

THE BUILDING ACT 2004 : Major implications for property developers, builders and vendors

On 31 March 2005, the Building Act 1991 was repealed and the Building Act 2004 ("Act") came into full force and effect. About half of the Act came into force on 30 November 2004. The changes aim to better protect home owners. The focus is on safety. Parliament has sought to "encourage, improve the control of better practices in building design and construction so that buildings meet the standards set out in the Building Code".

Woefully, the Act does not contain any transitional provisions. It is therefore arguable that all agreements for sale and purchase signed before 30 November 2004 yet settled post 30 November 2004 may now be subject to the new regime.

The Act contains some unwelcome surprises for the unprepared. Residential builders and residential property developers are subject to new criminal and civil liabilities. In addition, many vendors of residential properties will now find themselves caught by the provisions of the new Act.

Significantly, a "Residential Property Developer" is widely defined as a person who, in trade, does any of the following things in relation to a "household unit" for the purpose of selling the household unit:

- (a) Builds the household unit; or
- (b) Arranges for the household unit to be built; or
- (c) Acquires the household unit from a person who built it or arranged for it to be built.

So for those of you who purchase properties to flick-off for a profit "in trade", you may now be caught by the provisions of the Act. This is particularly significant in light of the new offence provisions.

So what are the new offences, and how will they change the way I operate?

1) Code Compliance Certificates

Previously many agreements for sale and purchase have provided for settlement on the issue of certificates of title and a certificate of practical completion, irrespective of whether a code compliance certificate ("CCC") is available. However it is now an offence for a residential property developer to complete a sale of or allow a purchase to enter into possession of a household unit before a CCC has issued in relation to the household unit. The Act allows for vendors and purchasers to contract out of the requirement for a full CCC.

The position in relation to an agreement for sale and purchase which is silent on whether a CCC is a requirement of settlement (or, indeed, explicitly states that the absence of a CCC will not entitle the purchaser to defer settlement) post 30 November 2004 is unclear from a vendor's perspective. If you are ready to settle i.e. new titles have issued and a certificate of practical completion is available, in the absence of a variation to the agreement for sale and purchase, you are practically left with two options:

- (a) Honour the contract and commit an offence; or
- (b) Default under the contract and wait for a CCC to issue.

It is unclear whether the new Department of Building and Housing has taken the view that the Act was not intended to apply retrospectively. So whether the Department will prosecute in situations where a vendor forces a purchaser to settle in the absence of a CCC is uncertain. Arguably, if Parliament intended the Act to apply retrospectively it should have been expressed.

2) Public use

It is also an offence if the residential property developer uses, or permits to be used, any part of the building that is intended for public use and is affected by building work for which:

- (a) a building consent is required but has not been granted; or
- (b) a building consent has been granted but no CCC has been issued.

Many of you will be surprised to hear that under the Act, a building is intended for public use if the building is "intended to be opened for the public, or is being used by the public, whether for free or on payment of a charge."

3) It is also an Offence:

if a person carries out or supervisors "Restrictive Building Work" and is not a "Licensed Building Practitioner", or not a Licensed Building Practitioner whose licence authorises him/her to carry out or supervise the Restrictive Building Work (Section 85).

If a person engages another person to carry out or supervise a Restrictive Building Work and knows that the other person is not a Licensed Building Practitioner or not a Licensed Building Practitioner whose licence authorises him or her to carry out or supervise the Restrictive Building Work (Section 86).

for a person to hold themselves out as a person who is licensed to carry out or supervise building work or building inspection work while not being so licensed (Section 341).

to fail to produce evidence of issue of a license (Section 289) or failure to give written notice of a change in circumstances in accordance with section 302.

Warranties

In addition to the new offences, a range of consumer warranties relating to the quality of building work and materials are now implied into every residential building contract and every agreement for the sale of a household unit by a residential property developer (Section 397).

Thankfully, the implied warranties only apply to contracts entered into or after the commencement of the Act (presumably 30 November 2004). Therefore, post 30 November 2004, builders and developers warrant that the building work and materials "will" meet certain standards. The same applies to vendors - they presumably warrant that the building work and materials "have" met certain standards.

Warranties are enforceable by the current owner of the household unit irrespective of whether he/she/it was party to the original building contract or sale agreement.

Although you cannot exclude warranties from agreements for sale and purchase, you can prevent the owner or purchaser or their successor in title from suing on the warranties if you prove that they had the requisite knowledge.

Other Key Changes:

- No more interim CCC's.
- Building consents are required for the various stages of a development - there no longer will one Building Consent be issued in relation to an entire development.
- Most developers must apply for a CCC within two years.
- Private entities may now certify building works (which may mitigate the risk of a territory authority being found liable).
- The designers now have the benefit of limitation dates as the definition of "building works" have changed to include design.

For further information regarding the Building Act 2004, contact [David Selkirk](#) or [Rob Coltman](#)

