

BUILDING LAW

UPDATE 2026

*Major Legislative Developments in Victoria and the Commonwealth
Significant Judgments of the High Court and Victorian Court of Appeal*

Overview

VICTORIAN LEGISLATION

- Buyer Protections Act 2025
- Domestic Building Contracts Amendment Act 2025
- SOP: Fairer Payments Act 2025

COMMONWEALTH & HIGH COURT

- National Construction Code 2025
- ACCC v Hutchinson
- Ravbar v Commonwealth
- Hunt Leather v TfNSW

VIC COURT OF APPEAL

- Carlisle Homes v Nexus
- Oil Basins v Esso
- Morris v MBS Whitehorse
- Singh v Ozzie Homes
- ASD Corp v Babicka
- VBA v Fall-Armytage

Building Legislation Amendment (Buyer Protections) Act 2025

3 Jun 2025

Royal Assent

1 Jul 2026

Operative from

5

Acts Amended

BPC Created 1 Jul 2025

Regulatory Body

- **Building & Plumbing Commission (BPC)**
 - Consolidates VBA, DBDRV and VMIA domestic building insurance functions into single regulator
- **Developer Bond Scheme (buildings > 3 storeys)**
 - 2% bond of construction cost; held 24 months post practical completion; inspections at 15–18 and 21–24 months
 - 12-month gap between the standard DLP and the 24-month bond period?
 - Projects with building permit before 1 Jul 2027 may be exempt (draft regulations)
- **First-Resort Domestic Building Insurance (DBI)**
 - Stage 1: VMIA functions transfer to BPC (last-resort basis continues)
 - Stage 2: Statutory Insurance Scheme — first-resort cover without proving builder death/insolvency/disappearance
- Expanded BPC Rectification Powers — orders for up to 10 years from occupancy permit; VCAT review within 28 days

Domestic Building Contracts Amendment Act 2025

16 Sep 2025

Royal Assent

1 Dec 2026

Effective by

11

Key Changes

- New developer carveout
 - Anti-avoidance provision (s 3(2)) — prevents aggregating contracts
 - Plans, specifications and bills of quantities no longer 'domestic building work'
 - Cost escalation tightened — threshold \$1M; cap 5% max increase; non-compliant clauses unenforceable
 - Cooling-off preserved — 5 business days even after receiving legal advice
- Single variation process — one unified process
 - Progress payment reform
 - Simplified termination (new s 41) if price increases $\geq 15\%$ or completion $> 1.5\times$ period
 - Expanded dispute resolution
 - Proportionate liability issues? — removal of 'reasonable' from s 8 warranties; VCAT review of BPC orders

Building Legislation Amendment (Fairer Payments on Jobsites) Act 2025

13 Nov 2025

Royal Assent

≤1 Sep 2026

Commences

16 of 28Recommendations
implementedRetrospective
application

- Excluded amounts abolished: ss 10A & 10B repealed; Victoria aligns with all other states
 - Delay costs, latent condition amounts and unwritten variation claims now adjudicable
 - Principals may now offset liquidated damages in payment schedule
- No new reasons in adjudication: all grounds must appear in the payment schedule; omission extinguishes the defence
- Performance security: mandatory 5 business days notice before recourse; cannot be contracted out
- Independent statutory claim for release of security through payment claim or adjudication
- Unfair time bars (new s 13A): adjudicator et al may declare a time bar of no effect if compliance was not reasonably possible or unreasonably onerous
- Payment cap: maximum 20 business days; any longer contractual term has no effect (including existing contracts)
- Final payment claim window extended from 3 to 6 months; unaffected by contract termination
- Christmas shutdown: 22 Dec to 10 Jan excluded from 'business day'
- Tranche 2 reforms: extension to domestic contracts and statutory retentions trusts — under consultation

- February 2026 – preview draft
- So far only ACT has announced an adoption date
- Water management and waterproofing — new provisions for apartment buildings
- Car park fire safety — updated provisions
- Commercial energy efficiency — mandatory on-site solar photovoltaic systems
- Residential NCC changes paused until mid-2029

- Hutchinson excluded waterproofing subcontractor (WPI) from Southpoint A after CFMEU threatened to 'sit the job down'
- Hutchinson never communicated to the CFMEU that it would comply with the demand
- ACCC alleged anti-competitive 'understanding' under ss 45E & 45EA of the Competition and Consumer Act 2010
- 'understanding' requires a meeting of minds: a consensus expressly or tacitly communicated
- Capitulation alone is not enough — doing what another demands, without communicating assent, is not an understanding
- Parallel or consistent unilateral conduct does not constitute an understanding
- May affect meaning of 'understanding' in cartel conduct provisions and other competition law contexts

Ravbar v Commonwealth of Australia [2025] HCA 25

- Fair Work (Registered Organisations) Amendment (Administration) Act 2024
- empowers Attorney-General to place CFMEU Construction & General Division into administration after 'Building Bad' investigation
- 4 constitutional grounds challenged — all unanimously dismissed
- Legislative power (s 51(xx)) — supported by corporations power; CFMEU regulates employer–employee relations involving constitutional corporations
- Implied freedom of political communication — burden justified; purpose was legitimate and compatible with representative government
- Judicial power (Ch III) — legislation characterised as protective/remedial, not punitive; not a bill of pains and penalties
- Acquisition of property (s 51(xxxi)) — administration regulated management without transferring beneficial ownership; not an acquisition
- Practical implications for the construction industry:
- Investigations — expect intensification; maintain comprehensive on-site record-keeping
- Enterprise bargaining — review project labour agreements; Administration may reduce informal 'side deals'
- Industrial action — stricter enforcement signalled; ensure no complicity in unlawful conduct
- Right of entry — Administrator's authority over entry permits confirmed

- Sydney Light Rail — design & construct across 31 'fee zones'; construction in many zones ran well beyond program
- Restated elements of private nuisance — substantial interference with ordinary enjoyment of land where:
 - Use is not 'common and ordinary'; OR use does not reasonably minimise the interference ('conveniently done')
- Once substantial interference proved, onus shifts to defendant to establish 'common and ordinary' use and 'conveniently done'
- Road construction is 'common and ordinary' — case turned on 'conveniently done'
- TfNSW failed: no evidence of genuine consideration of minimising disruption or contingency in IDP timeframes
- Statutory authority to build does not immunise against nuisance liability
- Section 43A Civil Liability Act — inapplicable: liability arose from inadequate planning, not exercise of a statutory power
- Litigation funding commission — not recoverable as nuisance damages; voluntary arrangement with third party

- Agreement for Lease: lease to commence after architect certified Practical Completion
- Certificate issued; tenant (Carlisle) disputed it; dispute referred to expert determination under the AfL
- Expert held certificate properly issued; primary judge upheld expert — Court of Appeal reversed
- Key principle: the Agreement required the expert to determine whether the specific defects identified by Carlisle disqualified the certificate
- Expert decided the question at too high a level of generality — failed to engage with whether the specific items fell within or outside the contractual definition
- Crucial distinction: an expert who performs the task and reaches a wrong answer — binding; an expert who fails to perform the assigned task — not binding

Oil Basins Limited v Esso Australia Resources Pty Ltd [2026]

VSCA 6

- Petroleum sector dispute — Oil Basins commenced Supreme Court proceedings; Esso sought a stay under s 7 of the International Arbitration Act 1974 (Cth)
- Oil Basins argued the Court must make a final, definitive jurisdictional determination before standing aside
- 'Light touch' approach confirmed — court need only form a general view that the dispute falls within the arbitration clause
- Once that threshold is crossed, all jurisdictional questions go to the arbitral tribunal under kompetenz-kompetenz
- Questions for the tribunal — scope of clause, whether agreement is void, inoperative or incapable of performance
- Court's role at the stay stage is supervisory and facilitative, not determinative

Morris v Municipal Building Surveyor for the City of Whitehorse

[2026] VSCA 17

- Mr Morris emailed council asking whether a permit was required to extend his rear deck by 1 metre — building surveyor's assistant said no permit needed
- Works carried out went beyond what was described — reconstruction and significant extension of a raised deck
- Council inspector attended; Building Notice and Building Order issued requiring removal or regularisation
- Estoppel cannot fetter a statutory power — a public authority cannot be estopped from exercising a statutory discretion by reason of a representation alone
- Works materially different from the email description — an independent and additional reason no estoppel arose
- Board's decision affirmed — deck required a permit, failed to comply with Building Regulations 2018; no procedural unfairness

Singh v Ozzie Homes Building & Construction Pty Ltd [2026]

VSCA 25

- Builder claimed lock-up stage progress payment; owners refused — plywood sheets nailed over doorways installed instead of doors
- Builder suspended and purported to terminate; owners counterclaimed for delay damages etc
- County Court: lock-up achieved
- Court of Appeal: lock-up not achieved: statutory definition requires 'external doors and external windows are fixed (even if temporary)'; plywood is not a door
- Single joint expert's opinion: lockup ~95% complete but not achieved, given considerable weight
- Progress payment not yet due → owners not in substantial breach → builder's termination invalid
- Mutual abandonment: parties ceased performance and treated the contractual relationship as at an end; inferred abandonment from conduct
- Quantum meruit claim failed: builder was itself in breach; not unconscionable for owners to retain partial benefit without further payment

- ASD contracted to build two warehouses. Milestone Structure stage precondition: works must be 'approved by a building surveyor'
- Lock Up stage was sequential: only achievable after Structure stage completed
- ASD made payment claims and won adjudications; County Court judgments entered; owners brought judicial review
- In Victoria (unlike NSW, currently) reference date only arises when the contractual precondition triggering entitlement to payment has been satisfied
- Structure stage precondition not met → no reference date → no valid payment claim for Structure or sequential Lock Up stage
- Mandatory framework inspection (regs 33–34 Building Act) without rectification directions may suffice for structural steel; but did not extend to concrete panel approval
- Parties can supplement the statutory regime with additional contractual preconditions for milestone payments

- Policy indemnified 'loss or damage arising from a non-structural defect occurring during the period ... ending 2 years after completion'
- Works completed November 2014; respondent acquired property May 2018; water damage discovered 2018
- County court: 'occurring during the period' qualifies the defect: defect must arise in period, but loss may manifest later
- Court of Appeal reversed: 'occurring during the period' qualifies 'loss or damage', not the defect itself
- Cover is tied to the timing of the loss or damage, not the timing of the underlying defect
- Section 9 DBC Act: successor in title can enforce s 8 statutory warranties but cannot inherit a prior owner's loss; successor must prove their own loss

Practical Implications

DEVELOPERS

- Assess 2% developer bond impact on project feasibility (from 1 Jul 2026, >3 storeys)
- Review corporate structures — broad 'developer' definition may capture unexpected entities
- Address 12-month gap between standard DLP and 24-month bond period in contracts
- Preserve evidence of construction quality for 10 years from occupancy permit
- Confirm whether transitional exemptions apply to current projects

SUBCONTRACTORS & SUPPLIERS

- Abolished excluded amounts may transform adjudication strategy from 1 Sep 2026
- Use new independent statutory right to claim release of performance security/retention
- Train staff on new procedures: Christmas shutdown, extended final payment claim window
- Conduct milestone precondition audit before next payment claim cycle

HEAD CONTRACTORS & BUILDERS

- Review BPC registration; comply with annual requirements from 1 Jul 2025
- Implement SOP Act compliance programs before 1 Sep 2026 (payment schedules, templates)
- Re-assess adjudication strategy — delay costs, EOT and latent condition claims now adjudicable
- Embed mandatory 5-day performance security notice in contract admin systems
- Verify all milestone preconditions before payment claims under existing contracts (ASD v Babicka)

INFRASTRUCTURE AUTHORITIES, PRINCIPALS

- Hunt Leather: base programs on thorough pre-construction investigation; document all disruption-minimisation steps
- Oil Basins: light-touch IAA stay approach — jurisdictional disputes go to tribunal

Legal Practitioners

- SOP Act reforms require comprehensive review of all construction contract advice and precedents before September 2026
- Carlisle Homes: draft expert determination mandates with precision; review existing clauses
- Morris v Whitehorse: no estoppel from informal council emails; obtain formal determinations
- Fall-Armytage: update DBI advice; cover tied to timing of loss, not defect

Questions