

Australian Capital Territory

Work Health and Safety Amendment Regulation 2014 (No 3)

Subordinate law SL2014–27

made under the

Work Health and Safety Act 2011

EXPLANATORY STATEMENT

The *Work Health and Safety Amendment Regulation 2014 (No 3)* ('the Regulation') amends the *Work Health and Safety Regulation 2011* ('the WHS Regulation') by introducing two new notice requirements.

The new notice requirements are a response to the issue of loose fill asbestos affected homes and their demolition. The Regulation is designed to enable the regulator to take proactive regulatory action and intervene, if required, to ensure the safe demolition of affected homes.

The Regulation inserts a requirement for a person conducting a business or undertaking to give the regulator five days written notice of commencing demolition of a structure, or part of a structure which contains, or has contained, loose fill asbestos insulation.

The Regulation also inserts a requirement for a licensed asbestos removalist to give the regulator five days written notice before commencing licensed asbestos removal work on a structure, or part of a structure, that contains, or has contained, loose fill asbestos insulation. This requirement is based on section 466 of the national Model Work Health and Safety Regulations.

Failure to comply with either of these requirements is an offence. Section 6A of the WHS Regulation provides that, unless otherwise specified, the physical elements of an offence are strict liability.

For the two offences in the Regulation, the prosecution is required to prove only the conduct of the accused. However, where the accused 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 has been carefully considered during drafting.

The strict liability offences arise in the regulatory context where for reasons such as worker and 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.

In addition, at the time of the making of the Regulation, a tradesperson who has carried out building work or who intends to carry out building work (which is defined in the *Building Act 2004* as including demolition work) is able to apply to the Environment and Planning Directorate to ascertain whether or not a residential property contained loose fill asbestos and was part of an asbestos removal program. Information about this policy is available at:

http://www.actpla.act.gov.au/customer_information/community/new_building_file_search_process_-_asbestos_removal_program. Also, at the time of writing, a person carrying out building work on a class 1, 2, 3 or 4 building, or a class 10 building associated with a class 1, 2, 3 or 4 building which was built before 1985 (or building which was commenced before 1985) is required under the *Building Act 2004* to include in the building approval application an asbestos removal control plan which must be complied with.

Therefore, 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 and the wider public.

Overview

Between 1988 and 1993 the Commonwealth Government conducted a program to remove loose fill asbestos insulation from over 1000 affected homes in the ACT which had been installed by one company throughout the 1960s and 1970s. The program was completed by the ACT Government following self-Government.

The removal program was not designed to remove *all* loose fill asbestos insulation from all ACT homes.

The demolition of loose fill asbestos affected properties represents a potential risk to the health and safety of workers and to the general public which must be appropriately managed.

There is no current requirement that notice be given to the regulator of a proposed demolition to ensure that the planned demolition or asbestos removal is safe for workers or the general public.

The demolition of a loose fill asbestos affected home is uniquely complex and triggers a number of legislative requirements and ACT regulatory areas as it involves the removal of friable asbestos and asbestos waste and the transportation and disposal of friable asbestos waste.

The regulation is designed to ensure that the unique risks and requirements relating to the demolition of loose fill asbestos homes can be properly managed. A notice requirement will allow the regulator, where necessary, to take proactive regulatory action in relation to the proposed asbestos removal and demolition, including to notify and work with other agencies relevant to the demolition and asbestos removal process and if necessary, to intervene or proactively require improved control measures prior to the demolition taking place.

Clause notes

Clause 1 Name of regulation

This clause provides for the name of the regulation as the *Work Health and Safety Amendment Regulation 2014 (No 3)*.

Clause 2 Commencement

This clause provides for the commencement of the regulation as the day after its notification day.

Clause 3 Legislation amended

This clause provides that the regulation amends the *Work Health and Safety Regulation 2011*.

Clause 4 Section 142 (1)

This clause substitutes a reference in section 142(1) to section 142(4) with a reference to section 142(3) relating to notice of demolition by an emergency service organisation.

Clause 5 New section 142 (1) (d)

This clause inserts paragraph (d) into section 142(1) of the WHS Regulation. New section 142(1)(d) requires a person conducting a business or undertaking to give five days notice to the regulator before commencing demolition of a structure, or part of a structure that contains, or has contained, loose fill asbestos insulation.

Failure to comply with the requirement is a strict liability offence and will form part of the existing infringement notice scheme.

Given the potential risk to health and safety of workers and the general public, if a demolition does not comply with necessary safeguards and the need for the provision to be proactively enforced by the regulator to be effective, it is appropriate for the offence to be one of strict liability and to be subject to an infringement notice scheme.

The maximum penalty for contravening a notice provision in section 142 of the WHS Regulation is \$1 250 for an individual and \$6 000 for a body corporate.

Section 142(3) prescribes different notification requirements for emergency service organisations that may have carried out demolition work in responding to an emergency. These organisations must give the regulator notice as soon as is practicable after carrying out the work.

Clause 6 Section 142 (2)

This clause substitutes a reference in section 142(2) to section 142(4) with a reference to section 142(3) relating to notice of demolition by an emergency service organisation.

Clause 7 New section 142 (5)

This clause inserts a definition of the term ‘loose fill asbestos insulation’ as used in the section.

Clause 8 New section 466

Section 466 specifies the requirements for licensed asbestos removalists to notify the regulator at least five days before commencing licensed asbestos removal work on a structure, or part of a structure, that contains, or has contained, loose fill asbestos insulation.

The maximum penalty for contravening section 466(1) is \$3 600 for an individual and \$18 000 for a body corporate. This is consistent with the maximum penalty for contravening section 466(1) of the national Model Work Health and Safety Regulations, which requires that a licensed asbestos removalist to notify the regulator at least five days before starting licensed asbestos removal work.

Section 466(2) provides that despite section 466(1), licensed asbestos removal work on a structure, or part of a structure, that contains, or has contained, loose fill asbestos insulation can commence immediately if there is a sudden and unexpected event that may cause persons to be exposed to respirable asbestos fibres or an unexpected breakdown of an essential service that requires immediate rectification.

Section 466(3) provides that if asbestos must be removed in the circumstances prescribed in sub-regulation 466(2), the licensed asbestos removalist must give notice to the regulator immediately by telephone and in writing within 24 hours after notification by telephone.

The maximum penalty for contravening section 466(3) is \$3 600 for an individual and \$18 000 for a body corporate. This penalty amount is consistent with section 466(3) of the Model Work Health and Safety Regulations.

Section 466(4) prescribes the information that the licensed asbestos removalist must provide when notifying the regulator of licensed asbestos removal work on a structure, or part of a structure, that contains, or has contained, loose fill asbestos insulation.

Section 466(5) provides for definitions of terms used in new section 466.

Clause 9 Dictionary, new definition of respirable asbestos fibre

This clause inserts the term ‘respirable asbestos fibre’ in the Dictionary to the WHS Regulation.