

OWNER-BUILDER DANGER ZONE

Particular care must be taken when negotiating one complex area of property law.

Owner-builder provisions can be disastrous for vendors and their solicitors in a falling property market.

The current property slump and the predictions that it will get worse before it gets better are cause for concern for property lawyers. When the market is dropping, purchasers often get cold feet and want to escape their contracts before settlement.

One area of particular concern from the Legal Practitioners' Liability Committee's position is the owner-builder provisions in s137B of the *Building Act 1993* (Vic) (the Act). Not only are the provisions difficult to understand and interpret, failing to comply with them means the purchaser can avoid the contract at any time up until settlement.

What is more, failure to provide all of the required information before the purchaser enters the contract cannot be remedied later. These are "drop dead" provisions.

What does s137B require?

The main requirement of s137B appears in sub-s137B(2), which can be paraphrased as follows:

A person who constructs a building must not enter into a contract to sell the building within the prescribed period unless:

- if they are not a registered builder – they have obtained a building report which is less than six months old and given it to the intending purchaser;
- they are covered by any required insurance and have given the intending purchaser a copy of the insurance certificate; and
- where the building is a home, the contract contains the required warranties.

What work does it cover?

One of the difficulties with these provisions is determining what "construct a building" means. "Construct" is defined in sub-s137B(7) to include:

- build, rebuild, erect or re-erect the building;
- make alterations to, enlarge or extend the building; and
- cause any other person to do these things or manage or arrange the doing of these things.

"Building" is defined in s3 of the Act and includes "structure, temporary building,

temporary structure and any part of a building or structure".

It is clear that "construct a building" will include building new homes, garages, sheds and verandahs, as well as extensions to homes, garages and sheds, including verandahs and decks. But what is meant by "make alterations" to a building (or any part of the building) is not clear. For the purposes of the Act, would a building be altered by installing a new kitchen, bathroom or an air-conditioner in the wall or by enclosing the verandah with flyscreens, moving an internal door or painting the walls?

Since the amendments to the definition of "prescribed period" in September 2009, it now seems clear that works not requiring a building permit are caught by the provisions.

In the past we have seen practitioners only asking vendors if there have been any building permits issued in the past seven years. Clearly this will not be enough to uncover all owner-builder issues. Practitioners need to ensure that they ask more questions of their vendor clients about any work done to the property in the past seven years, whether or not a building permit was obtained.

Sub-section 137B(5AA) also makes it clear that mortgagees in possession and executors or administrators of estates of the person who "constructed the building" will be considered owner-builders.

What information must be given?

A common mistake we see is the failure to comply with the provisions because the value of the work was less than \$12,000. Where the value of the work is less than \$12,000 there is no requirement for insurance, but the warranties set out in s137C must still be included in the contract and the building report (less than six months old) must still be provided to the intending purchaser before the contract is signed.

Insurance, building reports and warranties must be provided for work over \$12,000.

How does the insurance work?

The details of the insurance requirements are set out in the ministerial order dated 1 July 2003, published in *Victoria Government Gazette* Special No 98, Friday, 23 May 2003.

The ministerial order says the period of insurance runs from the date of the contract and for a period of:

- six years after the "completion date for the domestic building works" for structural defects (paragraph 23(2)); and
- two years after the "completion date for the domestic building works" for non-structural defects (paragraph 23(1)).

"Completion" here means the certificate of occupancy or final inspection or practical completion.

There may be instances where the works were completed, say, six years and four months before the sale. In such a case no insurance certificate is required because the ministerial order says the insurance has to be for six years from the date of completion – despite the prescribed period in s137B being six years and six months.

What about registered builders?

Another mistake often made is to assume that owner-builder provisions do not apply to registered builders selling their own residential property. Wrong.

These provisions, in a more limited way, do apply to registered builders where they are selling their own residential property. They must provide only the warranties where the work they did on the property was less than \$12,000, but both insurance and warranties where the work was more than \$12,000.

What about commercial property?

Practitioners should not forget that where commercial property is being sold, registered builders are not affected but other owner-builder vendors must comply. They must provide a condition report and the prescribed period is 10 years.

Risk management

These provisions are complicated and practitioners need to understand them and ensure they comply or they will leave themselves and their vendor clients exposed. ●

This column is provided by the Legal Practitioners' Liability Committee. For further information ph 9672 3800 or visit www.lplc.com.au.