

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

BUILDING (AMENDMENT) ORDINANCE (NO. 2) 1988

No. 80, 1988

The Building Ordinance 1972 (the Principal Ordinance) is an Ordinance relating to the erection, alteration and demolition of buildings with regard to building standards and safety considerations. The Principal Ordinance provides for the appointment of a Building Controller (subsection 7(1)) and building inspectors (subsection 8(1)).

The Building (Amendment) Ordinance (No. 2) 1988 (the Amending Ordinance) implements a government initiative to provide for the inspection of residential buildings in the ACT for the presence of asbestos insulation, and then the sealing of affected areas (if necessary) and the removal and disposal of the asbestos. This is a program initiated because of the possible health risks to occupants and to the public occasioned by the presence of asbestos insulation. The costs of the inspection, sealing and removal will be met by the Commonwealth and the ACT.

The Amending Ordinance provides for the inspection of buildings by building inspectors to ascertain whether the building contains asbestos. Because of the potential danger to public health presented by asbestos, the inspection will be compulsory. In most cases inspection will be effected merely by lifting roof tiles to inspect the roof cavity, but where it is necessary to effect an inspection by other means, appropriate powers of entry into the building are provided. If a building does contain asbestos, the Commonwealth is authorised to gain entry to the property to seal the contaminated area or remove the asbestos.

These provisions are necessary because:

- . the potentially large number of buildings containing asbestos;
- . the fact that the Commonwealth and the ACT are meeting the cost of asbestos removal; and
- . the overriding concern for public health,

are such that the existing mechanisms in the Principal Ordinance do not provide an adequate means of implementing the program.

The Amending Ordinance also amends the Principal Ordinance to ensure that work on ventilation systems is within the definition of building work. This amendment will better enable the control of Legionnaires' disease.

The Amending Ordinance also provides increased penalties for various offences, as part of a general revision of penalties.

Details of the Amending Ordinance are attached.

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

Section 1 provides for the short title of the proposed Ordinance to be cited as the Building (Amendment) Ordinance (No. 2) 1988.

Section 2 recites that the Principal Ordinance is the Building Ordinance 1972.

Section 3 of the Amending Ordinance provides a definition of "asbestos" and "loose asbestos"; expands the definition of "building work" in the Principal Ordinance and provides a definition of the "handling of asbestos".

"Asbestos" is defined as meaning any of listed minerals or a substance or material containing any of the minerals. "Loose asbestos" in relation to a building will mean any asbestos that is not securely affixed to the building. This definition covers all forms of potentially hazardous asbestos ceiling insulation.

The definitions of "building work" and "handling of asbestos" remove doubts about whether the handling of asbestos is "building work" as defined by the Principal Ordinance. The definition is necessary to make removal, except where a building permit has been issued, illegal, and to remove any doubts about the Building Controller's power to issue notices to stop building work and notices requiring work to be performed (see sections 10 and 11 below).

An incidental matter which is covered in the Amending Ordinance is to make the definition of "building work" include reference to installation and modification of mechanical ventilation systems. This provision is necessary to require building permits for such work. This provision is not related to asbestos inspection and removal but rather has arisen because of concerns about Legionnaires' disease.

Section 4 of the Amending Ordinance replaces the requirement in the Principal Ordinance that certificates of appointment be issued to building inspectors with a provision that photographic identity cards be issued. This change reflects the current attitude to identification of public officials with inspectorial roles and is a significant safeguard for the asbestos inspection program.

Section 5 amends section 9 of the Principal Ordinance by increasing the penalty for obstructing without reasonable excuse a building inspector carrying out an inspection under section 9. The penalty will be \$1,000 or a period of imprisonment not exceeding 6 months, or both. This replaces the existing penalty of \$200.

Section 6 of the Amending Ordinance inserts a new section 9A into the Principal Ordinance dealing with the inspection of premises for asbestos. The separate section is required because of the need for powers to survey a large number of houses in Canberra while providing safeguards through detailed procedural

requirements. These requirements are designed to protect privacy and to restrict as far as possible the interference with private property rights which the inspection will involve.

Subsection 9A(1) provides for the authorisation of building inspectors to conduct the inspections.

Subsection 9A(2) provides the powers which inspectors may exercise in carrying out the inspection: inspectors may enter onto land and inspect buildings on the land and, for that purpose, may open any cavity in the building or any other part of the building to determine whether it contains loose asbestos and may examine, test or remove for testing samples of any material reasonably believed to be loose asbestos. These powers are subject to the following subsections and may only be exercised to the extent permitted by those subsections.

Subsection 9A(3) requires that at least seven days notice of an inspection be given to the occupier. This subsection is intended to make occupiers of buildings aware of the action being taken by the Commonwealth and to minimise any element of surprise or confusion which might otherwise arise. The notice must state:

- . the purpose of the inspection;
- . that the inspector will carry photographic identification;
- . the procedure for advising the occupier of the results of the inspection; and
- . the period within which it will take place.

Although not required by the proposed Ordinance, the notice will contain advice, in several community languages, that an interpreter service is available. Subsection 9A(3) also provides that, when the inspector arrives at a building he or she will attempt to contact the occupier, and, if he or she meets the occupier, advise the purpose of the inspection and show his or her identity card, before proceeding with the inspection.

Subsection 9A(4) provides that a notice may be given to the occupier of a building by leaving it at the building or mailing it to the occupier at the address of the building.

It should be noted at this point that an inspector may not enter a building (as opposed to inspecting the roof cavity by removing and replacing the roof tiles from outside) unless the preconditions in subsections (5), (6) and (7) have been satisfied.

Subsection 9A(5) provides that, before an inspector may enter a building, he or she must make reasonable endeavours to contact the occupier and make a convenient arrangement. If the occupier can be contacted the inspector must make reasonable endeavours to arrange a convenient time for gaining access to the building.

Subsection 9A(6) confirms that, where arrangements have been made under subsection (5), entry to a building may only be gained in accordance with those arrangements - ie on the date and time agreed between the inspector and the occupier.

Subsection 9A(7) provides that, if all reasonable attempts to contact the occupier, to make arrangements, or to enter under arrangements agreed with the occupier, fail, entry with such force as is necessary may be authorised by the Building Controller. This is not a decision which the building inspector in the field can take on his or her own initiative.

Subsection 9A(8) provides that a building inspector who is authorised by the Building Controller under subsection (7) may enter the building with such assistance and with such force as is necessary and reasonable for the purpose of performing the inspection. In practice, a locksmith would be available and only rarely would property damage be caused.

Subsection 9A(9) requires the building inspector who has removed roofing material to perform an inspection to replace the roofing material correctly when the external inspection is completed. Restoring the roof would usually mean simply replacing the roof tiles removed but may also involve the repair of foil where this is installed under roof tiles where it has been necessary to cut the foil to gain access to the roof. The foil would be repaired using an appropriate adhesive metal tape.

Subsections 9A(10) and 9A(11) impose conditions (requiring minimization of damage, courtesy, respect for privacy and securing the building as appropriate) to be observed by a building inspector when access is gained to the interior of a building, either by arrangement (subsection (10)) or by force (subsection (11)). These conditions are intended to reinforce the implicit requirement that the powers to be created by the Amending Ordinance are to be exercised with as little inconvenience to the occupier as is possible.

Subsection 9A(12) provides that, where damage is caused, a notice detailing the damage is to be provided to the occupier.

Subsection 9A(13) provides for written notification of the occupier of the results of the inspection. In practice, one of two cards will be provided to the occupier. One will advise that no asbestos has been found. The other will advise that asbestos is suspected, that a sample has been removed for testing, and that results of the test will be promptly advised when those results become available. This subsection ensures that any unjustified concerns occupiers may have held concerning the possible presence of asbestos will be dispelled as quickly as possible.

Subsection 9A(14) confirms the intention expressed in subsection (13) that samples will be tested, and a report of the results provided, promptly.

Subsection 9A(15) provides that a report under subsection (14) may be left at the building or posted to the occupier at the address of the building.

Subsection 9A(16) provides that a building inspector is not authorised to remain on the premises if, on request from the occupier or a person apparently in charge of the premises, he does not show his identity card.

Subsection 9A(17) makes it an offence to obstruct or hinder a building inspector without reasonable excuse and will provide a maximum penalty of \$1,000.

Section 7 amends section 14 of the Principal Ordinance, which lists classes of Builder's Licenses. The amendments specifically restrict the carrying out of "specialist building work" to holders of Class D Builder's licenses, whose licence is endorsed to carry out such "specialist building work" as is specified by the Building Controller by endorsement on the licence. "Specialist building work" is defined in the Ordinance to be such building work as is prescribed by the Regulations. It is proposed that the Regulations will be amended to provide that one form of specialist building work is the handling of asbestos on a building site.

Paragraph 7(a) adds specialist building work to subsection 14(2) of the Principal Ordinance, to exclude that work from the type of building work that can be performed by a holder of a Builder's Licence Class A.

Paragraphs 7(b) and 7(c) exclude specialist building work from the type of building work that can be carried out by a holder of Builder's Licence Class B.

~~Paragraph 7(d) more closely defines the building work which is excluded from the type of work that can be carried out by a holder of a Builder's Licence Class C. Paragraph 7(d) replaces the current exclusions in subsection 14(4) with those involving~~

- (a) i) structural beams the spans of which exceed 6 metres;
- ii) reinforced concrete beams; or
- iii) suspended reinforced concrete slabs the spans of which exceed 5 metres; and
- (b) specialist building work.

Section 8 increases the penalty provided in subsection 30(4) of the Ordinance for the offence of commencing or carrying out building work without a permit, or by a person other than the licensee to whom the building permit was issued. The penalty is \$2,000 (natural person) or \$10,000 (body corporate). This replaces the existing penalty of \$500.

Section 9 amends section 36(5) of the Principal Ordinance by providing a penalty of \$1,000 (natural person) or \$5,000 (body corporate) when a builder proceeds beyond a stage of building which requires inspection. The subsection did not previously provide a penalty.

Section 10 of the Amending Ordinance amends section 43 of the Principal Ordinance by providing that the presence of loose asbestos is an additional basis on which the Building Controller

can issue a "stop notice" - ie a notice to stop building work. This complements the offence of handling asbestos without a building permit. The section is intended to allow early intervention by the Building Controller to prevent any potential disturbance of loose asbestos which may result from building work being carried out on a building containing asbestos.

Section 11 of the Amending Ordinance amends section 46 of the Principal Ordinance by providing that the presence of loose asbestos in a building is an additional basis on which the Building Controller may issue a notice to carry out building work. This section gives the Building Controller the power to order that the owner of a building carry out specified work - eg sealing a roof cavity, or removing asbestos. The power is required so that directions may be given in relation to non-residential buildings. The Government has decided that all residential buildings will have asbestos removed under the powers given by the sections outlined below.

Section 12 of the Amending Ordinance inserts a new Part IVA (Removal of Loose Asbestos) into the Principal Ordinance.

Section 51A gives the Commonwealth power to enter a building to treat and secure loose asbestos to prevent it moving, to seal any area contaminated with loose asbestos and to remove the loose asbestos. The power usually will be exercised in two stages. Upon discovery of the presence of loose asbestos the ceiling cavity will be sealed to prevent any contamination of the living areas. At some later stage the loose asbestos will be removed. The exercise of powers under s.51A (and additional powers under s.51B) will be conditional upon compliance with requirements of sections 51C, 51E and 51F.

Section 51B provides additional powers to allow treatment sealing or removal under section 51A to be effected. These additional powers reflect the complexity of asbestos removal which requires the building to be completely encased in plastic and takes approximately two weeks to complete.

Section 51B provides powers, for the purpose of performing work under section 51A, to enter onto land and do such things as place or construct materials, buildings or equipment (and remove or demolish such materials, buildings or equipment). Similar provision is also made specifically in relation to such things as construction, building or placing of machinery, equipment, goods or things in, on or over the building. Provision is also made to allow the opening of any cavity in the building, or any other part of the building reasonably expected to contact asbestos.

Section 51B also contains a power (subject to section 51F) to enter a building, in which loose asbestos has been found, at any reasonable time of the day with such assistance and with such force as is necessary and reasonable.

Section 51C provides that before work under section 51A may be performed, at least 28 days written notice must be given to the occupier. This notice will advise the nature of the work to be

carried out, the powers under which the work is performed, the days on which the work is expected to commence and to be completed, the period during which it is necessary for the occupants to vacate the building, where this is necessary or desirable, and a contact number for further information. Because of the need to schedule the asbestos removal program so as to minimise costs there will only be a limited scope for deferring or rescheduling the work to suit the convenience of occupiers. However reasonable requests will be acceded to if possible. Twenty-eight days notice is considered to be a reasonable time in which the occupier can arrange alternative accommodation if this is necessary. The ACT Administration will, if requested, provide housing to occupiers (and their families) for the duration of the asbestos removal. These matters will be explained to the occupier by an officer of the ACT Administration whose name and telephone number will be included in the notice.

Section 51D provides for delivery of the section 51C notice by personal delivery or delivery by post.

Subsection 51E(1) provides for a copy of the section 51C notice to be given to the owner, where the owner is not also the occupier of the building. This section is intended to alert owners of rented premises that the work is to be performed.

Subsection 51E(2) requires the Building Controller, before issuing a section 51C notice, to make reasonable enquiries to ascertain the identities of the occupier and the owner of the building and, if necessary, the address of the owner. This subsection, in practice, requires that, where possible, the occupier be contacted to discuss his or her status before the section 51C notice is issued. If the address of the owner is not known, this information would be obtained by contacting the tenant's real estate agent, or by other enquiries.

Subsection 51F(1) provides that, before the Commonwealth (or its agents, servants, or contractors) may enter a building with force to seal or remove asbestos, the Building Controller must make reasonable endeavours to arrange a convenient time for allowing the Commonwealth access to undertake the work.

Subsection 51F(2) imposes conditions (requiring minimization of damage, courtesy and securing the building when it is unattended) to be observed by servants, agents and contractors of the Commonwealth when entering with force.

Section 51G provides that the Commonwealth, where it performs work under section 51A or section 51B, will not be liable for:

- . accommodation costs while the work is being carried out;
- . cleaning costs (apart from furniture and carpet); or
- . any reduction in the value of the building which may result from the fact that the building had loose asbestos in it.

This section reflects the view that occupiers, who are receiving a substantial benefit in having loose asbestos removed by the Commonwealth, should be required to make a contribution to the

associated costs of cleaning and accommodation. Exceptions will be made in hardship cases. The section also envisages the possibility that, notwithstanding the removal of the loose asbestos, the market value of the building may be diminished eg because of concerns that prospective purchasers may hold about the efficacy of the removal process. In the absence of negligence in removal these concerns would not be justifiable and the Commonwealth will not accept liability in these situations. This provision does not however prevent an owner of a building suing the Commonwealth if a removal is carried out negligently.

Section 51H makes it an offence to obstruct or hinder the Commonwealth or any other person exercising the Commonwealth's powers under sections 51A or 51B and provides a maximum penalty of \$1,000.

Section 13 amends the penalty provided in section 53A of the Principal Ordinance, for failure to comply with a request by the Building Controller to the holder of a building permit for a statement that permit conditions have been met. The penalty is \$1,000 (natural person) or \$5,000 (body corporate). This replaces the existing penalty of \$400.

Section 14 amends the penalty provided in section 54 of the Principal Ordinance, for allowing a person to use a portion of building not certified fit for occupation and use. The penalty is \$1,000 (natural person) or \$5,000 (body corporate). This replaces the existing penalty of \$400.

Section 15 amends the penalty provided in section 54A of the Principal Ordinance, for using a building other than in accordance with approved plans. The penalty is \$1,000 (natural person) or \$5,000 (body corporate). This replaces the existing penalty of \$400.

Section 16 amends the penalty provided in section 57 of the Principal Ordinance, for occupying a building where safe live load plates are required to be affixed, where they are not so affixed. The penalty is \$1,000 (natural person) or \$5,000 (body corporate). This replaces the existing penalty of \$200.

Section 17 amends the penalty provided in section 58 of the Principal Ordinance, for exceeding the safe live load of a floor of a building. The penalty is \$2,000 (natural person) or \$10,000 (body corporate). This replaces the existing penalty of \$400.

Section 18 of the Ordinance validates retrospectively notices given before the commencement of this Ordinance if they complied with the requirements of paragraph 9A(3)(a) and are given in the manner prescribed by subsection 9A(4). This provision is necessary because, to avoid delays, notices may have been issued, advising that an inspection will be carried out, before the Amending Ordinance commenced operation. However inspections, except by consent, could not be carried out until the Amending Ordinance commenced operation.