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actlawsociety

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
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The Secretary
Standing Committee on Public Accounts
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Dr Cullen,

Inquiry into the Proposed Appropriation (Loose-Fill Asbestos Insulation Eradication) Bill 2014-15

I attach for your information a brief submission by the Law Society of the ACT regarding the above inquiry.

I look forward to speaking to the submission on Friday 28 November 2014.

Please do not hesitate to contact me should you require any further information in relation to the position of the Society.

Yours sincerely,

Martin Hockridge
President

**SUBMISSION TO THE ACT LEGISLATIVE ASSEMBLY PUBLIC ACCOUNTS COMMITTEE
INQUIRY INTO THE PROPOSED APPROPRIATION (LOOSE-FILL ASBESTOS INSULATION ERADICATION)
BILL 2014-15**

The Law Society of the Australian Capital Territory (the Society) is the peak professional association that supports and represents the interests of members of the legal profession in the ACT. The role of the Society is to maintain professional standards and ethics as well as to provide public comment and promote discussion regarding law reform and issues affecting the legal profession. The Society has over 2000 members.

The Society welcomes the opportunity to comment on aspects of the Loose Fill Asbestos Insulation Eradication Scheme. A number of individuals who have been invited to participate in the buyback scheme have sought advice from ACT legal practitioners. Practitioners in turn are seeking to ensure that they appropriately advise and assist their clients who have found themselves in difficult emotional and financial circumstances.

In particular, the Society notes the following matters in relation to the buyback scheme:

- the requirement for legal practitioners to provide a Solicitor's Certificate under the terms of the scheme and the limitations on their ability to do so in the absence of further information from Government;
- the importance of retaining some flexibility within the scheme in order to most appropriately deal with specific, individual circumstances; and
- clarification to parties of the intended purpose of the legal costs grant.

Provision of Solicitor's Certificate

The Society understands that the ACT Government has decided to implement a buyback scheme to apply to owners of homes affected by loose fill asbestos (eligible homeowners). Under the buyback scheme, the ACT Government has offered to purchase all affected houses in order to enable the demolition of houses and remediation of the sites. To this end, the Government has sent eligible homeowners an offer to accept the surrender of their crown lease. The buyback offer will remain open and capable of acceptance until 30 June 2015.

Eligible homeowners who elect to participate in the scheme will be required to sign a deed of surrender (in regard to the lease). The Society understands that the deed will:

- set out the process by which the eligible homeowners will surrender their crown lease to the Territory;
- include payment by the Territory of a surrender sum to the eligible homeowner;
- include a waiver of the eligible homeowner's rights to pursue legal action against the Territory and the Commonwealth in relation to any financial loss associated with the property (excluding any potential personal injury claim); and
- require that eligible homeowners obtain a certificate of independent legal advice to be returned with the deed.

Practitioners with clients involved in the buyback scheme are therefore required to provide a certificate of independent advice. The Society is concerned that if legal practitioners are to properly advise their clients, it is important that the ACT Government disclose exactly what it intends to do in the future should owners decide not to opt in to the buyback scheme. The Society argues that it is not reasonable to expect affected homeowners to make an informed decision on whether to opt in to the scheme in the absence of knowing what the effects will be should they decide not to do so.

The Society believes that in order to provide fully advise their clients, practitioners will be required to address a range of matters including:

- the buyback scheme is voluntary *at this stage*, but the ACT Government has not ruled out taking action under compulsory acquisition processes available to it under the ACT *Lands Acquisition Act 1994* in the

future. The Government has specifically reserved its right to compulsorily acquire and/or condemn affected houses in the future;

- information regarding the form that any future compulsory acquisition regime may take and its associated timings is not available to legal practitioners at this time. The Society further notes that it is not clear at this time what the Government's position will be in relation to section 51 of the Lands Acquisition Act. Section 51 refers to the amount of compensation that would be payable by the Territory under the Act;
- the Government has indicated homeowners who elect to remain in their homes will be subject to a significant level of restriction of their normal use of the property. Again, the specific nature of such restrictions is not known at this time, but is expected to include sealing all entry points for fibres, the requirement for ongoing testing and the implementation of an asbestos management plan. The obligations are expected to be made mandatory in 2015 through amendments to the *Dangerous Substances Act 2004*. The Society understands that any costs associated with implementation of the restrictions or any post scheme demolition and remediation will be outside of the buyback program and so will be at the expense of the home owner; and
- the Government has indicated that consideration will be given to unit titling, subdivision or consolidation of affected blocks in order to assist it achieve the best and highest value of the remediated blocks and contribute to the overall costs of the scheme. The specific circumstances of each block will not be known at the time the certificate is required.

The difficulty for practitioners completing a certificate of independent advice is that many aspects of the matters noted above are yet to be fully or finally determined. Practitioners will therefore find it difficult to comprehensively advise their clients in regard to all possible options.

Flexibility within the Scheme

The Society notes advice from the Asbestos Response Taskforce regarding the inability to negotiate terms of the buyback scheme. While understanding the need to apply a consistent outcome and the difficulties in negotiating outcomes with individual households, the Society is concerned that the application of a "one size fits all" scheme may result in unfair outcomes in some instances. The Society urges the Government to allow the consideration of exceptional circumstances of affected individuals in determining final buyback offers.

Clarification of legal costs

The Society understands that the buyback scheme provides \$1000 (inc GST) to eligible homeowners to cover the legal costs associated with the surrender of their lease (the legal grant). This will be paid on the settlement of the matter.

It appears the intention of Government that the legal grant assist eligible homeowners obtain advice on the Indemnity Deed they will be required to execute and for the practitioner to provide a certificate of independent advice. The Society notes that the legal grant is generally adequate in relation to this aspect of the legal work required by the eligible homeowner.

The Society further notes that it is likely that the conveyances required under the scheme will not be considered a standard conveyance. The market for a standard conveyance ranges from \$800 plus GST and disbursements (total around \$1,000) to \$2,000 plus GST and disbursements (total around \$2,500). Given that the sales under the buyback scheme will have terms that differ from the standard 2013 Contract for Sale as it will involve a surrender of crown lease arrangement (and therefore will not be a standard conveyance), it is likely that practitioners will charge more than a standard fee. Affected homeowners are likely to see invoices of \$1,500 plus GST and disbursements and upwards.

Summary

In summary, the ACT Law Society:

- has reservations as to the ability of legal practitioners to provide comprehensive advice to eligible homeowners in the absence of further information about planned future actions from the ACT Government;
- refers to proposed additional restrictions on the amenity of affected properties. While the Society supports the implementation of appropriate physical interventions at affected properties in order to ensure the safety of homeowners and the general community, it believes that onerous restrictions should only be implemented as strictly necessary and should not be used as a means of encouraging owners to leave their homes. The Society urges the publication of the proposed restrictions as soon as possible;
- would welcome further discussion with Government regarding the application of the Land Acquisition Act and how it might operate in relation to affected homeowners;
- urges the use of some discretion and flexibility in regard to the application of the buyback scheme in order to ensure fair and equitable outcomes are achieved.