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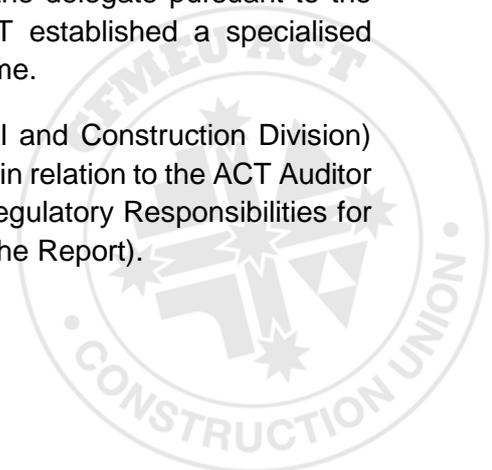
Submissions by the CFMEU to the Standing Committee on Public Accounts:

Inquiry into the Auditor-General's report on WorkSafe ACT's Management of its Regulatory Responsibilities for the Demolition of Loose-Fill Asbestos Contaminated Houses.

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A. Background

1. Demolition of ACT Government acquired asbestos contaminated houses commenced in or about July 2015, as part of the ACT Government's *Loose-Fill Asbestos (Mr. Fluffy) insulation Eradication Scheme* (Mr. Fluffy Scheme).
2. WorkSafe ACT is the Government's workplace health and safety regulator. WorkSafe ACT is primarily responsible for discharging the responsibilities of the delegate pursuant to the *Work Health and Safety Act 2011* (the Act). WorkSafe ACT established a specialised Asbestos Team to regulate the activities of the Mr. Fluffy Scheme.
3. The Construction Forestry Mining and Energy Union (General and Construction Division) ACT Branch (CFMEU), has been asked to provide submissions in relation to the ACT Auditor General's Report titled 'WorkSafe ACT's Management of its Regulatory Responsibilities for the Demolition of Loose-Fill Asbestos Contaminated Houses' (the Report).



4. Whilst these submissions are primarily focused on the specific findings of the Report, the CFMEU seeks the indulgence of the Parliamentary Committee to consider a matter not raised in the report, which involved an issue discovered by the CFMEU concerning the removal of contaminated products from Mr. Fluffy homes.
5. These submissions are made on the basis of matters observed by the Union and its officials and on the basis of information provided to us by members of the Union and members of the public. In many cases this information has been provided to the Union with an expectation of confidentiality as to the identity of the informant and those persons are not identified to protect that confidentiality. The submissions of the CFMEU are as follows:

B. Pre-Planning & Preparation for the Mr. Fluffy Scheme

6. At paragraph 2.10 of the Report, the Auditor General highlights the existence of a draft document titled '*Asbestos removal and demolition of houses affected by loose-fill asbestos insulation guide (a 'how-to' guide)*' (the Guide) and a 93 point checklist, the Report highlights that the purpose of the Guide is unclear and not finalised. The CFMEU submits that the Guide and the checklist were intended to serve as guidance documents and given to all Principal Contractors and/or PCBU's involved in the Mr. Fluffy Scheme, prior to the project commencement. The Guide was intended to inform the PCBU's around the correct procedures and documentation WorkSafe ACT would expect during the project. Information received by the CFMEU confirms the findings of the Auditor General that the document was never finalised or utilised during the Mr. Fluffy Scheme, prior to publication of the Report. The non-implementation of the Guide and apparently limited use of the checklist created a lack of Guidance to PCBU's regarding what was expected and created a risk of ad hoc project management.
7. At paragraph 2.29 of the Report, the Auditor General highlights a lack of planning and risk assessment around the Mr. Fluffy Scheme. At paragraph 2.33 of the Report, the Auditor General highlights a lack of strategy or program of activities in the Mr. Fluffy Scheme. At paragraph 3.102 of the Report, the Auditor General again highlights the lack of risk assessment procedures in the activities of the Asbestos Team. At paragraph 3.88 of the Report, the Auditor General highlights a lack of monitoring around the implementation of the Asbestos Teams activities. The CFMEU understands that the draft document mentioned in paragraph 3.34 titled '*Workflow processes*' was intended to be a Standard Operating Procedure (SOP) for the Asbestos Team.
8. Information given to the CFMEU suggests that Asbestos Team inspectors were consulted on the draft Workflow Process document in meetings in July and September 2015. However, none of the inspector's comments or recommendations were implemented into the draft document and the draft document was not finalised or completed prior to the publication of the Report. The drafting and implementation of a SOP prior to the commencement of the Mr. Fluffy Scheme, would have addressed many issues contained in the Report around training, compliance, risk assessments, health monitoring and the like.
9. Information received by the CFMEU confirms the Report's findings that no preliminary risk assessments were undertaken prior to inspectors attending any specific project in the scheme. We understand that Worksafe ACT management told inspectors that the work of inspecting Mr Fluffy Scheme demolitions was a not high-risk activity pursuant to regulation 291 of the *Work Health and Safety Regulation 2011* and as such, no Safe Work Method

Statement was required and all risks assessments should be undertaken on a project-by-project basis.

10. At paragraph 3.71 of the Report, the Auditor General highlights an instance of a high reading regarding air quality on one of the Mr. Fluffy sites, which according to the Report exposed deficiencies in reporting and team support in this area. The CFMEU is concerned that the deficiencies in this area, heightened the risk of exposure to inspectors. The CFMEU's concern in this regard is supported at paragraph 3.118 of the Report, which stipulates that records show that some inspectors entered a contaminated dwelling and challenged the clearance certificate of the relevant asbestos assessor. As the Report clearly notes, this presented a greater risk of exposure for the relevant inspector. Information provided to the CFMEU confirms the Report's findings that no procedures or control measures were implemented to protect inspectors from potential exposure and no health monitoring procedures occurred, prior to the Darke Street incident in August 2015.
11. Further evidence provided to the CFMEU suggests that photographic evidence exists of workers entering a contaminated area without the use of Powered Air Purifying Respirators and the reuse of contaminated plastic sheeting around a Negative Pressure Unit by a sub-contractor who provided services for the Mr. Fluffy Scheme. Information received by the CFMEU, further suggests that the relevant sub-contractor was also working on the Darke Street project in August 2015. The CFMEU has further evidence to suggest that personal property and fixtures, deemed contaminated, in the Mr. Fluffy Scheme houses, were removed, probably illegally, and intended to be for sale interstate, which again increased a risk of exposure to persons involved in the demolition scheme and to the public in general.

C. Regulatory Compliance

12. At paragraph 3.88 the Auditor General's report highlights the inadequacy of WorkSafe ACT's actions to monitor the regulatory activities of Asbestos Team for the purpose of continuous improvement. Further, at paragraph 3.93, the Report states that no independent assurance of documented records, in particular the assurance of statutory notices pursuant to section/s 191 and 195 of the Act took place. Again, at paragraph 4.15 of the Report, the Auditor General raises issues around the lack of clarity in the regulation of the Mr. Fluffy Scheme and how compliance issues within Scheme were to be actioned. At paragraph 4.25, the Report notes that five Improvement Notices and four Prohibition Notices were issued in the first 12 months of the Mr. Fluffy Scheme and due to a lack of clarity in this area and it was not possible to measure the Regulator's performance.
13. Further, at paragraph 4.32 of the Report, the Auditor General found information contained in Improvement Notices and Prohibition Notices was inadequate and management involvement, although not mandatory but encouraged, was lacking. The Report highlights the lack of compliance strategy in this area as a lost opportunity significantly impact on workers' health and safety, and the use of workplace inspection reports as a tool to raise safety standards. The Report also highlighted instances of under reporting to Safe Work Australia regarding the small number of Notices issued in 2015 and 2016.
14. In relation to the number of notices issued, information provided to the CFMEU indicates that inspectors were actively encouraged by WorkSafe ACT management, in the Mr. Fluffy Scheme, not to issue Notices. The CFMEU has been told that the objective of management in this regard, was to provide an illusion that the Mr. Fluffy Scheme was proceeding smoothly

and without issues around non-compliance. It is of particular note that during this period the Territory's construction industry was nationally regarded as the most dangerous industry in the country.

15. Since the Report highlighted the lack of management involvement and quality assurance around the issuing of notices pursuant to the Act (Notices), the CFMEU is aware that Access Canberra has implemented a new procedure in relation to the issue of notices under the WHS Act. This appears to be at least partly in response to Recommendations 5 and 6 of the Auditor General's Report.
16. We are aware and inspectors have been given a management direction not to issue Notices whilst at the workplace being inspected. We understand that Inspectors are required to leave the inspected workplace prior to issuing a Notice and then to provide a report to their supervisor, which in turn goes before an internal review panel comprised of senior employees of Access Canberra before any Notice can be issued.
17. We understand that the reasoning behind this procedure is to ensure consistency and quality assurance around the issuing of Notices, in response to part of recommendation 5 of the Report.
18. While the CFMEU understands the need to ensure consistency, probity and quality assurance in the issuing of such Notices and regulatory activity, we say that this should be achieved by effective training, and not by placing inappropriate obstacles to the legitimate issue of WHS Act notices.
19. The procedure implemented by Access Canberra appears to be at odds with the intention and wording of the Act. Notices pursuant to section/s 191 and 195 are to be issued by the relevant inspector and the obligation to do so is triggered by the inspector's reasonable belief at the time of issue. Any question about the substantive matters which give rise to the reasonable belief can be reviewed under Divisions 2 and 3 of the Act. However, any review of a Notice is to clearly take place after the Notice is issued and not before. It appears the internal review panel through its managerial capacity, is creating a quasi-internal review procedure prior to the issuing of Notices, which is inconsistent with the requirements of the Act. This process undermines the powers of the relevant inspector in section 160 and implements a procedure that is not envisaged by the Act.
20. Additionally and more importantly, the CFMEU has witnessed a number of occasions, and received information about other occasions, on which the procedure requiring review before a notice can be issued, has discouraged WorkSafe ACT inspectors from issuing Notices at the workplace even if they hold a reasonable belief that a serious safety related breach of the WHS Act is occurring. The CFMEU has witnessed unsafe and dangerous practices continue due to the reluctance of inspectors to issue Notice at the relevant time, thus placing workers at a greater risk of injury or ill health.

D. Investigation – Conflict of Interest

21. The Report highlights a practical problem contained within the statutory structure of the Act. The enforcement powers contained in the Act are broad, far-reaching and conferred on the Regulator. The Regulator is defined in the Act as the Director-General. The Regulator can do all things necessary or convenient to be done for or in connection with performance of its functions under the Act, including arbitration. Difficulties arise when the Regulator is required

to arbitrate disputes or investigate the Director-General's Directorate. The limitations with the ACT model of the Act become particularly apparent when you compare the arrangements to those in other jurisdictions. For example, under the Commonwealth Act, the NSW Act, the South Australian Act and the Queensland Act, the equivalent power to arbitrate disputes are provided to an "authorising authority" (an entity distinct from the Regulator). At the Commonwealth level, the authorising authority is the Fair Work Commission, and in the relevant states it is the state industrial court or tribunal.

22. At paragraph 4.51 the Report highlights an incident where the Regulator was called on to investigate itself. The incident involved a house in Darke Street Torrens where an ACT WorkSafe inspector was seriously exposed to Asbestos. WorkSafe ACT, as part of Access Canberra was both the PCBU (for the employee inspectors) and the Regulator investigating this incident.
23. The Report highlights serious concerns around the reviews and investigations of this incident from paragraphs 4.51 to 4.96. To avoid conflict of interest the investigation of this matter should have immediately been conferred on an external entity to Access Canberra. By not doing so, it raises questions as to the effectiveness of the investigation and integrity of WorkSafe ACT in general as a regulator.
24. In this particular instance, the facts of the matter compound the practical problem. The CFMEU has serious concerns around professionalism and clear conflict interest of a senior manager of WorkSafe ACT involved in this investigation. Information received by the CFMEU included allegations around the lack of proper procedure by a senior manager within WorkSafe ACT on the day of the incident. The information received alleged a failure of the senior manager to secure the site for investigative purpose, a power provided to the Regulator by virtue of a non-disturbance notice. It is alleged that the senior manager left the Darke Street site unsecured for several hours shortly after the incident had occurred. Given the serious nature of the incident, it was reasonable to ensure the site was not disturbed so that vital evidence could be secured. Further allegations suggest an investigative failure to obtain evidence of exposure from other workers present within a reasonable timeframe. This failure to ensure proper investigative processes, which resulted in skewed evidence resulting in a favourable outcome for the Directorate. The Union submits that the lack of proper planning, procedures, training and the like regarding the implementation of Mr. Fluffy Scheme compounded the seriousness of this incident.

E. Conclusions

25. The CFMEU supports the Auditor General's recommendation that guidance on additional probity controls be put in place when WorkSafe ACT is required to conduct a regulator's investigation of itself as a 'person conducting a business or undertaking'. However, we say that this should go further than mere provision of guidance and that there should be an active separation of investigative and PCBU responsibilities in these circumstances. We say that the failure to ensure this separation in particular circumstances of the Darke Street incident has caused significant personal prejudice to the inspector concerned. Overall we say that the Report highlights a failure by WorkSafe ACT to take adequate care in relation to its own role as the PCBU for inspectors who are its employees. We say that the effects of this failure have been compounded by a lack of proper internal documentation in relation to how inspectors were to conduct inspections during the Mr Fluffy scheme and that this lack of

documentation has been detrimental both to the safety of inspectors and of the ACT public generally.

26. In addition, we submit that the process which requires that Notices under the WHS Act are not issued unless they have been reviewed by persons in Access Canberra and other than the relevant inspector, is not an appropriate response to Recommendations 5 and 6 of the Auditor General's report. We say that the adoption of this process, whereby prospective WHS Act notices are subject to a regulatory rather than safety focused review is indicative of the inappropriateness of locating WorkSafe ACT within Access Canberra. Among other things we say that this is indicative of the need for a fully independent WHS Commissioner and Regulator in the ACT.