

Australian Capital Territory

Building (Prudential Standards) Determination 2005

Disallowable Instrument DI2005-250

made under the

***Building Act 2004*, Section 103 – Prudential Standards**

1 Name of instrument

This instrument is the *Building (Prudential Standards) Determination 2005*.

2 Commencement

This instrument commences on the day after it is notified.

3 Instrument Revoked

The Building (Prudential Standards) Determination 2002 DI 2002 – 48 is revoked.

4 Determination

I determine that the schedule to this instrument is the Prudential Standards.

Simon Corbell
Minister for Planning
8 November 2005

Definitions

1. In this Determination:

Act means the *Building Act 2004*;

accounting standards means the accounting standards applicable to a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001*(Cwlth);

actuary means, in relation to an approved scheme, the person appointed under section 111 of the Act as the actuary of the approved scheme;

annual accounts means, in relation to an approved scheme, the accounts of the approved scheme for a financial year prepared in accordance with clause 42;

approval means the approval of a fidelity fund scheme under section 96 of the Act;

approval criteria means the approval criteria as determined by the Minister under section 99 of the Act.

auditor means, in relation to an approved scheme, the person appointed under section 111 of the Act as the auditor of the approved scheme;

clause means a clause of this Determination;

the **Financial Management Guidelines** are the guidelines made under section 67 of the *Financial Management Act 1996*.

financial year means, in relation to an approved scheme:

- (a) the period from the date that the approved scheme is established to midnight on the next 30 June;
- (b) each subsequent period of 12 months ending at midnight on each 30 June preceding the date of the winding up of the approved scheme (**wind up date**); and
- (c) the period beginning at midnight on the 30 June immediately preceding the wind up date and ending on the wind up date;

material adverse effect means a material adverse effect on:

- (a) the ability of the trustees to perform any of their duties and obligations under the trust deed;
- (b) the value of the assets of the approved scheme; or
- (c) the interests of the owners who are entitled to make a request;

owner has the same meaning as in the approval criteria;

request has the same meaning as in the approval criteria;

total liabilities, in relation to an approved scheme, means, subject to clause 18(b), the liabilities of the approved scheme as they are required to be determined under clause 24;

total tangible assets, in relation to an approved scheme, means all assets of the approved scheme other than:

- (a) any future tax benefit; and
- (b) any other asset which, in accordance with the accounting standards, is regarded as an intangible asset;

trust deed means the trust deed of an approved scheme; and

trustee means a trustee of an approved scheme.

Ongoing standards for trustees

2. A trustee must, at all times during his or her appointment as trustee, meet the criteria set out in clause 11 of the approval criteria.
3. To be appointed as a trustee, a person must:
 - (a) satisfy the Minister as to the person's suitability for appointment by providing to the Minister, within 30 days after the person's appointment as trustee, materials demonstrating that the person satisfies the criteria set out in clause 9 and 11 of the approval criteria; and
 - (b) provide such further details as may be requested by the Minister in writing.
4. A trustee who at any time during his or her appointment as trustee becomes aware of any matters that could lead to, or result in, the trustee or another trustee contravening the criteria set out in clause 11 of the approval criteria or this Determination must immediately notify:
 - (a) the other trustees; and
 - (b) the Minister,of those matters in writing.

Auditor and actuary of an approved scheme

Criteria for the eligibility, fitness and propriety of a person to be an auditor or actuary of an approved scheme

5. For the purposes of section 112(2) of the Act, clauses 6 to 9 inclusive are the criteria which apply to the appointment of a person as the actuary.
6. A trustee must not act as the actuary or as the auditor.
7. An approved scheme must not have the same person as the auditor and the actuary.
8. Each of the actuary and the auditor must:
 - (a) have appropriate formal qualifications and be a member of a suitable professional body;
 - (b) not have been convicted of an offence against or arising out of the Act, the *Corporations Act 2001 (Cwlth)*, the *Insurance Act 1973 (Cwlth)*, or the *Financial Sector (Collection of Data) Act 2001 (Cwlth)*;
 - (c) not have been convicted of an offence against or arising out of a law of the Commonwealth, a State, a Territory or a foreign country involving dishonest conduct, or been insolvent under administration, as defined in the *Corporations Act 2001 (Cwlth)*;
 - (d) 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 functions with appropriate probity and competence; and
 - (e) have adequate experience (which must include at least 5 years' experience in the general insurance industry or in acting for an approved scheme) and demonstrated competence and integrity in the conduct of his or her professional duties.
9. The auditor must be approved by the Australian Prudential Regulation Authority under section 46 of the *Insurance Act 1973 (Cwlth)* as a person who may audit the accounts of entities carrying on insurance business.

Auditor

10. Subject to the additional responsibilities specified in clause 11, the auditor must audit the annual accounts of the approved scheme and provide an auditor's certificate to the trustees which must:
 - (a) include the information required under clause 20 to be reported to the Minister in relation to capital adequacy;

- (b) certify that the accounts accurately and correctly reflect the true financial position of the approved scheme; and
- (c) include such other matters as determined by the Minister in writing.

A determination made under paragraph (c) is a disallowable instrument.

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

11. In addition to the requirements under clause 10, with respect to an approved scheme during the first twelve months of its operation, the auditor must exercise the responsibilities specified in clause 10 every three months. For these purposes:
- (a) the trustees must prepare accounts for the approved scheme in respect of the relevant three month period in the same manner as the annual accounts must be prepared under clause 42; and
 - (b) the auditor's certificate must have the same content as is required for a certificate under clause 10.

If the date of an audit required by this clause is within 30 days after the end of the financial year, the performance of the end of financial year audit required by clause 10 satisfies the requirement for that audit.

12. The trustees must provide the auditor with a copy of these prudential standards.

Actuary

13. The actuary must prepare a report in relation to each financial year and provide this report to the trustees after the end of the financial year. The actuary's report must include the information required under:
- (a) clause 22 in relation to the solvency of the approved scheme;
 - (b) clause 23 in relation to the valuation of the liabilities of the approved scheme; and
 - (c) clause 31 in relation to the amount of the contribution required for the issue of a fidelity certificate.
14. The trustees must provide the actuary with a copy of these prudential standards.

Special actuary

15. For the purposes of section 124 (3)(e) of the Act, the Minister may direct, in writing, a special actuary to provide a statement of opinion in relation to any matter nominated by the Minister.

Actuarial matters

Capital adequacy

16. The trustees must maintain sufficient capital in the approved scheme at all times.
17. An approved scheme will be taken to have sufficient capital if and only if the value of the net tangible assets held in the approved scheme at the date shown in Column 1 of the following table is not less than the amount shown in the corresponding part of Column 2 of that table:

<i>Column 1: Date</i>	<i>Column 2: Amount</i>
The date of approval of the approved scheme	\$500,000
One month after that approval	\$550,000
Two months after that approval	\$600,000
Three months after that approval	\$650,000
Four months after that approval	\$700,000
Five months after that approval	\$750,000
Six months after that approval	\$800,000
Seven months after that approval	\$850,000

<i>Column 1: Date</i>	<i>Column 2: Amount</i>
Eight months after that approval	\$900,000
Nine months after that approval	\$950,000
Ten months after that approval, and any date thereafter	\$1,000,000

18. For the purposes of clause 17, “net tangible assets”:
- (a) means the total tangible assets of the approved scheme less the total liabilities of the approved scheme;
 - (b) must be calculated on the basis that the amount of all requests which have been notified to the trustees at the time of calculation, and which have not been determined and paid by the trustees, are to be included in the total liabilities;
 - (c) notwithstanding anything in paragraphs (a) and (b), may be calculated using a method determined by the Minister in writing.

A determination made under paragraph (c) is a disallowable instrument.

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

19. The trustees must ensure that the assets of the approved scheme are:
- (a) held and located within Australia; and
 - (b) invested exclusively in the following types of investments:
 - (i) real property;
 - (ii) cash;
 - (iii) secured loans;
 - (iv) fully paid securities of listed entities registered in Australia; and
 - (v) other assets as the Minister may in writing determine.

A determination made under paragraph (b)(v) is a disallowable instrument.

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

20. The trustees must provide to the Minister a certificate from the auditor confirming the matters set out in clause 17:
- (a) as part of the application to the Minister for the approval of the approved scheme under clause 3 of the approval criteria;
 - (b) during the first twelve months following the establishment of the approved scheme, as required by clause 11;
 - (c) within 90 days after the end of each financial year; and
 - (d) at any other time requested by the Minister in writing.

A request made under paragraph (d) is a disallowable instrument.

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

Solvency

21. The trustees must ensure that, at any time, the amount of the assets in the approved scheme are sufficient to meet the trustees’ obligations at that time:
- (a) to each owner who is entitled to make a request for payment pursuant to a fidelity certificate; and
 - (b) to all other creditors of the approved scheme,
- under a range of adverse conditions as reasonably determined by the actuary.

22. The trustees must provide to the Minister a certificate from the actuary confirming the actuary's satisfaction regarding the solvency of the approved scheme:
- (a) within 3 months (or such longer period determined by the Minister in writing) after the date of the application to the Minister for the approval of the approved scheme under clause 3 of the approval criteria;
 - (b) within 90 days after the end of each financial year; and
 - (c) at any other time requested by the Minister in writing.

A determination under paragraph (a) or request under paragraph (c) is a disallowable instrument.

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

Valuation of liabilities

23. The valuation of an approved scheme's liabilities must be performed by the actuary. The trustees must provide the actuary's report to the Minister setting out the actuary's valuation of the approved scheme's liabilities:

- (a) within 90 days after the end of the financial year; and
- (b) at any other time requested by the Minister in writing.

24. The Minister may determine a methodology for the valuation of an approved scheme's liabilities. In the absence of such approval, the valuation of liabilities must be performed in accordance with paragraphs 25 to 28 below.

A determination under this clause is a disallowable instrument.

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

25. The value of an approved scheme's liabilities must include a value for both:

- (a) its outstanding requests liabilities as set out in clause 26; and
- (b) its fidelity certificate liabilities as set out in clause 27.

26. Outstanding requests liabilities relate to liabilities associated with all events that could lead to a request for payment pursuant to a fidelity certificate incurred prior to the calculation date, whether or not they have been reported to the trustees.

27. Fidelity certificate liabilities relate to future requests for payment arising from future events, pursuant to existing fidelity certificates.

28. The valuation of an approved scheme's outstanding requests liabilities and its fidelity certificate liabilities must be calculated in accordance with:

- (a) the methodology of the prudential standard GPS 210 issued by the Australian Prudential Regulation Authority (or any replacement of that standard) so far as it is applicable to the operations of the approved scheme; and
- (b) such other matters as determined by the Minister in writing.

A determination made under paragraph (b) is a disallowable instrument.

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

Calculation of amount of contribution to approved scheme

29. The actuary must:

- (a) prior to the commencement of an approved scheme, calculate the appropriate amount of the initial contribution to be paid to the approved scheme to enable the issue of a fidelity certificate to an owner;
 - (b) recalculate the appropriate amount for a contribution to the approved scheme to enable the issue of a fidelity certificate to an owner, at least once every six months after that initial contribution, for as long as fidelity certificates are issued by the trustees, and must advise the trustees in writing of each of those calculations.
30. In addition to any other matter the actuary considers appropriate, the actuary must have regard to the following matters in calculating the appropriate amount of a contribution:
- (a) the valuation of the liabilities of the approved scheme referred to in clause 23 above;
 - (b) the number of fidelity certificates already issued;
 - (c) the total amount that could be requested to be paid pursuant to the fidelity certificates already issued;
 - (d) any other matter determined by the Minister in writing.

A determination made under paragraph (d) is a disallowable instrument.

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

- 31 The trustees must provide to the Minister a certificate from the actuary stating that the actuary is satisfied as to the adequacy of the amount of the contributions required to be paid to the approved scheme for the purposes of clause 29 at the following times:
- (a) as part of the application to the Minister for the approval of the approved scheme under clause 3 of the approval criteria;
 - (b) within 90 days after the end of each financial year; and
 - (c) at any other time requested by the Minister in writing.

Financial management of an approved scheme

Purposes for which the approved scheme is maintained

32. The trustees of the approved scheme must ensure that the approved scheme is maintained solely for the following purposes:
- (a) the provision of a fidelity certificate to an owner in accordance with the Act and the trust deed;
 - (b) the payment of an amount to an owner pursuant to a fidelity certificate in accordance with the Act and the trust deed;
 - (c) any other purpose that the Minister may in writing determine.

A determination made under paragraph (c) is a disallowable instrument.

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

Assets of an approved scheme

33. The trustees must not apply, or deal with, the assets of the approved scheme, whether indirectly or directly, except in accordance with these prudential standards.
34. The assets of an approved scheme must only be applied:
- (a) to meet liabilities or expenses incurred for the purposes of maintaining the approved scheme;
 - (b) to make an investment in accordance with clauses 19 and 35;
 - (c) to pay a request made pursuant to a fidelity certificate; or
 - (d) for such other purpose determined by the Minister in writing.

A determination made under paragraph (d) is a disallowable instrument.

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

35. Money in an approved scheme that is not immediately required for the purposes of the approved scheme may be invested in:
- (a) any manner authorised by the *Financial Management Guidelines*;
 - (b) any other investment determined by the Minister in writing.

A determination made under paragraph (b) is a disallowable instrument.

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

36. The trustees must formulate, adopt and give effect to an investment strategy that has regard to the whole of the circumstances of the approved scheme including, but not limited to, the following:
- (a) the risk involved in making, holding and realising, and the likely return from, the approved scheme's assets having regard to its expected cash flow requirements;
 - (b) the composition of the approved scheme's assets as a whole including the extent to which the assets are diverse or involve the approved scheme in being exposed to risks from inadequate diversity;
 - (c) the liquidity of the approved scheme's assets having regard to its expected cash flow requirements; and
 - (d) the ability of the approved scheme to discharge its existing and prospective liabilities.
37. The trustees must not mortgage, charge or otherwise encumber (including by entering into a contract of guarantee) any asset of the approved scheme.
38. The trustees must not borrow money in relation to the approved scheme except in accordance with clause 39 or 40.
39. The trustees may borrow money if:
- (a) the purpose of the borrowing is to enable the trustees to make a payment pursuant to a fidelity certificate and which, apart from the borrowing, the trustees would not be able to make;
 - (b) the period of the borrowing does not exceed 90 days;
 - (c) the borrowing were to take place, the total amount borrowed would not exceed 10% of the value of the approved scheme's assets; and
 - (d) the Minister is notified in writing of the amount and circumstances of the borrowing and approves the borrowing.

An approval made under paragraph (d) is a disallowable instrument.

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

40. Notwithstanding clause 39, the Minister may allow the trustees to borrow money in relation to the approved scheme on such conditions as the Minister may in writing determine.

A determination made under this clause is a disallowable instrument.

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

Financial records of an approved scheme to be kept

41. The trustees must keep such accounting records as will, for each financial year:
- (a) correctly record and explain the transactions and financial position of the approved scheme for that year;

- (b) enable the preparation of the annual accounts for that year; and
 - (c) enable the annual accounts to be conveniently and properly audited for that year in accordance with clause 10.
42. At the end of each financial year, the trustees must prepare annual accounts for that year in accordance with:
- (a) the accounting standards so far as they are applicable to the operations of the approved scheme; and
 - (b) such other requirements as may be determined by the Minister in writing.
- A determination made under paragraph (b) is a disallowable instrument.
- Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.
43. The accounting records kept by the trustees in accordance with clause 41 must be retained for at least 7 years after the end of the financial year to which the records relate.

Management of an approved scheme

Administration records of an approved scheme to be kept

44. The trustees must retain the following documents for at least 10 years after the date of the document:
- (a) minutes of a meeting of the trustees at which any matter relating to the approved scheme is considered;
 - (b) a record of a decision made by the trustees in relation to any matter affecting the approved scheme;
 - (c) the document evidencing the change of a trustee;
 - (d) any document which evidences the operations of the approved scheme;
 - (e) the compliance plan of the approved scheme as referred to in clause 45 (and each variation to the compliance plan);
 - (f) the contingency plan of the approved scheme as referred to in clause 50 (and each variation to the contingency plan);
 - (g) a copy of each fidelity certificate issued;
 - (h) a copy of all documents relating to the payment of a request made pursuant to a fidelity certificate; and
 - (i) any other document that the Minister may, in writing, determine.

A determination made under paragraph (i) is a disallowable instrument.

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

Compliance Plan

45. The trustees must formulate, adopt and give effect to a compliance plan for the approved scheme that sets out the measures that the trustees are to apply in operating the approved scheme including, but not limited to, the following matters:
- (a) ensuring compliance with the Act and any conditions of approval of the approved scheme under section 100 of the Act;
 - (b) identifying, understanding, addressing and monitoring:
 - (1) any financial and non-financial risks of the approved scheme; and
 - (2) balance sheet and market risk (including, but not limited to, the risk of an owner requesting a payment pursuant to a fidelity certificate, product design and pricing risk, liability risk, risk arising from the management of a request

for payment pursuant to a fidelity certificate, derivatives risk), credit risk and operational risk (including, but not limited to, legal and reputational risk);

- (c) reporting and rectifying any breach of the compliance plan; and
 - (d) specifying a person who is responsible for monitoring each risk.
46. The trustees must monitor at regular intervals, and in any event at least once every period of 3 months, to what extent the approved scheme complies with the compliance plan.
47. If there is a breach of the compliance plan which, in the opinion of the trustees will have a material adverse effect, the trustees must immediately notify the Minister in writing of the breach.
48. The trustees must assess whether the compliance plan is adequate for the purposes of the approved scheme and report that assessment, and any breaches of the compliance plan that the trustees are aware of, to the Minister at the end of each financial year as required under clause 55(e).
49. If the compliance plan is amended, the trustees must provide the Minister with a copy of the new compliance plan within 14 days of its approval by the trustees.

Contingency Plan

50. The trustees must formulate, adopt and give effect to a contingency plan for the approved scheme setting out the manner in which they will address any major administrative difficulty which may be caused by a disaster, accident, crime, systems failure or other unforeseen event beyond their control.
51. The contingency plan must include requirements concerning:
- (a) the keeping of duplicate paper and electronic records both at the office of the trustees and off-site;
 - (b) the availability of additional office, human, material and other resources and back-up computer facilities;
 - (c) the role of other service providers to the trustees in relation to the approved scheme;
 - (d) the availability of financial resources to fund any necessary rectification of difficulties; and
 - (e) any other matter that the Minister may determine in writing.

A determination made under paragraph (e) is a disallowable instrument.

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

52. The trustees must put in place, where possible, and maintain at all times the various structures which give effect to the contingency plan.
53. If a contingency event set out in the contingency plan occurs and, in the opinion of the trustees, the event will have a material adverse effect, the trustees must immediately notify the Minister in writing of the event.
54. The trustees must amend the contingency plan as necessary and as circumstances change. If the contingency plan is amended, the trustees must provide the Minister with a copy of the new contingency plan within 14 days of its approval by the trustees.

Reporting Obligations

Annual Reports

55. The trustees must, within 90 days after the end of each financial year, provide to the Minister the following documents in respect of that financial year:
- (a) the annual accounts;
 - (b) each report and certificate of the actuary as required by the Act;

- (c) each report and certificate of the auditor as required by the Act;
- (d) a declaration by the trustees that, within the period of one month prior to the lodgement of the documents set out in clause 55(a), (b) and (c) with the Minister, the trustees have resolved that they are of the opinion that there are reasonable grounds to believe that the approved scheme will be able to meet its liabilities as and when they become due and payable;
- (e) a declaration by the trustees that they have adopted and maintained a compliance plan for the approved scheme in accordance with clause 45 and have satisfied themselves as to the adequacy of, and their compliance with, the approved scheme's compliance plan;
- (f) a list, signed and dated by two trustees, setting out any breach of the compliance plan that must be reported under clause 47 and 48; and
- (g) a declaration by the trustees that they have adopted and maintained a contingency plan for the approved scheme in accordance with clause 50 and have satisfied themselves as to the adequacy of the approved scheme's contingency plan.

A copy of the annual accounts or of a report or a certificate referred to in this clause 55 may be lodged with the Minister if it is dated and signed by two trustees and who certify that it is a true copy of the original of the accounts, report or certificate (as the case may be).

Quarterly Reporting

56. The trustees must, as soon as practicable after receiving an auditor's certificate under clause 11, provide a copy of that certificate to the Minister. The copy of the certificate must be dated and signed by a trustee, who must certify that the copy of the certificate is a true copy of the certificate provided by the auditor to the trustees.

Reporting to the commissioner for fair trading

57. The trustees must report to the commissioner for fair trading each decision by the trustees to pay or refuse a request under a fidelity certificate:
- (a) every three months, commencing from the date of approval of the approved scheme; and
 - (b) if requested in a written direction from the Minister, within the period specified in the direction.

A direction made under paragraph (b) is a disallowable instrument.

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

58. The report for the purposes of clause 57 must include, in respect of a financial year:
- (a) the number of requests for payment received by the trustees pursuant to fidelity certificates;
 - (b) the amount sought under each request for payment pursuant to a fidelity certificate;
 - (c) the number of payments made in response to requests for payment pursuant to fidelity certificates;
 - (d) for each request for payment pursuant to a fidelity certificate that was paid, the amount that was paid, and
 - (e) where a request for payment pursuant to a fidelity certificate was rejected, the reason for its rejection.

Matters specified under sections 101 and 102

59. The following are changes to an approved scheme to which sections 101 and 102 of the Act do not apply a change of the bank account of the approved scheme.
60. For the avoidance of doubt, any change to a trust deed is a change to the approved scheme within the meaning of sections 101 and 102 of the Act.