

House Contracts Guarantee Bill

No.

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LEGISLATIVE ASSEMBLY

Read 1° 25 March 1987

(Brought in by Mr Spyker and Mr Jolly)

A BILL

to make fresh provision concerning the guarantees required to be given in relation to domestic building work, to specify requirements to be complied with in relation to domestic building work contracts, to repeal Division 1A of Part XLIX of the *Local Government Act* 1958 and the *Building Contracts (Deposits) Act* 1962, to amend the *Sale of Land Act* 1962 and the *Building Control Act* 1981 and for other purposes.

House Contracts Guarantee Act 1987

The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

Purpose.

1. The purposes of this Act are—

- 5 (a) to reform the law relating to house builders' liability; and
 (b) to provide for guarantees to be given in relation to house improvement work; and
 (c) to specify requirements to be complied with in relation to domestic building work contracts.

10 Commencement.

2. This Act comes into operation on a day or days to be proclaimed.

Definitions, etc.**3. (1) In this Act—**

- “**Approved builder**” means a builder approved by the approved guarantor under its rules.
- “**Approved guarantor**” means, subject to section 22 being complied with, Housing Guarantee Fund Limited. 5
- “**Builder**” means a person who performs, or two or more persons who together perform, domestic building work.
- “**Building approval**” has the same meaning as in the *Building Control Act 1981*. 10
- “**Building owner**”, in relation to a domestic building work contract, means the person for whom domestic building work is, or is to be, performed under the contract.
- “**Building surveyor**” has the same meaning as in the *Building Control Act 1981*. 15
- “**Chief administrator**” means the chief administrator (by whatever name called) of the Department.
- “**Claimant**” means a person who has made a claim to the approved guarantor.
- “**Construct**”, in relation to a dwelling-house, includes— 20
- (a) to build, re-build, erect or re-erect the dwelling-house up to or beyond lock-up stage (within the meaning of section 21); and
 - (b) in the case of a dwelling-house that has never been occupied, to place the dwelling-house on land. 25
- “**Contract price**”, in relation to a domestic building work contract, means the total amount payable to the builder under the terms of the contract.
- “**Co-ordinator**” has the same meaning as in the *Building Control Act 1981*. 30
- “**Department**” means the administrative unit referred to as the Ministry of Consumer Affairs in Column One of Schedule Two to the *Public Service Act 1974*.
- “**Domestic building work**” means— 35
- (a) the work of constructing a dwelling-house; or
 - (b) the work of improving a dwelling-house; or
 - (c) the work of improving a residence that is excluded from the definition of “dwelling-house” in this sub-section by paragraph (a) or (c) of that definition if the work is carried out wholly or substantially within the space bounded by the floor, external walls and roof of the residence; or 40

(d) in connection with the moving from one site to another of a building that has been occupied and that is not a dwelling-house by reason only of the operation of paragraph (b) of the definition of that term in this sub-section, the work of—

(i) preparing the site and laying the foundations; and

(ii) making provision for lighting, heating, water supply, drainage, sewerage and other like services in respect of the building; and

(iii) carrying out any other work required to be carried out to the building in consequence of any work referred to in sub-paragraph (i) or (ii); or

(e) work of a prescribed class.

“Domestic building work contract” means a contract between a builder and another person for the performance by the builder of domestic building work (including any variation of such a contract) but does not include—

(a) a contract for the performance of domestic building work for a builder who is in turn obliged to perform the work under another contract; or

(b) a contract for the performance of domestic building work of the class referred to in paragraph (b) or (c) of the definition of “domestic building work” in this sub-section unless the amount payable under the contract in respect of that work is more than \$3000 or any larger amount that is prescribed for the purposes of this paragraph.

“Dwelling-house” means a building (whether temporary or permanent) that is used, or is intended, adapted or designed for use, as a separate residence for an occupier who has a right to the exclusive use of it but does not include—

(a) a separate residence that is a portion of a building containing two or more separate residences if any part of a separate residence is above or below any part of the first-mentioned residence; or

(b) a building that has been moved from one site to another; or

(c) a building that is attached to a shop, office, warehouse or factory and is used, or is intended, adapted or designed for use, as a residence for an occupier or caretaker of the shop, office, warehouse or factory; or

(d) a building that is used, or is intended, adapted or designed for use, as—

- (i) an apartment or apartment-house within the meaning of Division 3 of Part XII. of the *Health Act 1958*; or
- (ii) a boarding-house or common lodging-house within the meaning of that Act; or 5
- (iii) a motel, residential club, residential hotel or residential part of premises licensed under the *Liquor Control Act 1968*; or
- (iv) a prescribed class of building.
- “Guarantee period”**, in relation to domestic building work, means 10
the period of 7 years from the time when the contract for the performance of that work was entered into or building approval was granted for that work, whichever occurred first.
- “Improve”**, in relation to a building, means— 15
 - (a) to make additions to the floor area of the building; or
 - (b) to make alterations to the structural design of the building; or
 - (c) to replace load-bearing fixtures that are part of the structural design of the building and are integral to its functioning; or 20
 - (d) to replace or install attached or fixed mechanical components that are integral to the functioning of the building; or 25
 - (e) to replace or install non-load-bearing rigid fixtures (other than machinery) that are integral to the functioning of the building; or
 - (f) to replace or install structures that are attached to the exterior of the building and are integral to its functioning; or 30
 - (g) to perform any other work required to be performed in consequence of any work referred to in paragraphs (a) to (f).
- “Industry association”** means Housing Industry Association or The Master Builders’ Association of Victoria. 35
- “Officer”**, in relation to a corporation, has the same meaning as in the *Companies (Victoria) Code* but does not include an employee of the corporation.
- “Recognised person”** means a person or body recognised by the Minister by Order made under section 29. 40

(2) If under the *Public Service Act 1974* the name of the Department is changed, the reference in the definition of “Department” in sub-section (1) to the “Ministry of Consumer Affairs” is from the date

when the name is changed to be taken to be a reference to the Department by its new name.

(3) A reference in this Act to obligations under a domestic building work contract, or to workmanship in relation to domestic building work, includes a reference to obligations or workmanship in relation to—

- (a) outbuildings; and
- (b) retaining walls the construction of which is required by or under any Act or enactment; and
- (c) provision for lighting, heating, water supply, drainage, sewerage and other like services in respect of the building.

(4) A reference in this Act to a successor in title of a building owner or purchaser includes—

- (a) a reference to an owner for the time being of the building; and
- (b) if there is in force a licence granted under section 138 of the *Land Act* 1958 to occupy for residence purposes the land on which the building is constructed—a reference to a person who is for the time being the holder of the licence or of a lien by way of security on the improvements on the land; and
- (c) if the land on which the building is constructed is a residence area within the meaning of Division 11 of Part I of the *Land Act* 1958—a reference to a person who is for the time being the holder of a right to occupy the residence area or of an encumbrance by way of security of the right to occupy the residence area.

Application of Act.

4. This Act does not apply in relation to domestic building work performed or to be performed by—

- (a) the Director of Housing incorporated under the *Housing Act* 1983; or
- (b) a prescribed person; or
- (c) any person if the function of performing that work is vested in that person by or under any Act of the Parliament of Victoria or of the Parliament of the Commonwealth.

PART 2—GUARANTEES

Guarantee required in relation to certain contracts.

5. (1) A person must not—

- (a) enter into a contract to perform domestic building work; or
- (b) sell a dwelling-house building approval in relation to the construction of which was granted within the preceding 7 years—

unless a guarantee required by this Act to be given by the approved guarantor is in force in relation to the domestic building work or the dwelling-house, as the case requires.

Penalty: 100 penalty units.

(2) Despite sub-section (1), a contract entered into in contravention of that sub-section is not void by reason only of the contravention but it is voidable at the option of the building owner or purchaser (as the case requires) at any time before completion of the contract or within 60 days after entering into the contract, whichever is the earlier. 5

Guarantees. 10

6. (1) The approved guarantor gives under this Act a guarantee in relation to the following types of domestic building work:

- (a) The work by an approved builder of constructing a dwelling-house under a domestic building work contract; 15
- (b) The work by an approved builder of constructing a dwelling-house that is sold by the builder under a contract entered into with a purchaser during the guarantee period; 15
- (c) The work by a person other than an approved builder of constructing a dwelling-house that is sold by that person under a contract entered into with a purchaser during the guarantee period; 20
- (d) The work by an approved builder of improving a building under a domestic building work contract;
- (e) The work referred to in paragraph (d) of the definition of "domestic building work" in section 3 (1) and performed by an approved builder under a domestic building work contract; 25
- (f) The work of a class prescribed for the purposes of the definition of "domestic building work" in section 3 (1) and performed by an approved builder under a domestic building work contract. 30

(2) The guarantee referred to in sub-section (1) is to be taken to have been given—

- (a) in the case referred to in paragraph (a), (d), (e) or (f) of that sub-section, on the domestic building work contract being entered into; and 35
- (b) in the case referred to in paragraph (b) or (c) of that sub-section, on the completion of the contract for sale.

Nature of guarantees.

7. (1) A guarantee given under this Act by the approved guarantor in relation to domestic building work performed or to be performed by an approved builder under a domestic building work contract is a 40

guarantee to the building owner and the owner's successors in title of the performance of the builder's obligations under the domestic building work contract.

5 (2) Subject to section 9, a guarantee given under this Act by the approved guarantor in relation to a dwelling-house constructed by an approved builder or by another person and sold by the builder or that other person under a contract for sale entered into during the guarantee period is a guarantee to the purchaser of the dwelling-house and the purchaser's successors in title of the workmanship of the builder or that
10 other person in relation to the construction of the dwelling-house.

(3) The liability of the approved guarantor under a guarantee referred to in sub-section (1) or (2) is the liability to make good loss or damage suffered by the building owner or purchaser or a successor in title of the building owner or purchaser on account of—

15 (a) in the case of a guarantee referred to in sub-section (1), the failure of the builder to fulfil the builder's obligations under the contract; or

(b) in any case, a defect caused by bad workmanship that appears in the building during the guarantee period.

20 (4) The maximum liability of the approved guarantor under a guarantee is \$40 000.

(5) The approved guarantor is not liable under a guarantee for loss or damage of less than \$500 arising out of a single defect unless—

25 (a) the claim is for loss or damage arising out of the work of constructing a dwelling-house and the defect appears within one year of the dwelling-house first being occupied; or

(b) the claim is for loss or damage arising out of the work of improving a building and the defect appears within one year of the work being completed.

30 (6) A guarantee given by the approved guarantor under this Act has effect subject to any terms and conditions that are prescribed.

(7) Despite anything to the contrary in this section, if an approved builder enters into a domestic building work contract under which the builder agrees to construct three or more dwelling-houses for a person,
35 the approved guarantor does not, for the purposes of this Act, guarantee to that person the performance of the builder's obligations under the domestic building work contract.

(8) Despite anything to the contrary in this section, if an approved builder that is a corporation enters into a domestic building work contract for the construction of a dwelling-house with a corporation to which the approved builder is deemed to be related by virtue of section 7 (5) of the *Companies (Victoria) Code*, the approved guarantor does not, for the purposes of this Act, guarantee to that corporation the performance of the builder's obligations under the domestic building
45 work contract.

(9) Nothing in sub-section (7) or (8) affects the guarantee to the successors in title of a person referred to in those sub-sections of the performance of the builder's obligations under the domestic building work contract.

(10) Despite anything to the contrary in this Act, this Act does not provide for a guarantee to be given in respect of materials supplied under a domestic building work contract if that contract does not also provide for their installation. 5

Builder liable on sale of house constructed by builder.

8. If a builder enters into a contract for the sale of a dwelling-house constructed by the builder and under this Act there is, or is required to be, in force a guarantee in relation to the dwelling-house, the builder is liable to the purchaser or a successor in title of the purchaser in respect of loss or damage on account of a defect caused by bad workmanship that appears in the dwelling-house during the guarantee period. 10 15

Owner builders.

9. (1) For the guarantee referred to in section 7 (2) to be applicable to the purchaser of a dwelling-house constructed by a person other than an approved builder and sold by that person under a contract for sale entered into during the guarantee period, the following requirements must be complied with: 20

- (a) The builder must, within the period of three months before entering into the contract for sale, have obtained from a recognised person and given to the purchaser before the purchaser signed the contract, a report containing such matters on the dwelling-house as are required by the Minister by notice published in the *Government Gazette*; 25
- (b) The defect must not have been identified in that report;
- (c) The builder must have paid to the approved guarantor the amount fixed by it from time to time for the purposes of this paragraph. 30

(2) If the purchaser referred to in sub-section (1) has improved the dwelling-house, for the guarantee referred to in section 7 (2) to be applicable to a successor in title of the purchaser the following requirements must be complied with: 35

- (a) The purchaser must, within the period of three months before entering into the contract for sale, have obtained from a recognised person and given to the successor in title before the successor in title signed the contract, a report containing such matters on the dwelling-house as are required by the Minister by notice published in the *Government Gazette*; 40
- (b) The defect must not have been identified in that report or the report obtained by the builder under sub-section (1) (a).

Extension of guarantee in certain circumstances.**10. (1) If—**

- 5 (a) a builder has under section 24 given to the approved guarantor notice of the builder's intention to construct a dwelling-house otherwise than under a domestic building work contract entered into by the builder; and
- (b) the builder has not entered into a contract for the sale of the dwelling-house or any such contract has been rescinded; and
- 10 (c) another person becomes entitled to sell the land on which the dwelling-house is constructed and proposes to do so within the guarantee period—

15 the person referred to in paragraph (c) must, within the period of three months before entering into a contract for the sale of the land, obtain from a recognised person and give to the purchaser before the purchaser signs the contract, a report containing such matters on the dwelling-house as are required by the Minister by notice published in the *Government Gazette*.

Penalty: 10 penalty units.

- 20 (2) If sub-section (1) is not complied with, the purchaser may rescind the contract for the sale of the land at any time before the purchaser becomes entitled to possession or to the receipt of rents and profits.

- 25 (3) A provision in a contract for the sale of land or in any other document whereby the right conferred by sub-section (2) on the purchaser is excluded, limited, modified or restricted is void and of no effect.

- 30 (4) If sub-section (1) is complied with and the contract for sale is entered into during the guarantee period, the purchaser is, for the purposes of this Act, to be treated as if the purchaser had purchased the dwelling-house under a contract for sale entered into by the builder except that the guarantee applicable by virtue of this sub-section does not extend to defects identified in the report on the dwelling-house obtained under this section.

Builder to have liability for subsidence and settlement.

- 35 **11. (1)** In this section “**builder**” means, in relation to a dwelling-house, the person or persons who laid the foundations of the dwelling-house.

- 40 (2) For the purposes of this Act, if there is movement of the foundations of a dwelling-house, other than movement caused by earthquake, then—

- (a) there is a defect in the dwelling-house; and
- (b) the defect is to be taken to have been caused by bad workmanship; and

- (c) the builder is liable for loss or damage suffered by a person on account of that defect if a guarantee given under this Act is in force in respect of the dwelling-house.

(3) Nothing in sub-section (2) (c) makes a builder liable for loss or damage that the builder proves was caused by an act or omission of a person other than— 5

- (a) the builder; or
- (b) a person employed by or under contract to the builder.

Indemnity by approved guarantor.

12. (1) Subject to this Act, the approved guarantor must indemnify a builder against any liability to which the builder may become subject as a result of legal proceedings brought in respect of domestic building work in relation to which a guarantee is given under this Act. 10

(2) Sub-section (1) applies only if—

- (a) the person who makes the claim notified the approved guarantor of the legal proceedings within three months of their being commenced; or 15
- (b) the approved guarantor is not prejudiced in dealing with the claim by the failure of the claimant to notify the approved guarantor in accordance with paragraph (a). 20

(3) Without limiting the generality of sub-section (2) (b), the approved guarantor can establish prejudice for the purposes of that sub-section by establishing that it could have recovered any sum payable by it in discharge of its liability had it been notified of the proceedings by the date by which it should have been so notified but that it cannot make that recovery on account of the delay in notification. 25

Procedure for resolving claims.

13. (1) The approved guarantor must, immediately on the commencement of this section and as often thereafter as the approved guarantor considers necessary, submit to the chief administrator for approval particulars of the procedures that the approved guarantor proposes to adopt in the handling and resolution of claims. 30

(2) The chief administrator may approve the proposed procedures with or without amendment.

(3) The approved guarantor must adopt the procedures approved by the chief administrator. 35

(4) If—

- (a) a claim has been made to the approved guarantor for loss or damage; and

- (b) the claimant has also brought legal proceedings against the builder involved in the claim—

the approved guarantor must proceed to make a decision in respect of the claim if the matters in dispute in the legal proceedings do not include any matter to which the claim relates.

- (5) If—

- (a) the approved guarantor has made an offer in respect of a claim by a person for loss or damage; and

- (b) within six months after the offer was made the offer has not been accepted or rejected—

the approved guarantor may refer the matter to the appeals committee established by it under its rules and that committee must treat the matter as if the claimant had not been satisfied with the offer and had appealed to it under section 16.

15 Claims.

14. (1) A person cannot claim under a guarantee given under this Act for loss or damage on account of the failure of the builder to fulfil the builder's obligation under a domestic building work contract to construct a dwelling-house unless that person, within six months of the builder ceasing construction of the dwelling-house, notified the approved guarantor of that failure in writing.

(2) Except as provided by sub-section (3), a person cannot claim under a guarantee given under this Act for loss or damage on account of a defect unless that person, within six months of becoming aware of the defect—

- (a) notified the builder of the defect orally or in writing; or

- (b) notified the approved guarantor of the defect in writing.

(3) Sub-section (2) has no effect unless in a particular case the approved guarantor can establish that the failure to notify the defect in accordance with that sub-section prejudiced it in dealing with the claim.

(4) For the purposes of sub-section (3) the approved guarantor is prejudiced in dealing with a claim if—

- (a) the defect became materially worse between the date by which notification of it should have been given in accordance with sub-section (2) and the date on which notification of it was given; or

- (b) the builder was able on the date by which notification should have been given to pay the cost of rectification but was unable to do so at the date on which notification was given.

(5) If a person gives notice of a defect, that person is to be taken for the purposes of this Act to have given notice of every defect of which the defect notified is a symptom, whether or not the claim in respect of the defect that was actually notified has been settled.

Costs.

15. The approved guarantor must reimburse a person in whose favour a guarantee is given under this Act for any costs incurred by that person in respect of a successful claim under the guarantee, if the costs were incurred at any time after—

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(a) the expiration of three months after the claim was made; or

(b) a rejection by the approved guarantor of the claim—
whichever occurs first.

Appeals.

16. (1) A person—

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(a) whose claim to the approved guarantor for loss or damage the approved guarantor has decided to reject; or

(b) being a claimant, to whom the approved guarantor has decided to make an offer with which the claimant is not satisfied; or

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(c) being a builder, who is dissatisfied with a decision of the approved guarantor not to reject a claim made for loss or damage on account of a defect alleged to be caused by bad workmanship on the part of that builder; or

(d) being a builder, who is dissatisfied with a decision of the approved guarantor not to approve that builder in relation to a class of domestic building work; or

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(e) being a builder, who is dissatisfied with a decision of the approved guarantor to revoke the approval of that builder in relation to a class of domestic building work—

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may, within 60 days after the decision is made, appeal to the appeals committee established by the approved guarantor under its rules.

(2) If, within three months after making a claim for loss or damage, a claimant has not received notice from the approved guarantor of its decision on the claim, the approved guarantor is to be treated as having made, on the last day of that period, a decision to reject the claim.

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(3) In calculating a period of time for the purposes of sub-section (2), there must not be included in the period any period during which legal proceedings brought by the claimant against the builder involving any matter to which the claim relates had not been settled or determined.

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(4) In determining an appeal the appeals committee may affirm, vary or quash the decision appealed against and may make or substitute any decision which the approved guarantor would have been empowered to make.

(5) The appeals committee has no power to allow costs to or against any party to an appeal made to it under this section.

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(6) The appeals committee has no power on an appeal under sub-section (1) (c) to vary or quash the decision of the approved guarantor not to reject the claim.

5 (7) An application may be made to the Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act* 1984 for review of a decision of the appeals committee on an appeal made to it under this section.

10 (8) Despite anything to the contrary in the *Administrative Appeals Tribunal Act* 1984, the approved guarantor is entitled to apply to the Administrative Appeals Tribunal for review of a decision referred to in sub-section (7) and, if it does so, it must in any event pay its own costs in respect of the proceeding before the Tribunal and those of every other party to the proceeding.

Discretionary payments.

15 17. (1) Subject to sub-section (2), the approved guarantor may make a payment or payments in respect of a claim made to it which it is not liable to make but which it would have been liable to make if—

- 20 (a) the builder had been an approved builder; or
(b) the defect had been caused by bad workmanship on the part of the builder.

(2) The approved guarantor may only make a payment under sub-section (1) if—

- 25 (a) the appeals committee established by the approved guarantor under its rules has affirmed the decision of the approved guarantor to deny liability on one or both of the grounds referred to in sub-section (1); and
(b) the chairman of the meetings of directors of the approved guarantor has recommended that the payment be made.

PART 3—DOMESTIC BUILDING WORK CONTRACTS

30 Requirements in relation to domestic building work contracts.

18. (1) The following requirements must be complied with in relation to a domestic building work contract:

- 35 (a) The contract must be in writing;
(b) The contract must set out—
 (i) the names of the parties; and
 (ii) a description of the subject-matter; and
 (iii) the contract price; and
 (iv) the date of the contract;
40 (c) Subject to sub-section (5), the contract must comply with any requirements of the regulations as to the contents of domestic building work contracts;

- (d) Subject to sub-section (5), the contract must comply with any requirements of a notice published in the *Government Gazette* under sub-section (4) as to the contents of domestic building work contracts;
 - (e) The contract must be signed by the builder and the building owner personally or by an agent authorised to act on behalf of the builder or building owner; 5
 - (f) The building owner must be given a copy of the signed contract as soon as reasonably practicable after it has been signed by both parties together with any notice that the Minister may, by Order published in the *Government Gazette*, require to be given; 10
 - (g) The copy of the contract and the notice given to the building owner must (apart from signatures or initials) be readily legible. 15
- (2) If a requirement of paragraph (a), (b), (e), (f) or (g) of sub-section (1) is not complied with—
- (a) the builder is guilty of an offence and liable to a penalty of not more than 50 penalty units; and
 - (b) the contract is void from the beginning; and 20
 - (c) the builder is not entitled to recover in any court the cost of any work performed or materials supplied purportedly under the contract.
- (3) If a requirement of paragraph (c) or (d) is not complied with—
- (a) the builder is guilty of an offence and liable to a penalty of not more than 10 penalty units; and 25
 - (b) the contract has effect as if the requirement had been complied with.
- (4) The Minister may, by notice published in the *Government Gazette*, specify requirements to be complied with as to the contents of domestic building work contracts, being requirements that are not inconsistent with any other such requirements specified in the regulations. 30
- (5) The Governor in Council in the regulations or the Minister in a notice under sub-section (4) may, in specifying a requirement to be complied with as to the contents of domestic building work contracts, provide for the exemption of a contract from that requirement if the building owner, in such manner as is specified in the regulations or the notice (as the case requires), agrees to the exclusion of that requirement. 35
- (6) A builder must not enter into a domestic building work contract that contains an amount or an estimated amount for a prime cost item or a provisional sum if the amount or estimated amount is less than the least that it could reasonably cost to perform the work to which that item or sum relates. 40

Penalty: 20 penalty units.

Variation of domestic building work contract.

5 **19.** (1) Subject to sub-section (2), if at any time after a domestic building work contract is entered into a variation is made to the contract, the builder is not entitled to recover in any court the cost of any work performed or materials supplied under the variation unless the variation is in writing and signed by the builder and the building owner personally or by an agent authorised to act on behalf of the builder or building owner.

10 (2) Sub-section (1) does not apply to a variation that is made necessary by—

 (a) any written directions lawfully given by a building surveyor; or

15 (b) circumstances that could not reasonably have been foreseen by the builder at the time the contract was entered into—

if the builder gives to the building owner within seven days after the variation is made a statement setting out the reason for, and the cost to be incurred in consequence of, the variation and a copy of the directions (if any) given by the building surveyor.

20 **Limit on amount of deposit.**

20. (1) A person must not demand or receive under a domestic building work contract, or enter into a domestic building work contract under which the person is entitled to demand or receive—

25 (a) if the contract price is \$20 000 or more, more than 3% of the contract price; or

 (b) if the contract price is less than \$20 000, more than 10% of the contract price—

before the commencement of the domestic building work that is the subject of the contract.

30 Penalty: 100 penalty units.

 (2) For the purposes of this section, the definition of “domestic building work” in section 3 (1) includes the work of moving from one site to another a building described in paragraph (d) of that definition.

35 (3) If a domestic building work contract contains a provision that contravenes sub-section (1), the contract is voidable at the option of the building owner at any time before completion of the contract, unless the court is of the opinion that in the particular circumstances it would be inequitable for the contract to be avoided.

40 (4) If a person is convicted of an offence against sub-section (1), the convicting court may order the person convicted to pay to the building owner a sum not exceeding the total amount already paid by the building owner under the terms of the contract.

(5) The reference in sub-section (4) to a person who is convicted of an offence includes a reference to a person who, without being convicted of the offence, is found guilty of or has pleaded guilty to the offence and the reference in that sub-section to the convicting court is to be construed accordingly.

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Limit on progress payments.

21. (1) In this section—

“Base stage”, in relation to a dwelling-house, means the stage when—

- (a) in the case of a concrete slab floor, the floor is completed; and 10
- (b) in the case of a timber floor, the concrete footings are poured and the base brickwork is built to floor level.

“Frame stage”, in relation to a dwelling house, means the stage when the house’s frame is completed and approved by the building surveyor. 15

“Lock-up stage”, in relation to a dwelling-house, means the stage when the external wall cladding and roof covering is fixed, the flooring laid and the doors and windows fixed. 20

“Fixing stage”, in relation to a dwelling-house, means the stage when all internal architraves, skirtings, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards are fitted and fixed in position.

(2) This section does not apply in relation to a contract between a builder and a government department or public statutory authority. 25

(3) Unless the parties to a domestic building work contract otherwise agree in writing in the prescribed manner, a person who constructs a dwelling-house must not demand or receive under the contract, or enter into a contract under which that person is entitled to demand or receive, in the case of a contract described in column 1 of the Table more than the percentage of the contract price specified in column 2 of the Table at the completion of a stage specified in column 3 of the Table in relation to that contract. 30

Penalty: 20 penalty units.

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TABLE

Column 1 <i>Type of contract</i>	Column 2 <i>Percentage of contract price</i>	Column 3 <i>Stage</i>
Contract to build to lock-up stage	20%	Base stage
„	25%	Frame stage
Contract to build to fixing stage	12%	Base stage
„	18%	Frame stage
„	40%	Lock-up stage
Contract to construct through all stages	10%	Base stage
„	15%	Frame stage
„	35%	Lock-up stage
„	25%	Fixing stage

PART 4—APPROVED GUARANTOR

Approved guarantor.

22. (1) Housing Guarantee Fund Limited is the approved guarantor for the purposes of this Act if—

- 5 (a) its articles of association provide that—
 - (i) the number of directors of the company is 7; and
 - (ii) one director is to be appointed by the Minister; and
 - 10 (iii) one director is to be appointed by the chief administrator; and
 - (iv) the chairman of the meetings of directors is to be appointed by the Minister for a period that does not exceed 3 years; and
 - 15 (v) a director whom an industry association is entitled to appoint is to be the person chosen by the Minister from a panel of two names submitted to the Minister by the company; and
- (b) its articles of association contain such other provisions as are required by the Minister by notice given by post to the company; and
- 20 (c) it has in force a contract of insurance approved by the Minister relating, subject to sub-section (4), to the liabilities incurred by it as the approved guarantor; and
- 25 (d) it has in force rules relating to the terms and conditions (including terms and conditions as to standards of competence and financial standing) under which it approves

- or proposes to approve builders in respect of whose obligations and workmanship it gives or proposes to give guarantees; and
- (e) the rules referred to in paragraph (d) require builders or a specified class of builders to pay to the company in respect of a specified class of domestic building work performed by them a specified fixed fee, irrespective of the value of the work; and 5
- (f) it has in force rules relating to the establishment by it of an appeals committee to hear appeals— 10
- (i) against a refusal or failure by it—
- (A) to accept a claim made to it for loss or damage; or
- (B) to reject a claim made to it for loss or damage; or
- (C) to approve a builder in relation to a class of domestic building work; or 15
- (ii) against a decision by it to revoke the approval of a builder in relation to a class of domestic building work; and
- (g) the rules referred to in paragraph (f) provide for each member of the appeals committee to be appointed by the Minister from a panel of three names submitted to the Minister by the company with respect to that position on the committee. 20
- (2) The approved guarantor—
- (a) must not make, amend or revoke the rules referred to in sub-section (1) (d) or (1) (f) without the consent of the Minister; and 25
- (b) must not, without the consent of the Minister, set terms and conditions (whether as to the contents or form of domestic building work contracts or otherwise) with which it requires or proposes to require builders approved by it to comply; and 30
- (c) must not, without the consent of the Minister, amend or revoke the terms and conditions referred to in paragraph (b); and 35
- (d) must comply with any other terms and conditions that are prescribed.
- (3) Subject to sub-section (4), if at any time the approved guarantor ceases to have in force a contract of insurance approved by the Minister relating to the liabilities incurred by it as the approved guarantor, it must forthwith notify the Minister and take steps to enter into another such contract of insurance. 40
- (4) The Minister may, by notice served on the approved guarantor, exempt it, on any terms and conditions that are specified in the notice,

from the requirement to have in force a contract of insurance in relation to any liability or class of liabilities specified in the notice.

5 (5) If any provision of this section is not complied with during any period during which Housing Guarantee Fund Limited purports to perform the functions of the approved guarantor, that non-compliance does not affect—

- 10 (a) the liability of Housing Guarantee Fund Limited under a guarantee given under this Act during that period; or
- (b) the liability of a builder to any person, including Housing Guarantee Fund Limited.

Approval of builders.

23. The approved guarantor may approve builders:—

- 15 (a) as builders performing domestic building work consisting of the construction of dwelling-houses; or
- (b) as builders performing any other class of domestic building work specified by the approved guarantor—

and may revoke any such approval.

Builders to notify approved guarantor of certain matters.

20 24. (1) An approved builder must serve on the approved guarantor notice in the prescribed form—

- (a) of each domestic building work contract that the builder enters into; and
- 25 (b) of all domestic building work that the builder intends to perform, if it is not to be performed under a domestic building work contract entered into by the builder; and
- (c) of each contract that the builder enters into for the sale of a dwelling-house in Victoria constructed by the builder.

30 (2) A builder must give a notice referred to in paragraph (a) or (c) of sub-section (1) within 14 days after the contract is entered into and a notice referred to in paragraph (b) of that sub-section before commencing to perform the building work.

Penalty: 100 penalty units.

Registers to be kept by approved guarantor.

35 25. (1) The approved guarantor must, in such form as is required by the Minister, keep—

- (a) a register of builders approved by it; and
- 40 (b) a register of work in relation to which a guarantee given by it under this Act is in force and of which the approved guarantor has received notice under section 24 or of which it otherwise has actual notice.

(2) The approved guarantor must permit a person to inspect a register required to be kept by it under sub-section (1) at any time during ordinary business hours at the principal place of business in Victoria of the approved guarantor or at such other place as the Minister may, by notice published in the *Government Gazette*, approve for the purposes of this sub-section.

5

(3) The approved guarantor must, on payment of the prescribed fee, issue a certificate in accordance with the regulations signed by a person authorised by the approved guarantor in that behalf certifying—

(a) whether or not a person named in the certificate is approved as a builder by the approved guarantor; or

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(b) whether or not a person named in the certificate has notified the approved guarantor under section 24 of a matter specified in the certificate; or

(c) whether or not work specified in the certificate is work in relation to which a guarantee given by the approved guarantor under this Act is in force; or

15

(d) whether or not a person named in the certificate has notified the approved guarantor under section 26 (2) of an application for building approval.

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(4) The approved guarantor must, at the request of the applicant for the certificate, include in a certificate issued under sub-section (3) a statement as to whether or not it has received a claim under a guarantee in force in relation to the building to which the certificate relates.

(5) A document purporting to be a register or part of a register required to be kept by the approved guarantor under sub-section (1) and purporting to be certified by two directors of the approved guarantor as such a register or part is admissible in evidence in any proceedings for an offence against this Act and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

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(6) A certificate purporting to be issued by the approved guarantor under sub-section (3) is admissible in evidence in any proceedings for an offence against this Act and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

PART 5—MISCELLANEOUS

35

Building approval.

26. (1) This section has effect despite anything to the contrary in Division 2 of Part III of the *Building Control Act* 1981.

(2) An applicant for building approval must serve notice of the application on the approved guarantor in the prescribed form.

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(3) A Co-ordinator must not grant building approval for domestic building work unless the applicant for approval has furnished to the Co-ordinator a certificate issued by the approved guarantor under

section 25 (3) certifying that the approved guarantor has been notified of the application for building approval under sub-section (2) of this section.

5 (4) A Co-ordinator must include in any building approval granted in relation to domestic building work a statement to the effect that this Act applies and the Co-ordinator must, together with the building approval, furnish or cause to be furnished to the applicant any information with respect to the operation and effect of this Act that the Minister from time to time requires.

10 (5) Immediately on granting building approval for domestic building work the Co-ordinator must serve on the approved guarantor notice in writing of the granting of that approval.

15 (6) If a person has been granted building approval for domestic building work and subsequently enters into a contract with a builder for the performance by the builder of that work, then not later than 14 days after that contract is entered into—

(a) the person to whom building approval has been granted must give the Co-ordinator notice in writing of that contract; and

20 (b) the builder must furnish to the Co-ordinator a certificate issued by the approved guarantor under section 25 (3) certifying that the work is work in relation to which a guarantee given by the approved guarantor is in force.

Supervision contracts.

25 27. (1) A person must not enter into a contract with another person (in this section referred to as 'a supervision contract') under which the first-mentioned person is to manage or supervise the construction of a dwelling-house on land owned by that other person unless—

(a) the first-mentioned person is an approved builder; or

30 (b) the other person has entered into, or in the supervision contract agrees to enter into, a contract with an approved builder for the construction of the dwelling-house.

Penalty: 100 penalty units.

(2) If a supervision contract contravenes sub-section (1)—

35 (a) the contract is voidable, at any time before completion of the contract, at the option of the person who owns the land on which the dwelling-house is to be constructed; and

40 (b) the person who is to manage or supervise the construction of the dwelling-house is not entitled to recover in any court the cost of any work performed under the contract.

(3) If a supervision contract complies with sub-section (1) by reason that the person who owns the land on which the dwelling-house is to be constructed agrees in the supervision contract to enter into a contract

with an approved builder for the construction of the dwelling-house and that person fails to do so, then—

- (a) that person is guilty of an offence and liable to a penalty of not more than 100 penalty units; and
- (b) the contract is voidable at the option of the other person at any time before completion of the contract. 5

False representations.

28. (1) A person must not—

- (a) represent that a person has a status under or for the purposes of this Act that the person does not have; or 10
- (b) represent that a building has a status under or for the purposes of this Act that it does not have; or
- (c) falsely represent that a guarantee of a particular type is in force under this Act; or
- (d) make a false or misleading statement concerning the making of a claim to the approved guarantor under this Act. 15

Penalty: 100 penalty units.

(2) It is a defence to a prosecution of a person for an offence against sub-section (1) if the person proves that the person believed on reasonable grounds that the representation was true or that the statement was not false or misleading. 20

Recognised persons.

29. The Minister may, by Order published in the *Government Gazette*, recognise a specified person or body as suitable to give a report on a dwelling-house for the purposes of sections 9 and 10. 25

Offences by corporation.

30. If an offence against this Act committed by a corporation is proved to have been committed with the consent or connivance of, or to have been attributable to any wilful neglect on the part of, an officer of the corporation, that officer is also guilty of that offence and liable to the penalty for that offence. 30

Time limit for proceedings.

31. Despite anything to the contrary in any Act, proceedings for an offence against this Act may be commenced within the period of 3 years after the commission of the alleged offence and not afterwards. 35

Act not to limit liability of builder.

32. Nothing in this Act limits the liability that a builder would have had to any person if this Act had not been enacted.

Agreement to exclude, etc. operation of Act void.

33. A provision in a contract that, but for this section, would have the effect of excluding, limiting, modifying or restricting the operation of this Act, or a liability arising under this Act, is void.

5 Regulations.

34. (1) The Governor in Council may make regulations for or with respect to—

- (a) prescribing terms and conditions with which the approved guarantor must comply;
- 10 (b) prescribing a class of work to be domestic building work;
- (c) prescribing a class of building not to be a dwelling-house;
- (d) prescribing provisions to be included in a domestic building work contract or a contract included in a class of domestic building work contracts and prescribing the circumstances in which it is not necessary for those provisions to be so included;
- 15 (e) prescribing the manner in which the parties to a domestic building work contract may agree to exempt that contract from the operation of section 21 (3);
- 20 (f) prescribing terms and conditions to which guarantees, or guarantees included in a class of guarantees, given under this Act are subject;
- (g) prescribing the form of certificates to be issued by the approved guarantor under section 25 (3);
- 25 (h) prescribing an amount larger than \$3000 for the purposes of paragraph (b) of the definition of “domestic building work contract” in section 3 (1);
- (i) exempting a person or a person included in a class of persons from the operation of this Act and prescribing the extent of the exemption;
- 30 (j) prescribing fees;
- (k) prescribing forms;
- (l) generally prescribing any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.
- 35

(2) A power conferred by this Act to make regulations may be exercised—

- 40 (a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified case or class of case;
- (b) so as to make, as respects the cases in relation to which it is exercised—

- (i) the same provision for all cases in relation to which the power is exercised, or different provisions for different cases or classes of case, or different provisions for the same case or class of case for different purposes; or
 - (ii) any such provision either unconditionally or subject to any specified condition. 5
- (3) Regulations made under this Act may be made—
 - (a) so as to apply—
 - (i) at all times or at a specified time; or
 - (ii) throughout the whole of the State or in a specified part of the State; or 10
 - (iii) as specified in both sub-paragraphs (i) and (ii) ;
 - (b) so as to confer a discretionary authority or impose a duty on a specified person or body or a specified class of persons or bodies; 15
 - (c) so as to impose a penalty not exceeding 10 penalty units for a contravention of the regulations.

Transitional provisions.

- 35. (1) The repeal by section 36 of this Act of Division 1A of Part XLIX. of the *Local Government Act* 1958 does not affect the operation of any guarantee given under that Division in respect of a dwelling-house. 20
- (2) Part 2 does not apply to—
 - (a) work performed under a domestic building work contract that was entered into before the commencement of that Part; or 25
 - (b) the work of constructing a dwelling-house if that dwelling-house was sold under a contract that was entered into before the commencement of that Part; or
 - (c) work in relation to which a guarantee was in force under Division 1A of Part XLIX. of the *Local Government Act* 1958 immediately before the commencement of that Part. 30
- (3) Part 3 does not apply to a domestic building work contract that was entered into before the commencement of that Part.
- (4) Section 27 does not apply to a supervision contract within the meaning of that section that was entered into before the commencement of that section. 35
- (5) A builder recognised by the approved guarantor under its rules immediately before the commencement of section 23 is on and from that commencement, but subject to this Act, to be deemed to be a builder approved by the approved guarantor under section 23 (a) until that approval is revoked. 40

(6) The amendment of the *Sale of Land Act* 1962 made by section 37 (1) of this Act does not apply to a contract for the sale of land entered into before the commencement of that section.

Amendment of *Local Government Act* 1958.

- 5 **36.** Division 1A of Part XLIX. of the *Local Government Act* 1958 is repealed.

No. 6299.
Reprinted to
No. 10081.
Subsequently
amended by
Nos. 10099,
10107, 10167,
10187, 10191,
10205, 10216,
10219, 10224,
10262, 13/1986,
16/1986,
36/1986,
108/1986,
109/1986,
110/1986,
121/1986
and 128/1986.

Amendment of *Sale of Land Act* 1962.

- 37.** (1) In section 32 of the *Sale of Land Act* 1962, after sub-section (1) insert—

No. 6975.
Reprinted to
No. 9858
Subsequently
amended by
No. 10087.

- 10 “(1A) A vendor under a contract for the sale of land must give to the purchaser before the purchaser signs the contract a statement signed by the vendor giving particulars of any building approval granted under the *Building Control Act* 1981 in the preceding seven years in relation to a building on the land.”.

- 15 (2) In section 9A (1) of the *Sale of Land Act* 1962—

(a) in paragraph (a) (i)—

- (i) omit “section 24 of the *Building Control Act* 1981 or”;
and

- 20 (ii) for “that Act (as the case may be)” substitute “the *Building Control Act* 1981”; and

(b) in paragraph (d) (ii)—

- (i) omit “under section 24 of the *Building Control Act* 1981 or”; and

- 25 (ii) for “that Act (as the case may be)” substitute “the *Building Control Act* 1981”.

Repeal of *Building Contracts (Deposits) Act* 1962.

- 38.** The *Building Contracts (Deposits) Act* 1962 is repealed.

No. 6973.
Reprinted to
No. 8938.

Amendment of *Building Control Act* 1981.

- 39.** Sections 23 and 24 of the *Building Control Act* 1981 are repealed.

No. 9720.
Reprinted to
No. 10090.
Subsequently
amended by
Nos. 10190,
10216, 10239,
10262, 16/1986,
90/1986 and
110/1986.

