

NORTHERN TERRITORY OF AUSTRALIA

BUILDING (RBI AND FIDELITY FUND SCHEMES) REGULATIONS

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Subordinate Legislation No. 44 of 2012

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# NORTHERN TERRITORY OF AUSTRALIA

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Subordinate Legislation No. 44 of 2012\*

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## ***Building (RBI and Fidelity Fund Schemes) Regulations***

I, Sally Gordon Thomas, Administrator of the Northern Territory of Australia, acting with the advice of the Executive Council, make the following regulations under the *Building Act*.

Dated 14 December 2012

S. G. THOMAS  
Administrator

By Her Honour's Command

J. W. ELFERINK  
Attorney-General and Minister for Justice  
acting for  
Minister for Lands, Planning and the Environment

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\* Notified in the *Northern Territory Government Gazette* on 14 December 2012.

## Chapter 1 Introduction

### Part 1.1 Preliminary matters

#### 1 Citation

These Regulations may be cited as the *Building (RBI and Fidelity Fund Schemes) Regulations*.

#### 2 Commencement

These Regulations commence on the commencement of the *Building Amendment (Residential Building Consumer Protection) Act 2012*.

#### 3 Application to public authority residential building work

Prescribed residential building work carried out, or to be carried out, in relation to a residential building owned by Defence Housing Australia is exempt from the operation of section 54A(2) of the Act.

*Note for regulation 3*

*The effect of this regulation is that an authorised RBI Policy or fidelity certificate is required for such residential building work.*

### Part 1.2 Interpretation

#### Division 1 Defined terms

#### 4 Definitions

In these Regulations:

**accounting standards**, in relation to an approved scheme, means the accounting standards applicable to a managed investment scheme registered under Chapter 5C of the Corporations Act 2001.

**actuarial report**, in relation to an approved scheme, means the report mentioned in regulation 84.

**approval criteria**, for a fidelity fund scheme, means the criteria for approval prescribed under Part 3.2.

**audit certificate** means the certificate mentioned in regulation 75(2).

**beneficiary**, under a policy or certificate, see regulation 9.

**builder** means a residential builder.

**capital management plan**, for an approved scheme, means a plan mentioned in regulation 79(2).

**certificate** means a fidelity certificate.

**claimant** means a person who makes a claim under a policy or certificate.

**Class**, in relation to a residential building, see regulation 5(6).

**compliance plan**, for an approved scheme, means a plan mentioned in regulation 87.

**contingency plan**, for an approved scheme, means a plan mentioned in regulation 90.

**contract** means a residential building contract.

**contributions certificate**, in relation to an approved scheme, means the certificate mentioned in regulation 77.

**cover period**, in relation to the period of cover under a policy or certificate, see regulation 7(1).

**current owner**, of land or a residential building, means a current owner mentioned in section 54AD(a) or (b) of the Act.

**declared consumer protection area** means an area of the Territory that is specified in a declaration under section 6(2) of the Act to be a part of the Territory to which Part 5A of the Act applies.

**Defence Housing Australia** means the body (however named) under the *Defence Housing Australia Act 1987* (Cth) on which is conferred the function of providing housing for, and related services to, members of the Defence Force.

**eligibility criteria** means:

- (a) in relation to the appointment of a person as a trustee of a scheme – the eligibility criteria specified in regulation 31; or
- (b) in relation to the appointment of a person as an auditor or actuary for a scheme – the eligibility criteria specified in regulation 53; or
- (c) in relation to the appointment of a person as a special actuary for a scheme – the eligibility criteria specified in regulation 57.

**financial year**, of an approved scheme, means each period from 1 July to 30 June subsequent to the first year of approval.

**first year of approval**, of an approved scheme, means the period from the date of approval of the scheme to the next 30 June.

**guaranteed work**, in relation to:

- (a) a policy – see regulation 12(1); or
- (b) a certificate – see regulation 39(b).

**insurer** means an approved insurer.

**non-completion**, of residential building work, is the failure of a builder to complete the work under the residential contract relating to the work.

**non-structural defect**, in a residential building, see regulation 6(1).

**policy** means an authorised RBI policy.

**prescribed Class 2 building** means a Class 2 building that does not exceed 3 residential storeys.

**prudential standards** means the standards prescribed under Part 3.4 for section 54DC(1) of the Act.

**relevant circumstances**, in relation to an entitlement to make a claim under a policy or certificate, see regulation 8(1).

**residential building**, see regulation 5(3).

**residential building work**, see regulation 5(2).

**residential storey**, in relation to a prescribed Class 2 building, does not include an undercroft or underground car park.

**scheme** means a fidelity fund scheme or an approved scheme.

**solvency certificate**, in relation to an approved scheme, means the certificate mentioned in regulation 83.

**structural defect**, in a residential building, see regulation 6(2).

**total contracted price**, in relation to guaranteed work, includes any variations to the price specified in the contract for the work as agreed by the parties to the contract.

**trust deed**, in relation to a scheme, means the trust deed for the scheme.



**trustee** means a trustee of a scheme.

## **Division 2 Important concepts**

### **5 Residential building work and residential buildings**

- (1) For section 54AB(1) of the Act, this regulation prescribes the building work that must be covered by a policy or certificate (**residential building work**).
- (2) Residential building work is building work, of at least \$12 000 in value, in connection with the construction of a residential building.
- (3) A **residential building** is any of the following:
  - (a) a Class 1a building or prescribed Class 2 building (each of which is a **relevant building**);
  - (b) a Class 10 building attached to a relevant building if the Class 10 building is constructed at the same time as the relevant building is constructed;
  - (c) a Class 10 building that is a retaining wall (whenever constructed) that is not attached to a relevant building but on which the integrity of the relevant building depends.

*Examples of Class 10 buildings for subregulation (3)(b)*

*A garage, retaining wall or verandah.*

- (4) Without limiting subregulation (2), the following building work is residential building work:
  - (a) work in connection with an extension of a relevant building;
  - (b) work in connection with an extension of a dwelling in a prescribed Class 2 building;
  - (c) work, to be carried out under the same contract, in connection with both:
    - (i) an extension mentioned in paragraph (a) or (b); and
    - (ii) a renovation of the same relevant building or dwelling.

- (5) However, residential building work does not include work in connection with:
- (a) the construction of a residential building that is entirely or substantially prefabricated and is designed to be transported from:
    - (i) the site of assembly; or
    - (ii) any subsequent site on which the building is located; or
  - (b) renovations or alterations to an existing relevant building that do not increase the floor area of the building, other than renovations mentioned in subregulation (4)(c)(ii).

*Examples of renovations for subregulation (5)(b)*

*The re-cladding of roofs or walls, replacement of windows, construction of new external openings and enlargement or filling in of existing external openings.*

- (6) A reference in this regulation to a residential building of a particular Class is a reference to a building of that Class as specified under the classification of buildings in the Building Code, as defined in regulation 2(1) of the *Building Regulations*.

## 6 Non-structural defects and structural defects

- (1) A **non-structural defect**, in a residential building, is a defect in a non-structural element of the building as a result of defective residential building work.
- (2) A **structural defect**, in a residential building:
- (a) is a defect in a structural element of the building as a result of defective residential building work; or
  - (b) is a defect, as a result of defective residential building work, that is reasonably likely to cause a defect in a structural element of the building.

*Example for subregulation (2)(b)*

*A waterproof membrane attached to a wall or floor of a bathroom.*

- (3) In this regulation:

**non-structural element**, of a residential building, means a component of the building that is not a structural element.

**structural element**, of a residential building, means:

- (a) a load-bearing component of the building (whether internal or external) that is essential to the stability of the building or part of the building; or
- (b) a component (including weatherproofing) forming part of the external walls or roof of the building.

*Examples for paragraph (a)*

*A foundation, floor, wall, roof, column or beam.*

## 7 **Cover period under policy or certificate**

- (1) This regulation prescribes the period for which a policy or certificate must provide cover for losses incurred as specified in the policy or certificate (the **cover period**).
- (2) The cover period for the non-completion of guaranteed work under a contract is the same as the relevant effective period under regulation 7(2) of the Building Dispute Resolution Regulations.
- (3) The cover period for defective guaranteed work is the total of the following 2 periods:
  - (a) the relevant construction period mentioned in regulation 7(4) and (5) of the Building Dispute Resolution Regulations;
  - (b) the relevant defect period mentioned in regulation 7(6) of those Regulations.
- (4) In this regulation:

**Building Dispute Resolution Regulations** means the *Building (Resolution of Residential Building Work Disputes) Regulations*.

## 8 **Relevant circumstances for making claim under policy or certificate**

- (1) The **relevant circumstances** that entitle a beneficiary to make a claim for financial loss incurred in relation to guaranteed work are as follows:
  - (a) under a policy – the failure or contravention of the builder mentioned in section 54C(a) of the Act and the occurrence of an event mentioned in section 54C(b) of the Act;
  - (b) under a certificate – the failure or contravention of the builder mentioned in section 54D(2)(a) of the Act and the occurrence of an event mentioned in section 54D(2)(b) of the Act.

- (2) For sections 54C(b)(i) and 54D(2)(b)(i) of the Act:
- (a) a builder is taken to have disappeared if the builder cannot be located after all reasonable inquiries have been made into the builder's whereabouts; and
  - (b) a builder is taken to be bankrupt if the builder has:
    - (i) applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
    - (ii) compounded with creditors or made an assignment of the builder's remuneration for their benefit; and
  - (c) a builder has become insolvent if the builder is unable to pay all the builder's debts as and when they become due and payable.
- (3) For sections 54C(b)(ii) and 54D(2)(b)(ii) of the Act, the reason for cessation of the builder's registration is that it has been suspended or cancelled:
- (a) by the Practitioners Board under Part 3, Division 3B or 3C of the Act; or
  - (b) by an order of the Local Court under Part 3, Division 4 of the Act.

## 9 Beneficiary under policy or certificate

- (1) Subject to this regulation, a **beneficiary** entitled to be indemnified under a policy, or to be paid an amount under a certificate, must be a current owner of the land or building described in the policy or certificate.
- (2) A trustee of a trust under which a builder in relation to guaranteed work may benefit from the cover given by a policy or certificate issued for the work cannot be a beneficiary under the policy or certificate.
- (3) Defence Housing Australia cannot be a beneficiary under a policy or certificate in relation to a claim for non-completion of the guaranteed work specified in the policy or certificate.

## **Chapter 2      Authorised RBI policies**

### **Part 2.1      Matters to be included in policy**

#### **10      Provisions of policy generally**

- (1) This Part prescribes matters required or permitted to be included in an authorised RBI policy.
- (2) This Part does not limit the provisions that may be included in an authorised RBI policy if the provisions do not contravene, and are consistent with, the Act and these Regulations.

#### **11      Declared consumer protection area**

The policy must specify that it applies only to residential building work in a declared consumer protection area.

#### **12      Guaranteed work**

- (1) The policy must describe the particular residential building work, prescribed by regulation 5, to which the policy applies (the ***guaranteed work***).
- (2) The policy must also include a description of the land or residential building for which, or in connection with which, the guaranteed work is to be carried out.

#### **13      Relevant circumstances giving right entitlement to indemnity**

- (1) The policy must specify that the beneficiary is entitled to be indemnified under the policy only if the relevant circumstances have occurred in relation to the guaranteed work.
- (2) For regulation 8(2)(a), the policy may specify that the insurer may make reasonable inquiries about the builder's whereabouts even if the beneficiary has already done so.

#### **14      Financial loss to be covered by policy**

- (1) The policy must indemnify the beneficiary against financial loss incurred because of defective guaranteed work (including defective design work under a contract) or the non-completion of guaranteed work.

- (2) The policy must cover financial loss incurred in relation to any of the following:
- (a) the costs of removal, and of alternative accommodation and storage for a period not exceeding 60 calendar days, reasonably incurred as a result of the defective guaranteed work or non-completion of the work;
  - (b) subject to regulation 15(1)(a) – the loss of a deposit or progress payment under a contract relating to the work;
  - (c) legal or other reasonable costs incurred in seeking to have a builder rectify or complete the work;
  - (d) an increase in costs for rectification of the work caused by the passage of time;
  - (e) any acts or omissions of persons engaged as contractors by the builder in relation to the work;
  - (f) any additional reasonable costs associated with engaging another builder to rectify or complete the work (excluding the costs associated with the work carried out by that builder).

**15      Financial loss not required to be covered by policy**

- (1) The policy need not cover financial loss incurred in relation to any of the following:
- (a) the payment of a deposit or progress payment above the amount specified in the contract relating to the guaranteed work;
  - (b) if the beneficiary is a subsequent purchaser of the residential building – defects that are readily apparent at the time of purchase;
  - (c) damage that could reasonably be expected to result from fair wear and tear or from the current owner of the building failing to maintain the work;
  - (d) damage caused by a person or made worse by the failure of the current owner to take reasonable and timely action to minimise the damage;
  - (e) legal liability resulting from any event that is not expressly insured under the policy;

- (f) a defect that is due to residential building work (including design work) or materials not specified in the contract relating to the guaranteed work (for example, materials supplied by the contracting owner);
- (g) a person's injury or impairment (including injury or impairment of the person's mental condition), death, disease or illness;
- (h) loss of rent, income, value or opportunity;
- (i) inconvenience or distress;
- (j) the unreasonable refusal of the beneficiary to allow access to the insurer, or the insurer's agent, for the purpose of assessing the beneficiary's claim;
- (k) the failure of the beneficiary to maintain adequate protection against pests;
- (l) the malfunction of any mechanical or electrical equipment if the insurer can prove the malfunction was not attributable to the workmanship of, or installation by, the builder;
- (m) fraud or dishonest conduct of any kind by the builder;
- (n) an appliance;
- (o) asbestos contamination or removal;
- (p) war, civil unrest, a nuclear event or an act of nature.

*Notes for subregulation (1)(m)*

- 1 *Section 54CH of the Act creates offences relating to a builder giving the authorised insurer misleading information.*
  - 2 *Section 54CI of the Act prevents an insurer from avoiding liability under a policy if the builder has given the insurer misleading information.*
- (2) In addition, the policy need not provide for the payment of an amount in damages or liquidated damages for delay in completing the guaranteed work.
  - (3) Despite this regulation, a provision of the policy does not contravene, and is not inconsistent with, the Act or these Regulations if the provision provides greater cover than is required by regulation 14.

## **16      Common property of prescribed Class 2 building**

A policy issued for guaranteed work in connection with a dwelling in a prescribed Class 2 building must provide that, in relation to defective guaranteed work carried out on the common property of the building:

- (a) a claim may be made on behalf of all the beneficiaries under policies issued for the dwellings (who are the current owners of the dwellings in the building); and
- (b) any payment made by the insurer to rectify the defective guaranteed work will reduce the entitlement to indemnity for financial loss in equal proportions for the dwellings.

*Example for regulation 16*

*If there are 10 dwellings in the prescribed Class 2 building and the rectification work amounts to \$40 000, the entitlement under the policy in relation to each dwelling will be reduced by \$4 000.*

## **17      Amount of cover and related matters**

In relation to the amount of cover to be provided for financial loss, the policy must:

- (a) provide a minimum amount of cover of \$200 000 in total for the guaranteed work; and
- (b) provide that if the total contracted price for the guaranteed work is varied by an increase or decrease of more than 5%, the builder must apply to the insurer for a reassessment of the amount of cover; and
- (c) limit the cover for non-completion of the guaranteed work to an amount not less than 20% of the total contracted price for the work; and
- (d) provide for cover for defective guaranteed work up to the maximum amount payable under the policy less any amount that may have been paid for non-completion of the guaranteed work.

## **18      Excess**

- (1) The policy may specify an amount for which the insurer is not liable under the policy (the **excess**).
- (2) The excess specified in the policy must not exceed \$500 in total for the guaranteed work.



## **Part 2.2            Claim under policy**

### **19            Time for making claim**

- (1) A beneficiary who makes a claim under a policy in relation to the non-completion of guaranteed work must give the insurer a written claim within the cover period relevant to the claim.
- (2) A beneficiary who makes a claim under a policy in relation to defective guaranteed work must give the insurer a written claim:
  - (a) within the cover period relevant to the claim; and
  - (b) within 90 days after the day on which the beneficiary became aware, or could reasonably be expected to have become aware, of the defective guaranteed work.
- (3) However, if the beneficiary becomes aware of the defective guaranteed work within 90 days before the end of the cover period, the cover period is extended for 90 days after the beneficiary became aware of the defective work.

### **20            Information and access to be given by claimant**

- (1) A claimant under a policy must give the insurer all information, documents and assistance requested by the insurer to enable a proper consideration of the claim.
- (2) The claimant must also allow the following persons access to the residential building or land on which the guaranteed work was carried out (or, under a contract, was to have been carried out):
  - (a) the insurer or the insurer's agent;
  - (b) a person engaged by the insurer to inspect the work, building or land;
  - (c) a builder nominated by the insurer to rectify or complete the guaranteed work.
- (3) The insurer is entitled to reject the claim if the claimant fails to comply with subregulation (1) or (2).

### **21            Insurer's rights to assess claim and payment**

- (1) The insurer must assess a claim under a policy and decide whether the claimant is a beneficiary.
- (2) If the claimant is a beneficiary, the insurer must decide the reasonable amount payable to the beneficiary.

- (3) The insurer is required to pay to the beneficiary only the reasonable amount as assessed, and is not required to pay the maximum amount allowable under the policy.

## **22      Claim for defective guaranteed work and rectification**

- (1) For a claim relating to defective guaranteed work, the insurer may:
- (a) arrange to have the work rectified; or
  - (b) pay the costs of the rectification to the beneficiary.
- (2) However, if the beneficiary has the defective guaranteed work rectified before making the claim, the insurer is entitled to reject the claim.
- (3) If the insurer pays the costs of rectification to the beneficiary, the insurer is not liable to indemnify any other person for financial loss incurred because of:
- (a) the same defective guaranteed work; or
  - (b) any other defective work arising directly or indirectly from that defective guaranteed work.

### *Example for subregulation (3)*

*A successor in title to a contracting owner is not entitled to payment for defective guaranteed work if the contracting owner has already received payment to cover losses incurred in relation to that work.*

## **23      Insurer may recover from builder**

An insurer who makes a payment to a beneficiary may recover the amount of the payment as a debt from the builder who carried out the guaranteed work or, under a contract, agreed to carry out the work.

## **24      Annual statement about claims**

For section 54CE(1) of the Act, the period within which an insurer must give the Minister a written statement about claims on policies dealt with by the insurer during a financial year is 90 days after the end of the financial year.

## **Chapter 3 Fidelity fund schemes and approved schemes**

### **Part 3.1 Application for approval of fidelity fund scheme**

#### **25 Form of application**

An application for approval of a fidelity fund scheme must:

- (a) be in a form that is acceptable to the Minister; and
- (b) for section 54DA(2)(c) of the Act, include the information required by regulation 26 and the approved form.

#### **26 Required information for application**

- (1) In relation to the trustees of the scheme, the application must include:
  - (a) the names and contact details of each trustee; and
  - (b) information to satisfy the Minister that each trustee meets the eligibility criteria; and
  - (c) an address in the Territory for service of documents on the trustees.
- (2) In relation to the persons to be appointed as the auditor and the actuary for the scheme (if the scheme and those appointments are approved), the application must include an application mentioned in regulation 54.
- (3) The application must also include:
  - (a) a preliminary audit certificate that is prepared:
    - (i) by the person to be appointed as the auditor for the scheme; and
    - (ii) as if it were an audit certificate for an approved scheme; and
  - (b) a preliminary capital management plan, for the Minister's approval, that is prepared by the trustees as if it were a capital management plan for an approved scheme;

- (c) a preliminary contributions certificate that is prepared:
  - (i) by the person to be appointed as the actuary for the scheme; and
  - (ii) as if it were a contributions certificate for an approved scheme; and
- (d) a contingency plan and a compliance plan that, if the scheme is approved, will take effect immediately for the scheme; and
- (e) any other information necessary to satisfy the Minister that the scheme complies with the approval criteria.

## **27 Certification of trust deed**

For section 54DA(2)(b) of the Act, one of the trustees of a scheme applying for approval must:

- (a) certify that the copy of the trust deed accompanying the application is a true copy of the original executed trust deed; and
- (b) sign and date the certification.

## **Part 3.2 Approval criteria**

### **Division 1 Preliminary matters**

#### **28 Purpose of Part**

For section 54DA(3) and (4) of the Act, this Part prescribes the approval criteria with which a fidelity fund scheme must comply to be an approved scheme.

#### **29 Contents of trust deed generally**

- (1) The scheme's trust deed may include provisions dealing with matters that are not covered by the approval criteria.
- (2) However, those provisions must not contravene or be inconsistent with the Act or these Regulations.

### **Division 2 Trustees and management of scheme**

#### **30 Required number of trustees**

Unless the Minister approves otherwise, the scheme must have at least 5 trustees.

### **31 Eligibility criteria for appointment as trustee**

- (1) The scheme's trust deed must include provisions about the eligibility criteria for the appointment of a person as a trustee of the scheme as specified by this regulation.
- (2) To be eligible for appointment as a trustee of the scheme, a person must:
  - (a) be an individual who is an Australian citizen; and
  - (b) have the competence, knowledge, skills, experience, qualifications and integrity to carry out the duties as trustee that would be expected of an ordinary prudent person carrying out those duties; and
  - (c) maintain professional indemnity insurance in relation to the position as a trustee that is prudent and reasonable in the circumstances and that covers claims amounting to the lesser of the following:
    - (i) \$5 000 000;
    - (ii) the total of the value of all the assets of the scheme.
- (3) A person is not eligible for appointment as a trustee of the scheme if the person:
  - (a) has an actual or potential conflict of interest that is likely to influence the person's ability to carry out the duties of a trustee with appropriate probity and competence; or
  - (b) has been an insolvent under administration as defined in section 9 of the Corporations Act 2001; or
  - (c) is under investigation, or has been disciplined or removed from membership of a professional body relevant to the duties as a trustee; or
  - (d) has been refused the right, or restricted in the right, to carry on any trade, business or profession relevant to the duties as a trustee; or
  - (e) has been the subject of an adverse finding in relation to dishonest conduct in any judgment in an administrative or civil proceeding in any jurisdiction of Australia or in a foreign country; or

- (f) has been convicted of an offence:
  - (i) against the Act, the Corporations Act 2001, the *Insurance Act 1973* (Cth), or the *Financial Sector (Collection of Data) Act 2001* (Cth); or
  - (ii) against a law of any jurisdiction of Australia, or a foreign country, involving dishonest conduct.

### **32 Exercise and performance of powers and duties of trustees**

- (1) The scheme's trust deed must include provisions about the exercise of the trustees' powers, and the performance of the trustees' duties, to the effect that each trustee agrees:
  - (a) to act honestly in all matters concerning the scheme; and
  - (b) to exercise, in relation to all matters affecting the scheme, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide; and
  - (c) to ensure that the trustees' powers and duties are exercised or performed in the best interests of the beneficiaries of the scheme and, if there is a conflict between the interests of the beneficiaries and the trustees' own interests, to give priority to the interests of the beneficiaries; and
  - (d) not to make use of information acquired as a trustee in order to:
    - (i) gain an improper advantage for the trustee or another person; or
    - (ii) cause detriment to a beneficiary of the scheme; and
  - (e) to ensure that the money and other assets of the scheme are:
    - (i) clearly identified as property of the scheme; and
    - (ii) held separately from the property of the trustee and the other trustees; and
  - (f) not to enter into an agreement, or do anything or omit to do something, that would prevent the trustee or the other trustees from, or hinder the trustee or the other trustees in, properly carrying out their duties; and

- (g) as soon as practicable after the trustee becomes aware of any breach of the Act or these Regulations that has had, or is likely to have, a materially adverse effect on the interests of a beneficiary, to report the breach to the Minister; and
  - (h) to perform any other duty, not inconsistent with the Act or these Regulations, that is imposed on the trustee by the trust deed.
- (2) The trust deed may include a provision to the effect that the agreement mentioned in subregulation (1)(f) does not prevent the trustees from engaging or authorising a person to do acts or things on behalf of the trustees.
- (3) The trust deed may also provide for a trustee to be paid a fee for performing his or her functions.

### **33 Management generally**

- (1) The scheme's trust deed must require the trustees to manage the scheme in accordance with:
- (a) the trust deed; and
  - (b) the prudential standards; and
  - (c) any requirements the Minister specifies by *Gazette* notice.
- (2) The trust deed must also require the trustees to ensure the scheme has available, at all times, adequate financial, technological and human resources to enable the trustees to perform their duties.

### **34 Financial management**

- (1) The scheme's trust deed must:
- (a) specify the powers of the trustees in relation to dealing with the scheme's assets; and
  - (b) require the trustees to:
    - (i) restrict the investment of the scheme's assets to the investments permitted by the prudential standards; and
    - (ii) ensure that all payments out of the scheme's assets are made in accordance with the Act, these Regulations and the trust deed.

- (2) If the trust deed gives the trustees a right to recover out of the scheme's assets liabilities or expenses incurred in relation to the performance of their duties, or to be indemnified out of the scheme's assets for those liabilities or expenses, the trust deed must specify that:
  - (a) the right or indemnity is to be available only in relation to the proper performance of the trustees' duties; and
  - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a right or indemnity.
- (3) If the trustees are to have any power to borrow money or raise money for the purposes of the scheme, the trust deed must specify that:
  - (a) the exercise of the power must be consistent with the restrictions on borrowing mentioned in regulation 80(5); and
  - (b) any other agreement or arrangement has no effect to the extent it purports to confer such a power.

### **35 Contributions from builders**

- (1) The scheme's trust deed must include a provision that allows the trustees to require builders to whom certificates are issued to make a contribution to the scheme for the issuing of certificates.
- (2) The trust deed must require the trustees to:
  - (a) determine the amount of a contribution to be paid to the scheme for the issuing of a certificate; and
  - (b) consider the prudential standards and the advice of the actuary for the fidelity fund scheme before determining the amount.

## **Division 3 Fidelity certificates for residential building work**

### **36 Areas to which scheme applies**

The scheme's trust deed must specify that the scheme applies only to residential building work in a declared consumer protection area.



### **37 When certificate may be issued**

The scheme's trust deed must specify that the trustees may issue a certificate to a builder:

- (a) only in relation to residential building work to be carried out by the builder within a declared consumer protection area; and
- (b) only if the builder has paid the full contribution required by the trustees under the trust deed as mentioned in regulation 35.

### **38 Application for certificate**

The trust deed must include provisions requiring:

- (a) the trustees to assess each application for the issue of a certificate; and
- (b) each application to be assessed in the same way, with no discrimination on the basis of an applicant's membership status with a building industry body.

### **39 Contents of certificate**

The scheme's trust deed must require a certificate issued under the scheme:

- (a) to be in the approved form as mentioned in section 54D(1) of the Act; and
- (b) to describe the particular residential building work, prescribed by regulation 5(1), to which the certificate applies (the **guaranteed work**); and
- (c) to describe the land or residential building in connection with which the guaranteed work is to be carried out; and
- (d) to specify the beneficiary under the certificate in accordance with regulation 9; and
- (e) to specify the relevant circumstances that entitle a beneficiary to make a claim under the certificate; and
- (f) to specify the matters relevant to making a claim provided for in the trust deed under regulation 40(1)(b) to (d); and
- (g) to specify the financial loss covered by the certificate provided for in the trust deed under regulation 45; and

- (h) to specify the amount a beneficiary may claim, which must not be lower than the minimum amount provided for in the trust deed under regulation 48; and
- (i) to specify that the following matters are in the discretion of the trustees in relation to a claim made under the certificate:
  - (i) whether the claimant is a beneficiary under the certificate;
  - (ii) if the claimant is a beneficiary – the amount of the payment to the beneficiary out of the assets of the scheme and the terms and conditions on which payment is to be made.

## **Division 4 Claim under fidelity certificate**

### **40 Making claim**

- (1) The scheme's trust deed must specify the following matters:
  - (a) the way in which a beneficiary may make a claim under a certificate;
  - (b) if a beneficiary makes a claim for the non-completion of guaranteed work – the claim must be made within the cover period relevant to the claim;
  - (c) if a beneficiary makes a claim for defective guaranteed work – the claim must be made:
    - (i) within the cover period relevant to the claim; and
    - (ii) within 90 days after the day on which the beneficiary became aware, or could reasonably be expected to have become aware, of the defective guaranteed work;
  - (d) only the amount specified in a certificate can be claimed in relation to the guaranteed work.
- (2) Despite subregulation (1)(b), the trust deed must specify that if the beneficiary becomes aware of the defective guaranteed work within 90 days before the end of the cover period, the cover period is extended for 90 days after the beneficiary became aware of the defective work.

## **41 Dealing with claim**

- (1) The scheme's trust deed must specify the following matters:
  - (a) subject to paragraphs (b) and (c) – the way in which a claim under a certificate is to be dealt with by the trustees;
  - (b) the trustees must consider a claim and decide whether or not the trustees will make a payment from the assets of the scheme to the claimant;
  - (c) if the trustees decide to make a payment to a beneficiary – the trustees must decide:
    - (i) the amount of the payment; and
    - (ii) the terms and conditions on which the trustees will make the payment.
- (2) The trust deed must specify that it is a condition of a payment made to a beneficiary that the trustees may take whatever action they consider appropriate in the name of the beneficiary against the builder to recover from the builder any amount paid by the trustees to the beneficiary.
- (3) For regulation 8(2)(a), the trust deed may specify that the trustees may make reasonable inquiries about the builder's whereabouts even if the beneficiary has already done so.
- (4) The trust deed must also specify that if more than one claim is made under a certificate, the total amount that can be paid to all the beneficiaries must not exceed the amount that is stated on the certificate.

## **42 Information and access to be given by claimant**

The scheme's trust deed must specify the following:

- (a) a claimant is required to give the trustees all information, documents and assistance requested by the trustees to enable a proper consideration of the claim;
- (b) a claimant is required to allow the following persons access to the residential building or land on which the guaranteed work was carried out (or, under a contract, was to have been carried out):
  - (i) the trustees or the trustees' agent;

- (ii) a person engaged by the trustees to inspect the work, building or land;
- (iii) a builder nominated by the trustees to rectify or complete the work;
- (c) the trustees are entitled to reject a claim if the claimant fails to comply with paragraph (a) or (b).

#### **43 Claim for defective guaranteed work and rectification**

- (1) The scheme's trust deed may include a provision to the effect that if a beneficiary makes a claim relating to defective guaranteed work, the trustees may:
  - (a) arrange to have the work rectified; or
  - (b) pay the costs of the rectification to the beneficiary.
- (2) The trust deed may also include a provision to the effect that if the beneficiary has the defective guaranteed work rectified before making the claim, the trustees are entitled to reject the claim.
- (3) If the trust deed includes a provision mentioned in subregulation (1) and the trustees pay the costs of rectification to a beneficiary, the scheme is not liable to pay an amount to any other person for financial loss incurred because of:
  - (a) the same defective guaranteed work; or
  - (b) any other defective work arising directly or indirectly from that defective guaranteed work.

##### *Example for subregulation (3)*

*A successor in title to a contracting owner is not entitled to payment for defective guaranteed work if the contracting owner has already received payment to cover losses incurred in relation to that work.*

#### **44 Trustees may recover from builder**

The scheme's trust deed may include a provision to the effect that if the trustees make a payment to a beneficiary, the trustees may recover the amount of the payment as a debt from the builder who carried out the guaranteed work or, under a contract, agreed to carry out the work.

## **Division 5 Fidelity certificate and losses covered**

### **45 Financial loss to which certificate relates**

- (1) The scheme's trust deed must require a certificate to apply in relation to financial loss incurred because of defective guaranteed work (including defective design work under a contract) or the non-completion of guaranteed work.
- (2) The trust deed must require a certificate to specify that it covers financial loss incurred in relation to any of the following:
  - (a) the costs of removal, and of alternative accommodation and storage for a period not exceeding 60 calendar days, reasonably incurred as a result of the defective guaranteed work or non-completion of the work;
  - (b) subject to regulation 46(1)(a) – the loss of a deposit or progress payment under a contract relating to the work;
  - (c) legal or other reasonable costs incurred in seeking to have a builder rectify or complete the work;
  - (d) an increase in costs for rectification of the work caused by the passage of time;
  - (e) any acts or omissions of persons engaged as contractors by the builder in relation to the work;
  - (f) any additional reasonable costs associated with engaging another builder to rectify or complete the work (excluding the costs associated with the work carried out by that builder).

### **46 Financial loss not required to be covered under certificate**

- (1) The scheme's trust deed need not require a certificate to cover financial loss incurred in relation to any of the following:
  - (a) the payment of a deposit or progress payment above the amount specified in the contract relating to the guaranteed work;
  - (b) if the beneficiary is a subsequent purchaser of the residential building – defects that are readily apparent at the time of purchase;
  - (c) damage that could reasonably be expected to result from fair wear and tear or from the current owner of the building failing to maintain the work;

- (d) damage caused by a person or made worse by the failure of the current owner to take reasonable and timely action to minimise the damage;
- (e) legal liability resulting from any event that is not expressly insured under the certificate;
- (f) a defect that is due to residential building work (including design work) or materials not specified in the contract relating to the guaranteed work (for example, materials supplied by the contracting owner);
- (g) a person's injury or impairment (including injury or impairment of the person's mental condition), death, disease or illness;
- (h) loss of rent, income, value or opportunity;
- (i) inconvenience or distress;
- (j) the unreasonable refusal of the beneficiary to allow access to the trustees, or the trustees' agent, for the purpose of assessing the beneficiary's claim;
- (k) the failure of the beneficiary to maintain adequate protection against pests;
- (l) the malfunction of any mechanical or electrical equipment if the trustees can prove the malfunction was not attributable to the workmanship of, or installation by, the builder;
- (m) fraud or dishonest conduct of any kind by the builder;
- (n) an appliance;
- (o) asbestos contamination or removal;
- (p) war, civil unrest, a nuclear event or an act of nature.

*Notes for subregulation (1)(m)*

1 *Regulation 67 creates offences relating to a builder giving the trustees misleading information.*

2 *Regulation 68 prevents the scheme from avoiding liability under a certificate if the builder has given the trustees misleading information.*

- (2) In addition, the trust deed need not provide for the payment of an amount in damages or liquidated damages for delay in completing the guaranteed work.

- (3) Despite this regulation, a provision of the trust deed does not contravene, and is not inconsistent with, the Act or these Regulations if the provision provides greater cover than is required by regulation 45.

#### **47 Common property of prescribed Class 2 building**

The scheme's trust deed must require a certificate issued for guaranteed work in connection with a dwelling in a prescribed Class 2 building to specify that, in relation to any defective guaranteed work carried out on the common area of the building:

- (a) a claim may be made on behalf of all the beneficiaries (who are the current owners of the dwellings in the building); and
- (b) any payment made under the certificate to rectify the defective guaranteed work will reduce the beneficiary's cover under the certificate in equal proportions for the dwellings.

*Example for regulation 47*

*If there are 10 dwellings in the prescribed Class 2 building and the rectification work amounts to \$40 000, the entitlement under the certificate in relation to each dwelling will be reduced by \$4 000.*

#### **48 Amount of cover and related matters**

The scheme's trust deed must require a certificate to:

- (a) provide a minimum amount of cover of \$200 000 in total for the guaranteed work; and
- (b) provide that if the total contracted price for the guaranteed work is varied by an increase or decrease of more than 5%, the builder must apply to the trustees for a reassessment of the amount of cover; and
- (c) limit the cover for non-completion of the guaranteed work to an amount not less than 20% of the total contracted price for the work; and
- (d) provide for cover for defective guaranteed work up to the maximum amount payable under the certificate less any amount that may have been paid for non-completion of the guaranteed work.

#### **49 Excess**

- (1) The scheme's trust deed may specify an amount for which the scheme is not liable under a certificate (the **excess**).

- (2) The excess specified in the trust deed must not exceed \$500 in total for the guaranteed work.

## **Division 6 Other matters**

### **50 Procedures for dealing with complaints**

- (1) The scheme's trust deed must specify procedures for dealing with a complaint relating to the operation of the scheme.
- (2) Without limiting subregulation (1), the procedures may relate to a complaint about the assessment of a claim by the trustees.
- (3) The trust deed must prohibit the trustees from refusing to pay a beneficiary under a certificate only because the builder to whom the certificate was issued gave the trustees misleading information to obtain the certificate.

### **51 Rights of consumer representative**

The trust deed must specify that if a consumer representative is appointed for the scheme under regulation 65, the representative has the right:

- (a) to be present at each meeting of the trustees; and
- (b) to perform the duties of the role in accordance with any provisions of the appointment.

### **52 Winding up**

The trust deed must provide for the winding up of the scheme.

## **Part 3.3 Approved schemes – general matters**

### **Division 1 Auditors and actuaries**

#### **53 Eligibility criteria for appointment as auditor or actuary**

- (1) For section 54E(3)(a) of the Act, this regulation specifies the eligibility criteria for the appointment of a person as the auditor or actuary of an approved scheme.
- (2) A trustee of the approved scheme is not eligible for appointment as an auditor or actuary of the scheme.
- (3) A person is not eligible for appointment as both the auditor and actuary of an approved scheme.



- (4) To be eligible for appointment as the auditor or actuary of an approved scheme a person must:
- (a) have appropriate formal qualifications to perform the role and be a member of an appropriate professional body; and
  - (b) have adequate experience to perform the role, including at least 5 years experience in the general insurance industry or in acting for a fidelity fund scheme (not limited to a building industry scheme); and
  - (c) have demonstrated competence and integrity in the conduct of his or her professional duties.
- (5) A person is eligible for appointment as the auditor for an approved scheme only if the person is eligible under the *Insurance Act 1973* (Cth) to audit the accounts of entities carrying on insurance business.
- (6) A person is not eligible for appointment as the auditor or actuary of an approved scheme if the person:
- (a) has been convicted of an offence:
    - (i) against the Act, the Corporations Act 2001, the *Insurance Act 1973* (Cth), or the *Financial Sector (Collection of Data) Act 2001* (Cth); or
    - (ii) against a law of any jurisdiction of Australia, or a foreign country, involving dishonest conduct; or
  - (b) has been an insolvent under administration, as defined in the Corporations Act 2001; or
  - (c) has an actual or potential conflict of interest that is likely to influence his or her ability to carry out the role of auditor or actuary with appropriate probity and competence.

#### **54 Application for approval of appointment**

- (1) An application under section 54E(2) of the Act for approval of the appointment of a person as the auditor or actuary of an approved scheme must include:
- (a) information to satisfy the Minister that the person meets the eligibility criteria; and
  - (b) the terms of appointment.

- (2) If, under section 54E(3)(b) of the Act, the Minister gives the trustees of the scheme a notice refusing to approve the appointment, the notice must specify the way in which the person fails to meet the eligibility criteria.

## **55 Revocation of approval of appointment**

- (1) The Minister may, by written notice, revoke the approval of a person's appointment as the auditor or actuary for an approved scheme if satisfied the person:
- (a) has failed to exercise adequately and properly the functions of the role; or
  - (b) no longer meets one or more of the eligibility criteria.
- (2) The revocation takes effect immediately.
- (3) The Minister must give the notice of revocation to the person whose approval is revoked and a copy of the notice to the trustees of the scheme.

## **56 Ceasing to be auditor or actuary**

- (1) A person ceases to be the auditor or actuary of an approved scheme if:
- (a) the approval of the person's appointment is revoked under regulation 55; or
  - (b) the person resigns the appointment by written notice to the trustees of the scheme; or
  - (c) the trustees terminate the appointment by written notice to the person.
- (2) Within 14 days after the day on which a person ceases to be the auditor or actuary as mentioned in subregulation (1)(b) or (c), the trustees must give the Minister written notice of the cessation specifying:
- (a) the date of cessation; and
  - (b) the reasons for, or circumstances of, the cessation.

## **Division 2 Special actuaries**

### **57 Eligibility criteria for appointment as special actuary**

- (1) For section 54EF(3) of the Act, this regulation prescribes the eligibility criteria for the appointment of a person as a special actuary for an approved scheme.
- (2) The person must:
  - (a) be Fellow of the Institute of Actuaries of Australia; or
  - (b) have the actuarial qualifications and experience necessary to enable the person to perform the functions of a special actuary under the Act.
- (3) The following persons are not eligible for appointment as the special actuary for an approved scheme:
  - (a) the auditor or actuary for the scheme;
  - (b) a trustee or officer of the scheme.

### **58 Procedures for appointment**

- (1) Within 7 days after the day on which the trustees are given notice under section 54EF(1) of the Act, they must appoint a person as the special actuary and give the Minister written notice of the appointment specifying:
  - (a) the name of the person appointed; and
  - (b) information about the person's eligibility for appointment.
- (2) Within 7 days after the day the Minister is notified of the appointment, the Minister may give written notice to the trustees stating that:
  - (a) the person appointed is not acceptable to the Minister; and
  - (b) the trustees must, within 7 days after receiving the notice, appoint a different person as the special actuary and give the Minister written notice specifying the matters mentioned in subregulation (1)(a) and (b).
- (3) Subregulation (2) also applies in relation to the appointment of a different person as the special actuary.

- (4) The trustees must not contravene a notice given to the trustees by the Minister under subsection (2).

Maximum penalty: 50 penalty units.

- (5) An offence against subregulation (4) is a regulatory offence.
- (6) It is a defence to a prosecution for an offence against subregulation (4) if the defendant establishes a reasonable excuse.

## **59 Special actuary's report**

For section 54EG(3) of the Act, a special actuary's report must contain a statement of the special actuary's opinion about each of the following:

- (a) the adequacy of the whole or part of the amount stated in the scheme's accounts in relation to its liabilities, and the amount that the scheme's actuary considers would be adequate in the circumstances;
- (b) the accuracy of any relevant valuations made by the scheme's actuary;
- (c) the assumptions used by the scheme's actuary in making the valuations;
- (d) the relevance, appropriateness and accuracy of the information on which those valuations were based;
- (e) any other matter relevant to the special actuary's investigation that the Minister directs the special actuary to give an opinion about.

## **Division 3 Financial matters generally**

### **60 Minister may require compliance with prudential standards**

- (1) For section 54DE(1)(a) of the Act, this regulation applies if the Minister is satisfied on reasonable grounds that the trustees of an approved scheme:
- (a) are contravening a provision of the prudential standards; or
- (b) are likely to contravene a provision of the prudential standards in a way that is likely to give rise to prudential risk.
- (2) The Minister may, by written notice given to the trustees of the scheme, require them to comply with the provision of the prudential standards.

- (3) The notice must specify a reasonable time for compliance with the provision.
- (4) The trustees must comply with the notice despite anything to the contrary in the scheme's trust deed or in any contract or arrangement to which they are a party.
- (5) Each trustee of the scheme commits an offence if the trustees fail to comply with the notice.

Maximum penalty: 60 penalty units.

- (6) An offence against subregulation (5) is a regulatory offence.
- (7) It is a defence to a prosecution for an offence against subregulation (5) if the defendant establishes a reasonable excuse.

## **61 Minister may require information about financial position**

- (1) For section 54DE(1)(b) of the Act, the Minister may give the trustees of an approved scheme a notice requiring information relevant to the scheme's ability to meet its liabilities and potential liabilities at a particular date or time or at particular intervals.
- (2) The notice must specify a reasonable period for complying with the notice.
- (3) Without limiting subregulation (1), the Minister may require information about any of the following:
  - (a) the scheme's liabilities and potential liabilities;
  - (b) contributions to the scheme;
  - (c) administrative or other costs of the scheme;
  - (d) claims received by the scheme.
- (4) If relevant to the requirement, the information may be given by an audit certificate.
- (5) Each trustee of the approved scheme commits an offence if the trustees fail to comply with the notice.

Maximum penalty: 60 penalty units.

- (6) An offence against subregulation (5) is a regulatory offence.
- (7) It is a defence to a prosecution for an offence against subregulation (5) if the defendant establishes a reasonable excuse.

## **Division 4 Suspensions, cancellations and changes**

### **62 Suspension or cancellation of approval**

- (1) For section 54DE(1)(c) or (d) of the Act, the Minister may suspend or cancel the approval of an approved scheme on any of following grounds:
  - (a) the trustees of the scheme have contravened:
    - (i) the Act, a regulation or another law in force in the Territory in relation to the scheme; or
    - (ii) the prudential standards;
  - (b) the scheme is insolvent and is unlikely to return to solvency within a reasonable time;
  - (c) the scheme has inadequate capital and is unlikely to have adequate capital within a reasonable time;
  - (d) the scheme is, or is likely to become, unable to meet its liabilities;
  - (e) there is, or may be, a risk to the security of the scheme's assets;
  - (f) there is, or may be, a sudden deterioration in the scheme's financial condition;
  - (g) the scheme has ceased to issue certificates in the Territory.
- (2) If the Minister proposes to suspend or cancel the approval of an approved scheme, the Minister must give the trustees of the scheme a written notice stating:
  - (a) the grounds on which the Minister proposes to suspend or cancel the approval; and
  - (b) the facts that, in the Minister's opinion, establish the grounds; and
  - (c) that the trustees may, within a reasonable specified time, give a written response to the Minister about the matters in the notice.
- (3) If, after considering a response given under subregulation (2)(c), the Minister is satisfied the grounds for suspending or cancelling the approval have been established, the Minister may suspend or cancel the approval.

- (4) If the Minister suspends or cancels the approval, the Minister must give written notice of the suspension or cancellation to the trustees.
- (5) Suspension or cancellation of an approval takes effect:
  - (a) on the day when notice of the suspension or cancellation is given to the trustees; or
  - (b) a later day as specified in the notice.

### **63 Cancellation of approval on application**

- (1) The Minister may cancel the approval of an approved scheme if the trustees of the scheme give the Minister a written request for cancellation.
- (2) The request must:
  - (a) be signed by all the trustees of the scheme; and
  - (b) set out the reasons for the request.
- (3) If the Minister cancels the approval, the Minister must give written notice of the cancellation to the trustees.

### **64 Application for approval of change**

- (1) The trustees of an approved scheme may apply in writing to the Minister for approval to change the scheme.
- (2) The application must:
  - (a) be signed by all the trustees of the scheme; and
  - (b) set out the proposed change and the reasons for it.
- (3) The Minister may, in writing:
  - (a) approve the change; or
  - (b) refuse to approve the change, giving reasons for the refusal.
- (4) However, the Minister must refuse to approve the change if not satisfied the scheme, as proposed to be changed, would continue to meet the approval criteria and prudential standards.
- (5) This regulation does not apply if the only change is in relation to the scheme's bank account.

## **Division 5 Other matters**

### **65 Appointment of consumer representative**

- (1) The Minister may, in writing, appoint a person (a **consumer representative**) to represent the interests of beneficiaries under an approved scheme.
- (2) Before appointing a person to be a consumer representative, the Minister:
  - (a) must be satisfied that the person has suitable qualifications and experience for the appointment; and
  - (b) may require the person to provide particular information in support of the appointment.
- (3) The appointment of a consumer representative is subject to the terms and conditions specified in the instrument of appointment.

### **66 Address for service of documents on trustees**

- (1) The trustees of an approved scheme must, at all times, have an address in the Territory for service of documents on the trustees.
- (2) After the scheme is approved, the trustees must give the Minister written notice of any change of address in the Territory for service of documents as soon as practicable after the change occurs.

### **67 Offence to give misleading information or document**

- (1) A builder must not give the trustees of an approved scheme information the builder knows is misleading information.

Maximum penalty: 100 penalty units.

- (2) A builder must not give the trustees of an approved scheme a document containing information the builder knows is misleading information.

Maximum penalty: 100 penalty units.

- (3) However, subregulation (2) does not apply if the builder, when giving the document to the trustees:

- (a) draws the misleading aspect of the document to the trustees' attention; and
- (b) to the extent to which the builder can reasonably do so – gives the trustees the information necessary to remedy the misleading aspect of the document.



**68 Scheme's liability not affected if given misleading information**

An approved scheme is not entitled to avoid liability under a certificate only because the builder to whom the certificate was issued gave the trustees of the scheme misleading information to obtain the certificate.

**Part 3.4 Approved schemes – prudential standards**

**Division 1 General prudential standards for trustees**

**69 Eligibility for appointment and continuing eligibility**

- (1) A person appointed as a trustee of a scheme must:
  - (a) within 30 days after the person's appointment – give the Minister information to satisfy the Minister that the person meets the eligibility criteria; and
  - (b) give any further information requested in writing by the Minister.
- (2) At all times during a trustee's appointment, the trustee must meet the eligibility criteria.

**70 Duty to notify contravention of prudential standards**

- (1) This regulation applies if a trustee of an approved scheme becomes aware of any matters that could lead to, or result in, the trustee or another trustee contravening a prudential standard.
- (2) The trustee must give written notice of the matters to:
  - (a) the other trustees; and
  - (b) the Minister.

**71 Management in compliance with trust deed**

The trustees of a scheme must manage the scheme in accordance with the trust deed for the scheme.

## **Division 2 Financial matters generally**

### **72 Financial management**

The trustees of a scheme must ensure the scheme is maintained solely for the following purposes:

- (a) the issuing of certificates to builders in accordance with the Act, these Regulations and the scheme's trust deed;
- (b) the payment of amounts to beneficiaries under certificates in accordance with the Act, these Regulations and the scheme's trust deed;
- (c) any other purpose the Minister specifies by *Gazette* notice.

### **73 Financial records and annual accounts**

- (1) The trustees of a scheme must keep accounting records for the scheme that will, for each financial year:
  - (a) correctly record and explain the transactions and financial position of the scheme for the year; and
  - (b) enable the trustees to prepare annual accounts for the year as required by subregulation (2); and
  - (c) enable the auditor to conveniently and properly audit those annual accounts under regulation 75.
- (2) As soon as practicable after the end of each financial year, the trustees must prepare annual accounts for the year in accordance with:
  - (a) the accounting standards so far as they are applicable to the operations of the scheme; and
  - (b) any requirements the Minister specifies by *Gazette* notice.
- (3) The accounting records must be kept for at least 7 years after the end of the financial year to which the records relate.

### **74 Financial records and accounts during first year of approval**

- (1) The trustees of a scheme must keep accounting records for the scheme for the first year of approval and prepare the accounts of the scheme as soon as practicable after each period of 3 months, to be audited under regulation 75.

- (2) However, if a period of less than 3 months remains at end of the scheme's first year of approval, the accounts for that period are to be prepared as part of the accounts for the first financial year.
- (3) The accounts must be prepared in accordance with:
  - (a) the accounting standards; and
  - (b) any requirements the Minister specifies by *Gazette* notice.

## **75 Audit of accounts and audit certificate**

- (1) As soon as practicable after the trustees of a scheme give the scheme's auditor the annual accounts, or the accounts mentioned in regulation 74, the auditor must:
  - (a) audit the accounts; and
  - (b) give the trustees an audit certificate in relation to the accounts.
- (2) The audit certificate must be signed by the auditor and must include the following:
  - (a) information about the capital adequacy of the scheme as mentioned in regulation 79;
  - (b) a statement by the auditor that the accounts accurately and correctly reflect the true financial position of the scheme;
  - (c) any other information the Minister specifies by *Gazette* notice.
- (3) As soon as practicable after the trustees are given an audit certificate relating to the first year of approval of the scheme, the trustees must give the certificate (or a certified copy) to the Minister.

## **Division 3 Actuarial matters**

### **76 Calculation of amount of contribution by actuary**

- (1) As soon as practicable after the end of a financial year, a scheme's actuary must:
  - (a) calculate the appropriate amount for a contribution to the scheme by a builder to enable the issuing of a certificate; and
  - (b) advise the trustees in writing of each calculation.

*Note for subregulation (1)(a)*

*A calculation of the appropriate amount for a contribution is required before the application for approval of the scheme may be made because regulation 26(3)(c) requires a preliminary contributions certificate to be included in the application.*

- (2) In addition to any other matter the actuary considers appropriate, the actuary must have regard to the following in calculating the appropriate amount of a contribution to be made by a builder:
- (a) the scheme's capital management plan;
  - (b) the valuation of the liabilities of the scheme mentioned in regulation 78;
  - (c) the number of certificates already issued;
  - (d) the total amount that could be claimed under the certificates already issued;
  - (e) any other matter the Minister specifies by *Gazette* notice.

## **77 Contributions certificate**

- (1) A scheme's actuary must give the trustees of the scheme a contributions certificate as soon as practicable after the end of each financial year to enable the trustees to comply with regulation 92.
- (2) The actuary must also give the trustees a contributions certificate at any other time if the Minister has, in writing, required the trustees to provide the Minister with the certificate.
- (3) A contributions certificate must be signed by the actuary and must include the following:
- (a) a statement that the actuary is satisfied with the adequacy of the amount of contributions required to be paid to the scheme as mentioned in regulation 76;
  - (b) any other information the Minister specifies by *Gazette* notice.
- (4) As soon as practicable after the trustees are given a contributions certificate under subregulation (2), the trustees must give the certificate (or a certified copy) to the Minister.

## **78 Actuary to make annual valuation of liabilities**

- (1) A scheme's actuary must make a valuation of the liabilities of the scheme as soon as practicable after the end of each financial year.
- (2) The Minister may determine by *Gazette* notice a methodology for the valuation of a scheme's liabilities.
- (3) In the absence of a determination by the Minister, the actuary must make the valuation in accordance with this regulation.

- (4) The valuation must be of both:
  - (a) the outstanding claims liabilities; and
  - (b) the certificate liabilities.
- (5) For subregulation (4)(a) and (b):
  - (a) the scheme's outstanding claims liabilities relate to the liabilities associated with all the relevant circumstances that could lead to claims for payment under certificates incurred before the date of the valuation, whether or not the circumstances have been reported to the trustees; and
  - (b) the scheme's certificate liabilities relate to future claims, under existing certificates, that may arise from future relevant circumstances.
- (6) The valuation of the scheme's outstanding claims liabilities and certificate liabilities must be in accordance with:
  - (a) the methodology of any standard, in force from time to time under the *Insurance Act 1973* (Cth), that relates to the valuation of similar liabilities under a policy of insurance; and
  - (b) any other requirement the Minister specifies by *Gazette* notice.

## 79 Capital adequacy in accordance with capital management plan

- (1) The trustees of a scheme must:
  - (a) have a capital management plan for the scheme to ensure there is adequate capital in the scheme at all times; and
  - (b) comply with the plan.
- (2) A **capital management plan** is a plan, approved by the Minister in writing, that includes the following information:
  - (a) the minimum value of net tangible assets the scheme is required to hold (***the minimum value***);
  - (b) the value of net tangible assets to be held by the scheme above the minimum value, having regard to the level of risk in relation to the scheme's liabilities (***the additional value***);
  - (c) the time within which the scheme is to hold the additional value;
  - (d) any other information as required by the Minister in writing.

- (3) The net tangible assets of the scheme:
  - (a) are the scheme's total tangible assets less the scheme's total liabilities; and
  - (b) must be calculated:
    - (i) on the basis that the amount of all claims that have been notified to the trustees at the time of calculation, but not determined and paid by the trustees, are included in the total liabilities; or
    - (ii) on a different basis as specified by the Minister in writing.
- (4) As soon as practicable after the end of the first year of approval and each financial year of the scheme, the trustees must:
  - (a) review the capital management plan and, if necessary, amend the plan; and
  - (b) submit the plan (whether amended or not) to the Minister for approval.
- (5) The trustees must make the capital management plan available to the public as soon as practicable after it is approved.
- (6) The trustees must notify the Minister in writing immediately if the value of the net tangible assets held in the scheme falls below the minimum value.

## **80 Assets**

- (1) The trustees of a scheme must not apply, or deal with, the assets of the scheme, whether indirectly or directly, except in accordance with these Regulations.
- (2) The assets of the scheme must be applied only for the following purposes:
  - (a) to meet liabilities or expenses incurred for the purposes of maintaining the scheme;
  - (b) to make an investment in accordance with regulation 81(1);
  - (c) to pay a claim made under a certificate;
  - (d) any other purpose the Minister specifies by *Gazette* notice.

- (3) The trustees must formulate, adopt and give effect to an investment strategy that has regard to the whole of the circumstances of the scheme including, but not limited to, the following:
  - (a) the risk (including currency and counterparty risk) involved in making, holding and realising, and the likely return from, the scheme's assets, having regard to its expected cash flow requirements;
  - (b) the composition of the scheme's assets as a whole including the extent to which the assets are diverse or expose the scheme to risks from inadequate diversity;
  - (c) the liquidity of the scheme's assets having regard to its expected cash flow requirements;
  - (d) the ability of the scheme to discharge its existing and prospective liabilities.
- (4) The trustees must not mortgage, charge or otherwise encumber (including by entering into a contract of guarantee) any asset of the scheme.
- (5) The trustees must not borrow money in relation to the scheme except in accordance with subregulation (6) or (7).
- (6) Unless subregulation (7) applies, the trustees may borrow money if:
  - (a) the purpose of the borrowing is to enable the trustees to make a payment under a certificate that, apart from the borrowing, the trustees would not be able to make; and
  - (b) the period of the borrowing does not exceed 90 days; and
  - (c) the total amount borrowed will not exceed 10% of the value of the scheme's assets; and
  - (d) the Minister is notified in writing of the amount and circumstances of the borrowing; and
  - (e) the Minister has given the trustees written approval of the borrowing.
- (7) The Minister may give the trustees a written direction that they may borrow money only on the conditions specified in the direction.

## **81 Investment of assets**

- (1) The trustees of a scheme must ensure the assets of the scheme are invested exclusively in the following types of investments, which must be held and located in Australia:
  - (a) cash;
  - (b) cash equivalents (including debt instruments);
  - (c) other types of investments the Minister specifies by *Gazette* notice after consulting with the Treasurer.
- (2) For subregulation (1)(b), a debt instrument includes securities (other than stocks that are equities) and other commercial paper.
- (3) However, a debt instrument only includes an instrument issued by or in relation to an entity that, at the time when the instrument is offered for sale for investment, is rated by Standard and Poor's or Moody's as investment grade.
- (4) If a counterparty is rated by Standard and Poor's and Moody's, each rating is a relevant rating for subregulation (3).

## **82 Trustees to ensure solvency**

- (1) The trustees of a scheme must ensure that, at all times, the amount of the scheme's assets are sufficient to meet the trustees' obligations:
  - (a) to each beneficiary under a certificate; and
  - (b) to all other creditors of the scheme.
- (2) The scheme's actuary must give the trustees a document specifying a range of adverse conditions for which there must be sufficient assets in the approved scheme to meet the trustees' obligations.
- (3) The trustees must take into account the document given to them by the actuary.

## **83 Solvency certificate**

- (1) A scheme's actuary must give the trustees of the scheme a solvency certificate as soon as practicable after the end of each financial year to enable the trustees to comply with regulation 92.



- (2) The actuary must also give the trustees a solvency certificate:
  - (a) within 3 months after the date on which the scheme is approved or a longer period as approved in writing by the Minister; and
  - (b) at any other time if the Minister has, in writing, required the trustees to provide the Minister with the certificate.
- (3) A solvency certificate must be signed by the actuary and must include the following:
  - (a) a statement that the actuary is satisfied about the solvency of the scheme;
  - (b) any other information the Minister specifies by *Gazette* notice.
- (4) As soon as practicable after the trustees are given a solvency certificate under subregulation (2), the trustees must give the certificate (or a certified copy) to the Minister.

#### **84 Actuarial report**

- (1) A scheme's actuary must give the trustees of the scheme an actuarial report as soon as practicable after the end of each financial year to enable the trustees to comply with regulation 92.
- (2) The actuarial report must include information about the following:
  - (a) the solvency of the scheme;
  - (b) the valuation of the scheme's liabilities by the actuary;
  - (c) the adequacy of the amount of contributions required to be paid to the scheme for the issuing of certificates.

#### **85 Engagement of investment fund manager**

- (1) The trustees of a scheme may engage a person to manage an investment portfolio for the scheme (an ***investment fund manager***).
- (2) The engagement of an investment fund manager must be by written agreement:
  - (a) specifying how the investment fund manager may invest for the scheme; and
  - (b) requiring the investment fund manager to comply with the prudential standards relevant to investment.

- (3) The trustees must give the Minister notice of the engagement of an investment fund manager.

## **Division 4 Records, plans and reports**

### **86 Administration records**

The trustees of a scheme must retain the following documents for at least 10 years after the date of the document:

- (a) minutes of a meeting of the trustees at which any matter relating to the scheme is considered;
- (b) a record of a decision made by the trustees in relation to any matter affecting the scheme;
- (c) a document evidencing the change of a trustee;
- (d) a document that deals with the operations of the scheme;
- (e) the scheme's compliance plan and each variation to the plan;
- (f) the scheme's contingency plan and each variation to the plan;
- (g) a copy of each certificate issued;
- (h) a copy of each document relating to the payment of a claim made under a certificate;
- (i) any other document the Minister specifies by *Gazette* notice.

### **87 Compliance plan**

- (1) The trustees of a scheme must formulate, adopt and give effect to a compliance plan for the scheme that specifies the measures the trustees must apply in operating the scheme.

*Note for subregulation (1)*

*Under regulation 26(3)(d), the compliance plan must be formulated before the approval of the scheme.*

- (2) The compliance plan must include (but is not limited to) measures for the following matters:
- (a) ensuring the compliance of the scheme with the Act, these Regulations and any conditions of approval of the scheme;

- (b) identifying, understanding, addressing and monitoring:
    - (i) any financial risks and any non-financial risks of the scheme; and
    - (ii) balance sheet risk and market risk;
  - (c) reporting and rectifying any breach of the compliance plan;
  - (d) specifying a person who is responsible for monitoring each risk.
- (3) For subregulation (2)(b)(ii), balance sheet risk and market risk include (but are not limited to) any of the following:
- (a) the risk of a beneficiary making a claim under a certificate;
  - (b) product design and pricing risk;
  - (c) liability risk;
  - (d) risk arising from the management of a claim under a certificate;
  - (e) credit risk;
  - (f) operational risk (including, but not limited to, legal and reputational risk).

## **88 Assessment and amendment of compliance plan**

- (1) As soon as practicable after the end of each financial year the trustees of a scheme must assess whether the compliance plan is adequate for the purposes of the scheme.
- (2) The trustees:
  - (a) may, at any time, amend the compliance plan to ensure it is adequate for the purposes of the scheme; and
  - (b) if the compliance plan is amended – must give the Minister a copy of the amended plan within 14 days after the amendment.

## **89 Monitoring and reporting in relation to compliance plan**

- (1) At regular intervals, and at least once every 3 months, the trustees of a scheme must monitor the extent to which the scheme complies with the compliance plan.

- (2) The trustees must immediately give the Minister written notice of any breach of the compliance plan that, in the trustees' opinion, will have a material adverse effect on the scheme.
- (3) The trustees may form the opinion mentioned in subregulation (2) if, in their opinion, the breach will have a material adverse effect on any of the following:
  - (a) the ability of the trustees to perform any of their duties and obligations under the trust deed;
  - (b) the value of the scheme's assets;
  - (c) the interests of beneficiaries.

## **90 Contingency plan**

- (1) The trustees of a scheme must formulate, adopt and give effect to a contingency plan for the scheme specifying the way in which they will deal with a contingency event specified in the plan.

*Note for subregulation (1)*

*Under regulation 26(3)(c), the contingency plan must be formulated before the approval of the scheme.*

- (2) The contingency plan must include provisions about the following matters:
  - (a) the place or places where duplicate paper and electronic records are to be kept;
  - (b) the availability of additional office, human, material and other resources and back-up computer facilities;
  - (c) the role of other service providers to the trustees in relation to the scheme;
  - (d) the availability of financial resources to fund any necessary rectification of difficulties;
  - (e) any matter the Minister specifies by *Gazette* notice.
- (3) The trustees must put in place, and at all times maintain, the processes and systems required to give effect to the scheme's contingency plan.
- (4) The trustees must immediately give the Minister written notice of the occurrence of any contingency event specified in the contingency plan that, in the trustees' opinion, will have a material adverse effect on the scheme.

(5) The trustees may form the opinion mentioned in subregulation (4) if, in their opinion, the occurrence of the contingency event will have a material adverse effect on any of the following:

- (a) the ability of the trustees to perform any of their duties and obligations under the trust deed;
- (b) the value of the scheme's assets;
- (c) the interests of beneficiaries.

(6) In this regulation:

**contingency event** means any major administrative difficulty that may be caused to a scheme by a disaster, accident, crime, systems failure or other unforeseen event beyond the control of the trustees.

## **91 Amendment of contingency plan**

- (1) The trustees of a scheme must amend the scheme's contingency plan as necessary.
- (2) If the contingency plan is amended, the trustees must give the Minister a copy of the amended plan within 14 days after the amendment.

## **92 Annual reporting to Minister**

- (1) Within 90 days after the end of each financial year, the trustees of a scheme must give the Minister the following documents in relation to that year:
  - (a) the annual accounts of the scheme;
  - (b) the audit certificate;
  - (c) the actuarial report, contributions certificate and solvency certificate;
  - (d) a declaration by the trustees that, within 1 month before the date of the documents mentioned in paragraphs (a) to (c), the trustees have resolved that they are of the opinion there are reasonable grounds to believe the scheme will be able to meet its liabilities as and when they become due and payable;
  - (e) a declaration by the trustees that they have adopted and given effect to a compliance plan for the scheme in accordance with regulation 87 and have satisfied themselves as to the adequacy of, and the scheme's compliance with, the plan;

- (f) if relevant – a list, signed and dated by 2 trustees, specifying any breach of the compliance plan that must be reported under regulation 89(2);
  - (g) a declaration by the trustees that they have adopted and given effect to a contingency plan for the scheme in accordance with regulation 90 and have satisfied themselves as to the adequacy of the plan.
- (2) The trustees may give the Minister a copy of the following documents if the copy is dated and signed by 2 trustees who have certified it is a true copy of the original:
- (a) the annual accounts;
  - (b) a certificate or report mentioned in subregulation (1)(b) or (c).

### **93 Reporting to the Commissioner of Consumer Affairs**

- (1) The trustees of a scheme must report to the Commissioner of Consumer Affairs each decision by the trustees to pay or refuse a claim under a certificate:
- (a) in the first year of approval – within 30 days after the end of the year; and
  - (b) in each financial year – within 30 days after the end of the year; and
  - (c) for any other period – as the Minister specifies by *Gazette* notice.
- (2) The report must include, for the relevant year or period:
- (a) the number of claims received by the trustees under certificates; and
  - (b) the amount sought in each claim; and
  - (c) the number of payments made in response to claims; and
  - (d) for each claim that was paid – the amount paid; and
  - (e) for each rejected claim – the reason for its rejection.