

-----Original Message-----

From: Phil Dwyer [mailto:dwyerbld@bigpond.net.au]

Sent: Monday, 19 May 2008 9:56 AM

To: Dawson, Geoffrey (SEN)

Subject: Ministerial Orders

Dear Geoff

Please find attached the information relating to the Ministerial Orders that mandate this insurance, I believe I have provided clarity in respect to the various changes made. Please advise I can be of further assistance in this regard to this matter. Quite happy for this information to be made public.

Kind Regards

Phil Dwyer

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Public Submission

19th May 2008

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Dawson

Re: Inquiry into the Australia's Mandatory Last Resort Home Warranty Insurance Scheme

I have obtained the relevant Ministerial Orders from the Building Commission. The Last Resort warranty insurance regime is mandated under a Ministerial Order that is signed by one person, in this case the Minister of Planning and it was first implemented on the 1st July 2002 as per the attachment above (BWI Ministerial Order May 2002)

There have been two changes made to the Ministerial Order since that time, and again they are made by the Planning Minister without any official reference to cabinet or the Parliament.

The first change was made in May 2003 (BWI Ministerial Order May 2003) that exempted the Director of Public Housing from needing Warranty Insurance because the Director was unable to source builders that held the required insurance to undertake his projects at that time.

The second change was made in 2005 to Section 32 that removed the requirement for the insurers to notify the Building Practitioners Board of **“any claims settled or paid by agreement or otherwise under a policy of the required insurance”**

Yours Faithfully

Phil Dwyer
President



Victoria Government Gazette

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SPECIAL

Building Act 1993

DOMESTIC BUILDING INSURANCE MINISTERIAL ORDER

I, Mary Delahunty, Minister for Planning make the following Order:

PART 1—INTRODUCTORY

1. ***Purposes of this Order***

- (1) This Order specifies the insurance that a builder is required to be covered by in order to carry out or manage or arrange the carrying out of domestic building work under a domestic building contract of a specified kind.
- (2) This Order specifies the insurance that a person who constructs a building and to whom section 137B of the **Building Act 1993** applies is required to be covered by before entering into a contract to sell that building.

2. ***Authorising provisions***

This Order is made under sections 135, 137A and 137D of the **Building Act 1993**.

3. ***Commencement***

This Order takes effect on 1 July 2002.

4. ***Revocation***

The following Orders made under section 135 of the **Building Act 1993** are **revoked**—

- (a) Domestic Building Insurance Ministerial Order made on 29 October 1998 and published in the Government Gazette on 30 October 1998; and
- (b) Domestic Building Insurance (Amendment) Ministerial Order made on 9 November 1998 and published in the Government Gazette on 12 November 1998.

5. ***Definitions***

Schedule 1 defines terms for the purposes of this Order.

PART 2—DOMESTIC BUILDING CONTRACTS

6. ***To which contracts does this Part apply?***

This Part applies to a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$12,000 (an “insurable domestic building contract”).

7. ***Required insurance***

- (1) Before entering into an insurable domestic building contract, a builder must ensure that—
 - (a) a policy is issued that complies with this Order (except Part 3); and
 - (b) the policy covers the building work to be carried out under the contract.
- (2) A builder may enter into an insurable domestic building contract without complying with subclause (1) if the contract contains a written condition that—
 - (a) requires a policy that complies with this Order (except Part 3) and covers the building work carried out under the contract to be issued before the builder may enforce any provision of the contract; and
 - (b) requires the policy to be issued before any domestic building work is carried out under the contract; and
 - (c) states that no money (including deposit money) is payable under the contract before that policy is issued; and
 - (d) requires the builder to ensure that a copy of the policy is provided to the building owner within 7 days after it is issued.

8. Indemnity for loss

- (1) The policy must indemnify the building owner in respect of loss or damage resulting from noncompletion of the domestic building work.
- (2) The policy must also indemnify the building owner in respect of loss or damage resulting from all or any of the following events—
 - (a) domestic building work that is defective;
 - (b) a breach of any warranty implied into the domestic building contract by section 8 of the **Domestic Building Contracts Act 1995**;
 - (c) a failure to maintain a standard or quality of building work specified in the domestic building contract;
 - (d) conduct by the builder in connection with the domestic building contract that contravenes a trade practices provision.
- (3) The policy may provide that the indemnity referred to in sub-clause (1) or (2) only applies if the builder dies, becomes insolvent or disappears.

9. Additional insurance

- (1) The policy must also indemnify the building owner in respect of loss of the deposit (or any part of the deposit) or loss of any progress payment under the insurable domestic building contract.
- (2) The policy must also indemnify the building owner in respect of the costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred subsequent to and as a result of any of the following events—
 - (a) the non-completion of the domestic building work;
 - (b) an event referred to in clause 8(2)(a) to (d).
- (3) The policy may provide that the indemnity referred to in sub-clause (1) or (2) only applies if the builder dies, becomes insolvent or disappears.
- (4) Despite sub-clause (2), the policy may exclude or limit claims for loss referred to in that sub-clause to the extent that the period of alternative accommodation or storage exceeds 60 days, excluding any period or periods of delay attributable to the insurer.
- (5) Nothing in clauses 13 to 17 applies to permit a policy to limit or restrict the indemnity required by this clause.

Note: The warranties referred to in clause 8(2)(b) are as follows—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgment, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

10. Policy to state that indemnity extends to acts or omissions of others

The policy must state that the indemnities referred to in clauses 8 and 9 include an indemnity in respect of the acts or omissions of all persons who were contracted by the builder to perform the domestic building work under the insurable domestic building contract resulting in loss or damage of the kind referred to in clause 8 or 9.

11. To whom does the cover extend?

The required insurance cover in the policy must extend—

- (a) to each person who becomes entitled to the benefit of any of the warranties referred to in clause 8(2)(b); and
- (b) to the owner for the time being of the building or land in respect of which the domestic building work is or was being carried out.

12. Period of insurance

(1) The policy must provide the indemnities referred to in clauses 8 and 9 in relation to non-structural defects in respect of loss or damage occurring during the period commencing on the commencement day and ending not earlier than 2 years after the earlier of—

- (a) the completion date of the domestic building work; and
- (b) the date of termination of the relevant domestic building contract.

(2) The policy must provide the indemnities referred to in clauses 8 and 9 in respect of all other loss or damage occurring during the period commencing on the commencement day and ending not earlier than 6 years after the earlier of—

- (a) the completion date of the domestic building work; and
- (b) the date of termination of the relevant domestic building contract.

13. Penalties for delay by builder

(1) The policy may exclude or limit claims under the policy for penalties, fines, liquidated damages or other sums, if any of these relate to delay on the part of the builder.

(2) Despite sub-clause (1), the policy must not exclude or limit any increase in rectification costs caused by the effluxion of time.

14. Excessive payments to builder

The policy may exclude or limit claims under the policy for money paid to a builder that exceeds the amounts that should have been paid to the builder in accordance with section 11 and (as the case requires) section 40(2) or section 40(3) or section 40(4) of the **Domestic Building Contracts Act 1995**.

15. Builder dies, disappears etc. before work begins

(1) The policy may exclude or limit claims under the policy for non-completion of building work if the death, insolvency or disappearance of the builder occurs before the builder commences on the building site any domestic building work (other than the removal of vegetation) that requires the use of any tools or building materials.

(2) An exclusion or limitation referred to in subclause (1) must be subject to a right of the building owner to recover—

- (a) any money paid in relation to the domestic building contract; and
- (b) all reasonable costs and expenses incurred by the building owner in relation to the contract.

16. Claims by developers

- (1) The policy may exclude or limit claims under the policy by a building owner who is a developer for non-completion of building work.
- (2) An exclusion or limitation under sub-clause (1) must not affect any rights under the policy of any subsequent owner for the time being of the building or land in respect of which the domestic building work is being carried out.

17. Maximum liability for non-completion claims

The policy may limit claims under the policy for non-completion of domestic building work to an amount that is not more than 20% of the contract price under the insurable domestic building contract.

PART 3—OWNER BUILDERS

18. To which contracts does this Part apply?

This Part applies to a contract of sale of a building (an “**insurable contract of sale**”) if—

- (a) section 137B of the **Building Act 1993** applies to that contract; and
- (b) domestic building work was carried out on that home before the sale; and
- (c) the value of that domestic building work exceeded \$12 000 at the time the work was carried out.

19. Required insurance

Before entering into an insurable contract of sale of a building, the owner builder must ensure that—

- (a) a policy is issued that complies with this Order (except Part 2); and
- (b) the policy covers the domestic building work on that building.

20. Indemnity for loss

- (1) The policy must indemnify the purchaser under a contract of sale in respect of loss or damage arising from a breach of any warranty implied into the contract by section 137C of the **Building Act 1993**.
- (2) The policy may provide that the indemnity referred to in sub-clause (1) only applies if the owner builder (the “**vendor**”) dies, becomes insolvent or disappears.
- (3) Despite sub-clause (1), the policy is not required to indemnify the purchaser in respect of a warranty that all materials used in the building work were new to the extent that any materials used were not new if—
 - (a) the condition report required by section 137B(2)(a) of the **Building Act 1993** states that the materials were not new; or
 - (b) it was apparent from the nature of the relevant building work that the materials were not new.

Note: The warranties referred to in clause 20(1) are as follows—

- (a) the vendor warrants that all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and
- (b) the vendor warrants that all materials used in that domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and
- (c) the vendor warrants that that domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act.

21. Additional insurance

- (1) The policy must also indemnify the purchaser in respect of the costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred subsequent to and as a result of a breach of any warranty referred to in clause 20(1).
- (2) The policy may provide that the indemnity referred to in sub-clause (1) only applies if the builder dies, becomes insolvent or disappears.
- (3) Despite sub-clause (1), the policy may exclude or limit claims for loss referred to in that sub-clause to the extent that the period of alternative accommodation or storage exceeds 60 days, excluding any period or periods of delay attributable to the insurer.
- (4) Nothing in clause 24 applies to permit a policy to limit or restrict the indemnity required by this clause.

22. To whom does the cover extend?

The required insurance cover in the policy must extend—

- (a) to each person who becomes entitled to the benefit of any of the warranties referred to in clause 20(1); and
- (b) to any person who is the successor in title to the purchaser; and
- (c) if the domestic building work is carried out on land in a plan of subdivision containing common property, the body corporate for that land or a building on that land.

23. Period of insurance

- (1) The policy must provide the indemnities referred to in clauses 20 and 21 in relation to nonstructural defects in respect of loss or damage occurring during the period commencing on the date of the contract of sale and ending not earlier than 2 years after the completion date for the domestic building work.
- (2) The policy must provide the indemnities referred to in clauses 20 and 21 in respect of all other loss or damage occurring during the period commencing on the date of the contract of sale and ending not earlier than 6 years after the completion date for the domestic building work.

24. Defects referred to in condition report

The policy may exclude or limit claims under the policy in respect of any defect or incomplete domestic building work that is referred to in the report required to be provided to a purchaser pursuant to section 137B of the **Building Act 1993**.

PART 4—ADDITIONAL POLICY PROVISIONS**Division 1—Mandatory Provisions****25. Purpose of this Division**

This Division sets out provisions that a policy required under Part 2 or Part 3 must contain.

26. Policy to comply with Order

The policy must contain a provision to the effect that the policy is issued in compliance with this Order and if any term of the policy conflicts or is inconsistent with this Order then the policy must be read and be enforceable as if it complies with this Order.

27. Insurer to accept findings of Tribunal

The policy must contain a provision to the effect that if the insurer has notice of the relevant proceedings before the Tribunal, the insurer will accept as determinative of the issues any finding made by the Tribunal—

- (a) as to whether any of the following events has occurred—
 - (i) the non-completion of domestic building work;
 - (ii) an event referred to in clause 8(2)(a) to (d);
 - (iii) a breach of warranty referred to in clause 20;
 - (iv) an event referred to in clause 9 or 21; and
- (b) if so, as to the amount of loss or damage suffered by the building owner or purchaser, as the case may be, as a result of the event or events.

28. *Restrictions on avoidance of policy*

- (1) The policy must contain a provision to the effect that the insurer may not avoid the policy or refuse to make or reduce any payment under the policy on the grounds that—
 - (a) the builder or owner builder, as the case may be—
 - (i) breached any duty of the utmost good faith; or
 - (ii) failed to comply with any duty of disclosure; or
 - (iii) made representations to the insurer; or
 - (iv) failed to comply with a provision or requirement of the policy; or
 - (v) by act or omission of any description prejudiced the interests of the insurer; or
 - (b) the premium or any instalment of the premium has not been paid.
- (2) The policy may provide that if an insurer makes a payment under a policy in circumstances to which this clause applies, the insurer is entitled to recover from the builder or owner builder, as the case may be, any amount so paid.

29. *Time for determination of claim*

The policy must contain a provision to the effect that if the insurer has not determined a written claim as to liability within 90 days of receipt of the claim, then, unless the insurer obtains an extension of time from the insured or the Tribunal, the insurer is to be deemed to have accepted liability for the claim.

30. *Notice of defect*

The policy must contain a provision to the effect that if a person gives the insurer notice of a defect, that person is to be taken for the purposes of the policy to have given notice of every defect to which the defect notified is directly or indirectly related, whether or not the claim in respect of the defect that was actually notified is settled.

31. *Application of section 54 of the Insurance Contracts Act 1984*

- (1) The policy must contain a provision to the effect that the insurer acknowledges that section 54 of the **Insurance Contracts Act 1984** (insurer may not refuse to pay claims in certain circumstances) of the Commonwealth applies or is deemed to apply to the policy.
- (2) The policy must contain a provision to the effect that, despite the provision referred to in sub-clause (1), if the person making a claim against an insurer has notified the insurer in writing, within 180 days after the date when the claimant first became aware, or might reasonably be expected to become aware, of the death, disappearance or insolvency of the insurer, then the insurer will not rely on section 54 of the **Insurance Contracts Act 1984** to reduce its liability under the policy or to reduce any amount otherwise payable in respect of a claim made by reason only of any delay in a claim being notified to the insurer.

32. Insurer to notify Building Practitioners Board

The policy must contain a provision to the effect that the insurer will notify the Building Practitioners Board at the times and in the manner agreed with the Board, in the event that—

- (a) a builder is refused insurance, ceases to be eligible to renew or procure insurance or, in respect of domestic building work performed prior to the commencement of this Order, fails to purchase or maintain required insurance; and
- (b) any claim under a policy of required insurance is settled or paid by agreement or otherwise.

33. Certificate of Insurance

The policy must contain a provision to the effect that the insurer must provide a Certificate of Insurance, in the form or to the effect of the form contained in either Schedule 2 or Schedule 3 to this Order (as the case may require) and evidencing that a policy has been issued in compliance with this Order in respect of each home for which insurance is required—

- (a) to the insured immediately on the issue of the policy; and
- (b) on request by the builder, owner builder or insured at any time.

Division 2—Allowable Exclusions and Limitations**34. Purpose of this Division**

This Division sets out provisions that a policy required under Part 2 or Part 3 may contain.

35. Policy may impose limitations on total amount payable

The policy may limit the liability of the insurer to not less than the aggregate amount of \$200 000 for all claims in respect of any one home, including reasonable legal costs and expenses incurred by the insured (not being the builder or owner builder) associated with the successful claim against the insurer.

36. Policy may limit cover for certain external works

- (1) The policy may exclude or limit cover for loss or damage relating to landscaping, paving, retaining structures, driveways or fencing.
- (2) The policy must not exclude or limit cover under sub-clause (1) in relation to works if those works—
 - (a) are integral to the construction of a building; or
 - (b) require the issue of a building permit under the **Building Act 1993**; or
 - (c) could result in water penetration of or within a building; or
 - (d) could adversely affect health or safety; or
 - (e) adversely affect the structural adequacy of a building; or
 - (f) are not completed and the builder has died, become insolvent or disappeared.

37. Exclusion concerning fair wear and tear

The policy may exclude or limit cover for loss or damage due to fair wear and tear of the domestic building work or the failure by the insured to maintain that work.

38. Limitation relating to contravention of trade practices provision

The policy may limit the indemnity provided by the insurer for loss or damage arising from conduct of a builder that contravenes a trade practices provision to the cost of rectifying the relevant domestic building work.

39. Requirements on insured

- (1) The policy may require the insured on making a claim under the policy—
- (a) to comply with any reasonable directions of the insurer in relation to the completion or rectification of the domestic building work;
 - (b) not to undertake or cause to be undertaken any rectification works without notifying the insurer, unless those works are reasonably necessary to prevent or minimise any further loss or damage;
 - (c) subject to sub-clause (2), to provide the insurer or any builder or other person nominated or approved by the insurer with reasonable access to the relevant building site for the purpose of inspection, rectification and completion of the domestic building work.
- (2) The policy must provide that the insured has the right on reasonable grounds (including loss of confidence in the builder) to refuse to provide the access referred to in sub-clause (1)(c) to a builder nominated or approved by the insurer.
- (3) Despite sub-clause (1), the policy must provide that the insurer may not reduce its liability to the insured by reason of a failure on the part of the insured to comply with a requirement imposed pursuant to that sub-clause unless and only to the extent that the insurer can prove that the failure increased the liability of the insurer under the policy.

40. Claims affecting common property

The policy may provide that if—

- (a) domestic building work is carried out on land in a plan of subdivision containing common property; and
- (b) a claim is paid by the insurer in relation to the common property—

then the amount of cover in respect of any one home on land in the plan of subdivision is to be reduced by not more than an amount calculated by dividing the amount paid under the claim by the number of homes on land in the plan of subdivision.

41. Right of subrogation

The policy may provide that the insurer is entitled to be subrogated to the rights of the insured to the extent of any amount paid by the insurer to the insured.

42. Precautions to minimise loss

The policy may provide that the insured must take reasonable precautions to avoid or minimise loss or damage covered by the policy.

43. Limitation on renewal

The policy may state that the policy will not be renewed and is of a kind that it is not usual to renew.

44. Limitation periods for making claims

The policy may include a provision under which the insurer may refuse to accept a claim that is not made within 180 days after the date on which the claimant first became aware, or might reasonably be expected to have become aware, of the death, disappearance or insolvency of the insurer.

Division 3—Excess**45. Purpose of this Division**

This Division sets out provisions relating to excess that a policy required under Part 2 or Part 3 may contain.

46. Allowable excess

- (1) The policy may include a provision which requires the insured (not being the builder or the owner builder) to bear at the insured's own risk—
- (a) an excess of not more than \$1000 in respect of a claim made after 5 years after the completion date;

- (b) an excess of not more than \$750 in respect of a claim made between 3 and 5 years after the completion date;
 - (c) an excess of not more than \$500 in respect of a claim made between 12 months and 3 years after the completion date;
 - (d) a claim under \$500 made between 3 months and 12 months after the completion date.
- (2) The policy must provide that for the purposes of sub-clause (1) a claim of \$500 or more may relate to more than one defect if the amount claimed for any one or more defects is less than \$500.
 - (3) For the purpose of this clause, the date when a claim is made is the earlier of—
 - (a) the date when the claimant first notifies the insurer of a circumstance that may give rise to a claim; and
 - (b) the date a claim is made.
- 47. *No excess to apply in certain circumstances***
- (1) Despite clause 46, a policy to which Part 2 applies must not include a provision that requires the insured to bear an excess—
 - (a) in respect of loss or damage arising between—
 - (i) the date of the insurable domestic building contract or the date of issue of the building permit for the relevant domestic building work, whichever is the earlier; and
 - (ii) the date that is 3 months after the completion date; or (b) if the loss or damage relates to noncompletion of building work.
 - (2) Despite clause 46, a policy to which Part 3 applies must not include a provision that requires the insured to bear an excess in respect of any arising between the date of the relevant contract of sale and the end of 3 months after the completion date if the relevant contract of sale is entered into before the end of 3 months after the completion date.
- 48. *Only one excess to apply***
- Despite clause 46, the policy must ensure that an excess may be applied only once in relation to—
- (a) any claim comprising more than one defect; or
 - (b) 2 or more claims that relate to the same defect.

PART 5—GENERAL

- 49. Purpose of this Part**
- This Part contains general provisions relating to policies required under Part 2 or Part 3.
- 50. *Policy not to contain terms inconsistent with this Order***
- (1) A policy must not contain any provision that limits, modifies, varies, avoids or excludes any of the requirements for a policy set out in this Order.
 - (2) Subject to sub-clause (3), a policy must not contain any provision that provides for limitations or exclusions to the policy not expressly permitted by this Order.
 - (3) A policy may include an exclusion or limitation that is not referred to in this Order if it is—
 - (a) a standard policy provision of the insurer and relates to loss or damage incurred as a result of—
 - (i) war; or
 - (ii) a nuclear event; or
 - (iii) civil unrest; or

- (iv) risks normally insured under a policy for public liability or contract works; or
 - (v) asbestos contamination or removal; or
 - (vi) act of God or nature; or
 - (vii) failure by the insured to maintain appropriate protection against pest infestation or exposure to natural timbers; or
 - (viii) consequential loss, not otherwise covered by this Order; or
 - (ix) malfunction in any mechanical or electrical equipment or appliance if the insurer can prove that the malfunction is not attributable to the workmanship of or installation by the builder or owner builder; and
- (b) not otherwise inconsistent with, or contrary to, anything in this Order.

51. *Policy can provide greater cover*

A provision in a policy will not contravene or be inconsistent with this Order by reason only that it—

- (a) provides a greater insurance cover or additional kinds of insurance cover to that specified in this Order; or
- (b) provides for a lower excess than that specified in Division 3 of Part 4; or
- (c) extends cover to persons other than the insured as defined in this Order.

52. *Who is responsible to pay the premium?*

The builder or owner builder (as the case requires) is responsible to the insurer for the payment of the premium for a policy required under this Order to be issued.

53. *Builder can complete work*

If the insurer, builder and Building Practitioners Board all agree, nothing in this Order prevents a builder from carrying out domestic building work under an insurable domestic building contract despite the fact that the builder has become insolvent, subject to any conditions that the Building Practitioners Board may require.

54. *Provisions in policy can be to like effect*

If this Order requires or allows a policy to include a particular provision or requirement, a provision to the same effect as the provision or requirement will be sufficient.

PART 6—EXCEPTIONS

55. *Exception for demolishers*

This Order does not apply to a person who is registered under Part 11 of the **Building Act 1993** solely under the category of builder, class of demolisher.

56. *Exception for builders of multi-storey residential buildings*

- (1) This Order does not apply to a person who carries out or proposes to carry out domestic building work under a domestic building contract for the construction of a multi-storey residential building in respect of the carrying out of domestic building work for the construction of that building.
- (2) This Order does not apply to an owner-builder who constructs a multi-storey residential building, in relation to any contract to sell that building.

PART 7—TRANSITIONAL

57. *Transitional*

A builder or owner builder is not required to comply with this Order in respect of the issue of a policy relating to domestic building work if that domestic building work is covered by

a policy that was issued before the commencement of this Order and that policy complies with the Revoked Order.

58. Guarantee deemed to comply with Order

A guarantee issued pursuant to the **House Contracts Guarantee Act 1987** is deemed to comply with this Order.

SCHEDULES

SCHEDULE 1

DEFINED TERMS

(1) In this Order—

“**builder**” means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

“**building owner**” means the person for whom domestic building work is being, or is about to be, carried out;

“**Building Practitioners Board**” means the Building Practitioners Board established under the **Building Act 1993**;

“**building site**” means a place where domestic building work has been, is being, or is about to be, carried out;

“**carry out**” in relation to building work, includes manage or arrange the carrying out of building work;

“**clause**” means clause of this Order;

“**commencement day**” means the earlier of—

- (a) the date that the relevant domestic building contract is entered into; or
- (b) the date of issue of the building permit for the relevant domestic building work;

“**completion date**” means—

- (a) the date of issue of the occupancy permit in respect of the building (whether or not the occupancy permit is subsequently cancelled or varied); or
- (b) if an occupancy permit is not issued, the date of issue under Part 4 of the **Building Act 1993** of the certificate of final inspection of the building work for the construction of the building; or
- (c) if neither an occupancy permit nor a certificate of final inspection is issued or required to be issued, the date of practical completion of the domestic building work;

“**construct**” in relation to a building, means—

- (a) build, rebuild, erect or re-erect the building; or
- (b) make alterations to the building; or
- (c) enlarge or extend the building; or
- (d) cause any other person to do anything referred to in paragraph (a), (b) or (c) in relation to the building; or
- (e) manage or arrange the doing of anything referred to in paragraph (a), (b) or (c) in relation to the building;

“**defective**”, in relation to domestic building work, includes—

- (a) a breach of any warranty listed in section 8 of the **Domestic Building Contracts Act 1995**;

a failure to maintain a standard or quality of building work specified in the relevant domestic building contract;

“developer” means any building owner or other person for whom 3 or more homes are being or proposed to be built—

- (a) on any one building site; or
- (b) on more than one building site under one domestic building contract;

“disappears” means cannot be found after due search and inquiry;

“domestic building contract” has the same meaning as it has in the **Domestic Building Contracts Act 1995**;

“domestic building work” means any work referred to in section 5 of the **Domestic Building Contracts Act 1995** that is not excluded from the operation of that Act by section 6 of that Act;

“home” means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include—

- (a) a caravan within the meaning of the **Residential Tenancies Act 1997** or any vehicle used as a residence; or
- (b) any residence that is not intended for permanent habitation; or
- (c) a rooming house within the meaning of the **Residential Tenancies Act 1997**; or
- (d) a motel, residential club, residential hotel or residential part of licensed premises under the **Liquor Control Reform Act 1998**; or
- (e) a nursing home, hospital or accommodation associated with a hospital; or
- (f) any residence that the regulations under the **Domestic Building Contracts Act 1995** state is not a home for the purposes of the definition of "home" in that Act;

“insolvent” means—

- (a) in the case of a natural person, insolvent under administration as that expression is defined in the Corporations Act; or
- (b) in the case of a body corporate, subject to external administration under the Corporations Act;

“insurable contract of sale” means a contract of sale referred to in clause 18;

“insurable domestic building contract” means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$12,000;

“insured” means—

- (a) in the case of a policy issued pursuant to Part 2—
 - (i) any person insured under the policy; and
 - (ii) any person to whom the cover under the policy extends pursuant to clause 11; and
- (b) in the case of a policy issued pursuant to Part 3—
 - (i) any person insured under the policy; and
 - (ii) any person to whom the cover under the policy extends pursuant to clause 22—

but, unless expressly provided for in the policy, does not include—

- (c) in the case of a policy issued pursuant to Part 2—
 - (i) the builder; or
 - (ii) the building owner, if the building owner is a related body corporate (within the meaning of the Corporations Act) of the builder; or

- (iii) the building owner, if neither the builder nor the building owner is a public company but each has a common director or a common shareholder; or
- (d) in the case of a policy issued pursuant to Part 3—
 - (i) the owner builder; or
 - (ii) the purchaser, if the purchaser is a related body corporate (within the meaning of the Corporations Act) of the owner builder; or
 - (iii) the purchaser, if neither the purchaser nor the owner builder is a public company but each has a common director or a common shareholder;

“multi-storey residential building” means a building—

- (a) that has a rise in storeys (within the meaning of the Building Regulations 1994) of more than 3; and
- (b) that contains 2 or more separate dwellings;

“non-structural defect” in relation to a building, means a defect in building work other than a structural defect;

“owner builder” in relation to a building, means—

- (a) a person to whom section 137B of the **Building Act 1993** applies; or
- (b) a mortgagee in possession of the building from that person; or
- (c) the executor or administrator of the estate of that person;

“Part” means Part of this Order;

“policy” means a contract of insurance;

“practical completion date” in relation to domestic building work, means the date when the domestic building work is completed except for any omissions or defects that do not prevent the domestic building work from being reasonably capable of being used for its intended purpose;

“Revoked Order” means the Domestic Building Insurance Ministerial Order made on 29 October 1998 and published in the Government Gazette on 30 October 1998 as amended by the Domestic Building Insurance (Amendment) Ministerial Order made on 9 November 1998 and published in the Government Gazette on 12 November 1998;

“storey” has the same meaning as it has in the Building Regulations 1994, but does not include a space within a building if the space contains only accommodation intended only for vehicles;

“structural defect” in relation to a building, means any defect in a structural element of the building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that—

- (a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used; or
- (b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building; or
- (c) results in, or is likely to result in—
 - (i) the destruction of the building or any part of the building; or
 - (ii) physical damage to the building or any part of the building; or
- (d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building;

“**structural element**” in relation to a building, means—

- (a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including (but not limited to), foundations, floors, walls, roofs, columns and beams; or
- (b) any component (including weatherproofing) that forms part of the external walls or roof of the building;

“**trade practices provision**” means section 52, 53, 55A or 74 of the **Trade Practices Act 1974** of the Commonwealth or section 9, 11 or 12 of the **Fair Trading Act 1999**;

“**Tribunal**” means the Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

- (2) In this Schedule, in calculating the number of homes that are being built or proposed to be built for the purposes of determining whether a building owner or other person is a developer, a home which is or is to be the principal place of residence of that building owner or person is to be disregarded.

SCHEDULE 2

Building Act 1993

Section 135

Domestic Building Insurance Order

Certificate in respect of Insurance

Domestic Building Contract

A contract of insurance complying with the Ministerial Order for Domestic Building Insurance issued under section 135 of the **Building Act 1993**, namely—

Type of insurance

Insurance

has been issued by: *[insert name of insurer]*

in respect of: *[insert brief description of domestic building work]*

at: *[insert address or description of land]*

carried out by: *[insert name of builder]*

for: *[insert details of building owner “the insured”]*

Subject to the **Building Act 1993**, the Ministerial Order and the conditions of the insurance contract, cover will be provided to the building owner named in the domestic building contract and to the successors in title to the building owner.

Date: *[insert date]*

Signed for and on behalf of the insurers: *[insert signature]*

SCHEDULE 3
Building Act 1993
Section 135
Domestic Building Insurance Order
Certificate in respect of Insurance
Contract of Sale

A contract of insurance complying with the Ministerial Order for Domestic Building Insurance issued under section 135 of the **Building Act 1993**, namely—

Type of insurance

Insurance

has been issued by: *[insert name of insurer]*

in respect of: *[insert brief description of domestic building work]*

at: *[insert address or description of land]*

carried out by/on behalf of: *[insert name of owner builder]*

for: *[insert details of purchaser "the insured"]*

Subject to the **Building Act 1993**, the Ministerial Order and the conditions of the insurance contract, cover will be provided to the purchaser named in the contract of sale and to the successors in title to the purchaser.

Date: *[insert date]*

Signed for and on behalf of the insurers: *[insert signature]*

Dated 16 May 2002

MARY DELAHUNTY
Minister for Planning

Gazette Services

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SPECIAL

Building Act 1993

DOMESTIC BUILDING INSURANCE MINISTERIAL ORDER

I, Mary Delahunty, Minister for Planning make the following Order:

PART 1—INTRODUCTORY

1. ***Purposes of this Order***

- (1) This Order specifies the insurance that a builder is required to be covered by in order to carry out or manage or arrange the carrying out of domestic building work under a domestic building contract of a specified kind.
- (2) This Order specifies the insurance that a person who constructs a building and to whom section 137B of the **Building Act 1993** applies is required to be covered by before entering into a contract to sell that building.

2. ***Authorising provisions***

This Order is made under sections 135, 137A and 137D of the **Building Act 1993**.

3. ***Commencement***

This Order takes effect on 1 July 2003.

4. ***Revocation***

The Domestic Building Insurance Ministerial Order made on 16 May 2002 and published in the Government Gazette No. S82 dated 20 May 2002 is revoked.

5. ***Definitions***

Schedule 1 defines terms for the purposes of this Order.

PART 2—DOMESTIC BUILDING CONTRACTS

6. ***To which contracts does this Part apply?***

This Part applies to a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$12,000 (an “insurable domestic building contract”).

7. ***Required insurance***

- (1) Before entering into an insurable domestic building contract, a builder must ensure that—
 - (a) a policy is issued that complies with this Order (except Part 3); and
 - (b) the policy covers the building work to be carried out under the contract.
- (2) A builder may enter into an insurable domestic building contract without complying with subclause (1) if the contract contains a written condition that—
 - (a) requires a policy that complies with this Order (except Part 3) and covers the building work carried out under the contract to be issued before the builder may enforce any provision of the contract; and
 - (b) requires the policy to be issued before any domestic building work is carried out under the contract; and
 - (c) states that no money (including deposit money) is payable under the contract before that policy is issued; and
 - (d) requires the builder to ensure that a copy of the policy is provided to the building owner within 7 days after it is issued.

8. Indemnity for loss

- (1) The policy must indemnify the building owner in respect of loss or damage resulting from non-completion of the domestic building work.
- (2) The policy must also indemnify the building owner in respect of loss or damage resulting from all or any of the following events—
 - (a) domestic building work that is defective;
 - (b) a breach of any warranty implied into the domestic building contract by section 8 of the **Domestic Building Contracts Act 1995**;
 - (c) a failure to maintain a standard or quality of building work specified in the domestic building contract;
 - (d) conduct by the builder in connection with the domestic building contract that contravenes a trade practices provision.
- (3) The policy may provide that the indemnity referred to in sub-clause (1) or (2) only applies if the builder dies, becomes insolvent or disappears.

9. Additional insurance

- (1) The policy must also indemnify the building owner in respect of loss of the deposit (or any part of the deposit) or loss of any progress payment under the insurable domestic building contract.
- (2) The policy must also indemnify the building owner in respect of the costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred subsequent to and as a result of any of the following events—
 - (a) the non-completion of the domestic building work;
 - (b) an event referred to in clause 8(2)(a) to (d).
- (3) The policy may provide that the indemnity referred to in sub-clause (1) or (2) only applies if the builder dies, becomes insolvent or disappears.
- (4) Despite sub-clause (2), the policy may exclude or limit claims for loss referred to in that sub-clause to the extent that the period of alternative accommodation or storage exceeds 60 days, excluding any period or periods of delay attributable to the insurer.
- (5) Nothing in clauses 13 to 17 applies to permit a policy to limit or restrict the indemnity required by this clause.

Note: The warranties referred to in clause 8(2)(b) are as follows—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgment, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

10. Policy to state that indemnity extends to acts or omissions of others

The policy must state that the indemnities referred to in clauses 8 and 9 include an indemnity in respect of the acts or omissions of all persons who were contracted by the builder to perform the domestic building work under the insurable domestic building contract resulting in loss or damage of the kind referred to in clause 8 or 9.

11. To whom does the cover extend?

The required insurance cover in the policy must extend—

- (a) to each person who becomes entitled to the benefit of any of the warranties referred to in clause 8(2)(b); and
- (b) to the owner for the time being of the building or land in respect of which the domestic building work is or was being carried out.

12. Period of insurance

- (1) The policy must provide the indemnities referred to in clauses 8 and 9 in relation to non-structural defects in respect of loss or damage occurring during the period commencing on the commencement day and ending not earlier than 2 years after the earlier of—
 - (a) the completion date of the domestic building work; and
 - (b) the date of termination of the relevant domestic building contract.
- (2) The policy must provide the indemnities referred to in clauses 8 and 9 in respect of all other loss or damage occurring during the period commencing on the commencement day and ending not earlier than 6 years after the earlier of—
 - (a) the completion date of the domestic building work; and
 - (b) the date of termination of the relevant domestic building contract.

13. Penalties for delay by builder

- (1) The policy may exclude or limit claims under the policy for penalties, fines, liquidated damages or other sums, if any of these relate to delay on the part of the builder.
- (2) Despite sub-clause (1), the policy must not exclude or limit any increase in rectification costs caused by the effluxion of time.

14. Excessive payments to builder

The policy may exclude or limit claims under the policy for money paid to a builder that exceeds the amounts that should have been paid to the builder in accordance with section 11 and (as the case requires) section 40(2) or section 40(3) or section 40(4) of the **Domestic Building Contracts Act 1995**.

15. Builder dies, disappears etc. before work begins

- (1) The policy may exclude or limit claims under the policy for non-completion of building work if the death, insolvency or disappearance of the builder occurs before the builder commences on the building site any domestic building work

(other than the removal of vegetation) that requires the use of any tools or building materials.

- (2) An exclusion or limitation referred to in subclause (1) must be subject to a right of the building owner to recover—
- (a) any money paid in relation to the domestic building contract; and
 - (b) all reasonable costs and expenses incurred by the building owner in relation to the contract.

16. Claims by developers

- (1) The policy may exclude or limit claims under the policy by a building owner who is a developer for non-completion of building work.
- (2) An exclusion or limitation under sub-clause (1) must not affect any rights under the policy of any subsequent owner for the time being of the building or land in respect of which the domestic building work is being carried out.

17. Maximum liability for non-completion claims

The policy may limit claims under the policy for non-completion of domestic building work to an amount that is not more than 20% of the contract price under the insurable domestic building contract.

PART 3—OWNER BUILDERS

18. To which contracts does this Part apply?

This Part applies to a contract of sale of a building (an “insurable contract of sale”) if—

- (a) section 137B of the **Building Act 1993** applies to that contract; and
- (b) domestic building work was carried out on that home before the sale; and
- (c) the value of that domestic building work exceeded \$12 000 at the time the work was carried out.

19. Required insurance

Before entering into an insurable contract of sale of a building, the owner builder must ensure that—

- (a) a policy is issued that complies with this Order (except Part 2); and
- (b) the policy covers the domestic building work on that building.

20. Indemnity for loss

- (1) The policy must indemnify the purchaser under a contract of sale in respect of loss or damage arising from a breach of any warranty implied into the contract by section 137C of the **Building Act 1993**.
- (2) The policy may provide that the indemnity referred to in sub-clause (1) only applies if the owner builder (the “vendor”) dies, becomes insolvent or disappears.
- (3) Despite sub-clause (1), the policy is not required to indemnify the purchaser in respect of a warranty that all materials used in the building work were new to the extent that any materials used were not new if—
- (a) the condition report required by section 137B(2)(a) of the **Building Act 1993** states that the materials were not new; or
 - (b) it was apparent from the nature of the relevant building work that the materials were not new.

Note: The warranties referred to in clause 20(1) are as follows—

- (a) the vendor warrants that all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and

- (b) the vendor warrants that all materials used in that domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and
- (c) the vendor warrants that that domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act.

21. Additional insurance

- (1) The policy must also indemnify the purchaser in respect of the costs of alternative accommodation and removal and storage costs that are reasonably and necessarily incurred subsequent to and as a result of a breach of any warranty referred to in clause 20(1).
- (2) The policy may provide that the indemnity referred to in sub-clause (1) only applies if the builder dies, becomes insolvent or disappears.
- (3) Despite sub-clause (1), the policy may exclude or limit claims for loss referred to in that sub-clause to the extent that the period of alternative accommodation or storage exceeds 60 days, excluding any period or periods of delay attributable to the insurer.
- (4) Nothing in clause 24 applies to permit a policy to limit or restrict the indemnity required by this clause.

22. To whom does the cover extend?

The required insurance cover in the policy must extend—

- (a) to each person who becomes entitled to the benefit of any of the warranties referred to in clause 20(1); and
- (b) to any person who is the successor in title to the purchaser; and
- (c) if the domestic building work is carried out on land in a plan of subdivision containing common property, the body corporate for that land or a building on that land.

23. Period of insurance

- (1) The policy must provide the indemnities referred to in clauses 20 and 21 in relation to non-structural defects in respect of loss or damage occurring during the period commencing on the date of the contract of sale and ending not earlier than 2 years after the completion date for the domestic building work.
- (2) The policy must provide the indemnities referred to in clauses 20 and 21 in respect of all other loss or damage occurring during the period commencing on the date of the contract of sale and ending not earlier than 6 years after the completion date for the domestic building work.

24. Defects referred to in condition report

The policy may exclude or limit claims under the policy in respect of any defect or incomplete domestic building work that is referred to in the report required to be provided to a purchaser pursuant to section 137B of the **Building Act 1993**.

PART 4—ADDITIONAL POLICY PROVISIONS

Division 1—Mandatory Provisions

25. Purpose of this Division

This Division sets out provisions that a policy required under Part 2 or Part 3 must contain.

26. Policy to comply with Order

The policy must contain a provision to the effect that the policy is issued in compliance with this Order and if any term of the policy conflicts or is inconsistent with this Order then the policy must be read and be enforceable as if it complies with this Order.

27. Insurer to accept findings of Tribunal

The policy must contain a provision to the effect that if the insurer has notice of the relevant proceedings before the Tribunal, the insurer will accept as determinative of the issues any finding made by the Tribunal—

- (a) as to whether any of the following events has occurred—
 - (i) the non-completion of domestic building work;
 - (ii) an event referred to in clause 8(2)(a) to (d);
 - (iii) a breach of warranty referred to in clause 20;
 - (iv) an event referred to in clause 9 or 21; and
- (b) if so, as to the amount of loss or damage suffered by the building owner or purchaser, as the case may be, as a result of the event or events.

28. Restrictions on avoidance of policy

- (1) The policy must contain a provision to the effect that the insurer may not avoid the policy or refuse to make or reduce any payment under the policy on the ground that—
 - (a) the builder or owner builder, as the case may be—
 - (i) breached any duty of the utmost good faith; or
 - (ii) failed to comply with any duty of disclosure; or
 - (iii) made representations to the insurer; or
 - (iv) failed to comply with a provision or requirement of the policy; or
 - (v) by act or omission of any description prejudiced the interests of the insurer; or
 - (b) the premium or any instalment of the premium has not been paid.
- (2) The policy may provide that if an insurer makes a payment under a policy in circumstances to which this clause applies, the insurer is entitled to recover from the builder or owner builder, as the case may be, any amount so paid.

29. Time for determination of claim

The policy must contain a provision to the effect that if the insurer has not determined a written claim as to liability within 90 days of receipt of the claim, then, unless the insurer obtains an extension of time from the insured or the Tribunal, the insurer is to be deemed to have accepted liability for the claim.

30. Notice of defect

The policy must contain a provision to the effect that if a person gives the insurer notice of a defect, that person is to be taken for the purposes of the policy to have given notice of every defect to which the defect notified is directly or indirectly related, whether or not the claim in respect of the defect that was actually notified is settled.

31. Application of section 54 of the Insurance Contracts Act 1984

- (1) The policy must contain a provision to the effect that the insurer acknowledges that section 54 of the **Insurance Contracts Act 1984** (insurer may not refuse to pay claims in certain circumstances) of the Commonwealth applies or is deemed to apply to the policy.

- (2) The policy must contain a provision to the effect that, despite the provision referred to in sub-clause (1), if the person making a claim against an insurer has notified the insurer in writing, within 180 days after the date when the claimant first became aware, or might reasonably be expected to become aware, of the death, disappearance or insolvency of the insured, then the insurer will not rely on section 54 of the **Insurance Contracts Act 1984** to reduce its liability under the policy or to reduce any amount otherwise payable in respect of a claim made by reason only of any delay in a claim being notified to the insurer.

32. *Insurer to notify Building Practitioners Board*

The policy must contain a provision to the effect that the insurer will notify the Building Practitioners Board at the times and in the manner agreed with the Board, in the event that—

- (a) a builder is refused insurance, ceases to be eligible to renew or procure insurance or, in respect of domestic building work performed prior to the commencement of this Order, fails to purchase or maintain required insurance; and
- (b) any claim under a policy of required insurance is settled or paid by agreement or otherwise.

33. *Certificate of Insurance*

The policy must contain a provision to the effect that the insurer must provide a Certificate of Insurance, in the form or to the effect of the form contained in either Schedule 2 or Schedule 3 to this Order (as the case may require) and evidencing that a policy has been issued in compliance with this Order in respect of each home for which insurance is required—

- (a) to the insured immediately on the issue of the policy; and
- (b) on request by the builder, owner builder or insured at any time.

Division 2—Allowable Exclusions and Limitations

34. *Purpose of this Division*

This Division sets out provisions that a policy required under Part 2 or Part 3 may contain.

35. *Policy may impose limitations on total amount payable*

The policy may limit the liability of the insurer to not less than the aggregate amount of \$200 000 for all claims in respect of any one home, including reasonable legal costs and expenses incurred by the insured (not being the builder or owner builder) associated with the successful claim against the insurer.

36. *Policy may limit cover for certain external works*

- (1) The policy may exclude or limit cover for loss or damage relating to landscaping, paving, retaining structures, driveways or fencing.
- (2) The policy must not exclude or limit cover under sub-clause (1) in relation to works if those works—
- (a) are integral to the construction of a building; or
- (b) require the issue of a building permit under the **Building Act 1993**; or
- (c) could result in water penetration of or within a building; or
- (d) could adversely affect health or safety; or
- (e) adversely affect the structural adequacy of a building; or
- (f) are not completed and the builder has died, become insolvent or disappeared.

37. Exclusion concerning fair wear and tear

The policy may exclude or limit cover for loss or damage due to fair wear and tear of the domestic building work or the failure by the insured to maintain that work.

38. Limitation relating to contravention of trade practices provision

The policy may limit the indemnity provided by the insurer for loss or damage arising from conduct of a builder that contravenes a trade practices provision to the cost of rectifying the relevant domestic building work.

39. Requirements on insured

- (1) The policy may require the insured on making a claim under the policy—
 - (a) to comply with any reasonable directions of the insurer in relation to the completion or rectification of the domestic building work;
 - (b) not to undertake or cause to be undertaken any rectification works without notifying the insurer, unless those works are reasonably necessary to prevent or minimise any further loss or damage;
 - (c) subject to sub-clause (2), to provide the insurer or any builder or other person nominated or approved by the insurer with reasonable access to the relevant building site for the purpose of inspection, rectification and completion of the domestic building work.
- (2) The policy must provide that the insured has the right on reasonable grounds (including loss of confidence in the builder) to refuse to provide the access referred to in sub-clause (1)(c) to a builder nominated or approved by the insurer.
- (3) Despite sub-clause (1), the policy must provide that the insurer may not reduce its liability to the insured by reason of a failure on the part of the insured to comply with a requirement imposed pursuant to that sub-clause unless and only to the extent that the insurer can prove that the failure increased the liability of the insurer under the policy.

40. Claims affecting common property

The policy may provide that if—

- (a) domestic building work is carried out on land in a plan of subdivision containing common property; and
- (b) a claim is paid by the insurer in relation to the common property—

then the amount of cover in respect of any one home on land in the plan of subdivision is to be reduced by not more than an amount calculated by dividing the amount paid under the claim by the number of homes on land in the plan of subdivision.

41. Right of subrogation

The policy may provide that the insurer is entitled to be subrogated to the rights of the insured to the extent of any amount paid by the insurer to the insured.

42. Precautions to minimise loss

The policy may provide that the insured must take reasonable precautions to avoid or minimise loss or damage covered by the policy.

43. Limitation on renewal

The policy may state that the policy will not be renewed and is of a kind that it is not usual to renew.

44. Limitation periods for making claims

The policy may include a provision under which the insurer may refuse to accept a claim that is not made within 180 days after the date on which the claimant first became aware, or might reasonably be expected to have become aware, of the death, disappearance or insolvency of the insured.

Division 3—Excess**45. Purpose of this Division**

This Division sets out provisions relating to excess that a policy required under Part 2 or Part 3 may contain.

46. Allowable excess

- (1) The policy may include a provision which requires the insured (not being the builder or the owner builder) to bear at the insured's own risk—
 - (a) an excess of not more than \$1000 in respect of a claim made after 5 years after the completion date;
 - (b) an excess of not more than \$750 in respect of a claim made between 3 and 5 years after the completion date;
 - (c) an excess of not more than \$500 in respect of a claim made between 12 months and 3 years after the completion date;
 - (d) a claim under \$500 made between 3 months and 12 months after the completion date.
- (2) The policy must provide that for the purposes of sub-clause (1) a claim of \$500 or more may relate to more than one defect if the amount claimed for any one or more defects is less than \$500.
- (3) For the purpose of this clause, the date when a claim is made is the earlier of—
 - (a) the date when the claimant first notifies the insurer of a circumstance that may give rise to a claim; and
 - (b) the date a claim is made.

47. No excess to apply in certain circumstances

- (1) Despite clause 46, a policy to which Part 2 applies must not include a provision that requires the insured to bear an excess
 - (a) in respect of loss or damage arising between—
 - (i) the date of the insurable domestic building contract or the date of issue of the building permit for the relevant domestic building work, whichever is the earlier; and
 - (ii) the date that is 3 months after the completion date; or (b) if the loss or damage relates to non-completion of building work.
- (2) Despite clause 46, a policy to which Part 3 applies must not include a provision that requires the insured to bear an excess in respect of any arising between the date of the relevant contract of sale and the end of 3 months after the completion date if the relevant contract of sale is entered into before the end of 3 months after the completion date.

48. Only one excess to apply

Despite clause 46, the policy must ensure that an excess may be applied only once in relation to—

- (a) any claim comprising more than one defect; or
- (b) 2 or more claims that relate to the same defect.

PART 5—GENERAL**49. Purpose of this Part**

This Part contains general provisions relating to policies required under Part 2 or Part 3.

50. Policy not to contain terms inconsistent with this Order

- (1) A policy must not contain any provision that limits, modifies, varies, avoids or excludes any of the requirements for a policy set out in this Order.
- (2) Subject to sub-clause (3), a policy must not contain any provision that provides for limitations or exclusions to the policy not expressly permitted by this Order.

- (3) A policy may include an exclusion or limitation that is not referred to in this Order if it is—
- (a) a standard policy provision of the insurer and relates to loss or damage incurred as a result of —
- (i) war; or
 - (ii) a nuclear event; or
 - (iii) civil unrest; or
 - (iv) risks normally insured under a policy for public liability or contract works; or
 - (v) asbestos contamination or removal; or
 - (vi) act of God or nature; or
 - (vii) failure by the insured to maintain appropriate protection against pest infestation or exposure to natural timbers; or
 - (viii) consequential loss, not otherwise covered by this Order; or
 - (ix) malfunction in any mechanical or electrical equipment or appliance if the insurer can prove that the malfunction is not attributable to the workmanship of or installation by the builder or owner builder; and
- (b) not otherwise inconsistent with, or contrary to, anything in this Order.

51. *Policy can provide greater cover*

A provision in a policy will not contravene or be inconsistent with this Order by reason only that it—

- (a) provides a greater insurance cover or additional kinds of insurance cover to that specified in this Order; or
- (b) provides for a lower excess than that specified in Division 3 of Part 4; or
- (c) extends cover to persons other than the insured as defined in this Order.

52. *Who is responsible to pay the premium?*

The builder or owner builder (as the case requires) is responsible to the insurer for the payment of the premium for a policy required under this Order to be issued.

53. *Builder can complete work*

If the insurer, builder and Building Practitioners Board all agree, nothing in this Order prevents a builder from carrying out domestic building work under an insurable domestic building contract despite the fact that the builder has become insolvent, subject to any conditions that the Building Practitioners Board may require.

54. *Provisions in policy can be to like effect*

If this Order requires or allows a policy to include a particular provision or requirement, a provision to the same effect as the provision or requirement will be sufficient.

PART 6—EXCEPTIONS

55. *Exception for domestic building works undertaken by the Director of Housing*

This Order does not apply to the Director of Housing incorporated under the Housing Act 1983 who carries out or proposes to carry out domestic building work.

56. *Exception for demolishers*

This Order does not apply to a person who is registered under Part 11 of the Building Act 1993 solely under the category of builder, class of demolisher.

57. Exception for builders of multi-storey residential buildings

- (1) This Order does not apply to a person who carries out or proposes to carry out domestic building work under a domestic building contract for the construction of a multi-storey residential building in respect of the carrying out of domestic building work for the construction of that building.
- (2) This Order does not apply to an owner-builder who constructs a multi-storey residential building, in relation to any contract to sell that building.

PART 7—TRANSITIONAL

58. Transitional

A builder or owner builder is not required to comply with this Order in respect of the issue of a policy relating to domestic building work if that domestic building work is covered by a policy that was issued before the commencement of this Order and that policy complies with the Revoked Order.

59. Guarantee deemed to comply with Order

A guarantee issued pursuant to the **House Contracts Guarantee Act 1987** is deemed to comply with this Order.

SCHEDULES
SCHEDULE 1
DEFINED TERMS

(1) In this Order—

“**builder**” means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

“**building owner**” means the person for whom domestic building work is being, or is about to be, carried out;

“**Building Practitioners Board**” means the Building Practitioners Board established under the **Building Act 1993**;

“**building site**” means a place where domestic building work has been, is being, or is about to be, carried out;

“**carry out**” in relation to building work, includes manage or arrange the carrying out of building work;

“**clause**” means clause of this Order;

“**commencement day**” means the earlier of—

- (a) the date that the relevant domestic building contract is entered into; or
- (b) the date of issue of the building permit for the relevant domestic building work;

“**completion date**” means—

- (a) the date of issue of the occupancy permit in respect of the building (whether or not the occupancy permit is subsequently cancelled or varied); or
- (b) if an occupancy permit is not issued, the date of issue under Part 4 of the **Building Act 1993** of the certificate of final inspection of the building work for the construction of the building; or
- (c) if neither an occupancy permit nor a certificate of final inspection is issued or required to be issued, the date of practical completion of the domestic building work;

“**construct**” in relation to a building, means—

- (a) build, rebuild, erect or re-erect the building; or
- (b) make alterations to the building; or
- (c) enlarge or extend the building; or
- (d) cause any other person to do anything referred to in paragraph (a), (b) or (c) in relation to the building; or
- (e) manage or arrange the doing of anything referred to in paragraph (a), (b) or (c) in relation to the building;

“**defective**”, in relation to domestic building work, includes—

- (a) a breach of any warranty listed in section 8 of the **Domestic Building Contracts Act 1995**;

- (b) a failure to maintain a standard or quality of building work specified in the relevant domestic building contract;
- “developer”** means any building owner or other person for whom 3 or more homes are being or proposed to be built—
- (a) on any one building site; or
 - (b) on more than one building site under one domestic building contract;
- “disappears”** means cannot be found after due search and inquiry;
- “domestic building contract”** has the same meaning as it has in the **Domestic Building Contracts Act 1995**;
- “domestic building work”** means any work referred to in section 5 of the **Domestic Building Contracts Act 1995** that is not excluded from the operation of that Act by section 6 of that Act;
- “home”** means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include—
- (a) a caravan within the meaning of the **Residential Tenancies Act 1997** or any vehicle used as a residence; or
 - (b) any residence that is not intended for permanent habitation; or
 - (c) a rooming house within the meaning of the **Residential Tenancies Act 1997**; or
 - (d) a motel, residential club, residential hotel or residential part of licensed premises under the **Liquor Control Reform Act 1998**; or
 - (e) a nursing home, hospital or accommodation associated with a hospital; or
 - (f) any residence that the regulations under the **Domestic Building Contracts Act 1995** state is not a home for the purposes of the definition of “home” in that Act;
- “insolvent”** means—
- (a) in the case of a natural person, insolvent under administration as that expression is defined in the **Corporations Act 2001**; or
 - (b) in the case of a body corporate, subject to external administration under the **Corporations Act 2001**;
- “insurable contract of sale”** means a contract of sale referred to in clause 18;
- “insurable domestic building contract”** means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$12,000;
- “insured”** means—
- (a) in the case of a policy issued pursuant to Part 2—
 - (i) any person insured under the policy; and
 - (ii) any person to whom the cover under the policy extends pursuant to clause 11; and
 - (b) in the case of a policy issued pursuant to Part 3—
 - (i) any person insured under the policy; and
 - (ii) any person to whom the cover under the policy extends pursuant to clause 22—
- but, unless expressly provided for in the policy, does not include—
- (c) in the case of a policy issued pursuant to Part 2—
 - (i) the builder; or
 - (ii) the building owner, if the building owner is a related body corporate (within the meaning of the **Corporations Act 2001**) of the builder; or

- (iii) the building owner, if neither the builder nor the building owner is a public company but each has a common director or a common shareholder; or
- (d) in the case of a policy issued pursuant to Part 3—
 - (i) the owner builder; or
 - (ii) the purchaser, if the purchaser is a related body corporate (within the meaning of the **Corporations Act 2001**) of the owner builder; or
 - (iii) the purchaser, if neither the purchaser nor the owner builder is a public company but each has a common director or a common shareholder;

“multi-storey residential building” means a building—

- (a) that has a rise in storeys (within the meaning of the Building Regulations 1994) of more than 3; and
- (b) that contains 2 or more separate dwellings;

“non-structural defect” in relation to a building, means a defect in building work other than a structural defect;

“owner builder” in relation to a building, means—

- (a) a person to whom section 137B of the **Building Act 1993** applies; or
- (b) a mortgagee in possession of the building from that person; or
- (c) the executor or administrator of the estate of that person;

“Part” means Part of this Order;

“policy” means a contract of insurance;

“practical completion date” in relation to domestic building work, means the date when the domestic building work is completed except for any omissions or defects that do not prevent the domestic building work from being reasonably capable of being used for its intended purpose;

“Revoked Order” means—

- (a) the Domestic Building Insurance Ministerial Order made on 29 October 1998 and published in the Government Gazette on 30 October 1998 as amended by the Domestic Building Insurance (Amendment) Ministerial Order made on 9 November 1998 and published in the Government Gazette on 12 November 1998; and
- (b) the Domestic Building Insurance Ministerial Order made on 16 May 2002 and published in the Government Gazette No. S82 dated 20 May 2002.

“storey” has the same meaning as it has in the Building Regulations 1994, but does not include a space within a building if the space contains only accommodation intended only for vehicles;

“structural defect” in relation to a building, means any defect in a structural element of the building that is attributable to defective design, effective or faulty workmanship or defective materials (or any combination of these) and that—

- (a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used; or
- (b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building; or

- (c) results in, or is likely to result in—
 - (i) the destruction of the building or any part of the building; or
 - (ii) physical damage to the building or any part of the building; or
- (d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building;

“structural element” in relation to a building, means—

- (a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including (but not limited to), foundations, floors, walls, roofs, columns and beams; or
- (b) any component (including weatherproofing) that forms part of the external walls or roof of the building;

“trade practices provision” means section 52, 53, 55A or 74 of the **Trade Practices Act 1974** of the Commonwealth or section 9, 11 or 12 of the **Fair Trading Act 1999**;

“Tribunal” means the Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

- (2) In this Schedule, in calculating the number of homes that are being built or proposed to be built for the purposes of determining whether a building owner or other person is a developer, a home which is or is to be the principal place of residence of that building owner or person is to be disregarded.
-

SCHEDULE 2
Building Act 1993
Section 135
Domestic Building Insurance Order
Certificate in respect of Insurance
Domestic Building Contract

A contract of insurance complying with the Ministerial Order for Domestic Building Insurance issued under section 135 of the **Building Act 1993**, namely—

Type of insurance

Insurance

has been issued by: *[insert name of insurer]*

in respect of: *[insert brief description of domestic building work]*

at: *[insert address or description of land]*

carried out by: *[insert name of builder]*

for: *[insert details of building owner "the insured"]*

Subject to the **Building Act 1993**, the Ministerial Order and the conditions of the insurance contract, cover will be provided to the building owner named in the domestic building contract and to the successors in title to the building owner.

Date: *[insert date]*

Signed for and on behalf of the insurers: *[insert signature]*

SCHEDULE 3
Building Act 1993
Section 135
Domestic Building Insurance Order
Certificate in respect of Insurance
Contract of Sale

A contract of insurance complying with the Ministerial Order for Domestic Building Insurance issued under section 135 of the **Building Act 1993**, namely—

Type of insurance

Insurance

has been issued by: *[insert name of insurer]*

in respect of: *[insert brief description of domestic building work]*

at: *[insert address or description of land]*

carried out by/on behalf of: *[insert name of owner builder]*

for: *[insert details of purchaser "the insured"]*

Subject to the **Building Act 1993**, the Ministerial Order and the conditions of the insurance contract, cover will be provided to the purchaser named in the contract of sale and to the successors in title to the purchaser.

Date: *[insert date]*

Signed for and on behalf of the insurers: *[insert signature]*

Dated 22 May 2003

MARY DELAHUNTY MP
Minister for Planning

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