

## Owner-builder. Liability for defects after sale (July 2009)

Owner-builders are subject to significant obligations under the *Building Act 1993 (Victoria)* when selling their home. What is not sufficiently understood is the continuing liability that owner-builders face with respect to any defects which might be in existence or arise following sale.

Most domestic homes are constructed by registered building practitioners (registered under the *Building Act*). In those cases the liability for defective building works will rest with the registered building practitioner.

In some cases however people take it upon themselves to become “owner-builders”. In those cases the owner assumes the responsibilities of also being a builder of the home. In some cases the owner performs some of the work themselves whilst engaging subcontractors to carry out some or all of the work. Significant issues arise if the owner-builder wishes to sell the home within six and half years after the building works have been completed.

It is important to acknowledge that legislation exists to provide “consumer protection” for the purchaser of a domestic home.

Essentially legislation that affects a registered builder also applies to an owner-builder. It is important for an owner-builder to be aware of their obligations and responsibilities should they determine to sell their owner-built home, as it is not uncommon for an owner-builder to incur significant liability following the sale of the owner built home where defects emerge after the sale.

Owner-builders must comply with a number of requirements set out in the *Building Act 1993*.

Those requirements include:

- Ensure that the contract of sale sets out the compulsory statutory warranties that are required to be given to the purchaser.
- Obtain and provide to the purchaser a defects report on the building work.
- Obtain owner-builder domestic building insurance covering the domestic building work.

The purpose of these obligations is to ensure that the purchaser is protected if the domestic building work carried out by the owner-builder (or carried out by subcontractors on behalf of the owner-builder) proves to be defective.

As a consequence of Section 137C(1) of the *Building Act 1993* an owner-builder provides a number of warranties to a purchaser.

- (i) The owner-builder warrants that all domestic building work carried out in relation to the construction by or on behalf of the owner-builder was carried out in a proper and workmanlike manner; and
- (ii) The owner-builder warrants that all materials used in the domestic building work was suitable for the purpose and unless otherwise stated in the contract of sale, that new materials were used; and
- (iii) The owner-builder warrants that the domestic building work was carried out in accordance with all laws and legal requirements, including, the *Building Act 1993* and the regulations made under the Act.

The impact of these warranties is that they apply to all defects that were known at the time of the sale unless such defects were specifically excluded in the contract of sale. Section 137C(3) specifically provides that the contract can exclude liability for a breach of warranty that were known or ought reasonably have been known to exist at the time the contract was entered into.

Section 137B also requires an owner-builder to provide a report to the prospective purchaser (known as a defects report).

It is important to understand that whilst a defect may be identified in such a report it does not relieve the owner-builder of his/her obligation to comply with the warranties contained in Section 137C. The identification of the defects merely allows the domestic building insurer to avoid responsibility for such defects. For the owner-builder to be relieved of responsibility for such defects with respect to the purchaser, the defects need to be specifically excluded in the contract of sale (Augello v McLean (2007) VCAT 2437).

There have been a number of instances we have seen where defects are identified in a defects report, however the contract of sale has not sought to exclude the owner-builder from liability for those defects.

Owner-builders must ensure that if defects are identified in the defects report that they are specifically excluded from the owner-builders obligations in the contract of sale.

It is common in a contract of sale for a term to be included indicating that the purchaser buys the property as a result of their own inspection and purchases the property in the condition and state of repair on the day of sale. Such a clause will not however override the specific warranties provided under the *Building Act*.

Owner-builders often misunderstand the relevance of the domestic building insurance cover that they have obtained and provided to the purchaser. Such cover is required by legislation.

However, domestic building insurance will only come into effect if the owner-builder dies, disappears or is insolvent. Apart from those eventualities the owner-builder himself or herself remains liable to remedy any defects in the same way as a building practitioner remains liable to remedy defects that occur after the home is constructed and handed to the home owner.

This risk and the continuing obligation of an owner-builder to the purchaser of their owner built home is not fully appreciated and owner-builders should exercise extreme diligence when considering the possible sale of their owner built home.

For advice and assistance concerning owner-builders contact Peter Wilson.

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