

AUSTRALIAN CAPITAL TERRITORY

Building (Amendment) Ordinance 1988

No. 73 of 1988

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910*.

Dated 22 September 1988.

N. M. STEPHEN
Governor-General

By His Excellency's Command,

CLYDE HOLDING
Minister of State for the Arts
and Territories

An Ordinance to amend the *Building Ordinance 1972*

Short title

1. This Ordinance may be cited as the *Building (Amendment) Ordinance 1988*.¹

Commencement

2. This Ordinance shall commence on such date as is fixed by the Minister by notice in the *Gazette*.

Principal Ordinance

3. In this Ordinance, "Principal Ordinance" means the *Building Ordinance 1972*.²

Interpretation

4. Section 5 of the Principal Ordinance is amended—
(Ord. 56/88)—Cat. No.

- (a) by inserting after the definition of “approved” in subsection (1) the following definition:

“ ‘authorised insurer’ means a body corporate that has been granted authority to carry on insurance business under the *Insurance Act 1973*;”;

- (b) by omitting from subsection (1) the definition of “House of Assembly”;

- (c) by omitting from subsection (1) the definition of “owner” and substituting the following definitions:

“ ‘owner’, in relation to land, means—

- (a) if the land is held under a lease from the Commonwealth for a term of years—the lessee;
- (b) if the land is held in fee simple—the person in whom the fee simple is vested;
- (c) if the land is subdivided into units and common property by the registration of a units plan under the *Unit Titles Ordinance 1970*—
 - (i) where building work has been, is being or is to be carried out on the land for the corporation constituted under that Ordinance on the registration of the units plan—the corporation;
 - (ii) where building work has been, is being or is to be carried out on the land for the proprietor of a unit—the proprietor; or
 - (iii) in any other case—the corporation; or
- (d) if the land is occupied under a tenancy from the Commonwealth—the occupier;

‘proprietor’, in relation to a unit, has the same meaning as in the *Unit Titles Ordinance 1970*;

‘residential building insurance policy’ means an insurance policy that complies with section 58E;”;

- (d) by inserting in subsection (1) after the definition of “specialist building work” the following definition:

“ ‘statutory warranty’ means a warranty specified in section 58C;” and

(e) by adding at the end of subsection (1) the following definition:

“ ‘unit’ has the same meaning as in the *Unit Titles Ordinance 1970*.”.

Application

5. Section 6 of the Principal Ordinance is amended—

- (a) by omitting from paragraph (5) (a) “or other free-standing building”; and
- (b) by inserting in paragraph (5) (b) “outdoor” before “ornamental”.

Building Review Committee

6. Section 10 of the Principal Ordinance is amended—

- (a) by omitting from subsection (3) “five” and substituting “4”;
- (b) by omitting paragraph (3) (b); and
- (c) by omitting from paragraph (3) (d) “Engineers of Australia” and substituting “Engineers, Australia”.

Vacancies in office of members of Review Committee

7. Section 11 of the Principal Ordinance is amended by omitting subsection (2).

Building Standards Committee

8. Section 24 of the Principal Ordinance is amended by omitting from paragraph (1) (d) “Engineers of Australia” and substituting “Engineers, Australia”.

Grant of building permits

9. Section 35 of the Principal Ordinance is amended by adding at the end the following subsections:

“(3) A building permit shall not be granted for residential building work to which Part VA applies unless the Building Controller is satisfied—

- (a) that the work is insured;
- (b) if each approved insurer has refused to insure the work—

- (i) that the owner of the land on which the work is to be carried out does not require the work to be insured; and
- (ii) 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.

“(4) In addition to complying with subsection (2), an application for a building permit for residential building work to which Part VA applies shall be accompanied by—

- (a) a residential building insurance policy that has been issued in respect of the work;
- (b) a certificate by an approved insurer to the effect that the insurer has insured the work; or
- (c) in a case referred to in paragraph (3) (b)—
 - (i) an application for the permit to be granted notwithstanding that the work is not insured;
 - (ii) a statement by each approved insurer to the effect that the insurer has refused to insure the work; and
 - (iii) a statutory declaration by the owner of the land on which the work is to be carried out to the effect that the owner does not require the work to be insured.

“(5) 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, a reference in subsection (3) or (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.

“(6) In subsections (3), (4) and (5)—

‘approved insurer’ means an authorised insurer who—

- (a) has had a form of residential building insurance policy approved by the Building Controller; and
- (b) has not notified the Building Controller under section 58G that the insurer has ceased to be in the business of issuing such policies, or that the insurer’s authority to carry on insurance business has been cancelled;

‘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;

‘insured’ means insured under a residential building insurance policy;

‘residential building work’ has the same meaning as in Part VA.”.

Repeal

10. Sections 53B and 53C are repealed.

Occupation and use of buildings

11. Section 54 of the Principal Ordinance is amended by omitting “the last preceding section” (wherever occurring) and substituting “section 53”.

Insertion

12. After Part V of the Principal Ordinance the following Part is inserted:

“PART VA—RESIDENTIAL BUILDING—STATUTORY WARRANTIES AND INSURANCE

Interpretation

“58A. In this Part—

‘builder’ in relation to residential building work or a residential building, means—

- (a) the person who applies for, holds or held a building permit in relation to the work or the building; or
- (b) if that person is an employee of another person, or a contractor engaged by another person—the other person;

‘building’ does not 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;

‘building work’ does not include work in connection with the demolition of a whole building;

‘cost’, in relation to residential building work, has the same meaning as in subregulation 2 (1) of the Building Regulations;

‘dwelling’ means 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;

‘flat’ has the same meaning as in the Building Manual;

‘ground storey’ has the same meaning as in the Building Manual;

‘habitable room’ has the same meaning as in the Building Manual;

‘house’ has the same meaning as in the Building Manual;

‘mezzanine’ has the same meaning as in the Building Manual;

‘residential building’ means 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);

‘residential building work’ means building work in connection with a residential building;

‘storey’ as the same meaning as in the Building Manual.

Application

“58B. This Part does not apply in relation to residential building work—

- (a) carried out or to be carried out by or for the Commonwealth or an authority established under an Act or an Ordinance;
- (b) if a building permit under subsection 39 (1) is granted for the work;
- (c) if the cost of the work is less than \$5,000; or
- (d) carried out or to be carried out in respect of buildings or dwellings other than buildings or dwellings referred to in Class I or Class II of the classifications of buildings in Part 6.1 of the Building Manual.

Statutory warranties

“58C. (1) There is implied, by force of this section, in every contract for the sale of a residential building, and every contract to carry out residential building work (being a contract to which the builder is a party), a warranty by the builder—

- (a) that the residential building work, on the building, or to be carried out, has been or will be carried out in accordance with this 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 judgment—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.

“(2) Each of the owner's successors in title succeeds to the rights of the owner in respect of the statutory warranties.

“(3) The warranties expire at the end of the period of 5 years after the date on which a certificate is issued under section 53 in relation to the building or the building work.

“(4) In subsection (2), ‘owner’ means—

- (a) in the case of a contract referred to in subsection (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 (1) to carry out residential building work—the owner of the land on which the work is to be carried out under the contract.

Builder's liability

“58D. Nothing in this Ordinance shall be taken to limit the liability that a builder would have had to any person if this Ordinance had not been made.

Residential building work insurance

“58E. (1) An insurance policy issued in respect of residential building work complies with this section if—

- (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 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 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 subsistence 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.

“(2) A residential building insurance policy may provide that the authorised insurer who issues the policy is not liable for the first \$500 (or some specified lesser amount) of each claim.

“(3) For the purpose of calculating the amount of the premium payable in respect of a residential building insurance policy, the value of the work shall be taken to be equal to the cost of the work.

“(4) Any provision, stipulation, covenant or agreement (whether made before or after the commencement of this Part) which negatives, limits or modifies or purports to negative, limit or modify the operation of this Part is void and of no effect.

“(5) A residential building insurance policy shall not be taken to be invalid only because it contains any term, condition or warranty not contained in the form of policy approved by the Building Controller, but any such term, condition or warranty is void and of no effect.

“(6) An authorised insurer is not entitled to avoid liability under a residential building insurance policy on the grounds that the policy was obtained by misrepresentation or non-disclosure by the builder.

“(7) Where—

- (a) a builder is not the owner of the land on which the builder is carrying out residential building work;
- (b) as a result of becoming insolvent, the builder fails to complete the work;
- (c) the owner has paid the builder part or all of the cost of the work; and
- (d) the work is insured under a residential building insurance policy;

the owner is not entitled to recover from the insurer any amount by which the amount paid exceeds the cost of the work done except, 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 less.

“(8) For the purposes of this section, a builder shall be taken to be insolvent if the builder becomes bankrupt, applies to take the benefit of any law

for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit.

“(9) In subsection (7), ‘deposit’, in relation to residential building work, means 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.

Recovery from builder

“58F. (1) Where—

- (a) a court gives judgment in favour of a 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;

the judgment creditor may apply to the court for a direction that judgment be entered in favour of the creditor against the authorised insurer who issued the policy.

“(2) The judgment creditor shall give the insurer at least 7 days’ written notice of his or her intention to make an application.

“(3) A judgment entered against an authorised insurer is enforceable only to the extent that it had not been satisfied at the time the judgment was entered.

“(4) An authorised insurer may, in addition to any other right or remedy, 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 entered or obtained against the insurer; and
- (c) the costs of and expenses reasonably incurred by the insurer;

as the insurer has paid under or in consequence of the policy.

Duties of insurers

“58G. (1) Where—

- (a) an authorised insurer has been in the business of issuing residential building insurance policies; and
- (b) the insurer ceases to be in that business, or the insurer’s authority to carry on insurance business is cancelled under the *Insurance Act 1973*;

the insurer shall notify the Building Controller of the cessation or cancellation within 7 days of its occurrence.

“(2) An authorised insurer shall not knowingly represent falsely that an insurance policy issued or to be issued by the insurer complies with section 58E.

Penalty: \$5,000.

Insertion

13. After section 59 of the Principal Ordinance the following section is inserted:

False or misleading statements

“59A. A person who knowingly or recklessly—

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

is guilty of an offence punishable, on conviction, by—

- (c) in the case of a natural person—imprisonment for a period not exceeding 6 months, or a fine not exceeding \$1,000, or both; or
- (d) in the case of a body corporate—a fine not exceeding \$5,000.”.

Insertion

14. After section 61 of the Principal Ordinance, the following sections are inserted:

Review of decisions

“61A. Application may be made to the Administrative Appeals Tribunal for a review of a decision of the Building Controller—

- (a) refusing to grant a building permit under section 35 for residential building work;
- (b) refusing to issue a certificate under subsection 53 (2), (3), (6), (10) or (11); or
- (c) refusing to approve a form of residential building insurance policy for the purposes of paragraph 58E (1) (k).

Notification of decisions

“61B. (1) Where the Building Controller makes a decision of a kind referred to in section 61A, the Building Controller shall, within 28 days of the date of the decision, cause written notice of the decision to be given—

- (a) in the case of a decision under section 35—to the applicant for the building permit;
- (b) in the case of a decision under section 53—to the applicant for the certificate; and
- (c) in the case of a decision under paragraph 58E (1) (k)—to the insurer who applied for approval.

“(2) If the applicant referred to in paragraph (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.

“(3) A notice under subsection (1) or (2) shall—

- (a) include a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, an application may be made to the Administrative Appeals Tribunal for a review of the decision to which the decision relates; and
- (b) 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 that Act.

“(4) The validity of a decision referred to in subsection (1) shall not be taken to be affected by a failure to comply with subsection (3).”.

Insertion

15. After section 63A of the Principal Ordinance the following section is inserted:

Conduct of directors, servants and agents

“63B. (1) Where, in proceedings for an offence against this Ordinance, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show—

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind.

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

“(3) Where, in proceedings for an offence against this Ordinance, it is necessary to establish the state of mind of a person other than a body corporate in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a servant or agent of the person within the scope of his or her actual or apparent authority; and
- (b) that the servant or agent had the state of mind.

“(4) Any conduct engaged in on behalf of a person other than a body corporate by a servant or agent of the person within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Ordinance, to have been engaged in also by the first-mentioned person unless the first-mentioned person establishes that the first-mentioned person took reasonable precautions and exercised due diligence to avoid the conduct.

“(5) Where—

- (a) a person other than a body corporate is convicted of an offence; and

- (b) the person would not have been convicted of the offence if subsections (3) and (4) had not been made;

the person is not liable to be punished by imprisonment for that offence.

“(6) A reference in subsection (1) or (3) to the state of mind of a person shall be read as a reference to—

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
- (b) the person’s reasons for the intention, opinion, belief or purpose.

“(7) A reference in this section to engaging in conduct shall be read as including a reference to failing or refusing to engage in conduct.

“(8) A reference in this section to an offence against this Ordinance shall be read as including a reference to—

- (a) an offence against the regulations; and
- (b) an offence against or arising out of Part VIII of the Crimes Act, 1900 of New South Wales in its application to the Territory, being an offence related to an offence against this Ordinance or the regulations.”.

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 30 September 1988.
2. No. 26, 1972 as amended by Nos. 7 and 38, 1974; Nos. 45 and 61, 1976; No. 46, 1978; No. 30, 1979; Nos. 69, 70 and 71, 1982; Nos. 20 and 66, 1983; No. 68, 1984; Nos. 20 and 47, 1987.