



## *Express law* fast track information for clients

15 February 2008

### **New asbestos laws for non-residential premises in the ACT**

This *Express law* outlines how amendments to the *Dangerous Substances (General) Regulation 2004 (ACT)* may affect the Commonwealth as an owner or tenant of non-residential premises in the Australian Capital Territory.

#### ***Background***

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Amendments to the Australian Capital Territory's *Dangerous Substances (General) Regulation 2004* (the Regulations) made by the [Dangerous Substances \(General\) Amendment Regulation 2007 \(No 1\)](#), which commenced on 7 September 2007, require 'a person in control of non-residential premises' to comply with a series of asbestos management requirements.

The Regulations apply to all non-residential premises built (i.e. for which a certificate of occupancy under the Building Act 2004 has been issued for part or all of the premises) prior to 31 December 2003. Buildings completed after that date are exempt.

The date for compliance with the Regulations varies depending on the type of premises. Compliance dates are:

- for multi-storey commercial premises: 1 September 2008
- for single-storey commercial premises: 1 September 2009
- for industrial premises: 1 March 2010
- for community or recreational premises: 1 September 2010.

The Commonwealth is not bound by the Regulations. (To be binding on the Commonwealth, the Act under which the Regulations are made must amongst other matters be specified in the schedule to the *Australian Capital Territory (Self-Government) Regulations 1989* (s 27 of the *Australian Capital Territory (Self-Government) Act 1988*). The *Dangerous Substances Act 2004 (ACT)* is not listed in these regulations. The position of bodies that have a separate legal identity from the Commonwealth, such as those regulated by the *Commonwealth Authorities and Companies Act 1997*, will depend on the nature of the body.) Notwithstanding this, Commonwealth agencies should be aware of the various requirements under the Regulations.

## ***Asbestos management obligations under the Regulations***

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'A person in control of non-residential premises' (discussed below) must comply with the following asbestos management obligations.

### **Identifying asbestos products and risk assessment**

A person in control must ensure the premises are inspected by a licensed asbestos assessor. The assessor is to provide an inspection report detailing, amongst other things, the location, type and condition of any asbestos product found at the premises (s 330 of the Regulations).

Where an asbestos product is identified in the report, the assessor is to make a written risk assessment, the details of which must be included in the asbestos management plan and asbestos register for the premises (s 333 of the Regulations). A person in control must ensure the risk assessment is reviewed in certain circumstances, such as where it is no longer adequate or there is a significant change proposed for the premises (s 334 of the Regulations).

It is important to note that only a licensed asbestos assessor can prepare the identification and risk assessment report. That report can then be used to prepare a written asbestos management plan, which must include an asbestos register to help inform relevant people of any asbestos in the building.

### **Preparing an asbestos management plan and register**

A person in control must have a comprehensive asbestos management plan for the premises which is to provide for, amongst other things, an asbestos register and a timetable for managing risks and procedures for review. It must also provide information about the location of, type of, and risks posed by, the product, as well as details of warning signs, safe work methods, and arrangements for dealing with accidents (s 325 of the Regulations). The asbestos management plan must be reviewed in certain specified circumstances as well as every five years (s 326 of the Regulations).

## ***Who is responsible for asbestos management?***

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The person responsible for complying with the Regulations is 'a person in control of the premises'.

The Dangerous Substances Act (at s 17(1)(b)) defines 'a person in control' of a premises as:

... anyone who has control of the premises (including anyone with authority to make decisions about the management of the premises) ...

The ACT Government has issued fact sheets which state that a number of people could be classified as a person in control of any one building, including the owner, occupier and/or property manager. Section 17(2) of the Act confirms that more than one person may be a person in control for a duty under the Act.

While two or more people may have the same obligation under the Regulations, each person in control is required to comply with that obligation. To avoid duplication, however, the Act

specifies that, where something is required to be done under the Act, it is sufficient if one of the persons in control does that thing. Based on the example at s 21(3) of the Act, if two people are in control of premises where an asbestos management plan is required, it is sufficient if one of them prepares the management plan. If the plan is not prepared, however, each person who could be classified as a person in control will be responsible for the failure to comply with the requirement.

### ***What action should agencies consider?***

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#### **Audit of ACT properties**

Commonwealth agencies may consider it appropriate to conduct an audit of their property portfolio in the ACT to determine:

- which properties are owned and which are leased
- whether the building was built prior to 31 December 2003
- whether negotiations are currently under way for future leases
- whether it would be appropriate to seek any assurance from any other party that they are complying with the Regulations and whether the Commonwealth itself wishes to comply with the Regulations (as a matter of policy/practice rather than legal obligation)
- who is best placed in the circumstances to comply with the Regulations.

#### **Properties leased by the Commonwealth in the ACT: existing leases**

Where there is an existing lease, a Commonwealth lessee may wish to request written confirmation from the owner that they will comply with the Regulations (or that the building is exempt).

#### **Properties leased by the Commonwealth in the ACT: new leases**

Where the Commonwealth is leasing one of the types of premises listed above (see 'Background'), it may wish to include a warranty from the landlord that it has prepared, or will prepare, an asbestos management plan and asbestos register for the building in accordance with the Regulations. The Commonwealth may also consider the inclusion of an indemnity clause whereby the owner indemnifies the Commonwealth for any loss incurred by the Commonwealth as a result of the owner's failure to comply with the Regulations. In some cases it may also be necessary for the lease to address the impact of the implementation of the asbestos management plan on the use and occupation of the premises by the Commonwealth tenant.

#### **Properties owned by the Commonwealth in the ACT**

If the building falls into any one of the types of premises listed above (see 'Background') the Commonwealth, as owner, may wish to consider adopting any of the requirements of the Regulations as a matter of policy (as opposed to legal obligation): for example, having an assessor prepare a report and then preparing an asbestos management plan and/or an asbestos register.

## Using a licensed asbestos assessor

Where an agency requires an asbestos assessment service other than for the purposes of the Regulations, it will need to determine whether or not to require the assessor to be licensed in accordance with the provisions of the ACT *Construction Occupations (Licensing) Act 2004*.

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