

BUILDING LEGISLATION AMENDMENT BILL 2014 – THE MOST SIGNIFICANT CHANGES TO THE VICTORIAN BUILDING INDUSTRY IN 20 YEARS

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The *Building Legislation Amendment Bill 2014* (the **Bill**) was introduced to Parliament and passed its First Reading on 6 May 2014, with the Second Reading on 8 May 2014. The amendments proposed by the Bill will cause the most significant changes to the building industry since the introduction of the *Building Act* in 1993 and the *Domestic Building Contracts Act* in 1995.

The Government states the purposes of the amendments are to improve and strengthen efficiency, fairness, accountability and confidence in the building industry.

Who's affected?

Groups affected by the Bill include: building surveyors, architects, building practitioners (in registration, regulation and discipline), warranty insurer providers as the scheme returns to a centrally administrated fund, corporations and company directions, subcontractors (as under the *Domestic Building Contracts Act* 'domestic building work disputes' may now arise directly between them and the building owner), among others.

What's changing?

The Acts to be amended by the Bill include: the *Building Act 1993*, the *Architects Act 1991*, the *Domestic Building Contracts Act 1995*, the *Victorian Civil and Administrative Tribunal Act 1998*, the *Building and Construction Industry Security of Payment Act 2002*, and others.

Bodies to be abolished include the Building Practitioners Board (BPB), the Building Appeals Board (BAB), the Architects Registration Board of Victoria (ARBV), the Building Regulations Advisory Committee (BRAC), the Building Advisory Council, and the Plumbing Advisory Council. The functions of these bodies are to be transferred to the Victorian Building Authority (**VBA**), the Victorian Civil and Administrative Tribunal (**VCAT**) and a Technical Accreditation Committee (TAC).

If the Bill is passed, both the BPB and BAB it is anticipated, will continue to hear those proceedings commenced prior to the commencement of the new Act.

What's got everybody talking?

In a legislative Bill full of changes, these are just three that have the industry talking:

1. Return to a centrally administered insurance fund

The establishment of the Domestic Building Consumer Fund will see a return to a centrally administered insurance fund. The Fund provides coverage to major domestic building contracts of a value of \$16,000 or more. Losses claimable include: non-completion, breach of an implied warranty, failure to maintain a standard or quality of work, contravention of consumer protection laws, non-payment of a deposit or progress payment and cost of storage/alternative accommodation. The Fund also extends to losses caused by sub-contractors.

When a claim may be made against the Fund will be expanded beyond when the builder is dead,

disappeared or insolvent and will now include where:
a rectification order has not been complied with and the contract has been completed or terminated;
or
the builder has been deregistered or suspended; or
the builder is permanently incapacitated and therefore cannot undertake rectification works.
The cover is extended to include losses relating to building work where the builder did not obtain the required coverage.
Replicating the existing time limits, a claim may be made within 2 years after completion for non-structural defects and 6 years for structural defects.
The maximum loss which may be claimed will increase from \$200,000 to \$300,000 per certificate.
The Fund will be managed by the Victorian Managed Insurance Authority (**VMIA**). The VBA will take over as fund manager on 1 July 2016.
The VBA may still refuse to accept a claim that is made more than 180 days after the claimant became aware or ought to have become aware of the circumstances in which the claim arose.
These sections relating to the Fund will not override other rights an applicant may have under the building contract, *Domestic Building Contracts Act* or *Building Act*.

2. VBA powers: Dispute Resolution and Rectification Notices

A new section 45 proposed under the *Domestic Building Contracts Act* will entitle a party to a 'domestic building work dispute' – a claim between the building owner and a builder, building practitioner, subcontractor or architect – to refer the dispute to the VBA. Consumer Affairs Victoria will no longer be responsible for such disputes.

a. Dispute Resolution

The VBA must assess whether the domestic building works are suitable for conciliation, meaning the dispute would be reasonably likely to settle by conciliation. The VBA may reject a referral for a number of reasons including the referring party not having complied with the temporal and procedural requirements of the legislation, the referring party having failed to take reasonable steps to resolve the dispute before referral or that the matter is already being considered by VCAT or a Court.

If more than one matter in dispute is referred to the VBA, the VBA may sever any matter that may be rejected if it were referred individually.

Anything said by the parties during the conciliation is not admissible as evidence in any other legal proceeding. But, failure to comply with the agreement reached at conciliation will be submitted as evidence at a subsequent hearing at VCAT or before a Court.

This referral process raises a number of questions that may only be answered in practice – *what steps are reasonable in attempting to resolve the dispute prior to making a referral? How will the parties deal with those matters severed as any settlement may therefore not be global?*

The VBA has also been granted associated powers to stop work and cause inspections of domestic building work.

b. Rectification Orders

The VBA will be given the power to issue 'rectification orders' requiring a range of actions, including: rectification or completion of domestic building work or payment of costs for another builder to complete such works.

A party to a domestic building contract may in certain circumstances ask the VBA to appoint an inspector to examine the building work and determine whether the work is defective or incomplete. Inspectors may perform destructive testing, take photos or require the production of documents. It will be an offence not to comply with, hinder or obstruct an inspector.

The inspector must provide a report specifying any defective work and may propose methods of rectification.

Inspectors may report on defects, defects that adversely affect the health and safety of people who use the building or amenity, rectification, the building contract or contraventions of the building legislation.

This is a very broad scope of power. Concerns have been raised in the industry that the inspector appointed may not have the appropriate expertise to consider the range of issues that may arise in any building dispute.

A rectification order may require a party to pay the costs of any tests or obtaining expert advice.

If parties have not resolved the dispute, the VBA may issue a rectification order. The rectification order may order the builder, or in the case of a corporation, an officer or related body corporate, to complete domestic building work, rectify domestic building work or damage, refrain from preventing another party from satisfying a term under the contract or carrying out domestic building work. The VBA may, in certain circumstances, order the builder to pay costs of another builder to perform the rectification works.

Importantly, directors will not be protected by corporate structures.

A rectification order may also require payment for costs or expert advice. Expert advice is not defined by the Bill or *Building Act* and it is not clear if these costs are limited to expert building consultant advice or legal advice as well.

Rectification orders are reviewable both internally by the VBA, and subsequently by an appeal to VCAT.

If there is a breach of the rectification order the owner or builder may have the right to terminate the building contract. A builder may also be subject to disciplinary action by the VBA.

3. Changes to registration of building practitioners

The Bill proposes a number of changes to registration, including:

Corporations and partnerships may be registered. Currently only natural persons may be registered. In line with other Australian states, corporations will now be registered, with one or more directors personally registered.

Building surveyor corporations may be registered and nominate up to three individuals to perform building surveyor functions. Currently, an entity does not retain the value of registration when a registered building surveyor leaves its employment. Under the proposed amendments, building surveyor corporations will be able to register itself and therefore retain the value of such registration within the corporate entity. This amendment will also lead to greater accountability for building surveyor corporations.

The registration requirements have been extended to include personal and financial probity tests, replacing the subjective 'good character' test. These tests will consider prior convictions or breaches of legislation, disciplinary action, solvency and whether insurance or fund cover has been declined or cancelled. Those corporations assessed by the VMIA in the last 12 months will not be required to satisfy these personal and financial probity tests prior to registration.

Registration will be limited to five years before renewal is required. Under the current Legislation once a practitioner is registered they are so unless the registration is cancelled.

The Bill introduces sweeping regulatory changes which will no doubt be tested as the industry comes to terms with the new legislation, how it will be implemented and how it will affect those within the building industry.



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