Inquiry into Auditor-General’s Report No 1 of 2017

Standing Committee on Public Accounts

JULY 2019

Report 7

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Resolution of appointment

At its meeting of 13 December 2016 the Legislative Assembly resolved to create ‘a Standing Committee on Public Accounts to:

(i) examine:

(A) the accounts of the receipts and expenditure of the Australian Capital Territory and its authorities; and

(B) all reports of the Auditor-General which have been presented to the Assembly;

(ii) report to the Assembly any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and

(iii) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question’.[[1]](#footnote-1)

On 26 October 2017 the Legislative Assembly resolved to amend the Committee’s resolution of Appointment by adding after paragraph (e)(i)(A), the words:

‘(AA) matters relating to market and regulatory reform (excluding Access Canberra), public sector management, taxation and revenue’.[[2]](#footnote-2)

Terms of reference

Auditor-General’s Report No. 1 of 2017: *Worksafe ACT’s Management of its Regulatory Responsibilities for the Demolition of Loose-Fill Asbestos Contaminated Houses* was presented to the Legislative Assembly on 14 February 2017.

The Audit report presented the results of a performance audit that examined the effectiveness of Worksafe ACT’s management of its workplace health and safety regulatory responsibilities for the demolition of loose-fill asbestos contaminated houses in the ACT.

In accordance with the resolution of appointment of the Standing Committee on Public Accounts, the Audit report was referred to the Committee.

The Auditor-General and her officers briefed the Committee on the report on 17 March 2017. Later that day the Committee resolved, in a private meeting, to inquire further into the report.

As for all Auditor-General’s reports, the Committee’s terms of reference are to examine the Audit Report and report to the Legislative Assembly.

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Recommendations

[Recommendation 1](#_Toc8970989)

[*3.37* The Committee recommends that the ACT government directs and ensures that WorkSafe ACT follows documentary processes consistent with those envisaged in Auditor-General’s Report No.1 of 2017: *WorkSafe ACT’s management of its regulatory responsibilities for the demolition of loose‐fill asbestos contaminated houses.*](#_Toc8970990)

[Recommendation 2](#_Toc8970991)

[3.38 The Committee recommends that the ACT government implements documentary frameworks as soon as possible after a project begins. The ACT government should use these frameworks to form and reflect operational procedures and accountability measures.](#_Toc8970992)

[Recommendation 3](#_Toc8970993)

[4.49 The Committee recommends that the ACT government ensures that reliable documentary guidance for WorkSafe ACT inspectors is provided to support the discretion accorded them under the *Work Health and Safety Act 2011*.](#_Toc8970994)

[Recommendation 4](#_Toc8970995)

[4.51 The Committee recommends that the ACT government ensures that WorkSafe ACT provides regular written briefings on its work to the responsible minister.](#_Toc8970996)

[Recommendation 5](#_Toc8970997)

[5.44 The Committee recommends that the ACT government take immediate action to change administrative and legislative arrangements so that WorkSafe ACT is no longer the designated regulator or investigator where an employee of WorkSafe ACT is subject to a notifiable incident under the *Work Health and Safety Act 2011*.](#_Toc8970998)

[Recommendation 6](#_Toc8970999)

[5.45 The Committee recommends that the ACT government ensures that the matter of a WorkSafe ACT inspector who was subject to exposure to loose-fill asbestos at Darke Street, Lyons, in August 2015 is appropriately resolved and that the ACT government report on the outcome to the Legislative Assembly for the ACT by the last sitting day of November 2019.](#_Toc8971000)

[Recommendation 7](#_Toc8971001)

[6.19 The Committee recommends that the ACT government, as a matter of urgency, ensures that WorkSafe ACT inspectors are able to exercise their discretion to issue prohibition orders, and other immediate and discretionary powers conferred by the *Work Health and Safety Act 2011.*](#_Toc8971002)

# Introduction

* 1. Background

Auditor-General’s Report No. 1 of 2017: *Worksafe ACT’s Management of its Regulatory Responsibilities for the Demolition of Loose-Fill Asbestos Contaminated Houses,* was published on 20 January 2017.*[[3]](#footnote-3)* The Auditor-General and her officers briefed the Committee on her report in a private briefing on 17 March 2017, and in a further private meeting that day the Committee resolved to inquire further into the report.

* 1. Conduct of the inquiry

The Committee held two public hearings for the inquiry, on 6 December 2017 and 16 March 2018. Witnesses who appeared are listed in Appendix A of this report.

The Committee received two submissions to the inquiry, which are listed in Appendix B of this report.

* 1. Structure of the report

This report comprises:

* Chapter 1, which is the present Introduction;
* Chapter 2, which considers the Audit Report, its findings, and responses to the Audit Report;
* Chapter 3, which considers matters related to the development and application of a documentary framework to support WorkSafe ACT in relation to the work of the Asbestos Response Taskforce;
* Chapter 4, which considers the work of WorkSafe ACT’s Asbestos Team;
* Chapter 5, which considers the management of Notifiable Incidents under Part 3 of the *Work Health and Safety Act 2011* (ACT) by WorkSafe ACT;
* Chapter 6, which considers the management of Improvement Notices under Division 5.7 and Part 10, and Prohibition Notices under Division 10.2, and Division 10.4, of the *Work Health and Safety Act* by WorkSafe ACT; and
* Chapter 7, which is the Committee conclusion to the report.

Each chapter, with the exception of the present chapter, presents evidence in the form of a narrative, followed by a final section of committee comment. The Committee conclusion is Committee comment on the whole of the report.

# The Audit Report

* 1. Background and scope of Audit
     + 1. Auditor-General

In hearings the Auditor-General told the Committee that this report was the second performance audit related to the government’s Mr Fluffy buyback scheme. The first was released in May 2016 and focused on the management of financial arrangements and the work of the Asbestos Response Taskforce.[[4]](#footnote-4)

The present report focused on WorkSafe ACT as the regulator of work done by the Taskforce. It was distinctive in that it was a ‘hot audit’, conducted mid-way through the Taskforce’s demolition schedule, and was intended to help WorkSafe meet its regulatory obligations for the remainder of the demolition program.[[5]](#footnote-5)

The Senior Manager, Performance Audits, told the Committee that the audit considered at a period of regulatory activity before and after the creation of Access Canberra in December 2014. Guidance material was originally produced by the former Office of Regulatory Services, Justice and Community Safety Directorate, prior to the creation of Access Canberra. ‘Operationalisation’ of this material was managed from within Access Canberra from July 2015. The focus of the audit was a small team of approximately 10 people, comprising a third of the 30 inspectors employed by WorkSafe ACT.[[6]](#footnote-6)

He told the Committee that in the period covered by the audit, the Asbestos Response Taskforce was at first uncertain as to what the level of take-up from owners of loose-fill asbestos affected properties would be. As a result, it was unclear to what extent the demolition scheme would be conducted by government or the private sector, and this led to uncertainty over whether WorkSafe ACT would, for the most part, be regulating demolitions conducted by public or private sector entities.[[7]](#footnote-7)

The Auditor-General told the Committee that adding to this uncertainty was the fact that there had been no pilot for the project, and no arrangements for how contracts would be put out to the private sector. There were also questions on whether the scheme would involve bringing contractors into the Territory or creating capacity within it.[[8]](#footnote-8) Subsequently, approximately 90 per cent of the houses were demolished by government, involving a ‘complex system’ in which Procurement and Capital Works engaged ten head contractors to do the demolition work.[[9]](#footnote-9)

Key questions for the Audit Office, the Auditor-General told the Committee, were:

* what were the arrangements for those contracts, and
* what levels of risk they entailed for the Canberra community, including risk associated with regulatory activity.[[10]](#footnote-10)

In the end, however, she did not have the evidence to answer these questions.[[11]](#footnote-11) It was not possible to meet the audit objective—to ascertain the effectiveness of regulatory activity—because WorkSafe ACT had not ‘developed, documented or formally adopted’ a strategy and program for the asbestos team against which its work could be evaluated.[[12]](#footnote-12)

* 1. Audit findings
     + 1. Auditor-General

The Auditor-General told the Committee about the Audit’s findings.[[13]](#footnote-13)

It had become clear early on in fieldwork that a regulatory strategy and program specific had not been developed. This did not mean that the asbestos team was not fully occupied. In comparison to other workplace health and safety inspectors in WorkSafe ACT, the Asbestos Team inspectors had undertaken twice as many workplace visits.[[14]](#footnote-14)

However, without a strategy and program, it was difficult to understand what was required of the Asbestos Team or the degree to which it complied with requirements. Audit had gone to great lengths to interview people involved in regulating the work of the Asbestos Task Force, but it had been difficult to get a full picture. She was also concerned that WorkSafe had not clearly articulated risks to its staff.[[15]](#footnote-15)

Overall, she told the Committee, the key question was whether the system provided some assurance. While she concluded it did, through a combination of contracts with service providers and the activities of the Asbestos Response Taskforce, if the Territory had relied entirely on WorkSafe ACT there would have been much higher risk. WorkSafe should have ‘articulated’ its risk, and ‘focused’ its work accordingly.[[16]](#footnote-16)

In addition, the ‘four or five per cent’ of demolitions that were privately managed had potential for higher risk. These demolitions should have attracted more care and attention from WorkSafe ACT than they did.[[17]](#footnote-17)

* 1. Future implications of the Audit Report
     + 1. Auditor-General

The Committee asked about the ongoing usefulness of the Audit Report to the Territory: that is, the degree to which the findings of the report could be generalised and applied to other cases. The Auditor-General told the Committee that the Audit Report could, potentially, assist Access Canberra in considering the management of other areas within its area of responsibility, and that if this were so, the audit could contribute to better regulatory practice in the Territory.[[18]](#footnote-18)

There were two ways in which this could apply. One related to everyday regulatory activity, while the other related to such issues as asbestos, where ‘critical issues’ emerged. In both cases, it was best to set out principles for executive management, including:

* being clear on strategy;
* being clear on the approach to be adopted; and
* giving due consideration to risks and resources.[[19]](#footnote-19)

Due to the large scale of the program in this instance, experience generated by the work of the Asbestos Response Taskforce could be used by WorkSafe and other critical incident responders—where for example there was a natural disaster, a chemical fire or a building collapse—if it was captured and expressed in standard operating procedures.[[20]](#footnote-20)

The Audit Report could also be useful to the Territory if its findings were taken up and considered in a further audit, such as by the agency’s own audit and review committee. This was particularly important in view of the inability of the Audit Office in this instance to ascertain whether WorkSafe’s regulatory activities had been effective, due to a lack of protocols and documentary evidence against which they could be measured.[[21]](#footnote-21)

While she told the Committee that she had no knowledge of the capacity of Access Canberra to undertake internal audit, she said that it was conventional for audit and review committees to take material from her audits and monitor the implementation of recommendations. Even if it showed that more capacity was required, that would be an important starting point.[[22]](#footnote-22)

A further way in which the Audit Report could be useful to the Territory would be if it prompted Access Canberra to consider accountability indicators that would help a committee, members of the Assembly, and the public, to assess the effectiveness of its activities.[[23]](#footnote-23)

The Senior Manager also commented on the question of the ongoing usefulness of the Audit Report to the Territory. He noted that the ACT government’s response to the Audit Report had stated that Access Canberra recognised:

* that across the organisation there were ‘varying degrees of maturity with regards to governance’;
* that it acknowledged ‘the implications of the Auditor-General's findings across the broader organisation’; and
* that it would ‘establish a dedicated team to strengthen the focus on governance arrangements’.[[24]](#footnote-24)

He told the Committee that these responses showed that the audit findings had a relevance that extended beyond the scope, alone, of WorkSafe’s regulation of the Taskforce.[[25]](#footnote-25)

* + - 1. Work Safety Commissioner

The Committee asked the Work Safety Commissioner what lessons had been learned from the Audit Report, and what changes had taken place in the operation of WorkSafe as a result.[[26]](#footnote-26)

He told the Committee that the Audit Report had focused on governance arrangements within WorkSafe. After its release, Access Canberra had formulated ‘fairly substantial’ governance documentation covering WorkSafe’s operations, and within WorkSafe there had been work done to document its compliance framework and its ‘risk-harm approach’.[[27]](#footnote-27)

He said that when the Audit considered WorkSafe’s governance arrangements, it sought ‘specific arrangements for the asbestos eradication program’. While WorkSafe had some documentation of that nature, it relied largely on broader arrangements within Access Canberra. In his view, Audit had considered that documentation should have been more specific to the task of overseeing the work of Asbestos Response Taskforce.[[28]](#footnote-28)

WorkSafe had, in response to the findings of the Audit Report and discussions that occurred during the audit process, adapted accountability requirements from Access Canberra and applied them to the program. WorkSafe now had policies and procedures so that where there was a significant program, relevant documentation was focused on that program, resulting in a greater level of detail in guidance material.[[29]](#footnote-29)

The Committee asked whether the Auditor-General’s report reflected practice at the time the Audit was released or the history of the program.[[30]](#footnote-30)

The Work Safety Commissioner told the Committee when the Audit commenced WorkSafe was more than halfway through the program. By the time the report was released, WorkSafe was ‘very comfortable’ with its risk assessments and processes in the field. To date, there had been only one injury in the course of approximately 500 to 600 demolitions, which had been a single hand injury which had occurred independently of the demolition process. Overall, he regarded safety outcomes as being ‘absolutely exemplary’.[[31]](#footnote-31)

WorkSafe had been focused on fieldwork, at a time when it was inspecting approximately 15 to 20 demolitions each week. However, in light of the Audit findings, it was clear that WorkSafe’s governance documentation had not kept pace. It was ‘fair comment’ that existing policies and procedures did not reflect what was occurring in the field, however after the Audit Report was released WorkSafe had responded by bringing governance material up to date.[[32]](#footnote-32)

The Committee asked the Work Safety Commissioner for a more specific account of how WorkSafe had responded to the Auditor-General’s report, and what another audit would find that was different if it was conducted.[[33]](#footnote-33)

He told the Committee that the government had accepted all eight recommendations from the Audit Report and as of September 2017 all recommendations had been fully implemented. Among key outcomes were the development, testing and adoption of a regulatory strategy and program of activities focused on the demolition program, which included the *Regulatory strategy for ACT government loose-fill asbestos insulation eradication scheme*, and a program of activities, documented as *Regulation of loose-fill asbestos removal and demolition works.* This last documented operating procedures for inspections of demolitions and removal of asbestos.[[34]](#footnote-34)

The Commissioner considered these to be ‘significant’ documents which had been ‘developed, tested and trialled’ and had been, as of September 2017, implemented as business as usual in the program. If the Auditor-General were to return to the agency, she would see these documents responding to her recommendations, and evidence to show that they had been implemented from September 2017.[[35]](#footnote-35)

* 1. Committee comment

The Committee is concerned that the Audit was not able to achieve its objective due to failings in the documentary framework used to support the role of WorkSafe ACT in regulating the work of the Asbestos Response Taskforce.

The wider implications of the Audit Report are that government agencies should design and implement documentary frameworks from when programs begin. Without this, it is difficult to see how future programs may accurately be assessed, which is essential to transparency and accountability.

The Work Safety Commissioner’s defence of WorkSafe practice in relation to its support of the work of the Asbestos Response Taskforce—on the grounds that the program was without precedent, involved changing practices, and high volumes of work— and that this led to an emphasis on the practical rather than documentary aspects of WorkSafe ACT’s scrutiny over the Taskforce, is noted. However, a counter-argument to this view is to suggest that it is in precisely such circumstances government agencies should take special care in attending to record-keeping and documentation in order effectively to manage the high levels of risk which attend novel, large, and complex programs.

These matters are considered in greater detail in the following chapter.

# Documentary framework

* 1. Principles and frameworks
     + 1. Audit Report

The Audit Report considered principles, frameworks, and their outcome, for WorkSafe’s role in regulating work done by the Asbestos Removal Taskforce and its contractors.

It proposed the Australian National Audit Office’s *Administering Regulation, Achieving the right balance Better Practice Guide* (June 2014) as a standard against which to assess WorkSafe’s regulatory practice.[[36]](#footnote-36) Thisadvised regulators to develop a hierarchy of plans, encompassing:

* ‘an overarching regulatory strategy (e.g. self-regulation or an enforcement-based regime)’;
* a compliance strategy; and
* ‘a systematic risk-based program of specific activities, all established according to a prioritisation process’.[[37]](#footnote-37)

*Administering Regulation* stated that developing and documenting procedures could represent ‘a significant overhead for a regulator’, but that such procedures:

* provided ‘a point of reference’;
* promoted ‘a consistent approach to regulatory administration by providing a clear decision-making framework’; and
* improved the ‘transparency of the decision-making process’.[[38]](#footnote-38)

It also set out definitions for key terms in this process, including ‘strategy’, ‘program’, ‘procedural documentation’, and ‘risk based’.[[39]](#footnote-39)

In light of this, Audit sought to identify whether WorkSafe ACT had developed a program strategy for regulation of the work of the Loose Fill Asbestos Insulation Eradication Scheme consistent with that set out in *Administering Regulation,* including whether the strategy employed a ‘risk-based prioritisation process’ and whether WorkSafe had ‘documented and approved strategies and programs’ in place.[[40]](#footnote-40)

* + - * 1. ACT frameworks

The Audit Report considered existing ACT frameworks that could be used as models for the program, including documents created by: the Justice and Community Safety Directorate; the Office of Regulatory Services; Access Canberra; and WorkSafe ACT.[[41]](#footnote-41) Some of these were consistent with *Administering Regulation*, but there was no evidence that they had been used by the WorkSafe ACT Asbestos Team in preparing its regulatory strategy for the Loose Fill Asbestos Insulation Eradication Scheme, as:

* ‘WorkSafe ACT officers were unable to provide any evidence that important steps, as set out in the *Standard operating procedures for programmed inspection* … had been followed’;
* there had been no prioritisation or review of the ’93-point checklist’, and no ‘risk-based planning’ to determine ‘the best mechanism … to regulate priority activities or requirements’; and
* there was ‘no evidence that WorkSafe ACT used existing … documented guidance to develop and inform the Asbestos Team’s regulatory approach to the demolition of loose-fill asbestos contaminated houses’.[[42]](#footnote-42)
  1. Development of documentation
     + 1. Audit Report

The Auditor-General’s report considered the development of a ‘how-to’ guide and other documentation as a basis for the work of the WorkSafe Asbestos Team. The ‘how-to’ guide was developed jointly by the Asbestos Response Taskforce and the Work Safety Commissioner, resulting in a draft in December 2014.[[43]](#footnote-43) At the same time WorkSafe ACT was developing a ‘93-point checklist’ to guide its regulatory response.[[44]](#footnote-44)

The ‘how-to’ guide was provided to industry representatives in December 2014 however, according to the Audit Report its purpose was unclear and it was never finalised. Officers interviewed by the Audit Office stated, variously, that it was intended to develop capacity in industry or to document regulatory expectations on the part of WorkSafe ACT.[[45]](#footnote-45)

By February 2015 it was agreed by WorkSafe ACT and the Asbestos Response Taskforce that further work on the guide was unnecessary. The document was not finalised as a guide or a code of practice, due to perceptions that the document was ‘overly-prescriptive’, ‘would place restrictions on industry innovation’, and ‘would impact on the overall Scheme cost’. Subsequently, the status of this document remained unclear because while it was never finalised it continued to be referenced by other organisational documents.[[46]](#footnote-46)

Later, the Asbestos Task Force advised the Audit Office that the ACT Government had initially used the ‘how-to’ guide to support the Pilot Demolitions Program, but after this it was agreed, ‘with industry input’, that there was no need to develop the guide as a code of practice. It was considered to have served its purpose in supporting early planning for the program, including: ‘contract risk apportionment’; briefings to industry; and the dissemination of the expectations of the Taskforce regarding ‘general approach’ and safety.[[47]](#footnote-47)

During this period WorkSafe developed the ’93-point checklist’, subsequently used as a foundation for inspectors’ workplace inspection forms and checklists.[[48]](#footnote-48) However neither of these documents—the ‘how-to’ guide or the checklist—were developed to a point where they could be considered documentary support for WorkSafe’s regulation of the work of the Asbestos Removal Taskforce. The closest thing to a systematic statement of what WorkSafe would do in its regulatory capacity was made by the Work Safety Commissioner in a briefing in a YouTube video,[[49]](#footnote-49) where he gave an undertaking that WorkSafe would:

* ‘interact with contractors and … query their plans for the removal and demolition activities’;
* ‘be ‘scrutinising the [removal] plan and coming out and making sure that this is being done safely’;
* ‘have “sighted the demolition plan and raised any concerns we have about that, if we have any”’;
* ‘on the day of the demolition “come out on site [making] sure it is being done Appropriately”’; and
* ‘no longer have a regulatory interest “once the material is taken away and disposed of and the site … cleared”’.[[50]](#footnote-50)
  1. Fate of documentation
     + 1. Audit Report

The Audit Report stated that the ‘how-to’ guide was not brought to completion, and the 93-point checklist never systematised—with priorities assigned according to risk—in the way envisaged by *Administering Regulation*.[[51]](#footnote-51)

There was, however, a three-page draft document of inspection activities which was ‘prepared by, and circulated between, inspectors’, entitled *Workflow processes for WorkSafe ACT inspectors responding to “Mr Fluffy” asbestos removal and demolition notifications*. This document proved to be the only procedural document created in preparation for ‘a program-based’ approach to WorkSafe’s regulation of demolitions, setting out when inspections would take place.[[52]](#footnote-52)

It identified four key inspections, including inspections:

* ‘during smoke testing prior to the commencement of the removal of any loose-fill asbestos to assess the conformance of the enclosure over the structure’;
* ‘during removal of the loose-fill asbestos to confirm that it accords with the documented method, as set out in the contractor’s site-specific Safe Work Method Statement or in the Asbestos Removal Control Plan’;
* ‘at pre-demolition to assess the contractors’ readiness for demolition’; and
* ‘at demolition to confirm that the method accords with the documented method, as set out in the Safe Work Method Statement’.[[53]](#footnote-53)

However, this document was also never finalised. WorkSafe officers provided ‘conflicting’ accounts of the status of the document, and of the basic program of activities it described, to Audit.[[54]](#footnote-54) In addition, there was uncertainty in the document as to what should be considered an adequate inspection regime. This included statements that key inspections identified in the document did not amount to ‘exhaustive list’ and could be ‘varied as required at the discretion of the inspector and after consultation with the team manager’. There were conflicting statements about the number and type of inspections that were to be considered adequate for each instance of asbestos removal from a property, and for the property’s subsequent demolition.[[55]](#footnote-55)

As a result, it was unclear which inspections—site establishment, smoke testing, asbestos removal, pre-demolition, demolition, post demolition—were mandatory or discretionary and, if inspections were discretionary, how this discretion was to be exercised. Important statements made in briefings and budget submissions to Ministers by WorkSafe ACT identified mandatory inspections that were to take place, but these were made less clear by inconsistencies between these and WorkSafe ACT’s draft Workflow processes document of July 2015. This created uncertainty as to the responsibilities of the Asbestos Team and made it more difficult to determine whether the Asbestos Team was meeting its obligations.[[56]](#footnote-56)

Overall, the Audit Report considered that WorkSafe ACT had not developed a strategy or program of activities for the purpose of regulating demolitions. A strategy would have described ‘the overall aim of the regulatory activity and define regulatory outcomes’, and a ‘program of activities’ would have identified actions to be undertaken to achieve the strategy.[[57]](#footnote-57) In addition, WorkSafe had failed, in its formal documentation, to provide for the management of increased risk where asbestos-affected properties were demolished by private contractors operating independently of the Asbestos Task Force.[[58]](#footnote-58)

* + - 1. Work Safety Commissioner

When the Work Safety Commissioner appeared in hearings the Committee asked about the draft ‘how-to guide’ referred to in the Auditor-General’s report.[[59]](#footnote-59)

He told the Committee that the program was its early days ‘fairly dynamic’ as there were no similar programs in Australia, or anywhere in the world, which could be used as a model. In consultation with the Asbestos Task Force, Procurement and Capital works and various expert asbestos removalists and assessors, WorkSafe had formulated a program, based on the information available at the time. The program was ‘very conservative’ when it first started because it was not known what challenges would be encountered as it expanded.[[60]](#footnote-60)

Changes were made from early in the life of the program, resulting in part from weekly meetings held after a small number of demolitions had been done, where ‘all of the stakeholders would get together, review what they learned, what worked, what did not work, what was necessary and what was not necessary’. WorkSafe was identifying additional risks, and encountering ‘unique characteristics of individual blocks’, and as a result there were frequent changes to practice.[[61]](#footnote-61)

During this period, the Commissioner told the Committee, the practical aspects of regulation were in advance of policies and procedures: the main focus was on safety for demolitions and refining arrangements to create an efficient process. Individual procedures did not keep pace with changes in practice because WorkSafe focused on safety and fieldwork rather than governance work in the office, and this was ‘another learning from the process’.[[62]](#footnote-62)

* + - 1. CFMEU

In its submission, and in hearings, the CFMEU raised concerns over documentation and planning for the Asbestos Response Taskforce.[[63]](#footnote-63)

The submission noted that the Auditor-General’s report had found a lack of planning and risk assessment or a strategy or program of activities for the Mr. Fluffy Scheme, and an absence of risk assessment procedures or monitoring of implementation in relation to the activities of the Asbestos Team.[[64]](#footnote-64)

It also noted that the Audit Report had referenced an incomplete draft document, ‘Asbestos removal and demolition of houses affected by loose-fill asbestos insulation guide’, the purpose of which was unclear, and a ‘93-point checklist’. The submission advised, consistent with the findings of the Audit Report, that the Guide and the checklist were originally intended to serve as guidance on ‘correct procedures and documentation’ which would be ‘given to all Principal Contractors and/or PCBU’s [Person Conducting a Business or Undertaking] involved in the Mr. Fluffy Scheme, prior to … project commencement’.[[65]](#footnote-65)

Information received by the CFMEU, independent from the Audit Report, confirmed that the Guide was not finalised, and that it was not employed in the Loose Fill Asbestos Insulation Eradication Scheme prior to the publication of the Audit Report. This failure to implement the Guide, and limited use of the checklist, resulted in ‘a lack of Guidance to PCBU’s regarding what was expected and created a risk of ad hoc project management’.[[66]](#footnote-66)

The CFMEU understood that the draft document mentioned in the Audit Report entitled ‘Workflow processes’ was intended to be a Standard Operating Procedure (SOP) for the Asbestos Team. Drafting and implementation of this SOP before the start of the Mr. Fluffy Scheme, ‘would have addressed many issues contained in the Report around training, compliance, risk assessments, health monitoring and the like’.[[67]](#footnote-67) The CFMEU had been advised, independently of the Audit Report, that Asbestos Team inspectors were consulted on the document in meetings of July and September 2015, but that ‘none of the [inspectors’] comments or recommendations were implemented’, and that the draft document had not been finalised by the time the Audit Report was released.[[68]](#footnote-68)

The submission also commented on how a lack of documentation had resulted in a ‘lack of clarity in the regulation of the Mr. Fluffy Scheme and how compliance issues within Scheme were to be actioned’,[[69]](#footnote-69) consistent with the Audit finding that ‘due to a lack of clarity in this area … it was not possible to measure the Regulator’s performance’.[[70]](#footnote-70)

In hearings, questions were asked of the CFMEU regarding draft documentation and the effect of it not being brought to completion.[[71]](#footnote-71) The Legal and Safety Officer told the Committee that had there been a Standard Operating Procedure and documentation for subcontractors, many of the issues that arose in the program could have been anticipated and dealt with because ‘all the contractors would have had the same documentation and the same procedures in place’. In practice, as noted above, these were not implemented: a ‘couple of checklists were implemented in the two initial trial stages of it, but then it never happened again’.[[72]](#footnote-72)

When the Legal and Safety Officer told the Committee about the incomplete drafting and failure to implement the how-to guide for PCBUs and Standard Operation Procedure, the Committee asked whether interim or draft documents had any effect under work health and safety legislation. The Legal and Safety Officer advised that they did not.[[73]](#footnote-73)

The Acting Secretary told the Committee that if there was ‘high-risk activity’, such as inspectors being present on-site during asbestos removal, there should have been ‘a set of working procedures, risk assessments and undertaking inductions’ for the inspectors in-place, ‘done and followed’. Implementation of standard operating procedures and risk assessment hazard reduction programs would have prevented the incident at Darke Street. If such arrangements were in place, the contractor would not have proceeded after the inspector ordered a halt to works, and exposure would not have occurred. Normally on construction sites, ‘safe systems of work’ and management systems were put in place to protect against such events, but in this case it had not happened.[[74]](#footnote-74)

The CFMEU considered that there were a number of elements which WorkSafe had mismanaged, and that this was symptomatic of its broader approach to operations. This included ‘basic preplanning tools’ not being completed or provided to inspectors, and an absence of ‘work flow processes and standard operating procedures’ for the asbestos team, in spite of the project involving ‘a billion dollars’ worth of work’.[[75]](#footnote-75)

The Acting Secretary told the Committee that the CFMEU had received reports that inspectors had been instructed not to issue improvement or prohibition notices so that ‘the scheme looked like it was a success’. It appeared that the capacity of inspectors under the Act to perform their duties by implementing improvement or prohibition notices had been reduced and that inspectors had to ‘sit in front of a committee’ before they could exercise such powers. The CFMEU believed this contravened the Act, by detracting from the powers it provided for inspectors to ‘immediately rectify safety issues using their powers’.[[76]](#footnote-76)

* 1. Committee comment

It is a matter for concern that in preparing to support a scheme of the significance of the Asbestos Response Taskforce, WorkSafe ACT did not establish and implement a documentary framework for its operations. Its actions in this regard were not proportionate to the scale and expense of the program and the health risks it entailed.

The principles proposed by the Auditor-General for the development of the framework are reasonable, as is the more general premise that government agencies should, when initiating programs which involve risk and the expenditure of public money, set out what will be done, how it will be done, and how performance will be measured.

The view put to the Committee by the Work Safety Commissioner regarding the documentary framework—that practical imperatives were prioritised over record-keeping—is noted. However, this assumes a dichotomy between the practical and written elements of a program. This does not stand up to scrutiny, as WorkSafe ACT needed effective documentary support in order to fulfil its responsibility to regulate the work of the Asbestos Response Taskforce.

WorkSafe ACT in its management of the program in its early period, characterised by the Work Safety Commissioner as ‘dynamic’, did not capture in documentation the views and experiences of inspectors, thus failing to capture practical experience that would have been useful for refining the program. This demonstrates that effective documentary practice is essential to achieving successful outcomes in a practical sense.

The Committee recommends that the ACT government directs and ensures that WorkSafe ACT follows documentary processes consistent with those envisaged in Auditor-General’s Report No.1 of 2017: *WorkSafe ACT’s management of its regulatory responsibilities for the demolition of loose‐fill asbestos contaminated houses.*

The Committee recommends that the ACT government implements documentary frameworks as soon as possible after a project begins. The ACT government should use these frameworks to form and reflect operational procedures and accountability measures.

# WorkSafe ACT Asbestos Team

* + - 1. Audit Report

According to the Audit Report, WorkSafe ACT commenced establishment of a dedicated Asbestos Team in June 2014, initially comprising four inspectors, one of whom was the manager, and all of whom were sourced from WorkSafe ACT.

The role of the Asbestos Team was ambiguous: one view was that its role was to ‘provide Work Health and Safety regulatory support to the Asbestos Response Taskforce’. Another was that it was ‘not part of the Taskforce governance model’ because it was the independent safety regulator, and thus should be kept separate from the Taskforce program and activities. As a result, it was difficult for WorkSafe ACT, and particularly the Asbestos Team, to strike a balance between providing support to industry and maintaining ‘arms-length regulatory independence’.[[77]](#footnote-77)

Funding for the WorkSafe Asbestos Team, in the 2014-15 financial year, was initially provided from within WorkSafe ACT by re-prioritising resources from existing budgets. Additional funding was provided from July 2015, allowing for additional inspectors and other staff. Establishment of the Team required ‘considerable senior management and executive capacity’. The former Work Safety Commissioner estimated that during the first two years of its existence there were significant periods during which the program required 70 per cent of his time.[[78]](#footnote-78)

According to the Audit Report, however, a failure to identify minimum requirements for regulatory activity, or to generate information on performance, resulted in a lack of information on which to base analysis of the resources that would be required. As a result, a business case put to the relevant minister in June 2016 did not include information necessary to estimate resource requirements.[[79]](#footnote-79)

In view of a need for WorkSafe ACT to act independently as a regulator of actions performed by the Asbestos Task Force, it was ‘problematic’ that WorkSafe ACT sought additional funding by way of the Asbestos Response Taskforce and the Eradication Scheme Steering Committee. As a result, the position of WorkSafe ACT was not consistent with the principle that a regulator needed to be ‘independent, and be seen to be independent, of those it regulates’.[[80]](#footnote-80)

* 1. Qualifications for inspectors

The Auditor-General was asked questions regarding qualifications for inspectors, and the finding in the Audit Report that ‘all asbestos team inspectors at the time met two essential standards: construction white card and introduction to asbestos removal’.[[81]](#footnote-81)

The Senior Manager, Performance Audits, told the Committee that the subject matter expert had advised that these qualifications were mandatory for working on a construction site and with asbestos in any case. Persons present at a site would be obliged to have both, whether or not they were an inspector.[[82]](#footnote-82)

* 1. Team management information
     + 1. Audit Report

The Audit Report stated that its subject-matter expert had advised that there was ‘no case management system’ available to the WorkSafe Asbestos Team. In place of this it was using a records management system, which did not support some necessary functions, such as ‘oversighting inspector case-loading, workflow progress’, and management of ‘probity matters’.[[83]](#footnote-83)

As a result, there was:

* no regular reporting on ‘the achievement of defined team-level objectives, workflow, unresolved incidents or compliance matters such as open or remedied Improvement Notices or Prohibition Notices’, and
* no information on targets and outcomes for demolition sites, contractors, inspectors or ‘the team as a whole’.[[84]](#footnote-84)

In addition, managers did not as a matter of course read workplace inspection reports, except where an Improvement Notice or Prohibition Notice under sections 191 and 195 of the *Work Health and Safety Act 2011*) had been issued. In these cases, workplace inspection reports were read by managers to prepare for a meeting with the recipient of the Notice, rather than for quality assurance, and there was no independent assurance of records of inspectors’ activities. The Audit Report stated that records of inspectors had the potential to provide evidence of regulatory activities and for this reason needed to be of high quality. Review of reports after-the-fact would have ensured consistency and supported improvements to practice but this did not occur.[[85]](#footnote-85)

* 1. Tests on files and records
     + 1. Audit Report

The Audit Report described the results of tests carried out by the Audit’s subject-matter expert on files and records created by the Asbestos Team.

Officers had described the role of the Asbestos Team as supporting industry ‘through engagement and advice, and only where necessary, enforcement’, and it was intended that these interactions would be captured in records. While the subject-matter expert considered that records showed that the Asbestos Team’s engagement with regulatory entities was ‘adequate’, the quality of record-keeping was not. All demolition sites were subject to a workplace inspection from an inspector, and ‘nearly all’ were inspected on demolition day, but only 16 per cent of sites received all four of the inspections specified in the draft Workflow Processes document of July 2015.[[86]](#footnote-86)

Thus, according to the Audit Report, if the four inspections identified in that document were to be considered as the basic requirement for WorkSafe’s regulation of demolitions in the Scheme, then inspection activity had fallen ‘far short’ of that requirement. Moreover, as the rate of demolitions increased in 2015-16, the overall number of inspections per site declined and the quality of records management also declined. In particular the quality of records fell in the last quarter of 2015-16, correlating with a significant increase in the number of weekly demolitions. There was also a reduction in the number of sites that were subject to pre-demolition- and post-demolition-day inspections.[[87]](#footnote-87)

The case file review confirmed comments by Asbestos Team officers that there had been a ‘significant change in priorities for different inspections’, but that there was no documented rationale for these changes.[[88]](#footnote-88)

* 1. Performance reporting
     + 1. Audit Report

According to the Audit Report, there were several anomalies in performance reporting on the work of the Asbestos Team:

* first, the only two indicators employed for annual reporting purposes were the ‘number of inspections conducted by Access Canberra’, and ‘compliance at the time of inspection’;
* second, for annual reporting purposes, reporting was aggregated within that for WorkSafe ACT, and then within accountability indicators for Access Canberra, the larger entity to which WorkSafe ACT belongs; and
* third, while data from WorkSafe ACT was reported to Safe Work Australia, it was incomplete: it was under-reported by 33 per cent—which was regarded as significant—and this indicated that quality control, including supervisory sign-off, was not effective.[[89]](#footnote-89)

The Audit Report noted that data which is provided to Safe Work Australia categorises inspections as either ‘pro-active’ or ‘reactive’. The data provided by the Asbestos Team categorised 99.5 percent of inspections as ‘reactive’. This was inconsistent with advice on best practice provided by the Audit’s subject matter expert: that workplace inspections reports should only be labelled as reactive where inspectors were called to a site ‘for a complaint or in response to a notification of real or potential harm’.[[90]](#footnote-90)

In addition, data on the compliance of Persons Conducting a Business or Undertaking (PCBU) was less than reliable because the Asbestos Team had used simplified criteria: if an Improvement, Prohibition or Infringement Notice had been issued, the PCBU was regarded as non-compliant, while if no notice had been issued it was regarded as compliant. Data generated on this basis did not provide sufficiently specific information on whether WorkSafe ACT’s regulatory activity was effective. This was more significant due to the absence of other indicators which could have been used to determine the extent to which the work of the Asbestos Team served the principles set out in the *Work Health and Safety Act 2011* (ACT).[[91]](#footnote-91)

For its part, and as noted above,[[92]](#footnote-92) WorkSafe ACT had advised the Audit that its regulatory interventions had been ‘instrumental’ in limiting the number of injuries and incidents associated with demolitions. The Asbestos Team had regulated over 200,000 hours of demolition activity under the Asbestos Response Taskforce’s program of work, and had conducted 2,066 site-visits since the beginning of Government managed demolitions, during which time there had been a only a ‘single notifiable injury relating to a hand fracture’, and a small number of notifiable incidents where there were ‘near misses’.[[93]](#footnote-93)

This positive view contrasted with that outlined in the Audit Report, which considered that there had been no articulation of a strategy or program for WorkSafe ACT’s regulation of house demolitions under the Scheme, and that without this there was no:

* statement of ‘purpose, goals or performance measures’;
* setting of targets against which performance could be judged; or
* basis for reporting and monitoring for activities of the Asbestos Team.[[94]](#footnote-94)

As a result, according to the Audit Report, there was no basis on which to judge reductions in risk or improvements in compliance as a result of Asbestos Team activities, nor was WorkSafe able to show their effectiveness in meeting requirements under the *Work Health and Safety Act 2011*.[[95]](#footnote-95)

In addition, while changes to inspection practices had been discussed at weekly team meetings they were recorded only in personal notes and were not disseminated to others in the team, and there was ‘no other record’ of these meetings. For the most part, changes to practice had:

* not been recorded;
* not been subject to a formal approval process; and
* not had a role in refining a documented inspection program or procedural documentation.[[96]](#footnote-96)

While a draft procedure had been developed in February 2016 for the termination of services inspection this was—again—not finalised or approved.[[97]](#footnote-97)

* 1. Variations in practice
     1. Air quality monitoring
        1. Audit Report

According to the Audit Report, air quality monitoring was one area in which there were significant variations in practice.[[98]](#footnote-98)

Information published by the Asbestos Response Taskforce had provided an undertaking that air quality monitoring would be conducted on each site where asbestos removal and demolition was to be conducted. Consistent with this, Asbestos Team inspectors were asked to confirm by way of items in their removal and demolition workplace inspection checklists, that air quality monitoring was being conducted during the three stages of each demolition.[[99]](#footnote-99)

In practice, however, there was no WorkSafe documentation stating that results were to be received by WorkSafe ACT from the licensed asbestos assessor or the principal contractor who engaged the licensed asbestos assessor, or that results would be monitored by an inspector. As a result, WorkSafe ACT did not collect the results of air quality monitoring as part of its ‘normal business practice’.[[100]](#footnote-100)

The case file review conducted by the subject-matter expert on behalf of Audit indicated that the Asbestos Team had received air quality monitoring results for around 60 per cent of demolition sites in 2015, while no air results were received for the selection of demolition sites in 2016. It was ‘not apparent’ from the review why this was the case.[[101]](#footnote-101)

There was other evidence of a lack of uniform approach to air quality monitoring. In particular, there was ‘no standard format or approach’ for asbestos removal clearance certificates: in some instances asbestos removal clearance certificates included full air quality monitoring results in an appendix, while in others there was ‘a simple statement that air quality monitoring results were satisfactory’. In some instances, the pre-demolition certificate for a site acknowledged air quality monitoring results but the corresponding post-demolition certificate did not.[[102]](#footnote-102)

There also appeared to be no consistent expectation in relation to air quality monitoring, contrary to a fixed regulatory requirement that principal contractors had an obligation to investigate readings of over 0.01 fibres/ml, and to notify the Asbestos Team when 0.02 fibres / ml were exceeded.[[103]](#footnote-103) There had, according to advice, been only one site where a reading had exceeded the 0.01 fibres/ml level, in August 2016. In this instance, the high reading was reported to an Asbestos Team inspector within two hours but was not communicated to another inspector visiting the site at 10 am the next morning, who then ‘discovered’ both the high reading and the remedial action being taken by the contractor.[[104]](#footnote-104)

The Audit Report stated that this ‘communication mishap’ occurred because:

* there were ‘times when more than one inspector [was] looking after the same principal contractor but on different sites’;
* ‘one inspector who had not been allocated the site of the high air monitoring reading was initially notified by the principal contractor on the evening of the high air monitoring reading’; and
* ‘another inspector who had been allocated the site of the high air monitoring reading made an unscheduled inspection visit to the site the next day, a visit which was not known about prior to the visit taking place to Asbestos Team colleagues or team supervisors’.[[105]](#footnote-105)

However, laboratory testing of a sample from the site showed that most of the respirable fibres were not asbestos fibres, resulting in a ‘calculated fibre concentration’ under the prescribed threshold of 0.01 fibres/ml.[[106]](#footnote-106)

* + 1. Site clearance
       1. Audit Report

The Audit Report stated that there was a lack of clarity about when the Asbestos Team’s regulatory responsibilities finished after a house was demolished. While the Work Safety Commissioner had stated, in a media video, that once demolition and clearance had been conducted on a site WorkSafe had no further obligations in relation to that site, variations in practice resulted in sites receiving inspections ‘after demolition day and during, or even after, site clearance’, without clear directions about when an inspector’s involvement should end.[[107]](#footnote-107) Regarding this, the Audit Report stated that:

Asbestos Team inspection reports have not identified why some sites have been the subject of post demolition workplace inspections and others have not. There is no procedural documentation for post demolition workplace inspections. It is not clear at what point WorkSafe ACT Asbestos Team’s regulatory interest in a particular demolition site concludes, and how this is confirmed.[[108]](#footnote-108)

* 1. Exercise of discretion by inspectors
     + 1. Audit Report

The subject-matter expert retained by the Audit Office considered discretion exercised by Asbestos Team inspectors. Some differences in approach resulted from inspectors ‘varying or omitting one or more of the four inspections’ envisaged for the program, described by WorkSafe ACT managers as ‘inspectors exercising discretion’.[[109]](#footnote-109)

The principle of ‘inspectors exercising discretion’ was referred to in:

* the draft Workflow processes document;
* Ministerial briefings;
* comments by WorkSafe ACT officers; and
* the Work Health and Safety Act 2011.[[110]](#footnote-110)

The Audit subject-matter expert had advised that where discretion was exercised under ‘delegated’ powers rather than ‘specified powers’ under the Act, it should be within the terms of ‘effective governance’, that is: ‘operationalised transparently through a strategy, role clarity, approved processes, policies and procedures, and managerial oversight’. In practice, however, variations shown in the records could not be defended because they did not meet the criteria for ‘reasonable discretion’, which was they should be:

* ‘bounded by policy’;
* ‘evidence based and on record’; and
* ‘subject to managerial oversight’.[[111]](#footnote-111)

In light of this, the Audit Report considered that such variations in practice could not be attributed to the exercise of reasonable discretion by Asbestos Team inspectors. Decisions on whether to conduct particular inspections had not been made according to documented programs or procedures and had not ‘been appropriately explained and recorded’.[[112]](#footnote-112)

* + - 1. Work Safety Commissioner

In hearings the Committee asked the Work Safety Commissioner whether WorkSafe inspectors would be present at a site for most of the time during demolition. It also asked whether they would be present during demolition only, or during the removal of material from the demolition.[[113]](#footnote-113)

The Commissioner told the Committee that this was at the discretion of the inspector. Inspectors were present for pre-demolition toolbox talks and usually for the start of demolition, although they would not necessary be present for all of it. Once demolition started and it was verified that all arrangements were correctly in place—such as appropriate loading, air monitoring and trucks being covered before leaving the site—it was at inspectors’ discretion as to how long they stayed.[[114]](#footnote-114)

* 1. WorkSafe inspectors and probity
     + 1. Audit Report

The Audit Report stated that:

the concept of “probity” may be understood as inspectors or investigators not taking advantage of their position of power and appropriately applying their powers.[[115]](#footnote-115)

Audit’s subject-matter expert had advised that inspectors had coercive powers that in some respects greater than those available to the Police in the ACT, such as a power to stop a business operating based on ‘reasonable probability of potential problems’. While the most important objective was harm reduction, a further important imperative was to ensure a level playing field. Unbounded use of inspectors’ powers could create the potential for corrupt behaviour, actual or perceived. Accusations of bias were often made when inspectors took enforcement action. In light of this, effective probity controls protected the inspector, the PCBUs [Persons Conducting a Business or Undertaking], and the regulator.[[116]](#footnote-116) In industries where there were regular interactions between the regulator and regulated, probity risks were created where inspectors lost objectivity resulting in ‘regulatory capture’.[[117]](#footnote-117)

He advised that poor regulatory cultures emerged where:

* there were ‘few standards imposed’;
* ‘resources [were] perceived as low’;
* ‘few review mechanisms [existed] to challenge decisions’; and
* ‘compliance officers [chose] whether or not to apply the standards and operating principles of the organisation’. [[118]](#footnote-118)

In light of this, the subject-matter expert advised, procedures should:

* ‘Prevent a single officer from opening and closing a case’;
* ‘Ensure the rationale for opening and closing a case is captured’; and
* ‘Provide for an annual probity audit of inspector and manager decisions to intervene or not intervene’.[[119]](#footnote-119)

A basic safeguard, the subject-matter expert advised, was supervisory involvement in allocating inspectors to regulated entities. For the Asbestos Team, however, this was an administrative support task, in which supervisors were not involved in assigning tasks and probity was not considered. Due to a lack of ‘procedural documentation in general, decision rationale, risk management, quality assurance, outcome/output reporting and other oversight mechanisms’, inspectors were at risk of ‘accusations of preferential treatment’ or ‘imposing an excessive burden’ on regulated parties.[[120]](#footnote-120)

In addition, because procedural documentation and guidance for the Asbestos Team was not correctly maintained, it was not possible to determine which documents were current, approved, superseded or withdrawn.[[121]](#footnote-121) Overall, the Asbestos Team’s documentation and record keeping was ‘poor’. This was important because in instances where matters were subject to an investigation or judicial examination, information on the Asbestos Team’s actions and decisions would be required as evidence.[[122]](#footnote-122)

Of special concern were ‘reports of site visits where no site visit occurred’ and ‘poor or confused language’ in those reports, which did not always show their purpose and were inconsistent in language and intent. Where a need for further work was indicated in one report, there was often no follow-up in subsequent reports. The subject-matter expert advised Audit that the primary purpose of workplace visit reports was to be a ‘a record of a visit, written for business’, with a secondary purpose of record keeping, but many— particularly those created in 2016—fulfilled ‘neither objective’.[[123]](#footnote-123)

* 1. Reporting to minister
     + 1. Minister for Regulatory Services

When asked whether he received regular reporting from WorkSafe regarding the operation of the Asbestos Removal Taskforce the Minister for Regulatory Services told the Committee that he received weekly briefings from Access Canberra; that matters regarding WorkSafe were a part of those briefings, and that they also included matters regarding the Loose Fill Asbestos Insulation Eradication Scheme. All reporting took place in these weekly briefings: he received only oral briefings, did not receive any written reports, and all briefings came from Access Canberra and WorkSafe alone.[[124]](#footnote-124)

Quantitative information on the program, the Work Safety Commissioner told the Committee, was provided as part of WorkSafe’s weekly oral briefing to the Minister, and included information on progress, including numbers of demolitions and updates on the progress of the program as a whole. Issues or incidents were reported on an exception basis.[[125]](#footnote-125)

* 1. Committee comment

The Committee is concerned at evidence that WorkSafe inspectors are given discretion under particular sections of the *Work Health and Safety Act 2011* (ACT) but are provided with little in the way of operational guidance on how they should respond, including in the context of notifiable incidents. Here again, there is a deficit in the documentary framework for the operations of WorkSafe ACT. This would best be addressed by maintaining the operational independence of inspectors contemplated by the Act while providing appropriate guidance, in documentary form, on how those powers should be exercised.

Notifiable incidents are considered in further detail in the following chapter.

The Committee recommends that the ACT government ensures that reliable documentary guidance for WorkSafe ACT inspectors is provided to support the discretion accorded them under the *Work Health and Safety Act 2011*.

The Committee is concerned that important information is provided to the minister responsible for WorkSafe ACT in verbal form only. This increases the risk of inaccuracies being introduced in the transmission of that information and detracts from transparency and accountability.

The Committee recommends that the ACT government ensures that WorkSafe ACT provides regular written briefings on its work to the responsible minister/s.

# Notifiable incidents

* 1. Management of notifiable incidents
     + 1. Auditor-General

Section 35 of the *Work Health and Safety Act 2011* (ACT) provides that:

*notifiable incident* means—

(a) the death of a person; or

(b) a serious injury or illness of a person; or

(c) a dangerous incident.[[126]](#footnote-126)

In hearings, the Committee asked the Auditor-General about WorkSafe ACT’s handling of notifiable incidents under the Act and whether suitable procedures were in place.[[127]](#footnote-127)

The Senior Manager, Performance Audits, told the Committee that there was ‘quite a lot’ of documentation about what a notifiable incident was and the obligations of the entity making the notification. However, there was uncertainty as to how government officers should respond when receiving a notification.[[128]](#footnote-128)

Responsible persons with knowledge of an incident were encouraged to coordinate their efforts to notify WorkSafe ACT,[[129]](#footnote-129) but when an ACT Government employee was either a witness to a matter or was contacted by a duty holder, records of interactions between ACT Government officers indicated ‘hesitancy and a lack of knowledge of procedure’, and uncertainty as to their obligations as an employee of WorkSafe.[[130]](#footnote-130)

* + - 1. Ms Lorraine Carvahlo

When she appeared in hearings Ms Lorraine Carvahlo made an opening statement, in which she told the Committee that:

* she lived in Lyons in a house that was considered by government to be affected by loose-fill asbestos;
* she and her neighbours had made complaints about the demolition of a house affected by loose-fill asbestos, immediately next door to her own property;[[131]](#footnote-131) and that
* her family and neighbours were also concerned about the management of demolitions of other loose-fill asbestos-affected houses in the area.[[132]](#footnote-132)

She told the Committee that on 27 April 2016 her neighbours intervened to stop demolition work on an affected property at 4 Barrow Place, Lyons, next door to her property, because workers had commenced demolition work without protective clothing. When pre-demolition work commenced at the property, no pre-demolition asbestos reports had been conducted, yet pre-demolition work had continued. Robson Environmental had conducted tests at the request of the ACT government on 2 May 2016 but tests had not been conducted on the site of the contamination, and an insufficient amount of material had been collected to allow reliable testing.[[133]](#footnote-133)

In this instance, she said, there was no prior notification of the demolition date and the property was not enclosed in plastic sheeting, as was accepted practice for demolitions of affected houses. Ms Carvahlo claimed that, as a result, dust and debris came over the fence into her property, and although this was reported no action was taken by WorkSafe or the Task Force.[[134]](#footnote-134)

She argued that the close proximity of the house being demolished to her dwelling should have led WorkSafe to ensure that it was fully enclosed during demolition. Both she and her neighbours had contacted WorkSafe and the Task Force about this, but had received no response,[[135]](#footnote-135) and in a later kerbside meeting with members of the Asbestos Taskforce and WorkSafe, their concerns had been disregarded.[[136]](#footnote-136)

She said that the residents of Barrow Place were concerned that there were insufficient safeguards to protect people in neighbouring properties from residues after demolition, and that these concerns were supported by photographs depicting children walking through dust outside a loose-fill asbestos affect property while it was being demolished at 19 Olympus Way, Lyons.[[137]](#footnote-137)

* + - * 1. Identification of airborne loose-fill asbestos

When asked whether airborne material identified in photographs supplied by Mrs Carvahlo with her submission was water mist used to suppress dust arising from removal and demolition works, as had been suggested by the Work Safety Commissioner, she told the Committee that this was not the case: she had been covered in the dust and it was not wet.[[138]](#footnote-138)

* + - * 1. Whether houses for demolition had been sealed

When asked whether the house adjoining her property in Barrow Place, Lyons—pictured in photographs provided with her submission—had been sealed in plastic as part of safety procedures, Mrs Carvahlo told the Committee that it had not, and that exposure had been increased because her house was at a lower level, allowing material to drop from the house being demolished onto her property.[[139]](#footnote-139)

When asked the same question about houses in Olympus Way or Tarraleah Street, Lyons, she told the Committee that the house in Tarraleah Place had not been enclosed during demolition, nor was an affected house facing it across the road. As a result, when demolition commenced on those properties, asbestos dust was also released, as it was from the demolition in Barrow Place.[[140]](#footnote-140)

* + - * 1. Concerns expressed at a public meeting

The Committee asked Mrs Carvahlo about a kerbside meeting she had attended in Lyons on 28 April 2016, and what concerns she had put to the Task Force and to WorkSafe inspectors at that meeting. She told the Committee that she had said in that meeting that a house next to her own property in Barrow Place was contaminated by asbestos, and one of her neighbours had showed pictures of the contamination. Government representatives were told that the house should be enclosed due to its proximity to her own house, but expressed the view that this was not necessary. She told the Committee that after the meeting WorkSafe representatives who had attended the meeting were seen entering the site of demolition works at Barrow Place.[[141]](#footnote-141)

When asked how it was that neighbours gained access to the property at Barrow Place and took photographs, she told the Committee that these events had taken place during house removals rather than during pre-demolition. During the move, the ceiling had been penetrated and material dropped onto the floor, and neighbours who were helping with the move took photographs.[[142]](#footnote-142)

She said that at this stage there was no sense that members of WorkSafe or the Taskforce were aware of the state of the house. At the time there was conjecture as to whether a second report was being conducted: the contractor had said that he had not received a second report, while WorkSafe said there was one. Residents never knew whether this second report existed or not. They had asked for samples to be taken. In the event, this was done on 2 May, ‘well after’ the demolition had commenced.[[143]](#footnote-143)

* + - * 1. Conduct of WorkSafe

Mrs Carvahlo told the Committee about her experience with, and perceptions of, WorkSafe as a result of her interactions with it in connection with the Asbestos Buyback Scheme.

She told the Committee that herself and her husband’s experience of WorkSafe had been disappointing because, in their view:

* the supervision of Mr Fluffy worksites was ’severely lacking’;
* safety procedures were not been followed by workers, who were not properly supervised;
* when complaints were made to WorkSafe they were ignored, and there was no follow-up; and
* WorkSafe did not return telephone calls and when contacted, did not have records of previous calls.[[144]](#footnote-144)
  + - 1. Work Safety Commissioner

The Committee asked the Work Safety Commissioner whether he had seen a submission to the inquiry by Mr L and Ms L Carvalho, and whether there was anything in the submission with which he disagreed.[[145]](#footnote-145) The Commissioner told the Committee that while he had read the submission he did not have it with him in hearings, and was not familiar with its contents in detail.[[146]](#footnote-146)

When asked whether he planned to respond to concerns voiced in the submission, the Minister told the Committee that these were matters which were something that WorkSafe would ‘continue to work through and respond to as appropriate’.[[147]](#footnote-147)

The Committee noted that the submission had alleged that in one instance workers had been seen working in skip bins where loose asbestos was present. When asked whether the allegations had been investigated, the Commissioner told the Committee that such incidents ‘would have been investigated at that time’. Task Force staff who controlled specific sites were responsible for investigations. For some incidents, action had been taken against individuals or the contractor responsible, however these were matters for the Task Force.[[148]](#footnote-148)

When asked how many people had been exposed to loose-fill asbestos in this instance, the Commissioner told the Committee that he did not know as he did not have any results of an investigation available to him in hearings.[[149]](#footnote-149) The Committee described photographs and video footage provided to the Committee showing possible exposure of workers to loose-fill asbestos without appropriate protections applied, and asked how many workers in the Taskforce program, working in loose-fill asbestos affected houses, had been exposed to asbestos without appropriate protection.[[150]](#footnote-150) The Commissioner took the question as a Question Taken on Notice and later responded:

In addition to the identified incident, there has been three other incidents concerning workers not wearing safety gear during house demolitions in the Territory from 1 January 2015. These instances were identified during regular workplace inspections by WorkSafe Inspectors as part of the Loose-fill Asbestos Eradication program.

One incident occurred in Torrens in August 2015 where several asbestos removal workers were observed not wearing their personal protective equipment appropriately. In November 2015, an incident occurred in Melba involving personal protective equipment, and in June 2016 a worker was observed by a WorkSafe Inspector at a Downer site not wearing personal protective equipment correctly.[[151]](#footnote-151)

* + - * 1. Responses to incidents

The Committee noted that the submission asserted that a phone call was made to WorkSafe ACT regarding these events.[[152]](#footnote-152) When asked as to usual or best practice in response to such a call, the Commissioner told the Committee that WorkSafe had arrangements for ‘quick response’. If it were in connection with a demolition in progress on a Mr Fluffy site a WorkSafe inspector would be present for a toolbox talk and ‘usually … for most, if not all, of the actual demolition’. In attending sites being prepared for demolition, WorkSafe inspectors would check that air monitoring and dust suppression by water vapour was in place. Thus, WorkSafe would be able to check with the inspector on site as to what was taking place. Frequently, he suggested, sprayed water used to suppress dust was mistaken for dust because water misting could be mistaken for dust by those ‘less familiar with construction activity’.[[153]](#footnote-153)

* + - 1. CFMEU

The CFMEU submission to the inquiry made comment on the management of notifiable incidents in relation to the safety of WorkSafe staff inspecting properties contaminated by loose-fill asbestos, in particular on an incident in which it was alleged a WorkSafe inspector was exposed to loose-fill asbestos at a property in Darke Street, Torrens.[[154]](#footnote-154)

It advised that information the CFMEU had received information confirming Audit Report findings that preliminary risk assessments had not been done before inspectors attended sites covered by the Scheme. Worksafe ACT management had told inspectors that:

* inspection of demolitions under the Scheme was not a ‘high-risk activity’ in the terms of Regulation 291 of the *Work Health and Safety Regulation 2011* (ACT);
* as a result no Safe Work Method Statement was required in the terms of Regulation 299 of the Regulation; and that
* ‘all risks assessments should be undertaken on a project-by-project basis’.[[155]](#footnote-155)

The submission said that this information showed that WorkSafe ACT had not adopted procedures which would have protected inspectors from potential exposure, or to monitor their health, before the Darke Street incident of August 2015. Photographic evidence obtained by the CFMEU showed workers entering a contaminated area without the use of appropriate breathing equipment, and the reuse of contaminated plastic sheeting around a Negative Pressure Unit by a sub-contractor who was working on the Darke Street project at the time of the August 2015 incident.[[156]](#footnote-156)

The CFMEU expressed ‘serious concerns’ regarding judgement and conflict of interest on the part of a senior manager of WorkSafe ACT involved in the investigation of the incident at Darke Street. This included a failure to secure the site so that the matter could be investigated, which was a ‘power provided to the Regulator by virtue of a non-disturbance notice’. This had not occurred ‘for several hours’ after the incident, placing ‘vital evidence’ at risk.[[157]](#footnote-157)

In addition, a failure to obtain evidence from other workers present within a reasonable timeframe breached investigative process, and led to ‘skewed evidence resulting in a favourable outcome for the Directorate’. In this case, a lack of appropriate planning, procedures, and training for the Loose Fill Asbestos Insulation Eradication Scheme had ‘compounded’ the seriousness of this incident.[[158]](#footnote-158)

These matters were considered in hearings of 16 March 2018. When asked what had taken place at Darke Street, the Legal and Safety Officer told the Committee that a WorkSafe inspector, Dominic Hides, had attended the site on the demolition day to check whether correct safety procedures and documentation were in place prior to demolition. While he was attending the site, the principal contractor had proceeded with the demolition, resulting in the inspector being exposed to hazardous material.[[159]](#footnote-159)

When it was noted that previous witnesses had advised that there were no records of any person being exposed to asbestos, the Legal and Safety Officer told the Committee that was inaccurate. As to whether it had been verified that the substance to which the inspector was exposed was loose-fill asbestos, the Legal and Safety Officer told the Committee that this question pointed to ‘a fundamental issue regarding the integrity of everything that was going on at the time’:

What happened, and what should not have happened, was that there were air monitors engaged by [Robson Environmental]. Robson had a conflict immediately in relation to the incident because Robson were the actual engaged Mr Fluffy asbestos person for the whole scheme.[[160]](#footnote-160)

The Legal and Safety Officer told the Committee that as this was ‘a private dwelling’, ‘Robson were not involved in it at the first instance’. However once Robson Environment was called to the site, there was an ‘immediate’ conflict of interest because Robson Environmental attended at the request of the regulator, WorkSafe ACT, which was also the Person Controlling a Business or Undertaking (PCBU) in relation to its own staff. WorkSafe ACT at this point was at risk of being found to have failed to perform its duties under Section 19 of the *Work Health and Safety Act 2011*, but was also investigating the potential breach of obligations under the Act.[[161]](#footnote-161)

Subsequently, the Legal and Safety Officer told the Committee, Robson Environmental had used air monitoring samples as a basis to suggest that the inspector had not been exposed. This was not appropriate because air monitoring samples are not used to detect exposure: their relevance is limited to air monitoring. Just because air was assessed as acceptable at one point in time, it did not mean that the inspector had not been exposed. The fact was that the inspector, his iPad and his clothes were ‘covered in dust’, but the dust was not tested.[[162]](#footnote-162)

Following this, the inspector notified WorkSafe ACT that he may have been exposed to asbestos contamination. The second in charge at WorkSafe at the time, who had responsibility for its inspectors, attended the site but then ‘left to go to another meeting’. As a result, the material that should have been collected was not, the site was not shut down and secured, and ‘the whole investigation was flawed from the outset’.[[163]](#footnote-163)

The Legal and Safety Officer told the Committee that the Darke Street incident left the inspector exposed to a dangerous substance, and that this had led in turn to a Comcare claim and his subsequent departure from WorkSafe ACT.[[164]](#footnote-164) The Legal and Safety Officer had tried to investigate this, because the inspector was a member of the CFMEU. However, when he sought further information the ACT government refused on grounds of privacy, and as a result he was not able to obtain relevant documentation or to continue his investigation.[[165]](#footnote-165)

* 1. Conflicts of interest
     + 1. CFMEU

The CFMEU submission attributed mishandling of the incident at Darke Street to a conflict of interest on the part of Work Safe ACT, in that it, as the regulator, had been called on to ‘investigate itself’. WorkSafe ACT was both the Person Conducting a Business or Undertaking under Section 5 of the *Work Health and Safety Act 2011*,in relation to its inspectors, and the Regulator investigating the incident.[[166]](#footnote-166)

To avoid conflict of interest, the submission suggested, the investigation should have been transferred and conducted by an entity external to Access Canberra. The fact that this did not occur raised questions as to ‘the effectiveness of the investigation’ and the ‘integrity of WorkSafe ACT in general as a regulator’,[[167]](#footnote-167) because at this point WorkSafe was in charge of an investigation into what may have been its mismanagement or breaches of the *Work Health and Safety Act*.[[168]](#footnote-168)

It noted that this had been referred to in the Auditor-General’s report, which highlighted ‘a practical problem contained within the statutory structure of the Act’,[[169]](#footnote-169) in that the enforcement powers defined in the Act were conferred on the Regulator, ‘defined as the Director-General’. Difficulties arose when the Regulator was ‘required to arbitrate disputes or investigate the Director-General’s Directorate’.[[170]](#footnote-170)

These arrangements in the ACT, it said, compared poorly with those in other jurisdictions. In corresponding Commonwealth, NSW, South Australian and Queensland legislation, the power to arbitrate disputes was given to an “authorising authority” which was distinct from the Regulator. In the Commonwealth this was the Fair Work Commission, and in the listed states ‘the state industrial court or tribunal’.[[171]](#footnote-171)

The submission said that the failure to create such a separation had caused ‘significant personal prejudice’ to the inspector involved in incident at Darke Street, and noted that the Audit Report had indicated ‘a failure by WorkSafe ACT to take adequate care in relation to its own role as the PCBU for inspectors who are its employees’. The CFMEU took the view that this failure had 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 was ‘detrimental both to the safety of inspectors and of the ACT public generally’.[[172]](#footnote-172)

As a result the CFMEU supported the Audit 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”’.[[173]](#footnote-173) However, the CFMEU’s view was 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’.[[174]](#footnote-174)

In addition, the submission said, the process in which notices under the *Work Health and Safety Act 2011* could not be issued until they were reviewed from within Access Canberra:

* was not an appropriate response to Recommendations 5 and 6 of the Auditor General’s report;
* showed that it was inappropriate to locate WorkSafe ACT within Access Canberra; and
* indicated the need for a fully independent regulator in the ACT.[[175]](#footnote-175)

In hearings, when asked whether there were other instances in which there was a conflict of interest because WorkSafe was obliged to investigate itself, the Acting Secretary told the Committee that this could occur at any time when WorkSafe ACT put its inspectors at risk, but that it also included instances where inspectors had sought to issue notices independently as provided for under the Act, but had been overruled by WorkSafe ACT management.[[176]](#footnote-176)

* 1. Committee comment

The Committee notes the identification, by the Audit Report and the CFMEU, of a conflict of interest where WorkSafe is both the statutory regulator and the designated investigator where its own employees are exposed to workplace harms. In the Committee’s view, this appears not to be effectively managed under current arrangements, and a means to resolve this is urgently required.

Associated with this, in the Committee’s view, is uncertainty over the outcome of a specific incident at Darke Street, Torrens, where a WorkSafe ACT inspector was exposed to loose-fill asbestos. In this case, the Committee takes the view that further steps should be taken to ensure that the matter is brought to an acceptable conclusion.

The Committee recommends that the ACT government take immediate action to change administrative and legislative arrangements so that WorkSafe ACT is no longer the designated regulator or investigator where an employee of WorkSafe ACT is subject to a notifiable incident under the *Work Health and Safety Act 2011*.

The Committee recommends that the ACT government ensures that the matter of a WorkSafe ACT inspector who was subject to exposure to loose-fill asbestos at Darke Street, Lyons, in August 2015 is appropriately resolved and that the ACT government report on the outcome to the Legislative Assembly for the ACT by the last sitting day of November 2019.

# Improvement Notices and Prohibition Orders

* 1. Background

Part 10 of the *Work Health and Safety Act 2011*, ‘Enforcement measures’, provides that work health and safety inspectors may issue:

* ‘improvement notices’ (s 191);
* ‘prohibition notices’ (s 195); and
* ‘non-disturbance notices’ (s 198).[[177]](#footnote-177)
  1. Management of Improvement Notices and Prohibitions Orders
     + 1. Work Safety Commissioner

In hearings, the Committee asked the Work Safety Commissioner as to how prohibition orders were employed by WorkSafe inspectors for work done under the responsibility of the Asbestos Response Taskforce.[[178]](#footnote-178)

He told the Committee that improvement notices and prohibition notices were among the regulatory tools available to WorkSafe under work health and safety legislation. Improvement notices were issued where there was no imminent risk of danger but there were ‘ways of doing it better in the future or to improve the immediate situation at the time’. Prohibition notices were issued where there was ‘imminent risk to anyone involved’, and could apply to the whole, or to a particular part of a site. Inspectors had powers as authorised officers under the *Work Health and Safety Act* to issue either improvement or prohibition notices as they saw fit at the time, in accordance with their assessment of risk.[[179]](#footnote-179)

The Commissioner told the Committee that in recent years WorkSafe had introduced a scheme such that any notice, unless there was imminent danger, was reviewed by a manager within WorkSafe before it was issued. This ensured that the wording of the notice was ‘appropriately robust and tight’, made correct reference to legislation and was ‘the most appropriate and proportionate response at that time’. This form of quality assurance was applied by a WorkSafe manager, usually within hours of a draft notice being created by an inspector, ‘depending on its urgency at that time’.[[180]](#footnote-180)

However, all inspectors were made aware that if there were an imminent risk and they needed to stop work on a site, they had the power to do so. Such arrangements provided for the issuing of a verbal notice, followed by written notice within 24 hours. Such powers were long-standing. Arrangements for the quality assurance of notices had been in place for the previous 18 months to two years.[[181]](#footnote-181)

* + - 1. CFMEU

Improvement notices and prohibition notices were considered in the CFMEU’s submission and in hearings of 16 March 2018.[[182]](#footnote-182)

The submission noted the Audit Report’s finding that ‘information contained in Improvement Notices and Prohibition Notices was inadequate and management involvement, although not mandatory but encouraged, was lacking’. It described this lack of compliance activity as ‘a lost opportunity’ which had significant implications for workers’ health and safety, and as an obstruction to the use of workplace inspection reports as ‘a tool to raise safety standards’.[[183]](#footnote-183)

The submission also noted the Audit Report’s finding that there had been significant under-reporting of notifiable incidents to Safe Work Australia.[[184]](#footnote-184)

* + - * 1. New procedure

The submission advised that since the Audit Report found a lack of management involvement and quality assurance for the issuing of notices under the *Work Health and Safety Act*, Access Canberra had implemented a new procedure for issuing notices under the Act.[[185]](#footnote-185) It said that inspectors had been directed not to issue Notices at the workplace being inspected: rather they were required to leave the inspected workplace before issuing a Notice and 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’. [[186]](#footnote-186)

The stated reasoning, the submission stated, was to ensure consistency and quality assurance for the issuing of notices, ‘in response to part of recommendation 5 of the Report’.[[187]](#footnote-187) However, while the CFMEU understood the need to ensure ‘consistency, probity and quality assurance’ in the issuing of notices, this should be achieved through ‘effective training’, and not ‘by placing inappropriate obstacles to the legitimate issue’ of notices under the *Work Health and Safety Act 2011*.[[188]](#footnote-188)

The submission argued that the procedure implemented by Access Canberra in this instance was ‘at odds with the intention and wording of the Act’. Under Sections 191 and 195 of the Act notices were to be issued by the inspector. The ‘obligation to do so [was] triggered by the inspector’s reasonable belief at the time of issue’, and bases for ‘reasonable belief’ were stipulated in Divisions 2 and 3 of the Act. Under the Act, reviews of notices were to take place ‘after the Notice [was] issued and not before’. It appeared that the internal review panel was ‘creating a quasi-internal review procedure prior to the issuing of Notices’, which was ‘inconsistent with the requirements of the Act’. The effect was to undermine ‘the powers of the relevant inspector in section 160’ and to implement ‘a procedure that [was] not envisaged by the Act’.[[189]](#footnote-189)

The submission stated that the CFMEU was aware of a number of occasions in which the new procedure, requiring review before a notice could be issued, had discouraged WorkSafe ACT inspectors from issuing Notices at the workplace even where they believed serious safety-related breaches of the Act were taking place. Under this regime, the CFMEU had seen ‘unsafe and dangerous practices continue’ due to the reluctance of inspectors to issue notices on the spot, placing workers at ‘greater risk of injury or ill health’.[[190]](#footnote-190)

In hearings, the Acting Secretary told the Committee that in relation to the Loose Fill Asbestos Insulation Eradication Scheme inspectors had been ‘given a directive to not hand out or not to issue improvement or prohibition notices’.[[191]](#footnote-191) An informant had told the CFMEU that this was because the ACT government ‘wanted to give an illusion that the Mr Fluffy program was going along without any non-compliance issues and was going smoothly’. As a result nine notices were issued in the first 12 months of the Scheme and there was ‘no record of any after that’.[[192]](#footnote-192)

The Legal and Safety Officer noted that the Audit Report’s finding that there was significant under-reporting of notices issued to Safe Work Australia. This was important because the ACT ‘had the worst construction industry record in the country at the time’. [[193]](#footnote-193) Under previous arrangements, when an inspector had a ‘reasonable suspicion’ that there was a breach, the inspector was able to issue a notice ‘there and then’, which then protected ‘people from that point on’. The new procedure differed in that there was ‘a quasi-internal review’ prior to a notice being issued and, in his view, this approach was ‘going to kill someone’.[[194]](#footnote-194)

The Acting Secretary told the Committee that this was indicative of broader concerns about WorkSafe. Access Canberra included a bureaucracy which oversaw WorkSafe and undermined its ability to regulate. A better approach was for the regulatory authority—that is, WorkSafe—to stand alone, without being told ‘when and where’ to issue notices. The *Work Safety Act 2011* outlined the powers of WorkSafe inspectors, and this should determine their response to matters of concern in the workplace.[[195]](#footnote-195)

Under present arrangements, this approach, set out in statute, this had been replaced by an ‘engage, educate and enforcement policy’ which stipulated that ‘only 10 per cent of engagements with WorkSafe’ were to be enforcement activities. This, he told the Committee, explained why the ACT was ‘the most unsafe jurisdiction’ in terms of work safety, particularly in the construction industry. The ACT had many competent WorkSafe inspectors, but under the current approach it was ‘virtually impossible for them to do their job’.[[196]](#footnote-196)

He noted, as stated in the CFMEU’s submission, that at present if an inspector wished to issue a prohibition or improvement notice they were obliged to wait until ‘a group that sits above the WorkSafe inspectorate’ met and ‘gives the go-ahead’. This, the CFMEU believed, contravened the *Work Health and Safety Act*. The reason why the Act gave inspectors the power to issue a prohibition or improvement notice with immediate effect was to ensure that work ceased ‘until people find out what the issues are’. Under the new arrangements delays—between the time when an inspector believed there was a concern to the time when the group met—left people in the workplace ‘at risk of serious injury or worse’.[[197]](#footnote-197)

* 1. Committee comment

The Committee is concerned that Access Canberra and WorkSafe ACT have reduced the decision-making powers of WorkSafe inspectors, in connection with prohibition notices and other powers accorded inspectors under the *Work Health and Safety Act 2011*, contrary to the processes set out in the Act.

The Committee recommends that the ACT government, as a matter of urgency, ensures that WorkSafe ACT inspectors are able to exercise their discretion to issue prohibition orders, and other immediate and discretionary powers conferred by the *Work Health and Safety Act 2011.*

# Committee conclusion

This report has considered regulatory functions exercised by WorkSafe ACT in relation to the work of the Asbestos Response Taskforce.

The Taskforce was entrusted with works to the value of more than $1 billion. Under the circumstances, where there were political sensitivities regarding both the history of the management of loose-fill asbestos in the Territory, and carriage of a large and expensive program which posed significant work safety risks, it was the ACT government’s responsibility to ensure that regulation of the program was beyond reproach.

As shown in the Auditor-General’s report, and in the body of the present report, this was not the case. Rather, the risk and sensitivities attached to the program resulted in a reduction in regulatory rigour and probity, including the down-grading of powers accorded inspectors in the *Work Health and Safety Act 2011* and the under-reporting of reportable incidents to the relevant national body. These were regrettable actions which reduced the degree to which front-line workers in the ACT could be confident that the work safety apparatus was putting their interests first.

It is notable that the actions recommended in this report, which are consistent with the findings and recommendations of the Audit Report and proposals by contributors to the inquiry, have been taken up in other jurisdictions. Notable in this sense is the creation of alternate means of managing workplace incidents where the regulator is the Person in Charge of the Business or Undertaking (PCBU), which is a well-trodden path in other Australian jurisdictions.[[198]](#footnote-198) This should result in a timely and effective response by the ACT government to put new arrangements in place.

Overall, it is surprising that WorkSafe ACT’s approach to creating an effective documentary framework for its regulation of the work of the Taskforce was not proportional to the risk and expense attached to this work. As noted elsewhere in this report, proposing a necessary conflict between documentary and practical activity, on the part of the regulatory, is a false dichotomy. In fact, and as shown in comments by the subject-matter expert retained by Audit, effective regulatory activity is wholly reliant on good documentation: in terms of guidance, information capture, and assurance that key regulatory actions have been performed.[[199]](#footnote-199)

As a result, it should be an acknowledged basic principle of public sector regulation that as risk increases more, not less, care must be paid to documentary processes. If that principle were to become embedded in regulatory activity in the Territory over time, that would be a positive outcome of both the Audit and the present report.

* + - * 1. Vicki Dunne MLA  
           Chair

Appendix A—Witnesses

Hearings of 6 December 2017:

* Dr Maxine Cooper, ACT Auditor-General
* Mr Brett Stanton, Director, Performance Audits, ACT Audit Office

Hearings of 16 March 2018:

* Mr Gordon Ramsay MLA, Minister for Regulatory Services
* Mr Greg Jones, Work Safety Commissioner and Director, Construction, Environment and Workplace Protection, Chief Minister, Treasury and Economic Development Directorate
* Mrs Lorraine Carvalho
* Mr Jason O’Mara, Acting Secretary, CFMEU ACT Branch
* Mr Gary Hamilton, Legal and Safety Officer, CFMEU ACT Branch

Appendix B—Submissions

Submission No. 1, Mr L and Ms L Carvalho [[200]](#footnote-200)

Submission No. 2, CFMEU [[201]](#footnote-201)

1. Legislative Assembly for the ACT, *Minutes of Proceedings*, 13 December 2016, p.13, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0008/1017980/MoP002F1.pdf> [↑](#footnote-ref-1)
2. Legislative Assembly for the ACT, *Minutes of Proceedings*, 26 October 2017, p.489, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1122285/MOP037F.pdf> [↑](#footnote-ref-2)
3. Auditor-General’s Report No. 1 of 2017: *Worksafe ACT’s Management of its Regulatory Responsibilities for the Demolition of Loose-Fill Asbestos Contaminated Houses*, viewed 21 June 2018, available at: <http://www.audit.act.gov.au/__data/assets/pdf_file/0014/1180004/Report-No-1-of-2017-WorkSafe-ACTs-management-of-its-regulatory-responsibilities-for-the-demolition-of-loose-fill-asbestos-contaminated-houses.pdf>  
   The report was tabled in the Assembly on 14 February 2017. See Legislative Assembly for the ACT, *Minutes of Proceedings*, 14 February 2017, p.53, viewed 21 June 2018, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0013/1033411/MoP005F.pdf> [↑](#footnote-ref-3)
4. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.1. The earlier report referred to was Auditor-General Report No 3 of 2016, *The management of the financial arrangements for the delivery of the Loose-fill Asbestos (Mr Fluffy) Insulation Eradication Scheme*, viewed 17 May 2019, available at: <https://www.audit.act.gov.au/__data/assets/pdf_file/0012/1179939/Report-No-4-of-2016-The-management-of-the-financial-arrangements-for-the-delivery-of-the-Loose-fill-Asbestos-Mr-Fluffy-Insulation-Eradication-Scheme.pdf> [↑](#footnote-ref-4)
5. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.1. [↑](#footnote-ref-5)
6. Mr Jonathon Brown, *Transcript of Evidence*, 6 December 2017, p.10. [↑](#footnote-ref-6)
7. Mr Jonathon Brown, *Transcript of Evidence*, 6 December 2017, pp.3-4. [↑](#footnote-ref-7)
8. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.4. [↑](#footnote-ref-8)
9. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.6. [↑](#footnote-ref-9)
10. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.6. [↑](#footnote-ref-10)
11. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.6. [↑](#footnote-ref-11)
12. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.2. [↑](#footnote-ref-12)
13. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.2. [↑](#footnote-ref-13)
14. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.2. [↑](#footnote-ref-14)
15. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, pp.6-7. [↑](#footnote-ref-15)
16. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.7. [↑](#footnote-ref-16)
17. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.7. [↑](#footnote-ref-17)
18. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.9. [↑](#footnote-ref-18)
19. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.9. [↑](#footnote-ref-19)
20. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.10. [↑](#footnote-ref-20)
21. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.2. [↑](#footnote-ref-21)
22. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, pp.10-11. [↑](#footnote-ref-22)
23. Dr Maxine Cooper, *Transcript of Evidence*, 6 December 2017, p.11. [↑](#footnote-ref-23)
24. Mr Jonathon Brown, *Transcript of Evidence*, 6 December 2017, p.10. [↑](#footnote-ref-24)
25. Mr Jonathon Brown, *Transcript of Evidence*, 6 December 2017, p.10. [↑](#footnote-ref-25)
26. *Transcript of Evidence*, 16 March 2018, p.15. [↑](#footnote-ref-26)
27. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, p.15. [↑](#footnote-ref-27)
28. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, p.15. [↑](#footnote-ref-28)
29. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, p.16. [↑](#footnote-ref-29)
30. *Transcript of Evidence*, 16 March 2018, p.17. [↑](#footnote-ref-30)
31. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, p.17. [↑](#footnote-ref-31)
32. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, p.17. [↑](#footnote-ref-32)
33. *Transcript of Evidence*, 16 March 2018, p.17. [↑](#footnote-ref-33)
34. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, p.17. [↑](#footnote-ref-34)
35. Mr Greg Jones, *Transcript of Evidence*, 16 March 2018, pp.17-18. [↑](#footnote-ref-35)
36. Auditor-General Report No.1 of 2017, p.30. [↑](#footnote-ref-36)
37. Auditor-General Report No.1 of 2017, p.30, citing Australian National Audit Office, *Administering Regulation, Achieving the right balance* Better Practice Guide (June 2014), p.41, viewed 12 June 2018, available at: <https://www.anao.gov.au/sites/g/files/net4816/f/2014_ANAO%20-%20BPG%20Administering%20Regulation.pdf> [↑](#footnote-ref-37)
38. Auditor-General Report No.1 of 2017, p.31, citing Australian National Audit Office, *Administering Regulation, Achieving the right balance* Better Practice Guide (June 2014), p.25. [↑](#footnote-ref-38)
39. Auditor-General Report No.1 of 2017, p.31, citing Australian National Audit Office, *Administering Regulation, Achieving the right balance* Better Practice Guide (June 2014), p.7. [↑](#footnote-ref-39)
40. Auditor-General Report No.1 of 2017, p.31. [↑](#footnote-ref-40)
41. Auditor-General Report No.1 of 2017, p.32. [↑](#footnote-ref-41)
42. Auditor-General Report No.1 of 2017, p.33. [↑](#footnote-ref-42)
43. Auditor-General Report No.1 of 2017, pp.27-28. [↑](#footnote-ref-43)
44. Auditor-General Report No.1 of 2017, pp.27-28. [↑](#footnote-ref-44)
45. Auditor-General Report No.1 of 2017, p.28. [↑](#footnote-ref-45)
46. Auditor-General Report No.1 of 2017, p.28. [↑](#footnote-ref-46)
47. Auditor-General Report No.1 of 2017, p.29. [↑](#footnote-ref-47)
48. Auditor-General Report No.1 of 2017, p.30. [↑](#footnote-ref-48)
49. Auditor-General Report No.1 of 2017, p.29. [↑](#footnote-ref-49)
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