

Kerin Benson Lawyers Fact Sheet 8

Asbestos Compliance and Group Title in the ACT

Group title schemes, such as strata schemes and company title schemes, may be subject to various requirements to reduce the risk of asbestos under both statutory and common law duties.

Statutory duties:

Who do the duties apply to?

On 1 January 2012 the *Work Health and Safety Regulation 2011 (the Regulations)* commenced, imposing significant duties relating to reducing the risk of exposure to asbestos. Chapter 8 of the Regulations which deals with asbestos is quite extensive, running to over 100 pages. The requirements of the Regulations will not apply to those schemes that:

- are not considered a 'person conducting a business or undertaking' (**PCBU**) (see ACT Fact Sheet 6 'Work Health & Safety and Unit Plans in the ACT'); and/or
- were constructed on or after 1 January 2004, and no asbestos has been identified or is likely to be identified at the scheme.

What do the duties require?

For those schemes that do need to comply, the Regulations impose, amongst other things, the following key duties:

- ensuring that airborne asbestos is eliminated, or if it can't be eliminated, that the exposure to airborne asbestos is minimised (r 420 of the Regulations);
- ensuring that all asbestos is identified by a competent person (r 422 of the Regulations);
- if asbestos is identified, ensuring that its presence is clearly indicated (r 424 of the Regulations);
- maintaining and reviewing an asbestos register recording any asbestos identified or stating that no asbestos was identified (r 425-6 of the Regulations); and
- preparing and reviewing an asbestos management plan (r 429-30 of the Regulations).

Please note that this Fact Sheet is a very brief summary of the duties under the Regulation and reference should be made to the Regulations and Codes of Practice to ensure a full understanding of the various requirements is obtained.

Non-compliance with any of the above duties can result in penalties of up to \$30,000 for each offence for an owners corporation and the risk of loss or damage caused by asbestos is not covered by residential strata insurance policies (indeed it is usually specifically excluded).

How to comply with the duties?

In order to comply with the above duties, we recommend that a group title scheme takes steps appropriate to its circumstances including the following:

- resolve at a general meeting to engage a qualified asbestos expert to inspect the property and prepare an asbestos report determining whether any asbestos is present in the scheme;
- if no asbestos is found, keep copies of the report in the records of the scheme and on the premises for future reference;
- if asbestos is found, prepare an Asbestos Management Plan and Asbestos Register in consultation with the asbestos expert;
 - Keep copies of the Asbestos Management Plan and Register with the records of the scheme and on the premises and send copies to the owners/occupiers of the scheme;
- place adequate signage around the premises advising of the risks and identifying the areas where asbestos has been found. If reasonably practicable, the presence and location of asbestos should be indicated by a label;
- advise any contractors conducting work on the scheme of the result of the asbestos report, and refer them to the Asbestos Management Plan and Asbestos Register before work is undertaken; and
- keep the Asbestos Management Plan and Asbestos Register up to date by regular reviews (e.g. include asbestos management as an agenda item for general meetings).

Codes of Practice

Two Codes of Practice have been established in the ACT – ‘How to Manage and Control Asbestos in the Workplace Code of Conduct’ and ‘How to Safely Remove Asbestos Code of Practice’. These Codes of Practice are practical guides to achieve the standards of health, safety and welfare required under the WHS legislation in the ACT and apply to anyone who has a duty of care in the circumstances described in the Codes. These Codes should be referred to in order to fully understand how the above Regulations are to apply.

Common law duties:

Who does the duty apply to?

Despite the relatively exhaustive statutory duties outlined above, a group title scheme may still owe a common law duty of care. This common law duty will extend beyond PCBU schemes and will include the owners of residential schemes which are not considered to be PCBUs under the WHS legislation.

What does the duty require?

According to *Ridis v Strata Plan 10308* [2005] NSWCA 246 (McColl JA), an owners corporation has the same duty of care as that owed by occupiers generally under the principles of negligence. As such, the duty of care owed by an owners corporation to entrants on the common property is to take such care as is reasonable in the circumstances. This duty to take reasonable care requires the occupier to protect entrants from the risk of injury which can be foreseen and avoided. To discharge this duty, the occupier must do what a reasonable person would do, in the circumstances, by way of a response to the foreseeable risk.¹

However, there is considerable authority suggesting that occupiers will not breach the duty of reasonable care when an entrant is injured because of a defect in the premises which could not have been ascertained without expert examination, in circumstances where there was

¹ *Hackshaw v Shaw* (1984) 155 CLR 614 (Deane J).

nothing which would have caused the occupier to believe such an examination was needed.² As such, owners corporations are generally not under a duty to engage experts to inspect the common property for the purpose of discovering unknown and unsuspected defects.³

Therefore, whether an owners corporation is under a common law duty to reduce or eliminate the risk of asbestos to entrants depends on whether the owners corporation knew about or suspected the existence of asbestos on the common property. In circumstances where the existence of asbestos is known to the owners corporation, a failure to act to remove or reduce the risk is more likely to be considered a breach of the duty of reasonable care than in circumstances where the existence of asbestos was unknown to the owners corporation and/or only ascertainable by an expert.

How to comply with the duties?

If a scheme follows the procedure to comply with the statutory duties relating to asbestos, outlined above, they will also comply with the common law duty as the statutory duties go above and beyond what the common law duty requires.

² *Watson v George* (1953) 89 CLR 409; *Stannus v Graham* (1994) Aust Torts reports 81-293; *Jones v Bartlett* (2000) 205 CLR 166.

³ *Ridis v Strata Plan 10308* [2005] NSWCA 246 (McColl JA).