

# AUSTRALIAN CAPITAL TERRITORY

## BUILDING ACT 1972

### BUILDING (APPROVAL CRITERIA) DETERMINATION 2002

#### Disallowable instrument DI2002—49

#### EXPLANATORY STATEMENT

Divisions 5A.4 and 5A.5 of the *Building Act 1972* (the Act), as inserted by the *Building Amendment Act 2002*, contain provisions for a building industry fidelity fund scheme to provide consumer protection under the Act. Section 58K of the Act allows the Minister responsible the Act to determine approval criteria for a scheme and lists matters that the criteria must deal with.

The approval criteria deal with things that must be done before a fidelity fund scheme can be approved. The trust deed and the fidelity certificates it is to issue must, in acceptable terms, set out the circumstances in which consumer protection is to be provided to home owners through fidelity certificates, provide for financial contributions from participating builders, state how the scheme will deal with claims for payments from home owners and provide for the financial management of the trust fund and the role of the trustees.

The trustees of the scheme must meet eligibility criteria and the scheme cannot be approved until it is in a position to begin operations. For some of their requirements the approval criteria refer to the requirements of the prudential standards for the financial management of a fidelity fund scheme. The prudential standards are a disallowable instrument made under section 58O of the Act.

## Clause

- 1 This clause gives the meaning of terms used in the approval criteria.

### **Application for approval of a fidelity fund scheme**

- 2-3 An application for approval of a fidelity fund scheme must be accompanied by information about the scheme and trustees that facilitates contact with them and shows that the scheme and trustees comply with the approval criteria and prudential criteria. Section 58H of the Act calls for a copy of the trust deed for the scheme and clause 3 contains details about the authentication of the copy.

Clause 2 provides for the determination of an application form that must be used. A form determined under this clause is a disallowable instrument.

### **Fidelity fund scheme**

- 4 – 8 These clauses set out matters that the trust deed for a fidelity fund scheme must deal with.

A scheme must operate only in the ACT.

A fidelity fund scheme must provide protection to owners through the issue of fidelity certificates. The issue of certificates is to be linked to the making of a contribution to the trust fund. The prudential standards consider contributions in detail and require them to be at a level that is financially prudent.

A fidelity fund must provide protection to owners (but not an owner who is the builder) up to the minimum amount and for the period that are set out in the Building Act and Regulation 20 of the Building Regulations 1972. The trust deed is to limit the critical circumstances as provisions of section 58E of the Building Act do for an insurance-based scheme.

Total payments to a home owner are to be limited to the value of the work (or the maximum amount covered by the scheme).

The approval criteria allow the fidelity certificate to set other terms and conditions on payments to owners.

The effect of these provisions is to impose on fidelity funds the same standard of protection for consumers as is currently required of an insurer.

The trust deed must describe how owners can request payments

**Clause**

from a fidelity fund. Payments are to be formally discretionary and therefore not subject to review.

The trust deed must describe how the trustees will administer the fidelity fund scheme and deal in acceptable ways with the financial administration of the fund, the trustees' role and powers in it, their rights to remuneration and include covenants about standards of behavior for trustees. If the trust deed allows the trustees to raise or borrow money, the trust deed must comply with some of the prudential standards: clauses 38 to 40 of the prudential standards limit this power.

**Trustees**

- 9 - 11 There must be at least five trustees, who must be individuals, Australian nationals and not affected by requirements in relation to fitness and propriety or conflict of interest.

**Management of a fidelity fund scheme**

- 12 The Minister may determine requirements for a trust fund in addition to those in the trust deed. A determination is a disallowable instrument.

**Consumer representative**

- 13 The Minister may appoint a consumer representative to a fidelity fund scheme without the representative being a trustee. Under clause 4(u) of these approval criteria, the right of the representative to attend meetings of the trustees must be part of the trust deed. The powers of the representative to participate in the scheme and have access to information and documents may be increased as part of the appointment.

**Prudential standards and capacity of the trustees**

- 14 An application cannot be approved until the trustees can comply with the prudential standards (including the drawing up of contingency and compliance plans as required by those standards) and are in a position to begin operating.