

Ms Jo de Morton
Secretary
Department of Government Services
1 Treasury Place
Melbourne 3002

By email only: regulationpolicyconsultation@justice.vic.gov.au

Dear Ms de Morton,

Re: Review of the Domestic Building Contracts Act 1995

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 18,000 members. The LIV has a long history of contributing to, shaping, and developing effective laws.

The LIV notes that the Department of Government Services (**DGS**) is currently reviewing the *Domestic Building Contracts Act 1995* (Vic) (**DBC Act**) and has invited submissions from the public in response to the Review of the Domestic Building Contracts Act 1995 Issues Paper (**Issues Paper**).

The LIV understands that the main purpose of the review is as stated by the Hon Sonya Kilkenney in her second reading speech in relation to the *Building Legislation Amendment (Domestic Building Insurance New Offences) Bill 2023*:

‘.....The collapse of Porter Davis Homes Group revealed an additional issue of multiple agreements being used by builders, often avoiding the threshold for the requirement to obtain a DBI policy. This issue – and further legislative options to address it – will be considered as part of a review of the Domestic Building Contracts Act. This review will also consider related issues including whether there should be any changes to monetary thresholds for deposits, the definition of domestic building work and progress payments at various stages of a construction contract.....’

The LIV would prefer the review to be in relation to the whole of the DBC Act (including Part 5) given the significant role that VCAT plays in relation to domestic building disputes and our comments below in relation to the mediation services conducted through Domestic Building Dispute Resolution Victoria. Accordingly, the LIV suggests that the scope of the review be broadened, and that the Victorian Attorney-General be invited to participate.

The LIV also seeks confirmation that both the Victorian Building Authority (**VBA**) and Consumer Affairs Victoria (**CAV**), who disseminate information to the public and exercise regulatory powers and functions under the DBC Act, are involved in the present review. It is important that any changes to the DBC Act should be well publicised by the VBA or other relevant government agencies. This could be done in conjunction with a broader campaign to inform those proposing to enter into a building contract about cost escalation clauses, including highlighting warnings about the use of such clauses.

Below, the LIV provides its responses to the review of Parts 1, 2, 3, 4, and 6 of the DBC Act. This submission is informed by LIV members including a number from the LIV Building and Construction Committee, which is comprised of lawyers with significant experience advising on building and related contracts, thus the recommendations contained in this submission arise from a unique building law perspective.

In its responses to the Issues Paper questions below, the LIV wishes to raise a number of concerns about important issues relevant to the DBC Act and specifically, the protection of consumers.

The LIV considers that the DBC Act has, in principle, achieved its intended purpose of protecting consumers. However, LIV members have reported that the main issue concerning the DBC Act is the failure to enforce the obligations contained in the Act. The LIV notes the recent introduction of the *Building Legislation Amendment (Domestic Building Insurance New Offences) Bill 2023*, which seeks to create certain offences for builders in respect of demanding payment for building work that is not covered by insurance, and allows investigation of, and the exercise of enforcement powers and commencement of proceedings in relation to, some breaches of the DBC Act. If enacted into legislation, the provisions of this bill may mean that there is greater enforcement of the obligations imposed on builders under the DBC Act.

The other main concern expressed by members, which the LIV wishes to note, is the ineffectiveness of the dispute resolution process conducted through Domestic Building Dispute Resolution Victoria (**DBDRV**). In this respect, please see the responses to questions 27 and 28 below.

Finally, and as raised in the LIV's responses to the Issues Paper questions, the LIV wishes to draw attention to the interplay between the DBC Act and obligations imposed on owner-builders under the *Building Act 1993* (Vic). The LIV submits that the present review should include a review of owner-builder obligations, and notes that section 68 of the DBC Act refers to the right to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for an exemption from the owner-builder obligations.

Responses to Issues Paper Questions

The LIV notes questions 2, 3, 5, 7 – 11, 14, 21 – 24, 26 and 29 of the Issues Paper. The LIV does not at this stage make detailed comment in response to any of these questions but recommends that input be sought directly from relevant industry stakeholders such as the VBA, the Housing Industry Association (**HIA**), Master Builders Association of Victoria (**MBA**) and organisations representing consumers.

The LIV's responses to questions 1, 4, 6, 12, 13, 15 – 20, 25, and 27 – 28 of the Issues Paper are provided below.

Q 1: Should there be any changes to the monetary threshold for a MDBC?

Please refer to the comments in the LIV's 2017 submission to Christine Nigro Chief Policy Advisor Policy & Corporate Services Division Consumer Affairs Victoria in relation to a review of the operation of the Domestic Building Contracts Regulations 2007 (**LIV 2017 submission**), where the LIV proposed a monetary threshold of \$10,000. A copy of the LIV 2017 submission is **attached**, for ease of reference.

The LIV suggests that input on this matter should also be sought directly from relevant industry stakeholders such as the VBA, the HIA, the MBA, and organisations representing consumers.

Q 4: Should there be any changes to requirements around insurance as it relates to deposits or other payments taken prior to the commencement of domestic building work?

In response to this question, the LIV notes that the Victorian Government has established the Liquidated Builders Customer Support Payment Scheme for customers of certain builders whose businesses collapsed between 1 July 2022 and 30 June 2023, where those customers were at risk of losing deposits because the builder had not obtained domestic building insurance.

Any deposit taken prior to the commencement of domestic building work should be held in trust until such time as the builder is entitled to payment. The LIV suggests that a Victorian Government authority could hold such deposits in trust, similar to the way deposit bonds are held in residential leases. If such a scheme is implemented, it follows that it should be an offence where there is a failure to pay the deposit to such Government authority.

Q 6: Is the current \$500,000 contract price threshold for cost escalation clauses appropriate? Please provide further information about your answer.

Please refer to comments made in the LIV 2017 submission, where the LIV referred to the case of *Sumic v Muzaferovic (Domestic Building)* [2013] VCAT 1862 and noted that given this case, there may be scope to review the \$500,000 threshold.

Input should also be sought from relevant industry stakeholders, such as building surveyors and those collecting data about the cost of building works such as local councils, to determine whether a \$500,000 contract price threshold is still appropriate given the time that has passed since this amount was legislated.

Q 12: Should any changes be made to the building stages, including to their definitions? Please provide further information about your answer.

The LIV submits that further clarity around the definition of 'lockup stage' is required. Further about the stage at which the installation of i) garage doors and ii) appliances is said to occur, and the stage at which any landscaping or driveway works is said to occur, is also required.

The LIV has no other specific comments at this stage, but does refer DGS to the LIV's previous comments, contained in the LIV 2017 submission, about definitions in the *Domestic Building Contract Regulations 2017* (Vic).

Q 13: Should single trades work (or certain types of single trades work) be considered domestic building work, to be made subject to DBC Act restrictions and to fall within Domestic Building Dispute Resolution Victoria (DBDRV)'s jurisdiction?

On the matter of single trades work, the LIV notes that it would like to see the single trade exemption under the DBC Act linked to owner-builder obligations, so that the single trade exemption also applies to owner-builders. This would mean where an owner-builder, for example, paints their house, this is not captured as owner-builder work (as it is a single trade) and would not be subject to the owner-builder obligations under section 137B of the *Building Act 1993* (Vic).

Q 15: Do the implied warranties need to be updated, including through the removal or addition of any warranties, or expanding their application to all developers? Please provide further information about your answer.

Please note the LIV's comments in item 3.6 of the LIV's 2004 submission to Jenny Mikakos MP in relation to a review of the DBC Act (**LIV 2004 submission**). A copy of the LIV 2004 submission is **attached** for ease of reference.

Q 16: Are the consumer information products effective? If not, how can they be improved?

The LIV observes, based on LIV member experience, that members of the public are not aware of the importance or content of the consumer information products.

Further input should be sought from CAV and VBA, as they are best placed to comment on this matter.

The LIV does submit that, where a customer does not want to seek legal advice and does not want to appoint their own building surveyor, they should be obliged, before entering a contract, to give written acknowledgment to the relevant builder noting that they have chosen not to seek legal advice and not to appoint their own building surveyor.

Q 17: Should there be a requirement for a standard form contract to be used for some or all domestic building contracts? For an example, see the prescribed residential rental agreements made under the Residential Tenancies Act 1997.

Yes, there should be such a requirement. The LIV is experienced in developing standard form contracts and would welcome consultation on this matter.

Q 18: Are there other changes or requirements that would help consumers and builders understand their legal obligations and rights? Please provide further information about your answer.

Yes. The LIV submits that there should be a requirement for builders to inform prospective customers that they should seek independent legal advice before entering a domestic building contract. This information should be provided at the first opportunity, such as when the customer first engages with the builder.

Please see our comments in response to question 16 in respect of situations in which customers choose not to seek independent legal advice.

Q 19: Should there be any changes to what must be included in a MDBC? If yes, please provide further information about your answer.

LIV members are aware of a number of special conditions that are commonly added by builders to major domestic building contracts (**MDBCs**). These are commonly provided by the HIA and MBA.

The LIV suggests that, to inform itself as part of the present review, the DGS should seek a copy of the special conditions commonly used by builders in MDBCs.

Q 20: What else can be provided to a consumer to help them to understand a contract including the rights and obligations of the parties to the contract?

The LIV submits that an additional warning should be included in the consumer information products (see question 16) about the need to obtain legal advice about any special conditions.

Further, any special conditions should be required to be prominent and clearly identified in the contract and precede the general conditions. Where the standard contract is used, the standard contract should be required to contain a warranty that it is in the standard form without amendment save for any special conditions. Please also see comments in response to question 16.

Q 25: Should any changes be made to when or how a building owner can end a MDBC?

In the experience of LIV members, section 41 of the DBC Act is not well understood by landowners. For this reason, the LIV recommends that a fact sheet about the operation of section 41 should be prepared and published.

Q 27: Is the current dispute resolution framework fit for purpose?

The LIV is of the view that the DBDRV dispute resolution process is not effective at resolving disputes and that most domestic building disputes still ultimately go to the VCAT or court as is appropriate.

The LIV has identified the following as the reasons why the DBDRV dispute resolution process is not effective:

- The mandatory nature of the DBDRV dispute resolution process slows down the resolution of disputes. The DBDRV often takes months to allocate a dispute to a dispute resolution officer, and the dispute resolution officer then takes weeks or months to gather information and facilitate a conciliation conference, only for the dispute to usually not be resolved. The additional time it now takes to resolve domestic building disputes leads to more financial and emotional strain on consumers and builders.

- LIV members report that DBDRV dispute resolution officers often do not have legal backgrounds and have little knowledge of construction related issues. This leads to an inability for dispute resolution officers to facilitate discussion on legal or technical issues effectively.

Accordingly, the LIV submits that instead, parties to a domestic building dispute should be able to proceed straight to the VCAT or court as is appropriate. The dispute resolution framework would be more effective if the funding for DBDRV was reallocated to the VCAT and the courts, and more members and judges were appointed to the VCAT and the courts to help resolve the backlog of cases.

It is common practice in the VCAT and courts for an early mediation or compulsory conference to be scheduled. In the experience of LIV members, most disputes end up resolving through this process. An advantage of such mediations and compulsory conferences is that they are presided over by legal professionals who often also have knowledge of construction related issues.

Q 28: What improvements, if any, could be made to strengthen domestic building dispute resolution?

Please see response to question 27.

Further Consultation and Contact

Whilst the LIV has at this stage responded only to certain of the questions in the Issues Paper, it does not necessarily wish to indicate that it does not have a view on the other matters raised in the Issues Paper. The LIV would be grateful to be consulted further on these matters following completion of the present review, the publication of any recommendations, and the proposal of any legislative changes.

The LIV welcomes the opportunity to discuss this submission with you in greater detail. Please contact Phillip Nolan, Special Counsel, Property, Environment & Risk, at pnolan@liv.asn.au or (03) 9607 9311.

Yours sincerely,

Adam Awty
Chief Executive
Law Institute of Victoria