

EXPLANATORY MEMORANDUM – MODEL WORK HEALTH AND SAFETY LEGISLATION AMENDMENT (ASBESTOS) 2019 – Model Provisions

The *Model Work Health and Safety Legislation Amendment (Asbestos) 2019* (Prohibited Asbestos Amendments) amends the model WHS Act and model WHS Regulations to insert a new compliance power that will allow a regulator to issue a prohibited asbestos notice directing a relevant person to take certain measures in relation to prohibited asbestos at the workplace.

Details of the Model Work Health and Safety Legislation Amendment (Asbestos) 2019

Regulation 1 – Name of model provisions

This regulation sets out the name of the Prohibited Asbestos Amendments.

Regulation 2 – Legislation amended

This regulation provides that Schedule 1 amends the model WHS Act and Schedule 2 amends the model WHS Regulations.

Schedule 1 – Amendments to the model WHS Act

Item [1] Section 4 Definitions

This item inserts ‘asbestos’ and ‘asbestos containing material (ACM)’ into the definitions and signals that they are defined in section 197A.

Item [2] Part 10, Division 2A

This item inserts a new Division 2A after Division 2 of Part 10. Division 2A establishes a new compliance power to deal with prohibited asbestos (a ‘prohibited asbestos notice’). It ensures a regulator has powers in relation to prohibited asbestos in circumstances where an inspector may not otherwise be able to issue an improvement notice or prohibition notice.

Section 197A inserts new definitions which are necessary for the power to issue a prohibited asbestos notice. In particular, it defines ‘asbestos’, ‘asbestos containing material (ACM)’, ‘prohibited asbestos’ and ‘relevant person in relation to a workplace’ for the purposes of the Division. ‘Prohibited asbestos’ means asbestos or ACM fixed or installed in a workplace on or after 31 December 2003.

A prohibited asbestos notice must be issued to a ‘relevant person in relation to a workplace’. The definition of ‘relevant person in relation to a workplace’ in s 197A provides discretion for a regulator to determine who a ‘relevant person’ is when issuing the notice, taking into account that there may be various persons with responsibility for asbestos at a workplace because of different workplace arrangements and the complexity of modern supply chains. For example, the person conducting a business or undertaking (PCBU) at the workplace at the time the prohibited asbestos is discovered may not have caused it to be fixed or installed, or be most able to comply with the notice and carry out measures in relation to the prohibited asbestos.

There may also be more than one relevant person in relation to a workplace. In some circumstances, a regulator may issue multiple notices in relation to the same workplace.

Section 197B provides that a regulator must issue a prohibited asbestos notice to a 'relevant person in relation to a workplace' if they reasonably believe that prohibited asbestos is present at the workplace. A regulator must issue a prohibited asbestos if they form the necessary belief.

A regulator may be able to form the necessary belief for issuing a prohibited asbestos notice even where the regulator does not know the precise location of prohibited asbestos at the particular workplace. For example, a regulator may be able to form the necessary belief based on intelligence from other cases where the same products were used.

Section 197C specifies the content for a prohibited asbestos notice. Sub-section 197C(1) requires the notice to state:

- (a) the basis for a regulator's belief that prohibited asbestos is present in the workplace; and
- (b) details of the prohibited asbestos (including the location, type and condition); and
- (c) specific measures the relevant person is required to take in relation to the prohibited asbestos, including in relation to the management or removal of the prohibited asbestos, and
- (d) the day by which compliance is required by the relevant person – which must be reasonable in all the circumstances.

Sub-section 197C(1)(c) provides flexibility for a regulator to determine what measures a relevant person is required to take in relation to the prohibited asbestos. While immediate removal of prohibited asbestos would be the most desirable outcome, removal may not be appropriate in some circumstances (e.g. if the prohibited asbestos does not present a risk to health and safety in its current state, but its removal may create a health and safety risk).

A regulator will consider the particular circumstances when determining specific measures to be taken by the relevant person in relation to prohibited asbestos. Section 193C(3) also allows for regulations to be made to prescribe factors that a regulator must take into account when determining specific measures to be taken by the relevant person in relation to prohibited asbestos. No such regulations are proposed at this stage.

Section 197D makes it an offence for a relevant person not to comply with a prohibited asbestos notice. The maximum penalty is \$100,000 for an individual and \$500,000 for a body corporate. This is consistent with the maximum penalties for non-compliance with prohibition notices.

Section 197E allows a regulator to extend the period for compliance with a prohibited asbestos notice and sets out how this must be done, but only if the compliance period has not already ended.

Item [3] Section 202 Application of Division

This item amends section 202 to include reference to 'prohibited asbestos notice' within the meaning of 'notice' for the purposes of Division 4 of Part 10, which concerns the general requirements that apply to notices.

Item [4] Sections 204 and 205(1)

This item amends sections 204 and 205(1) to include reference to 'prohibited asbestos notice' wherever there is a reference to 'improvement notice' and 'prohibition notice'. This amendment clarifies that directions and recommendations can also be included in a prohibited asbestos notice.

Item [5] Section 204(b)

This item amends section 204(b) to insert the words 'measures to take' in relation to remedying a contravention. This amendment provides that a direction included in a notice may offer the person to whom it is issued a choice of measures to take, or ways in which to remedy the contravention.

Item [6] Section 206 Changes to notice

This item omits and replaces section 206. This amendment separates the changes that can be made to a notice by an inspector and a regulator. An inspector may make minor changes to all notices (except prohibited asbestos notices) and extend the compliance period for improvement notices only. Regulators may make minor changes to and extend the compliance period for prohibited asbestos notices.

Item [7] Section 207 Regulator may vary or cancel notice

This item amends section 207 to clarify that a prohibited asbestos notice issued by the regulator may only be varied or cancelled by the regulator.

Item [8] Sections 211, 212 (1)(a) and 213(b)**Item [9] Section 212 Power of the regulator to take other remedial action**

These items amend sections 211, 212 and 213(b) so that, similar to the existing framework for prohibition notices, a regulator can carry out remedial action in relation to prohibited asbestos at a workplace if the relevant person to whom a prohibited asbestos notice is issued fails to take reasonable steps to comply with the notice, or the regulator cannot find a relevant person to issue a prohibited asbestos notice to.

Where a notice was issued and was not complied with, a regulator may carry out the measures that were specified in the notice or any other measures the regulator believes reasonable to make the workplace or situation safe. If no notice was issued, the regulator may take any action necessary to make the workplace safe. A regulator is able to recover the reasonable costs of carrying out the measures.

Item [10] Section 214 Application of Division

This item amends section 214 to include prohibited asbestos notices within the meaning of 'notice' for the purposes of Division 6 of Part 10, which concerns injunctions. This allows a regulator to apply to the relevant court for an injunction to compel a person to comply with a notice or restrain a person from contravening a notice.

Item [11] Section 223 Reviewable decisions

This item amends the table in section 223 to include the following as reviewable decisions: the issuing of a prohibited asbestos notice under section 197B and the extending of time to comply with a prohibited asbestos notice under section 197E.

Schedule 2 – Amendments to the model WHS Regulations**Item [1] Clause 5 Definitions**

This item replaces the existing definitions of ‘asbestos’ and ‘asbestos containing material (ACM)’ with a reference to the definitions contained in section 197A of the model WHS Act.

Item [2] Clause 419 Work involving asbestos or ACM—prohibitions and exceptions

This item creates an additional exception to the prohibition on work involving asbestos, where the work is being carried out in accordance with a prohibited asbestos notice issued under section 197B of the model WHS Act.