

KELLEHERS

AUSTRALIA

In-House Memorandum

Asbestos

Asbestos is the name given to a group of fibrous silicate minerals and derivative materials¹ which, prior to 1987, were used widely in building materials. Some materials containing asbestos, while in an undisturbed condition, are unlikely to pose a health risk to humans because fibres are 'bonded' and non-friable. Other asbestos materials, however, are able to be crumbled, pulverised or reduced to powder by hand pressure and are therefore considered friable. When disturbed, these materials produce a dust that bears asbestos fibres. Such fibres, breathed into the lungs, can cause a range of health problems including asbestosis, lung cancer and mesothelioma, ultimately causing death.

Environment Protection Authority

Owners and occupiers of property containing asbestos in Victoria face potentially serious liability if they do not manage property, or the risks posed by asbestos, appropriately. The *Environment Protection Act 1970* (Vic) makes the occupier the first point of call for potential liability for clean-up of discharge or pollution. For example, if the source of friable asbestos is broken asbestos within the roofing of a building and emissions are occurring beyond the premises, there is potential liability for off-site clean-up.

Due Diligence

Companies and directors of businesses leasing or owning such premises can find themselves prosecuted personally. Due diligence is required to ensure full compliance and a strict audit chain should be maintained.

In the Canadian case of *R v Bata Industries Ltd* (1992) 7 CELR (NS) 245 (Ontario), useful due diligence principles were elaborated and subsequently adopted by Australian commentators:

- (a) Did the board of directors establish a pollution prevention system ie was there supervision, inspection, monitored improvement in business measures with adequate board influence and control to ensure implementation of their directions?;
- (b) Did each director ensure that officers were instructed to set up a sufficient system, according to industry practice, to ensure compliance with environmental laws, whilst ensuring officers reported back periodically to the board on the system's operations and were instructed to report any substantial non-compliance to the board in a timely fashion?;
- (c) Did directors review environmental compliance reports provided by officers - note, they are justified in relying on reports from informed parties?;
- (d) Did directors actively ensure that officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties?;
- (e) Are directors aware of industry standards both within their industry and other industries that deal with similar pollutants or risks;
- (f) Do directors immediately, and personally, react when they receive notice that their system has failed?

¹ For example, silicates belonging to the serpentine and amphibole groups of rock-forming minerals including actinolite, amosite (brown asbestos), anthophyllite, crocidolite (blue asbestos), chrysotile (white asbestos), tremolite or any material containing one or more of the mineral silicates belonging to the serpentine and amphibole groups. These minerals were mined in Australia and overseas and used for a range of products in the Australian building industry between the 1940s and 1990.

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Occupational Health and Safety

All state authorities, property owners, employers and employees at risk of exposure to asbestos must identify, manage, remove and dispose of asbestos carefully. In Victoria, obligations fall on employers under the *Occupational Health and Safety Act 2004* (Vic) ('OHS Act'). Workplaces in which asbestos may be an issue must establish proper review and reporting on site, which may include site inspections or necessary works plans for asbestos management.

Workplaces must ensure that all relevant areas of employee safety are addressed and, where this is not possible, investigate high risk locations. Under OHS Act, employers have general duties to provide and maintain a safe, risk-free working environment as far as is reasonably practicable². That duty extends to independent contractors and other matters over which the employer has control³. Employers must also:

- monitor employee health and workplace conditions;
- keep information and records on the health and safety of employees;
- employ or engage qualified persons to provide health and safety advice; and
- inform employees (in appropriate languages) of how, and to whom, a health and safety enquiry or complaint may be made.⁴

Employees themselves also have duties under OHS Act. They must take reasonable care for their own health and safety and for the health and safety of anyone else who may be affected by their acts or omissions at the workplace⁵. They must co-operate with their employer in these matters.

Due Diligence

Each director of a company that is an employer has legal obligations both individually and personally. An OHS Act breach can result in an array of penalties, including formal legal proceedings against individual company officers or directors who fail to take reasonable care. Publication of an OHS Act conviction usually also causes serious embarrassment and damage to individual and corporate reputation.

The commissioning of independent expert asbestos advice not only assists in demonstrating due diligence, but provides sound advice as to scoping of both operational matters and remediation works. It is essential that company directors inform themselves independently as to their legal obligations.

² *Occupational Health and Safety Act 2004*, s 21

³ *Ibid*, s 21(3)

⁴ *Ibid*, s 22

⁵ *Ibid*, s 25