

Client Update

Shaping the future of insurance law

Addressing the asbestos legacy – managing risks with EIL insurance

7 OCTOBER 2020

AT A GLANCE

- Asbestos was used extensively in Australia throughout much of the 20th century.
- Across the country, all levels of government are focused on addressing Australia's asbestos legacy through regulation and remediation.
- However, the risks remain significant for businesses that own significant industrial property or deal with soil or construction.
- This is reflected in the number of asbestos-related claims being pursued under EIL policies.

BACKGROUND

The legacy of asbestos is keenly felt in Australia, a country that had one of the highest per capita rates of asbestos use in the world¹. While the harmful and potentially fatal consequences to human health from the inhalation of asbestos fibres are now well-known, it wasn't until 31 December 2003² that an Australia-wide prohibition on asbestos was enforced. Today, approximately one-third of homes still contain asbestos-based products.³

Asbestos is prevalent in buildings, soil and groundwater. As dealing with the problem is both expensive and highly regulated, there are many unscrupulous parties that are involved in illegal activities, such as dumping and fake certification – often at a high cost to others.

Unlike some general liability policies that may contain blanket asbestos exclusions, EIL policies can respond to some asbestos-related claims under cover. For developers, landowners and other businesses that deal with soil, this protection can be critical.

ENVIRONMENTAL IMPAIRMENT LIABILITY (EIL) INSURANCE

EIL insurance policies typically provide site-specific or contractor coverage on a claims-made basis for losses, including clean-up costs, arising from defined 'pollution conditions', which commonly include the

¹ Australian Government, Asbestos Safety and Eradication Agency, *National Asbestos Profile for Australia*, November 2017 p. 6.

² Australian Government, *National Strategic Plan for Asbestos Awareness and Management 2019-2023*, November 2019.

³ NSW Government, *NSW Asbestos Waste Strategy 2019-21*, p. 3.

discharge, release or escape of a pollutant into land, water or the atmosphere.

EIL policies can cover:

- emergency response costs regarding imminent threats to human health or the environment
- clean-up costs associated with statutory requirements for the remediation of contamination
- third party bodily injury or property damage arising from pollution or environmental contamination
- natural resource damage for harm to the environment on or beyond the insured property, and
- defence costs necessary to investigate or defend claims made against an insured.

EIL policies tend to exclude cover relating to asbestos-containing materials (ACM) used in buildings or structures; however, these exclusions often write back cover for the remediation of asbestos in soil or groundwater.

ASBESTOS REMOVAL

Friable asbestos can only be removed by licensed asbestos removalists once asbestos has been removed from a building or ACM are collected ready for disposal. The hazardous material usually needs to be disposed of at an EPA-licensed facility.

For example, in NSW, the reporting and transportation requirements of asbestos waste must comply with Part 7 of the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) (Waste Regulation), which sets the framework for waste tracking requirements given effect by the EPA's WasteLocate system.

WasteLocate is used to assign a unique consignment number to each load of asbestos waste, which is tracked from its starting location to the receiving premises using GPS in the transporter's smart phone or other device.⁴ WasteLocate must be used

whenever more than 100 kilograms of asbestos waste or asbestos-contaminated soil (or more than 10 square meters of asbestos sheeting per load) is transported.⁵ Transporters of asbestos waste must register with WasteLocate before asbestos waste is transported and provide details around the type of asbestos in the load and the vehicle registration number of the registered driver.⁶ Asbestos-receiving facilities must also provide the EPA with details of each consignment of asbestos waste they receive.⁷

Other states and territories have similar reporting and transportation requirements.



EIL insurance policies typically provide site-specific or contractor coverage on a claims-made basis for losses.

ASBESTOS TESTING

Even small levels of asbestos can render large amounts of soil or ACM as asbestos-contaminated waste.

In *Environment Protection Authority v Grafil Pty Ltd* [2019] NSWCCA 174 (*Grafil*), the Court of Criminal Appeal took a strict approach to what constitutes 'asbestos waste' under the POEO Act when it decided that the proportion of asbestos in any given volume of material is "not relevant to whether the material contains asbestos".⁸ The decision in *Grafil* meant that an entire stockpile of 44,000 tonnes of material was deemed 'asbestos waste', after sampling had found 634.64 grams of asbestos in sampled material.

The difficulty in identifying asbestos in soil and the low threshold for it to contaminate large quantities of material poses an issue for insurers. Insurers may consider requiring prospective insureds to undertake asbestos sampling before offering EIL cover, especially at high-risk brownfield locations.

⁴ NSW Environmental Protection Authority, *Do I need to use WasteLocate?*, <https://wastelocate.epa.nsw.gov.au/>.

⁵ NSW Environmental Protection Authority, *Do I need to use WasteLocate?*, <https://wastelocate.epa.nsw.gov.au/>.

⁶ Waste Regulation r 79(3); NSW EPA, *Asbestos and Waste Types Guidelines* [2.5].

⁷ Waste Regulation r 79(6); NSW EPA, *Asbestos and Waste Types Guidelines* [2.4].

⁸ *Environment Protection Authority v Grafil Pty Ltd* [2019] NSWCCA 174 at [329] (Preston CJ of LEC with Davies and Adamson JJ agreeing).

Asbestos testing is conducted on a sample basis, which may not uncover asbestos that is thinly dispersed within the tested material. It also will not uncover asbestos that may be located in fill used under existing structures. When this occurs, EIL insurance may later kick in to cover the remediation of asbestos-contaminated soil when the asbestos is first identified during the period of insurance.

Claims risks also exist for professional indemnity insurers of specialist environmental consultants if an asbestos testing or sampling regime fails to identify the existence or extent of asbestos that later becomes apparent.



An issue for insurers is the difficulty in identifying asbestos in soil and the low threshold for it to contaminate large quantities of material.

COMMON ASBESTOS-RELATED CLAIMS

EIL claims involving asbestos are often made after an owner or occupier of a premises receives a clean-up notice from the relevant EPA or a local council.⁹ Clean-up notices can be issued where an appropriate regulatory authority “reasonably suspects that a pollution incident”¹⁰ “has occurred, is occurring or is likely to occur”¹¹ and the notices constitute the requisite ‘claim’ trigger under most EIL policies.

The most common causes of asbestos claims are:

- disturbance of latent asbestos in historic buildings during new construction
- the receipt of asbestos contaminated soil for use in various commercial purposes, and
- illegal dumping of asbestos.

Construction

With the construction boom in Australia, latent asbestos (which can be safe when appropriately managed) may become harmful during the demolition process and require remediation. Furthermore, the repurposing of brownfield sites has an attendant risk of being disrupted by the discovery or disturbance of asbestos-contaminated soil or waste material since historic asbestos disposal techniques were rudimentary. Both scenarios can involve significant remediation costs.

The appropriate and most cost-effective method of remediation is often not always clear cut. Consideration needs to be given to the types of asbestos and whether it is bonded or friable, whether the asbestos is naturally occurring or located at the surface level or at depth, the historical, current or proposed use(s) of the land and the degree of asbestos contamination.

Fake certification

Many businesses use soil as part of their business process, ranging from large enterprises using soil as fill for construction or waste capping purposes through to landscapers. In many claims, prudent businesses that have obtained certification from the supplier of the soil have been dismayed to find themselves in receipt of building and demolition waste contaminated with asbestos, instead of the virgin excavated natural material (VENM) they thought they were purchasing.

Due to the cost of asbestos disposal, there is unfortunately a big market in fake VENM certification and it is difficult for someone who purchases what they think is VENM to verify for themselves that it is not contaminated with asbestos without undertaking their own expensive sampling and testing regime – and even that is not foolproof.

Under the statutory regimes in all Australian jurisdictions, owners/occupiers of land can be obliged to undertake clean up even if it was not their fault that they have received asbestos from unscrupulous operators. While there is a mechanism available for the owner/occupier to attempt to

⁹ In NSW, this is under s 91 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

¹⁰ POEO s 91(1).

¹¹ POEO Act Dictionary definition of “pollution incident”.

recover these costs from the wrongdoer, it is often a fruitless exercise.¹²

The point at which genuine VENM has been swapped for building and demolition waste can be hard to trace and, even when it can, the perpetrator usually does not have the resources or insurance to make a recovery action worthwhile.

Illegal dumping

Unfortunately, the high costs associated with asbestos removal and asbestos waste disposal have led some unscrupulous operators to illegally dump ACM.¹³ This illegally dumped asbestos can constitute grounds for a clean-up notice to be issued on innocent owners or occupiers of land.¹⁴

REGULATORY FOCUS

Asbestos remains a focus of legislators and regulators.

The Asbestos Safety and Eradication Agency (ASEA) is the key federal-level agency tasked with coordinating the national approach to asbestos policy and regulation.¹⁵ ASEA's *2019-23 National Strategic Plan for Asbestos Awareness and Management* sets the national agenda with broad principles which "aim to improve asbestos awareness and management."¹⁶ Similarly, the EPA's *NSW Asbestos Waste Strategy 2019-21* outlines the blueprint for the goal to improve the management of asbestos waste, including asbestos found in soils. Across the country, other government agencies, including the Victorian Asbestos Eradication Agency and state departments with focuses on workplace and community health, are also focussed on addressing the issues.



The Asbestos Safety and Eradication Agency (ASEA) is the key federal-level agency tasked with coordinating the national approach to asbestos policy and regulation.

Governments are also imposing tougher penalties on offenders. For example, the POEO Act was amended in 2018 to include a new mandatory sentencing consideration whenever "the presence of asbestos in the environment" is relevant to any offence under the POEO Act.¹⁷ It has penalties of up to \$1 million and/or seven years' imprisonment for individuals and up to \$5 million fines for corporations for offences involving the wilful dumping of "waste in a manner that harms or is likely to harm the environment".¹⁸

EIL insurance may cover some civil fines, which are insurable at law, but not criminal fines or penalties. Some policies do offer a writeback for defence costs cover and enforceable undertakings.

MANAGING THE RISKS

The legacy of the use of asbestos in Australia means that businesses that own significant industrial property or deal with soil or construction should consider an EIL insurance program to help manage their asbestos risks. This is an important risk mitigation strategy, considering:

- the near ubiquity of asbestos
- the prevalence of illegal dumping
- the fact that even small quantities can pose serious health or environmental risks
- the low thresholds for its presence to potentially contaminate large portions of material, and
- the high remediation costs associated with its removal and disposal.

¹² See for example, ABC News "'Gut wrenching': Hunter man told to expect \$1 million asbestos clean-up bill" 16 May 2020, <https://www.abc.net.au/news/2020-05-16/hunter-man-told-to-expect-million-dollar-asbestos-clean-up-bill/12248878>

¹³ Fairfield City Champion, "'It never occurred to me': Landowners urged to fence off vacant lots" 29 July 2020, <https://www.fairfieldchampion.com.au/story/6855256/it-never-occurred-to-me-landowners-urged-to-fence-off-vacant-lots/?cs=12>

¹⁴ See, POEO Act Dictionary, definitions of 'pollution incident', 'premises' and 'waste'.

¹⁵ ASEA, *Who we are*, <https://www.asbestossafety.gov.au/what-we-do/asbestos-safety-eradication-agency>

¹⁶ ASEA, *2019-23 National Strategic Plan for Asbestos Awareness and Management*, p. 4.

¹⁷ POEO Act s 241(f).

¹⁸ POEO Act ss 115 and 119.

Given the levels of asbestos contamination, strong regulatory focus and prevalence of illegal practices, EIL insurers can also proactively manage their exposures by:

- determining whether insureds are engaged in activities or own property likely to give rise to asbestos exposure
- requiring sampling and testing of proposed insured properties
- verifying asbestos risk management practices of proposed insureds, such as
 - the sourcing of soil
 - pre-purchase property testing, and
 - security measures for vacant land at risk of illegal dumping.

NEED TO KNOW MORE?

For more information please contact us.



Charu Stevenson

Partner, Sydney

T: +61 2 8273 9842

E: charu.stevenson@wottonkearney.com.au



Simon Nickolas

Graduate at Law, Sydney

T: +61 2 8273 9856

E: simon.nickolas@wottonkearney.com.au

© Wotton + Kearney 2020

This publication is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this publication. Persons listed may not be admitted in all states and territories. Wotton + Kearney Pty Ltd ABN 94 632 932 131, is an incorporated legal practice. Registered office at 85 Castlereagh St, Sydney, NSW 2000