

**Submission  
No 2**

## **INQUIRY INTO LOOSE FILL ASBESTOS INSULATION**

**Organisation:** Real Estate Institute of New South Wales

**Date received:** 1/10/2014

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The Director  
Joint Select Committee on Loose Fill Asbestos Insulation  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

**By Email: [asbestosinsulation@parliament.nsw.gov.au](mailto:asbestosinsulation@parliament.nsw.gov.au)**

1 October 2014

Dear Sir/Madam

**THE REAL ESTATE INSTITUTE OF NEW SOUTH WALES SUBMISSION  
TO THE INQUIRY INTO LOOSE FILL ASBESTOS INSULATION**

We refer to the letter from NSW Parliament's Joint Select Committee on Loose Fill Asbestos Insulation dated 26 September 2014. That letter invited The Real Estate Institute of New South Wales (**REINSW**) to make a submission to the inquiry into loose fill asbestos insulation.

As you may know, REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. Our members specialise in one or more practice areas, including property management, strata management, residential sales, commercial/industrial, project marketing/management, project investment, stock and station, holiday and short-term rentals, business agents, buyers' agents, auctioneers and valuers.

REINSW recognises that asbestos is a hazardous and dangerous substance and that our members are faced with harsh penalties for non-compliance with work health and safety legislation, particularly with respect to their dealings with asbestos.

REINSW is concerned that there are no clear guidelines or documented process available which, when followed, would ensure that our members comply with their obligations.

REINSW has made several requests to Government authorities seeking assistance to develop guidelines for dealing with this dangerous substance. In that regard, please refer to the following **enclosed** correspondence:

- (a) letter from REINSW to the Office of the NSW Small Business Commissioner dated 14 August 2013; and

(b) correspondence between REINSW and WorkCover.

You will see from the enclosures that the Commissioner and WorkCover have not provided guidelines regarding the obligations of our members in relation to asbestos in the properties and buildings which they manage.

Whilst regulatory authorities have refused to give specific guidance on how to deal with asbestos, when someone is injured as a result of being in contact with the substance it is those very same regulatory authorities that prosecute our members for failure to deal with asbestos in a safe manner. REINSW is constantly seeking the information or guidance necessary to prevent that circumstance from arising.

The problem seems to be that people do not know the procedure associated with discovering, disclosing and dealing safely with asbestos. The Government is reluctant to prescribe such procedures because if compliance led to an injury then the Government will be held liable.

Despite the above, REINSW is of the view that the Government is not discharging its obligations adequately in this area by remaining silent and failing to provide guidance on such a significant and important safety concern. REINSW would like to see the Government or other appropriate entity issue clear guidelines and document a process to ensure that our members are able to comply with their work health and safety obligations.

REINSW thanks you for the opportunity to provide this submission. Should you wish to discuss it further, please contact the writer on

Yours faithfully

Tim McKibbin  
**Chief Executive Officer**



# REINSW

REAL ESTATE INSTITUTE  
OF NEW SOUTH WALES

Wayne Gates  
Director Small Biz Connect  
Office of the NSW Small Business Commissioner  
GPO Box 5477  
SYDNEY NSW 2000

14 August 2013

Dear Mr Gates,

## **Asbestos – the obligations of strata, residential property and commercial managers**

The Real Estate Institute of NSW (the Institute) is the peak industry body representing real estate professionals in NSW. Our members include real estate agents who are property managers, strata managers and commercial property managers.

### ***The work of managing agents***

Strata managers are agents engaged by the owners' corporation in a strata building to manage the running of the whole building and to carry out the functions of the owner's corporation prescribed under the strata legislation.

Residential property managers are agents who manage the tenancy of a residence on behalf of the owner of the residence – for example advertising the property for rent, showing the property to prospective tenants, drawing up the lease, collecting rent monies on behalf of the owner, arranging for repairs and maintenance to the property, carrying out periodic inspections of the property. The residences may or may not be located in a strata scheme – for example many residences are free-standing privately owned homes. The property manager is engaged by the owner of the property and not by the owners corporation where the property is strata title.

Commercial property managers manage the tenancies within commercial or industrial buildings (offices, shops, factories etc) on behalf of the owner of the building or individual premises in a similar way. As with residential premises, some commercial premises can be located in a strata scheme.

### ***Concerns regarding asbestos***

Agents generally have a fundamental appreciation of work health and safety issues and the dangers associated with asbestos. However our members have found that information on the obligations of a real estate agent specifically arising during the delivery of real estate

services in their various facets of practice is not readily available. Of particular concern for property managers are their obligations when it comes to dealing with tenants and arranging repairs and maintenance to strata, residential and commercial properties and dealing with contractors.

REINSW has sought advice from WorkCover in relation to these issues. We enclose copies of the correspondence received from WorkCover for your information.

You will note there does not seem to be a clear guideline or documented process available which, then followed, would ensure agents comply with their obligations.

As you are probably aware, there are harsh penalties on individuals and corporations for non-compliance with work health and safety legislation.

The Institute therefore seeks the assistance of the Office of the Small Business Commissioner to develop guidelines regarding the obligations of real estate agents in relation to asbestos in the properties/buildings they manage.

We would be grateful if you could please contact the writer on \_\_\_\_\_ to discuss the possibility of developing such guidelines.

Yours faithfully,

Eva Sklavos  
**Legal and Policy Manager**



The Legal Manager  
WorkCover NSW  
Locked Bag 2906  
LISAROW NSW 2252

13 August 2012

Email: [contact@workcover.nsw.gov.au](mailto:contact@workcover.nsw.gov.au)

Dear Sirs,

**Asbestos – the obligations of property, strata and commercial managers**

The Real Estate Institute of NSW (the Institute) is the peak industry body representing real estate professionals in NSW. Our members include real estate agents who are property managers, strata managers and commercial property managers.

Agents generally have a fundamental appreciation of work health and safety issues and the dangers associated with asbestos. However our members have found that information on the obligations of a real estate agent specifically arising during the delivery of real estate services in their various facets of practice is not readily available.

The Institute therefore seeks the assistance of WorkCover NSW to develop guidelines regarding the obligations of real estate agents in relation to asbestos in the properties/buildings they manage.

We would be grateful if you could please contact the writer on \_\_\_\_\_ to discuss the possibility of developing such guidelines.

Yours faithfully,

Eva Sklavos  
Legal and Policy Manager



WorkCover

WorkCover Authority of NSW | Gosford Office  
92-100 Donnison Street  
Gosford, NSW 2250

t 02 4321 5000 f 02 4325 4145

WorkCover Assistance Service 13 10 50

23 October 2012

Eva Sklavos  
Legal and Policy Manager  
Real Estate Institute of NSW  
PO Box A624  
Sydney South NSW 1235

Dear Ms Sklavos

I refer to your correspondence of 13 August 2012 regarding the obligations of property, strata and commercial property managers under the *Work Health and Safety Act 2011* (WHS Act). Safe Work Australia has answered some of your questions in their frequently asked questions "*Strata Title Bodies Corporate and the Work Health and Safety Laws: Frequently asked questions*". A copy of this fact sheet has been enclosed for your information, or go to <http://www.safeworkaustralia.gov.au/sites/SWA/Legislation/FAQ/Pages/FAQs-Strata-title.aspx>

As you may be aware strata title bodies corporate are exempt from coverage under the work health and safety laws if:

- they do not engage any workers as employees, and
- the common areas the body corporate is responsible for are used only for residential purposes.

However, strata managing agents are persons conducting a business or undertaking (PCBUs) under the Work Health Safety Act. They have duties to ensure, so far as is reasonably practicable, the health and safety of their employees and any workers engaged by them to undertake work as part of their business or undertaking, and 'others' who may be at the workplace when work is being carried out. When a strata manager, as part of their business or undertaking, is engaged by the owners' corporation to manage the common areas, they take on responsibilities under sections 19 and 20 of the WHS Act.

The PCBU with management or control of the workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of anyone. Section 62 of the *Strata Schemes Management Act 1996* requires the owners' corporation to keep the common property in a state of good and serviceable repair. By ensuring this obligation is met, the strata managers would also be taking steps to meet their duty under section 20 of the WHS Act.

When strata managers engage anyone to work on the common area, they must, so far as is reasonably practicable, ensure the health and safety of the workers they engage and ensure that 'others' are not put at risk from the work being carried out. Some of the things strata managers can do to ensure that contractors work safely include:

- doing a reference check to ensure contractors have a good safety record, and the necessary licences and insurance policies
- consulting, cooperating and coordinating activities with contractors including advising the contractor of any known risks in the workplace
- ensuring the work is satisfactory and there are no safety concerns
- discussing and resolving safety issues that may arise
- ensuring the contractor prepares a safe work method statement if high-risk construction work is undertaken.

#### **Asbestos identification and registers**

If an owners' corporation of a residential strata scheme is exempt from being a PCBU It is not required to have an asbestos register. Any refurbishments undertaken in the common area are the responsibility of the contractor. It is the contractor's responsibility to identify asbestos and have it removed, if necessary, before refurbishment.

However a PCBU (such as a strata manager) with management or control of a workplace is required to ensure an asbestos register is prepared and kept at the workplace for all buildings constructed prior to 31 December 2003 or where there is asbestos.

Whether a real estate agent acting as a strata or commercial property manager is a PCBU with management or control and required to ensure an asbestos register is prepared will depend on whether:

- the agent has management or control of the premises; and
- whether the premises are a workplace.

#### *Management or control?*

Who is the PCBU with management or control of a workplace will depend on the circumstances. It is possible for more than one individual or company to be in control of premises at the same time. The person with management or control of the premises may be either the owner or the occupier of the premises, or both. Generally, the landlord of commercial premises would be considered to be the controller of the premises. The person who has management or control of a workplace can be the person who:

- owns the workplace but is not at or based at the workplace (It does not have to be that person's actual place of work)
- has legally been assigned management and control duties over the workplace (such as a management group that may or may not be located at the workplace, including commercial and industrial property agents)
- owns the workplace and is working (or has workers undertaking work) at the workplace.

#### *Are the premises a workplace?*

If the premises are used for commercial purposes one would expect that they will be a workplace, but if the premises are primarily residential they might not be a workplace. If the premises are only a work place on an ad hoc basis such as when a tradesman attends to repairs then the premises should not be regarded as a workplace for the purposes of an asbestos register.

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However if people regularly work at the premises, even if they are not working there full time, the premises should be considered a workplace and an asbestos register prepared.

*Refurbishment of premises*

If substantial refurbishment is to be undertaken at the premises it is likely that the premises would be considered a workplace, triggering the requirement for an asbestos register as well as other requirements in relation to refurbishment or demolition, including reviewing the asbestos register and providing a copy of the asbestos register to the PCBU who will carry out the refurbishment or demolition work (noting that a register is not required for buildings constructed after 31 December 2003 and no asbestos has been identified).

There are specific obligations on the PCBU who will carry out demolition or refurbishment and this extends to identifying asbestos in residential premises and removing the asbestos, so far as is reasonably practicable, before the demolition commences.

WorkCover recommends that an asbestos register be developed for strata title premises built before 2004 so that residents and anyone undertaking work at the premises are aware of the location of any asbestos and can take appropriate precautions. However this is not mandatory except as discussed above and this should be made clear in any discussions with strata title owners.

WorkCover is currently developing some additional guidance in relation to the application of the legislation in relation to strata title premises and this will include many of the matters discussed above. In addition, the code of practice: *How to manage and control asbestos in the workplace* (<http://www.workcover.nsw.gov.au/lawpolicy/codes-of-practice/Pages/default.aspx>) provides guidance on these duties and how to comply with them. If the information in this letter will assist your members perhaps you would like to use it as the basis for a fact sheet or guidance note specifically for your members. If so, I would be happy to review it for you prior to publication. Otherwise please let me know if there are any other questions that you have in relation to managing risks related to asbestos under the work health and safety laws.

Yours sincerely

**WorkCover Authority of NSW**

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## Strata Title Bodies Corporate and the Work Health and Safety Laws

### FREQUENTLY ASKED QUESTIONS

#### Are strata title bodies corporate of wholly residential strata schemes covered by the new work health and safety laws?

No, unless they directly employ a worker.

Under the new work health and safety (WHS) laws duties apply to 'persons conducting a business or undertaking' (PCBUs). Strata title bodies corporate are however exempt from coverage if:

- they do not engage any workers as employees, and
- the common areas the body corporate is responsible for are used only for residential purposes.

**Note:** this exemption does not affect duties under other laws including laws relating to negligence and strata laws more generally.

For more information on the legal difference between contractors and employees, see ['The essential handbook'](#) for independent contractors or use the online decision tool at [www.business.gov.au/contractors](http://www.business.gov.au/contractors).

#### Why are residential strata schemes exempt?

The new WHS laws treat owners and occupiers of residential units or flats in the same way as owners and occupiers of detached residential dwellings.

Any place where a worker is working is a 'workplace' under the new WHS laws.

In general if work is carried out from or at a person's home:

- the person conducting the relevant business or undertaking owes general work health and safety duties to the worker
- the worker and other persons at the workplace must take reasonable care (see below for more details)
- the owner/occupier of the home does not owe duties as the 'person with management or control of the workplace'—unless the place is used as a nursing home, hospice or for similar purposes.

#### Are strata title bodies corporate of wholly residential strata schemes always exempt?

No. If a strata title body corporate engages a worker as an employee (for example a caretaker) then the exemption no longer applies.

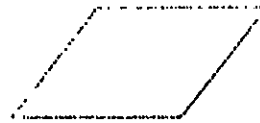
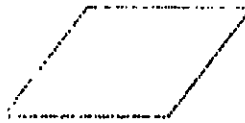
In these circumstances the strata title body corporate has the duties of a PCBU under the new WHS laws.

For more information on the legal difference between contractors and employees, see ['The essential handbook'](#) for independent contractors or use the online decision tool at [www.business.gov.au/contractors](http://www.business.gov.au/contractors).

#### Does engaging people to do repairs or maintenance affect the exemption?

No. If a contractor such as a plumber or electrician is engaged to carry out maintenance or repair work then the exemption still applies.

The exemption only stops if a worker is engaged as an employee.



### **Does the exemption apply if an occupant conducts a business from a residential unit?**

Home-based businesses can be conducted in a residential unit without it affecting the exemption status of the strata title body corporate.

### **How do the new WHS laws apply in relation to mixed and commercial strata schemes?**

The exemption only applies in relation to common areas used only for residential purposes. This means that for:

- mixed residential/commercial schemes the exemption only applies to the common areas of the scheme that are used only for residential purposes, and
- commercial strata schemes the exemption does not apply.

If the exemption does not apply, then the strata title body corporate has the same duties under the WHS laws as any other PCBU in relation to the premises.

### **What kinds of duties apply under the new WHS laws if no exemption applies?**

If the strata title body corporate is not exempt from the WHS laws it must ensure, so far as is reasonably practicable:

- the health and safety of its workers
- the entrance and exit of a workplace and anything arising from the workplace is without risks to the health and safety of workers and other people, and
- fixtures, fittings and plant (for example machinery, appliances, equipment and tools) at a workplace are without risks to the health and safety of workers and other people at the workplace.

### **How can strata title bodies corporate ensure that contractors work safely?**

Strata title bodies corporate should:

- do a reference check to ensure contractors have a good safety record, and the necessary licences and insurance policies
- consult, co-operate and co-ordinate activities with contractors including
  - advise the contractor of any known risks at the workplace
  - ensure the work is satisfactory and there are no safety concerns
  - discuss and resolve safety issues that may arise, and
  - ensure the contractor prepares a safe work method statement if high-risk construction work is undertaken.

### **More information**

For more details on how the new WHS laws apply to strata title bodies corporate in your jurisdiction contact your [work health and safety regulator](#).

## Eva Sklavos

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**From:**  
**Sent:** Wednesday, 31 October 2012 3:36 PM  
**To:** Eva Sklavos  
**Cc:**  
**Subject:** RE: Asbestos - Agents' Obligations

Eva

sorry for the letter being a bit confusing but I ran it past our legal people and that is what they came up with, to try and answer your question property managers is similar to the strata development

### Commercial development

All workplaces built before January 2004 are required to have an asbestos register even if it is only to say that there is no asbestos present.

The legislation requires that a person in control of the business undertaking PCBU is the one who develops the asbestos register. In most cases this register is developed and maintained by the building owner or manager. If the occupier has control over the maintenance of the building then they can become the PCBU and therefore can develop the register.

### Domestic premises

Generally the WHSL does not apply to a domestic premises as it is not a workplace where this changes is when maintenance or renovation work is carried out on the domestic premises when this occurs all asbestos has to be identified prior to work being carried out.

Because older dwellings may require considerable maintenance that may disturb asbestos, some property managers may wish to have an asbestos register for those houses where they know asbestos is present so as not to inadvertently expose maintenance workers to asbestos fibres. For properties where it is known that no asbestos is present a simple statement that the building does not contain asbestos will suffice.

There is no legal requirement to label asbestos products in domestic dwellings although it is advisable to place a sign in the meter box warning that the house may contain asbestos and not to break the surface.

I hope this information is useful to you  
if you need further advice please contact me

**WorkCover NSW**

**WORK SAFE ► HOME SAFE**

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**From:** Eva Sklavos

**Subject:** Asbestos - Agents' Obligations

Dear \_\_\_\_\_,

Thank you for your letter of 23 October 2012. I note the information in your letter relates mainly to strata managers – thank you for this valuable information, which we will pass on to our strata management committee. As you are probably aware, strata managers are agents engaged by the owners' corporation in a strata building to manage the

running of the whole building and to carry out the functions of the owner's corporation prescribed under the strata legislation.

Further to your telephone conversation with [redacted] of our office today, as discussed, we are seeking to also clarify the obligations of residential property and commercial managers.

Residential property managers are agents who manage the tenancy of a residence on behalf of the owner of the residence – for example advertising the property for rent, showing the property to prospective tenants, drawing up the lease, collecting rent monies on behalf of the owner, arranging for repairs and maintenance to the property, carrying out periodic inspections of the property. The residences may or may not be located in a strata scheme – for example many residences are free-standing privately owned houses. The property manager is engaged by the owner of the property and not by the owners corporation where the property is strata tile. Our members are particularly concerned about their obligations when it comes to arranging repairs and maintenance to residential properties and dealing with contractors.

Commercial property managers manage the tenancies within commercial or industrial buildings (offices, shops, factories etc) on behalf of the owner of the building or individual premises in a similar way.

Would it be possible to obtain clarification on the obligations of residential property managers and commercial property managers when it comes to asbestos please. If you require further information on the day to day activities of the various types of agents, then please do not hesitate to contact me on the number below.

Thank you for your further consideration of this matter and I look forward to hearing from you.

Regards,

**Eva Sklavos | Legal & Policy Manager**  
Real Estate Institute of New South Wales



**REINSW - your professional association**  
**advice | support | education | knowledge | training**

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