

2002

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY

BUILDING AMENDMENT BILL 2002

EXPLANATORY MEMORANDUM

Circulated by authority of
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Overview

The Building Amendment Bill 2002 (the Bill) amends the *Building Act 1972* (“the Act”).

Part 5A of the Act (Residential building – statutory warranties and insurance) sets out a system of consumer protection for the owners of new homes and significant changes to homes. It requires builders of new homes or significant additions to existing homes to take out residential building work insurance against which owners can claim if the building work is not completed or there are defects in the work. The insurance protects the owner during construction and for a period of five years from completion. Part 3 of the Act (Building work) includes provisions designed to ensure that the insurance is taken out before work begins.

It has recently become difficult for builders to obtain this insurance. The brokers for one of the two approved insurance schemes were unable to find enough reinsurance to satisfy their insurance company. On 10 April 2002 they announced that they were no longer able to provide residential building work insurance. This has affected more than half of the ACT’s house builders and their customers. Further insurance may become available on a commercial basis but the market for insurance is currently volatile. The Bill therefore amends the Act by inserting new provisions in Part 5A that allow the approval, as an alternative to insurance, of a fidelity fund scheme that will provide similar consumer protection.

Residential building work insurance must be provided by approved insurers and is subject to the capital adequacy and other prudential obligations of the *Insurance Act 1973* of the Commonwealth and supervision by APRA, the Australian Prudential Regulation Authority. The Bill, and detailed approval criteria and prudential standards to be determined by the Minister, therefore include provisions intended to ensure that a fidelity fund scheme is responsibly managed and fair.

A scheme operates under a trust deed and is managed by a Board of Trustees. A scheme may be approved if it meets entry criteria. These include the scope of the protection to be provided to consumers by the issue of Fidelity Certificates. A scheme is subject to requirements for prudent management (including capital adequacy, the valuation of liabilities and effective risk management strategies and techniques). An independent auditor and actuary must examine and certify the activities of the scheme and report annually, or as otherwise directed by the Minister, on the state of the scheme. A statutory officer, the Commissioner for Fair Trading, has a supervisory role and the Minister may, if necessary, suspend or revoke a scheme’s authority to operate..

The Bill also makes changes to Part 3 of the Act so that certificates under an approved industry scheme are acceptable during building approval.

Financial implications

Nil.

Clause Notes

Clauses 1 to 3

Clauses 1, 2 and 3 are formal clauses that deal with the name of the Bill, its commencement and the name of the Act amended. The proposed Act commences the day after it is notified on the legislation register.

Clause 4 - Section 5(1) new definition

Clause 4 adds to the Act a definition of “fidelity certificate”.

Clause 5 - New section 34 (1) (fa) (ii)

Clause 5 amends section 34 of the Act (Issue of building approvals) to allow a fidelity certificate issued under division 5A.4 of the Act to be accepted by a building certifier as an alternative to evidence of insurance.

Clause 6 - Section 34

Clause 6 provides for the renumbering of section 34 as amended.

Clause 7 - Section 38 (2)

Clause 7 amends section 38 of the Act (Notifications by certifier in relation to building work) in line with the changes in section 34.

Clause 8 - Part 5A heading

Clause 8 changes the title of Part 5A and inserts a new division title. The effect, in combination with other changes, is to divide the existing provisions of Part 5A into three divisions that deal in turn with preliminary matters, statutory warranties and residential building insurance. New provisions for approved fidelity fund schemes, for auditors and actuaries of approved schemes and transitional provisions then become the fourth to sixth divisions of the Part.

Clause 9 Section 58A, new definitions

Clause 9 adds to Part 5A definitions of terms used in relation to a fidelity fund scheme.

Clauses 10 and 11 - New division 5A.2, new heading, New division 5A.3, new heading

Clauses 10 and 11 insert two division titles for existing text.

Clause 12 - New divisions 5A.4 to 5A.6

Clause 12 inserts new divisions 5A.4 to 5A.6 into the Act. These divisions provide for the issue of fidelity certificates as an alternative to insurance. New provisions for approved fidelity fund schemes, auditors and actuaries of approved schemes and transitional provisions become the fourth to sixth divisions of the Part.

Approval of fidelity fund schemes

New section 58H sets out requirements for the approval of a fidelity fund. The Minister responsible for the Act can only approve a scheme if the scheme complies with the requirements in this section. An approval is a must be notified on the legislation register but is not disallowable, because this could make for significant delays in the effective commencement of an approved scheme.

Additional information etc

New section 58I provides for a written requirement to produce additional information or a statutory declaration to clarify an application for approval of a scheme.

Minister may require changes to scheme

New section 58J allows an application for a building industry scheme to be amended and then approved rather than merely approved or rejected. The changes to the scheme may only be made to ensure that the scheme complies with the requirements in the Act.

Approval criteria for fidelity fund schemes

New section 58K allows the determination, in a disallowable instrument, of requirements, additional to those of new section 58H, for a scheme that is to be approved. They include compliance with the prudential standards that the Bill provides for and provisions relating to consumer protection through the issue of fidelity certificates and the making and handling of claims under certificates.

Approval of scheme may be conditional

New section 58L allows an application for a building industry scheme to be approved with conditions that must then be complied with. Conditions may include a higher standard than the prudential standards provided for by the Bill. Failure to comply is an offence of strict liability.

Application for changes to approved scheme

New section 58M provides for a written application to change an approved scheme. Minor changes of a kind specified in the prudential standards may be made without the need for approval.

Approval of changes to approved scheme

New section 58N allows an application for changes to be approved but only if the changes are consistent with the approval criteria and prudential standards provided for by the Bill.

Prudential standards

New section 58O provides for the determination, as a disallowable instrument, of prudential standards for the management of a fidelity fund scheme. The section also sets out the topics that may be included in the disallowable instrument and allows the standards to include discretionary provisions.

Compliance with prudential standards by trustees

New section 58P makes it an offence of strict liability for the trustees of an approved scheme, if the scheme fails to comply with the prudential standards.

Notice to trustees to comply with prudential standards

New section 58Q allows for directions to the trustees of an approved scheme to comply with a prudential standard and for deadlines for doing so. Failure to comply with a direction is an offence of strict liability. The direction must be complied with despite the trustees acting in accordance with the trust fund or another agreement.

Notice to trustees requiring information

New section 58R provides for a written notice to the trustees of an approved scheme to provide information about the scheme's liabilities or potential liabilities and sets out information that may be required. A notice must include a deadline. Failure to comply with a direction is an offence of strict liability.

Suspension or cancellation of approval of approved scheme

New section 58S allows the issue of a written notice that suspends or cancels the approval of a fidelity fund scheme and sets out grounds for doing so. The trustees must first be given a written warning and time to respond. A notice under this section must be notified on the legislation register.

Cancellation of approval on application

New section 58T allows the Minister responsible for the Act to issue, at the request of the trustees, a written notice that cancels the approval of a fidelity fund scheme. The revocation must be notified on the legislation register.

Orders consequential on suspension or cancellation

New section 58U provides for the winding-up of a building industry scheme that has been suspended or cancelled by the Minister responsible for the Act. If an approval is suspended or cancelled, the Minister may apply to the Supreme Court for

directions about matters including the winding up of the scheme and the assignment of the scheme's assets and liabilities.

Address for service for trustees

New section 58V requires the trustees for an approved scheme to provide advice of their address for service and makes this address their legal address for notices under the Act.

Appointment of auditor and actuary for approved scheme

New section 58W requires the trustees for an approved scheme to appoint an auditor and actuary. The Minister must approve the appointment and the terms of appointment.

Approval of appointment of auditor or actuary

New section 58X provides for the approval by the Minister responsible for the Act of an approved scheme's auditor and actuary. The person must be eligible to be appointed.

Revocation of approval of appointment of auditor or actuary

New section 58Y sets out circumstances in which the Minister responsible for the Act may revoke the approval of an approved scheme's auditor or actuary.

When person stops holding appointment as auditor or actuary

New section 58Z provides that a person is no longer an approved scheme's auditor or actuary once he or she is no longer eligible under the prudential standards or the appointment is revoked under the preceding new section, as well as in the case of resignation.

Notification of appointment or ending of appointment of auditor or actuary

New section 58ZA requires notice to the Minister responsible for the Act that a person has become, or ceased to be, an auditor or actuary for the scheme. This does not apply when the appointment is revoked by the Minister responsible for the Act.

Compliance with prudential standards by auditors and actuaries

New section 58ZB makes it an offence of strict liability for an auditor or actuary for an approved scheme to breach the prudential standards.

Auditor and actuary to tell Minister if scheme insolvent

New section 58ZC sets out findings about an approved scheme that an auditor or actuary must inform the Minister responsible for the Act of within a maximum period. Failure to do so is an offence.

Giving of information to Minister by auditors or actuary etc

New section 58ZD allows an auditor or former auditor and an actuary or former actuary for an approved scheme to choose to provide the Minister responsible for the Act with information about the scheme or to be required to provide specified information to the Minister. It is an offence to fail to respond to a demand for information or to give false or materially misleading information in response to a demand.

Auditor's role

New section 58ZE sets out obligations of the auditor of an approved scheme in relation to the prudential standards.

Actuary's role

New section 58ZF sets out obligations of the actuary of an approved scheme in relation to the prudential standards.

Certificates and reports required to be given to Minister

New section 58ZG identifies certificates and reports that the trustees for an approved scheme must provide copies of to the Minister responsible for the Act. Failure to comply is an offence of strict liability.

Investigation of liabilities by special actuary

New section 58ZH provides for written notice to an approved scheme to appoint a new actuary and for the actuary to investigate the scheme's liabilities and report to the Minister responsible for the Act on the results. The new actuary must be acceptable to the Minister. The section sets a series of deadlines for action and specifies matters that the report must deal with.

Offences in relation to appointment of special actuary

New section 58ZI creates offences for failures by the trustees of an approved scheme to comply with requirements related to the appointment of a special actuary.

Who can be appointed as a special actuary

New section 58ZJ states who is eligible to be appointed as a special actuary. The person needs not hold all of these qualifications if the person has other relevant qualifications and experience and the appointment is approved by the Minister responsible for the Act.

Obligations of trustees to auditors and actuaries

New section 58ZK requires the trustees for an approved scheme to assist the auditor and actuary or a special actuary in carrying out the functions assigned to them by the Act. Failure to comply is an offence of strict liability.

Protection of auditor and actuary from liability

New section 58ZL limits the extent to which an auditor or actuary for a scheme or a special actuary incurs liability.

Transitional regulations

New section 58ZM allows the regulation-making powers of the Act to provide for savings or transitional matters arising from the Bill.

Modification of operation of divisions 5A.4 and 5A.5
New section 58ZN allows the regulation-making powers of the Act to be used to correct errors in the Bill.

Expiry of div 5A.6

New section 58ZO repeals the two preceding sections after a year.

Clause 13 - Parts 5A and 6

Clause 13 provides for the renumbering of the Parts and sections of the Act most affected by the Bill.

Clause 14 – Administrative decisions (Judicial Review) Act 1989

Clause 14 excludes decisions about the approval of a scheme or about the suspension or cancel a scheme from review under the Administrative decisions (Judicial Review) Act. The purpose is to avoid the difficulties that may follow delay.