

2014

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

WORK HEALTH AND SAFETY AMENDMENT REGULATION 2014 (No 1)

SL2014-10

EXPLANATORY STATEMENT

**Circulated by the authority of
Simon Corbell MLA
Minister for Workplace Safety and Industrial Relations**

Background

The object of the Work Health and Safety Amendment Regulation 2014 (No 1) (the Regulation) is to provide protection for workers who may be exposed to asbestos while carrying out work for a person conducting a business or undertaking, through the provision of mandatory asbestos awareness training.

Section 19 (3) (f) of the *Work Health and Safety Act 2011* provides that a person conducting a business or undertaking must, as far as is reasonably practicable, provide information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.

Exposure to asbestos is a concern for workers in the ACT, particularly (but not limited to) those in the building and construction (and related) industries. Most homes built before 1990 will have some building products containing bonded asbestos. Whilst left undisturbed bonded asbestos poses minimal health risk. However, workers such as construction workers, electricians, plumbers, and cabinet makers, and their apprentices, because of the very nature of their work, can disturb the bonded nature of the materials making the asbestos friable.

For more information on asbestos, including health impact, go to www.asbestos.act.gov.au .

The Regulation requires workers who may, because of the nature of their work, be exposed to asbestos, to undertake the VET course Asbestos Awareness.

The Regulation imposes a duty on the person conducting a business or undertaking to ensure the worker has undertaken the training by 30 September 2014.

Further, the Regulation imposes a duty on the person conducting a business or undertaking to retain a record of the training undertaken by the worker for five years after the worker ceases working for the person.

Application of the Regulation

A ‘worker’ may be owed duties of care by more than one person or ‘business or undertaking’, for example, where a worker is an employee for one business or undertaking and a contractor for another business or undertaking under a labour hire arrangement.

Parallel duties may also be owed in relation to a workplace.

Offences in the Regulation

The Regulation has criminal penalties. The offences, like all other provisions adopted under the model work health and safety laws, have been drafted in non-jurisdictional specific terms

and do not necessarily reflect the general drafting practice of including each physical element of the offence in a separate paragraph.

Subsection 6A of the WHS Regulation provides that, unless otherwise specified, the physical elements of each offence are strict liability.

For an offence against this Regulation, the prosecution will have to prove only the conduct of the defendant. However, where the defendant produces evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made the conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

The application of strict liability to the element of an offence has been carefully considered during drafting.

The strict liability offences arise in the regulatory context where for reasons such as public safety, and the interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offences also arise in a context where a defendant can reasonably be expected, because of his or her professional involvement, to know the requirements of the law. Subsequently, the mental or fault element can justifiably be excluded. The rationale is that people who owe work safety duties (such as employers, persons in control of aspects of work and designers and manufacturers or work structures and products – as opposed to members of the general public) can be expected to be aware of their duties and obligations to workers.

The Regulation is being, and will continue to be, advertised to relevant persons and industries through various mechanisms. It will also be accompanied by a WorkSafe ACT guidance note to assist persons conducting a business or undertaking (including employers and principal contractors) and workers to understand and comply with the new training requirements.

Clause 1 — Name of Regulation

This clause provides for the Regulation's name.

Clause 2 — Commencement

This clause provides for the Regulation to commence on 30 September 2014.

Clause 3 — Legislation amended

This clause gives effect to amending the *Work Health and Safety Regulation 2011*.

Clause 4 — New chapter 8

This clause introduces the amendments necessary to give effect to the requirements for persons conducting a business or undertaking to ensure their workers are trained in asbestos awareness.

Subclause 445(1)(a) provides that from 30 September a person conducting a business or undertaking, for example an employer or principal contractor, **must** ensure that all of their workers *who they reasonably believe will work with asbestos or asbestos containing materials* are trained in the VET course Asbestos Awareness. This is the Course 10314 NAT. These workers include construction workers as well as a number of other workers in occupations declared by the Minister.

There is no definition of what *reasonably believes* means, however it is commonly used in legislation. It is based on what is reasonable in the circumstances – when in doubt whether a worker may work with asbestos or be exposed to asbestos fibres, it is better to ensure the worker is trained in asbestos awareness.

There is no definition of *work with asbestos or asbestos containing materials*, so how this is interpreted relies on the ordinary meaning of the words, for instance it would include any worker who might:

- penetrate or disturb asbestos in any way, for example, breaking, cutting, drilling or sanding internal and external walls, sheeting, ceilings
- penetrate or disturb asbestos by using power tools, high pressure water blasters etc
- work in the vicinity of friable asbestos material (including damaged or crumbling bonded asbestos)
- handle asbestos such as through professional laundering of clothes or soft furnishing that have been in contact with asbestos (e.g. builders clothes, furnishing contaminated during unsafe building work)
- work where loose-fill asbestos insulation may be present – i.e. in ceiling cavities or subfloors of homes constructed before 1980

This would include *all* building and construction workers.

It would also include workers who may not physically handle asbestos or work in construction, but could be in the vicinity of work that is being undertaken, where there is a risk of exposure. For example, this might include a designer or colour consultant who conducts in-home consultations during renovation work on pre-1990 homes.

It would also include facility and corporate managers who are responsible for ensuring their premises has an asbestos management plan in place.

However, this would not include workers who might:

- work on asbestos in a theoretical sense e.g. academics, researchers, and who do not come into contact with asbestos
- work in a building that contains asbestos, such as office workers in pre-2004 buildings.

However, any worker who has responsibilities for ensuring workers in an office context are not exposed to asbestos, such as ensuring the premises built before 2004 are maintained in

good condition, or through managing or arranging repairs, refurbishment and renovations would be covered by the mandatory requirement.

Subclause 445 (1)(b) provides that all workers who work in an occupation declared by the Minister must also undertake the course. This would apply to prescribed workers regardless of how long they have worked in the job, their level of seniority, their qualifications and regardless of whether they are licensed or an apprentice.

An instrument under subclause 445 (1) (1A) is a notifiable instrument.

A person conducting a business or undertaking commits an offence for non-compliance with the mandatory requirement.

Subclause 445 (3) provides that a person conducting a business or undertaking must ensure that a record is kept of the training being undertaken by the worker. There is no requirement for workers to have an 'Asbestos Awareness Training card' as is the case with other similar mandatory training requirements under work health and safety laws.

Subclause 445 (3) provides that a person conducting a business or undertaking must keep the record of training available for inspection.

Clause 5 — Dictionary

Clause 5 amends the dictionary to include definitions for asbestos and asbestos containing material. The definitions are consistent with the Dangerous Substances Act 2004 and the definitions used in the nationally harmonised Work Health and Safety legislation that deals with chemicals and asbestos, which the ACT anticipates will be in place in the next 12 months.