section 8 of the Act details warranties as to the quality of all domestic building work as follows:

8 Implied warranties concerning all domestic building work

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

Section 9 of the Act provides that those warranties run with the land as follows:

9 Warranties to run with the building

In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract.

Section 11 of the Act limits the deposit under a domestic building contract as follows:

11 Limit on amount of deposit

- (1) A builder must not demand or receive a deposit under a domestic building contract of more than —
 - (a) 5% of any contract price that is \$20 000 or more;
 - (b) 10% of any contract price that is less than \$20 000 —before starting any work under the contract.
Penalty: 100 penalty units.

...

- (3) If a builder does not comply with subsection (1), the building owner may avoid the contract at any time before it is completed.

Section 29 of the Act requires builders to be registered in the following terms:

29 Builder must not enter into a contract unless registered

A builder must not enter into a major domestic building contract unless —

- (a) the builder is registered as a builder under the *Building Act 1993*, in the case of a natural person; or
- (b) in the case of a builder which is a partnership, at least one of the partners is registered as a builder under that Act; or
- (c) in the case of a builder which is a corporation, at least one of the directors is registered as a builder under that Act; or
- (d) in the case of a builder who is exempt under the *Building Act 1993* from the requirement to be registered, the domestic building work to be carried out under the contract is to be carried out by a builder who is registered as a builder under the *Building Act 1993*.

Penalty: 100 penalty units.

Section 30 of the Act requires builders to obtain information to do with foundations before entering major domestic building contracts and then limits builders' rights to claim more money as follows:

30 Builder must obtain information concerning foundations

- (1) This section applies if proposed domestic building work under a major domestic building contract will require the construction or alteration of the footings of a building, or may adversely affect the footings of a building.
- (2) Before entering into the contract, the builder must obtain foundations data in relation to the building site on which the work is to be carried out.

Penalty: 50 penalty units.

- (3) In this section *foundations data* means —
 - (a) the information concerning the building site that a builder exercising reasonable care and skill would need to prepare—
 - (i) a proper footings design for the site; and
 - (ii) an adequate estimate of the cost of constructing those footings; and
 - (b) any reports, surveys, test results, plans, specifications, computations or other information required by the regulations for the purposes of this section.
- (4) In deciding whether he, she or it has obtained all the information required by subsection (2), a builder must have regard to —
 - (a) the relevant standards published by Standards Australia; and
 - (b) the need for a drainage plan or engineer's drawings and computations; and
 - (c) the need for information on the fall of the land on the site.
- (5) It is not necessary for a builder to commission the preparation of foundations data under this section to the extent that such data already exists and it is reasonable for the builder to rely on that data.
- (6) A builder must give a copy of any foundations data obtained by the builder to the building owner (unless the building owner supplied the data to the builder) on payment by the building owner of the amount owing in relation to the obtaining of that data by the builder.

Penalty: 10 penalty units.

- (7) After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section.
- (8) Nothing in this section prevents a builder from exercising any right given by this Act to the builder to claim an amount of money not already provided for in the contract if the need for the additional amount could not reasonably have been ascertained from the foundations data required by this section.

Section 31 of the Act details a wide range of requirements which must be met by a builder entering into a major domestic building contract as follows:

31 General contents etc. of a contract

- (1) A builder must not enter into a major domestic building contract unless the contract
 - (a) is in writing; and
 - (b) sets out in full all the terms of the contract; and
 - (c) has a detailed description of the work to be carried out under the contract; and
 - (d) includes the plans and specifications for the work and those plans and specifications contain enough information to enable the obtaining of a building permit; and
 - (e) states the names and addresses of the parties to the contract; and
 - (f) states the registration number (as it appears on the registration certificate under the *Building Act 1993*) of—
 - (i) the builder, in the case of a natural person; or
 - (ii) in the case of a builder which is a partnership, the partners who are registered as builders under that Act; or
 - (iii) in the case of a builder which is a corporation, the directors who are registered as builders under that Act; and
 - (iv) in the case of a builder who is exempt under the *Building Act 1993* from the requirement to be registered, the builder who is to carry out the work;
 - (g) states the date when the work is to start, or how that date is to be determined; and
 - (h) if the starting date is not yet known, states that the builder will do everything that it is reasonably possible for the builder to do to ensure that the work will start as soon as possible; and
 - (i) states the date when the work will be finished, or, if the starting date is not yet known, the number of days that will be required to finish the work once it is started; and
 - (j) states the contract price or, in the case of a cost plus contract, how the amount that the builder is to be paid is to be determined; and
 - (k) states the date the contract is made; and
 - (l) sets out details of the required insurance under the *Building Act 1993* that applies to the work to be carried out under the contract (including any details required by the Director); and
 - (m) is in English and is readily legible; and
 - (n) has a conspicuous notice in a form approved by the Director advising the building owner of the right the building owner may have to withdraw from the contract under section 34 (the 5 day cooling-off period); and
 - (o) has a separate section that defines the key words and phrases used in the contract (for example, prime cost item and provisional sum); and

- (p) indicates whenever a defined word or phrase is used that that word or phrase is defined in the definition section; and
- (q) sets out the warranties implied into the contract by sections 8 and 20; and
- (r) contains a checklist in a form approved, and containing the details required, by the Director; and
- (s) complies with any other requirements set out in the regulations.

Penalty: 50 penalty units.

- (2) A major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their authorised agents).

Section 34 of the Act provides for a 5 day cooling-off period as follows:

34 Building owner may end a contract within 5 days without penalty

- (1) A building owner may withdraw from a major domestic building contract at any time before the expiration of 5 clear business days after the building owner receives a copy of the signed contract.

Section 35 of the Act provides as follows that a major domestic building contract is voidable if the cooling-off warning is not given:

35 Building owner may withdraw from a contract if cooling-off warning not given

- (1) If a major domestic building contract does not contain a notice advising the building owner of the building owner's possible rights under section 34 (as required by section 31(1)(n)), the building owner may withdraw from the contract within 7 days of becoming aware that the contract should have contained such a notice.

Section 132 of the Act prohibits contracting out in the following terms:

132 Contracting out of this Act prohibited

- (1) Subject to any contrary intention set out in this Act—
 - (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
 - (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.
- (2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act.

Otherwise, the Act includes the following sections addressing a range of historically problematic issues which have tended to give rise to disputes, including for example claims for variations:

- section 12 - Contract for more than one sort of work must identify the domestic building work;
- section 13 - Restrictions on cost plus contracts;
- section 14 - Arbitration clauses prohibited;
- section 15 - Restrictions concerning cost escalation clauses;
- section 15 - Builder must not seek more than the contract price;
- section 17 - Restrictions on builders' control of building sites;
- section 18 - Contract does not entitle builder to put caveat on the title of building site land;
- section 20 - Warranty concerning provisional sums;
- section 21 - Requirements concerning prime cost item and provisional sum estimates;
- section 22 - Details of prime cost items and provisional sums must be set out in writing;
- section 23 - Builder must supply evidence of cost of prime cost items and provisional sums;

- section 24 - Builder may exclude certain items from contract price;
- section 25 - Builder must give copy of contract to building owner;
- section 26 - Builder must supply copies of relevant reports etc.;
- section 28 - Fixtures and fittings are included in contract price;
- section 32 - Builder must make allowance for delays in time estimates;
- section 33 - Contract must contain warning if price likely to vary;
- section 37 - Variation of plans or specifications—by builder;
- section 38 - Variation of plans or specifications—by building owner;
- section 39 - Effect of a variation on the contract price;
- section 40 - Limits on progress payments;
- section 41 - Ending a contract if completion time or cost blows out for unforeseeable reasons;
- section 42 - When work is to be considered to have been completed; and
- section 43 - Requirements concerning display home contracts.

As a result, we can say the following as to the implications of the Act for building contracts:

- domestic building work is covered by a suite of quite broadly cast warranties as to workmanship, materials, compliance with law and fitness for purpose;
- those warranties run with the land;
- the deposit under a major domestic building contract for more than \$20,000 must not exceed 5% or the contract will be voidable;
- builders must be registered;
- builders must not enter into major domestic building contracts without having first obtained sufficient information to properly design and cost foundations work and they may not claim a variation if they fail to do so;
- there are many quite strict formal requirements for the documentation of a major domestic building contract, failure to comply with which may render the contract voidable;
- major domestic building contracts have a 5 day cooling-off period;
- there is regulation of a range of historically problematic issues which have tended to give rise to disputes; and
- contracting out is prohibited.

Pricing foundations work

As we have seen, section 30 of the Act requires builders to obtain information to do with foundations before entering major domestic building contracts and then limits builders' rights to claim more money.

In *Amery Homes Pty Ltd v Gray*¹, Senior Member Walker found as follows in respect of a variation claim for the increased cost of a floor slab:

24 There was no evidence given by the person who poured the slab but it was admitted on behalf of the Owners that it was poured in accordance with the design. There is insufficient evidence for me to be satisfied that, if the Builder did incur any additional cost in regard to this very slight fall in the land, it was as much as \$5,000.00.

25 In any event, the Owners rely upon s30(7) of the Domestic Building Contracts Act 1995 ("the Act") which provides as follows:

"After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section."

26 It transpired that there was an earlier soil report in existence that had been obtained by Mr Watts. Mr Amery admitted that he was aware of it but said that he did not have a copy of it in his possession at the time the Contract was entered into. His evidence on this point is somewhat vague. If he were aware of the soil report it seems

¹ [2010] VCAT 1810 (Unreported, Senior Member Walker, November 2010).

unlikely that he would not have known what it said. In any event, the Builder had constructed a number of houses in that street and it was the Builder that arranged for the land to be sold to the Owners. All of the houses classified by that engineer in that street had the same classification. The only justification asserted by the Builder for the extra charge was the fall of the land over the building envelope but the Builder was aware of that at the time the Contract was entered into. It is therefore not open to the Builder to make any claim for any extra payment with respect to the slab.

27 For all of these reasons the claim with respect to the slab fails.

In *Wilson v Lazaway Pools & Spas Pty Ltd*², Senior Member Walker found as follows in respect of a variation claim by a swimming pool builder:

45 Conclusion

The Builder's claim for this extra money fails for three reasons:

- (a) In breach of s. 30 of the Act, the Builder failed to obtain foundation data prior to entering into the Contract. If it had obtained that data the need to carry out the additional work and supply the additional material the Builder now seeks to charge for could reasonably have been ascertained. Consequently, by operation of s 30(7), the Builder cannot now seek from the Owners the additional amount with respect to that work and materials.
- (b) The contract price was variable because of the provisions for extra payment for excavation and the other amounts the Builder claims. In breach of s.33(2) of the Act, no warning that the contract price is subject to change was placed next to the price in the Contract. That section provides that any provision in the contract that enables the contract price to change only has effect to the extent that it enables the contract price to decrease.
- (c) In addition, the amount sought as a variation is not recoverable as a variation because the Builder has neither complied with the requirements of Clause 13.1 nor established that the variation is made necessary by circumstances that could not reasonably have been foreseen by the Builder at the time the Contract was entered into. No exceptional circumstances have been established or suggested to satisfy me that the Builder would suffer a significant or exceptional hardship by this consequence or that it would not be unfair to the Owners for the Builder to receive the money.

However, in the recent case before VCAT of *Schultz trading as Panther Designer Homes v Duncombe*³, the builder and the owner had agreed in the contract to exclude the foundations from the contract price.

The builder subsequently claimed the foundations work as a variation, which the owner paid. When the project resulted in litigation, the owner counterclaimed against the builder and took the opportunity to claim for the return of the amount paid for the foundations variation, arguing that the variation was contrary to the Act.

Senior Member Riegler dismissed this element of the owner's counterclaim, finding that "the present case is somewhat different to the mischief sought to be prohibited by the Act". He stated that "the parties were free to negotiate the terms of the contract as they saw fit" and concluded that "the parties agreed to exclude the cost of the foundation variation from the contract price, notwithstanding that this may have left some uncertainty as to the final contract price".

The decision seems to be contrary to the express provisions and purpose of the Act.

² [2011] VCAT 1827 (Unreported, Senior Member Walker, 21 September 2011).

³ [2011] VCAT 1165 (Unreported, Senior Member Riegler, 16 June 2011).

The ruling that parties can agree to exclude foundations from the contract price and then treat the foundations work as a variation, may not ultimately survive any appeal or a more focussed analysis in a future case. In this case, neither party was represented by lawyers and the issue was on the periphery of the major issues in dispute.

The facts in the case actually appear to fall perfectly within the prohibition under the Act. As the foundations work was expressly excluded from the contract price, the variation claimed may well have been "an amount of money not already provided for in the contract" which apparently could "reasonably have been ascertained had the builder obtained all the foundations data required" prior to entering the contract.

It would then have followed that the builder would not have been entitled to claim the foundations variation.

Further, the parties to a domestic building contract are not always free to simply negotiate such terms as they see fit since contracting out of the Act is void unless it imposes greater or more onerous obligations on the builder.

On one view, the exclusion of the foundations work from the contract price is exactly the type of behaviour the legislation is intended to prevent. Contracting in this manner results in an uncertain price for the owners. It also follows that the owners, who have no building expertise, will bear the risks of a cost-blow out for the foundations work because the experienced builder has failed to obtain all the foundations data and assess and price all the works before entering the contract.

Even where builders are prevented from excluding foundations work from the contract price, diligent domestic builders have some protection under the Act for the cost of foundations work that could not reasonably have been anticipated. The builders have to obtain the foundations data only to the extent of a builder exercising reasonable care and skill. Further, the builders can still claim for a variation if the cost of the foundations work exceeds what could reasonably have been ascertained from that foundations data.

Whilst a variation for foundations work can have a major impact on each of a small domestic builders and inexperienced consumers, it is perhaps with respect to very substantial multi-storey high-rise residential developments for tens of millions of dollars, that section 30 of the Act and its application has the potential to have the greatest impact.

The implications of the Act for Contracts of Sale

As we have seen, the purposes and objects of the Act include that domestic building work should be insured.

The *Building Act 1993* (Vic) includes the following provisions regarding insurance for domestic building work:

135 Order requiring insurance

- (1) The Minister may, by order published in the Government Gazette—
 - (a) require building practitioners in specified categories or classes of building practitioners or any part of a class or category of building practitioners to be covered by insurance; and ...
 - (c) specify the kinds and amount of insurance by which building practitioners and persons in each specified category or class or part of a category or class are required to be covered.

136 Offence to work as building practitioner without required insurance

- (2) A builder must not carry out or manage or arrange the carrying out of domestic building work under a major domestic building contract unless the builder is covered by the required insurance.

Penalty: 500 penalty units, in the case of a natural person.

Penalty: 2500 penalty units, in the case of a body corporate.

137A Insurance for domestic building work

- (1) Without limiting section 135, if an order under that section requires a builder to be covered by insurance relating to the carrying out of domestic building work or managing or arranging the carrying out of domestic building work, the insurance required by the order may, subject to any exemptions or exclusions set out in the order, relate to losses resulting from—
 - (a) breaches of warranties implied into the major domestic building contract for that work under the *Domestic Building Contracts Act 1995*;
 - (b) domestic building work which is defective within the meaning of that Act;
 - (c) non-completion of the domestic building work;
 - (d) conduct by the builder in connection with the major domestic building contract for that work which contravenes section 18, 29, 34 or 151, or Subdivision B of Division 1 of Part 3-2, of the Australian Consumer Law (Victoria).
- (2) An order under section 135 may require insurance cover of a kind referred to in—
 - (a) subsection (1)(a) to extend to each person who is or may become entitled to the benefit of any of those warranties; or
 - (b) subsection (1)(b) to extend to any person on whose behalf the domestic building work is being carried out and to the owner for the time being of the building or land in respect of which the building work was being carried out.

137E Insurance requirements for home sold before completion

A person must not enter into a contract for the sale by the person of land on which a home is being constructed, or is to be constructed, if the contract provides for or contemplates that the construction of the home will be completed before the completion of the contract unless—

- (a) the home is being constructed under a major domestic building contract or the contract of sale is a major domestic building contract or provides that the home is to be constructed under a major domestic building contract; or
- (b) Part 2 of the *House Contracts Guarantee Act 1987* applies to the construction of that home.

Penalty: 120 penalty units.

By the *Domestic Building Insurance Ministerial Order* (No S 98 Friday 23 May 2003), the Minister required domestic builders to carry insurance as contemplated by section 137A of the *Building Act 1993* (Vic), for work in excess of \$12,000, including to run with the land. The cover is limited to respond essentially only where the builder is dead, disappeared or insolvent, sometimes described as "insurance of last resort". The cover is also limited to building work other than a multi-storey residential building with a rise of more than 3 stories and containing 2 or more separate dwellings.

Before a contract of sale is entered into, section 32 of the *Sale of Land Act 1962* (Vic) relevantly also provides:

- (1A) A vendor under a contract for the sale of land on which there is a residence must give to the purchaser before the purchaser signs the contract, a statement signed by the vendor giving particulars of—
 - (a) any building permit under the *Building Act 1993* in the preceding 7 years in relation to a building on the land; and
 - (b) in the case of a residence to which Part 2 of the *House Contracts Guarantee Act 1987* applies which was constructed by an owner-builder within the meaning of that Act within the preceding 7 years, any guarantee under that Act applying to that residence; and
 - (c) in the case of a residence to which section 137B of the *Building Act 1993* applies which was constructed within the preceding 6 years, any required insurance under that Act applying to that residence. ...
- (5) Where a vendor—
 - (a) supplies false information to the purchaser in the statements or certificates required to be given by this section; or
 - (b) fails to supply all the information required to be supplied in the statements or certificates required to be given by this section—

the purchaser may rescind any contract for the sale of the land which has been entered into on the basis of that information at any time before he accepts title and becomes entitled to possession or to the receipt of rents and profits. ...

- (6) Where a vendor knowingly or recklessly—
- (a) supplies false information to the purchaser in the statements or certificates required to be given by this section; or
 - (b) fails to supply all the information required to be supplied in the statements or certificates required to be given by this section—
- he shall be guilty of an offence and liable to a penalty of not more than 50 penalty units.
- (7) Notwithstanding subsection (5) the purchaser may not rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if all the relevant provisions of this section had been complied with.
- (8) A provision in a contract for the sale of land whereby any provision of this section is excluded, modified or restricted shall be void and of no effect.
- (9) Where a vendor and purchaser have entered into a contract for the sale of land in respect of which statements under this section have been given and that vendor and purchaser enter into a subsequent contract in relation to the same land in substantially the same terms as the original contract the vendor shall not be required in respect of the subsequent contract to give to the purchaser the statements required by this section.

As we have seen, section 3(4) of the Act also provides:

A contract for the sale of land on which a home is being constructed or is to be constructed that provides or contemplates that the construction of the home will be completed before the completion of the contract is not, and is not to be taken to form part of, a domestic building contract within the meaning of this Act if —

- (a) the home is being constructed under a separate contract that is a major domestic building contract; or
- (b) the contract of sale provides that the home is to be constructed under a separate contract that is a major domestic building contract.

As a result, we can say the following as to the implications of the Act for contracts of sale:

- for work over \$12,000, domestic builders must carry "insurance of last resort" which runs with the land for breach of the statutory warranties and non-completion for building work, other than for multi-storey residential building;
- a section 32 statement must include details of any building permit in the preceding 7 years, which will disclose any such work and alert the purchaser to check that the domestic builder held the required insurance;
- where there is a sale "off the plan":
 - either:
 - the home must be constructed under a major domestic building contract; or
 - the contract of sale must be a major domestic building contract; and
 - the contract of sale will not be a major domestic building contract if there is a separate contract that is a major domestic building contract.

As we have seen:

- major domestic building contracts include a suite of quite broadly cast warranties as to workmanship, materials, compliance with law and fitness for purpose;
- the deposit under a major domestic building contract for more than \$20,000 must not exceed 5% or the contract will be voidable;
- builders must be registered;
- there are many quite strict formal requirements for the documentation of a major domestic building contract, failure to comply with which may render the contract voidable;
- major domestic building contracts have a 5 day cooling-off period; and
- contracting out is prohibited.

These are not provisions which any "off the plan" vendor would voluntarily include in their contract of sale since they very substantially detract from its enforceability. Accordingly, it is critical to them to ensure that the home is constructed under a separate major domestic building contract.

The Application of the Act to Larger Developments

The effect of section 3(4) of the Act and section 137E of the *Building Act 1993* (Vic) seem reasonably straightforward. The purchaser of an "off the plan" home must have conferred upon them the benefits of the Act and the related insurance. The vendor seems to have the option to elect whether to carry the risk itself of conferring these benefits upon the purchaser under the contract of sale, or whether instead to simply enter into a separate major domestic building contract, the benefits of which will run with the land to be conferred upon the purchaser.

As we have just observed, the election is easy for a developer of a larger development. A separate major domestic building contract will always be preferable because it will result in a far more robust contract of sale.

Unfortunately however, the courts' application of the Act to larger developments over the years has been problematic and remains unresolved. The difficulty stems from the structure of the regime, in particular that the protection of home owners with warranties and insurance that run with the land, has the result from time to time, that apparently undeserving developers may unfairly enjoy the benefits of the Act at the expense of the builder.

The difficulties began in *Mirvac (Docklands) Pty Ltd v Philp*⁴, where Byrne J found that a typical "off the plan" contract of sale was a major domestic building contract because the developer was managing or arranging the carrying out of domestic building work.

His Honour's judgment was in the following terms:

- 2 By contract of sale of real estate dated 26 May 2000 entered into between Mirvac (Docklands) Pty Ltd ("Docklands") and Peter Evan Philp, Mr Philp agreed to purchase from Docklands the land and improvements described in the particulars of sale as Lot 347 on stage 5 of an unregistered Plan of Subdiv PS428541D for \$950,000. The subject matter of the sale did not then exist. It was an area on the eleventh floor of the west tower of Building 2, Yarra's Edge at Docklands. Work on the construction of this tower had not commenced. It was a sale "off the plan". ...
- 6 The contract of sale contemplates that the construction of the apartment and, presumably, the building and services on, below and above level 11, will be carried out by a builder which is defined as "Mirvac Constructions (Vic) Pty Ltd ("Constructions") or such other builder as [Docklands] may nominate from time to time". The west tower within which the apartment is to be situated is a substantial building, comprising 31 levels inclusive of five carpark levels and containing 127 apartments. ...
- 9 On 11 February 2002, the solicitors for Mr Philp wrote to the solicitors for Docklands asserting that the contract of sale was in breach of the Domestic Building Contracts Act 1995 and advising that he elected to avoid the contract pursuant to s 11(3) for breach of s 11(1). In this judgment I shall simply refer to this statute as "the Act". Section 11.1 of the Act makes it an offence for a builder to demand or receive a deposit under a domestic building contract of more than 5% of the contract price before starting any work under the contract. ...
- 16 Finally, I record that Parliament has intervened by passing the Domestic Building Contracts (Amendment) Act 2004 removing from the definition of domestic building contract in the Act, contracts of sale off the plan, effective from 1 May 1996, this amending legislation, however, does not affect such a contract which is subject to a

⁴ (2005) V ConvR 54-698.

proceeding commenced before 16 March 2004. The contract of sale in this case, therefore, is not affected by the legislation.

Domestic Building Contract

18 Central to the operation of the Act is the concept of a domestic building contract. So far as is here relevant, it is defined in s 3 to mean --

A contract to carry out, or to arrange or manage the carrying out of, domestic building work ...

A major domestic building contract is defined as a domestic building contract where the contract price for the carrying out of the domestic building work is more than \$5,000.

19 It was not disputed that the work of constructing the apartment, the subject of the contract of sale, was domestic building work as defined in s 5 of the Act.

20 The point in issue, therefore, was whether the contract of sale was a contract --

- to carry out such work; or
- to arrange the carrying out of such work; or
- to manage the carrying out of such work.

21 On behalf of Docklands it was contended that, under the contract of sale, it undertook no obligation to any of these things. Indeed, it seems clear enough from special condition 6.1 that the contract of sale has been carefully drawn to avoid such a conclusion. The question for determination is whether it has achieved this objective.

22 Nowhere in the contract of sale is it provided, in terms, that Docklands would carry out building work. Its obligation is to deliver on settlement a completed apartment. In the event that the building work is not completed by the end of the construction period, either party may terminate the contract of sale upon written notice. The rights of a purchaser, such as Mr Philp, in such an event are only to the return of moneys paid and of any guarantee provided; he is not entitled to compensation for losses, costs, fees or other expenses paid or incurred by him in relation to the contract of sale.

23 The contract contemplates that the building work is to be carried out by a builder which is to be Constructions or such other company as is nominated by Docklands. It is important to note that, on 26 May 2000, when the contract of sale was entered into, there was in existence no building contract with Constructions or any other builder. The major domestic building work contract in evidence pursuant to which the tower was constructed is dated 3 April 2001.

24 The provisions in the contract of sale with respect to the building work are expressed to create an expectation that building work will done, but with no obligation by the contracting party to do it. This is achieved by the use of the passive voice in special conditions such as: "Settlement of the Contract is conditional on the construction of the Apartment under a Major Domestic Building Contract generally in accordance with the Building Plans and Specifications before the end of the Construction Period"⁸; "If the Apartment is not constructed ... "; "If the Apartment is likely to be delayed ... "¹⁰; "Construction of the Apartment will be completed ... ".

25 Special conditions 6.1 and 6.2 are important in this regard and I set them out in full.

6.1 The Purchaser acknowledges that, although:

- (a) part of the Price includes an amount in respect of the construction of the Apartment on the Land; and

- (b) this Contract provides for the Apartment to be constructed under a Major Domestic Building contract,

nothing in this Contract will be construed as imposing on the Vendor any obligation in relation to construction, which will make this Contract a Major Domestic Building Contract.

6.2 The Vendor represents to and the Purchaser acknowledges that:

- (a) the Apartment and the Building will be constructed by the Builder under a Major Domestic Building Contract and the construction work will be covered by the insurance required under the Building Act 1993;
- (b) subject to special condition 6.3, the Apartment will be completed generally in accordance with the Building Plans and Specifications by the Settlement Date;
- (c) on completing the purchase of the Property and Chattels under this Contract, the Purchaser will have (as the Vendor's successor in title) the benefit of the warranties by the Builder concerning construction of the Apartment specified in section 8 of the Domestic Building Contracts Act 1995; and
- (d) any defects and other faults in the construction of the Apartment (excluding minor shrinkage and settlement cracks) due to faulty materials or poor workmanship, of which the Purchaser has given the Vendor written notice within 12 weeks from the Settlement Date, will be repaired in a proper and workmanlike manner by the Builder at the Builder's expense as soon as practicable after written notice is given.

26 The thrust of the submission put on behalf of Mr Philp is that Docklands assumed under the contract of sale, an obligation to arrange or manage the carrying out of the building work by the builder. The submission is expressed in this way because the question is not whether Docklands did these things, or even whether it was entitled for some reason to do these things; the statutory definition requires that the contract between Docklands and Mr Philp is a contract to do one or other of these things. The response on behalf of Docklands was that it did not have under the contract of sale a contractual obligation to do either of these things. It did not, under the contract of sale, have the right or the duty to exercise control or direction over the building work undertaken by Constructions; it simply commissioned Constructions to do this. I note in passing the slide between "arrange or manage" in the statute, to "control or direction" in the submission.

27 In my opinion this question must be addressed as at the date on which the contract of sale was entered into and having regard to the provisions of that contract, including those provisions which are to be implied in the contract in accordance with orthodox principles of construction. The Act, in Pts 2 and 3, abounds with restrictions and requirements as to the content and form of a domestic building contract and as to what must or must not be contained in it. Moreover, in many cases, non-compliance is a criminal offence. In these circumstances, the status of the contract, the statutory rights of the parties in respect of it and the criminality of the builder for suggested breach of these provisions cannot be affected by events after the making of the contract or by the manner in which the builder chooses to give effect to the contract. The requirements of s 11(1) of the Act are but an example of this.

28 It is clear, to my mind, that, as at that date, Docklands was, under the terms of the contract of sale, to arrange and manage the carrying out of the building work. It is Docklands which is to select the builder; it is Docklands which is responsible for the associated work including the landscaping. In this regard it will be appreciated that Mr Philp did not purchase an apartment suspended as it were in space far above the ground; it is part of a large and doubtless sophisticated structure.

Shortly afterwards, Bell J disagreed on very similar facts in *Shaw v Yarranova Pty Ltd*⁵ and found that the separate major domestic building contract precluded the contract of sale from being one.

His Honour's judgment was in the following terms:

- 1 By a contract of sale dated 12 April 2000 John Shaw bought an apartment in the Boyd Tower in the Docklands from Yarranova Pty Ltd, a developer. Yarranova later assigned its interests in the contract to NewQuay Stage 2 Pty Ltd. Thereafter, NewQuay stood in the shoes of Yarranova.
- 2 Mr Shaw bought the apartment "off the plan". Therefore, in the contract of sale, the apartment was depicted in a plan for a building project that Yarranova was developing, not in a plan for an actual building. Whether the building would be built depended, for example, on whether the project attracted enough buyers to be commercially viable.
- 3 The project did attract enough buyers so it went ahead. By a contract dated 15 December 2000, NewQuay engaged Bovis Lend Lease Pty Ltd, a registered builder, to design and construct the building, which it did over the next year or so. ...
- 25 As already noted, the apartment building was constructed by Bovis under a design and construct contract with NewQuay.
- 26 The design and construct contract was patently a major domestic building contract under the Domestic Building Contracts Act and the parties were correct to so agree. It was a contract for the carrying out of domestic building works for a price exceeding \$5,000, indeed for the carrying out of such works on a major scale. The work involved was domestic building work because it came within the definition of such work in s 5(1), in particular, the erection or construction of a home (para (a)). ...
- 32 A contract "to carry out" domestic building work is a contract that requires the contractor to perform the building works, that is, and in essence, construct the building. The design and construct contract between Yarranova and Bovis was a contract of this kind. I have already noted that cl 7.1 of this contract required Bovis to design and construct the building.
- 33 The contract of sale between Mr Shaw and Yarranova was not such a contract. This contract expressly contemplated that the building would be constructed pursuant to another contract into which Yarranova would enter with a builder (see cl 18.1).
- 34 Counsel for Mr Shaw submitted that the contract of sale was a contract by which Yarranova agreed with Mr Shaw "to arrange or manage the carrying out of" the work of constructing the apartment. It was submitted that "arrange" and "manage" are wide words deliberately chosen by the legislature to encompass a broad range of building activities. It was submitted that, in the contract of sale, Yarranova accepted the obligation to arrange or manage the construction of the apartment, and it intended to do so³. With some force, it was submitted that this conclusion was demanded by the provisions, for example, that required Yarranova to enter into a building contract for the construction of the building (cl 18.1) and that recorded Yarranova's intention to proceed with and complete the works (cl 26.1). ...
- 36 The scheme of the Domestic Building Contracts Act and its companion legislation is designed to deal, among other things, with the commercial setting in which apartments are sold "off the plan". In this setting, at the time of the initial sale, the apartment may be part of a building project that the seller, as a developer, hopes to undertake. Before the project can go ahead, it may be necessary for enough apartments to be forward-sold to make the project commercially viable. In many cases, the finance necessary to bring the project to fruition will not be supplied until

⁵ [2006] VSC 45 (Unreported, Bell J, 23 February 2006).

the sales "off the plan" have reached a critical number. At a certain point, it may become clear that the project is, indeed, viable. At this point, the developer, who, to sell the apartments, need not be a registered builder, may engage a registered builder to construct the building, or perhaps confirm an arrangement already made with such a builder. ...

- 40 Section 137E of the Building Act 1993 specifies the conditions that must be satisfied before a person can sell land on which a home is being or is to be constructed where the home is to be finished before completion of the contract. Only the conditions in s 137E(a) need be mentioned. The conditions are:
- the home is being constructed under a "major domestic building contract" (which, under s 3(1) of the Building Act, is a reference to this expression in the Domestic Building Contracts Act);
 - the contract of sale is itself a major domestic building contract; or
 - the contract of sale provides that the home is to be constructed under a major domestic building contract.
- 41 Since the present case concerns a sale of an apartment by a developer, we can focus on how s 137E(a) operates in such a case. The section operates to give a developer three options for going forward with a project:
- option one: the land can be sold after commencement of the construction of a home as long as the home is being constructed under a major domestic building contract. This might apply, for example, where the developer is not a registered builder but has already entered into such a contract for the construction of the home with a registered builder and construction is underway;
 - option two: the land can be sold prior to the commencement of construction of a home under a combined contract to sell the land and construct the home which is itself a major domestic building contract. This might apply, for example, where the developer is also a registered builder and is both the seller and the builder of the home under such a contract; or
 - option three: the land can be sold prior to the commencement of the construction of the home where the contract of sale is not a major domestic building contract but it provides that the home is to be constructed under such a contract. This might apply, for example, where the developer is not a registered builder and but intends to enter into such a contract with a registered builder for the construction of the home.
- 42 Sales "off the plan" in large multi-storey residential developments will often be made by the method given in the third option. This is how Yarranova sold the apartment to Mr Shaw. This is why cl 18.1 of the contract of sale required Yarranova to enter into a major domestic building contract with a builder for the works. ...
- 46 Section 137E(a) of the Building Act and ss 8 and 9 of the Domestic Building Contracts Act operate hand-in-glove to ensure that, where an apartment is sold "off the plan", and the building is constructed, the buyer, and all subsequent owners, obtain the protection of the warranties. The third option in s 137E(a) allows a developer to sell an apartment to be built in the future to a buyer as long as the contract of sale provides that it is to be constructed under a major domestic building contract. Section 8 of the Domestic Building Contracts Act operates so that the developer, who will be the owner under the contemplated major domestic building contract, will get the benefit of the statutory warranties. Section 9 operates so that a person who buys the apartment from the developer, as the new owner, and all subsequent owners, will get the benefit of the same warranties. ...
- 55 Put simply, in many, perhaps very many, cases of selling apartments "off the plan" there will be three main parties and two main contracts. The three parties will be the buyer, the developer and the builder. The contracts will be the contract of sale between the buyer and the developer and the contract to design and construct the

apartment building between the developer and the builder. The present case conformed to this pattern. ...

- 59 As I have already noted, "to arrange or manage" in the definition of "domestic building contract" refers to the building work. The definition contemplates either that the builder will carry out the work or arrange or manage this activity. The focus in each case is upon the work -- essentially, the practical activities involved in the work of constructing a building. The activities are specified in s 5 and I will come to them later. A contract under which a person carries out these activities comes within the definition. So does a contract under which a person arranges or manages these activities as carried out by others. To meet the statutory definition, the contract must be to carry out, or to arrange or manage the carrying out by others of, the activities that constitute the building work. ...
- 63 Acceptance of the construction advanced by counsel for Mr Shaw would produce absurd results:
- Inclusion in the contract of sale of the very term required by the third option stipulated in s 137E(a) of the Building Act would convert the contract of sale into a major domestic building contract when this option is based upon the preservation of the difference between these two types of contract.
 - If the fact that a contract has a term that an apartment will be constructed under a major domestic building contract means that the contract is itself a domestic building contract, developers could not lawfully enter into such contracts unless they were also registered builders. Similarly, when a developer entered into the major domestic building contract with the builder, this would itself constitute the management or arrangement of domestic building work. By doing this act, the developer would thereby be a "builder" as defined (see s 3(1)(b)). But the developer, like Yarranova, might not be a registered builder, and so would be prohibited from entering into such a contract (s 29(a)).
 - If the contract of sale is to be treated as a domestic building contract (and therefore a major domestic building contract) and the developer is to be treated as a builder, the strict regulatory provisions of Pts 2 and 3 of the Domestic Building Contracts Act would apply to the contract and the developer. The nature of these provisions is such that they were plainly not intended to apply in this manner.
- 64 For these reasons I am of the view that the contract of sale between Mr Shaw and Yarranova was not a contract "to carry out, or to arrange or manage the carrying out of" domestic building work within the definition of "domestic building contract" in s 3(1) of the Domestic Building Contracts Act. ...
- 77 With respect, the provisions of the contract relied upon by Byrne J did not require the activities constituting the building work to be managed and arranged. They, like the corresponding provisions in the present case, required Docklands to ensure that the building would be constructed under a major domestic building contract with the result that those activities would be carried out, or managed or arranged, by a registered builder. Further, for the reasons given below, Docklands' responsibilities under the contract, like Yarranova's responsibilities under the contract of sale with Mr Shaw, were not domestic building work under s 5(1) of the Domestic Building Contracts Act
- 78 For these reasons, I must respectfully disagree with these aspects of the decision of Byrne J in *Mirvac v Philp*. I note that I have had the benefit of the considerable advantage of the subsequent decision of the Court of Appeal in *Winslow Constructors*.

Although the Chief Justice preferred Byrne J's analysis in *Mirvac (Docklands) Pty Ltd v Philp*⁶ and so dissented, an appeal was unsuccessful (*Shaw v Yarranova Pty Ltd*). Neave JA wrote the majority judgment in the following terms:

⁶ (2005) V ConvR 54-698.

- 62 It (the DBC Act) achieves these goals by, among other things:
- implying statutory warranties on the quality of work into domestic building contracts;
 - enabling any person who becomes the owner of a building or land which has been built under a domestic building contract, to enforce these warranties;
 - prohibiting unregistered builders from entering into major domestic building contracts; and
 - requiring various provisions to be included in major domestic building contracts.
- 63 The provisions of the DBC Act operate together with the Building Act 1993, which requires building practitioners to be registered, and makes it an offence for a builder to carry out, manage or arrange the carrying out of domestic building work under a major domestic building contract, without an appropriate level of insurance.⁴⁸ Domestic builders were originally regulated by the Housing Guarantee Act 1987, but the Building Act was extended to require registration of domestic as well as commercial builders, by the enactment of the Domestic Building Contracts and Tribunal Act 1995 (now the DBC Act).
- 64 Section 137E of the Building Act imposes insurance requirements in relation to homes sold before completion of the contract, including homes sold "off-the-plan". The provision was introduced by an amendment made to the Building Act by the Domestic Building Contracts and Tribunal Act 1995 (now the DBC Act). That Act phased out the Housing Guarantee Fund, which provided for payment of compensation to people who suffered loss because their houses were defective or were not completed, and replaced it with provisions requiring builders to take out private insurance.
- 65 In its original form, s 137E provided that:
- A person must not enter into a contract for the sale by the person of land on which a home is being constructed, or is to be constructed, if the contract provides for or contemplates that the construction of the home will be completed before the completion of the contract unless --
- (a) the home is being constructed under a major domestic building contract ...
- 66 Section 137E(a) was amended by s 11 of the Domestic Building Contracts and Tribunal (Amendment) Act 1996, so that, in para (a) after "contract" the words "or the contract of sale is a major domestic building contract or provides that the home is to be constructed under a major domestic building contract" were inserted.
- 67 In his second reading speech the Minister for Planning and Local Government said that:
- Representations have been received by government to the effect that there may be some ambiguity in the ability of developers of large scale domestic high-rise properties to sell off the plan before they have entered into a construction contract with a registered builder. While the government has received legal advice that there is no such ambiguity, the government is anxious to put the matter beyond all possible doubt and is therefore proposing a minor amendment to s 137E of the Building Act 1993.
- 68 The second reading speech indicates that s 137E was intended to differentiate between registered builders who carry out construction works and developers who sell properties off-the-plan, but who do not undertake construction themselves. That distinction would be meaningless if developers who sell properties off-the-plan were treated in the same way as builders. I note that Byrne J did not refer to the

⁷ (2006) 15 VR 289.

interrelationship between the DBC Act and the Building Act in his judgment in *Mirvac*, presumably because this was not argued. ...

- 72 The registration requirements in the Building Act will apply to the person or body carrying out the work. Because the building includes residential apartments, the contract will have to include the provisions specified in Pt 3 of the DBC Act. Under s 137E of the Building Act, depending on the nature of the contract either the developer or the builder will be required to take out insurance. Warranties will be implied into the contract by s 8 of the DBC Act. If the contract of sale to the purchaser is not itself a major domestic building contract the warranties implied into the contract between the developer and the builder will run with the land under s 9. ...
- 79 Section 136 makes it an offence for a builder to carry out major domestic building work without being covered by the required insurance. It was said that if contracts of sale of the kind under consideration here were classified as major domestic building contracts, the three different types of contracts contemplated by s 137E would be elided, so that both developers and builders would have to take out insurance against the risk that the works were defective. The cost of double insurance would be passed on to the purchasers of off-the-plan apartments. Developers would be required to register as builders, whether or not they were actually involved in building work. Contracts for sale off-the-plan would have to contain the provisions required by Pts 2 and 3 of the DBC Act, though such provisions would also have to be included in the contract between the developer and the builder.

Conclusion

- 83 In order to give effect to the legislative scheme established by the interrelated provisions in the Building Act, and the DBC Act, and to avoid the absurd results identified above, it is necessary to read down the words "arrange or manage" in s 3 of the DBC Act to exclude contracts of sale which contemplate that a building or a home will be constructed by a builder under a major domestic building contract.

The characterisation of the contract of sale has been consistent with this approach since the commencement of section 3(4) of the Act, which was introduced in response to the dispute in *Mirvac (Docklands) Pty Ltd v Philp*⁸.

However the characterisation of the building contract underlying the development has become problematic over time.

There seemed to be no difficulty initially. In *Mirvac (Docklands) Pty Ltd v La Rocca*⁹, Hargrave J found as follows:

- 148 In *Mirvac (Docklands) Pty Ltd v Philp*, Byrne J held in relation to an identical contract to the contract of sale in this case that the plaintiff had failed to comply with s 11(1)(a) of the Act and that, accordingly, Mr Philp was entitled to avoid the contract.
- 149 However, the contract considered by Byrne J in *Philp* was not subject to the provisions of the Domestic Building Contracts (Amendment) Act 2004 ("the amending Act"). The amending Act inserted s 3(4) and 3(5) into s 3 of the Act. Those subsections provide:
- (4) A contract for the sale of land on which a home⁴⁰ is being constructed or is to be constructed that provides or contemplates that the construction of the home will be completed before the completion of the contract is not, and is not to be taken to form part of, a domestic building contract within the meaning of this Act if –

⁸ (2005) V ConvR 54-698.

⁹ [2006] VSC 48 (Unreported, Hargrave J, 22 February 2006).

- (a) the home is being constructed under a separate contract that is a major domestic building contract; or
 - (b) the contract of sale provides that the home is to be constructed under a separate contract that is a major domestic building contract.
- (5) Subsection (4) does not apply to a contract for the sale of land that is the subject of proceedings commenced in a court or tribunal before 16 March 2004 but not completed before that date in which it was alleged, before that date, that the contract was, or formed part of, a domestic building contract. ...

153 I will deal with the second element first. In my view, this element has been established in this case. Under special condition 1.1 of the contract of sale, settlement is conditional upon registration of the Plan of Subdivision and construction of the Apartment "under a Major Domestic Building Contract". The contract of sale defines "Major Domestic Building Contract" as a major domestic building contract as defined in s 3 of the Act. Under special conditions 6.1 and 6.2, the plaintiff represents that the Apartment will be constructed by the Builder under a major domestic building contract. The Builder is not a party to the contract of sale. It is clear that the contract of sale provides for the major domestic building contract under which the Apartment is to be constructed to be separate from the contract of sale. In my view, this is so even if the representations in special conditions 6.1 and 6.2 are construed as warranties by the plaintiff that it will ensure that the Apartment will be constructed by the Builder. On this construction of the contract of sale, it would still provide for the Apartment to be constructed under a separate contract. Accordingly, the decision of Byrne J in *Philp* is of no assistance to the defendant in respect of this limb of s 3(4).

154 Finally, as to the first limb of s 3(4) of the Act, I reject the submission put on behalf of the defendant that the Building Contract provided for in the contract of sale and in fact entered into between the plaintiff and the Builder is a sham, because the plaintiff was the "de facto builder". This submission is wholly inconsistent with the express terms of the contract of sale to which I have referred, and which have been carried into effect by the construction of the Building and the Apartment by the Builder under the Building Contract.

However, by following two decisions in the Supreme Court of Victoria apparently excluding developers from the application of the Act, the County Court has found that the building contract underlying a typical multi-storey residential development was not a major domestic building contract.

In *Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd*¹⁰, Judge Shelton found as follows:

15 A useful starting point for the consideration of whether or not an owner-developer is subject to the provisions of the *DBC Act* is the decision of Byrne J in *Fletcher Construction Australia Pty Ltd v Southside Tower Developments Pty Ltd* (unreported, VSC, No.6668 of 1996 (*BC9604891*)). There, His Honour stated, at pp 3 and 4:

"Before me the Proprietor relied on s.5(1)(a) and (e), saying that the work required under the contract between the parties in this proceeding was the erection or construction of a home, alternatively it was work associated with the construction or erection of a building on land zoned for residential purposes and for which a building permit is required. It was accepted on behalf of the Builder that 'home' covered a multi-residence building or multi-storey residential building since this was in fact a number of homes; the singular "home" in s.5(1)(a) including the plural 'homes': *Interpretation of Legislation Act 1984* s.37. . . . There is, if I may say so, much to be said for this view. There are, however, some indications in the Act and in the Second Reading Speech which suggest that the definition may not be so wide; that it was the intention of Parliament to provide a legislative framework for contracts and disputes concerning building work of a more modest character and to protect parties to

¹⁰ [2008] VCC 1170 (Unreported, Judge Shelton, 10 September 2008).

more conventional domestic building projects from the consequences of an inequality of bargaining power rather than to interfere with major commercial transactions. Nevertheless, this was not contended for before me, and I am content to proceed on the accepted basis expressing no view on the broad question: Counsel for the Builder submitted, however, that the work, the subject of this proceeding, was not the erection or construction of a home or homes."

- 16 The ruminations of Byrne J as to whether the *DBC Act* applied to "major commercial transactions", such as here, were, surprisingly, not seized upon in subsequent litigation. Mr Andrew, however, took me through the Second Reading Speech of 24 October 1995, which he submitted showed that the purpose of the legislation was to protect consumers and that it was to apply to individual owners and not owner-developers, as here. Likewise, he took me through the provisions of the *DBC Act*, again submitting that its purpose was to protect consumers and that many of its provisions were quite inappropriate to apply to the owner-developers of a 96-unit development. I thought there was some merit in his submissions.
- 17 I turn to the case of *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159. There, the lead judgment was given by Hansen AJA. He stated, at paragraph 104:

"... the intent of the *DBC Act* is to protect individual home owners rather than commercial developers, a point which was noted by Eames JA in *HIA Insurance Services*."

- 18 Further on in the judgment, at paragraph 110, he stated:

"I also accept the appellant's submission that the *DBC Act* was enacted to regulate the rights of home owners and builders as distinct from developers, having regard to the object of the *DBC Act* in s.4 and the Second Reading Speech."

- 19 Callaway and Buchanan JJA indicated in a short joint judgment that they generally agreed with the judgment of Hansen AJA. In their judgment they referred to various matters but made no reference to the comments of Hansen AJA on the *DBC Act*. Thus, it can be said at the very least that they did not disagree with his comments.

- 20 In *Kane Constructions Pty Ltd v Cole Sopov & Ors.* [2005] VSC 237, Warren CJ was concerned with the renovation and extension of a disused boiler house in Collingwood. The works consisted of the erection of 14 residential units, together with a gallery, office space and restaurant. Her Honour stated, at paragraphs 891-893:

"While in *Winslow Constructions*, the views expressed by the Court of Appeal with respect to the limitations or application of the *Domestic Building Contracts Act* are confined to the narrow ambit before the Court on that occasion, and therefore obiter, the fact remains that the authority is of assistance in the present case. It was suggested at one point in argument that, given the fact that the present project encompassed a partially domestic building component, then it necessarily followed that the provisions of the Act applied. This cannot be so. There were components of the project that were intended for business purposes, for example, the area described as 'the gallery', and a virtually entire floor designated for office use.

I have difficulty in accepting that in a project such as the present where it is a combined, mixed use development of residential, office and gallery and restaurant, developed by a developer, it should be subject to the protections enshrined in the *Domestic Building Contracts Act*. Picking up on the observations of Hansen AJA in *Winslow Constructions*, it seems to me that the Act was not intended to apply to developers, and for that reason alone the provisions have no bearing on the present case. . . .

. . . I am of the view, therefore, that the Act does not apply to a project such as the present. . . .”

21 In *Shaw v Yarranova Pty Ltd & Anor*. [2006] VSC 45, Bell J stated, at paragraph 35:

“In *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd* the Court of Appeal ascertained the meaning of ‘associated work’ in s.5(1)(a)(i) of the *Domestic Building Contracts Act* in this manner. This decision was applied by Warren CJ in *Kane Constructions Pty Ltd v Sopov* where her Honour considered that the provisions of the *Domestic Building Contracts Act* at issue in the case before her did not apply to developers.”

22 Mr Frenkel sought to distinguish *Kane Constructions* on the basis that there the development had a commercial aspect, in that there was an office, gallery and restaurant which are not present in the matter before me. I do not accept this submission. In my view, the Chief Justice, as with Hansen AJA, was stating her conclusion in broader terms when she said:

“. . . it seems to me that the Act was not intended to apply to developers.”

23 Mr Frenkel sought to rely on *Mirvac (Docklands) Pty Ltd v Philp* [2004] VSC 301, where Byrne J was concerned with a contract for the sale of apartments off the plan at Docklands. He concluded that the contract of sale between a developer and an individual was a domestic building contract within the meaning of s.3 of the *DBC Act*. This decision is readily distinguishable, since there the builder was the developer, not the owner.

24 Mr Frenkel also referred to *Shaw v Yarranova Pty Ltd & Anor* [2006] VSCA 291, an appeal from the decision of Bell J referred to above. There, Neave and Eames JJA upheld the decision of Bell J, with the Chief Justice dissenting. At paragraph 18, Neave JA stated:

“The single issue to be decided in this appeal is whether a contract of sale ‘off-the-plan’ of an apartment to be built as part of a residential development in the Docklands area in Melbourne, is a ‘major domestic building contract’ under the *Domestic Building Contracts Act 1995*.”

25 Again, a developer was the builder not the owner. The judgment was principally concerned with the meaning of the words “manages or arranges the carrying out of domestic building work” in the definition of “builder” (paragraph (b) contained in s.3(1) of the *DBC Act*).

26 Mr Frenkel further relied upon the fact that the Contract contains provisions which are required in a domestic building contract under the *DBC Act*.

27 Corsello, in paragraph 51 of his affidavit, deposes that the Contract was prepared by Steven Foley (“Foley”), an independent quantity surveyor engaged by the defendants. In my view, the fact that the parties entered into the Contract on the mistaken belief that the *DBC Act* applied to the Contract does not affect the question of whether as a matter of law the *DBC Act* does apply to owner-developers.

28 I follow the approach of Hansen AJA, the Chief Justice and Bell J, and conclude that the *DBC Act* does not apply to owner-developers.

It is presently unclear whether Judge Shelton will be followed in the Victorian Civil and Administrative Tribunal. In *Body Corporate Plan No. P5509946A v VM Romano Construction Group Pty Ltd*¹¹, Deputy President Aird said:

¹¹ [2009] VCAT 1662 (Unreported, Deputy President Aird, 19 August 2009).

Should leave to withdraw the admission be granted?

11 Whether the contract was a major domestic building contract is far from settled. The builder seeks to amend its defence having regard to a recent County Court decision of *Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd* [2008] VCC 1170 which was handed down on 10 September 2008, which, whilst interesting and informative, is not binding on the tribunal. In *Glenrich* Judge Shelton determined that the DBC Act does not apply to an owner-developer. Whether his Honour's attention was drawn to s5(1)(e) or s6(c) of the DBC Act is unclear from his judgement. Relevantly they provide:

s5(1) This Act applies to –

- (e) any work associated with the construction or erection of a building—
 - (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
 - (ii) in respect of which a building permit is required under the **Building Act 1993**;

...

s6 This Act does not apply to the following work-

- (c) any work in relation to a building intended to be used only for business purposes; [emphasis added]

12 However, I am not required to determine this question at this time. ...

Analysis

The result is that, as things stand, the characterisation of building contracts under the Act is uncertain for larger developments.

This detracts from the enforceability of "off the plan" contracts of sale by reason of section 3(4) of the Act and section 137E of the *Building Act 1993* (Vic). If the building contracts are not major domestic building contracts, the door is open for the contracts of sale to be major domestic building contracts.

If the contracts of sale are major domestic building contracts:

- they will include a suite of quite broadly cast warranties as to workmanship, materials, compliance with law and fitness for purpose;
- the deposit under a contract for more than \$20,000 must not exceed 5% or the contract will be voidable;
- the vendor must be registered as a builder;
- there are many other quite strict formal requirements for the documentation of a major domestic building contract, failure to comply with which may render the contract voidable;
- the purchaser has a 5 day cooling-off period; and
- contracting out is prohibited.

Those who can remember *Mirvac (Docklands) Pty Ltd v Philp*¹² and the Parliament's rush to enact section 3(4) of the Act in response, will see the potential for another surprising interpretation of the Act to blind-side the residential development industry.

However that seems less likely here to me, or at least likely to be as quickly remedied, for the following reasons:

¹² (2005) V ConvR 54-698.

- I am not sure that there is any sound basis in the first instance to read the Act down to limit its application where a developer is involved. The key to the application of the Act is to determine whether or not the work is domestic building work by reference to sections 5 and 6 and the definition of home. The result is that residential premises are covered by the Act, excluding certain specific types of building, but including parts of commercial or industrial premises. There is no consideration called for in those provisions, of the characterisation of the proponent of the work by reference to such undefined roles as "developer" or "owner-developer".
- The present structure of the consumer protection regime for home owners with warranties and insurance that run with the land, must necessarily have the result from time to time, that developers may enjoy the benefits of the Act. Further, there is no obvious reason why developers should not have the benefit of those protections, particularly if they mandated, well understood and agreed.
- The roles of "developer", "commercial developer", "builder-developer" and "owner-developer" defy precise description. In *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd*³, Hansen AJA stated "the intent of the *DBC Act* is to protect individual home owners rather than commercial developers", however this was a case about subdivision infrastructure where there was not a home yet in sight. Her Honour Chief Justice Warren relied on this to find in *Kane Constructions Pty Ltd v Cole Sopov*⁴, simply "that the Act was not intended to apply to developers", however this was a case about combined residential and commercial premises as expressly contemplated by the Act. This was endorsed by Judge Shelton in *Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd*⁵. However, rather than distinguishing *Mirvac (Docklands) Pty Ltd v Philp*⁶ and *Shaw v Yarranova Pty Ltd*⁷ on the basis that they were cases about contracts of sale rather than building contracts, Judge Shelton instead refined the developer exclusion to "conclude that the *DBC Act* does not apply to owner-developers" and explained the contract of sale cases as being covered by the Act because they involved "builder-developers".
- It is difficult to see the impact of Judge Shelton's distinction between "builder-developers" and "owner-developers" on the critical characterisation of the work by reference to sections 5 and 6 and the definition of home.
- Judge Shelton's distinction between "builder-developers" and "owner-developers" seems to have the counterintuitive result that a related party transaction between a "builder-developer" and a commercial builder is more likely to attract the consumer protection regime than an arms length transaction between an "owner-developer" and third party commercial builder.
- No step has yet been taken to include larger developments amongst the specific exclusions under the Act. In fact, as observed by Jane Hider in her excellent article *Domestic Building Contracts Act 1995 – Uncertainty Reigns for Developers and Builders*⁸, when the *Domestic Building Insurance Ministerial Order*⁹, was limited to building work other than a multi-storey residential building with a rise of more than 3 stories and containing 2 or more separate dwellings, there was no step taken to limit the application of the Act to such developments.
- If despite the above it is the Parliament's intention that the Act should not apply to larger developments of some particular type or dimension, why not restrict the application of the Act to such developments to sections 8 and 9 which serve the critical functions of attaching the statutory warranties to the land?

Conclusions

Until the application of the Act to larger developments is clarified, this uncertainty is a risk, particularly for developers. They may find themselves without the benefits of the Act in their dealings with

¹³ (2004) 10 VR 435.

¹⁴ (2006) 22 BCL 92.

¹⁵ [2008] VCC 1170 (Unreported, Judge Shelton, 10 September 2008).

¹⁶ (2005) V ConvR 54-698.

¹⁷ (2006) 15 VR 289.

¹⁸ Jane Hider, 'Domestic Building Contracts Act 1995 – Uncertainty Reigns for Developers and Builders' (2009) 34 *Building Dispute Practitioners' Society News* 4

¹⁹ No S 98 Friday 23 May 2003.

builders and they may find their contracts of sale voidable as non-compliant major domestic building contracts. The latter risk will increase if the economy and the market continue their current trends. The residential development industry might again be blind-sided by a surprising interpretation of the Act.

In the meantime, developers should do everything they can to try to ensure that the building contracts they enter into comply with all of the requirements under the Act for a major domestic building contract so that they:

- comply with their express obligation in their contracts of sale to have the home constructed under a major domestic building contract so as not to risk being in breach;
- maximise the likelihood of the building contract being characterised as a major domestic building contract to reduce the risk of the contract of sale being a voidable major domestic building contract;
- maximise their consumer protection from the builder; and
- maximise the purchaser's consumer protection.