

## Application of the *Domestic Building Contracts Act 1995* (Vic)

July 2021

### Background

The purposes of the *Domestic Building Contracts Act 1995* ('Act') are to regulate "contracts for the carrying out of domestic building work" and to "provide for the resolution of domestic building disputes and other matters by the Victorian Civil and Administrative Tribunal." <sup>1</sup> The Act was enacted in response to the substantial increase in residential development in Victoria which saw the approval of \$2.8 billion worth of residential work in the years 1994-95. <sup>2</sup> In presenting the Act, the Minister stated that "for most people, buying a house is probably the biggest outlay they will make", "anyone who is disadvantaged because of dealings with a shonky builder or as the result of entering into a building contracts suffers an incredible crippling experience because it usually involves a lot of money and hardship." <sup>3</sup>

Crisp Law was recently approached by a Victorian client who was concerned about whether their development fell under the definitions under the Act and consequently attracted the accompanying warranties.

### Issues Explored in this Newsletter

The issue that will be explored in this newsletter is that the definition of 'domestic building work' under the Act, though clearly articulated under the legislation, poses a number of issues. One of the issues concerns buildings for commercial use. Though the building may be certified as commercial, if a developer nevertheless intends to lease the buildings units, it may fall under the definition of 'residential work'. The relevant definitions under the Act, will be set out in the Schedule.

### Judicial Interpretation

#### *Maclaw v HIHI Casualty and General Insurance Ltd*

*Maclaw* considered whether the Act applied to the construction of a serviced apartment. In holding that the development fell within the definition of 'home', Judge Davey stressed that the term 'residential premises' "refers to the design purpose of the premise to be determined by the

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<sup>1</sup> *Domestic Building Contracts Act 1995* (Vic), s 1 ('DBC').

<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Council, 22 November 1995, 743 (Barry Thomas Pullen).

<sup>3</sup> *Ibid.*

application of objective criteria at the time the contract is entered into, not subjective intent”.<sup>4</sup> Moreover, Judge Davey noted that the exclusion under section 6 of ‘any residence that is not intended for permanent habitation’ is a reference “to intended future use to be derived objectively from the nature of the structure.”<sup>5</sup>

*H Buildings Pty Ltd v Owners Corporations*

*H Buildings v Owners Corporation* commenced in the Victorian Civil and Administrative Tribunal against the builder of a defective resort development in Torquay.<sup>6</sup> In bringing the builder to the tribunal, the applicants argued that the development fell within the purview of the Act and they were consequently entitled to the accompanying legislative warranties. The builder appealed to the Supreme Court claiming that the residential hotel did not fall within the definition of ‘domestic building contract’ which prevented not only the tribunal from having jurisdiction but barred the applicants from the legislative warranties.

The Builder contended before the Court that the “Contract Drawings and Specification” identified a “multi-storey residential hotel resort complex” which had “dual key apartment types.”<sup>7</sup> Moreover, though some of the apartments catered “for long-term residents” other apartments did not have “provisions for a kitchen” and were therefore “intended to be serviced by the hotel operator.”<sup>8</sup> According to the Builder the duality of apartments at the resort precluded the classification of the resort as domestic building work.

Despite the Builders reliance on the Contract Drawings, the Court was instead influenced by *Maclaw* and identified that the process of “determining whether the Act applies to particular work as described in s 5(1)” requires having “regard to the design purpose of the premises to be determined by the application of objective criteria, including the physical characteristics of the building, at the time the contract is entered into”.<sup>9</sup>

In dismissing the Builders claim the Court stated that “objectively considered” the residential apartments, “which constitute a substantive component” of the development, has “the physical characteristics of a residential premise and are intended to be used as residential premises”.<sup>10</sup> Aside

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<sup>4</sup> *H v Buildings v Owners Corporation* [2017] VSC 802, [77]; *HIH Casualty v General Insurance Ltd v Maclaw No 651 Pty Ltd* [1999] VSCA 217.

<sup>5</sup> *H v Buildings v Owners Corporation* [2017] VSC 802, [76].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* [30].

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* [77].

<sup>10</sup> *Ibid* [121].

from looking at the “design and specifications”, the Court also factored in the various components of the apartments which satisfied the “indicia of long term residence” such as “separate entries, normal household facilities, including full kitchens and laundries” which “are separately metred for serviced”.<sup>11</sup> Moreover, the Court concluded that “such residential apartments have not only been designed and constructed” for permanent residence, “but also marketed and sold, as such”.<sup>12</sup>

## Significance

The expansive interpretation given to the definitions under the Act has serious ramifications for all builders in Victoria. Whilst your contract may evidence an intention of a more commercial enterprise, the case law has highlighted that subjective intention is irrelevant and that the application of the Act depends on additional factors such as physical criteria. In light of this judicially preferred broader approach, it is likely that multiple developments will fall under the umbrella of ‘domestic building contract.’ This is important as the Act implies multiple warranties into the contract that cannot be excluded.<sup>13</sup> These warranties stipulate such conditions as the ‘work will be carried out in a property and workmanlike manner’ and that the ‘work and any material used in carrying out the work will be reasonable fit for that purpose.’<sup>14</sup> Significantly, the latter warranty was the subject of the Lacrosse decision in 2019 where a mixed-used building located in Docklands was engulfed in flames, forcing the residents of the 21 storey building to be evacuated. The Court found the builder liable for breaching the warranty of fitness for purpose as the material used on the façade of the building aided the spread of the fire. Please see our next newsletter which considers the scope of responsibility under the Act, focusing on whether the Act also applies to developers.

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> *DBCA* (n 1) s 8.

<sup>14</sup> Ibid.

# Schedule

## Definitions

Under the Act, 'domestic building work' is defined in section 5 as:

- (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 after 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 includes a reference to any part of a home.*<sup>15</sup>

Under section 3, home is further defined as:

*Any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include-*

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<sup>15</sup> DBC (n 1) s 5.

- (a) a caravan within the meaning of **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 home 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<sup>16</sup>

Interestingly, section 6 explicitly excludes the following work from the Act's application:

- (b) any work in relation to a form 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 a draftsman or an endorsed building engineer within the meaning of the **Professional Engineers Registration Act 2019**
- (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

(2) This Act or a provision of this Act does not apply to any work that the regulations state is not building work to which this Act or that provision (as the case requires) applies. <sup>17</sup>

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<sup>16</sup> Ibid s 3.

<sup>17</sup> Ibid s 6.

