



Asbestos: How NSW government agencies deal with the problem

A Special Report to Parliament under s 31
of the *Ombudsman Act 1974*

April 2017

Asbestos: How NSW government agencies deal with the problem

A Special Report to Parliament under s 31
of the *Ombudsman Act 1974*

April 2017

**NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000**

**Phone 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
Facsimile: 02 9283 2911
Website: www.ombo.nsw.gov.au
Email nswombo@ombo.nsw.gov.au**

ISBN 978-1-925569-29-2

© State of New South Wales, April 2017

This publication is released under a Creative Commons license CC BY 4.0.

Contents

Glossary	f
Executive Summary	1
Chapter 1. Asbestos in NSW.....	3
1.1. Asbestos – an ongoing problem.....	4
1.2. National Asbestos Exposure Register	6
1.3. Research on DIY exposures to asbestos	6
Chapter 2. Government response to the 2010 Ombudsman report.....	8
2.1. Heads of Asbestos Coordination Authorities (HACA)	8
2.2. Asbestos Act	8
2.3. State-wide Asbestos Plan.....	9
Chapter 3. State-wide Asbestos Plan (SWAP) initiatives.....	10
3.1. Research	10
3.2. Risk communication	10
3.3. Prevention	11
3.4. Coordination	11
3.5. Funding for asbestos initiatives	12
Chapter 4. Current regulatory responses to asbestos	13
4.1. Asbestos on private property.....	13
Chapter 5. Community awareness of the dangers of asbestos	14
Chapter 6. Heads of Asbestos Coordination Authorities	15
6.1. 1800 Asbestos (1800 272 378)	16
Chapter 7. James Hardie Education Fund	17
7.1. Ongoing funding.....	17
Chapter 8. Local Government.....	18
8.1. Local Government NSW initiatives.....	18
8.2. Model council asbestos policy.....	18
8.3. Council asbestos registers and asbestos management plans	19

Chapter 9. Asbestos disposal	20
9.1. WasteLocate.....	21
9.2. Asbestos waste levy	21
9.3. Gate fees for asbestos at licensed disposal sites.....	22
9.4. Illegal dumping	22
9.5. Householders asbestos disposal scheme.....	23
Chapter 10. James Hardie legacy sites	24
10.1. Impact of legacy sites on residents	24
10.2. EPA inspections	25
10.3. Liability for James Hardie asbestos legacy sites	25
Chapter 11. Woodsreef mine closure	27
Chapter 12. Naturally occurring asbestos	28
Chapter 13. Loose-fill asbestos insulation	29
Chapter 14. Vendor disclosure laws.....	30
Chapter 15. Asbestos in Aboriginal communities.....	31
15.1. Wallaga Lake	31
15.2. Baryulgil	32
15.3. Weilmoringle	33
15.4. Aboriginal asbestos awareness program.....	34
15.5. Aboriginal Lands Clean-Up and Prevention Program.....	34
15.6. Research into asbestos diseases in Aboriginal communities	35
Chapter 16. The way ahead for asbestos in NSW	36
16.1. Single agency concept.....	36
16.2. Asbestos Act.....	37
16.3. State-wide Asbestos Plan.....	37
16.4. 1800 Asbestos helpline.....	37
16.5. Model Asbestos Policy for councils.....	37
16.6. LGNSW project officer	38
16.7. Asbestos disposal.....	38
16.8. James Hardie legacy sites	38

16.9. Contaminated Land Management Act	38
16.10. Vendor disclosure law	39
16.11. Aboriginal asbestos awareness program	39
16.12. Wallaga Lake	39
16.13. Baryulgil.....	39
16.14. Research into asbestos diseases in Aboriginal communities	40
16.15. The EPA needs to take the lead	40
16.16. Government response.....	40
16.17. Making the report public.....	40

Glossary

ACA	Asbestos Coordination Authority (NSW)
ACM	asbestos-containing material
ADRI	Asbestos Diseases Research Institute (Cwlth)
ALCUP	Aboriginal Land and Clean Up and Prevention (NSW)
AMP	Asbestos Management Plan
AMR	Australian Mesothelioma Registry (Cwlth)
ASEA	Asbestos Safety and Eradication Agency (Cwlth)
CLM Act	<i>Contaminated Lands Management Act 1997</i>
DDB	Dust Diseases Board (NSW)
DECCW	Department of Environment, Climate Change and Water (NSW)
DIY	Do-it-yourself
EPA	Environment Protection Authority (NSW)
HACA	Heads of Asbestos Coordination Authorities (NSW)
HEPA	High efficiency particulate air
HWSA	Head of Workplace Safety Authorities (Cwlth)
LFAI	loose-fill asbestos insulation
LGNSW	Local Government New South Wales
NAER	National Asbestos Exposure Register (Cwlth)
NOA	naturally occurring asbestos
OLG	Office of Local Government
POEO Act	<i>Protection of the Environment Operations Act 1997</i>
PPE	personal protective equipment
SWAP	State-wide Asbestos Plan
WES	workplace exposure standard
WH&S Act	<i>Work Health and Safety Act 2011</i>
WH&S Reg	Work Health and Safety Regulation 2011

Executive Summary

In November 2010 the Ombudsman made a special report to the New South Wales Parliament titled *Responding to the asbestos problem – the need for significant reform in NSW*. Since then, we have continued to monitor how government agencies in NSW deal with asbestos. This report demonstrates the significant achievements since 2010 by various agencies and identifies ongoing asbestos issues that need to be addressed.

The 2010 Ombudsman report found that the methods for dealing with asbestos across the whole of government were disjointed, ad hoc, confusing and largely ineffective. There were no laws preventing home owners from demolishing asbestos buildings. Asbestos was being dumped illegally on public and private land. Awareness of the dangers of asbestos seemed minimal. Meanwhile, tens of thousands of fibro buildings constructed in the 20th century continued to deteriorate, and be renovated or demolished without proper precautions being taken.

The 2010 report stressed that the NSW public had the right to expect government agencies to respond appropriately to serious health hazards, such as asbestos, and that appropriate action was needed to tackle these difficult issues. We noted that a comprehensive government plan was required to prevent exposure to asbestos, through introducing an effective coordination scheme, addressing legislative deficiencies and adequately funding asbestos remediation.

Key recommendations in the 2010 report were:

- an Asbestos Coordination Authority be established and adequately funded
- an Asbestos Act be introduced to facilitate effective measures to appropriately address asbestos issues in NSW
- the NSW Government develop a state-wide plan for dealing with asbestos
- adequate funding be allocated to implement the state-wide asbestos plan.

The Government accepted the majority of our recommendations. Important changes to the way asbestos is managed in NSW were introduced. A key change was the establishment of the Heads of Asbestos Coordination Authorities (HACA) in 2011. HACA is chaired by SafeWork NSW, with representatives from seven NSW agencies with responsibility for the safe management of asbestos, and one senior official representing local government. HACA's charter sets out the arrangements for coordinating the activities of public bodies in relation to all aspects of asbestos information, assistance, compliance and enforcement. HACA has implemented a number of initiatives to raise public awareness and manage asbestos issues and it has overseen a program to deal with loose-fill asbestos insulation in NSW.

NSW is now widely recognised in Australia as having a best practice approach to managing asbestos, much of which is due in our view to the work of HACA. However, many people continue to be diagnosed with asbestos-related diseases. In Australia, between 1 January 2011 and 31 December 2015 a further 2682 people have died from mesothelioma and 3568 people were diagnosed with this generally fatal disease. In NSW, between 1 January 2011 and 31 December 2015, 831 people have died from mesothelioma and 1131 people were diagnosed with the disease.¹

As explained in the 2010 report, there is a concerning 'third wave' of asbestos-related diseases – in people who have renovated homes built before 1987, and in innocent bystanders in non-occupational settings. Asbestos contamination will continue to cause deaths in NSW, unless it is properly dealt with.

1. Correspondence from Cancer Institute NSW – Australian Mesothelioma Registry to NSW Ombudsman, dated 6 March 2017.

We previously reported on the lack of awareness within Aboriginal communities about safe asbestos handling. Our ongoing work within Aboriginal communities shows that this problem persists. However, HACA has developed and partially implemented a public awareness program about asbestos in Aboriginal communities, which is discussed in this report.

The 2010 report recommended that the Government propose a single Act of Parliament to deal with asbestos issues in NSW. This recommendation was not accepted. However, we remain concerned that gaps in existing NSW legislation may limit the ability of relevant agencies to appropriately address asbestos issues. There are critical areas where no agency has authority to ensure that asbestos is properly dealt with. SafeWork NSW has jurisdiction over workplaces. The Environment Protection Authority along with local councils can deal with some asbestos issues. However, there is no effective regulation of asbestos handling in private residences where less than 10² metres of asbestos containing materials is to be removed.

Several sites identified as asbestos disposal points by James Hardie Industries have remained unremediated since the 2010 report, with residents left to deal with the risk associated with friable asbestos. No government agency appears to have a plan to address this serious issue apart from relying on legislation that would make it the responsibility of current property owners to remediate the land.

The NSW Government's response to the 2010 Ombudsman report accepted the need to consider a vendor disclosure law that would require a vendor to certify if asbestos is present in a property that is being sold or rented. This requirement has not yet been introduced.

The Government recently provided significant funding for the testing of houses suspected of containing loose fill friable asbestos. This costly program, which included purchasing contaminated houses from owners, has highlighted the urgent need for a vendor disclosure law in NSW. We believe property purchasers and renters should have a right to know whether asbestos is located within a property and how to deal with it safely.

Since 2010, SafeWork NSW has provided administrative support to HACA and has funded several initiatives from within its own budget. This arrangement addressed the lack of funding to address the asbestos problem in NSW in the short term. There is however a need for separate funding for all of HACA initiatives within the State Wide Asbestos Plan.

Six years have now passed since the NSW Ombudsman released a report on asbestos. In that time, there has been significant improvement in how government agencies deal with asbestos. There is a continuing need for coordinated action and ongoing commitment to address this important public safety issue.



Professor John McMillan AO
Acting Ombudsman

We've got campaigns to ensure people don't go out in the sun, expose themselves to the sun for fear that they might get melanoma or skin cancer. This is no different. We must inform the community about where asbestos is located, what it looks like, what the dangers are.

Bruce Barbour, former NSW Ombudsman, 2010²

Chapter 1. Asbestos in NSW

In 2009, the NSW Ombudsman began looking closely at how asbestos issues were managed by state and local government agencies. We investigated several issues raised in complaints about alleged exposure to asbestos. Despite the well-known dangers of asbestos, we saw that the level of government involvement and interagency cooperation in managing asbestos-related issues was minimal.

Approaches to dealing with asbestos across the whole of government were disjointed, ad hoc and confusing. Tens of thousands of fibro buildings constructed throughout the 20th century continued to deteriorate and be renovated or demolished. However, there were no controls or adequate guidance to caution home owners against doing this work without first checking if there was asbestos present and, if it was, taking adequate safety precautions.

Asbestos was being illegally dumped on public and private land. Community awareness of the dangers of asbestos was minimal. We saw that the abandoned Woodsreef asbestos mine at Barraba had remained un-remediated since 1983, leaving vast amounts of 'friable' asbestos on site.³ We concluded that the systems for dealing with asbestos in New South Wales were largely ineffective. We also found that no single agency was responsible for asbestos issues.

In the early stages of our inquiries we were concerned by the apparent lack of action by some government agencies. One notable quote came from a meeting where a senior government official told Ombudsman staff, 'People get way too emotional about asbestos'. We took a different view and considered asbestos to be a significant public safety issue that needed a whole-of-government approach.

In November 2010, the Ombudsman tabled a report to the NSW Parliament titled, *Responding to the asbestos problem – the need for significant reform in NSW*. The report recommended that:

- an Asbestos Coordination Authority be established and adequately funded
- an Asbestos Act be introduced to facilitate effective measures to appropriately address asbestos issues in NSW
- the NSW Government develop a state-wide plan for dealing with asbestos
- adequate funding be allocated for implementing the state-wide asbestos plan
- funding be allocated for the \$5.5 million remediation project at the Woodsreef mine sought by the Department of Industry and Investment in 2009
- the Government develop a comprehensive public awareness program for asbestos for all sections of the community
- the Chief Executive of the Division of Local Government issue a Model Asbestos Policy to all NSW councils
- consideration be given to the introduction of a vendor disclosure law making it mandatory for property vendors to provide certification of the presence of asbestos in buildings.

2. Interview with Bruce Barbour (former NSW Ombudsman), 'Asbestos inaction', *ABC 7.30 Report*, 17 November 2010.

3. Friable asbestos is material containing asbestos that when dry is in powder form or may be crushed or pulverised into powder form by hand pressure. This material poses a higher risk of exposing people to airborne asbestos fibres.

The Government agreed with the majority of the recommendations in the report. The following initiatives were implemented that brought about important changes to the way asbestos is dealt with in NSW:

- the NSW Government established the Heads of Asbestos Coordination Authorities (HACA), governed by a charter that sets out the arrangements for coordinating the activities of statutory authorities in relation to all aspects of asbestos information, assistance, compliance and enforcement
- NSW adopted a state-wide asbestos plan – *National Strategic Plan on Asbestos Awareness and Management 2013–2018*
- in conjunction with HACA, Local Government NSW developed a Model Asbestos Policy, which the Office of Local Government issued to all NSW councils⁴
- a comprehensive asbestos awareness campaign was rolled out across NSW
- an asbestos and demolition web search facility was developed to help the community easily locate asbestos removal and demolition contractors
- consistent asbestos awareness training and safety procedures were implemented across the electrical supply industry
- a coordinated response to asbestos management is now provided after natural disasters such as bushfires, storms and cyclones, and NSW is represented on a national cross-jurisdictional working party to help develop a *National Strategic Plan on Asbestos Awareness and Management 2013–2018*
- in early 2015, derelict buildings and infrastructure were removed from the abandoned Woodsreef asbestos mine at Barraba and air monitoring for asbestos continues at the site
- a public awareness program for Aboriginal communities was developed to be launched in 2017
- SafeWork NSW launched the *1800-Asbestos* helpline (1800 272 378) in November 2016 to provide advice about asbestos issues

This report will discuss these and other work done by government agencies since 2010, as well as what needs to be done in the future to deal with asbestos across all areas of NSW.

1.1. Asbestos – an ongoing problem

There is no question that asbestos fibres released into the environment present risks to health that must be continually monitored and dealt with. Since the 2010 Ombudsman report, many people in NSW have been diagnosed with asbestos-related diseases. Between 1 January 2011 and 31 December 2015, 831 people died from mesothelioma, and 1131 people were diagnosed with this normally fatal disease.⁵

Exposure to asbestos is also known to cause the following diseases:

- **Lung cancer**

Lung cancer caused by asbestos exposure can take 20 years or more from the time of exposure before the first clinical signs appear. The types of lung cancer that result from asbestos exposure are the same as those which are caused by smoking.

4. Issued by the Chief Executive, Office of Local Government, under s 23A of the *Local Government Act 1993*, which provides that the CE may issue guidelines to councils. Local Government NSW developed and produced the Model Asbestos Policy following consultations with HACA Working Group participants, local councils and other key community stakeholders.

5. Correspondence from Cancer Institute NSW – Australian Mesothelioma Registry to NSW Ombudsman, dated 6 March 2017.

- **Pleural plaques or pleural thickening**

Pleural plaques or pleural thickening is thickening of the lining of the chest wall and is frequently observed in people who have worked with asbestos. It is often considered to be an indicator of asbestos exposure.

- **Pleural effusion**

Occasionally people with past asbestos exposure develop pleural effusion, which is excessive fluid in the pleural cavity (between the lung and the chest wall). It may result in permanent and sometimes progressive pleural thickening which, when severe, may interfere with the expansion of the lungs.

- **Asbestosis**

Asbestosis is a form of pneumoconiosis (dust disease of the lung) caused by asbestos. The usual time from first exposure to first clinical signs of asbestosis is 10 to 20 years. Asbestosis is an inflammatory reaction in the lungs brought about by inhaled asbestos fibres. Inflammation occurs throughout the tissues of the lungs and leads to scarring (fibrosis). This process results in stiffening of the lung tissues, which makes the work of breathing harder, and impairs the uptake of oxygen from the air into the blood.⁶

In Australia a wide range of building and construction products containing asbestos were available up to 1987. Asbestos was banned from being used in fibro or sheet asbestos cement products made after 1982, corrugated products (mainly roofing materials) in 1984 and all other products by 1986. The use of asbestos use was completely banned in 2003.⁷

By 2003, mining, manufacturing and the use of asbestos had ceased in Australia. However, the risks of exposure now appear to have moved from workers in asbestos industries to non-occupational exposures from activities such as home renovations.

The first wave of disease was due to exposure through mining and milling ore, and making asbestos products. The second wave was due to working with and using asbestos products. Much debate has ensued about what has been termed the 'third wave' of asbestos disease in people directly or indirectly exposed to asbestos through repairing, renovating or demolishing asbestos-containing buildings.⁸

Data collected for the Australian Mesothelioma Registry, although based on only about 15% of newly diagnosed mesotheliomas, indicates that third-wave exposure is now important. Of 449 people newly diagnosed with mesothelioma between 1 July 2010 and 1 April 2015 who gave information, 101 (22%) had worked in construction – which includes repair, renovation and demolition of buildings (but also second-wave use of asbestos products) – and 88% were judged to have had probable high exposure to asbestos.

With respect to third-wave non-occupational exposure, 57% of the 449 had done (unpaid) major home renovations involving asbestos. These figures suggest, but do not establish, that home renovation is now contributing to mesothelioma risk in Australia. However, the extent to which the 15% of all people with newly diagnosed mesothelioma who gave information to the Registry were representative of all such people is not clear, and bias in the choice to participate is likely.⁹

6. The Australian Asbestos Network, <http://www.australianasbestosnetwork.org.au/asbestos-about/diseases/asbestos-related-diseases/>, viewed 4 September 2016.

7. NSW Health, <http://www.health.nsw.gov.au/environment/diy/Pages/building-hazards.aspx>, viewed 20 October 2016.

8. Armstrong Bruce and, Driscoll Tim, Asbestos-related mesothelioma in Australia: Cresting the third wave, *Public Health Research and Practice*, Vol. 26(2), 2016.

9. Ibid.

In a 2008 mail survey of 10, 000 adults listed on the New South Wales (NSW) Electoral Roll, 37.5% of whom gave information, 24% reported having done do-it-yourself (DIY) home renovations. Of these, 61% reported asbestos exposure during the renovation, including contact with asbestos cement sheeting (96%), contact with asbestos insulation (14%)¹⁰ and cutting (54%), drilling (41%) or sanding (19%) asbestos building materials. A total of 20% of participants reported other home renovations, of whom only 3% reported asbestos exposure.¹¹

We accept that it is unrealistic in the short term to completely eradicate asbestos-containing material (ACM)¹² throughout NSW. It is vital, on the other hand, that the NSW Government has a long-term plan to safely remove asbestos where possible or manage it in situ.

1.2. National Asbestos Exposure Register

The National Asbestos Exposure Register (NAER) is a federal government initiative managed by the Asbestos Safety and Eradication Agency (ASEA). The NAER captures details of exposure, including where and when the potential exposure occurred, and details any diagnosis of asbestos-related disease.¹³

ASEA's Data Analysis Report for 1 July 2015 to 31 December 2015 noted that almost 63% of exposures occurred at the place of work, approximately 24% were reported in the residential setting, approximately 10% in a school or educational establishment and fewer than 2% were reported as domestic or environmental exposures.¹⁴

1.3. Research on DIY exposures to asbestos

Exposure to asbestos during DIY renovations is an issue of increasing concern for all levels of government. The potential dangers to individuals engaged in DIY was examined in a study conducted by Monash University for ASEA which focused specifically on asbestos fibre release during scenarios typical of DIY activities.

The 2015 study measured levels of asbestos exposure during a simulation of nine tasks commonly undertaken in the DIY renovation and maintenance of residential homes.¹⁵ The concentration of asbestos fibres during those activities was measured by static monitoring and personal monitoring using air sampling pumps. Static monitoring measures the level of hazardous substance in an area by using air sampling pumps in fixed locations. Personal monitoring refers to monitoring in a person's breathing zone in order to measure their likely exposure to a hazardous substance.¹⁶

The simulated activities included sawing, breaking, drilling and grinding ACM, particularly involving sheeting and roofing materials. Some tasks were undertaken in the open and others were undertaken inside a purpose built enclosure, specifically designed to simulate the approximate size of a small bathroom or laundry in a 1960s constructed house.

10. Loose-fill asbestos insulation, mainly amosite, was used in some Australian houses.

11. Ibid.

12. Asbestos-containing material (ACM) means any material or thing that, as part of its design, contains asbestos. See Work Health and Safety Regulation 2011, cl 5.

13. Asbestos Safety and Eradication Agency, <https://www.asbestossafety.gov.au/national-asbestos-exposure-register#national-asbestos-exposure-register1> viewed 10 October 2016.

14. Asbestos Safety and Eradication Agency, *National Asbestos Exposure Register, Data Analysis Report 1 July 2015 to 30 June 2016*.

15. Asbestos Safety and Eradication Agency, *Measurement of asbestos fibre release during removal works in a variety of DIY scenarios*, prepared by Monash University, March 2016.

16. Email from Asbestos Safety Eradication Agency dated 13 February 2017

Personal monitoring during the testing provided significant examples of excessive total fibre concentration. The most extreme was during removal of sheeting by cutting with an angle grinder. Those tests identified total fibre concentrations of 13.231 f/ml, while static monitoring measured total fibre concentrations of 0.01f/ml.

In Australia, the workplace exposure standard (WES) for asbestos exposure is 0.1f/ml.¹⁷ A licenced asbestos removalist must stop work when the recorded respirable asbestos fibre level exceeds 0.02f/ml. The removalist cannot resume removal work until air monitoring shows that the recorded respirable asbestos fibre level is below 0.01f/ml.¹⁸

The total fibre concentrations during outdoor tasks were relatively low compared to those conducted in the enclosed space. This points to the importance of proper ventilation by opening doors or windows during indoor asbestos removal. It also highlights the need to warn potential renovators of the risks associated with removing asbestos using power tools, smashing asbestos containing sheeting, in dry clean-up, and in confined and poorly ventilated work areas. During simultaneous static and personal monitoring undertaken while a particular task was being carried out, the study found that the results from the static sampling indicated that exposure was less than half the readings received from the personal monitoring.

These results have concerning implications for both DIY renovations and work by professional removalists. Personal monitoring is rarely conducted during professional asbestos removal. The majority of monitoring that is currently undertaken is para-occupational control and clearance monitoring, which is static monitoring.

In non-friable removal operations, clearance and control monitoring rarely returns results exceeding 0.01f/ml. While the purpose of such monitoring is not directly related to occupational exposure, there is a strong argument for more personal monitoring in order to provide more accurate results in respect of the controls employed.

This research highlights the risks to individuals who engage in renovations without recourse to proper safety procedures. We believe that home renovators need to be targeted by specific asbestos awareness initiatives and made better aware of careful removal techniques. There is also a need to examine the efficacy of static monitoring for asbestos fibres in light of the above study's findings.

17. f/ml is a measure of the concentration of respirable fibres per millilitre of sampled air.

18. Work Health and Safety Regulation 2011, cl. 476.

Chapter 2. Government response to the 2010 Ombudsman report

2.1. Heads of Asbestos Coordination Authorities (HACA)

In response to the Ombudsman's 2010 report, the NSW Government established the Heads of Asbestos Coordination Authorities (HACA) governed by a Charter that sets out the arrangements to coordinate the activities of statutory authorities on all aspects of asbestos information, assistance, compliance and enforcement.

HACA aims to ensure that NSW Government agencies and local councils effectively coordinate the safe management of asbestos at all stages of the asbestos lifecycle and across the policy areas of workplace health and safety, public health and environment protection.

HACA has the following membership:

- Chief Executive Officer, SafeWork NSW (Chair)
- One senior official (head of agency or representative) from the following state government agencies or their successor organisations:
 - Department of Industry
 - Department of Planning and Environment
 - Environment Protection Authority
 - Ministry for Police and Emergency Services
 - NSW Health
 - Office of Local Government
 - Workers' Compensation Dust Diseases Board
- One senior official nominated by Local Government NSW to represent local councils and shires.

A representative of the NSW Ombudsman has had observer status on the HACA Working Group since its inception.

The role of HACA is further discussed in Chapter 6 of this report.

2.2. Asbestos Act

The 2010 Ombudsman report recommended that a separate Asbestos Act be created. The NSW Government did not support that recommendation. As part of its response the Government stated:

Asbestos regulation and administration is most effectively and efficiently managed where agencies and operational staff with expertise in specific disciplines (e.g. work health and safety, environmental protection, public health) are responsible for compliance and enforcement within their existing legislative frameworks.

We acknowledge that various agencies with responsibility for asbestos issues work within specific legislative guidelines; however, the existing legislation is disjointed and does not cover the field. We also believe that specific legislation would assist with the coordination of asbestos across government. More importantly, a separate Asbestos Act would give HACA statutory powers which it does not at present have.

The lack of adequate statutory powers can have significant consequences. We have seen that while there is cooperation by all agencies and goodwill through the HACA process, reliance on individual agency goodwill cannot necessarily be relied upon in the longer term.

One option would be to build a new legislative code by amendment of an existing Act such as the *Protection of the Environment Operations Act 1997* (POEO Act). The legislation could include a new Part that enabled the following:

- The title of HACA would be changed to the NSW Asbestos Authority. The current HACA group could be reconstituted as an executive committee to provide input to the proposed Authority. In this way, the current work of HACA would continue in regard to coordinating asbestos issues.
- The Authority would be designated as an Appropriate Regulatory Authority under s 6 of the POEO Act.
- The Authority should have powers under the POEO Act to direct government agencies and non-government entities to comply with related legislation and government policies and guidelines for asbestos.
- The Authority should issue and maintain consistent model policies and guidelines that must be complied with, at least by government agencies with an asbestos role.
- The Authority would be responsible to an appropriate government Minister, and have a statutory responsibility to provide advice to the Government on asbestos related matters.

2.3. State-wide Asbestos Plan

The State-wide Asbestos Plan (SWAP) was developed by HACA as part of the Government's response to the 2010 Ombudsman report. The SWAP enjoins those in government, industry and the community to responsibly manage asbestos throughout its lifecycle, and through research to endeavour to find better mitigation and management controls and effective treatment of asbestos-related diseases.

The SWAP has been coordinated by HACA and developed in consultation with key government agencies, local councils, industry representatives, employee representatives, researchers and asbestos diseases groups.¹⁹

The SWAP is the key document for ensuring that government agencies work to a coordinated plan for dealing with asbestos issues in NSW. The SWAP has a four-year cycle; the current plan expires at the end of 2016. We understand that HACA has provided a submission to the Government that the SWAP be extended for another four years, with proper funding for the various key initiatives within the plan. The Ombudsman's office supports that proposal.

19. WorkCover NSW, *The NSW State-wide Asbestos Plan: A plan to secure the safe management of asbestos in NSW* 2013.

Chapter 3. State-wide Asbestos Plan (SWAP) initiatives

The SWAP targets relevant initiatives around four priority areas to provide better awareness and improve health and safety outcomes:

- research – improved understanding of asbestos issues
- risk communication – increased awareness and knowledge
- prevention – protection of workers, the community and the environment
- coordination – responsive planning, regulation and services.²⁰

A summary of the progress on each of those initiatives is set out below.²¹

3.1. Research

Funding has been provided for the following research projects:

- a clinical trial at the Asbestos Diseases Research Institute (ADRI) for a newly developed drug therapy for the treatment of mesothelioma
- research to develop evidence-based guidelines for health professionals responsible for providing services to patients with malignant mesothelioma. As part of that project, the ADRI and the Cancer Council NSW produced an easy-to-read booklet called *Understanding Pleural Mesothelioma: A guide for people with cancer and their families and friends*.
- research to quantify the nature and extent of asbestos-containing material (ACM) and airborne asbestos fibres and identify the groups of people who may be exposed and the health risks associated with exposure from fire-affected asbestos.

3.2. Risk communication

Progress in relation to risk communication includes the following:

- Local Government NSW developed a Model Asbestos Policy and distributed it to NSW Councils
- The Heads of Asbestos Coordination Authorities (HACA) participated in the National Asbestos Awareness Campaign chaired by the Asbestos Safety and Eradication Agency (ASEA)
- a database of asbestos-containing products is now available on www.asbestosawareness.com.au
- an asbestos and demolition licence holder search facility was developed that identifies SafeWork licence holders for asbestos removal, demolition and assessors by region
- a multi-tiered project to improve the safe management of asbestos in Aboriginal communities was developed and implemented, including providing education to:
 - organisations that own or are responsible for managing Aboriginal Housing
 - community leaders and elders
 - the general Aboriginal community.

20. http://www.safework.nsw.gov.au/__data/assets/pdf_file/0014/50072/2013-statewide-asbestos-plan-3760.pdf, viewed April 2017.

21. Key achievements of the Heads of Asbestos Coordination Authorities Summary to the NSW Ombudsman, May 2016.

The project to improve the safe management of asbestos in Aboriginal communities will build capacity and capabilities in the community through non-friable asbestos removal training and dealing with any legacy issues identified throughout the awareness campaign. Asbestos in Aboriginal communities is discussed in Chapter 15.

Other guidance material developed includes:

- a local council fact sheet
- guidance on managing asbestos in or on soil
- how to deal with asbestos fibro in soil at home
- living in a home with loose-fill asbestos (flyer and DVD)
- working in a home that may contain loose-fill asbestos
- loose-fill asbestos – a guide for the real estate industry
- general asbestos awareness training.

3.3. Prevention

Progress towards prevention includes:

- a dedicated specialist Asbestos and Demolition Unit located within SafeWork NSW that undertakes education and advice to stakeholders and planned audits on licence holders and registered training organisations delivering asbestos training courses
- mapping of naturally occurring asbestos (NOA) and supporting guidance material
- development and implementation of consistent asbestos awareness training and safety procedures across the electrical supply industry
- membership of the Commonwealth Heads of Workplace Safety Authorities (HWSA) Imported Materials with Asbestos Working Group; HWSA was engaged to develop a rapid response protocol and other strategies for the detection and control of prohibited asbestos-containing imports
- identification and resolution of identified asbestos-containing imported materials, including electrical switch room flooring and wall panelling
- members of HACCA were heavily involved in the Woodsreef Taskforce that oversaw the Woodsreef Mine rehabilitation project
- SafeWork NSW and the Environment Protection Authority (EPA) have an ongoing joint verification program on the Management of Asbestos in Waste Facilities
- activities under the EPA's 'Waste Less, Recycle More' initiative:
 - Householders Asbestos Disposal scheme
 - Clean Up and Prevention Grant Fund program combating illegal dumping
 - Waste Locate pilot program.

3.4. Coordination

Coordination activities undertaken include:

- coordination of the Loose-fill Asbestos Insulation program in conjunction with the Office of Fair Trading

- coordination of the NSW Government response to dealing with asbestos located in Telstra telecommunication pits
- the Asbestos Emergency Sub Plan that sets out arrangements for managing asbestos debris during and following a large scale emergency, where the presence of ACM in the community poses a significant risk to public health and safety²²
- coordinated responses to asbestos management following natural disasters, including the Blue Mountains bushfires, storms and cyclones
- HACA participating in a cross-jurisdictional working party to assist with the development of the *National Strategic Plan for Asbestos Awareness and Management 2013 - 2018* (the NSW SWAP encompasses all priority areas in the National Strategic Plan)
- monitoring and evaluating the SWAP and uptake of the Model Asbestos Policy for NSW Councils.

3.5. Funding for asbestos initiatives

We understand that HACA will be proposing that the SWAP be funded by the Government for a further four-year period. The EPA has advised that the NSW Government has committed \$4 million over four years from July 2014 towards ongoing HACA initiatives, sourced from waste and environment levy revenue.²³

Although this funding would appear to cater for many of the proposed SWAP initiatives, there remains a need for further funding to be identified to support the remaining programs, in particular for the asbestos awareness project for Aboriginal communities and research into asbestos diseases within those communities.

We understand that the proposed SWAP for 2017–2020 includes a proposal for a secretariat for HACA. We support this proposal, given the current administrative burden placed on SafeWork NSW to supply secretariat and administrative support. It is important that HACA has funded positions to perform secretariat and administrative functions.

22. <https://www.emergency.nsw.gov.au/publications/plans/sub-plans/asbestos.html>, viewed April 2017.

23. Correspondence from the Chair and CEO, Environment Protection Authority 5 October 2015.

Chapter 4. Current regulatory responses to asbestos

The *Work Health and Safety Act 2011* (WH&S Act) provides a permit/licensing scheme for persons who operate a business involving asbestos removal. Permits and licences are administered by SafeWork NSW. They impose strict obligations on commercial operators to comply with the Act and Regulations regarding the safe handling of asbestos.²⁴ A commercial operator is required to have a permit for all friable asbestos removal work (of any amount), but is not required to have a licence for removal of less than 10 square metres of bonded asbestos.

4.1. Asbestos on private property

There appears to be no legislation to prevent a home owner from privately carrying out demolition work involving any amount of bonded asbestos. It also appears that a home owner is not prevented from privately removing friable asbestos. While clause 485 of the Work Health & Safety Regulation 2011 prohibits the carrying out of friable asbestos removal work other than by a person who holds a Class A licence,²⁵ those provisions apply to workplaces only.

While the POEO Act requires that transportation and disposal of ACM is strictly controlled, the Act does not apply to the removal of asbestos-containing material (ACM), including friable asbestos. The result is that this may be carried out by an individual without regard to the potential environmental release of asbestos.

These apparent regulatory gaps between workplaces and other areas should be addressed. While it may not be practical to legislate to ensure that home renovators comply with minimum safety requirements, the key to reducing risk is to ensure that people are aware of the dangers that asbestos poses. The introduction of vendor disclosure laws (see Chapter 14) would be one way of improving asbestos awareness and reducing overall risk.

24. *Work Health and Safety Act 2011*, s. 5.

25. There are two classes of asbestos removal licences. Class A licences authorise the removal of friable asbestos, non-friable asbestos and asbestos contaminated dust debris. Class B licences allow for the removal of non-friable (bonded) asbestos, such as fibro sheets, but not friable asbestos.

Chapter 5. Community awareness of the dangers of asbestos

Since 2010, the quality and amount of asbestos information available has improved, in particular from SafeWork NSW, the EPA and local councils.

Several key websites have been developed containing valuable asbestos safety information along with video presentations. Heads of Asbestos Coordination Authorities (HACA) produced a successful YouTube video campaign known as The Renovation Roulette and a YouTube video explaining how to deal with naturally occurring asbestos.

Holroyd Council developed a highly successful asbestos safety program for communities where English is not the first language. This included a video presentation in a number of community languages showing the dangers of asbestos and how to obtain assistance. The Council also developed an asbestos website called 'Asbestos Answers' that provides wide-ranging information and guidance on all asbestos issues for the community.

Research commissioned by the Asbestos Safety and Eradication Agency (ASEA) found that an increasing number of do-it-yourself (DIY) home renovators do not feel they are informed enough about asbestos, despite the increasing number of home renovations requiring asbestos removal. The research found that almost a quarter of all home renovations in the last two years required asbestos removal, yet half of home renovators did not obtain an asbestos assessment from a qualified professional.

Also of concern are the results showing that 47% of DIY renovators did not conduct a risk assessment for asbestos before renovating, and that 32% of DIY home renovators undertook the removal of asbestos themselves.²⁶ These statistics clearly indicate the need for better public awareness of how to deal safely with asbestos. We note that ASEA intends using this research to guide a national approach to asbestos education and awareness.²⁷

26. Asbestos Safety and Eradication Agency, *Asbestos present in more home renovations, but DIYers are less likely to know about the dangers – new study*, <https://www.asbestossafety.gov.au/article/asbestos-present-more-home-renovations-diyers-are-less-likely-know-about-dangers-%E2%80%93-new-study>, viewed 4 October 2016.

27. Ibid.

Chapter 6. Heads of Asbestos Coordination Authorities

In July 2011, Cabinet approved the NSW Government response to the recommendations in the 2010 Ombudsman report. The response included the establishment of the Heads of Asbestos Coordination Authorities (HACA) to coordinate the activities of all state authorities in relation to all aspects of asbestos information, assistance, compliance and enforcement.

HACA's terms of reference are to:²⁸

- develop and oversee a State-wide Asbestos Plan (SWAP) for the safe management of asbestos in NSW to help prevent asbestos-related diseases, in consultation with key stakeholders and the community
- coordinate the governance framework for the regulation of asbestos and identify, consider and resolve any unintended consequences, regulatory duplication, service delivery or operational issues arising from the practical application of the SWAP
- promote the exchange and deliberation of each organisation's interventions, projects and communications strategies regarding asbestos matters
- provide technical and policy advice as appropriate on how asbestos policy initiatives that have cross-portfolio or cross-jurisdictional implications might be best coordinated and progressed
- apply new information and learning outcomes to asbestos management policy and advice and control strategies.

HACA was intended to build upon the work of the former Asbestos Co-regulators Working Group, which was initiated and chaired by WorkCover NSW. HACA developed the *Asbestos Blueprint: A guide to roles and responsibilities for operational staff of State and Local Government*.

The Asbestos Blueprint provides clarity about the roles and responsibilities of all local councils and relevant government agencies at each stage of the asbestos lifecycle. The Asbestos Blueprint will be promoted among all local councils and relevant government agencies to improve service delivery to the community through improved coordination and increased collaboration on asbestos issues. The Asbestos Blueprint may be updated from time to time.²⁹

HACA's strategic direction is to oversee a SWAP (discussed in section 2.3 of this report) for the safe management of asbestos in NSW to help prevent asbestos-related diseases through key prevention programs and policy direction.

As discussed in Chapter 3, HACA has made significant progress in raising asbestos awareness across the NSW community and demonstrating the value of cross-government collaboration and engagement. HACA has had a widespread positive influence over how asbestos is dealt with in NSW. It appears that no other jurisdiction has so successfully engaged the various key stakeholders to such an effect. Having said that, HACA has done this work with what we consider to be an inadequate funding model and having to rely on the goodwill of SafeWork NSW, in particular, for administrative support.

We believe that HACA should be properly funded to allow it to undertake its work without having to rely on member agencies diverting funds from their core role.

28. WorkCover NSW, *Heads of Asbestos Coordination Authorities (HACA) Charter*, August 2011, http://www.safework.nsw.gov.au/__data/assets/pdf_file/0015/50127/heads_asbestos_coordination_authorities_charter_3509.pdf, viewed April 2017.

29. NSW Government Response to the NSW Ombudsman's Report: *Responding to the asbestos problem: The need for significant reform in NSW*, 9 August 2011.

6.1. 1800 Asbestos (1800 272 378)

One of the most important initiatives arising out of the work of HACA has been the establishment of the helpline 1800 Asbestos (1800 272 378). We understand that the helpline was developed in response to a Ministerial direction to SafeWork NSW.

SafeWork NSW is to be commended for utilising its internal resources to implement the helpline. This includes having SafeWork NSW telephone operators who provide free advice and support to callers. The helpline can also refer callers to other agencies with asbestos responsibilities.

We believe the hotline has the potential to make a significant difference in how asbestos is dealt with in all communities. We think it is critical that the hotline be widely promoted as a single source of accessible and reliable asbestos information in asbestos literature and on websites that are likely to be accessed by home renovators and the construction industry. The hotline is an example of an initiative that needs a specific funding allocation from the Government as part of the SWAP to ensure it can remain viable and continue to provide this important public service.

Chapter 7. James Hardie Education Fund

In 2005 James Hardie entered into a legally binding agreement with the NSW Government to provide compensation for individuals who sustained asbestos-related disease as a result of exposure in Australia to products manufactured by James Hardie former subsidiaries. The NSW Government subsequently introduced legislation in 2005 to begin implementing arrangements for James Hardie to provide compensation for Australian claimants.

As part of its agreement with the NSW Government, James Hardie agreed to contribute \$75,000 per annum for a period of 10 years towards an education campaign for the benefit of the Australian public on the dangers of asbestos.

The James Hardie Education Fund was administered by a committee consisting of the NSW Government and other key stakeholders. Over a 10-year period, ending in 2016, the fund was used to conduct an education campaign focussed on home renovators to:

- alert them to the dangers of asbestos
- provide advice as to what products may contain asbestos and where those products may be found in existing households or other environments
- advise them as to the steps that ought to be taken by people planning home renovations or who otherwise identify asbestos products in their home or other environment.³⁰

This education program has formed part of the State-wide Asbestos Plan (SWAP). In order to continue, it will require ongoing government funding.

7.1. Ongoing funding

The 'Asbestos Awareness' website is overseen by SafeWork NSW, the Australian Council of Trade Unions and James Hardie and supported by the Asbestos Diseases Research Institute. It is a one-stop portal for obtaining information or assistance on asbestos, and requires ongoing maintenance, including to ensure the content is reliable, relevant and up-to-date.

Funding for the Asbestos Awareness website was provided by James Hardie and the Dust Diseases Board. Now that the James Hardie Education Fund has expired, we consider the website should be funded as part of the SWAP.

30. Amended and restated final funding agreement between James Hardie Industries SE, James Hardie 117 Pty Limited (formerly known as LGTDD Pty Limited) and The State of New South Wales Asbestos Injuries Compensation Fund Limited in its capacity as trustee of the Asbestos Injuries Compensation Fund. 20 December 2013, cl. 19.1.

Chapter 8. Local Government

The 2010 Ombudsman report noted that the risks associated with handling asbestos have been exacerbated due to a lack of public awareness regarding the presence of asbestos in domestic dwellings and the dangers of exposure to asbestos. The report observed that asbestos was being dealt with in home renovations and on development and demolition sites without adequate oversight by councils or any other regulatory agency.

Councils have a statutory responsibility for asbestos under various NSW legislation and policies including the *Protection of the Environment and Operations Act 1997* (POEO Act). Accordingly, local councils have a key role in ensuring that applicants for consent to renovate or demolish are adequately informed about asbestos-related matters, including the dangers of asbestos, health and safety standards, licensing, certifying and legislative requirements, and reference to the various asbestos-related codes of practice and guidelines.³¹ Providing this information is critical to managing the public health and safety risk associated with a range of unregulated or illegal activities involving asbestos, from home owner renovations to the illegal removal and disposal of asbestos.

Although less than 50% of councils have adopted the Model Asbestos Policy (discussed in 8.2 below), there has been a marked improvement in asbestos-related services in council areas. We expect that councils will continue to play a vital role in addressing asbestos issues across the state. Nevertheless, there is cause for concern about how councils are expected to carry out certain functions of the POEO Act without access to additional resources. This has been evident in particular with regard to legacy asbestos sites (discussed in Chapter 10).

8.1. Local Government NSW initiatives

Local Government NSW (LGNSW) is the peak industry association that represents the interests of NSW general purpose councils, 12 special purpose councils and the NSW Aboriginal Land Council. Since the release of the 2010 Ombudsman report, LGNSW has taken the lead in developing the model policy for asbestos, promoting asbestos awareness and delivering training on asbestos matters to councils throughout NSW.

The Heads of Asbestos Coordination Authorities (HACA) funded a project officer position to work with LGNSW to research, develop and deliver asbestos programs to councils. We believe the project officer position should continue to be funded to provide an important conduit between HACA and local councils.

8.2. Model council asbestos policy

Our previous investigations found that there was an unacceptable level of non-compliance, confusion and misunderstanding about asbestos within councils in NSW. There is clearly a central role for the Office of Local Government (OLG) in providing consistent guidelines to councils for dealing with asbestos. Consistent council policies are needed as a priority across all local government areas to ensure that asbestos is not dealt with or disposed of in unsafe ways.

31. Councils have statutory responsibilities for asbestos under various NSW legislation and policies including the *Environmental Planning and Assessment Act 1979*, *Local Government Act 1993*, *Contaminated Land Management Act 1997*, *Protection of the Environment Operations Act 1997*, *Environmental Planning and Assessment Regulation 2000*, *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, *Protection of the Environment Operations (General) Regulation 2009*, *Work Health and Safety Act 2011*, *Work Health and Safety Regulation 2011*, *Protection of the Environment Operations (Waste) Regulation 2014*, , *State Environmental Planning Policy No. 55 – Remediation of Land and Demolition Work Code of Practice 2015*.

The 2010 Ombudsman report recommended that OLG issue a model asbestos policy to all NSW councils. The 'Model Asbestos Policy for NSW Councils Project' developed in 2012 by LGNSW in partnership with the NSW Government is a successful example of how the State Government can support councils in undertaking one of their key planning and compliance functions. The Model Asbestos Policy resulted in councils being given a model or template as a basis for their local asbestos policy. It also provided ongoing advice, subsidised training workshops, free forums, updates on asbestos issues and information resources to assist councils in all aspects of asbestos management.

Critical to the success of this project, in 2012 the State Government provided funding to LGNSW to appoint a Project Manager – Asbestos Policy to formulate the Model Asbestos Policy in collaboration with HACA and to assist councils to adopt and implement it. The position has been funded from the State Wide Asbestos Plan should, in our view, continue with funding allocated specifically for that purpose.

To assist councils to understand, adopt and implement the Model Asbestos Policy, LGNSW has also held Asbestos Management Training Workshops for councils across NSW.

Although the model policy was distributed to councils in 2013, it appears that less than 50% of councils have promulgated the policy. Councils are not required to report when they have adopted or updated an asbestos policy and there are no timeframes or deadlines. However, LGNSW is monitoring councils' progress and is meeting with councils that have not yet adopted an asbestos policy to assist them and ensure compliance with relevant legislation.

We are concerned at the level of take-up of the Model Asbestos Policy by councils. In August 2016 we were advised that 62 out of a total of 152 councils had promulgated the policy, despite the directive to do so by the CEO of OLG and support from relevant government Ministers.³² We believe OLG should continue to reinforce the need to implement the model policy.

The ongoing program of support for councils has meant that meaningful assistance has been provided to councils on a range of asbestos issues (for example, on loose-fill asbestos insulation and naturally occurring asbestos). The LGNSW program acknowledges council success through an annual Asbestos Management Award sponsored by SafeWork NSW, along with an online suite of case studies of successful projects and opportunities to present council initiatives at conferences and forums.³³

In 2015, the Model Asbestos Policy was due for review and was revised by HACA and made available to all councils by LGNSW.³⁴

8.3. Council asbestos registers and asbestos management plans

The Work Health and Safety Regulation 2011³⁵ (WH&S Reg) requires that a person with management or control of a workplace must ensure that an asbestos register is prepared and kept at the workplace. Local councils typically have a wide variety of workplaces, given the range of services and activities they provide. This means that local councils must ensure, so far as is reasonably practicable, that all asbestos-containing material (ACM) in their workplaces is identified by a competent person³⁶ and where asbestos has been identified, an asbestos management plan is in place.³⁷

It is unclear if all councils who have ACM in their properties have registers and management plans in accordance with the regulation. We believe that OLG in conjunction with SafeWork NSW should provide direction to councils on the need to implement registers and plans in accordance with the regulation.

32. Correspondence from Local Government NSW, 11 October 2016.

33. Local Government NSW report to HACA Working Group, 9 September 2016.

34. Local Government NSW website: <http://www.lgnsw.org.au/policy/asbestos-model-policy> viewed 10 October 2016.

35. Work Health and Safety Regulation 2011, cl. 425.

36. Ibid cl. 422.

37. Ibid cl. 429.

Chapter 9. Asbestos disposal

The storage, disposal and transport of asbestos waste at non-worksites in NSW are regulated by the NSW Environment Protection Authority (EPA) or by local councils. Under the Protection of the Environment Operations (Waste) Regulation 2014 ('Waste Regulation'), asbestos waste may only be disposed of at a site licensed by the EPA and must not be disposed of along with other waste.

SafeWork NSW and the EPA recently conducted a project to visit and assess the practices of a number of waste facilities in the Sydney metropolitan area.³⁸ A total of 14 waste facilities licensed by the EPA were visited: 10 in Sydney metro, two in the North region and two in the South region.

There was considerable variation in systems for managing asbestos among the waste facilities visited. Some had comprehensive formal systems and controls in place, and some had informal systems in place to protect either workers or the general public. A number of waste facilities were found to have poor practices for receiving and properly disposing of asbestos waste. Large landfill sites were found to have satisfactory procedures and training in place. SafeWork NSW identified non-compliance in the following areas in some facilities, based on notices issued and voluntary compliance achieved:

- no air monitoring
- no or inadequate asbestos management plan (AMP)
- no health monitoring
- no decontamination facility
- no personal protective equipment (PPE)
- no asbestos awareness training
- no high efficiency particulate air (HEPA) filters on plant
- no asbestos register.

Of all the waste facilities visited, half had asbestos segregated from other waste. The rest mixed and buried asbestos with other waste material that is capped at the end of the day.³⁹

Of concern is the fact that these licensed waste facilities permit the public to enter their sites. Many operators commented that their customers were either unaware of the problems with mixing asbestos-containing material (ACM) with other waste or were fully aware of the problems but failed to act appropriately.

The findings from this project raise concern about how the facilities are dealing with asbestos. However, we note that SafeWork NSW has advised that it will be taking further action in conjunction with the EPA to ensure compliance with the Waste Regulation. We believe that monitoring of asbestos disposal facilities should be given priority as part of the State-wide Asbestos Plan.

38. SafeWork NSW, *Management of Asbestos in Waste Facilities Project Post Implementation Report*, 2015.

39. Mixing of ACM and normal waste has contamination implications as well as breaching provisions of the Waste Regulation. Where waste materials are mixed with ACM, and cannot be separated, the combined waste is treated as asbestos waste, which adds significantly to disposal costs and to the environmental impact on landfills.

9.1. WasteLocate

WasteLocate is an online system run by the EPA to monitor the transport and management of waste tyres and asbestos waste within NSW.⁴⁰

The Waste Regulation requires the transport of asbestos waste in NSW to be recorded from the place of generation to its final destination. Operators must use the EPA's WasteLocate system to comply with these requirements. The Waste Regulation applies to all loads of more than 100 kg of asbestos waste or more than 10m² of asbestos sheeting transported within NSW.

WasteLocate was designed in consultation with industry representatives, relevant government agencies and local government. It allows the EPA to gather information on the movement of asbestos waste within NSW and better target enforcement and compliance activities, while minimising the impact on lawful businesses.⁴¹

We consider the introduction of the WasteLocate program is an effective step towards holding organisations and individuals accountable for asbestos disposal. The program should continue.

9.2. Asbestos waste levy

The *Protection of the Environment Operations Act 1997* (POEO Act) requires certain licensed waste facilities in NSW to pay a contribution for each tonne of waste received at the facility. Referred to as the 'waste levy', the contribution aims to reduce the amount of waste being landfilled and to promote recycling and resource recovery.

The 2016–17 levy rates apply from 1 July 2016. The waste levy rate calculation is prescribed in the Waste Regulation as follows:

- Metropolitan Levy Area: \$135.70 per tonne
- Regional Levy Area: \$78.20 per tonne.

In line with the Waste Regulation, the 2017–18 levy rates will again increase by Consumer Price Index (CPI) only.⁴²

Since the 2010 Ombudsman report, the imposition of the levy has frequently been raised as a disincentive to properly disposing of ACM. For example, the Manager Compliance Services, Newcastle City Council told the NSW Parliamentary Committee on Environment and Regulation:

*One of the key costs involved in disposing of waste lawfully is the waste levy imposed by the New South Wales Government. The levy is designed to encourage reuse of material and take it out of the waste stream so it does not end up in landfill. You cannot reuse asbestos, so it makes no sense at all to apply a levy to the disposal of it because there are no alternatives, and in fact we should be encouraging lawful disposal and making it as cheap as possible.*⁴³

Disposing large quantities of asbestos waste is expensive. Disposal of the waste from demolition of a standard three-bedroom fibro house can cost tens of thousands of dollars. The paradox is that the cost of proper ACM disposal may be a perverse incentive to illegal dumping. The principled response is that more should be done to encourage proper ACM disposal.

40. The disposal of tyres is regulated because of the public health risks associated with the stockpiles of tyres, which are both a fire risk and a breeding environment for mosquitoes.

41. <http://www.epa.nsw.gov.au/wasteregulation/transport-asbestos-tyres.htm>, viewed 28 November 2015.

42. <http://www.epa.nsw.gov.au/wasteregulation/waste-levy.htm>, viewed 28 November 2016.

43. Legislative Assembly Committee on Environment and Regulation, Parliament of NSW, *Report on the Management and Disposal of Waste on Private Lands Report 2/55*, June 2014.

WasteLocate appropriately imposes controls for separation and disposal of commercial quantities of ACM. On the other hand, removing the levy for ACM waste that is properly prepared and is not mixed with normal waste would encourage proper disposal. Another possible encouragement is to exempt from the levy owner builders and renovators who remove less than 10m² or 100kg of ACM.⁴⁴

9.3. Gate fees for asbestos at licensed disposal sites

The EPA licenses landfill operators to accept asbestos waste. The EPA has no role in setting the gate fees charged by waste facility operators. These are set by the local waste facility's management, and the waste levy is only one component of the cost. The waste levy provides an incentive for waste generators to reduce the amount of waste they generate. The NSW Government uses the levy revenue for programs including 'Waste Less, Recycle More', to provide better waste and recycling infrastructure across NSW.

Costs for disposing ACM at licensed facilities vary across NSW. Information available to the Ombudsman's office shows that in NSW the approximate costs for the 76 landfill sites averaged \$277 per tonne for residential (max \$600) to \$274 per tonne (max \$471) for commercial ACM.

Given the public health risks associated with improper disposal of asbestos, consideration should be given to applying a cap to the fees that licensed operators can charge at landfill sites for properly prepared asbestos waste.

9.4. Illegal dumping

The 2010 Ombudsman report identified that ACM was being dumped on private and public land. This continues to be a problem throughout NSW which the Heads of Asbestos Coordination Authorities (HACA) have addressed through its coordination of responses by the relevant agencies.

The POEO Act and the Waste Regulation provide the regulatory framework for managing waste, deterring people from illegal dumping, and investigating and prosecuting illegal dumping offences. The EPA and local councils have the regulatory authority to enforce the provisions of the POEO Act and Waste Regulation, which contain strong penalties for polluting the environment and illegally dumping waste.

The Asbestos Safety and Eradication Agency (ASEA) commissioned ACIL Allen Consulting to undertake a review⁴⁵ to identify issues relating to the illegal dumping of ACM in Australia, and the initiatives being implemented by state, territory and local governments to address the problem. A number of stakeholders were consulted for the review, including those from state and territory government agencies and local councils as well as waste facilities, relevant peak bodies and asbestos removalists and demolition contractors.

The review included an examination of the motivations behind the illegal dumping of ACM. It found that motivations included:

- seeking to avoid paying tip fees and levies
- convenience (for example, to avoid a journey to a legal disposal site)
- lack of readily accessible legal disposal options (for example, where legal disposal sites are distant)

44. Exemption from the levy does not include gate fees applied by licensed facility operators.

45. Asbestos Safety and Eradication Agency, *Illegal asbestos dumping: Review of issues and initiative*, March 2016

- the opportunity for commercial operators to make higher profits (for example, where a client has been charged the full cost of legal disposal)
- apathy and/or a perception that dealing with ACM properly is too difficult.

Stakeholders indicated that the motivation to dump ACM illegally may vary across different places and different times. There is evidence of similar motivations for illegally dumping both ACM and general waste. However, as noted above, the motivation for illegally dumping ACM may be greater because of the regulatory arrangements and costs associated with its disposal.

The evidence also suggests that much illegal disposal of ACM occurs as a result of home renovations, with stakeholders suggesting that do-it-yourself renovators and contractors to owner-occupiers are primarily responsible for illegally dumped ACM. However, some licensed asbestos removalists and even organised crime were mentioned as having involvement in illegal ACM disposal.

ASEA estimated the national annual cost for clean up and disposal of ACM at \$13.3 million.⁴⁶ Costs to local councils in particular can be significant. For example, Liverpool City Council spent \$56,000 between August 2014 and May 2015 cleaning up 38 incidents. Holroyd City Council reported spending between \$55,000 on 29 incidents during the same period.⁴⁷

We note that the EPA has implemented a number of programs across the state to deal with illegal dumping, including coordinating approaches by councils. We believe that further research is required into the most effective ways of addressing how best to motivate proper disposal of ACM.

9.5. Household asbestos disposal scheme

The householders' asbestos disposal scheme was a trial program designed to explore the impact on illegal dumping of asbestos waste of applying cheaper and easier asbestos disposal rates for householders. The EPA scheme ran from 1 July 2014 to 1 August 2016⁴⁸ at a total cost of \$781,000.

This trial involved waiving the waste levy on asbestos and reducing tip fees in 23 selected council areas. The trial also included a NSW EPA contribution of \$50 per tonne as an incentive towards the safe disposal of asbestos waste. The trial has now finished. The evaluation results will be used to inform future EPA policy on asbestos disposal.⁴⁹

While we are yet to see the EPA evaluation of this innovative project, anecdotal evidence suggests that it was successful in safely removing and disposing of small quantities of ACM from households. We are also mindful of how publicity for the scheme may have added to the overall public awareness of asbestos issues. We believe that similar schemes should be considered for the future.

46. Asbestos Safety and Eradication Agency, *Illegal asbestos dumping: Review of issues and initiative*, March 2016, p.13.

47. Asbestos Safety and Eradication Agency, *Illegal asbestos dumping: Review of issues and initiative*, March 2016, p.13 -14.

48. Correspondence from the EPA, dated 28 February 2017.

49. <http://www.epa.nsw.gov.au/wastegrants/house-asbestos-dispose.htm>, viewed 29 November 2016.

Chapter 10. James Hardie legacy sites

In April 2010 the Environment Protection Authority (EPA) (then the Department of Environment, Climate Change and Water (DECCW)) published a report on several sites in the Sydney area that had been used as asbestos disposal sites by James Hardie Industries. The EPA's report listed the James Hardie sites where asbestos had been disposed of and made recommendations on asbestos management and options for those sites.⁵⁰

To identify the location of the sites, the EPA issued notices under section 77 of the *Contaminated Land Management Act 1997* (CLM Act) to James Hardie and its associated companies through the Asbestos Injuries Compensation Fund (the Fund). The notices required provision of all available information on asbestos waste disposal sites in the Sydney area.

The Fund provided information on 47 potential asbestos disposal sites across Sydney associated with James Hardie entities. The majority (29) of the sites were identified as being located in the Parramatta Local Government Area. The EPA determined that 27 of the 47 sites required inspection and assessment of contamination.

The EPA determined that the remaining 20 sites had variously been redeveloped, subject to change of use such as road widening or extensions, were incorporated into larger landfills, were subject to change of ownership and identity, or were unidentifiable due to inaccuracies in the information provided by the Fund. The EPA determined that these 20 sites either did not require inspection or assessment because contamination had been dealt with during redevelopment, were being actively managed by public authorities, or further action was not feasible because the quality of information provided by the Fund prevented identification of the location.⁵¹

Of the 27 sites inspected and assessed by the EPA, several have now been identified as containing friable asbestos in soils in particular. This presents ongoing health risks which need to be addressed.

The management of asbestos legacy sites has not formed part of the State-wide Asbestos Plan (SWAP) to date. We consider that remediation of the James Hardie asbestos legacy sites should be included in the SWAP.

We note that the agreement between the NSW Government and James Hardie⁵² effectively absolved James Hardie of further responsibility for legacy asbestos sites in NSW. We accept that dealing with residual asbestos dumped in urban areas such as Parramatta may be difficult, but this should not prevent the requirement to formulate a plan to address the problem.

We also understand that dealing with the legacy issues may be costly, but we consider the Government has an obligation to prevent exposure to asbestos by residents living near or on top of asbestos dump sites about which they may be unaware.

10.1. Impact of legacy sites on residents

The level of risk associated with some of the James Hardie legacy sites was demonstrated when, after testing, people living in a house on one legacy site were advised by their local council that they should not enter their backyard for activities such as lawn mowing due to the risk of exposure to friable asbestos. This situation is unacceptable and must be dealt with as an urgent priority.

50. Department of Environment Climate Change and Water, *James Hardie Asbestos Waste Contamination Legacy, Summary Project Report*, April 2010.

51. Ibid.

52. Amended and restated final funding agreement between James Hardie Industries SE, James Hardie 117 Pty Limited (formerly known as LGTDD Pty Limited) and The State of New South Wales Asbestos Injuries Compensation Fund Limited in its capacity as trustee of the Asbestos Injuries Compensation Fund, 20 December 2013, cl. 8.23.

We sought information from the EPA about the reasons why the James Hardie legacy sites had not been properly remediated. The EPA stated in its response:

In general, the presence of asbestos does not warrant that a site be notified to the NSW EPA under the CLM Act. Sites may be regulated under the CLM Act where the EPA determines that there is 'significant contamination' of land, such as where the scale and nature of the contamination is causing or may cause actual or potential harm to human health or the environment (e.g. when there are elevated levels of asbestos fibres in the air).

If land is contaminated but not determined to be 'significantly contaminated land' the CLM Act does not apply. Asbestos contamination in such an instance is considered by planning authorities in the same way as other forms of contamination. Asbestos legacy sites are also regulated by the appropriate regulatory authority under the Protection of the Environment Operations Act 1997 (POEO Act). The EPA is the appropriate regulatory authority for asbestos legacies on local and State Government land.

By way of an example, asbestos contaminated fill along A'Beckett's Canal in Granville affects residential premises and land owned by Sydney Water and Roads and Maritime Services (RMS). Council is the appropriate regulatory authority under the POEO Act for the residential premises, and the NSW EPA is the appropriate regulatory authority for the Sydney Water and RMS premises. As such, the NSW EPA has been working with the local Council, Sydney Water and RMS over a number of years on the management of asbestos at this site. Currently, Council is working with RMS and UrbanGrowth NSW on future options for the site and we are providing Council with guidance and advice.

The NSW EPA takes a consistent approach to regulating asbestos legacy. Generally, since 2010, where a site is not covered by the CLM Act, the NSW EPA has worked within the planning process, undertaking site inspections and liaising with local Government to provide comments on development applications.⁵³

10.2. EPA inspections

Between 2007 and 2008 the EPA conducted site inspections on the 27 identified metropolitan sites. The inspections revealed that most of the asbestos at the sites was capped, contained or buried, and where present at the surface was in small amounts of bonded asbestos sheets or pipes. The EPA advised that the relevant local councils were not involved in the site inspections.⁵⁴

The EPA's report listed the 27 sites and the action taken or recommended. In each instance reference was made to whether asbestos was or was not present at the site. Those findings appear to be based on visual inspection of the sites only. While this may have been appropriate at the time, we question how the presence of asbestos could be reliably determined without recourse to soil testing by a NATA-accredited testing laboratory.⁵⁵

In our view, James Hardie legacy sites that have not been subject to development or remediation should be tested to determine if asbestos is present in soils and the level of risk that remains. We consider that this testing should be carried out without delay.

10.3. Liability for James Hardie asbestos legacy sites

It was agreed by the NSW Government that James Hardie would not be held responsible for asbestos remediation in NSW.⁵⁶ It therefore follows that sites containing asbestos can only be remediated at a cost to either the current owners (who did not contaminate the sites) or the NSW Government.

53. Letter from The Chair and CEO, Environment Protection Authority, dated 5 October 2015.

54. Department of Environment Climate Change and Water, *James Hardie Asbestos Waste Contamination Legacy, Summary Project Report*, Department of Environment Climate Change and Water, April 2010.

55. National Association of Testing Authorities Australia.

56. Amended and restated final funding agreement between James Hardie Industries SE, James Hardie 117 Pty Limited (formerly known as LGTDD Pty Limited) and The State of New South Wales Asbestos Injuries Compensation Fund Limited in its capacity as trustee of the Asbestos Injuries Compensation Fund, 20 December 2013, cl. 8.23.

The costs for remediation would be prohibitive in most instances for the current owners. Those owners may have had no prior-purchase knowledge that asbestos had been disposed of on their land. It therefore seems unreasonable that they should be left to suffer whatever consequences may occur from potential exposure to asbestos without any form of assistance from the NSW Government.

We consider that people who reside at or near James Hardie legacy sites should be assisted to either remediate their land or to relocate, similar to the assistance provided under the 'Mr Fluffy loose fill-asbestos insulation program' (discussed in Chapter 13). We note that the NSW Government has fully funded the testing, assessment and acquisition of houses with loose-fill asbestos insulation.⁵⁷

57. The Hon. Scott MacDonald, NSWPD, (Hansard), 28 October 2015.

Chapter 11. Woodsreef mine closure

The 2010 Ombudsman report to Parliament recommended the removal of derelict buildings and infrastructure at the abandoned Woodsreef asbestos mine at Barraba. That recommendation was implemented in 2015. The Department of Minerals and Energy continues to monitor air at the site, and those readings have consistently been below minimum safety standards.

The 2010 report also recommended that the public access road through the mine site be permanently closed. In December 2013, in a media release, the Hon. Andrew Stoner, MP, Minister for Trade and Investment, and Minister for Regional Infrastructure and Services announced:

after much consultation with the community and health experts, a decision has been made to close Mine Road near Barraba in Northern NSW due to the associated risks from asbestos at the adjacent Woodsreef Asbestos Mine.

Mr Stoner said the public health risks to keep the road open were far too high with deposits of Chrysotile, or white asbestos – considered to be a carcinogen, present at the Woodsreef mine, which is managed as part of the NSW Derelict Mines Program.

It is pleasing that derelict buildings have been removed and the access road through the mine site has been permanently closed. However, the residual mounds of asbestos tailings identified in our previous report remain. These mounds are 75m high, contain approximately 24 million tonnes of tailings containing friable asbestos and are visible several kilometres away from the site. This is a matter of genuine concern.

Testing and monitoring at the site should continue until such time as the area has been fully remediated.

Chapter 12. Naturally occurring asbestos

Although asbestos is a commercial term, all asbestos is of natural origin. The term ‘naturally occurring asbestos’ (NOA) seeks to differentiate natural sources of fibre from commercial or industrial sources. NOA refers to fine fibrous minerals of the serpentine and amphibole groups that occur in rocks or soil that may be disturbed by human activities or weathering processes. NOA also includes other fine fibrous minerals that are not strictly asbestiform.⁵⁸

NOA can be found in some rocks and soils as a natural mineral. Less than one per cent of the land surface of NSW is estimated to have the potential for NOA within 10 metres of the land surface. With few exceptions – such as road building and maintenance in NOA areas – the risk of exposure is low.

NSW Trade and Investment maintains databases of mineral and construction material that provide a basis for informing land use planning and encourages mineral exploration. The Geological Survey of NSW also undertakes regional scale mapping and mineral deposit projects that provide a framework for sustainable development of mineral resources and to inform land use planning more generally. The identification of known NOA sites and mapping of rocks likely to contain NOA was completed based on these datasets and geological knowledge of the Geological Survey of NSW.⁵⁹ NSW Trade and Investment has also developed geographic information system maps locating high, medium and low probability areas of NOA.

The Heads of Asbestos Coordination Authorities (HACA) has developed general guidance on reducing potential exposure for residents, farmers and people managing recreational activities in areas identified with a high probability of NOA. HACA has also released an information video detailing how to deal with NOA⁶⁰ and fact sheets for recreation, residing and farming in areas of NOA.

We note that significant deposits of NOA remain at the sites of the two former asbestos mines at Woodsreef and Baryulgil and in other areas throughout NSW.

We consider the ongoing mapping of NOA to be an important initiative supported by HACA and should continue as part of the State-wide Asbestos Plan.

58. Heads of Asbestos Coordination Authorities, *Mapping of naturally occurring asbestos in NSW, Known and potential for occurrence*, July 2015.

59. *Ibid*, p.2.

60. <http://www.safework.nsw.gov.au/health-and-safety/safety-topics-a-z/asbestos/naturally-occurring-asbestos>, viewed 28 November 2016.

Chapter 13. Loose-fill asbestos insulation

Loose-fill asbestos insulation (LFAI) was installed as ceiling insulation in an unknown number of NSW homes in the 1960s and 1970s. LFAI is made from raw amosite or crocidolite asbestos, which is crushed and then pumped with air into roof spaces as ceiling insulation. LFAI is classed as a 'friable' form of asbestos and is characterised by its soft clumpy appearance. An example is the 'Mr Fluffy' LFAI that was installed in over 1300 Canberra homes and that resulted in an ACT Government program to buy and demolish those homes.

What differentiates LFAI from other asbestos products is that it is relatively pure (often 100 per cent amosite or crocidolite asbestos) and the fibres easily become airborne if disturbed. If not managed correctly, asbestos fibres can become airborne and may be inhaled, which could increase health risks. Over time, LFAI can migrate out of roof cavities and into habitable areas. It is important that tradespeople and any other visitors be warned of the presence of LFAI in the property, especially in the roof, walls or sub-floors.⁶¹

Earlier experience in both NSW and the ACT has demonstrated that simply removing loose-fill asbestos from a ceiling cavity does not remove the enduring hazard. The NSW Government, with input from a range of experts, has determined that demolition, comprehensive site remediation and disposal are the best ways to ensure the health and safety of the NSW community.

In August 2015 NSW Fair Trading established the Loose-fill Asbestos Implementation Taskforce. The Taskforce is responsible for overseeing and implementing the Voluntary Purchase and Demolition Program in NSW and its associated Assistance Package.

Extensive sample testing of pre-1980s residential properties is being conducted in areas where it is believed LFAI might be present.⁶² The Program is designed to provide safety, certainty and support for NSW residents and is being delivered in four stages:⁶³

- **Assistance and identification** – testing and technical assessments and support for affected owners and tenants as they progress through the Program.
- **Purchase** – valuation and purchase of affected properties.
- **Demolition** – demolition of affected properties and remediation of the land.
- **Sale** – sale of remediated land.

We acknowledge that this is an important program for dealing with residual asbestos, but consider action should be taken to implement the same approach to legacy asbestos issues.

61. WorkCover NSW, *NSW Taskforce report: Loose-fill asbestos insulation in NSW Homes*, 2015, p.12.

62. Office of Fair Trading website: http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Loose_fill_asbestos_insulation.page, viewed 17 October 2016.

63. *Ibid.*

Chapter 14. Vendor disclosure laws

Current regulations require workplaces to maintain an asbestos register detailing the location of all asbestos on site. No such requirement applies to private dwellings. There is no requirement for a purchaser or occupier of a residence in NSW to be informed where asbestos may be in a building. This is a serious safety issue.

The 2010 Ombudsman report recommended that the Government consider introducing a vendor disclosure law similar to that in the ACT. Government did not accept this recommendation. We remain of the view that property purchasers and renters should be informed where asbestos may be located within a property and how to deal with it safely. We believe this should be revisited.

The introduction of a scheme to certify the presence or otherwise of asbestos in a building constructed before 1987 (the year asbestos ceased being used in construction) would provide important information to all parties. Such a scheme would ensure that purchasers and occupiers of a residence are provided with a certificate compiled by a qualified person who identifies the location and types of any asbestos present in any building. The onus would be upon the property owner to obtain and provide the certificate to a potential purchaser as part of a vendor disclosure requirement, and to incoming tenants when entering into a residential lease.

Certificates obtained prior to the sale of a property could also be lodged with the relevant local council. This would allow councils to build up records of asbestos in their areas of responsibility and may help to assist in ensuring compliance with asbestos-related legislation. This would also enable councils to put appropriate conditions on any subsequent approvals to renovate or demolish.

The recommendation in the 2010 Ombudsman report for a vendor disclosure law should be revisited. We met with Real Estate Institute executives who advised that they supported the concept. Not only would this protect potential purchasers and tenants, it would also protect agents and their staff. We understand that some insurance companies may be reluctant to provide workers, compensation coverage for staff working in buildings containing asbestos containing material.⁶⁴

The NSW Government set aside \$250m⁶⁵ for the testing of houses suspected of containing loose-fill friable asbestos.⁶⁶ This program, which includes the testing of thousands of properties and the purchase of contaminated houses from owners, has once more demonstrated the need for a vendor disclosure law to be introduced in NSW.

The Australian Government Asbestos Management Review report of 2012 supported the introduction of a form of vendor disclosure law. It stated:

Having regard for the likely presence of large quantities of ACMs that present a significant public health hazard, it is appropriate for there to be implemented a simple, practical and robust scheme that would identify and label the existence of asbestos in private homes. At least one jurisdiction has introduced a requirement for disclosure of a report of known ACMs at the time of sale or lease, and the review has concluded that this type of approach should apply nationwide. Therefore, initially owners of those private properties constructed prior to 1987 should be required to identify the location and condition of any known ACMs before sale or lease of the property, or when the property is subject to renovation of sufficient scale that would require local council building approval. This would involve obtaining an asbestos content report (ACR) from a licensed assessor.⁶⁷

Introducing an asbestos vendor disclosure scheme for NSW has the potential to reduce the number of people exposed to asbestos in residential settings and save lives and public health costs.

64. Meeting between NSW Ombudsman staff and CEO, Real Estate Institute of NSW, 12 April 2016.

65. The Hon. Scott MacDonald, NSWPD, (Hansard), 28 October 2015.

66. Loose-fill asbestos program run by Office of Fair Trading.

67. Australian Government, *Asbestos Management Review Report*, June 2012.

When they dropped off the new tailings we would just go and play in these piles of asbestos. To us it was just like dirt or sand. We thought it wasn't harmful because no one told us that it was, so we just dived in it.⁶⁸

Di Randall, Baryulgil resident

Chapter 15. Asbestos in Aboriginal communities

Many people in Aboriginal communities live in dwellings constructed of fibro asbestos containing material (ACM). Some of those buildings are more than 50 years old, and many are in poor repair. The widespread past use of ACM within Aboriginal communities has left a legacy that needs to be addressed.

Most of the fibro asbestos buildings in Aboriginal communities were constructed by state or federal government programs. Those communities have had little access over the years to information on the risks of asbestos or where to obtain assistance. We believe the implementation of a Heads of Asbestos Coordination Authorities (HACA) program for Aboriginal communities (see 15.4) is an important step towards addressing this significant deficiency.

15.1. Wallaga Lake

The 2010 Ombudsman report featured a case study of the Aboriginal Community at Wallaga Lake. In 2009 we received complaints that although widespread asbestos contamination had been identified within the community in 2007, no clean-up occurred at the site until 2009, and only following intense media exposure.

Asbestos had been left on site at Wallaga Lake following a federal government housing program in the 1980s. Old fibro houses were demolished by community members with much of the ACM left on site or constructed over. When we visited Wallaga Lake in October 2009, we saw broken bonded asbestos pieces scattered throughout the community. Bonded asbestos was lying uncovered, on top of soil in gardens, on roadways and underneath houses. Wallaga Lake community members told us:

New houses were built in the late 1980s and the men in the community would move from one house to the next to demolish the houses by hand. The remains were dumped in the bush and some of the men are still living in here.⁶⁹

The handling of asbestos at Wallaga Lake reveals the level of confusion that existed at the time within local councils and the community about who is responsible for dealing with asbestos. It highlights a lack of any sense of urgency to remove asbestos from sites and reveals a lack of understanding about the dangers and potential for exposure among the Wallaga Lake community and the community generally.

We corresponded with relevant government agencies involved in the Wallaga Lake community. While we remained concerned about delays in clearing the site of asbestos, we were advised that an asbestos management plan had been put in place to help the local community to address the issues on an ongoing basis.

In August 2016 we learned that SafeWork NSW inspectors had visited Wallaga Lake and discovered widespread asbestos contamination still in situ. That was despite the assurances we had received in 2009 from the then Department of Environment and Climate Change, WorkCover and the local council, to the effect that an asbestos management plan had been developed for the Wallaga Lake community.

68. Matt Peacock, James Hardie unlikely to pay compensation for Aboriginal kids exposed to asbestos in NSW Town of Baryulgil, ABC 7.30 Report, <http://www.abc.net.au/news/2016-09-08/man-with-mesothelioma-from-asbestos-can't-sue-james-hardie/7823308>, viewed 10 October 2016.

69. Interview with Mr Max Munro at Wallaga Lake, 16 October 2009.

Asbestos remediation needs to be carried out at Wallaga Lake in consultation with the Environment Protection Authority (EPA), SafeWork NSW, NSW Aboriginal Land Council and Merrimans Local Land Council.

15.2. Baryulgil

The Aboriginal people who form the Baryulgil community are members of the Bunjalung tribe, from the New South Wales North Coast region. At the beginning of the 20th Century they resided on an area set aside for them on Yugilbar Station about 10km from Baryulgil Square. Sometime around 1920, the people moved to Baryulgil Square.⁷⁰

The chrysotile asbestos mine at Baryulgil was in production until 1971. The majority of mine workers were members of the local Aboriginal community.⁷¹ Baryulgil mine was an open-cut operation with dry milling processes notorious for creating hazardous asbestos dust levels. Angus Cave, one of the dozen or so non-Aboriginal people to work at the mine described working in the mill changing bags on the dust collector:

We didn't wear masks or protective gear [you'd] take a lungful of air, walk in and you've got a stick that long to beat the bag. You'd stand there and beat it, like a carpet, and this is stirring all the dust up. It was like concrete! I'd turn around and I'd be out of breath. I'd shoot outside, and breath in, go back in, and it would take two or three times to change the bag. When you finished that, you'd walk outside and go down underneath. I could guarantee you'd be stirring up dust four to five inches thick.⁷²

While the Baryulgil mine closed in 1971, former workers and Baryulgil residents are still being diagnosed with asbestos diseases. In September 2016, it was reported that a person had been diagnosed with mesothelioma that was believed to have been contracted as a child growing up in the Baryulgil community.⁷³

On 26 October 2016, the Deputy Ombudsman (Aboriginal Programs) visited the Baryulgil community and held discussions with Local Aboriginal Land Council members. The purpose of the visit was to examine the effectiveness of the remediation of the area after the mine closed.

The Baryulgil township consists of a number of fibro asbestos buildings. We saw that several dwellings were uninhabited with evident damage to exterior fibro walls. Community members told us they would welcome participation in HACA's Aboriginal asbestos awareness program and that they were eager to access sponsored asbestos training of community members.

We noted during our visit that the community lies adjacent to the former asbestos mine which is located on private property. We saw that naturally occurring asbestos is apparent in the area and there are no visible signs warning of asbestos. While the former mine area is fenced, we considered there was a need to warn any person who might enter the fenced area about the presence of asbestos and to exercise caution.

During our conversations with community representatives we learned that relatives of many current community members had died from asbestos-related diseases. We heard that many Baryulgil residents continue to suffer from poor health, and that there is a general suspicion that undiagnosed asbestos diseases had caused the premature deaths of other Baryulgil residents. One person stated:

70. House of Representatives Standing Committee on Aboriginal Affairs, *The Effects of Asbestos Mining on the Baryulgil Community*, October 1984, p. 11.

71. Haigh, Gideon, 2007, *Asbestos House*, Scribe, Melbourne, p.108.

72. Interview with A Cave 19 September 2005, cited in Peacock, M., 2011. *Killer Company: James Hardie Exposed*. Harper Collins Australia, 2011.

73. ABC News item, <http://www.abc.net.au/news/2016-09-08/man-with-mesothelioma-from-asbestos-can-t-sue-james-hardie/7823308>, viewed 12 October 2016.

My Dad worked in the mine for 29 years; he died at 43, worked from when he was thirteen years of age. Never drank. Hypertension they had on his death certificate, but he never drank, never smoked lived a pretty healthy life. The doctor when he died, called me back into his office and said your Dad's body was riddled with asbestos. Hypertension was on his death certificate.⁷⁴

It was clear from our discussions that the Baryulgil community has suffered widely from the effects of asbestos. One community member talked of the relatives he had lost to asbestos diseases and stated:

We see Hardie's shares keep going up and my family members keep going down.⁷⁵

We were told that there has been little testing for asbestos land contamination at Baryulgil for several years. While much of the area was remediated by capping, a process which involves covering the contamination with clean fill, the community believes that flood events have now eroded much of that cover. Considering that the township is situated on a known reef of naturally occurring asbestos, we believe testing and follow up maintenance of the remediation processes should be put in place.

We also heard that Baryulgil community members have had difficulty obtaining medical services. There appeared to be a lack of information about tests for asbestos-related diseases. We were also told that community members suffering from respiratory symptoms and who were concerned about asbestos exposure could not access testing for asbestos-related diseases due to the prohibitive costs of those tests. We believe that NSW Health should provide up-to-date information to the community about accessing government funded medical assistance.

It was apparent from our discussions that members of the community feel isolated from the wider NSW community and there is a general feeling of abandonment caused by being 'out of sight, out of mind'.

15.3. Weilmoringle

During a visit to the Aboriginal community at Weilmoringle⁷⁶ the Deputy Ombudsman (Aboriginal Programs) was shown a 1960s era fibro dwelling that had been damaged in a house fire some six weeks prior. Local residents described how they had combined to extinguish the fire. They said they had entered the building on numerous occasions since the fire.

We were concerned that the fire damaged building at Weilmoringle may contain asbestos fibres which could present a health risk. When ACM is exposed to fire and high temperatures, it may suddenly crack and break, causing the bond to degrade as a result of loss of moisture. The ACM may 'explode' or break into small chips, flakes or splinters. This usually occurs in the early stages of a fire.⁷⁷

Depending on the extent of damage, ACM exposed to fire can be classified as either friable or bonded. Asbestos sheets that are severely damaged or reduced to ash are likely to be friable. Asbestos that is intact or has suffered smoke damage only is likely to be classified as bonded.⁷⁸

It was apparent from our discussion with Weilmoringle community members that this community was unaware about the dangers of asbestos exposure or how to safely manage asbestos to reduce the risks of exposure. This suggests that while many asbestos awareness programs have been successful in urban areas, this may not be the case for remote communities like Weilmoringle.

74. Baryulgil community member stated in meeting with Ombudsman staff 25 October 2016.

75. Mr Terry Robinson stated in meeting with Ombudsman staff, 25 October 2016.

76. Weilmoringle is an Aboriginal community in north western NSW, approximately 100km north of Brewarrina. It has a population of 155 (2011 Census).

77. SA Government website http://www.asbestos.sa.gov.au/home_fire.html, viewed 24 October 2016.

78. EPA Guidance Material: *Asbestos and Fire-damaged Buildings*, January 2015, p. 1.

15.4. Aboriginal asbestos awareness program

The 2010 Ombudsman report identified a clear need for asbestos education and public awareness for regional Aboriginal communities, given the heightened risk levels associated with the dwellings typical in many of those communities. The report also considered the suitability of asbestos awareness programs for Aboriginal communities. It concluded that web-based materials popular among the wider community may not be accessible to many regional Aboriginal communities. The limited availability of computers and access to the internet in many regional Aboriginal communities makes this problematic, as do generally lower levels of literacy. We said a different approach was required to take account of cultural considerations and preferred communication methods.

In response to the report HACA, in conjunction with the NSW Aboriginal Land Council and Aboriginal Housing, engaged consultants to develop a culturally specific asbestos awareness program to be delivered to Aboriginal communities in NSW. This program follows a highly successful community based initiative in the Northern Territory involving training of community members on how to deal safely with asbestos. This program will involve collaboration between SafeWork NSW, the NSW Aboriginal Land Council, individual Local Aboriginal Land Councils and TAFE NSW to provide relevant training for the removal of non-friable asbestos. Training will include construction induction, non-friable asbestos removal, asbestos supervisor and other training to Local Aboriginal Land Council workers. SafeWork NSW will collaborate with asbestos removalists to provide non-friable asbestos removal work experience to Local Aboriginal Land Council supervisors.

We consider this vital NSW community program should be properly funded and be continued until all ACM has been removed from or properly treated in these communities.

15.5. Aboriginal Lands Clean-Up and Prevention Program

The 2010 Ombudsman report identified the problem of illegal dumping of ACM on Aboriginal land. Illegal dumping continues with health risk implications for the communities.

Under its 'Waste Less, Recycle More' program, the EPA has developed the Aboriginal Land Clean Up and Prevention (ALCUP) funding program to manage illegal dumping on privately-owned Aboriginal Land. The EPA administers the ALCUP and provides funding of between \$5000 and \$50,000 for individual projects of up to one year's duration. This important program provides funding to NSW Local Aboriginal Land Councils, and local councils, government agencies, non-governmental organisations, consultants, and other entities working in partnership with a Local Aboriginal Land Council.

Since 2006, the ALCUP program has mobilised and invested resources and more than \$2.1 million to support Local Aboriginal Land Councils working with a range of partners and supporters to protect their cultural and natural resources from illegal dumping through clean-up, prevention and deterrence. ALCUP has resulted in:

- 6108 tonnes of waste cleaned up
- 1344 tonnes of waste safely disposed of at landfills (including 547 tonnes of asbestos)
- 1706 tonnes of materials and 35 car bodies recycled
- 3058 tonnes waste reused.⁷⁹

Funding for the 'Waste Less, Recycle More' program has been extended to 2021. We understand that waste management in Aboriginal communities has been included in that funding.⁸⁰

79. <http://www.epa.nsw.gov.au/wastegrants/alcup.htm>, viewed 30 November 2016.

80. Correspondence from the EPA, dated 28 February 2017.

15.6. Research into asbestos diseases in Aboriginal communities

We have been unable to identify any studies into asbestos-related diseases in Aboriginal communities in NSW. We believe research in this area may be warranted, given the amount of residual ACM within these communities, and the historic exposure to asbestos in mines and from various government building/demolition programs. As discussed earlier in this chapter, the diagnosis of mesothelioma detected in a Baryulgil resident, believed to have been exposed to asbestos as a child, highlights the need for specific research, as does the anecdotal evidence of premature death from respiratory diseases which may be linked to asbestos exposure.

Chapter 16. The way ahead for asbestos in NSW

The Ombudsman's office continues to monitor the response of NSW Government agencies to dealing with asbestos issues. While we are pleased to see the many improvements in coordination, public awareness and regulating, we note that tackling the problem requires both proper funding and long-term commitment.

We acknowledge that there is no immediate panacea for dealing with residual asbestos and for dealing with issues such as loose-fill and legacy asbestos. What will be important for the future health and wellbeing of the people of NSW will be an assurance that those agencies charged with licensing, managing and regulating will do so effectively and in accordance with a defined government plan.

This chapter contains our views on the way ahead and our recommendations.

16.1. Single agency concept

There is no single government agency in NSW which has both the statutory responsibility and power to deal with asbestos issues throughout the state. The primary agencies are the Environment Protection Authority (EPA), which deals with asbestos in various environmental settings and SafeWork NSW, which deals with workplace matters. Local councils are responsible for residential issues, demolitions and developments, while private certifiers coordinate development sites that are exempt or compliant under State Environmental Planning Policies. These fragmented arrangements contribute to confusion among members of the public, councils and industry alike.

Despite significant improvements in the coordination of agencies with responsibility for asbestos issues, there is no single authority with the statutory power to deal with asbestos across all environments.

SafeWork NSW has done excellent work but its role is confined to dealing with workplaces or persons conducting a business or undertaking in accordance with the *Work Health and Safety Act 2011*.

There is a need for a statutory authority that has overall responsibility for managing asbestos in NSW. That body should be responsible for taking the lead in implementing government strategies for asbestos into the future. For administrative convenience and support, such an authority could be located within or associated with a larger entity such as SafeWork NSW or the EPA.

The current Heads of Asbestos Coordination Authorities (HACA) group should be reconstituted as an executive committee which provides input and reports to the proposed statutory body. We consider that the current work of HACA should continue in regard to coordinating asbestos issues.

- i. **Recommendation: A NSW Asbestos Authority should be created for NSW with statutory authority to develop model policies and guidelines, report to a relevant Minister and be the chief advisory body to government on all asbestos matters. The authority should also have enforcement powers to ensure compliance with government policies for asbestos.**
- ii. **Recommendation: A NSW Asbestos Authority should be created with requisite funding, possibly with secretariat and administrative staff support provided by an existing relevant agency such as SafeWork NSW or the Environment Protection Authority.**

16.2. Asbestos Act

Existing legislation is disjointed and does not cover all asbestos-related activities in NSW. Specific legislation would assist with the coordination of asbestos management across government. More importantly it would give the NSW Asbestos Authority statutory powers to properly oversee how government agencies deal with asbestos.

iii. Recommendation: Legislation should be introduced to:

(a) create the NSW Asbestos Authority, giving that body statutory powers to properly oversee how government agencies deal with asbestos, and jurisdiction over workplaces, government and residential buildings and land generally across the state, or

(b) amend the Protection of the Environment Operations Act 1997 to give the Environment Protection Authority statutory powers to perform a similar role.

16.3. State-wide Asbestos Plan

The NSW State-wide Asbestos Plan has been pivotal in enhancing coordination of asbestos policies, procedures and agency responses and should continue to be funded.

iv. Recommendation: Funding separate to individual agencies should be provided for the initiatives proposed by HACA to implement the State-wide Asbestos Plan.

16.4. 1800 Asbestos helpline

The launching of the 1800 Asbestos helpline in November 2016 was a crucial part of the asbestos awareness program, in particular for residents, renovators and do-it-yourself individuals.

v. Recommendation: Specific funding for the 1800 Asbestos helpline should be included in the State-wide Asbestos Plan.

16.5. Model Asbestos Policy for councils

Many NSW local councils have not yet adopted the Model Asbestos Policy developed by Local Government NSW (LGNSW) and issued by the CEO, Office of Local Government in accordance with section 23A of the *Local Government Act 1993*. Section 23A (3) of the Act stipulates that a council must take any relevant guidelines issued under this section into consideration before exercising any of its functions. The model policy is designed to provide advice and guidance to members of the public and council staff on how to safely handle asbestos. It is clearly in the public interest that the model policy be adopted across all council areas in NSW without delay.

vi. Recommendation: The Office of Local Government should conduct a review of how the Model Asbestos Policy has been implemented, and provide direction to non-compliant councils on the need to implement the policy without delay.

16.6. LGNSW project officer

LGNSW has taken the lead in developing the Model Asbestos Policy, promoting asbestos awareness and delivering training on asbestos matters to councils throughout NSW. Much of this work has been carried out by the project officer attached to Local Government NSW funded by HACA. This position has been essential for providing ongoing support to councils on asbestos issues.

- vii. Recommendation: The project officer position at LGNSW should continue to be funded as part of the proposed four-year State-wide Asbestos Plan.**

16.7. Asbestos disposal

Illegal dumping of asbestos continues to cause financial impacts on local councils, government agencies and private landholders. The current levies of \$135.70 per tonne (Metropolitan) and \$78.20 per tonne (Regional) are considered to be a disincentive to properly disposing of asbestos and should not be imposed for properly prepared and identified asbestos-containing materials. Asbestos containing material (ACM) that has not been separated from other waste materials should remain subject to the levy.

- viii. Recommendation: Asbestos-containing materials which have been transported and managed in accordance with Part 7 of the Protection of the Environment Operations (Waste) Regulation 2014⁸¹ should be exempt from the levy when disposed of at licensed facilities.**

16.8. James Hardie legacy sites

James Hardie asbestos legacy sites in the metropolitan area, which contain friable asbestos, present a serious health risk and should be properly remediated.

- ix. Recommendation: Testing be conducted on all sites listed in the Environmental Protection Authority, James Hardie Asbestos Waste Contamination Legacy, Summary Project Report. Where asbestos is identified, those sites should be remediated at NSW Government expense.**
- x. Recommendation: Residential sites found to contain appreciable quantities of friable asbestos should be acquired and/or remediated at NSW Government expense.**

16.9. Contaminated Land Management Act

Section 5(1) of the *Contaminated Land Management Act 1997* states:

Contamination of land, for the purposes of this Act, means the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.

81. 81 Clause 78 of the Protection of the Environment Operations (Waste) Regulation 2014 lists the general requirements applying to transportation of asbestos waste as:

A person who transports asbestos waste must ensure that:

- (a) any part of any vehicle in which the person transports the waste is covered, and leak-proof, during the transportation, and
- (b) if the waste consists of bonded asbestos material – it is securely packaged during the transportation, and
- (c) if the waste consists of friable asbestos material – it is kept in a sealed container during transportation, and
- (d) if the waste consists of asbestos-contaminated soils – it is wetted down.

Clause 80(2) provides that: 'When a person delivers asbestos waste to a landfill site, the person must inform the occupier of the landfill site that the waste contains asbestos'.

It is difficult to see how friable asbestos, such as that identified in several James Hardie asbestos legacy sites, does not constitute a risk of harm to human health.

- xi. Recommendation: Amendments should be made to the *Contaminated Land Management Act 1997* to ensure that land containing friable asbestos, which presents a risk of harm to human health, is designated contaminated land under the Act.**

16.10. Vendor disclosure law

A law that makes it compulsory for vendors and landlords of properties constructed up to and including 1987 to provide a report to purchasers or tenants may prevent inadequate handling of asbestos materials and thereby potentially save lives.

- xiii. Recommendation: Legislation should be introduced to make it mandatory for vendors to provide a report to property purchasers and tenants where dwellings were constructed up to and including 1987, which identifies the presence or otherwise of asbestos-containing materials.**

16.11. Aboriginal asbestos awareness program

The widespread past use of ACM within Aboriginal communities has left a legacy that needs to be addressed. As this report has highlighted, those communities have had little access over the years to information on the risks of asbestos or where to obtain assistance. We believe the implementation of the HACA program for Aboriginal communities is an important initiative that should be fully supported given the amount of residual ACM within these communities, and the historic exposure to asbestos in mines and from various government building/demolition programs.

- xiv. Recommendation: The Aboriginal asbestos awareness program initiated by HACA should be continued and provided with specific funding under the State-wide Asbestos Plan.**

16.12. Wallaga Lake

Vast amounts of residual asbestos remains present within the Wallaga Lake community despite previous clean-up efforts. This presents a potential health risk to the community, which needs to be addressed, and an ongoing management program should be implemented.

- xv. Recommendation: The Environment Protection Authority, in conjunction with SafeWork NSW, should take action to ensure proper remediation of residual asbestos within the Wallaga Lake community is carried out and ongoing management procedures are implemented.**

16.13. Baryulgil

There has been little testing for asbestos land contamination at Baryulgil for several years. Previous capping within the community may have been eroded by flood events and should be reassessed. Considering how the township is situated on a known naturally occurring asbestos reef, testing and follow up maintenance of the remediation processes should be put in place.

- xv. Recommendation: The EPA should carry out soil testing at the Baryulgil community and carry out any necessary remediation in consultation with the Local Aboriginal Land Council.**

- xvi. Recommendation: NSW Health should provide advice and assistance to Baryulgil community members on how best to access medical testing for asbestos-related diseases, where indicated, without incurring significant individual costs.**

16.14. Research into asbestos diseases in Aboriginal communities

There remains scant evidence of any research on the incidence of asbestos-related diseases in Aboriginal communities in NSW. Considering the amount of residual asbestos in these communities along with anecdotal evidence of deaths from asbestos diseases, up-to-date research needs to be conducted. That research should at a minimum seek to quantify the prevalence of asbestos-related diseases within these communities and could be conducted by organisations such as the Aboriginal Health and Medical Research Council.

- xvii. Recommendation: Separate funding should be provided to HACA to conduct research into asbestos-related diseases within Aboriginal communities in NSW.**

16.15. The EPA needs to take the lead

This report endorses the view expressed in the 2010 Ombudsman report that the EPA should have a role to play, especially in regard to contaminated land. Comparable environmental watchdogs have carriage of asbestos issues in other jurisdictions, such as the EPA in the USA and the environmental regulator in the UK. It is logical that the NSW EPA be the lead agency for all asbestos matters that do not relate to workplaces; this includes local council areas where the available resources cannot deal with significant asbestos issues, such as the James Hardie legacy sites.

Alternatively, given that SafeWork NSW has done a commendable job dealing with asbestos and coordinating responses even without the necessary statutory reach outside of workplaces, the proposed Asbestos Authority could be located within that agency.

- xviii. Recommendation: The Environment Protection Authority should be designated as the lead agency for all asbestos related matters with the exception of workplaces. Alternatively this role should be given to SafeWork NSW.**

16.16. Government response

This report has raised serious issues to do with the management of asbestos in NSW, and the potential adverse impact of current laws and regulatory responsibilities for the health and wellbeing of NSW residents.

- xix. Recommendation: The Premier advise the NSW Parliament and the NSW Ombudsman within six months of the date of this report of the actions taken or proposed by the Government in responding to the recommendations in the report.**

16.17. Making the report public

As this report is about an important matter of public interest, we recommend that the report be made public forthwith.

- xx. Recommendation: Pursuant to sections 31(2) and 31AA(2) of the Ombudsman Act 1974, this report should be made public forthwith.**



NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: (02) 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
NRS: 133 677
Facsimile: (02) 9283 2911
Email: nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au