

INDUSTRY UPDATE

ASBESTOS UNDER THE WORK HEALTH AND SAFETY ACT



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Operation of Strata Title Body Corporate under the new regime in relation to Asbestos

Prelude

This article is to be read in conjunction with the Health Work and Safety Act workbook issued by Grace Lawyers in February 2012.

This article is to review the basic issues that have been raised in the various forums on the issue of asbestos management. Naturally this is not to be construed as legal advice and individual circumstances may impact on comments in this article.

The examples and various sections (to make it easier) focus on the application of the legislation in NSW. The system should be identical in other States and Territories as they join (or have joined) the system. For the purpose of this article we shall use the generic term of bodies corporate to include strata schemes, community associations, body corporates, company title and stratum developments except where specific reference is required.

Commonwealth Work Health and Safety Bill

The Commonwealth Work Health and Safety Bill (**WHS**) was introduced into the House of Representatives on 6 July 2011. The reforms came about as a result of the July 2008 signing by COAG (Council of Australian Governments) of the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety.

Each jurisdiction, including the Commonwealth, has developed legislation to give effect to the Model WHS, with an intended focus on harmonizing Occupational Health and Safety arrangements through the implementation of uniform legislative measures. The WHS commenced on 1 January 2012 in New South Wales, Queensland and Northern Territory (the remaining States continue to discuss).

The WHS 2011 is accompanied by the Model Work Health and Safety Regulations (**MWHSR**). The MWHSR is supported by a number of model Codes of Practice which were agreed to by all Ministers in December 2009.

Asbestos issues

Chapter 8 of the MWHSR deals with changes to the practice and procedure surrounding Asbestos. The MWHSR set out a number of obligations upon what is described as a '*person conducting a business or undertaking...*' (**PCBU**), unless excluded under the WHS (see WHS workbook for discussion on PCBU).

Section 5 of the WHS sets out what a *person conducting a business or undertaking* is taken to include and exclude (see workbook). For the purposes of this article it will be assumed that the building is a PCBU.

Codes of Practice

There are currently two (2) Codes of Practice (**Codes of Practice**) available relating to the obligations of PCBU's regarding Asbestos. These Codes of Practice are:

1. How to Manage and Control Asbestos in the Workplace;
2. How to Safely Remove Asbestos.

These Codes of Practice provide guidelines and procedures for the obligations prescribed under the WHS and are *approved codes* for the purposes of section 274 of the WHS. While compliance with the Codes of Practice does not appear to be mandatory, it is our recommendation that they should be followed by anyone who has a responsibility under the WHS, such as a PCBU.

In light of the fact that it appears as though most strata title body corporate schemes will be included in the new regime, at least in some capacity, we felt it necessary to set out some of the more important aspects of the WHS and MWSHR. These are discussed below and, where applicable, are dealt with by the draft Motion provided at page 11 below.

The MWSHR

Chapter 8 of the MWSHR provides for the regulations relating to Asbestos.

While all PCUB's and responsible persons must ensure that they have read, understood and, where applicable, implemented the obligations and requirements of Chapter 8 of the MWSHR, we have highlighted a number of the more onerous obligations below.

Regulation 419

Regulation 419 of the MWSHR provides that a PCUB must not carry out, or direct or allow a worker to carry out, work involving asbestos, with a maximum penalty of thirty thousand dollars (\$30,000.00) in the case of a breach of the prohibition by a body corporate.

However, there are over 12 exceptions to this prohibition. Notably, this prohibition

1. does not apply to maintenance of, or service work on, non-friable asbestos or ACM, fixed or installed before 31 December 2003;
2. does not apply to management in accordance with the MWSHR of in situ asbestos that was installed or fixed before 31 December 2003;
3. does not apply to the removal of asbestos of ACM, including demolition.

Accordingly, in order to ensure compliance with this regulation, knowledge of the location and type of all asbestos present in the applicable building is essential.

Regulation 425

Regulation 425 provides for the establishment and maintenance of an Asbestos Register.

A PCUB with management or control of a workplace must ensure that a register is prepared and kept at the workplace.

This regulation does not apply in circumstances where:

1. the workplace is a building that was constructed after 31 December 2003; and
2. no asbestos has been identified in the workplace; and
3. no asbestos is likely to be present at the workplace from time to time.

Further, there is no requirement to create a new asbestos register if one is pre-existing.

Accordingly, unless you are a PCUB with management or control of a workplace, Regulation 425 does not apply to you.

If the building is deemed to be a workplace, Regulation 425 will not apply to you if:

1. the building was constructed after 31 December 2003; and
2. no asbestos has been identified in the workplace; and
3. no asbestos is likely to be found.

However, all three (3) of the above criteria must be satisfied for the exemption to apply.

Regulations 426 through 430

Regulations 426 through 430 provide for the access, review and management of the Asbestos Register. In the event that Regulation 425 applies to you, these Regulations will apply to you in circumstances where:

1. You are a PCUB; and
2. You have the management or control of a workplace; and
3. The workplace was constructed prior to 31 December 2003.

The maximum penalty for a breach of Regulations 425 through 430 by a body corporate is eighteen thousand dollars (\$18,000.00), except for Regulation 429, which carries a maximum penalty of thirty thousand dollars (\$30,000.00).

Part 8.6 – Demolition and Refurbishment: Regulations 447 through 457

Regulation 447 through 457 provide for the demolition and refurbishment of buildings under the new regime.

These regulations do not apply:

1. to structures built or installed after 31 December 2003; or
2. to minor or routine maintenance work, or other minor work; or
3. the building is not deemed a workplace.

Accordingly, these Regulations will apply to you in circumstances where:

1. You are a PCUB; and
2. You have the management or control of a workplace; and
3. The workplace was constructed prior to 31 December 2003.

In any other circumstance, unless expressly stated, these regulations will apply to a strata title body corporate. The maximum penalty for breach of these regulations is between eighteen thousand dollars (\$18,000.00) and thirty thousand dollars (\$30,000.00) depending on the offence.

How do bodies corporate keep compliant?

Under the duty of care obligations and the asbestos provisions, a PCBU must take reasonable steps to ensure the safety of all workers and contractors onsite.

In order to do this it is suggested the following approach be undertaken:

1. A decision must be made at a meeting to obtain a report on the current status of the building as it applies to asbestos;
2. A suitably qualified person needs to be engaged to carry out the inspection (this can be in conjunction with the general inspection for compliance with the WHS in any case);
3. The report needs to do the following:
 - a. Determine whether the building is subject to any exemption;
 - b. Determine whether the building has any asbestos (this in conjunction with the report on safety/risks).
4. If no asbestos is found the report to be tabled at a meeting and accepted, kept on file and kept at the premises for future reference.
5. If asbestos is found an Asbestos Management Plan and Register to be prepared and:
 - i. one be kept with the records of the body corporate;
 - ii. one to be kept on site for access by trades if and when they attend the premises;
 - iii. one to be issued to all owners/occupants of the building advising of the Plan and Register and guidelines when carrying out any work;
 - iv. place adequate signage around the premises advising of the risks.
6. Where any works are to be conducted at the premises (including work orders issued) the contractor must be advised that there is asbestos at the premises, where to find the Asbestos Management Plan and Register and who is the point of contact at the premises.
7. All Plans and Registers must be kept up to date and ensure contractors are advised of any risks etc. A process for obtaining the reports and making the documents available should be approved by a resolution at either a general or committee meeting (recommended each 12 months).

There may be occasions where decisions are made not to comply with the requirements (and the motions may fail). In these instances bodies corporate (and potentially managers) will need to be apprised of the risks for that non compliance.

How do I find a good consultant/expert?

In engaging any contractor/expert bodies corporate must be diligent in who they engage (as there are parts of the legislation that do not absolve a body corporate from liability even when they have engaged an expert). The following can be used as a guide:

- The person should be trained to handle the type of item found (or expected to be found);
- The person should be trained to take samples (if required);
- The person should have knowledge and expertise in identifying asbestos;



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- The person should be able to properly determine the risks associated with the type of asbestos found;
- The person should have expertise in managing asbestos (maintenance, management, removal);
- The person should be familiar with the type and style of the building to be inspected (and have experience in similar buildings);
- The person should be able to evaluate friable and non friable particles;
- Reports should be professional and have limited exclusions.

What are the fines for non-compliance

As with any legislation the sting is in the tail, under the WHS, the maximum fines for non-compliance are severe and exhaustive. There are certain penalties that range up to \$3 million for a body corporate found guilty, \$600,000 for individuals such as committee members/owners or in some instances jail terms.

Whilst these are the maximum fines under the proposed laws the non compliance by bodies corporate of even the simplest issue may result in fines and/or claims against it.

Conclusion

The new legislation places more onerous obligations on bodies corporate. They are required to take a more pro-active role in the management of risk at their premises.

The Executive Committee needs to work closely with their managing agents and consultants/experts to ensure that the measures are in place and risks identified (and dealt with). There needs to be an ongoing risk management system developed and regularly reviewed and updated.

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