

**Submission
No 34**

INQUIRY INTO LOOSE FILL ASBESTOS INSULATION

Organisation: Maurice Blackburn Lawyers

Date received: 31/10/2014



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31 October 2014

Joint Select Committee on Loose Fill Asbestos
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Dear Committee Members,

NSW Parliamentary Inquiry into loose fill asbestos insulation

Thank you for the opportunity to provide a submission to the New South Wales Parliamentary loose fill asbestos **(LFA)** insulation (the **Inquiry**).

Set out in Section 1 of our submissions is a brief introduction and a brief overview of Maurice Blackburn’s unique position of being able to comment on the issue of LFA insulation given our historic and continued involvement in this issue in the Australian Capital Territory **(ACT)**. Set out in Sections 2 to 6 below is our commentary and recommendations in relation to the Inquiry’s terms of reference.

1. Introduction

Maurice Blackburn’s intimate involvement in the ACT “Mr Fluffy” issues

- 1.1 Maurice Blackburn has had a long and proud history of representing victims of dust diseases in Australia, especially those who have suffered as a result of asbestos exposure. We litigate claims on behalf of our clients in every State and Territory in Australia. We represent hundreds of victims each year.
- 1.2 Relevantly to this Inquiry, Maurice Blackburn has been intimately involved in the ongoing “Mr Fluffy” asbestos insulation issue in the ACT. We have advised and worked closely with the Fluffy Owners and Residents Action Group **(FORAG)** and the advocacy group For Renewal and over 250 individual affected homeowners and residents in the ACT in relation to their legal rights.
- 1.3 In addition, we are currently acting for a former owner of a Mr Fluffy home in a personal injury claim brought in the Dust Diseases Tribunal of NSW who, we allege, contracted mesothelioma as a result of exposure to LFA insulation in his home in the ACT. Furthermore, we have spoken with numerous other concerned people who have sought our advice about potential legal rights and entitlements flowing from known exposures to LFA insulation.
- 1.4 The work that we have undertaken has involved an in-depth legal analysis of the applicable statutory and common law and the legal rights of those affected by personal injury and devaluation of property as a result of LFA insulation.

We are therefore uniquely placed to provide our recommendations to the Inquiry.
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Knowledge of the dangers of asbestos – a general comment

- 1.6 Before dealing with the Inquiry's terms of reference, underlying all of our submissions to the Inquiry are the following widely held scientific, medical and legally accepted propositions:
- (a) There is no level of asbestos exposure below which there is no increased risk of developing mesothelioma (the signature terminal cancer of the pleura and peritoneum caused only by exposure to asbestos). In other words, there is no known safe level of asbestos exposure. This fact has arguably been the actual knowledge of asbestos manufacturers, and the constructive knowledge of government agencies at State and Federal level, since at least September 1965;
 - (b) Asbestos causes a number of diseases in humans, some malignant such as mesothelioma and lung cancer and some non-malignant such as pleural plaques, thickening of the pleura and asbestosis. In high doses, loose asbestos fibres have been linked with the development of all of these conditions, but in low doses, only mesothelioma is known to be caused by comparatively low to very low exposures;
 - (c) Crocidolite (blue asbestos) and amosite (brown/grey asbestos) are by far the more potent and carcinogenic types of asbestos fibre when compared to chrysotile (white asbestos). However, all asbestos types are linked to the causation of mesothelioma; and
 - (d) There is a latency period between first exposure to asbestos and the development of mesothelioma and other asbestos related diseases of between 10 and 70 years. Accordingly, given the time period within which ACT and NSW based asbestos contractors deposited LFA insulation in ACT and NSW homes, that being in late 1960's to late 1970's, we are only now starting to see evidence of how this issue had affected people from a personal injury perspective.
- 1.7 We now address the Inquiry's terms of reference.

2. <u>Terms of Reference 1: The number and location of homes affected by loose fill insulation in New South Wales</u>
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- 2.1 From the ACT experience, we have obtained evidence from a variety of sources which confirms that:
- (a) D Jansen & Co Pty Ltd (otherwise known as "Mr Fluffy")(**D Jansen & Co**) operated his business of selling and depositing 100% pure amosite asbestos into roof cavities of ACT and NSW domestic homes and businesses from at least 1968 to as late as 1978;
 - (b) D Jansen & Co deposited LFA not only in the ACT but also in Queanbeyan, Bateman's Bay and other coastal NSW towns;
 - (c) There was at least one Sydney based contractor who also installed LFA in Sydney homes from as far back as 1955 to an unknown date. This company was known as "Bowers Asphalt" and was located in Rozelle NSW; and

- (d) One stated supplier of the loose fill asbestos insulation used by D Jansen & Co was James Hardie & Co Pty Ltd.

2.2 On the above basis, the following conclusions can be drawn:

- (a) that LFA insulation is not a problem unique to the ACT;
- (b) that there were likely to be more contractors (other than those identified above in 2.1) who were based Sydney or other metropolitan or regional areas of NSW;
- (c) that the number of NSW cities, regions and towns that could be affected by this issue is **unknown**; and
- (d) it is unreasonable to assume that relevant contractors only operated in the Sydney metropolitan area.

Recommendations

Given the magnitude of the potential health risk of asbestos exposure we recommend the following action be taken to allow identification of all affected buildings in NSW:

- Conduct a full-scale survey of all domestic homes, commercial and public buildings constructed in NSW before 1980 to identify the presence of LFA insulation. There should be no exceptions;
- Commence an immediate investigation to identify all suppliers and installers of LFA insulation who operated in NSW from 1940 onwards. This could be achieved initially by drawing upon information sources such as ASIC, WorkCover NSW and the Dust Diseases Board of NSW;
- To assist with the full-scale inspection of homes and buildings, institute special powers to access homes for the identification of LFA. Similar powers to those which were legislated in the ACT should be enacted. In the ACT, the *Building Ordinance 1972* (as amended in 1988) (the **Ordinance**) sets out a legislative code for the inspection of homes and the removal of asbestos. Section 9A and Part IVA of the Ordinance granted extensive powers to the Commonwealth to inspect buildings for the presence of LFA and enter buildings in which LFA had been found without the owner's permission; and
- Compile a statewide register of all affected buildings in NSW.

3. Terms of Reference 2: The actions taken by governments to deal with loose fill asbestos insulation in other jurisdictions

The ACT Experience

- 3.1 For affected homes in the ACT, the response from the Commonwealth and then the ACT governments is widely publicised and we do not wish to reprise in fine detail the actual action taken.
- 3.2 We do, however, note the following key points about the removal programme undertaken by the Commonwealth and ACT governments in the 1989 to 1993 period:

- (a) In 1988 the ACT *Building Ordinance 1972* (the Ordinance) was amended with a legislative code for the removal of loose asbestos. Section 9A and Part IVA of the Ordinance granted extensive powers to the Commonwealth to inspect buildings for the presence of loose asbestos and to enter buildings in which loose asbestos had been found without the owners' permission.
- (b) On 10 October 1988, the Commonwealth announced that a government funded Loose Asbestos Insulation Removal Program (**Removal Program**) would be established to assist ACT residents to remove loose asbestos insulation from their properties. Tellingly, the Removal Program was limited to domestic dwellings and did not include commercial and public buildings.
- (c) In late October 1988, the ACT Administration Asbestos Branch (the Asbestos Branch) was established to oversee and coordinate the Removal Program. The Removal Program was mandatory for all residences built in the ACT before 1979.
- (d) The Removal Program was divided into three phases:
 - (i) Inspection of all Canberra homes constructed before 1979, commenced in October 1988;
 - (ii) Sealing off roof space from the living environments of affected houses, commenced in December 1988; and
 - (iii) The removal phase, commenced in early 1989.
- (e) On 11 May 1989 the ACT became self-governing and it assumed responsibility for the Asbestos Branch and the administration of the Removal Program.
- (f) The Ordinance became the *Building Act 1972* (ACT) by virtue of section 34(4) of the *Australian Capital Territory (Self Government) Act 1988* (Cth).
- (g) In all, 1060 houses were identified as Mr Fluffy properties.
- (h) In 1989, the Asbestos Branch undertook a survey of homes which had privately removed loose fill asbestos insulation. It found that of the 30 homes identified, 26 showed signs of residual asbestos. It was therefore understood at that time that there was a risk that a removal program may not be successful in removing all LFA from homes.
- (i) However, the Asbestos Branch determined that a removal program rather than a demolition and re-build program would be sufficient.
- (j) The agreed removal method involved the following steps:
 - (i) The roof space was sealed off from rest of the house;
 - (ii) A double plastic membrane canopy was erected over the house;
 - (iii) Part of the roof was removed and the asbestos insulation was vacuumed out;

- (iv) Any visible asbestos was removed from wall cavities and beneath the house; and
 - (v) Once all visible asbestos was removed from the roof, wall cavities and beneath the house, these areas were sprayed with a polyvinyl acetate sealant.
- (k) The Removal Program commenced in April 1990.
- (l) The ACT Asbestos Branch engaged private contractors to carry out the removal work. Smaller private contractors engaged by private homeowners were required to obtain a building permit under the Building Act 1972 (ACT).
- (m) The cost of the Removal Program was approximately \$60,000.00 per house. If homeowners engaged their own private contractors, they could make a claim for reimbursement for \$35,000.00 from the ACT Government.

- (n) Following completion of the removal process, homeowners received a "Certificate of Completion of Asbestos Removal Work". This stated that:

"Tests carried out on [insert date] established that the National Health and Medical Research Council and Worksafe Australia standards of safety for asbestos removal have been met"

But that:

"Residual fibres may still be present in the wall cavities of the building. Prior approval of the Building Controller is to be obtained for any building work involving the alteration or removal of internal wall sheeting or external brickwork. It may be necessary for a licensed asbestos removalist to attend this work."

- (o) A copy of this certificate was to be placed on each of the remediated houses' building file, but this was not, tellingly, regulated on the contract of sale until 2004.
- (p) The Removal Program concluded in mid-1993.
- (q) At the conclusion of the program, the Asbestos Branch sent a letter to each of the owners of these houses stating that prior to building alterations to any internal or external walls or ceilings, they should contact "Building Control" to ascertain any specific requirements of the building regulations.

3.3 From our perspective, the major issues with the above steps undertaken by the Commonwealth government/ACT governments in relation to the Removal Program are that:

- (a) The Removal Program was limited to domestic dwellings only. This meant that the program was fundamentally flawed from the outset. There may well be many hundreds of commercial and public buildings in the ACT which contain, or did contain, loose asbestos insulation which continue to pose massive health risks to an unknown number of owners, tenants, occupants, patrons and visitors;

- (b) There was a known risk at the time of the development of the Removal Program (prior to 1989) that there would be residual loose fibres left within dwellings even after removal and that the presence of these residual fibres could/would continue to pose a risk to human health (and, as a corollary, a risk to property values). Despite these risks, and with the knowledge that there was no safe level of exposure to asbestos, the Removal Program was accepted as being appropriate in the circumstances. Indeed, the other alternate option of complete demolition and re-build was considered unnecessary. This, in our view, was not only fundamentally flawed reasoning but also beggars belief from the point of view of failing to protect defined members of the public from a known cancer causing agent;
- (c) There was a severe lack of clear disclosure to Mr Fluffy homeowners and residents about the continued probability of residual asbestos fibres being present after the Removal Program but also, more importantly, that there was no safe level of exposure to asbestos. Homeowners were not given this essential piece of information which would have not only warned them of the magnitude of the risks they (and any prospective purchaser of their homes) potentially faced but also the absolute need for them to obtain appropriate advice and guidance from the ACT government in relation to how to attempt to deal with these risks; and
- (d) There was no clear identification of homes being Mr Fluffy homes on Contracts for Sale until 2004, when it finally became mandatory.

The NSW Experience

- 3.4 From a NSW perspective, we understand that in 1988/89 the NSW Government was specifically invited by the Commonwealth Government to become involved in a removal program for homes in Queanbeyan and the South Coast of New South Wales. That invitation was declined.
- 3.5 Our understanding from media reports at the time is that while the ACT was conducting the Removal Program, the NSW Government declined to undertake any investigations into the extent of Mr Fluffy installation into Queanbeyan and surroundings areas. We understand that Queanbeyan Council offered an advisory service to concerned homeowners. However, this was the extent of any other action taken by NSW government.
- 3.6 We are of the view that to do nothing on behalf of this community in relation to this significant public health issue was tantamount to a complete abdication of governmental responsibility.

Recommendations

In light of the above discussion, our primary submission and recommendation is that it is absolutely clear that there is only one reasonable course for the NSW government to take and that is:

- (a) All identified domestic homes, commercial properties and public buildings in NSW which are shown to contain or, having had contained, LFA insulation be bought back at market rates, cleaned and demolished at the expense of the NSW Government with appropriate funding by the Commonwealth; and

- (b) The identification process should commence in those NSW regions and towns which are known to have been affected by LFA contamination, including Queanbeyan, Batemans Bay and North Sydney.

4. Terms of reference 3: The role of state and local governments to advise and assist homeowners and occupiers to reduce the risks posed by loose fill asbestos insulation

- 4.1 Many of the people who have contacted Maurice Blackburn in relation to the ACT Mr Fluffy issue were unaware of some or all of the following:
- (a) the probability that there was residual LFA insulation in places such as roof spaces, wall cavities and subfloor areas of their homes;
 - (b) LFA fibres could circulate within the living areas of their homes;
 - (c) the extreme risk to their health if they were exposed to these asbestos fibres;
 - (d) the extreme risk to their health if they undertook even minor alterations and repairs within their homes including such things as removing light fittings and demolishing built-in-cabinetry, which does not require prior building approval; and
 - (e) that their homes were in fact homes which had LFA insulation in them.
- 4.2 In the majority of cases, we understand that home owners were not aware of the above matters because the notice referred to in 3.2(n) of this submission and the subsequent communications by the ACT Government, were grossly inadequate insofar as they did not disclose these matters.

Recommendations

Given the problems identified above, clear and unequivocal communication is paramount not only in relation to managing the health risks of being exposed to LFA insulation but also the negative effect that the presence of such materials will have on the value of land the dwellings in the current climate.

Accordingly, in the absence of our primary recommendation that all homes and building be bought back, cleaned and demolished as set out in 3.6 above, our secondary recommendation is that:

State Government

- (a) Every owner and/or occupier of domestic, commercial or public dwellings built prior to 1980 (irrespective of whether they have been shown as having, or has had, loose asbestos insulation) should be provided with targeted information on the dangers of asbestos and particularly LFA insulation in these properties;
- (b) The cost of engaging a private asbestos inspector, as an interim step, should be paid for in full by the New South Wales government;
- (c) The cost of removing LFA insulation from dwellings and properties should be paid for in full by the NSW government; and

- (d) All ancillary costs incurred as a result of displacement of householders and occupants (for example cost of renting another suitable property for the period during which removal of LFA insulation is undertaken) should also be reimbursed in full by the NSW government.

Local Government

- (e) All Development Applications in respect of homes built prior to 1980 must be considered as potentially having LFA insulation contained within. Therefore, the roof spaces, wall cavities and sub-floor areas of all houses built prior 1980 must be inspected for such fibres prior to the granting of building approval;
- (f) Clear and unequivocal certificates which set out that a home contains, or has contained, loose fill asbestos insulation must be placed on the building file. These notifications must contain clear advice as to the severe risk to human health of inhaling loose asbestos fibre; and
- (g) All private certifiers and inspectors must ensure that roof spaces, wall cavities and sub-floor areas of all houses built prior to 1980 are inspected for evidence loose fill asbestos insulation.

Coordinated response between local and State Government bodies

- (h) Clear lines of responsibility for inspections and actions must be developed between Government bodies at state and local levels.

5. Terms of Reference 4: The requirements for property owners to notify potential buyers, renters, tradespeople and emergency service officers regarding the presence of loose fill asbestos insulation in their property

- 5.1 In our experience a recurring complaint of ACT Mr Fluffy homeowners has been that they were not made aware of the significance of their homes having been part of the Removal Program when they purchased their properties.
- 5.2 As noted above, others were not aware of the possibility of residual fibres upon purchase or when they renovated their properties. They are not only concerned for their own families' health, but also those builders and other tradespeople who have undertaken work on their homes without being sufficiently warned of the dangers of residual LFA fibres.
- 5.3 These complaints and concerns highlight the need for stronger measures to ensure that home owners/vendors fully inform potential buyers, renters, tradespeople and emergency service officers of the fact of their properties being contaminated, or having been contaminated, with LFA insulation.

Recommendations

In the absence of our primary recommendation that all homes and building be bought back, cleaned and demolished as set out in 3.6 above, and consistently with our secondary recommendations set out in 4.2 above, we recommend the following:

- (a) That there be a positive legal requirement on owners/vendors (and their advisors like lawyers, real estate agents, conveyancers etc) that on the sale of a property that they are required to give notification of the fact that a home has, or did have, LFA insulation and that such notification must be clearly and unambiguously identified on the contract of sale and in communications to prospective purchasers;
- (b) That clear notification be given by owners/vendors (and their advisors like lawyers, real estate agents, conveyancers etc) in relation to the probability of residual fibres being present and that extreme risk that is posed to human health of the presence of LFA – that is, there is no safe level of exposure to asbestos;
- (c) That a home or property that is or has been contaminated with LFA insulation should be registered on the property title;
- (d) Such notifications should be given by the owner at each occurrence/event involving the transfer of property or the transfer of a lease;
- (e) There should be fines for breaches of the above laws; and
- (f) A central register of all homes and properties which have been identified as having or having had LFA insulation in them should be publicly accessible and searchable by prospective purchasers, renters, emergency services personnel, tradespeople etc.

Should you wish to discuss this letter, please do not hesitate to contact any of the below signed on

Yours faithfully

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