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A CALL FOR REFORM: THE NEED FOR AN EFFECTIVE RESPONSE TO ASBESTOS IN AUSTRALIAN WORKPLACES AND RESIDENTIAL SETTINGS

GILL NORTH * AND THERESE WILSON #

This article argues for greater regulatory efforts to prevent unnecessary deaths from asbestos exposure in Australia. Despite asbestos-related diseases being responsible for a large number of deaths in Australia every year, the danger from exposure to asbestos is not well understood in the community and the regulatory response has been inadequate. A survey of 43,000 Australians between April 2020 and May 2021 found that only 28 percent of respondents knew that asbestos is dangerous to health and only 5 percent were aware that once diagnosed, most cases of asbestos-related disease are fatal within relatively short timeframes. Despite the significant risk to Australian lives posed by in situ asbestos, governments have failed to ensure that Australians are accurately informed about that risk, and responsible corporations have not been fully held to account.

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I INTRODUCTION

Despite asbestos-related diseases being responsible for a large number of deaths in Australia every year,¹ the danger from exposure to asbestos is not well understood in the community and the regulatory response has been inadequate. A survey of 43,000 Australians between April 2020 and May 2021, found that only 28 percent of respondents knew that asbestos is dangerous to health and only 5 percent were aware that once diagnosed, most cases of asbestos-related disease are fatal within relatively short timeframes.²

Despite the significant risk to Australian lives posed by in situ asbestos, governments have failed to ensure that Australians are accurately informed about that risk, and responsible corporations have not been fully held to account.

We argue that at the very least clear, effective, and scientifically informed communications and public health campaigns about the risks of even short exposures to asbestos need to be implemented. Ideally there should also be a funded program for removal of in situ asbestos, to prevent further unnecessary deaths, although we acknowledge that removal itself brings with it potential risk if not carefully managed.

This article begins with an outline of the ongoing harms of in situ asbestos, before exploring the current regulatory frameworks applicable to asbestos in Australia in both the workplace and in residential settings. It then provides a critique of those regulatory frameworks before drawing upon the recommendations of the Asbestos Management Review and the observations and findings of the Full Court of the Supreme Court of South

*Professor Gill North passed away after a three-year battle with the asbestos-related cancer, mesothelioma, on 23 December 2021. At the time of her passing, Professor North was an Adjunct Professor at both Deakin University Law School and Griffith Law School.

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¹ See Asbestos Safety and Eradication Agency, 'Asbestos Health Risks' (Web Page) <<https://www.asbestosafety.gov.au/asbestos-health-risks-and-exposure/asbestos-health-risks#how-can-asbestos-affect-your-health>> where the estimate given is 4000 deaths per year although this is based on 2015 mesothelioma deaths which might be linked to a time when asbestos was legal and used extensively.

² See Digital Finance Analytics and Asbestos Awareness Australia, 'Community Awareness & Knowledge of Asbestos Threats & Consequences' (Research Report, Asbestos Awareness Australia, May 2021) <<https://digitalfinanceanalytics.com/blog/wp-content/uploads/2021/05/Report-Version-27-May-final.pdf>>.

Australia in *Amaca Pty Ltd v Werfel*,³ to formulate a set of recommendations which will offer much needed protection to the Australian public moving forward.

II THE ONGOING HARMS OF IN SITU ASBESTOS

As noted in prior papers, the asbestos crisis in Australia is far from over,⁴ and the ongoing risks and harms are poorly documented and comprehended. Exposure to asbestos can lead to diagnoses of asbestosis, mesothelioma, and lung cancer.

Asbestosis is a chronic lung disease caused exclusively by inhalation of asbestos fibres.⁵ While this condition is not fatal, it can trigger respiratory or cardiac failure and exposure to asbestos can lead to subsequent diagnoses of other asbestos-related diseases such as mesothelioma or lung cancer.⁶ There is currently no cure for asbestosis.⁷

Mesothelioma (also called malignant mesothelioma) occurs when abnormal cells in the tissue that surrounds the lungs, known as the pleura, grow in an uncontrolled way. This disease is not the same as lung cancer, which starts inside the lungs.⁸ Unlike other forms of cancer, exposure to asbestos is the only known cause of mesothelioma in Australia.⁹ According to the Cancer Council it was estimated that 868 new cases of mesothelioma would be diagnosed in 2021, and the five-year survival rate for mesothelioma is 6.3 percent.¹⁰

³ *Amaca Pty Ltd v Werfel* (2020) 138 SASR 295 ('*Werfel Case*').

⁴ See, eg, Peter Franklin and Alison Reid, 'The Ongoing Problem of Asbestos In Situ' in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia* (Monash University Publishing, 2019); Matthew Soeberg, Deborah A Vallance, Victoria Keena, Ken Takahashi and James Leigh, 'Australia's Ongoing Legacy of Asbestos: Significant Challenges Remain Even After Complete Banning of Asbestos Almost Fifteen Years Ago' (2018) 15(2) *International Journal of Environmental Research & Public Health* 384. Soeberg et al at 12 of 14 conclude that the 'Australian community needs to remain vigilant to the public health risk of asbestos exposure from existing asbestos or asbestos-containing materials as well as exposure to asbestos-containing materials that are brought into Australia despite regulations being in place'.

⁵ Safe Work Australia, 'Asbestos-Related Disease Indicators', *Safe Work Australia* (Report, October 2012) v <<https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestos-related-disease-indicators-2012.pdf>>.

⁶ *Ibid* 2. For example, Bernie Banton suffered initially from asbestosis but was subsequently diagnosed with mesothelioma.

⁷ St Vincent's Hospital Lung Health, 'Asbestosis' (Web Page) <<https://www.svhlunghealth.com.au/conditions/asbestosis>>.

⁸ Australian Government Cancer Australia, 'What is Mesothelioma?' (Web Page) <<https://www.canceraustralia.gov.au/cancer-types/mesothelioma-cancer/overview>>.

⁹ Safe Work Australia (n 5) 3.

¹⁰ Cancer Council, 'Mesothelioma' (Web Page) <<https://www.cancer.org.au/cancer-information/types-of-cancer/mesothelioma>>.

Lung cancer develops when cells grow out of control in a person's lungs on one side or on both.¹¹ Lung cancer can be curable in the early stages but is often not diagnosed until the disease is advanced.¹² While smoking is the single greatest risk factor for lung cancer, some people diagnosed with lung cancer have never smoked, and asbestos is an exacerbating and interacting risk factor.¹³ In 1964, a study by Selikoff, Hammond and Churg showed that asbestos workers who smoked had 92 times the risk of developing asbestos-related cancer than non-smokers with no exposure to asbestos.¹⁴ A lung cancer diagnosis is very serious, with a relatively low average five-year survival rate of 20 percent.¹⁵

Given the seriousness of the diagnoses that can follow asbestos exposure, the need to protect Australians through a robust, interventionist regulatory scheme seems obvious. This is particularly the case when considering the studies which have demonstrated that, contrary to common misconceptions, there are positive and strong associations between non-occupational exposure (including neighbourhood, domestic and household exposures) and the risk of mesothelioma.¹⁶ Marsh et al conclude that mesothelioma risks from non-occupational asbestos exposure are consistent with the fibre-type potency response observed in occupational settings.¹⁷ Other medical researchers highlight cases of mesothelioma arising from much lower dosages in non-occupational settings than observed from occupational sources.¹⁸

¹¹ St Vincent's Hospital Sydney, 'Early Screening for Lung Cancer' (Web Page) <<https://www.svhs.org.au/research-education/participating-in-research-trials/early-screening-for-lung-cancer>>.

¹² *Ibid.*

¹³ In *Burrows v WA Government Railways Commission* (1982) 1 WCR WA 177, the Court accepted evidence by Arthur Musk of the multiplicative interaction between smoking and asbestos. It found that asbestos had materially increased the risk of lung cancer to the plaintiff and on balance contributed to it.

¹⁴ Irving J Selikoff, E Cuyler Hammond and Jacob Churg, 'Asbestos Exposure, Smoking, and Neoplasia' (1968) 204(2) *Journal of the American Medical Association* 106, 110.

¹⁵ Australian Government Cancer Australia, 'Lung Cancer' (Web Page) <<https://www.canceraustralia.gov.au/cancer-types/lung-cancer/statistics>>.

¹⁶ See, eg, Gary M Marsh, Alexander S Riordan, Kara A Keeton and Stacy M Benson, 'Non-occupational Exposure to Asbestos and Risk of Pleural Mesothelioma: Review and Meta-analysis' (2017) 74(11) *Occupational Environmental Medicine* 838; Rengyi Xu, Frances K Barg, Edward A Emmett, Douglas J Wiebe and Wei-Ting Hwang, 'Association Between Mesothelioma and Non-Occupational Asbestos Exposure: Systematic Review and Meta-Analysis' (2018) 17:90 *Environmental Health* <https://doi.org/10.1186/s12940-018-0431-9>: 1-14.

¹⁷ Marsh et al (n 16) 845.

¹⁸ See, eg, Alison Reid, Jane Heyworth, Nicholas H. de Klerk and Bill Musk, 'Cancer Incidence among Women and Girls Environmentally and Occupationally Exposed to Blue Asbestos at Wittenoom, Western Australia' (2008) 122(10) *International Journal of Cancer* 2337; *Werfel Case* (n 3) 340[128] citing Jan

While the discussion concerning asbestos exposure has tended to focus on occupational exposure, since 2008, 52 percent of the mesothelioma claims made through the Asbestos Injuries Compensation Fund (established by James Hardie in 2006) have been categorised by KPMG (the auditor of this fund) as home renovation related. These percentages rose to 62 and 55 percent in 2018 and 2019 respectively, and the number of these types of claims reached a record number in 2019.¹⁹

Even occupational exposure has not been adequately addressed through regulation. Scientists acknowledged in the 1960s that the only safe level of exposure to asbestos was nil, with any exposure presenting certain and known risks.²⁰ These facts were subsequently confirmed by the World Health Organization and International Agency for Research on Cancer in 1977.²¹ Despite the clarity of the science in this arena, the asbestos industry continued to argue for minimum dust standards during the 20th century.²²

III THE CURRENT STATE OF WORKPLACE REGULATION

Existing law around the control and handling of asbestos in Australia is primarily designed to apply in workplaces. The *Work Health and Safety Act 2011* (Cth) was introduced nationally as model legislation for the management of health and safety issues in workplaces. This model legislation was then enacted by the states and territories as law and associated regulation.²³

Lieben and Harry Pistawka, 'Mesothelioma and Asbestos Exposure' (1967) 14(4) *Archives of Environmental Health: An International Journal* 559.

¹⁹ KPMG, 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust', *Asbestos Injuries Compensation Fund* (Report, 19 May 2020) 27-28 <https://www.aicf.org.au/docs/AICFL_KPMG%20Annual%20Actuarial%20Report_31%20March%202020.pdf>.

²⁰ *Werfel Case* (n 3) 338-9 [120] citing N W Hendry, 'The Geology, Occurrences, and Major Uses of Asbestos' (1965) 132 *Annals of New York Academy of Sciences* 21.

²¹ International Agency for Research on Cancer, 'Monographs on the Evaluation of Carcinogen Risks of Chemicals to Man: Asbestos', *IARC Publications* (Report, 1977) 14

<<file:///C:/Users/61493/Downloads/mono14.pdf>>. See also International Agency for Research on Cancer, 'IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Humans - Overall Evaluation of Carcinogenicity: An Updating of IARC Monographs Volumes 1 to 42 Supplement 7', *IARC Publications* (Report 1987) 106-116 <<file:///C:/Users/61493/Downloads/Suppl7.pdf>>; World Health Organization, 'Elimination of Asbestos-Related Disease' (Web Page) <https://apps.who.int/iris/bitstream/handle/10665/69479/WHO_SDE_OEH_06.03_eng.pdf;sequence=1>.

²² See, eg, Lenore Layman, 'Tackling the Dust Hazard: The Response of Public Health' in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia: From Boom to Bust* (Monash University Publishing, 2019) 105; Jock McCulloch, *Asbestos: Its Human Cost* (Queensland University Press, 1986) 242.

²³ See, eg, *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Regulation 2011* (NSW).

SafeWork Australia has issued a Code of Practice to provide guidance on how to respond to asbestos risks. The Code contains information on identifying asbestos materials, how to report asbestos properly, and how to manage the risk of exposure in a work setting.²⁴

Australian employers are not legally obliged to remove materials containing asbestos but are required to assess and manage any related threats.²⁵ When asbestos is identified during an assessment, a written management plan must be prepared that records its location, type and condition, and the date of review.²⁶ For this purpose, employers are required to maintain an asbestos register that can be viewed by employees and others.²⁷

A Compliance & Enforcement

The extent to which the present workplace obligations around asbestos threats are complied with, and are monitored and enforced by regulatory bodies, is unclear. A national audit conducted by the Heads of Workplace Safety Authorities found that the construction industry had the lowest rate of compliance with asbestos-related standards.²⁸ Another Safe Work Australia study found that although construction and maintenance workers indicated that they were well aware of the potential dangers of asbestos to their health, they lacked knowledge on how to recognise materials containing

²⁴ SafeWork Australia, *How to Manage and Control Asbestos in the Workplace - Code of Practice* (July 2020) <https://www.safeworkaustralia.gov.au/sites/default/files/2020-07/model_code_of_practice_how_to_manage_and_control_asbestos_in_the_workplace_1.pdf>.

²⁵ See Mark Kay, 'The "A" Word', *Company Director* (Web Page, 1 March 2014) <<https://www.aicd.com.au/leadership/types/thought/the-a-word.html>>. Kay states that it has never been more important for directors to keep up to date with their asbestos duties and obligations.

²⁶ See, eg, SafeWork NSW, *Asbestos Registers and Management Plans* (Web Page) <<https://www.safework.nsw.gov.au/resource-library/asbestos-publications/asbestos-registers-and-management-plans-fact-sheet>>.

²⁷ See Inca Consulting, 'A Strategic Review of the Practice and Use of Asbestos Registers in Australia', *Asbestos Safety and Eradication Agency* (Report, 2016) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-01/ASEA_Reports_strategic_review_use_of_asbestos_registers_in_Australia_discussion_paper.pdf>.

²⁸ Corie Gray, Renee Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22(4) *International Journal of Occupational and Environmental Health* 292, 295. This audit was conducted in 2006. See also Safe Work Australia, 'Asbestos Exposure and Compliance Study of Construction and Maintenance Workers' (Research, February 2010) <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestosexposureandcompliancestudyofconstructionandmaintenanceworkers_2010_pdf.pdf>; Safe Work Australia, 'Asbestos-Related Disease Indicators' (Report, August 2010) 10 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestos-related_disease_indicators.pdf>.

asbestos, they were not complying with safety procedures as well as they perceived, and there were instances of inappropriate disposal of asbestos contaminated materials.²⁹

The Asbestos Safety and Eradication Agency ('ASEA') admits that instances of workplace noncompliance remain a serious issue.³⁰ The *ASEA National Strategic Plan 2019-2023* includes targets for the public, commercial and residential sectors. The target for the commercial sector is an expectation that commercial buildings that are required by law to maintain asbestos registers will have up-to-date registers and management plans that are actively being implemented.³¹ The fact that compliance with existing law is set as a target suggests that either non-compliance remains a significant issue or that this target is tokenistic.

B Training

Compulsory training on asbestos risks and removal is not mandated for tradespersons across all states and territories of Australia. In a survey of tradespersons involved with home renovations in 2018, the proportion of tradespeople who had undertaken formal training in relation to the management, handling and removal of asbestos was only 37 percent.³²

The voluntary or recommended training frameworks seem insufficient given the risks and fatalities involved.

IV LACK OF PROTECTIONS AROUND ASBESTOS IN RESIDENTIAL SETTINGS

²⁹ Safe Work Australia, 'Asbestos Exposure and Compliance Study of Construction and Maintenance Workers' (Research, February 2010)

<https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestosexposureandcompliancestudyofconstructionandmaintenanceworkers_2010.pdf>.

³⁰ Asbestos Safety and Eradication Agency, 'National Asbestos Profile for Australia' (Report, November 2017) 11 <https://www.asbestossafety.gov.au/sites/default/files/documents/2017-12/ASEA_National_Asbestos_Profile_interactive_Nov17.pdf>.

³¹ Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Awareness and Management' (Strategic Plan, November 2019) <https://www.asbestossafety.gov.au/sites/default/files/documents/2019-11/ASEA_NSP2_ebrochure%28Nov19%29.pdf>.

³² Colmar Brunton, 'Asbestos Awareness Research' (Draft Report, June 2018) 60 <<https://www.asbestossafety.gov.au/sites/asea/files/documents/2018-08/Executive%20summary%20-%202018%20National%20asbestos%20awareness%20and%20attitudes%20survey.pdf>>.

Outside of workplaces, there are still no systematic policy or public health protections in Australia. The legal obligations in the residential sector and the ability for outsiders to review actions taken in homes are considerably more ambiguous than in the public and commercial sectors. When tradespersons are employed by a homeowner or occupant to do a project, the project occurs within a workplace, and the workplace health and safety obligations around the handling and control of asbestos theoretically apply. However, very few homeowners in Australia voluntarily seek professional asbestos assessments of their homes on either a one-off or periodic basis.³³

A Longstanding scientific evidence

Scientific evidence demonstrating that asbestos-related diseases arise in non-occupational or environmental settings is longstanding. Within the non-occupational exposure risk category, expert warnings on incidences of mesothelioma linked to home renovations have been documented since the 1960s.³⁴ These include people with very brief periods and dosages of asbestos exposure.

For example, Wagner et al highlighted mesothelioma cases caused by environmental exposure in South Africa in 1960,³⁵ Newhouse and Thompson identified mesothelioma cases linked to household exposure in London in 1965,³⁶ and Lieben and Pistawka discussed mesothelioma cases linked to non-occupational exposures in the United States in 1967.³⁷

Longstanding scientific evidence of the risks of limited exposure was accepted as evidence in the *Werkel Case*. For instance, an article in the *British Medical Journal* in 1967 observed that ‘there is a vast number of “do-it-yourself” enthusiasts who may be

³³ NSW Environment Protection Authority, ‘Asbestos Safety Part 1- Household Renovations and Maintenance’ (Social Research Report, 2021) 7, 17-46 <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/asbestos/asbestos-safety-social-research-report-part-1-2021.pdf?la=en&hash=F6BBA34B3B0F9D41F50A1CB3F433BD2CAE8A6D0B>>.

³⁴ See, eg, *Werkel Case* (n 3) [125] citing ‘Asbestosis’ (1967) 5557 *British Medical Journal* 62.

³⁵ JC Wagner, CA Sleggs, and P Marchand, ‘Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province’ (1960) 17(4) *British Journal of Industrial Medicine* 260, 269-70. Eleven of the 30 cases studied by Wagner had not worked with asbestos and arose from non-occupational sources of exposure, *ibid*.

³⁶ ML Newhouse and H Thompson, ‘Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area’ (1965) 22(4) *British Journal of Industrial Medicine* 261, 264.

³⁷ J Lieben and H Pistawka, ‘Mesothelioma and Asbestos Exposure’ (1967) 14(4) *Archives of Environmental Health* 559, 561-62.

exposed intermittently to highly concentrated asbestos dust'.³⁸ The authors note that in some cases, extremely short exposures have been reported.³⁹ The following year in 1968, an article published in the *Medical Journal of Australia* warned of the development of mesothelioma after 'minor exposure to asbestos'.⁴⁰

B *Excess risk studies in homes*

Scientists often use excess risk studies that compare the incidences of asbestos-related diseases in a controlled group versus the incidences across the general population to assess statistically significant associations between individuals with specific sources of exposure to asbestos.

There are published studies within medical journals that find statistically significant excess risks of mesothelioma in homes.⁴¹ For example, in 2017, Marsh et al conducted meta-analysis and concluded that mesothelioma risks from non-occupational asbestos exposure are consistent with the fibre-type potency response observed in occupational settings.⁴²

In 2018, Xu et al also used meta-analysis and found non-occupational asbestos exposure is significantly associated with an elevated risk of mesothelioma.⁴³ The relative risk estimates varied by types of exposure (neighbourhood, domestic and household exposure), but for all these categorisations, there was an elevated risk of mesothelioma.

The handling of asbestos by non-workers, such as residential property owners or "do-it-yourselfers" remains largely unregulated across Australia.⁴⁴

In some circumstances, local council development controls in Australia may require owners or renovators to use a licensed asbestos removalist, but these rules generally only apply to residential areas containing asbestos of over 10m².⁴⁵ So, homeowners are legally

³⁸ *Werfel Case* (n 3) 339 [125] citing 'Asbestosis' (1967) 5557 *British Medical Journal* 62, 62-3

³⁹ *Ibid* 340 [125].

⁴⁰ *Ibid* 341 [131].

⁴¹ Marsh et al (n 16); Xu et al (n 16).

⁴² Marsh et al (n 16) 845.

⁴³ Xu et al (n 16).

⁴⁴ Asbestos Safety and Eradication Agency (n 30).

⁴⁵ In the ACT, all asbestos removal work must be carried out by a licensed asbestos removalist. In other states and territories, a non-licensed person can remove non-friable asbestos as long as the area is no bigger than 10m².

responsible for the control and cost of asbestos in their properties but are largely unaware of this fact and remain at risk of deadly exposure.

Under current State and local council settings (other than in the ACT),⁴⁶ even if homeowners do arrange for a professional asbestos assessment, and asbestos threats in their properties are identified as a result, the owner(s) can choose to sell or lease their premises rather than resolve these threats and are not obliged to disclose the identified risks to potential buyers or tenants.⁴⁷

In any event, these measures place responsibility on property owners, while recent qualitative research by the NSW Environment Protection Authority cautioned against this approach, noting that:

...interventions (such as those currently in place) that position property owners as solely responsible for the management of asbestos (and its costs) can be considered by the community as punitive and are likely to have unintended and perverse outcomes.⁴⁸

The emphasis on regulating asbestos in the workplace in Australia is consistent with the early stages of the asbestos crisis when most of the asbestos-related victims were employees in mines and factories where asbestos was present. However, published sources suggest that the share of sufferers from what is referred to as ‘the first wave’ is now low, while those who were possibly or probably exposed from non-occupational sources (such as home renovations) are increasing.⁴⁹

The most recent Australian Mesothelioma Registry report released November 2021 emphasises the historical nature of the current deaths from mesothelioma and suggests the working conditions that resulted in these deaths have changed.⁵⁰ Similar arguments and claims have been made by the industry worldwide since the 1970s,⁵¹ but they ignore

⁴⁶ When a residential owner in the ACT seeks a professional asbestos assessment, they must disclose any identified asbestos threats to prospective buyers or tenants. This policy approach was recommended in NSW by the Ombudsman in 2010 and again by the Acting Ombudsman in 2017.

⁴⁷ Asbestos Safety and Eradication Agency (n 30) 38.

⁴⁸ NSW Environment Protection Authority (n 33) 104.

⁴⁹ See, eg, Australian Government, Australian Institute of Health and Welfare, ‘Mesothelioma in Australia 2018’ (Report, 28 August 2019) <https://www.aihw.gov.au/getmedia/7df8ff10-d0b7-4d42-881b-76647a9263ef/aihw-can-130-infocus_1.pdf.aspx?inline=true>.

⁵⁰ Australian Mesothelioma Registry, ‘Mesothelioma in Australia 2020’ (Report, 10 November 2021) <<https://www.aihw.gov.au/reports/cancer/mesothelioma-in-australia-2020/summary>>

⁵¹ See, eg, Jock McCulloch and Geoffrey Tweedale, *Defending the Indefensible* (Oxford University Press, 2008) 111, 112, 196-202, 270.

the incomplete regulation governing the control and handling of asbestos in residential properties beyond workplaces.

The NSW government website on ‘Asbestos and Health Risks’ presently states that those ‘who get health problems from inhaling asbestos have usually been exposed to high levels of asbestos for a long time’.⁵²

However, as noted in a report by Safe Work Australia released in 2010:

Mesothelioma ... can develop from *short or lengthy periods of low or high concentrations* of asbestos, although exposure to asbestos fibres does not make the development of the disease inevitable.⁵³

While the risk of disease from low level exposure may be low, it is nevertheless real for those who develop disease as a result.

V THE INADEQUACY OF THE CURRENT RESPONSE

The *Asbestos Safety and Eradication Act 2013* (Cth) makes the Asbestos Safety and Eradication Agency responsible for implementing the National Strategic Plan and for annual reporting on the progress made by the federal, state and territory governments in achieving its stated objectives.⁵⁴

The Asbestos Safety and Eradication Agency has published three progress reports.⁵⁵ The last was the 2017-2018 report which indicated that:

⁵² NSW Government Health, ‘Asbestos and Health Risks’ (Web Page) <<https://www.health.nsw.gov.au/environment/factsheets/Pages/asbestos-and-health-risks.aspx#:~:text=People%20who%20get%20health%20problems,the%20first%20exposure%20to%20asbestos>>.

⁵³ Safe Work Australia, ‘Asbestos-Related Disease Indicators’ (Report, August 2010) 2 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestos-related_disease_indicators.pdf>.

⁵⁴ *Asbestos Safety and Eradication Act 2013* (Cth) ss 8, 29. See also Asbestos Safety and Eradication Agency, ‘National Strategic Plan for Asbestos Management and Awareness 2014-2018’ (Report, April 2019) <<https://www.asbestossafety.gov.au/sites/default/files/documents/2019-05/National%20Strategic%20Plan%20for%20Asbestos%20Management%20and%20Awareness%2014%20-%202018%20Final%20Report.pdf#:~:text=The%20National%20Strategic%20Plan%20for%20Asbestos%20Management%20and,%28ARDS%29%20in%20Australia%2C%20over%20the%20last%20five%20years>>; Asbestos Safety and Eradication Agency (n 31).

⁵⁵ Asbestos Safety and Eradication Agency, ‘National Strategic Plan for Asbestos Management and Awareness: Progress Report 2015-16’ (Report, Oct 2016) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-03/ASEA_NSP_2015-16_Progress_Report_final_web.pdf>; Asbestos Safety and Eradication Agency, ‘National Strategic Plan for

- The NSW Government produced guides, templates, and fact sheets, held a media event at Orange, and ran a pilot scheme to improve asbestos awareness in Aboriginal communities.⁵⁶
- The Victorian Government invested \$200 million over four years to remove asbestos from its public schools,⁵⁷ with a further \$179 million allocated for this purpose in the 2019-2020 budget.⁵⁸
- The Queensland Government ran a program to assess compliance by seven of its licensed asbestos removalists, resulting in the cancellation of two licenses, the suspension of one license, and the sending of a warning letter to another.⁵⁹
- The South Australian Government identified and contacted 42 building owners to warn them about the potential existence of asbestos-containing millboard in their heater banks.⁶⁰
- The Tasmanian Government ran a state-based online and help line asbestos awareness campaign and concluded that it may be more effective for jurisdictions to collaborate on a national campaign.⁶¹

Asbestos Management and Awareness: Progress Report 2016-17' (Report, November 2017) <<https://www.asbestossafety.gov.au/what-we-do/national-strategic-plan/national-strategic-plan-progress-report-2016-17>>; Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Management and Awareness: Progress Report 2017-18' (Report, November 2018) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-12/ASEA_2017-18_Progress%20Report.pdf>. See also Asbestos Safety and Eradication Agency, 'Case Studies of Significant Asbestos Removal Projects' (Report, December 2017) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-01/ASEA_Reports_case_studies_significant_asbestos_removal_Jan18.pdf>.

⁵⁶ Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Management and Awareness: Progress Report 2017-18' (Report, November 2018) 26-30 <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-12/ASEA_2017-18_Progress%20Report.pdf>. The pilot scheme resulted in the distribution of guidance material to 250 recipients and trained 95 people.

⁵⁷ Ibid.

⁵⁸ Victorian School Building Authority, 'Asbestos Safety Program' (Web Page) <<https://www.schoolbuildings.vic.gov.au/Pages/Asbestos-removal-from-schools.aspx>>.

⁵⁹ Asbestos Safety and Eradication Agency, (n 55) 34-35.

⁶⁰ Ibid 34, 36, 37.

⁶¹ Ibid 38-39.

- The ACT Government removed loose fill asbestos from the roof space of one property in Edgar Street and remediated three other properties in this street to ensure the safety of these premises.⁶²

The summary table at the rear of the ASEA 2018 progress report reflects the slow pace of government responses to fatalities caused by asbestos-related diseases since 2012. Most of the reported activity consists of plans, announcements, the establishment of agencies, and the holding of conferences.⁶³ Similarly, ASEA's annual report 2020-21 refers to data collection, the establishment of working groups, and providing reporting templates.⁶⁴

The reported actions by State and Territory governments to raise public awareness of asbestos dangers in homes and prevent future incidences of asbestos-related disease linked to the residential sector seem minimal, given the seriousness of the public health issues and the numbers of lives involved.

Our research found only one example of a body beyond the Victorian School Asbestos Eradication Program acting in accordance with the eradication goals of the Asbestos Management Review, which will be referred to below. The Victorian Asbestos Eradication Agency (VAEA) states on its home webpage that 'the only way to prevent asbestos-related diseases is to eliminate the risk of exposure by removing asbestos-containing materials'.⁶⁵ This objective is backed by specific plans and actions and the scope of its actions are clearly stated: 'to remove asbestos containing materials from buildings owned by the Victorian government, including offices, hospitals, train stations, community centres, prisons and TAFEs'.⁶⁶

To achieve its goal, the VAEA developed a consolidated register of identified asbestos-containing materials in government-owned buildings, a risk assessment model to assess asbestos hazards, and a schedule for the prioritised removal of asbestos from government-owned buildings. The VAEA highlights that this approach will ensure that

⁶² Ibid 40-41.

⁶³ Ibid.

⁶⁴ Asbestos Safety and Eradication Agency, 'Asbestos Safety - Annual Report 2020-21' (Report, 17 September 2021) 25 <<https://www.asbestossafety.gov.au/sites/default/files/documents/2021-10/ASEA%20Annual%20Report%202020-21%20-%20Final.pdf>>.

⁶⁵ Victorian Asbestos Eradication Agency, 'Providing Victoria with a long term plan for the removal of asbestos from government owned buildings' (Web Page) <<https://www.vaea.vic.gov.au/>>.

⁶⁶ Victorian Asbestos Eradication Agency, 'Scope of the VAEA's Work' (Web Page) <<https://www.vaea.vic.gov.au/scope>>.

‘the long-term plan for the prioritised removal of asbestos from Victorian government buildings is informed, measured, systematic and safe’.⁶⁷

The program by the Victorian School Building Authority in Victoria to remove asbestos from public schools is more advanced. This authority conducted a full audit of the 1,712 government school sites and prioritised the risks.⁶⁸ Having completed this planning, it removed asbestos from the highest risk schools in March 2016 and continues to remove asbestos from other school sites identified as a threat.⁶⁹

Beyond the VAEA example, we found no evidence of formal plans to eradicate *in situ* asbestos fully or substantively across any State or Territory of Australia.

The Asbestos Safety and Eradication Agency’s *National Strategic Plan 2019-2023* incorporates very limited targets towards the Asbestos Management Review goals.

For the public sector, the agreed targets in the *National Strategic Plan 2019-2023* include the identification and assessment of asbestos risks in publicly owned and controlled buildings, land and infrastructure, with specified schedules and processes for the prioritised safe removal of asbestos-containing material.⁷⁰

The stated targets in the *National Strategic Plan 2019-2023* for the commercial sector are lower, with the expectation for commercial buildings that are required by law to maintain asbestos registers, that they will have up-to-date registers and management plans that are actively being implemented.⁷¹

The indicated targets in the *National Strategic Plan 2019-2023* for the residential sector include the development of an evidence-based national picture that assesses the likelihood of asbestos-containing materials being present in the residential environment and increased awareness of the health risks of asbestos-containing materials to 80 per cent of homeowners and occupiers.⁷²

⁶⁷ Ibid.

⁶⁸ Victorian School Building Authority, ‘Asbestos Safety Program’ (Web Page) <<https://www.schoolbuildings.vic.gov.au/Pages/Asbestos-removal-from-schools.aspx>>.

⁶⁹ Ibid.

⁷⁰ Asbestos Safety and Eradication Agency, ‘National Targets’ (Web Page) <<https://www.asbestossafety.gov.au/research-publications/national-strategic-plan-asbestos-management-and-awareness/overview-national-strategic-plan>>.

⁷¹ Ibid.

⁷² Ibid.

There has however been a lack of concrete commitments and urgency in the 2019-2023 *National Strategic Plan*. Under this Plan:

- The States and Territories can determine the nature and timing of their plans to identify, assess and deal with asbestos in the public sector, and may delay these processes for many decades.
- There are no targets in the commercial sector beyond compliance with existing law. This means that most of the private sector can continue to “manage” asbestos within their properties, without firm commitments or obligations to remove or remediate it if they consider it to be “safe”.
- The targets for the residential sector in the plan are vague and minimal. It is unclear how the national residential picture will be developed; what household awareness means; which mechanisms will be used to assess and raise awareness by homeowners and occupiers of the health risks of asbestos; and what will happen if these targets are not achieved. If 80 percent of Australian households are “aware” of asbestos risks under the definition used by the Asbestos Safety and Eradication Agency, will this mean that all these households will seek assistance from licensed asbestos professionals or will take adequate precautions? Empirical research suggests not.⁷³

VI THE RECOMMENDATIONS OF THE ASBESTOS MANAGEMENT REVIEW

In 2012, the Asbestos Management Review considered the arguments (and submissions) for and against regulation governing the handling of asbestos in residential settings. It reported that after

...careful consideration, and having regard to the statistics and research indicating increasing incidences of asbestos-related disease among DIY home renovators and their families, the review has concluded that the provision of information and protective equipment is not a sufficient safeguard against the risk of exposure to potentially lethal airborne fibres.⁷⁴

⁷³ NSW Environment Protection Authority (n 33).

⁷⁴ Asbestos Safety and Eradication Agency, ‘Asbestos Management Review Report’ (Report, June 2012) 30 <https://www.asbestossafety.gov.au/sites/default/files/documents/2017-10/asbestos_management_review_report_june_2012_0.pdf>.

The Asbestos Management Review recommended that the national strategic plan provide for a

...requirement that an asbestos content report be undertaken by a competent assessor to determine and disclose the existence of ACMs [i.e. asbestos containing materials] in residential properties constructed prior to 1987 at the point of sale or lease, and prior to renovation, together with a property labelling system to alert workers and potential purchasers and tenants to the presence of asbestos.⁷⁵

In 2012, the Asbestos Management Review report concluded that:

Dealing with Australia's asbestos legacy requires urgent nationwide action undertaken in a systematic way.⁷⁶

Nevertheless, there is minimal evidence of systematic responses since this time at either federal or state government levels, and there continues to be a lack of public acknowledgement as to the scale of the ongoing asbestos crisis.

In 2012, the Federal Government indicated that it supported the recommendation for mandatory asbestos assessments of residential homes built prior to 1987, with a labelling system to alert potential buyers, tenants and renovators of identified threats.⁷⁷ However, this recommendation has not been adopted in full by any State or Territory government.

The Asbestos Safety and Eradication Agency, referred to above, is empowered under the *Asbestos Safety and Eradication Agency Act 2013* (Cth) to coordinate a framework for the Commonwealth, States and Territories to work together to prevent harmful exposure to asbestos and to eliminate asbestos-related diseases.⁷⁸ The Asbestos Safety and Eradication Agency confirms that it was set up to 'provide a national focus on asbestos issues which goes beyond workplace safety to encompass environmental and public health concerns'.⁷⁹ Despite these worthy ambitions, our research suggests that public acknowledgment of asbestos issues in Australia beyond workplaces remains minimal and equivocal.⁸⁰ Survey results suggest the broader community remains largely unaware of

⁷⁵ Ibid 7 (Recommendation 3 (b)).

⁷⁶ Ibid 17.

⁷⁷ David Twomey, 'Labor Plans National Asbestos Removal Agency', *Econews online* (Web Page) (4 September 2012) <<https://econews.com.au/20094/labor-plans-national-asbestos-removal-agency/>>.

⁷⁸ The Agency is a statutory body established under the *Asbestos Safety and Eradication Agency Act 2013* (Cth)

⁷⁹ Asbestos Safety and Eradication Agency, 'History of Asbestos' (Web Page) <<https://www.asbestossafety.gov.au/aboutasbestos/history-asbestos>>.

⁸⁰ See, eg, *Werfel Case* (n 3) 364-5 [231].

the public health risks and impacts of legacy asbestos in homes.⁸¹ Further, analysis of available public health guidance suggests current warnings to householders about the health risks of asbestos exposure are qualified, incomplete and poorly disseminated.⁸²

The Asbestos Management Review also recommended nationally consistent laws that restrict the handling, removal, storage, transport, and disposal of asbestos to licensed operators.⁸³ Adoption of this recommendation is limited to the ACT.

The Asbestos Safety and Eradication Agency's 2017-18 Progress Report notes that a significant portion of DIY home renovators are still at risk, but after decades of warnings to this sector, specific policies, plans and actions to mitigate these risks are still lacking.⁸⁴

VII RECOMMENDATIONS AND CONCLUSION

The regulatory settings across Australia governing the handling and control of asbestos in the residential sector presently seem to assume that homeowners and occupiers are aware of, and well informed about, the risks of exposure to asbestos in poor condition or during maintenance or renovation activity, or that they will become informed about the risks by searching and assessing material online. For example, the present online public health communications, including *Asbestos: A guide for householders and the general public*,⁸⁵ *Asbestos Fact Sheet for Home Owners and Tenants*,⁸⁶ and *Safety information for the removal of less than 10m² of non-friable asbestos*,⁸⁷ presume that prospective DIY renovators know enough about asbestos dangers to search for, locate, and respond to, the relevant material. These assumptions are poorly founded.

⁸¹ See Digital Finance Analytics and Asbestos Awareness Australia, (n 2).

⁸² Ibid.

⁸³ Asbestos Safety and Eradication Agency (n 74) 30.

⁸⁴ Asbestos Safety and Eradication Agency (n 55) 14, 43. Page 43 of the report indicates that the promotion of a short film to increase community awareness about asbestos safety is ongoing (with a DIY focus).

⁸⁵ Australian Government Department of Health, 'Asbestos - A guide for householders and the general public' (Web Page) <<https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-enhealth-asbestos-may2012.htm>>.

⁸⁶ NSW Government, 'Asbestos Fact Sheet for Homeowners and Tenants' (Factsheet, March 2019) <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/applications/asbestos/factsheet/19p1498-AA-factsheet-homeowners.pdf>>.

⁸⁷ Asbestos Safety and Eradication Agency, 'Safety information for the removal of less than 10m² of non-friable asbestos' (Safety Information, April 2017) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-01/ASEA_less_than_10m2_Safety_Leaflet_Apr17_Final_web.pdf>.

The two most significant areas of concern in the residential and DIY sectors in Australia are poor awareness of asbestos dangers and a lack of precautions and protections.⁸⁸ These concerns are commonly intertwined because if homeowners or occupiers are not aware of the dangers of legacy asbestos or do not fully understand the gravity of the risks involved, they cannot or will not make well-informed decisions.

A household survey conducted in 2021 found that most respondents would not pass a basic asbestos risk test and that the general community levels of awareness and knowledge around asbestos threats and consequences are very low.⁸⁹ Households who do not comprehend the nature and scale of the risks of asbestos exposure are highly unlikely to search for relevant information online, seek professional help, or take appropriate precautions. Consequently, grave questions remain concerning the laxity of the regulatory schemes around home renovations. These regulatory inadequacies are heightened by a lack of residential property disclosure obligations. Under current policy settings (except in the ACT),⁹⁰ even if Australian homeowners do arrange for a professional asbestos assessment, they are not obliged to disclose any identified risks to potential buyers or tenants.⁹¹

The public health and policy responses to asbestos threats in Australia ought to be prudent and proactive given the vast numbers of Australians potentially at risk. Franklin and Reid confirm that '[r]enovation and removal are the activities, that, if done poorly, probably present the greatest contemporary risk of exposure to asbestos fibres.⁹² Gray et al conclude that future cases of asbestos-related diseases and mortality can only be prevented by stringent regulation and careful maintenance and removal of existing *in situ* asbestos across the country.⁹³

⁸⁸ Peter Franklin and Alison Reid, 'The Ongoing Problem of Asbestos *In Situ*' in Lenore Layman and Gail Phillips (Eds) *Asbestos in Australia* (Monash University Publishing, 2019) 257, 262.

⁸⁹ See Digital Finance Analytics and Asbestos Awareness Australia (n 2).

⁹⁰ When a residential owner in the ACT seeks a professional asbestos assessment, they must disclose any identified asbestos threats to prospective buyers or tenants. This policy approach was recommended in NSW by the Ombudsman in 2010 and again by the Acting Ombudsman in 2017.

⁹¹ Asbestos Safety and Eradication Agency, *National Asbestos Profile for Australia* (November 2017) 38.

⁹² Franklin and Reid (n 88) 261.

⁹³ Corie Gray, Renee N Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22(4) *International Journal of Occupational and Environmental Health* 292, 295.

Additionally, the Full Court decision in *Amaca Pty Ltd v Werfel*⁹⁴ has highlighted the need for clear information through public health campaigns, to ensure that Australians are aware of the risks of asbestos exposure. The decision supports a view that those corporations which profited from the manufacture and sale of asbestos-containing materials even after becoming aware of the risks of asbestos exposure to human life, ought to provide financial support for such campaigns.

In the *Werfel Case*, Werfel was diagnosed with mesothelioma following brief periods working as a fencing contractor in the late 1990s and do-it-yourself home renovations in 2000-2001 and in 2004. The Court ultimately held that James Hardie owed a duty of care to avoid injury to persons who might occasionally remodel, repair or remove its asbestos-cement products, and that this duty had been breached with respect to Werfel. More broadly, the decision in the *Werfel Case* recognised a duty on James Hardie to warn homeowners, occupants, and tradespersons of the risks of contracting mesothelioma from occasional exposures to asbestos cement products and to provide appropriate advice on the necessary precautions. Their Honours suggested that this duty might be satisfied by conducting mass media campaigns that acknowledge these risks and that provide appropriate guidance. They further noted that a mass media public campaign could minimise incidences of future harm by alerting both occasional users and tradespersons working with asbestos cement products, thereby reducing future claimants.⁹⁵

Chief Justice Kourakis and Justices Nicholson and Livesay highlighted the problems arising from qualified and guarded public communications on asbestos risks. They indicated that if James Hardie had previously acknowledged the risks of occasional exposure during home renovations unequivocally and very publicly, this would have allowed government and non-government agencies, the public health and safety authorities, and the media to be less guarded in their commentary to the public.⁹⁶

The Asbestos Injury Compensation Fund agreement entered into between the NSW government and James Hardie⁹⁷ prevents or makes it difficult to legally require funding

⁹⁴ *Werfel Case* (n 3).

⁹⁵ *Ibid* 385 [313], 386 [317], [319].

⁹⁶ *Ibid* 364-5 [231].

⁹⁷ See discussion in Asbestos Awareness Australia, 'Asbestos Related Burdens: Societal Harms' (Web Page) <<https://asbestosawarenessaustralia.com.au/societal-harms/>>.

from James Hardie to support the identification and removal of asbestos from homes and other properties or to fund public health campaigns or recover other economic losses. While this fund provides victim compensation, preventing loss of life rather than merely compensating for it would clearly be a preferable approach. Even if compensation were to be considered an adequate remedy for loss of life, which it clearly is not, it is also worth noting the difficulties that can arise in seeking compensation through civil litigation due to difficulties in clearly establishing causal links between asbestos exposure and resulting illness.⁹⁸

When a corporation shifts the costs of harm caused by its actions and activities to groups and persons beyond its legal structure, such as property owners, this results in negative corporate externalities for which the corporation should arguably be held responsible.⁹⁹ Most asbestos-related externalities stem from the prior activities of James Hardie and CSR Limited ('CSR'). These companies mined asbestos and manufactured and distributed asbestos-containing products for many decades, leaving a legacy of disease and mass fatalities that will likely span at least another century, and possibly longer if the present policy and public health settings are not disrupted and extended to the residential sector.

There are no legal or other barriers that prevent James Hardie or CSR from taking further voluntary actions or from making additional contributions in accordance with their stated sustainability principles, when doing so would enhance their long-term brand and reputation.¹⁰⁰

James Hardie and CSR ought, at a minimum, to provide funding to pay for public health campaigns to properly warn all Australians about the risk and impacts of legacy asbestos; and also, medical research to prevent asbestos-related diseases or to mitigate the consequences of these diseases.

Further, James Hardie and CSR ought to fully acknowledge their roles in creating the asbestos crisis and the continuing risks and harms of legacy asbestos. Such public

⁹⁸ Martin Rogalski, 'Causation in Long Dust Disease' (2020) 157 *Precedent* 16.

⁹⁹ See, eg, Daniel Chow, 'Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries' (2011) 51(4) *Virginia Journal of International Law* 785. See also Jock McCulloch, *Asbestos: Its Human Cost* (Queensland University Press, 1986) 130, 135.

¹⁰⁰ See, eg, Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 35(1) *University of New South Wales Law Journal* 317; Gill North, 'Corporate Management & Communication of Environmental and Social Risks in Australia: Pressures are Mounting' (2018) 33 *Australian Journal of Corporate Law* 227.

acknowledgement is critical, because public discussion on, and warnings about, legacy asbestos in Australia remain heavily guarded, especially on the scale of related fatalities and the risks of brief, occasional and low dose exposure.¹⁰¹

In addition to the need for public health campaigns, and notwithstanding the costs involved, there should be practical action towards the removal of *in situ* asbestos in all settings whether residential, commercial, public, or industrial, to prevent further unnecessary deaths. This should be undertaken systematically and be externally funded either by the responsible corporations or government, rather than relying on property owners to bear these costs. It is important that such removal occurs under a policy setting that minimises risk to those undertaking the removal, ensuring that removalists are properly trained. Costs-based arguments against such measures suggest that we can place a limit on the value of Australian lives lost every year, which is clearly unacceptable.

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