

update

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Building and Construction update: Beware the preliminary agreement

The question of whether a builder can enter into a “preliminary work agreement” and whether such an agreement is “domestic building works” which must comply with the Domestic Building Contracts Act 1995 (“the Act”) has been the subject of a recent decision in the Victorian Supreme Court.

In this case, the builder entered into a contract with owners to carry out preliminary works for the commencement of a new home. The contract required the builder to produce full working drawings, details and designs required to construct the home, obtain structural engineering reports, submit and obtain building and town planning approval, undertake colour consultancy selection, and document and supervise the completion of those items. The price for the preliminary work was \$20,333.

Consumer Affairs considered this agreement infringed the requirements of Section 31(1) of the Act, which states that a builder must not enter into a major domestic building contract for works in a sum greater than \$5,000 unless the contract complies with that section. To do so carries a penalty of up to 50 penalty units. Consumer Affairs brought a number of charges against the builder in the Melbourne Magistrates Court.

While the builder conceded that its contract did not comply with Section 31, it argued it was not Parliament’s intention for the Act to apply to the type of preparatory work being performed in this instance. It argued a number of parts in Section 31 are

inapplicable and unable to be complied with for preparatory work, such as the requirement for builders’ warranty insurance and the need for a planning permit.

At first instance the Magistrate dismissed the charges. However, Consumer Affairs successfully appealed to the Supreme Court.

Justice Kaye held that the preliminary contract for the preparation of plans and specifications was a “major domestic building contract” and it was clear that the preliminary work being performed was intended to be covered by the Act.

He held that Sections 3 and 5 of the Act clearly state that the Act applies to domestic building work including the erection or construction of a home and associated activities, renovation or extension, and the improvement or repair of a home and the preparation of plans or specifications for the carrying out of this type of work. Justice Kaye further held that where work is only preparatory, certain requirements of Section 31 will simply be inapplicable. This does not mean however that the entire Section is irrelevant.

A builder who therefore intends to carry out preliminary works for an owner must ensure the contract used complies with Section 31 to avoid both the risk of prosecution by Consumer Affairs and an owner terminating the contract or refusing to pay for the preliminary works.

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