

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY  
BUILDING (AMENDMENT) ORDINANCE 1988  
ORDINANCE NO. 13 OF 1988

The Building Ordinance 1972 (the Principal Ordinance) regulates the erection, alteration and demolition of buildings in the Australian Capital Territory.

The Building (Amendment) Ordinance 1988 (the Ordinance) amends the Principal Ordinance to introduce a compulsory housing indemnity insurance scheme. The scheme confers a measure of protection for home purchasers against faulty workmanship and failure to satisfactorily complete building work because of the death, disappearance or insolvency of a builder.

The principal object of the scheme is to protect the purchase by an individual or corporation of a new private residential dwelling, including a flat or a home unit. It also covers alterations and renovations the cost of which exceeds \$5,000.

The scheme does not apply to residential building work which is constructed for the Commonwealth or a statutory authority, which is constructed by an owner builder or which costs less than \$5,000.

The new scheme is linked to the system of granting of building permits by the Building Controller appointed under the Principal Ordinance. A building permit is usually only issued where a residential building insurance policy is in force in respect of the work. A policy is issued to a builder only by an insurer authorised by the Insurance Commissioner to carry on general insurance business.

However, provision exists for the Building Controller to issue a permit without insurance cover where all insurers withdraw from providing insurance or where the builder has been unable to obtain insurance and the home owner declares in a statutory declaration that he or she does not require the work to be insured and in each case, the Building Controller considers it fair to issue a permit. This will enable a permit to be issued, for example, where an interstate builder enters the ACT industry or where a person commences a new building operation and is unknown in the industry.

An important element of the Ordinance is the establishment of implied statutory warranties by the builder in contracts for the sale of a residential building work to which the builder is a party.

Details of each of the provisions of the Ordinance are set out in the Attachment.

ISSUED BY AUTHORITY OF  
THE MINISTER OF STATE  
FOR THE ARTS AND TERRITORIES

Building (Amendment) Ordinance 1988

Section 1 cites the short title of the Ordinance as the Building (Amendment) Ordinance 1988.

Section 2 provides that the Ordinance will commence on a date fixed by the Minister by a notice published in the Gazette.

Section 3 cites the Building Ordinance 1972 as the Principal Ordinance.

Section 4 amends section 5 of the Principal Ordinance which relates to interpretation in a number of respects.

The term 'authorised insurer' is defined to mean a body corporate that has been granted authority to carry on insurance business under the Insurance Act 1973.

The definition of 'House of Assembly' (which ceased to exist on 30 June 1986) is omitted.

A new definition of 'owner' is included so as to make it clear which person is referred to when land is held under a lease, in fee simple, under the Unit Titles Ordinance 1970 and under a tenancy from the Commonwealth.

The term 'proprietor' is defined to have the same meaning as in the Unit Titles Ordinance 1970.

The term 'residential building insurance policy' is defined to mean an insurance policy that complies with section 58E of the Principal Ordinance (inserted by section 12 of the Ordinance).

The term 'statutory warranty' is defined to mean a warranty specified in section 58C of the Principal Ordinance (inserted by section 12 of the Ordinance).

The term 'unit' is defined to have the same meaning as in the Unit Titles Ordinance 1970.

Section 5 amends section 6 of the Principal Ordinance by

- (a) omitting from paragraph 5(a) the words 'or other free-standing building'. This ensures that the Principal Ordinance applies to all free standing buildings other than a shed not exceeding 2.1 metres in height and 5 square metres in area; and
- (b) inserting in paragraph 5(b) the word 'outdoor' the effect of which is to exclude only outdoor ornamental ponds of a certain depth from the application of the Principal Ordinance.

Section 6 amends section 10 of the Principal Ordinance, which establishes the Building Review Committee, in consequence of the expiration on 30 June 1986 of the ACT House of Assembly. Subsection 10(3) is amended to reduce the number of members of the Building Review Committee, on which the Assembly was formerly represented, from 5 to 4. Paragraph 10(3)(b), which refers to the House of Assembly, is omitted. Section 6 also amends paragraph 10(3)(d) of the Principal Ordinance to amend the reference to one of the members of the Building Review Committee to mean a person representing The Institution of Engineers, Australia.

Section 7 amends section 11 of the Principal Ordinance by omitting subsection 11(2) which refers to a member of the Building Review Committee representing the former House of Assembly.

Section 8 amends paragraph 24(1)(d) of the Principal Ordinance to amend the reference to one of the members of the Building Standards Committee to mean a person representing The Institution of Engineers, Australia.

Section 9 amends section 35 of the Principal Ordinance by inserting new subsections 35(3)-(6) relating to the issue of building permits.

Subsection 35(3) requires the Building Controller not to grant a building permit for residential building work to which the statutory warranties and insurance provisions apply under Part VA unless he or she is satisfied:

- (a) that the work is insured;
- (b) if each approved insurer, as defined in proposed subsection 35(6) of the Principal Ordinance, has refused to insure the work:
  - that the owner of the land on which the work is to be carried out does not require the work to be insured; and
  - that it is fair in the circumstances to issue the permit;
- (c) if there are no approved insurers, that it is fair in the circumstances to issue the permit.

Subsection 35(4) requires an application for a building permit for residential building work, in addition to the matters specified in subsection 35(2) of the Principal Ordinance, to be accompanied by a residential building insurance policy in respect of the work (paragraph 35(4)(a)) or a certificate by an approved insurer that the work has been insured (paragraph 35(4)(b)).

In a case in which each approved insurer has refused to insure the work, the application should, as paragraph 35(4)(c) provides, also be accompanied by:

- (i) an application that the permit be granted although the work is not insured;
- (ii) a statement from each approved insurer that the insurer has refused to insure the work; and
- (iii) a statutory declaration by the owner for whom the work is to be carried out that he or she does not require the work to be insured.

Subsection 35(5) covers the situation where the applicant for a building permit for residential building work is the owner of the land on which the work is to be carried out, or an employee of the owner by providing that a reference in subsection 35(3) or 35(4) to the owner of the land shall be read as a reference to the person to whom title in the land is to be transferred by the person who was the owner at the time the application was made.

Subsection 35(6) inserts 4 definitions which relate to the interpretation of subsections 35(3)-(5).

The term 'approved insurer' means an authorised insurer, as defined in proposed section 5 of the Principal Ordinance who has had a form of residential building insurance policy approved by the Building Controller and who has not notified the Building Controller under proposed section 58G that it has ceased to be in the business of issuing such policies or that its authority to carry on insurance business has been cancelled.

The term 'employee', in relation to the owner of the land on which residential building work is to be carried out, includes a contractor engaged by the owner to carry out part or all of the work.

The term 'insured' means insured under a residential building insurance policy issued under section 58E.

The term 'residential building work' means building work in connection with a residential building.

Section 10 repeals sections 53B and 53C of the Principal Ordinance. These provisions were inserted by the Building (Amendment) Ordinance 1987 and related to appeals from specific decisions of the Building Controller to the Administrative Appeals Tribunal. These provisions are incorporated in sections 61A and 61B of the Principal Ordinance, inserted by section 14 of the Ordinance.

Section 11 omits from section 54 a reference to "the last preceding section" and substitutes a specific reference to section 53. The need for this amendment was the insertion of sections 53A, 53B and 53C by the Building (Amendment) Ordinance 1987.

Section 12 inserts a new Part VA (sections 58A-58G) into the Principal Ordinance which relates to statutory warranties and insurance relating to residential building work.

Section 58A includes definitions of terms which relate specifically to Part VA.

The term 'builder' means the person who applies for, holds or held a building permit in relation to residential building work or a residential building or, if that person is an employee of another person, or a contractor engaged by another person - the other person.

The term 'building' is defined so as not to include paving or a structure that is a fence, retaining wall, outdoor swimming pool, outdoor ornamental pond, mast, antenna, aerial, advertising device, notice or sign.

The term 'building work' is defined so as not to include work in connection with the demolition of a whole building.

The term 'cost' is defined as having the same meaning as in subregulation 2(1) of the Building Regulations.

The term 'dwelling' is defined to mean a house, unit, flat or any other building or part of a building used or intended to be used or designed or adapted to be used as a self-contained private residence.

The terms 'flat', 'ground storey', 'habitable room', 'house', 'mezzanine' and 'storey' will be defined as having the same meanings as in the Building Manual prepared by the Building Standards Committee under section 25 of the Principal Ordinance.

The term 'residential building' is defined to mean a building intended primarily for use for private residential purposes or as an adjunct to such a building, being a building containing not more than 3 storeys at any point (including the ground storey unless the ground storey contains no habitable rooms).

The term 'residential building work' is defined to mean building work in connection with a residential building.

Section 58B excludes the operation of Part VA in relation to residential building work:

- (a) carried out by or for the Commonwealth or a statutory authority;
- (b) carried out by an owner who is not a licensed builder;
- (c) costing less than \$5,000; or
- (d) carried out on premises of other than Class I or Class II of the classifications of buildings contained in Part 6.1 of the Building Manual.

The Building Manual defines a Class I building as a residential building containing one dwelling or a number of dwellings separated by a vertical party wall. A Class II building contains at least 2 flats separated by a party structure or a flat forming part of or attached to a Class I building.

Subsection 58C(1) implies in every contract for the sale of a residential building and for the carrying out of residential building work (to which contract the builder is a party) the following statutory warranties by the builder:

- (a) that the residential building work on the building, has been or will be, carried out in accordance with the Principal Ordinance as amended by the Ordinance;
- (b) that the work has been, or will be, carried out in a proper and workmanlike manner and in accordance with the plans approved for the work by the Building Controller;
- (c) that good and proper materials for the work have been or will be used in carrying out the work;
- (d) if the work has not been completed, and the contract does not specify a date by which, or a period within which, the work is to be completed - that the work will be carried out with reasonable diligence; and
- (e) if the owner of the land on which the work is being, or is to be carried out is not the builder, and the owner expressly makes known to the builder, or a servant or agent of the builder, the particular purpose for which the work is required, or the result that the owner desires to be achieved by the work, so as to show that the owner is relying on the builder's skill and judgement - that the work and any material used in carrying out the work is or will be reasonably fit for that purpose or of such a nature and quality that they might reasonably be expected to achieve that result.

Subsection 58C(2) provides that each of the owner's successors in title succeeds to the rights of the owner in respect of the statutory warranties specified in subsection 58C(1).

Subsection 58C(3) provides for the warranties to expire 5 years after the date of issue by the Building Controller of a certificate of completion under section 53 of the Principal Ordinance.

Subsection 58C(4) defines the term 'owner' in subsection 58C(2) to mean

- (a) in the case of a contract referred to in subsection 58C(1) for the sale of a residential building - the person to whom title in the land on which the building was built is transferred under the contract; or
- (b) in the case of a contract referred to in subsection 58C(1) to carry out residential building work - the owner of the land on which the work is to be carried out under the contract.

Section 58D preserves the liability that a builder would have had to any person independently of the making of the Ordinance.

Subsection 58E(1) specifies the following conditions which must be met before a residential building insurance policy complies with the Ordinance:

- (a) it is issued by an authorised insurer;
- (b) it provides for a total amount of insurance cover of at least \$50,000, or an amount equal to the cost of the work, whichever is less, in respect of each dwelling that forms part of the work;
- (c) if the builder is not the owner of the land on which the work is to be carried out - it insures the owner and the owner's successors in title for the period beginning on the date on which a building permit is granted for the work and ending 5 years after the date on which a certificate is issued under section 53 of the Principal Ordinance in respect of the work;
- (d) if the builder is the owner of the land on which the work is to be carried out - it insures the builder's successors in title for the period beginning on the date on which the title in the land is transferred to another person and ending 5 years after the date on which a certificate is issued under section 53 of the Principal Ordinance in respect of the work;
- (e) the whole of the premium payable in relation to the respective period has been paid;
- (f) it insures the owner (if the builder is not the owner) and the owner's successors in title against the risk of being unable to enforce or recover under the contract pursuant to which the work has been, is being or is to be carried out because of the insolvency, disappearance or death of the builder;
- (g) it insures the owner (if the builder is not the owner) and the owner's successors in title against the risk of loss resulting from a breach of a statutory warranty;
- (h) it insures the owner (if the owner is not the builder) and the owner's successors in title against the risk of loss resulting, by virtue of the builder's negligence, from subsidence of the land;
- (j) it provides that a claim under it may only be made within 90 days (or some specified period of more than 90 days) after the claimant becomes aware of the existence of grounds for the claim; and
- (k) the form of the policy has been approved in writing by the Building Controller.

Subsection 58E(2) provides that a policy may limit the insurer's liability for the first \$500 (or some specified lesser amount) of each claim.

Subsection 58E(3) provides that the value of the work is that specified as its cost as defined in subsection 58A(1).

Subsection 58E(4) voids any purported attempt to negative, limit or modify the operation of Part VA.

Subsection 58E(5) preserves the validity of a residential building insurance policy which contains a provision not contained in the form of policy approved by the Building Controller. However, any such provision is void.

Subsection 58E(6) prevents an authorised insurer from avoiding liability on the grounds that the policy was obtained by misrepresentation or non-disclosure.

Subsection 58E(7) provides that where:

- (a) a builder is not the owner of the land on which the builder is carrying out residential work;
  - (b) the builder fails to complete the work because of insolvency;
  - (c) the owner has paid the builder part or all of the cost of the work;
  - (d) the work is insured under a residential building insurance policy whichever is the less the owner is not entitled to recover from the insurer any amount by which the amount paid exceeds the cost of the work done. The only exception is where the owner has paid a deposit on the work and the cost of any work done is less than the amount of the deposit, the owner may recover from the insurer;
  - (e) an amount equal to the amount of the deposit less the cost of any work done; or
  - (f) \$5,000 less the cost of any work done;
- whichever is the less.

Subsection 58E(8) provides that a builder shall be taken to be insolvent if the builder becomes bankrupt; applies to take the benefit of any law relating for the relief of bankrupt or insolvent debtors or assigns remuneration for the benefit of a creditor.

Subsection 58E(9) defines the term "deposit" (in subsection 58E(7)) in relation to residential building work; to mean an amount that was paid or payable by the owner to the builder, under the contract to carry out the work, before the commencement of the work.

Subsection 58F(1) empowers a person to apply to a court for a direction that judgment be entered in favour of the person against the authorised insurer who issued the policy where:

- (a) a court gives judgment in favour of the person in respect of a matter for which the person is insured under a residential building insurance policy;

- (b) the insurer is a party to the proceedings in which the judgment is given; and
- (c) the judgment is not satisfied in full within the period of 30 days after the judgment is entered.

Subsection 58F(2) requires the judgement creditor to give the insurer at least 7 days written notice of his or her intention to make an application.

Subsection 58F(3) provides that a judgment entered against an authorised insurer is enforceable only to the extent that it had not been satisfied when the judgment was entered.

Subsection 58F(4) entitles an authorised insurer, in addition to any other right or remedy, to recover from a builder in respect of whose work a residential building insurance policy was issued so much of:

- (a) any judgment entered or obtained against the insurer;
- (b) any sums paid by the insurer in payment, settlement or compromise of a claim or of a judgment against the builder or of a judgment obtained against the insurer; and
- (c) the costs and expenses reasonably incurred by the insurer as the insurer has paid under the policy.

Subsection 58G(1) makes it an offence, subject to a penalty of \$5,000, for an authorised insurer to fail to notify the Building Controller that it has ceased to issue residential building insurance policies or that its authority to carry on insurance business has been cancelled under the Insurance Act 1973.

Subsection 58G(2) makes it an offence, subject to a penalty of \$5,000, for an authorised insurer to knowingly represent falsely that a policy complies with section 58E.

Section 13 inserts into the Principal Ordinance a new section 59A relating to false or misleading statements which make it an offence, subject to a penalty of \$1,000 or 6 months imprisonment or both in the case of an individual, and \$5,000 in the case of a corporation, to knowingly or recklessly:

- (a) make a statement to the Building Controller that is false or misleading in a material particular; or
- (b) omit from a statement made to the Building Controller any matter or thing without which the statement is misleading in a material particular.

Section 14 inserts a new section 61A which confers a right of appeal to the Administrative Appeals Tribunal from a decision of the Building Controller refusing:

- . to grant a building permit under section 35 for residential building work;
- . to grant a completion certificate under subsections 53(2), (3), (6), (10) or (11); or
- . to approve a form of residential building insurance policy under paragraph 58E(1)(k).

Section 14 also insert a new subsection 61B(1) which requires the Building Controller to give, within 28 days of the date of the decision, a written notice of a decision under sections 35 and 53 to the applicant and under paragraph 58E(1)(k) to the insurer who applied for approval.

Subsection 61B(2) provides that, if the applicant referred to in paragraph 61B(1)(a) or (b) is not the owner of the land on which the building work to which the permit or certificate relates has been or is to be carried out, or an employee of, or contractor engaged by, the owner, the Building Controller shall also cause written notice of the respective decision to be given to the owner within 28 days of the date of the decision.

Subsection 61B(3) requires that a notice issued under subsection 61B(1) or (2) shall include a statement to the effect that an application may be made to the Administrative Appeals Tribunal for a review of the decision to which the notice relates and, except where subsection 28(4) of that Act applies, include a statement to the effect that a person whose interests are affected by the decision may request a statement pursuant to section 28 of the Administrative Appeals Tribunal Act 1975.

Subsection 61B(4) provides that the validity of a decision under subsection 61B(1) is not affected by a failure to comply with subsection 61B(3).

Section 15 inserts into the Principal Ordinance a new section 63B. This is an evidentiary provision relating to the state of mind of directors, servants and agents of a body corporate.

Subsection 63B(1) is an evidentiary provision which imputes to a body corporate the state of mind of its directors, servants or agents in circumstances where it is necessary to establish a body corporate's state of mind for the purposes of proceedings for an offence against this Ordinance in relation to particular conduct.

Subsection 63B(2) provides that, for the purposes of a prosecution for an offence against the Principal Ordinance, conduct engaged in on behalf of a body corporate by a director, servant or agent acting within the scope of his or her actual or apparent authority shall be taken to also have been engaged in by the body corporate unless the body corporate establishes it took reasonable precautions and exercised due diligence to avoid the conduct.

Subsection 63B(3) contains similar evidentiary provisions in relation to a person other than a body corporate as those contained in subsection 63B(1).

Subsection 63B(4) contains similar evidentiary provisions in relation to a person other than a body corporate as those contained in subsection 63B(2).

Section 63B(5) provides that a natural person shall not be subject to a term of imprisonment when convicted of an offence in respect of conduct attributable to him or her by subsections 63B(3) and 63B(4).

Subsection 63B(6) provides that a reference in subsection 63B(1) or 63B(3) to a person's state of mind shall be read as a reference to the person's knowledge, intention, opinion, belief or purpose and the person's reasons for the intention, opinion, belief or purpose.

Subsection 63B(7) provides that a reference in section 63B to an offence against the Principal Ordinance shall be read as a reference to failing or refusing to engage in conduct.

Subsection 63B(8) provides that a reference in section 63B to an offence against the Principal Ordinance shall be read as including a reference to an offence against the Building Regulations and an offence under Part VII of the Crimes Act, 1900 (NSW) in its application to the Territory being an offence relating to an offence against the Principal Ordinance or the Building Regulations. Part VIII (section 344) of the Crimes Act, 1900 provides that "Any conspiracy falsely to accuse a person of a crime shall be punishable by imprisonment for fourteen years".