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By email: Karyn.Davidson@workcover.nsw.gov.au

26 February 2015

Dear Ms Davidson,

REINSW Submission
Asbestos - Key Issues and Recommendations

We refer to the meeting held on 19 January 2015 between the Loose-fill Asbestos Taskforce and the Real Estate Institute of NSW (“**REINSW**” or “the **Institute**”).

As you may know, REINSW is the largest professional association of real estate agents and other property professionals in New South Wales.

The Institute appreciates the opportunity to provide this submission outlining key issues faced by property professionals in relation to asbestos when providing services to their clients.

Whilst we recognise that the current Taskforce is concerned particularly with loose-fill asbestos, this submission will refer to asbestos generally - the issues affecting real estate agents are similar in both cases.

Introduction

REINSW recognises that asbestos is a dangerous substance and that our members have certain obligations under work health and safety legislation, including in relation to properties that REINSW members sell or manage where asbestos is present. REINSW also believes that the safety of the public must be of paramount consideration in the legislative process.

Real estate agents are “persons conducting a business or undertaking” for the purposes of the work health and safety laws. As such they have obligations under the legislation to “ensure so far as is reasonably practicable that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking”. However, agents are not qualified to identify hazards (including asbestos) and are dependent on the instructions received from their client (usually the property owner). Agents also have no actual control over the activities taking place on properties they are engaged to sell or manage.

One of the stated objects of the work health and safety legislation is to “protect workers and other persons against harm to their health, safety and welfare through the elimination or

minimisation of risks arising from work”. The Institute does not believe that this purpose can be achieved by imposing vague health and safety obligations on unqualified persons with no actual control over the activities carried on in the properties concerned.

The Institute is seeking a legislative solution to provide guidance and mechanisms for its members to ensure they comply with their obligations under the work health and safety legislation. Such legislation must compel owners to seek the expertise of appropriately qualified inspectors and building professionals and to make appropriate disclosures to workers and prospective purchasers and tenants. The ultimate aim is to ensure procedures are put in place to protect occupiers and workers on the property.

Key issues

The Institute’s members are dedicated property professionals who specialise in one or more facets of real estate practice, including:

- residential property sales
- residential property management
- strata management
- commercial/industrial property sales and/or management
- business sales
- holiday/short term rentals
- buyers agents
- auctioneers
- valuers

Whilst members of each facet of practice face their own unique issues and challenges when it comes to asbestos, there are key areas that affect most real estate agents.

No qualifications

Real estate and property professionals are subject to work health and safety laws, professional conduct rules, fair trading and consumer protection laws and the general duties under the common law.

Professional standards legislation for real estate agents allows for persons who have received a total of 10 to 35 hours’ professional training to work in the industry. It is the Institute’s belief that this is not sufficient to prepare a property professional to be properly aware of their legal obligations. The REINSW has made numerous submissions to Government lobbying for increased entry level training.

Given that the educational standards imposed by Government are set at this (in the view of the Institute) insufficient level, it is unfairly onerous to expect agents to be placed under such a heavy responsibility under the work health and safety legislation. It seems that on one hand Government continues to legislate and further complicate the legislative regime in which agents operate and on the other hand educational standards are constantly lowered.

Agents are not building experts and do not have the skills and qualifications necessary to identify hazards, including asbestos, or to assess the level of risk it might pose if present. The legislature should impose a duty on the property owner to engage a licensed person specifically trained to deal with asbestos.

The agent's role is to carry out the owner's instructions and to represent the owner's best interests.

The *Property, Stock and Business Agents Act 2002* (PSBA Act) imposes an obligation of an agent to act in the best interest of the principal at all times. This includes acknowledging areas where an agent is qualified or not qualified to comment. Commenting and acting on an issue like asbestos without the appropriate qualification does not constitute acting in the best interest of the principal. To provide advice without the necessary expertise and qualification would arguably be in breach of the PSBA Act.

It is submitted therefore that the onus with regard to work health and safety matters on the property should be on the owner. The owner would then instruct the agent to make the arrangements necessary to ensure the safety of persons on the owner's property.

Insufficient information

Although in most cases an agent will inspect a property before entering into a contract with the owner, the agent does not spend vast amounts of time on the property or have intimate knowledge of a property, as an owner or occupier would.

The agent relies on the information and instructions provided to them by the owner about the property. Frequently an agent may not be aware of health and safety hazards found on the property or the magnitude of any hazards. It could also be that the owner themselves are not aware of asbestos being present on the property.

The agent therefore has little control over how much information they have about a property and no actual control over how the current owner, any purchaser or the tenants are using the property, and yet, has an obligation to ensure the safety of workers and other persons on the premises.

It is submitted that a process for obtaining information from owners of properties should be legislated so as to ensure that any hazards, including asbestos, are identified. This should include a mechanism whereby the owner must seek reports and risk management plans from appropriately qualified experts.

Acting on instruction

In instances where it is known, or there is a strong suspicion that asbestos is present on the property, agents can recommend to an owner that the owner obtain an asbestos report and appropriate management plan. However ultimately it is up to the owner to instruct the agent to arrange the inspection and obtain the report if the owner does not arrange it themselves. If the owner chooses not to act, the owner is not liable and yet the agent is not absolved of liability.

The agent can only do as much as the owner instructs the agent to do.

There needs to be a process whereby, once the agent has made recommendations to the owner, the agent is considered to have done all that "is reasonably practicable" and to have discharged their obligations under the work health and safety legislation. The Institute looks to Government for legislative guidance as to the kinds of steps that would be considered to be "reasonably practicable" having regard to the constraints and tensions under which property agents operate.

Disclosure obligations

In order to ensure that “the health and safety of workers and other persons is not put at risk” from work carried out on a property, the workers and other persons concerned need to be made aware of the potential risks to health and safety.

Apart from obligations under work health and safety legislation, under professional conduct rules agents have a responsibility to disclose “material facts” about a property to a prospective purchaser or tenant. The presence of asbestos is likely to be a material fact. There are heavy penalties for failing to disclose material facts.

Except for the documents which are compulsory attachments to contracts for sale and purchase of land and tenancy agreements under the relevant conveyancing and tenancy legislation, there are no obligations on property owners for such disclosures. Frequently owners consider it is not in their interest to disclose certain matters as this may have an effect on the value of the property and on the willingness of the prospective purchaser or tenant to proceed with the transaction.

Therefore the agent is placed in the unenviable position of balancing the tension between the agent’s obligations to disclose material facts to prospective purchasers or tenants and resistance from the owner and their solicitor in relation to making these disclosures.

At the end of the day, the work health and safety legislation does not absolve the agent from their obligations merely because they do not have the relevant information available or because the owner chooses not to disclose it to the agent.

It is therefore submitted that a requirement should be legislated for the owner of the property to obtain an asbestos report from a licensed asbestos inspector before any sale or tenancy proceeds and to attach that report to the contract for sale or the tenancy agreement. This would be a process similar to the swimming pools requirements, which are due to commence in April of this year.

Alternatively, an asbestos notice could be incorporated in the certificate issued by the local Council under section 149 of the *Environmental Planning and Assessment Act 1979* alerting prospective purchasers of the possibility of asbestos being found on the property.

No insurance

Professional indemnity insurance for real estate agents specifically excludes all liability in relation to asbestos.

Agents are dependent on the principal’s instructions and the information they provide and agents have no control over what happens on a property. Taking into account that agents are not covered by professional indemnity insurance for matters pertaining to asbestos, and that agents do not have the requisite qualifications to identify or manage asbestos, this leaves agents completely exposed and totally uninsured.

It would be an instructive and worthwhile enquiry to discover why professional indemnity insurers will not insure agents for asbestos-related matters.

Other issues

As mentioned above, there are unique issues affecting members of the various facets of real estate practice. Some examples are:

- Property managers are faced with obligations to identify a number of other hazards in a residential property for rent, including blind cords, window locks, deck and balcony structural integrity, safety glass, and the list grows each year with Government adding to the requirements. Asbestos is yet another area of responsibility.
- Strata managing agents face the challenge of many owners' corporations believing that the issue not subject to work health and safety legislation because the scheme is wholly residential. The strata manager can make recommendations to the owners' corporation, however ultimately it is up to the owners' corporation to carry out the recommendations. If the owners' corporation chooses not to obtain a report or take safety precautions, the strata manager remains liable although the matter is now out of their control.
- Sales agents rely on information obtained from the owner about the property. Even if the agent suspects there could be asbestos on the property, they are not qualified to determine this with certainty and therefore are not in a position to make relevant disclosures to workers or prospective purchasers. The agent then risks being in breach of the work health and safety legislation, professional conduct rules and fair trading legislation.
- An auctioneer may attend a property only once for a short period of time in order to conduct the auction, yet they still have obligations to ensure the health and safety of persons on the property.
- Specialist commercial agents in many cases possess tertiary qualifications. Yet they are not building specialists qualified to identify asbestos. The uses for commercial buildings can be varied and the activities of the tenant can be such that asbestos is inadvertently disturbed.
- In the case of business agents, the owner/vendor of a business can instruct the agent that a physical inspection of the business premises is not required. Again there is the issue of the agent being placed in a position of liability in respect of premises they have not seen and activities they do not control.

The question in all cases is: What actions would be considered "reasonably practicable" for the agent to take to ensure the safety of workers and other persons on the property?

Recommendations

REINSW suggests that Government consider implementing the following recommendations, which we believe would assist in addressing some of the concerns of property professionals whilst achieving greater protection and safety for the public:

1. The NSW Government should develop and issue a notice relating to asbestos similar to the *ACT Dangerous Substances (Asbestos Advice) Notice 2006 No 1*. This will assist all parties to gain awareness of the likely locations of asbestos materials in residential buildings.

A similar Notice should also be prepared and issued in respect of strata title residential buildings and for commercial buildings.

The Notice should also include sections on “what to do” and “what not to do” in relation to suspected or known asbestos.

2. In the identified 26 high-risk local government areas Councils should conduct inspections of all properties and provide an asbestos report and management plan to the owners. The report should then be annexed to any contract for sale or tenancy agreement.
3. In respect of areas that are not identified as high-risk there should be a legislated requirement for the owner of the property to attach either an asbestos report or the Notice mentioned in paragraph 1 above to the contract for sale or tenancy agreement before any sale or tenancy proceeds.

The asbestos report and Notice will serve multiple purposes, including alerting the agent to possible hazards associated with asbestos so the agent can in turn advise any workers, and discharging the requirement to disclose the presence of asbestos to prospective purchasers and tenants.

4. An asbestos notice should be incorporated in the certificate issued by the local Council under section 149 of the *Environmental Planning and Assessment Act 1979* alerting prospective purchasers of the possibility of asbestos being found on the property.
5. A process for the obtaining of information by property agents from their clients and clearly setting out the steps agents are required to take in order to be considered to have done all things that are “reasonably practicable” should be legislated.

There needs to be a point in the process whereby the owner of the property is compelled to seek reports and risk management plans from appropriately qualified experts.

It is submitted that once the agent has made recommendations to the owner to obtain an asbestos report and management plan, the agent should be considered to have fulfilled their obligations under the work health and safety legislation.

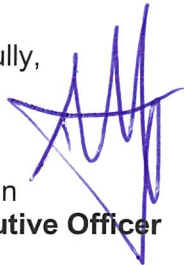
6. The exemption under regulation 7(1) of the *Work Health and Safety Regulations 2011*, whereby strata bodies corporate that are responsible for any common areas used only for residential purposes are exempt from being taken to be a person conducting a business or undertaking for the purpose of the WHS Act, should be repealed.
7. An enquiry should be conducted with the insurance industry as to the reasons why professional indemnity insurance for agents excludes coverage for matters relating to asbestos.
8. Regular awareness and education campaigns should be conducted for property owners and persons carrying out work in any buildings likely to be affected by asbestos.

Summary

In summary, the Institute looks to Government for a legislative process that clearly states that for high-risk properties the owner of a property must attach a report from a licensed asbestos inspector to sale and leasing contracts. For low-risk geographic areas either an asbestos report or a Government-issued Notice should be required.

The Institute also seeks a legislated process as to the kinds of steps that would be considered to be “reasonably practicable” for agents to take under the work health and safety legislation having regard to the complex legislative environment and the other constraints and tensions under which property agents operate.

Yours faithfully,



Tim McKibbin
Chief Executive Officer