

ACCESS BY HOMEOWNERS DURING CONSTRUCTION, PART 2 – WHAT ARE THE INS AND OUTS?

In Part 2 of a two part series of articles for Master builders, Hemming+Hart look at the issue of rights and obligations of builders when owners wish to access the site

Mechanics for access under the contract

Clause 7.4 of the Master Builders Residential Contract requires that access be sought by written request for the owners and access is to be by way of prior arrangement with the builder and shall be during working hours or other times as agreed.

How many times is the owner entitled to access and when does the right of access end?

The owners have a right to “reasonable” access, including a reasonable opportunity to view any part of the works (provided the builder’s performance is not obstructed). The point where the owners become unreasonable in seeking access depends on the circumstances. At the very least, owners would be entitled to access when stage or other progress payments are being sought. It may also be reasonable for owners to seek access at other times, particularly if some issue of concern arises where an owner would reasonably want access in relation to the issue.

It is not stated in the QMBA Contract as to when the right of access ends. However, given that a builder would normally have exclusive possession of the site until handover, it is likely that the owners would have a reasonable right of access under the contract until handover of possession of the site (and even after the builder maintains that practical completion has been reached).

Access while the owners are living in the construction

Where the owners are residing on the property during the construction (for example, if it is a renovation), consideration should be given to amending some of the standard clauses of the Master Builders Contract (by way of Special Conditions) to clarify the owners’ right to inspect the construction in those circumstances. Special

Conditions should not be inconsistent with Section 87(1) of the DBC Act (which allows reasonable access) but these Special Conditions can better clarify when (and how) access to the areas of construction are to occur.

Where owners are living on the property during construction, the reality is that they will in all likelihood, with or without the builder's knowledge, be accessing areas of the construction. However, it is important that the contract makes the legal position clear that they can only access areas where the construction is being undertaken with the builder's knowledge and approval. If that is made clear (and that position is maintained by the builder during construction), if the owners **do** access the construction in breach of these requirements, and an incident occurs which results in either damage to the property or injury to the owners, these clauses may help to protect the builder (or the builder's insurers) from attempts by owners to claim for any losses incurred. Where the owners are living on the property during construction and the builder does not insist on strict compliance with these requirements, that is when problems may occur.

Practical tip

It is not uncommon for access issues to arise during residential construction. Whilst you should always be mindful of your legal rights and obligations (and check with the Master Builders if in doubt) a reasonable and sensible approach is the one most likely to achieve the best outcome. Communication with the owners is critical so that they understand your position and, hopefully, you understand (and address to the extent that you can) concerns that they have.

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