

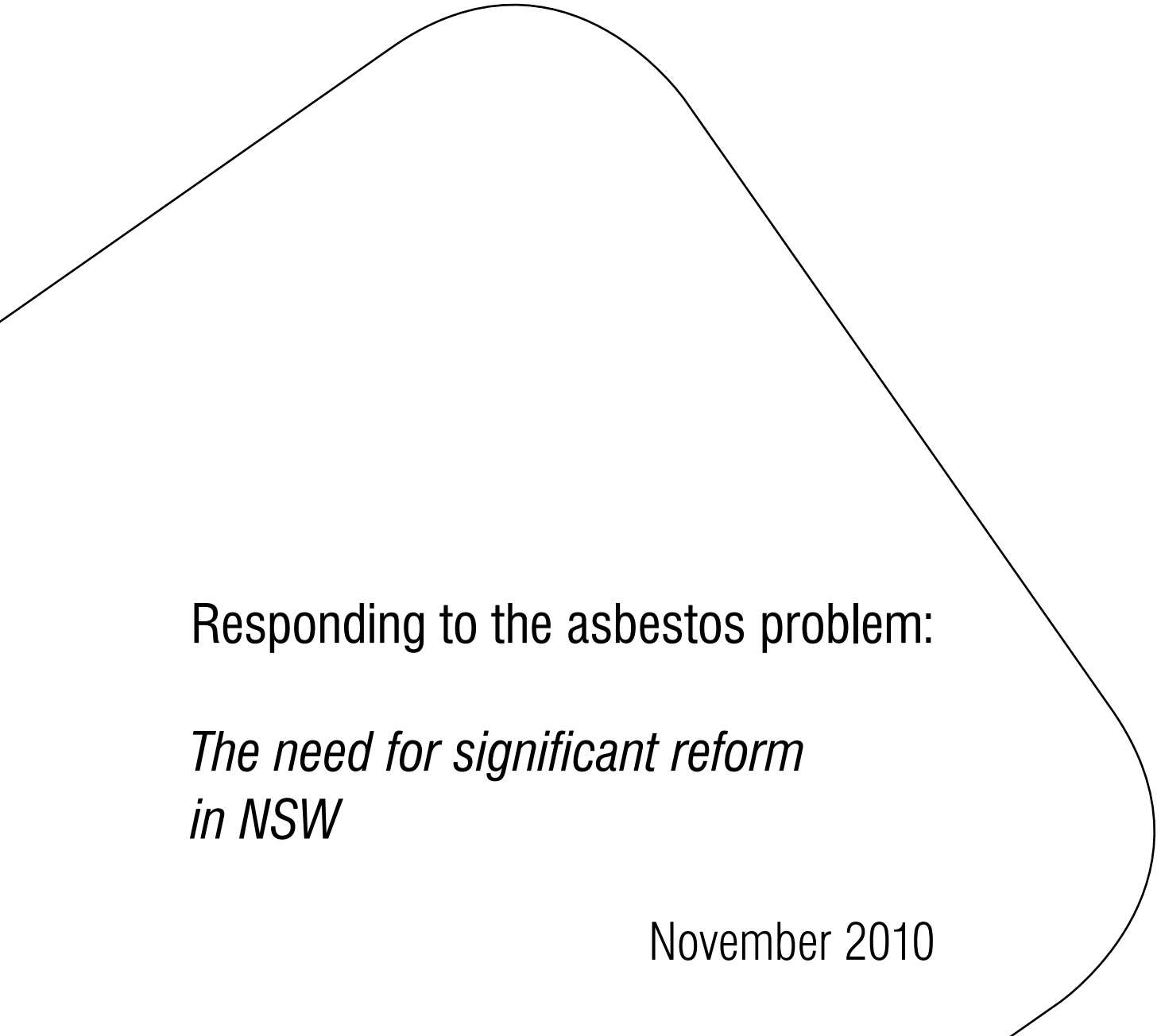


NSW Ombudsman

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Responding to the  
asbestos problem:  
*The need for significant  
reform in NSW*

November 2010



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*The need for significant reform  
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Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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NSW Ombudsman

November 2010

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Dear Madam President and Mr Speaker,

I submit a report pursuant to s.31 of the *Ombudsman Act, 1974*.

I draw your attention to the provisions of s.31AA of the *Ombudsman Act, 1974* in relation to the tabling of this report and request that you make it public forthwith.

Yours faithfully

Bruce Barbour  
**Ombudsman**



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# Executive summary

In NSW there is no single government agency responsible for coordinating the management and containment of asbestos, there is no state-wide government plan for dealing with asbestos, there are gaps in asbestos legislation and funding to deal with these issues is inadequate.

Australian Bureau of Statistics figures show that 397 people died in fatal road traffic accidents in NSW in 2008, with 1,464 deaths Australia wide.<sup>1</sup> As tragic as these figures are, the annual road toll is expected to be dwarfed by future cases of asbestos-related deaths. While 1,014 people died from mesothelioma in NSW during the five year period between 2002 and 2006,<sup>2</sup> it is estimated that by 2020 Australia will have 13,000 cases of mesothelioma, for which there is currently no known cure, and a further 40,000 cases of asbestos-related cancers.<sup>3</sup>

In the course of our investigations we heard from experts that even though, historically, it was the workers in asbestos industries who had contracted asbestos-related diseases, several additional waves are now occurring. Tradesmen, home renovators and innocent bystanders are now presenting with asbestos-related diseases and dying from mesothelioma. In some cases those deaths have resulted from minimal contact with asbestos which occurred years before the diagnosis. For example, a woman in South Australia developed mesothelioma in her early thirties from an exposure that occurred as a child while playing near bonded asbestos being worked on by her father.<sup>4</sup> There are many similar stories about people dying from non occupational exposure to asbestos in circumstances which were previously thought to be harmless.

## Case study investigations

For the past two years we have conducted three investigations into specific asbestos-related issues which we have used as case studies to inform our broader review of how the NSW government as a whole is responding to the asbestos problem.

In 2007 we investigated the circumstances surrounding the actions taken at a warehouse on the central coast which had been contaminated by asbestos fibres following a severe hail storm (our first case study). Management had sought the advice of an occupational hygienist, who failed to identify the presence of friable asbestos; the workers had then been directed by management to clean the warehouse with no regard for the potential to be exposed to asbestos.

We provided a report to the relevant minister and agency and made a number of recommendations relating to workplaces, occupational hygienists and policies and procedures.

The second case study concerns asbestos within the Aboriginal Community at Wallaga Lake. In 2009 we received complaints about the existence of widespread asbestos contamination that had been identified within the community in 2007, but no clean up at the site occurred until 2009, and only following intense media exposure. The Wallaga Lake incident highlighted the confusion that exists within local councils and the community about who is responsible for dealing with incidents and the lack of any sense of urgency to remove asbestos from sites. It also revealed a lack of understanding about the dangers and potential for exposure amongst the Wallaga Lake community and the community generally.

We wrote to the relevant agencies involved at Wallaga Lake and while we maintain some concerns about the delays in clearing the site of asbestos, we were pleased to note that an asbestos management plan has now been put in place to help the local community to address the issues on an ongoing basis.

The third case study concerns the Woods Reef mine (see chapter 7). This abandoned open cut asbestos mine located at Barraba could reasonably be described as an environmental disaster. The extent of the asbestos contamination at the site is extraordinary, yet very little remediation has occurred at the site since the mine closed in 1983. Friable chrysotile asbestos is scattered over vast areas of the 400 hectare site, untreated and with minimal security or protection in place. Despite a plethora of consultants' reports obtained by government showing there is a danger to the health of people inhaling asbestos fibres, very little has been done by successive governments and agencies to deal with this serious public health issue.

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1 Australian Bureau of Statistics, *Year Book Australia 2009–2010*, cat. no. 1301.0, ABS, Canberra.

2 Incidence and Mortality data from the NSW Central Cancer Registry.

3 Cited in the Prime Minister of Australia's Media Release for the opening of the Bernie Banton Research Centre, 21 January 2009.

4 *Amaca Pty Ltd v CSR Limited* [2008] NSWDDT 18.



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The fact that the asbestos contamination at the Woods Reef mine has been allowed to go virtually untreated since 1983 exemplifies the way asbestos issues have generally been perceived as low priority throughout NSW. Excessive delays, lack of funding, no coherent plan for remediation and an apathetic approach by government to what is a significant public health and safety issue have left contamination on a scale that is of serious concern.

## Addressing the asbestos problem

Dealing effectively with asbestos in NSW is not only necessary but it has the potential to save many lives. This can best be achieved by increasing public awareness and by implementing long-term regulatory and remediation measures designed to reduce the incidence of asbestos-related diseases and death.

Approaches to dealing with asbestos across the whole of government have to date been disjointed, ad hoc and confusing. Tens of thousands of fibro buildings constructed throughout the 20th century continue to deteriorate and be renovated or demolished, yet there are no laws preventing home owners from undertaking these works personally without first checking if there is asbestos present and, if it is, taking adequate safety precautions. Asbestos is illegally dumped on public and private land and community awareness of the dangers of asbestos is minimal.

In the course of our investigations we have obtained information from officials from all government agencies that have a role in dealing with asbestos issues and from industry groups. We have visited asbestos sites and spoken with members of the public, asbestos support groups, lawyers representing asbestos victims, and with union representatives. We have concluded that the systems for dealing with asbestos in NSW are ineffective.

The focus of our investigations have been to identify ways to improve the systems in place as opposed to making punitive findings against agencies and individuals. We have noted commendable efforts by certain officials within relevant agencies to come to grips with the issues surrounding asbestos, in particular the efforts by Ms Lisa Hunt, CEO WorkCover to negotiate consistent approaches with other agencies. It seems that efforts by agencies to address the key deficiencies have been hampered by a lack of central planning, fragmented responses to incidents and limiting legislation.

We have noted how NSW Health have historically interacted with other agencies at a technical level and have made continued calls for action in areas like the Woods Reef mine. We are also grateful for the assistance we have received from NSW Health during this investigation, in particular from Professor Wayne Smith, Director, Environmental Health Branch.

## Saving lives in the future

It is well known that there is a risk of contracting asbestos-related diseases from inhaling asbestos fibres, most significantly from airborne friable asbestos. The majority of asbestos in NSW consists of asbestos bonded with concrete in the form of house cladding and roofs. If damaged these forms of asbestos have the potential to be released into the environment. Hail, storm and fire damaged bonded asbestos can pose a high risk of asbestos exposure as friable asbestos may be released into the environment. Bonded asbestos that has been drilled, sawn or incorrectly removed, such as during home renovations or demolitions, can also pose a risk.

The only way to effectively address the issue of asbestos in NSW is through preventative measures. By their very nature, cancers such as mesothelioma cannot be detected until it is too late, therefore the primary consideration at all sites where asbestos is present, should be to safely remove it. If this is impractical, then in the short term, steps must be taken to protect people from exposure and educate them about the risks.

One way of achieving long-term eradication of the risk of asbestos from our environment is to implement a priority removal program, commencing with NSW Government buildings.

We acknowledge that the amount of asbestos remaining in NSW is immense; however the safe removal of asbestos is the only sure way of reducing the numbers of fatalities caused by asbestos-related diseases. The long-term removal of asbestos from buildings and remediation of sites contaminated by asbestos should be incorporated into a state-wide NSW asbestos plan as a priority.

This report details my concerns about public safety and the way asbestos is dealt with in NSW and makes a number of recommendations relating to systemic issues and reform.



Bruce Barbour  
**Ombudsman**

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## Key recommendations

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| 1. An Asbestos Coordination Authority (ACA) be established and adequately funded. <sup>5</sup>                     | 18 |
| 2. An Asbestos Act be introduced to facilitate effective measures to appropriately address asbestos issues in NSW. | 18 |
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<sup>5</sup> Some of the issues that should be addressed by the ACA include those matters set out in chapter 11 of this report.



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# Chapter 1.

## Asbestos in Australia

### 1.1. What is asbestos?

Asbestos is the generic term used for a number of silicate minerals with fibrous crystalline structures. For more than 4,500 years naturally occurring fibrous minerals have been used by humans for their flexibility, strength, chemical inertness and insulation qualities. The Romans used asbestos for its flame-retardant and insulation properties by weaving asbestos fibres into fabrics and the Ancient Egyptians also used asbestos to improve durability in their clothes.

The asbestos minerals belong to two distinct mineralogical groups:

- Serpentine, including chrysotile (white asbestos), and
- Amphibole, including amosite (brown asbestos) and crocidolite (blue asbestos), as well as a number of less known types such as tremolite, actinolite and anthophyllite.<sup>6</sup>

Under NSW Occupational Health and Safety legislation, material that contains asbestos is referred to as friable or bonded.

#### Bonded asbestos material

Bonded asbestos material is any material that contains asbestos in a bonded matrix. It may consist of asbestos mixed with Portland cement or various resins/binders, which cannot be crushed by hand when dry. Asbestos cement products and electrical meter boards in good condition are examples of bonded asbestos material.

#### Friable asbestos material

Friable asbestos material is any material that contains asbestos and is in the form of a powder, or can be crumbled, pulverized or reduced to powder by hand pressure when dry. Examples of friable asbestos include:

- asbestos cloth and rope
- millboard
- pipe lagging
- boiler lagging, and
- sprayed limpet.

Any asbestos cement products that have been subjected to weathering, or damaged by hail, fire or water blasting, are also considered to be friable asbestos.<sup>7</sup>

### 1.2. Mining of asbestos in Australia

Asbestos was mined in Australia for over 100 years and Australia was the world's highest user per capita of asbestos in the 1950's.<sup>8</sup> Between 1880 and 1889 approximately 47 tonnes of amphiboles were mined at Jones' Creek, near Gundagai, NSW, and between 1890 and 1899 about 35 tonnes of chrysotile was mined at Anderson's Creek, Tasmania. South Australia was the first State to mine crocidolite, at Robertstown in 1916.

Throughout the 20th century there was a gradual increase in asbestos production, with more chrysotile than amphiboles mined until 1939. With the commencement of mining at Wittenoom, Western Australia, in 1937, crocidolite dominated production, until final closure in 1966. New South Wales, the first State to mine asbestos, also produced the largest tonnages of chrysotile (until 1983) as well as smaller quantities of amphiboles (until 1949).

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6 Asbestos Diseases Research Institute, Asbestos Diseases Research Institute, Concord, viewed 2 August 2010, <http://www.adri.org.au/education.html>.

7 WorkCover NSW, *Working with Asbestos Guide 2008*.

8 Leigh, J, Driscoll, T, *Malignant Mesothelioma in Australia, 1945–2002*.

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With the closing of the crocidolite mine at Wittenoom in 1966, Australian asbestos production declined to a pre-1952 level. Exports declined from 1967. Imports of chrysotile also started to decline. The earliest records of asbestos imports date from 1929. The main sources of raw asbestos imports were Canada (chrysotile) and South Africa (crocidolite and amosite).

In NSW, the chrysotile mine at Baryulgil continued production until 1971 when the chrysotile deposits at Woods Reef near Barraba began to be exploited and exports of asbestos fibre expanded as production increased. This operation was open-cast with dry milling. At its height the Woods Reef mine employed some 400 workers.<sup>9</sup>

Australian production of asbestos fibre decreased in 1981 because of the drop in world demand for asbestos and the increased operating costs at the Woods Reef mine. This mine ceased production in 1983 when the dry milling plant could not meet dust control regulations.

### 1.3. Use of asbestos in Australia

Asbestos-containing materials were used extensively in Australian buildings and structures, plant and equipment and in ships, trains and motor vehicles during the 1950's, 1960's and 1970's, and some uses, including some friction materials and gaskets, were only discontinued on 31 December 2003.<sup>10</sup>

In Australia over 60% of all production and 90% of all consumption of asbestos fibre was by the asbestos cement manufacturing industry. From about 1940 to the late 1960's all three types of asbestos were used in this industry, crocidolite then being phased out. Amosite use in this industry continued until about 1983. Chrysotile was used until about 1987. Much of this industry output remains in service today in the form of fibro houses and water and sewerage piping. By 1954 Australia was number four in the world in gross consumption of asbestos cement products, after the United States of America, the United Kingdom and France. Australia ranked first on a per capita basis.

Between 1945 and 1954, 70,000 asbestos cement houses were built in the State of NSW alone (52% of all houses built). In Australia as a whole, until the 1960's, 25% of all new housing was clad in asbestos cement.<sup>11</sup>

Today there are tens of thousands of houses and industrial buildings in NSW that are constructed from materials containing asbestos.

There were also a number of sites within the Sydney metropolitan area which were known to contain asbestos waste left over from asbestos producing facilities operated by James Hardie Industries.

We have been advised by the Department of Environment, Climate Change and Water (DECCW) that they had obtained information from James Hardie related entities about where asbestos materials had been placed in the past. Forty seven sites were identified in the local government areas of Parramatta (29), Fairfield (2), Holroyd (5), Homebush (3), Wingecarribee (1), Liverpool (1) Auburn (3), Blacktown (2) and Baulkham Hills (1).<sup>12</sup>

The DECCW has taken action to investigate each of the sites and had provided advice to the relevant local councils concerning clean-up, capturing the sites on their property information systems and section 149 planning certificates under the *Environmental Planning and Assessment Act 1979*.

We also understand that it has been agreed that James Hardie will not be held responsible for asbestos remediation in NSW. It therefore follows that these sites containing asbestos can only be remediated at cost to the current owners or the NSW Government.

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9 Haigh, G, 2007, *Asbestos House*, Scribe, Melbourne, p.108.

10 *Code of Practice for the Safe Removal Of Asbestos* 2nd Edition [NOHSC:2002(2005)].

11 *Ibid.*

12 Department of Environment, Climate Change and Water response dated 15 March 2010.

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## Chapter 2.

# The effects of exposure to asbestos

*Every time you walk into an office building, a home, a factory; every time you put your foot on the brake, ride in a train, see a bulldozer at work. Every time you see or do any of those things, the chances are that a product from James Hardie (Asbestos) Group of Companies has a part in it.*

John Reid, Chairman of James Hardie Asbestos Ltd. In *Hardie Ferodo 1000; A James Hardie Group and Activity Report (1978)*<sup>13</sup>

Asbestos is in houses, schools, hospitals, factories and commercial buildings. Asbestos has been used as a reinforcing agent in cement sheeting for walls and roofs; in cement building products, such as tiles, cold water tanks, pipes and gutters; and in insulating board used, among other things, as wall partitions, fire doors, ceiling tiles and electrical switchboards. It was also mixed with cement to make lighter, stronger commercial and domestic building materials such as flat and corrugated sheets for cladding, roofing and fencing, moulded products such as flue pipes, guttering and downpipes, and high and low-pressure pipes for water distribution. Asbestos cement tiles have been used as flooring in larger commercial buildings. The manufacture of asbestos cement sheeting and high-pressure piping ceased in the late 1980's and houses built since then are unlikely to contain asbestos.

Bonded asbestos materials in Australia typically contain 10–15 per cent asbestos by weight, bound in a cement matrix. Chrysotile is the most commonly used form of asbestos, although asbestos cement products may also contain a small quantity of amosite and/or crocidolite. There may be 3–5 per cent asbestos in fibrocement products manufactured during the phase-out of asbestos in the late 1980's. The release of fibres from materials such as asbestos cement used for construction is the main potential source of indoor exposure to fibres in domestic premises.<sup>14</sup>

It is also currently not possible to identify how many buildings in NSW contain asbestos. We noted that local councils do not hold data showing which buildings are constructed of asbestos containing materials nor does any other government agency.

It is generally accepted that asbestos poses a very significant health hazard in Australia. Exposure to asbestos fibres is known to cause mesothelioma, asbestosis and lung cancer. While asbestos is relatively safe in a bonded form, asbestos poses a risk to health by inhalation whenever asbestos fibres become airborne and people are exposed to these fibres. Non-friable asbestos containing materials that has been subjected to extensive weathering or deterioration also has a higher potential to release asbestos fibres into the air.<sup>15</sup>

Current scientific literature indicates there is no safe exposure level for asbestos fibres.<sup>16</sup>

Malignant mesothelioma is a cancer of the outer covering of the lung (the pleura) or the abdominal cavity (the peritoneum). It is usually fatal. Mesothelioma is caused by the inhalation of needle-like asbestos fibres deep into the lungs where they can damage mesothelial cells, potentially resulting in cancer.

The latency period is generally between 35 and 40 years, but it may be longer, and the disease is very difficult to detect prior to the onset of illness. Survival rates for mesothelioma in NSW are particularly poor, with only 40% surviving for one year after diagnosis and only 4.5% surviving for five years.<sup>17</sup>

Mesothelioma was once rare, but its incidence is increasing throughout the industrial world as a result of past exposures to asbestos. Australia has the highest reported incidence of mesothelioma in the world.<sup>18</sup>

Lung cancer has been shown to be caused by all types of asbestos. The average latency period of the disease, from the first exposure to asbestos, ranges from 20 to 30 years. Lung cancer symptoms are rarely felt until the disease has developed to an advanced stage.

Asbestosis is a form of lung disease (pneumoconiosis) directly caused by inhaling asbestos fibres, causing a scarring (fibrosis) of the lung tissue which decreases the ability of the lungs to transfer oxygen to the blood. The latency period of asbestosis is generally between 15 and 25 years.<sup>19</sup>

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13 McCulloch J and Tweedale G, 2008, *Defending the Indefensible*, Oxford University Press, Oxford, p.17.

14 *Management of Asbestos in the Non-Occupational Environment*, Department of Health and Ageing (Cth), 2005.

15 *Code of Practice for the Management and Control of Asbestos in Workplaces* [NOHSC: 2018 (2005)].

16 *Elimination of Asbestos-related Disease*. Geneva, World Health Organisation: 2006.

17 Creighton N, Baker D. *Mesothelioma in New South Wales*. Sydney: Cancer Institute NSW, September 2010, p.30.

18 McCulloch J and Tweedale G, 2008, *Defending the Indefensible*, Oxford University Press, Oxford, p.10.

19 *Code of Practice for the Management and Control of Asbestos in Workplaces* [NOHSC: 2018 (2005)].

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Given the vast numbers of buildings in NSW that are either constructed of bonded asbestos or which contain asbestos products, we sought to establish whether bonded asbestos materials posed a health risk and if so how that was manifested.

At a hearing we conducted, we obtained evidence from Dr James Leigh, a consultant occupational physician who was head of the Epidemiology Unit at the National Occupational Health and Safety Commission from 1998 to 2000. We asked Dr Leigh whether or not there was a safe level of exposure to asbestos, in particular a level above which asbestos-related diseases such as mesothelioma may occur. He answered:

*Mesothelioma have been reported in exposures down to one day, quite casual exposures of days or weeks. So the current consensus is that there is no threshold for mesothelioma causation.*

Mesothelioma has also been diagnosed where there has been no other exposure apart from during renovations or as a bystander to demolitions. Dr Leigh confirmed the potential for broken, damaged or cut bonded asbestos to result in mesothelioma. He stated:

*I'm aware in the Australian Mesothelioma Register in the cases from 1 January of 1986 to 31 December 2001 which was the period that the register operated in its fullest form, there was 71 cases where the only exposure was listed as asbestos dwellings, fences built [or] renovated, in other words people that just did domestic work ... using asbestos cement sheeting like the building or renovator. Some of those exposures, I know from giving evidence in Court cases, were quite low, ... over just a few days or weeks exposed to cutting asbestos or in some cases exposed to asbestos waste from a building project ... or playing on broken asbestos as a child. There's certainly cases that I'm aware of from exposure due to broken asbestos cement products over a fairly short period.<sup>20</sup>*

While the latency period for mesothelioma may be several decades long, this disease causes a torturous and painful death. The pain and suffering associated with mesothelioma was described by Justice O'Meally of the Dust Diseases Tribunal, where he said:

*I have been at the bedside of many men and women dying of mesothelioma. I have seen many people present in court, at their homes, at hospitals and at hospices dying of mesothelioma. It is a dreadful and a devastating disease, accompanied by pain which is uncontrollable. Those who suffer it reach a stage where it is necessary to fight for every breath, with every breath accompanied by pain so dreadful that the only way to avoid it is not to breathe. The choice between breathing and not breathing is no choice at all. Constant and exquisite pain is all that one may expect in the struggle to exist. My own experience is that in 80 to 85 per cent of cases, plaintiffs with mesothelioma reach a stage where they suffer pain which is uncontrollable.<sup>21</sup>*

Additionally the NSW fire brigade advises that asbestos roofs and walls have a tendency to explode when subjected to intense fires. The downwind effects of such events remains unknown as no testing has been done to measure asbestos fibre concentrations emitted in such circumstances.

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<sup>20</sup> Provided in evidence before a NSW Ombudsman hearing on 30 September 2008.

<sup>21</sup> *Putt v James Hardie & Co Pty Ltd & Another* [1998] NSWDDT 1.

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## Chapter 3.

# Community understanding of the dangers of asbestos

*We did not know it was dangerous stuff going down into your lungs. It was just rubbish. The same as in a dust storm; you put a handkerchief up to your face; you do not think the dust is poison.*

Former Baryulgil asbestos mine worker<sup>22</sup>

From our research and enquiries it is clear that the public has little or no knowledge about the dangers of asbestos and the types of measures required to handle it safely. This was evidenced during our enquiries into the Wallaga Lake issues where it was clear that the community was poorly informed about asbestos. This extended to individual community members who had been employed demolishing fibro houses in the 1990's, who seemed to have little understanding of the danger they may have been exposed to.

Although members of the community had been provided with a copy of a consultant's report which detailed the findings of asbestos testing carried out at the site and advised that the site was safe; the report was complex, full of technical jargon and difficult to understand. Accordingly the report provided little real assistance or practical information for the community.

Many Aboriginal communities in NSW contain fibro houses and buildings that are, in some cases, more than 50 years old. While we have not focused particularly on Aboriginal communities as part of this investigation, we have identified that there is clearly a need for education and public awareness to be provided for these communities in particular, given the heightened risk levels.

More generally, there are several websites containing advice on how to deal with asbestos, such as WorkCover and the Think Asbestos websites, but that information is of little value, or no use where the people do not read the information, do not know how to find it or have no access to computers or the internet.

The Cancer Council of Western Australia conducted a survey of around 2,800 people living in WA. 77% of male and 71% of female respondents stated they had been exposed to asbestos dust or fibres. 11% of males and 10% of females said they had lived near where asbestos was processed or used and a total of 65% of both sexes said that they had been exposed to asbestos in the home.

Of those interviewed only 40% stated they had taken precautions to protect themselves from asbestos in the workplace, of those who lived near where asbestos was processed or used only 10% had taken precautions and only 11% stated they had taken precautions when they had lived near asbestos renovations/demolitions.<sup>23</sup>

We are concerned by such figures, with about three in four people knowing they have been exposed to some form of asbestos during their lifetime but only about 10% of those exposed to asbestos outside workplaces having taken any precautions to protect themselves.

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<sup>22</sup> Report of the House of Representatives Standing Committee on Aboriginal Affairs, *The Effects of Asbestos Mining on the Baryulgil Community*, 1984, p.55.

<sup>23</sup> Cited in a presentation to the National Asbestos Summit, Sydney, 29 June 2010, by Slevin, T, for the National Research Centre for Asbestos Disease (UWA, Curtin University, Murdoch University).



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# Chapter 4.

## The current regulatory response to asbestos issues

### 4.1. Coordinating asbestos issues

There is no single government agency in NSW which has the role of coordinating asbestos issues throughout the state. The primary agencies are the Department of Environment, Climate Change and Water (DECCW), which deals with asbestos in various environmental settings and WorkCover, 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 the State Environmental Planning Policies. These diverse arrangements contribute to confusion amongst members of the public, councils and industry alike.

The manufacture and use of products containing chrysotile asbestos has been prohibited in Australia since 2003 and products containing amphibole variety asbestos have been prohibited since 1984. However, there remains a state-wide legacy of asbestos products in both occupational and non-occupational settings that have not been subjected to an integrated and coordinated regulatory response by government. Some aspects of the regulatory response are thorough, particularly in the occupational environment; however there are significant gaps in other areas. The environmental hazards presented by abandoned asbestos works such as the Woods Reef mine or the damage to or removal of asbestos building products by owner-builders are subject to either patchy or little or no effective regulation.

### 4.2. The workplace: asbestos as an occupational hazard

In NSW the management of asbestos risk in the workplace is the primary responsibility of WorkCover. This area of risk is closely regulated by the *Occupational Health and Safety Act 2000* and, in particular, the Occupational Health and Safety Regulation 2001 (OH&S regulation) imposes strict obligations on employers to identify and manage asbestos risks in the workplace. The OH&S regulation additionally provides a permit/licensing scheme for persons who operate a business involving asbestos removal. However, a person who privately carries out bonded asbestos removal work as an owner-builder is not regulated by the licensing or permit schemes under the OH&S regulation.

This is because these regulatory schemes primarily have application to people who carry on the business of licenced work (clause 318(1) of the OH&S regulation) – that is, a commercial operator. Whilst a commercial operator is required to have a permit for all friable asbestos removal work (of any amount) they are not required to have a licence where the removal work involves less than 10 square metres of bonded asbestos. Permits and licences are matters for which WorkCover is the responsible authority.

By way of contrast, there would seem to be no legislation barring a home owner from privately carrying out removal work involving any amount of bonded asbestos. It also appears that a home owner is not prevented from privately removing friable asbestos. Whilst part 11.2 of chapter 11 of the OH&S regulation prohibits the carrying out of friable asbestos removal work other than by a person who holds a permit and a licence under chapter 10 of the OH&S regulation. It would appear that these provisions apply to workplaces only.

Clearly ordinary citizens cannot be expected to know about the OH&S regulation, or the difference between bonded and friable asbestos, or the requirements for licencing. We have seen from our enquiries how local councils have experienced difficulty in applying the relevant legislation and in understanding who is responsible for regulatory action. This confusion was highlighted by comments made by one council manager who said, *'There is no clear legislative delineation of responsibility in relation to the governance of asbestos management. This leads working arrangements between agencies to be guided by the knowledge that the individual worker has.'* If it is confusing for councils and they get it wrong, clearly it must be difficult for members of the public to be across the issues and handle asbestos safely.

The transportation and disposal of bonded asbestos is regulated by clause 42 of the Protection of the Environment Operations (Waste) Regulation 2005 and enforced by DECCW. Additionally, DECCW may issue Environment Protection Notices (prevention or clean-up) under chapter 4 of the *Protection of the Environment Operations Act (POEO) 1997*. For instance, where an owner-builder is carrying out bonded asbestos removal work in such a way as to cause a pollution incident (the term is defined in the Act) then DECCW may issue notices to the occupier to prevent the further carrying on of the work in this manner (s.96 of the Act) and/or to clean up the polluted site (s.91 of the Act).

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In particular, clause 42 of the Protection of the Environment Operations (Waste) Regulation has general application to disposal of all asbestos products, whether removed by a commercial operator or an owner-builder. The clause sets out in detail the manner in which asbestos waste is to be transported and disposed of at an authorised landfill site.

Many local councils require, as a condition of any development approval that might involve the carrying out of bonded asbestos removal work, compliance with the relevant codes of asbestos removal. It should be noted, though, that not every development requires council approval. In this regard, the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, which came into force in February 2009, provides for a complying development to be approved by a private certifier without a development application going before council. The Code, which is intended to simplify the approval process for the construction of standard types of housing, contains only standard conditions for demolition. In contrast, a development application approved by a council can be subject to conditions concerning the safe removal of asbestos products during demolition.

In summary, there are gaps in the legislation and not everyone is prevented from removing bonded and friable asbestos in an unsafe way. We consider this to be a significant public safety issue that requires legislative change making it illegal for anyone to remove any amount of friable asbestos and more than 10m<sup>2</sup> of bonded asbestos without a permit. This should apply regardless of the setting i.e. residential, workplace, public, private or Crown land.

### **4.3. The environment: asbestos as a pollutant and public health risk**

The management of asbestos risk in the environment is the primary responsibility of DECCW under the POEO Act, although local councils also have powers as a regulatory authority under that Act, particularly in relation to the illegal dumping of asbestos contaminated waste.

In relation to the abandoned asbestos mine site at Woods Reef, there are clear regulatory gaps. Provided that work is being carried out at a mine site, a mining company can be required to rehabilitate and remediate the site under the *Mining Act 1992*, which is administered by the Department of Industry and Infrastructure (DII). However, Woods Reef is no longer an operating mine site and DII told us:

*...for abandoned mine sites where no work is being carried out, DII does not have any [regulatory] responsibility.*

Whilst the Woods Reef mine site is eligible for rehabilitation funding under the DII's Derelict Mines Program, it is not clear to us why the site might not also be dealt with as '*contaminated land*' for the purposes of the *Contaminated Land Management Act 1997*. This Act is administered by DECCW and has as its object the remediation of land identified as significantly contaminated.

Where asbestos is a contaminated waste product that requires storage or treatment or presents as a public health risk, the *Contaminated Land Management Act and the Public Health Act 1991* (administered by NSW Health) seem to have application. In particular, Part 2 of the Public Health Act provides powers to the Minister for Health to take action in relation to what would seem to be the type of risk to public health posed by asbestos exposure. However, the view of NSW Health is that the focus of the Public Health Act relates to controlling pandemic situations:

*... in circumstances where there are no other readily available means to deal with the imminent risk to public health [and] the powers in Part 2 of the Public Health Act are not readily applicable to situations in which there is asbestos contamination on land ... given that such contamination is unlikely to pose an immediate and acute risk to public health.*

This lack of certainty and responsibility would seem to leave a site such as Woods Reef, although located on Crown land, in a regulatory limbo.

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# Chapter 5.

## Involvement of local councils

### 5.1. Responsibilities of local councils

Local councils are usually the first point of contact for members of the public seeking information on asbestos, either by phone or via the internet. When we looked at how councils deal with asbestos issues and how they provide information we saw little evidence to suggest the majority have sufficient understanding and appreciation of their role in relation to regulation of asbestos. Indeed, what we saw was very disturbing as it demonstrated an alarming lack of knowledge and interest on the part of many councils.

A number of councils acknowledged confusion in relation to identifying the responsible agency for asbestos incidents and difficulty in clearly distinguishing council responsibilities from other key agencies in particular WorkCover and DECCW. From our enquiries it is clear that such confusion is common and that councils have a poor grasp of the roles and responsibilities of the relevant regulatory agencies, including their own role. One council stated that '*... there is considerable confusion in the community about which agency deals with asbestos incidents*'. Another council stated that '*... there is no clear delineation of responsibility in relation to the governance of asbestos management. This leads working arrangements between agencies to be guided by the knowledge that the individual worker has*'. Only one council indicated a working relationship, formalised in a '*statement of alliance*', with another agency – in this case WorkCover.

Confusion in regard to the legislative framework for asbestos has significant implications for the capacity of councils to effectively fulfil their regulatory responsibilities in this area. As an authority under the Protection of the Environment Operations Act and Environmental Planning and Assessment Act for asbestos incidents on public land which are not the responsibility of DECCW, councils have responsibilities for a wide range of asbestos-related activities. Those include building construction and demolition, activities in relation to residential properties, commercial sites and the illegal dumping of asbestos.

In their formal response to this investigation one council stated that '*Council does not see it as its role or responsibility to facilitate clean up and removal of this material*', while another suggested that the role of council in ensuring that correct procedures were followed in regard to asbestos was minor, '*... as a general rule the owners of properties are well educated and they know they have to do this*'.

Local councils also have important responsibilities for ensuring that the public are adequately informed about asbestos-related matters, including the provision of information relating to the dangers of asbestos, health and safety standards, licensing, certifying and legislative requirements, and reference to the various asbestos-related codes of practices and guidelines. This function is important in regard to the range of unregulated activities involving asbestos, from home handyman renovations to the illegal removal and disposal of asbestos, which constitute a significant risk to public health and safety. Many of these activities occur due to a lack of public awareness in regard to the presence of asbestos in domestic dwellings and the dangers of exposure to asbestos.

Overall we have found that asbestos is being dealt with in home renovations and on development and demolition sites without proper oversight by councils or any other regulatory agency.

### 5.2. Council websites

As part of our investigation, the websites of all the 152 councils across NSW were reviewed in order to assess the extent to which they were providing asbestos-related information to their local community.

We were concerned to see that there was no consistency in the information that was provided to the public. We observed that many of the websites contained:

- advice to members of the public that they can remove asbestos with no stipulation that there is in fact a legal requirement for a licenced person to remove bonded or friable asbestos in specified circumstances
- out of date information stating it is acceptable to remove up to 200m<sup>2</sup> of bonded asbestos without a licence
- no information detailing the dangers of friable or damaged bonded asbestos
- little or no advice about mandatory licencing requirements for the removal of asbestos
- no information concerning demolition work and the requirement to obtain approvals from WorkCover NSW and council

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- no information showing how compliance and enforcement action can or will be taken against those who fail to deal with asbestos appropriately, and
  - no council policy for dealing with asbestos.

Our review of council websites found that 53% made no reference at all to asbestos. Of the 47% that contained some reference to asbestos issues, in a significant proportion of cases this consisted of little more than a direction to visit the websites of other authorities. Only 34% provided any policy information in regard to asbestos and only 22% provided correct advice concerning asbestos removal licencing requirements.

We also found that many council websites incorrectly advised people to contact WorkCover for information about asbestos issues that were not workplace related. This indicated to us that there is widespread misunderstanding of councils' jurisdiction and responsibilities.

We wrote to all councils suggesting they conduct reviews of their websites to ensure the information they were providing complied with relevant legislation and asbestos-related information including:

- councils roles and responsibilities in relation to asbestos
- licencing requirements for asbestos removals
- local council requirements for demolitions and renovations of buildings containing asbestos
- council regulatory measures in place to ensure compliance when demolitions and development are carried out, and
- links to relevant government websites containing up to date information on dealing with asbestos.

The majority of councils responded positively and amended their websites and policies accordingly. Disappointingly, some still held the view that asbestos was not their responsibility but that of DECCW or WorkCover.

### **5.3. Holroyd Council**

In the course of our enquiries we have identified several local councils who have excellent policies, practices and procedures in place for dealing with asbestos. We have been particularly impressed with the way Holroyd Council has introduced comprehensive asbestos policies. In addition we noted how Holroyd have implemented public awareness information sessions and have lobbied for improvements in the way asbestos is dealt with.

Holroyd Council has also provided input to the Asbestos Co-regulators Working Group (see chapter 11) as an invited party. This has provided the working group with a much needed local council perspective.

# Chapter 6.

## Woods Reef abandoned mine

### 6.1. Asbestos at the mine

Asbestos was mined in NSW from the 1890's until 1983 when the only remaining asbestos mine at Woods Reef near Barraba was closed down. The Woods Reef mine exemplifies the serious challenges facing NSW in relation to the management of asbestos, including a lack of responsibility for the site and the scale of the problem.

The Woods Reef mine site is situated approximately 20 km north east of the Barraba township. Mining has occurred at Woods Reef since asbestos was discovered in the region of the Peel Fault system in the early 1900's. The large scale mining operations were conducted by the Chrysotile Mining Corporation of Australia between 1972 and 1983. During the period the mine was in operation around 500,000 tonnes of chrysotile asbestos was produced.<sup>24</sup> At its height the Woods Reef mine employed some 400 workers.<sup>25</sup> The entire mining area, including tailings and over burden stockpiles covers approximately 400 hectares.<sup>26</sup>

The Woods Reef mine is the only known asbestos mine site in NSW which has yet to be remediated. With the failure of the mine in 1983, the then owners abandoned the site and it later became part of the Derelict Mines Program (DMP) administered by the Department of Industry and Investment (DII). While the DII manages the site under the DMP, as we have previously stated there is no government agency that has a legislative responsibility for the site.

The Woods Reef site includes an abandoned eight story building where the processing of asbestos occurred when the site was operating (see Photo 1). The building is in a severe state of disrepair, is deteriorating rapidly and is heavily contaminated with 100% friable asbestos fibres.



Photo 1. Abandoned mill house.

<sup>24</sup> Department of Industry and Investment submission dated 2 August 2010.

<sup>25</sup> Haigh G, 2007, *Asbestos House*, Scribe, Melbourne, p.108.

<sup>26</sup> *Investigation of Environmental, Council and OH&S Requirements for Disposal of Asbestos Waste-Woods Reef Mine, Barraba, NSW*, Parsons Brinckerhoff, February 2006, p.3.

There are four mining pits at the site which remain open and unfenced and contain water. The largest of those pits is approximately 500m wide, 1km long and 150m deep to the surface of the water.

To the south of the mill house is a mound of asbestos tailings reaching a height of some 75m which is said to contain approximately 24 million tonnes of fine tailings (see photo 2). There are three separate waste rock dumps located around the open pits. Together these dumps contain 75 million tonnes of rock.<sup>27</sup>



*Photo 2. Asbestos tailings mound. Crow Mountain Road can be seen in the foreground.*

An unsealed road (Crow Mountain Road) divides the rock tailings, the mill house and the asbestos tailings mound. The public has access to this road and it is used regularly by several neighbouring properties.

While the mine site has been fenced off to a certain degree, the site can be entered from a number of other points which are not fenced. It should also be noted that the asbestos tailing mounds are only partially fenced and access can be gained by entering from neighbouring private properties.

Assessments of the environmental issues at the Woods Reef site began as far back as 1985. Since that time there have been numerous studies, reviews and proposals provided to government to address the environmental issues. To date there has been minimal remediation work at the site, with the exception of the following:

- In 1998/99 \$500,000 was spent on fencing, air monitoring testing, sediment/erosion controls, detailed costings and revegetation trials.
- In 2004 \$200,000 was expended on sediment and erosion control works.

In 1997 a consultancy firm undertook a risk assessment of the Woods Reef site. They assessed the risks associated with the inhalation of asbestos as generally low – low for residents of Barraba and medium for residents near the mine or downstream watercourses and for regular users of Crow Mountain Road. This assessment was undertaken at a time when asbestos products were still widely used in Australia and before all forms of asbestos including chrysotile were finally banned in December 2003. Even then (1997) it was deemed that the asbestos was a risk to the public and the environment.

<sup>27</sup> Parsons Brinckerhoff report titled *Investigation of Environmental, Council and OH&S Requirements for Disposal of Asbestos Waste-Woods Reef Mine, Barraba, NSW* dated February 2006, p.3.

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While we acknowledge that such a large scale clean up may prove difficult and costly, the community should be concerned about the failure on the part of relevant agencies and successive governments to take effective action since the mine closed in 1983. In the short term the mine site must be properly quarantined and secured to prevent public access, a plan for remediation developed and decisions made concerning the timing of remediation works.

The DMP has responsibility for in excess of 500 derelict sites within NSW. Funding for the entire program is currently set at \$1.9 million per annum. Clearly this is inadequate to carry out remediation at Woods Reef on the scale necessary, let alone any other sites.

In 2005 the consultancy firm Parsons Brinkerhoff was engaged by the then Department of Mineral Resources to prepare a tender specification for the demolition of the mill building and to review methods, permits and licences required for the disposal of the asbestos waste products (building materials and raw fibres) on site. They made a number of recommendations which included the removal of the buildings and processed asbestos left on site.<sup>28</sup>

In 2009 the DII submitted a proposal to government for funding to remove the buildings and processed asbestos. That proposal amounted to \$5.5 million to carry out the critical removal of buildings and friable asbestos waste. Funding was not approved in the 2010–2011 budget.

We note that most of the studies into the mine conducted by or on behalf of government have focused on accepting the risk of people becoming exposed to asbestos on the basis that it was deemed a low risk.<sup>29</sup> The acceptance of risk on behalf of workers and members of the public, where there is no safe exposure level, without taking action to prevent exposures is of serious concern.

## 6.2. Local community awareness of the problem

When one of my officers inspected the Woods Reef mine site he spoke with some members of the Barraba community. He found there was generally a lack of awareness about the seriousness of asbestos exposures and indeed one local voiced the opinion that:

*It's a shame to see such a good product going to waste.*

He met with a person who worked at the site in the late 1970's and admitted to entering the site regularly and taking tourists there as it was considered a local attraction. We remain concerned about how unimpeded access to the site is being permitted, potentially exposing members of the local community and outsiders to asbestos.

During our investigation, we noticed that the Area Health Service at Barraba had the mine listed on their website as a local attraction stating:

*The Woods Reef asbestos mine is closed but can be viewed from the road.*

After we voiced our concerns to the Department of Health, that website entry was removed.

We were gravely concerned to learn that the mine site has been treated as a tourist attraction by members of the local community and many of them appear to be ill informed about the real dangers of exposure to asbestos. This general lack of understanding in the Barraba community needs to be addressed as a priority through a properly structured public awareness campaign.

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<sup>28</sup> Parsons Brinkerhoff 2006, *Investigation of Environmental and OH&S Requirements for Disposal of Asbestos Waste Woods Reef Mine Barraba NSW*.

<sup>29</sup> *Woods Reef Mine Hazard and Risk Assessment-Barraba, New South Wales*, Dames and Moore 1997.

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# Chapter 7.

## The asbestos industry in NSW

### 7.1. Licencing of asbestos removalists

Asbestos removalists are licenced through WorkCover in accordance with the requirements of the *Occupational Health and Safety Act 2000*. There are two types of asbestos specific licences which are designated as ASA and ASB licences:

- ASA licences the operator to carry out work with friable and bonded asbestos.
- ASB licences the operator to carry out work with bonded asbestos only.

According to WorkCover figures there are some 106 ASA licences and 1230 ASB licences current in NSW.<sup>30</sup>

### 7.2. Training required to obtain an asbestos removal licence

The OH&S regulation requires a licence for the removal of bonded or friable asbestos by a commercial operator, with some exceptions. Applicants for licences must complete a training course recognised by WorkCover to obtain a licence.

The bonded asbestos courses are delivered by organisations such as TAFE, Master Builders Association, Housing Industry Association, Local Government Training Institute and the Asbestos Removal Contractors Association.

Friable asbestos training courses are only conducted by Miller TAFE in NSW. The course is of two days duration. The course covers both bonded and friable removal work, including conducting risk assessments, preparing safe work statements and all aspects of asbestos encapsulation, safe removal, setting up of decontamination units, ongoing monitoring and clearance checking. The course is targeted at workers involved in the removal of friable asbestos<sup>31</sup>.

### 7.3. Occupational hygienists

Probably the most crucial members of the asbestos industry in NSW are occupational hygienists. It is their role to attend sites, conduct testing and provide clearances declaring a site is safe and free from contaminants such as asbestos. There are no regulatory requirements or oversight of whether they are adequately qualified and experienced to carry out these tasks. Asbestos removalists, developers, government agencies and individuals often rely on occupational hygienists' reports to ensure asbestos is dealt with appropriately.

While WorkCover recommends the services of hygienists accredited by the Australian Institute of Occupational Hygienists (AIOH), there is no legislation making this mandatory. Given the importance of this work, it seems extraordinary that any person can claim to be an occupational hygienist and engage in assessment and testing at asbestos sites without having any formal qualifications or certification.

AIOH holds concerns for unqualified people acting as hygienists and the possible consequences:

*A major concern of the AIOH is that there are many individuals claiming to be occupational hygienists, with no formal background in the area. It is not uncommon to see consulting companies offering services in occupational hygiene, despite having no known expertise as occupational hygienists. The consequence of unqualified, untrained and uninformed personnel advising employers on the management of health hazards in the workplace should be the cause of significant concern to all parties engaged in OH&S legislation.*<sup>32</sup>

AIOH recommended that consideration be given to the recognition of professionally qualified OH&S practitioners to ensure employers and employees are not subjected to unethical, inappropriate or incorrect advice.<sup>33</sup>

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<sup>30</sup> Figures provided by WorkCover and correct as at 31 August 2010.

<sup>31</sup> WorkCover submission dated 15 March 2010.

<sup>32</sup> Australian Institute of Occupational Hygienists submission to the National Review into Model OHS Laws dated 10 July 2008.

<sup>33</sup> Ibid.



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We have previously recommended to WorkCover that hygienists be licenced and regulated by WorkCover and that they should be required to hold qualifications laid down by the AIOH for membership. WorkCover has advised they have taken this recommendation to the Safework Australia forums for inclusion in the national harmonisation of occupational health and safety laws, which is a federal government initiative. Whether or not the other states and territories agree to licencing and regulating hygienists, we believe introducing such a scheme in NSW will improve the handling of asbestos and has the potential to save lives by ensuring hygienists are properly qualified and experienced in dealing with asbestos sites.

While we understand the difficulties in training and qualifying occupational hygienists to the required standards, their role at asbestos sites is pivotal in protecting workers and the public from exposure. Effective training, licencing and monitoring would at least provide standards for the industry to abide by. The current situation where any person can engage in work with asbestos as an occupational hygienist without qualifications or regulation is of serious concern, regardless of whether most other jurisdictions in Australia operate the same way.

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# Chapter 8.

## Management of asbestos in other states

*To eliminate deadly asbestos-related disease in Australia we must decrease and eventually eliminate all exposures to asbestos. To achieve that, governments and the community generally must adopt programs to safely and systematically remove Asbestos Containing Materials (ACMs) from the built environment.<sup>34</sup>*

### 8.1. Comparison with other states/jurisdictions

All other states and territories of Australia have some form of licencing controls relating to asbestos removalists. However as in NSW, there is little or no regulation for occupational hygienists or *competent persons* who are responsible for testing on sites and deeming them free from contaminants.

While there are some significant variations in the way asbestos is dealt with throughout Australia, we noted that generally, with the exception of Tasmania, the Australian Capital Territory (ACT) and South Australia, it appears there are no plans to address the issues on a state-wide basis.

#### Tasmania

Tasmania recently introduced several changes to how asbestos is dealt within that state, by setting up a government asbestos unit and introducing changes relating to asbestos removal in particular.

In the 2010-11 Tasmanian budget, the government announced the establishment of an Asbestos Unit, which will initially investigate the registration and prioritised removal of asbestos in Tasmania.<sup>35</sup>

#### ACT

In 2004 the ACT Government conducted extensive surveys and research into asbestos in private residences and non residential buildings in the ACT and developed a system of regulating the asbestos industry which exceeded all other Australian jurisdictions.

They also introduced significant changes to asbestos laws. Of interest was the ACT approach to licencing of people to inspect sites containing asbestos.<sup>36</sup> The ACT Government identified the need to licence 'asbestos assessors' and require assessors to undergo training and have mandatory qualifications.

The ACT legislation also requires property vendors to provide an asbestos certificate or asbestos advice to purchasers as part of the sale process.

The ACT model is one that may be suitable for NSW, especially as it relates to licencing of assessors and vendor disclosure. We accept that the ACT is a great deal smaller than NSW and the imposition of controls on hygienists would have a significant impact. Nonetheless we believe the system has potential to be applied in NSW.

#### South Australia (SA)

In 2008 the SA Government released a plan titled the South Australian Asbestos Safety Action Plan. In his foreword to that plan the SA Premier said:

*The South Australian Asbestos Safety Action Plan outlines the State Government's commitment to reducing death and illness resulting from asbestos-related diseases.<sup>37</sup>*

The plan has been coordinated and led by SafeWork SA, and developed in partnership with key government agencies, local government authorities, industry representatives, unions, the Asbestos Advisory Committee, the Asbestos Victims Association and Asbestos Diseases Society SA.

The SA plan is an excellent initiative and we note that it contains processes for identifying actions and responsibilities at various levels and, importantly, is signed off by the Premier and relevant ministers.

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<sup>34</sup> National Declaration: *Towards Australian Safe Asbestos Free Environment (SAFE)* agreed to at the National Asbestos Summit, Sydney, 29 June 2010.

<sup>35</sup> *Tasmanian Budget 2010-11*, media release by David O'Byrne, Minister for Workplace Relations, <http://www.budget.tas.gov.au/ministers-on-the-budget/david-obyrne> viewed 12 September 2010.

<sup>36</sup> *Asbestos Management in the ACT*, Report by the ACT Asbestos Task Force, August 2005.

<sup>37</sup> *South Australian Asbestos Safety Action Plan 2008*.

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## Chapter 9.

# Asbestos Co-regulators Working Group

Arising out of our enquiries into the central coast warehouse incident the CEO of WorkCover formed an Asbestos Co-regulators Working Group (ACWG).

The ACWG was established with the approval of the Minister for Finance:

*... as a mechanism to clarify existing roles and responsibilities, identify potential policy or operational gaps and to use the forum as a means of sharing information about agencies initiatives.<sup>38</sup>*

Members of the ACWG include:

- DECCW
- WorkCover
- Department of Premier and Cabinet
- Department of Planning
- Workers Compensation Dust Diseases Board, and
- other agencies with asbestos responsibilities.

We consider this to be an excellent initiative and an important way for the various agencies to identify key issues and provide consistent approaches to dealing with asbestos.

Terms of Reference for the ACWG are:

To provide high-level input to:

- clarify roles and responsibilities for the management of asbestos issues
- identify potential issues and unintended consequences arising from the legislative framework and contribute to the development of options to address any policy or operational gaps
- provide technical and policy advice on the operations of the agencies' legislative obligations as they relate to asbestos, and
- promote the exchange and deliberation of each agencies' interventions, projects and communications regarding asbestos matters.

The terms of reference also lists key challenges for the relevant agencies which are to:

- identify barriers that adversely influence the interagency coordination of asbestos issues and consider opportunities to positively drive improved cooperation between agencies
- consider and provide constructive feedback and guidance on a range of available options for improving the effectiveness of the management of asbestos matters in New South Wales, and
- foster a cooperative and consultative environment in which consensus can be reached on key issues.

ACWG meetings commenced in March 2010 and WorkCover invited a representative of this office to attend the sessions as an observer. The final outcomes from the ACWG are due to be reported in March 2011.

WorkCover is to be commended for the efforts they have made to bring together all of the key agencies in an attempt to gain consensus on the most suitable approach to asbestos issues. In particular we have been impressed with the contributions made by the working group chair Mr Peter Dunphy, Director, Specialist Services Group, WorkCover NSW, who has been the catalyst for effective exchange of ideas and concepts within the ACWG.

We will continue to observe the workings of the group and look forward to seeing their final report.

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<sup>38</sup> Letter from the CEO WorkCover to the Ombudsman dated 11 March 2010.

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# Chapter 10.

## Conclusion

*Looking back in the light of present knowledge, it is impossible not to feel that opportunities for discovery and prevention of asbestos disease were badly missed.*

Thomas Legge, ex Chief Medical Inspector of Factories [UK],  
in *Industrial Maladies*, 1934.<sup>39</sup>

Whilst the NSW public have the right to expect that government agencies will respond appropriately to environmental health hazards such as asbestos, methods for dealing with asbestos across the whole of government have been disjointed, ad hoc and confusing. There are no laws preventing home owners from demolishing asbestos buildings, asbestos is dumped illegally on public and private land, awareness of the dangers of asbestos seems minimal, and tens of thousands of fibro buildings constructed in the 20th century continue to deteriorate and be renovated or demolished.

There must be carefully considered and appropriate action on asbestos in NSW that tackles these difficult issues. Preventing exposures to asbestos by implementing a comprehensive government plan, introducing an effective coordination scheme, addressing the legislative deficiencies and adequately funding asbestos remediation are key control strategies that must be given the priority they deserve.

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<sup>39</sup> Gee D, and Greenberg M, 2001, *European Environment Agency, Environmental Issues Report No 22, Asbestos: from Magic to Malevolent Mineral*, p.1.

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# Chapter 11.

## The way ahead

### 11.1. NSW needs a coordinating authority which is responsible for asbestos

**Recommendation:**

An Asbestos Coordination Authority (ACA) be established and adequately funded.

We have found that there is general confusion across agencies, in particular local councils, about exactly what their responsibilities are in relation to asbestos. In addition there are a number of legislative deficiencies which together make it very difficult for those who deal with the public to provide clear and concise advice and directions.

We understand the Australian Council of Trade Unions has called for a national asbestos unit to coordinate asbestos issues. We support this but we would add that there is a pressing need to resolve the systemic problems in NSW. Widespread confusion and insufficient expertise at many levels are symptoms of a system that is not working.

Given the consequences of indecision and prevarication we have seen in relation to asbestos incidents, we believe the only way to ensure there is proper commitment to solving asbestos problems is to have one body responsible for the oversight of all asbestos matters in NSW. This would alleviate the current unacceptable level of confusion about responsibility and should provide consistent clear directions to government agencies, industry and the public.

NSW needs a body that is charged with coordinating the activities of government agencies in relation to all aspects of asbestos regulation, remediation, training, industry oversight and public awareness.

To be effective such an authority needs to be adequately resourced and staffed by people trained and qualified in asbestos issues. In addition the authority should provide a single point of contact to the public for information concerning asbestos. Ideally the authority should also be responsible for reviewing asbestos legislation, providing oversight to agencies and have a training development function.

The ACA could form part of an existing agency with expertise in dealing with asbestos such as, DECCW or WorkCover. Alternatively it may be appropriate for the ACA to be a stand-alone body with its own board of management.

Funding for the authority should be new funding and not simply re-allocated from other areas. The success of the authority will be dependent upon the adequacy and security of that funding.

### 11.2. NSW needs an Asbestos Act

**Recommendation:**

An Asbestos Act be introduced to facilitate effective measures to appropriately address asbestos issues in NSW.

The gaps in legislation concerning asbestos need to be addressed and relevant legislation needs to be consolidated into a single stand-alone Act and regulation. It is important that the legislation encompasses asbestos in all environments, including workplaces, residential settings and private, public and Crown land.

### 11.3. A plan for asbestos in NSW

**Recommendation:**

The NSW Government develop a state-wide plan for dealing with asbestos.

There needs to be a whole of government approach to the problem of asbestos in NSW. A state-wide plan for the management and future eradication of asbestos should be developed as a priority. Ideally those measures should be incorporated into the current State Plan under the Green State initiatives.<sup>40</sup>

We acknowledge the problem is immense and in some instances costly to resolve, however the problem(s) we describe are not going away and a proper long-term response is overdue. We accept there are technical difficulties in removing asbestos and that it is safer for the environment in many instances to leave it in situ, but there remains the possibility of life threatening asbestos-related diseases being contracted from buildings that are ageing and deteriorating and from unsafe practices during renovations and demolitions.

We note that the Australian Council of Trade Unions has approached the federal government with a proposal to have all asbestos in Australia removed by 2030.<sup>41</sup> Whether or not that timeframe is feasible remains a point of contention, but the proposal has rightly identified the need for a proper plan for the complete eradication of asbestos at a future date.

NSW should consult with the Commonwealth about these issues; but nonetheless develop its own clear plan of action.

We consider the SA Asbestos Safety Action Plan to be an example of the sort of government plan that is required to address asbestos issues in NSW. We are also of the belief that the collaborative approach involving agencies, industry and the public should be taken up by NSW.

A NSW plan should be developed in consultation with industry, government agencies, asbestos victims groups and the public. The first step in this process should be widespread consultations amongst all interested parties with a view to providing the people of NSW with a coherent workable plan for dealing with asbestos.

There are many government buildings that still contain asbestos, including schools and other buildings used by the public. The NSW government asbestos plan should include plans for the prioritised removal of asbestos from all government buildings and should include a future date for this action to be complete.

### 11.4. The asbestos problem must be adequately funded

**Recommendation:**

Adequate funding be allocated for implementing the state-wide asbestos plan.

We understand that each year in excess of 200,000 tonnes of asbestos-related waste is processed through disposal facilities in NSW. This waste attracts a levy of up to \$70 per tonne. We have seen no evidence that any appreciable portion of these funds is dedicated to addressing asbestos issues. We believe that funds generated by the imposition of the levy on asbestos waste could potentially be utilised to fund the implementation of the ACA and towards the costs of asbestos remediation.

It is essential that the remedial action proposed is properly funded and resourced. Some of the matters we have raised require urgent government attention to reduce the risk of people becoming exposed to asbestos and developing life threatening diseases. For this reason alone such matters should receive priority.

<sup>40</sup> NSW Government *State Plan*, 2010.

<sup>41</sup> National Declaration: *Towards Australian Safe Asbestos Free Environment (SAFE)* agreed to at the National Asbestos Summit, Sydney, 29 June 2010.

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## 11.5. The Woods Reef Mine

### **Recommendation:**

Funding be allocated for the \$5.5 million remediation project at the Woods Reef mine sought by the Department of Industry and Investment in 2009.

Initial remediation steps that should be taken as a matter of urgency include removing the derelict buildings and equipment, closing Crow Mountain Road to public access and implementing proper security measures to prevent access to the site.

There also needs to be a long-term plan developed for remediation of the site.

## 11.6. Community awareness program

### **Recommendation:**

Government develop a comprehensive public awareness program for asbestos for all sections of the community.

There must be a coordinated approach to providing asbestos awareness information to members of all communities in NSW, which is not just confined to electronic media sources. People have the right to know where asbestos is and how they can reduce the likelihood of becoming exposed. There needs to be a comprehensive community awareness program developed and delivered throughout NSW. This could be developed by the government or by the new Asbestos Co-ordinating Authority.

## 11.7. Division of Local Government of the Department of Premier and Cabinet

### **Recommendation:**

The Chief Executive of the Division of Local Government issue a model asbestos policy to all NSW councils.

The Department of Premier and Cabinet's Division of Local Government has a responsibility to provide guidelines to councils in NSW in accordance with s.23A of the *Local Government Act 1993*, which provides that, '*... the Director-General [Chief Executive of the Division of Local Government] may from time to time prepare, adopt or vary guidelines relating to the exercise by a council of any of its functions.*'

Section 23A also stipulates that:

*(3) A council must take any relevant guidelines issued under this section into consideration before exercising any of its functions.*

There is an unacceptable level of non compliance, confusion and misunderstanding about asbestos within councils in NSW. The Division of Local Government has a responsibility to provide consistent guidelines to councils for dealing with asbestos.

Considering the potential for asbestos to be dealt with or disposed of in unsafe ways, consistent council policies must be introduced as a priority across all local government areas.

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## 11.8. Identifying asbestos in residences

### **Recommendation:**

Consideration be given to the introduction of vendor disclosure laws making it mandatory for property vendors to provide certification of the presence of asbestos in buildings.

Current OH&S regulations require workplaces to maintain an Asbestos Register detailing the location of all asbestos on site. No such requirement applies for private dwellings and there is no requirement for a purchaser or occupier of a residence in NSW to be informed where asbestos may be in a building. We consider this to be a serious safety issue and suggest that occupiers, owners and purchasers have a right to know where asbestos is located and to be assured that there is no danger to their health.

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. Ideally such a scheme would ensure that the purchaser and occupier of a residence are provided with a certificate compiled by a qualified person who identifies the location and types of asbestos present in any building. That certificate could be provided to the purchaser when a property is sold as part of the vendor disclosure requirements. Copies should also be provided to incoming tenants.

Certificates obtained during the sale of a property could also be lodged with the relevant local council. This will 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.

Introducing an asbestos reporting scheme has the potential to reduce the number of people exposed to asbestos in residential settings and thereby save lives.

Government should consider similar schemes in operation in other states and consult with all relevant parties to assist in making a decision about whether to implement a scheme in NSW.

## 11.9. Government response

Given the seriousness of the issues raised in this report, I recommend that the Premier advise the NSW Parliament within six months of the date of this report of the actions taken or proposed by government in responding to my recommendations.





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