

Australian Capital Territory

Building (Approval criteria) Determination 2002

Disallowable instrument DI2002—49

made under the

Building Act 1972, s 58K (Criteria for approval of fidelity fund schemes)

I determine that the requirements with which a fidelity fund scheme must comply to be approved shall be those in the schedule to this instrument.

Simon Corbell
Minister for Planning
23 May 2002

Definitions

1. In this Determination:

Act means the *Building Act 1972*;

clause means a clause of this Determination;

consumer representative has the meaning set out in clause 13(a);

owner:

(a) for the purposes of the table in clause 4(f), has the meaning set out in the Act; and

(b) otherwise, has the meaning set out in clause 4(f);

request has the meaning set out in clause 4(f);

specified period means, in relation to, residential building work, the period prescribed for the purpose of sections 58E(1)(c) and (d) of the Act commencing on the date on which a certificate of occupancy is issued for the residential building work;

trust deed means the trust deed of a fidelity fund scheme; and

trustee means a trustee of a fidelity fund scheme.

Application for approval of a fidelity fund scheme

2. An application for the approval of a fidelity fund scheme must be in a form determined by the Minister in writing and must include:

(a) the contact details of each trustee and of the fidelity fund scheme; and

(b) information to demonstrate, to the Minister's satisfaction, that:

(1) the fidelity fund scheme; and

(2) each person who wishes to be appointed as a trustee, complies with this Determination and the prudential standards.

A determination made under clause 2 is a disallowable instrument.

Note *A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act 2001.*

3. The copy of the executed trust deed lodged with the application for approval must be dated and signed by a trustee who must certify that the copy of the trust deed is a true copy of the executed trust deed.

Fidelity fund trust deed

4. The trust deed must:

(a) require the trustees to assess each application for a fidelity certificate;

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- (b) allow the trustees to require that, in certain circumstances, a contribution be made to the fidelity fund scheme including for the issue of fidelity certificate;
- (c) set out the terms and form of the fidelity certificate to be issued by the trustees;
- (d) provide for the issue of a fidelity certificate by the trustees, including a requirement that each fidelity certificate that the trustees issue:
 - (1) is only issued for residential building work in the ACT that is undertaken by a licensee or a holder of an owner-builder's licence;
 - (2) is only issued after the full contribution that the trustees require to be paid to the fidelity fund scheme for the issue of the fidelity certificate has been paid;
 - (3) must state the amount that the owner can request from the trustees under clause 4(f), being at least the amount that is the minimum amount of insurance cover that is required to be provided by an insurance policy under section 58E(1)(b) of the Act; and
 - (4) must state that each of the following matters is at the discretion of the trustees when a request is made by an owner:
 - (i) whether any payment is to be paid to the owner from the assets of the fidelity fund scheme;
 - (ii) the amount of any such payment to be paid to the owner; and
 - (iii) the terms and conditions on which any payment to the owner is to be paid by the trustees from the assets of the fidelity fund scheme;
- (e) require the trustees to determine the amount of a contribution to be paid to the fidelity fund scheme for the issue of a fidelity certificate including a requirement that the trustees consider the prudential standards and the advice of the actuary for the fidelity fund scheme before they determine the amount of the contribution;
- (f) only allow the person (*owner*) described in column 2 of the table set out below to make a request (*request*):
 - (1) in the circumstances set out in column 1 of the table set out below; and

- (2) for the period set out in column 3 of the table set out below,

that the trustees pay to the owner an amount, up to the amount stated on the owner's fidelity certificate, out of the assets of the fidelity fund scheme for a part or the whole of any loss stated in clause 4(i) that the owner has incurred:

Column 1 Circumstance	Column 2 Person covered by the fidelity certificate	Column 3 Period for which the owner is covered
The owner* is not the builder	The owner* and the owner's* successors in title of the land on which the residential building work is to be, is being or has been carried out	The period that: <ul style="list-style-type: none"> • begins on the date on which the certifier in relation to the residential building work receives a notification under section 37A(1) or (2) of the Act in relation to the builder who will carry out the residential building work on the land; and • ends at the expiration of the specified period
The owner* is the builder	The owner's* successors in title of the land on which the residential building work is to be, is being or has been carried out	The period that: <ul style="list-style-type: none"> • begins on the date on which the title in the land on which the residential building work is to be, is being or has been carried out is transferred to another person; and • ends at the expiration of the specified period

**Note: the word "owner" where used in this table has the same meaning as in the Act.*

- (g) require that only the amount stated on a fidelity certificate under clause 4(d)(3) can be requested by the owner;
- (h) require that, if more than one request is made in relation to a fidelity certificate, the total amount that can be paid to an owner must not exceed the amount that is stated on the fidelity certificate;
- (i) state that the types of losses in relation to which a request may be made are only those losses which would be recoverable under an insurance policy under sections 58E(1)(f), (g) and (h) of the Act;
- (j) require that a request be made within the period that is the prescribed period for the purpose of section 58E(1)(j) of the Act after the owner becomes aware of the existence of the grounds for making the request;

- (k) state how an owner can make a request under a fidelity certificate;
- (l) subject to clause 4(m), state how a request will be handled by the trustees;
- (m) subject to clause 4(t), require the trustees to consider a request from an owner and determine, in their discretion:
 - (1) whether the trustees will make a payment from the assets of the fidelity fund scheme in respect of the request;
 - (2) the amount of any such payment; and
 - (3) the terms and conditions on which the trustees will make the payment, such terms and conditions to include a right for the trustees to take whatever action they consider appropriate in the name of the owner against the builder to recover from the builder any amount paid by the trustees to the owner;
- (n) restrict the investment of the assets of the fidelity fund scheme to the investments permitted under the prudential standards;
- (o) include any powers of the trustees to deal with the assets of the fidelity fund scheme;
- (p) include the method by which a complaint made in relation to the operation of the fidelity fund scheme (including, but not limited to, the assessment of a request) is to be dealt with;
- (q) provide for the winding up of the fidelity fund scheme;
- (r) include covenants to the effect of the covenants set out in clause 5 governing the exercise of the trustees' powers and the performance of the trustees' duties;
- (s) prohibit the payment of any fee to the trustees for the performance of their duties;
- (t) prohibit the trustees from refusing to pay an owner under the fidelity certificate on the grounds that the fidelity certificate was obtained by misrepresentation or non-disclosure by the builder;
- (u) state the terms and conditions which are to apply to the consumer representative in carrying out his role in relation to the fidelity fund scheme, which must include:
 - (1) the right to be present at each meeting of the trustees of the fidelity fund scheme; and
 - (2) any terms and conditions determined by the Minister in writing.

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Determination signed by the Minister for Planning on 23 May 2002.

A determination made under sub-clause (u) is a disallowable instrument.

Note *A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act 2001.*

- (v) include or omit any provision as determined by the Minister in writing.

A determination made under sub-clause (v) is a disallowable instrument.

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5. The covenants referred to in clause 4(r) are that each trustee must:

- (a) act honestly in all matters concerning the fidelity fund scheme;
- (b) exercise, in relation to all matters affecting the fidelity fund scheme, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
- (c) ensure that the trustee's powers and duties are exercised and performed in the best interests of the owners entitled to make a request and, if there is a conflict between the interests of the owners and the trustee's own interests, give priority to the owners' interests;
- (d) not make use of information acquired through being a trustee in order to:
- (1) gain an improper advantage for the trustee or another person; or
 - (2) cause detriment to an owner entitled to make a request;
- (e) ensure that the money and other assets of the fidelity fund scheme are:
- (1) clearly identified as property of the fidelity fund scheme; and
 - (2) held separately from the property of the trustee and the other trustees;
- (f) not enter into any contract, or do anything else or omit to do something, that would prevent the trustee or the other trustees from, or hinder the trustee or the other trustees in, properly performing or exercising the trustees' duties and powers;

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- (g) ensure that all payments out of the assets of the fidelity fund scheme are made in accordance with the trust deed and the Act;
 - (h) as soon as practicable after the trustee becomes aware of any breach of the Act that has had, or is likely to have, a materially adverse effect on the interests of an owner who is entitled to make a request, report the breach to the Minister; and
 - (i) carry out or comply with any other duty, not inconsistent with the Act, that is conferred on the trustee by the trust deed.
- 6. The trust deed may include a provision to the effect that the covenant set out in clause 5(f) does not prevent the trustees from engaging or authorising a person to do acts or things on behalf of the trustees.
- 7. If the trustees are to have a right to recover liabilities or expenses incurred in relation to the performance of their duties out of the assets of the fidelity fund scheme, or to be indemnified out of the assets of the fidelity fund scheme for those liabilities or expenses, that right or indemnity:
 - (a) must be specified in the trust deed; and
 - (b) must be available only in relation to the proper performance of the trustees' duties;and any other agreement or arrangement has no effect to the extent that it purports to confer such a right or an indemnity.
- 8. If the trustees are to have any power to borrow money or raise money for the purposes of the fidelity fund scheme:
 - (a) that power must be specified in the trust deed and be consistent with the restrictions upon borrowing set out in clause 38 of the prudential standards;
 - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power; and
 - (c) the trust deed must include a provision requiring the trustees to notify the Minister each time money is borrowed or raised.

Trustees

- 9. A trustee of a fidelity fund scheme must be a natural person.
- 10. A fidelity fund scheme must have at least 5 trustees unless the Minister approves otherwise.
- 11. Each trustee must:
 - (a) be an Australian citizen;

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- (b) have the competence, knowledge, skills, experience, qualifications and integrity to carry out his or her duties as a trustee which would be expected of an ordinary prudent person carrying out those duties;
- (c) maintain professional indemnity insurance in respect of his or her position as a trustee of the fidelity fund scheme that is prudent and reasonable in the circumstances, and in any event which cover claims amounting to the lesser of \$5 million or the sum of the value of all the assets in the fidelity fund scheme of which he or she is the trustee;
- (d) not have been refused the right, or restricted in the right, to carry on any trade, business or profession relevant to his or her duties as a trustee;
- (e) not be under investigation, or have been disciplined or removed from membership of a professional body relevant to his or her duties as a trustee;
- (f) not have been the subject of an adverse finding in relation to dishonest conduct in any judgment in any administrative or civil proceeding in any jurisdiction in any country;
- (g) not have been:
 - (1) convicted of an offence against or arising out of:
 - (i) a law of the Commonwealth, a State, a Territory or a foreign country involving dishonest conduct;
 - (ii) the Act, the *Insurance Act 1973* (Cth), the *Financial Sector (Collection of Data) 2001* (Cth) or the *Corporations Act 2001* (Cth); nor
 - (2) have been insolvent under administration as that term is defined in the *Corporations Act 2001* (Cth); and
- (h) have no actual or potential conflict of interest that is likely to influence his or her ability to carry out his or her role and duties with appropriate probity and competence.

Management of a fidelity fund scheme

12. The trustees must manage the fidelity fund scheme in accordance with:
- (a) the trust deed; and
 - (b) such other matters as may be determined by the Minister in writing.

A determination made under sub-clause (b) is a disallowable instrument.

This is page 8 of the Schedule to the Building (Approval criteria) Determination signed by the Minister for Planning on 23 May 2002.

Note *A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act 2001.*

Consumer representative

13. (a) The Minister may appoint a person (*consumer representative*) to represent the interests of the owners who participate in a fidelity fund scheme on such terms and conditions as may be determined by the Minister in writing.
- (b) The Minister may determine in writing any information and documents which must be provided to the Minister by the person seeking to be appointed as a consumer representative.

A determination made under clause 13 is a disallowable instrument.

Note *A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act 2001.*

Prudential standards and capacity of the trustees

14. The trustees of a fidelity fund scheme must:
- (a) comply with the prudential standards (including the requirements in relation to the financial management of the fidelity fund scheme);
- (b) at all times have available adequate financial, technological and human resources to carry out their duties as trustees;
- (c) have a contingency plan as required by the prudential standards; and
- (d) have a compliance plan as required by the prudential standards,

from the date that the Minister approves the fidelity fund scheme.