



Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces

A special report to Parliament under sections 26
and 31 of the *Ombudsman Act 1974*.

21 August 2020

**NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000**

**Phone: 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
National Relay Service: 133 677
Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au**

ISBN 9978-1-925885-20-0

© State of New South Wales, 21 August 2020

This publication is released under a Creative Commons license CC BY 4.0.

Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces

A special report to Parliament under sections 26
and 31 of the *Ombudsman Act 1974*

21 August 2020

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

NSW Ombudsman Public Report – Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces

Pursuant to section 31 of the Ombudsman Act 1974 I am providing you with a report titled *Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces*.

I draw your attention to the provisions of s 31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make the report public forthwith.

The report concerns an investigation into certain actions taken by SafeWork NSW (**SafeWork**). It follows complaints received from Blue Mountains City Council about enforcement action taken in relation to a number of its workplaces in 2017 and 2018.

SafeWork is the State's work health and safety regulator: it plays a central role in ensuring safe workplaces, reducing work-related fatalities, serious injuries and illnesses.

Workers, employers and the community rely on SafeWork to make enforcement decisions and actions that are based on professional expertise, evidence and relevant standards. These decisions and actions must reflect the seriousness of the risk and the potential for harm in the workplace.

In my investigation, however, I identified a number of occasions where SafeWork's compliance notices were issued contrary to law.

In particular, on a number of occasions SafeWork Inspectors issued notices without holding the reasonable belief that is required under the legislation. Instead, they issued the notices because they were directed to do so.

The investigation also found some cases where the Council was required by SafeWork to take action that was not justified by legislative guidelines and relevant industry standards. SafeWork also failed to provide clear and documented evidence as to why other standards were being applied.

The investigation's findings are detailed in the attached report along with a number of recommendations to SafeWork.

The impact of SafeWork's conduct in the cases identified imposed significant financial costs on Blue Mountains City Council, and therefore indirectly on its ratepayers. I have recommended that SafeWork apologise to the Council and provide compensation for the undue expenses caused by its actions.

I have also recommended that SafeWork improve its policies, procedures and training.

The report recognises the difficult contextual environment in which SafeWork was operating. There was considerable media and political interest in Blue Mountains City Council at the time, particularly in relation to its management of asbestos health and safety risks.

Nothing in my report should be taken to suggest that the potential danger of asbestos is anything but extremely significant. The NSW Ombudsman has previously reported on the need for even more rigorous management of asbestos in the community. We have previously made recommendations to Government on that issue in two special reports to Parliament in 2010 and 2017.

However, where risks such as asbestos raise legitimate and significant community concerns, it is even more critical that a regulator acts in a rigorous, consistent and proportionate manner. It must act in accordance with its legislative powers, with decisions made on the basis of relevant standards and the best available evidence.

The issues at the heart of this investigation centre on good administrative practice. Employers, workers and the community need to be able to place their trust in a regulator to act lawfully and reasonably, and to provide certainty and consistency in enforcement.

Only by addressing issues such as these can we ensure that everyone in NSW receives the right services and fair treatment from those we oversee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Barnes', written in a cursive style.

Michael Barnes
Ombudsman

21 August 2020

Contents

Executive Summary	1
1.1. Introduction	1
1.2. The lawfulness of the notices issued	2
1.3. Testing requirements.....	5
1.4. Administrative issues.....	5
1.5. Consistency of compliance action	5
1.6. Assessing and communicating risks from asbestos.....	6
1.7. Findings and recommendations	6
1. Introduction	11
1.1. Complaint.....	11
1.2. Investigation	12
1.3. Context.....	13
2. The lawfulness of notices issued	19
2.1. Overview.....	19
2.2. Reasonable belief.....	21
2.3. What is dictation?.....	22
2.4. Was the Wentworth Falls Preschool Prohibition Notice lawfully issued?.....	24
2.5. Was the Wentworth Falls Preschool Improvement notice lawfully issued?.....	28
2.6. Was the Heatherbrae House Improvement notice lawfully issued?	29
2.7. Were the Springwood Depot Prohibition notices lawfully issued?	31
2.8. Was the Lawson Carpark notice lawfully issued?.....	38
2.9. Supporting Information	44
3. Testing requirements	57
3.1. Overview.....	57
3.2. Was the additional testing of Wentworth Falls Preschool reasonable?	57
3.3. Was the soil-sampling requirement imposed at Lawson Carpark reasonable?	60
3.4. Supporting information.....	65
4. Administrative issues	70
4.1. Overview.....	70
4.2. Were the contents of notices adequate?.....	70
4.3. Were conflicts of interests appropriately managed?.....	72
5. Consistency of compliance action	76
5.1. Were the compliance actions against BMCC consistent?	76
5.2. Are internal review mechanisms sufficient to ensure consistency?	79
6. Assessing and communicating risks from asbestos	81
6.1. Was risk from asbestos assessed consistently by Inspectors?	81
7. Findings under section 26 of the Ombudsman Act	88
8. Recommendations	90
8.1. SafeWork’s response to the provisional recommendations	91
8.2. Reporting requirement.....	92
Appendix 1: Key Legislative Provisions	93
8.3. <i>Work Health and Safety Act 2011</i>	93
Appendix 2: Glossary	95

Executive Summary

This report sets out the findings and recommendations of the Ombudsman's investigation into SafeWork NSW (SafeWork). The investigation was started following a complaint by Blue Mountains City Council (BMCC) in 2018. BMCC alleged wrong administrative conduct by SafeWork when it took various compliance actions under the *Work Health and Safety Act 2011* (WHS Act) in relation to BMCC's asbestos management practices.

The report incorporates submissions received from SafeWork and other affected parties during the procedural fairness phase of the investigation. The Minister for Better Regulation and Innovation consulted the Ombudsman under section 25 (2) of the *Ombudsman Act 1974* prior to the report being made final under s 26 of the Act.

1.1. Introduction

Complaint

In January 2018, BMCC complained to the Ombudsman that SafeWork took excessive and unreasonable compliance actions under the WHS Act compared to what it would normally have done in similar circumstances. BMCC claimed that the actions were taken in response to media and political pressures. The complaint further alleged that because of the external pressures, senior executives of SafeWork inappropriately instructed SafeWork Inspectors to issue compliance notices that were not otherwise warranted. BMCC provided supporting evidence for its allegations about actions taken in relation to a recycling centre at Springwood Depot.

Investigation

On 14 February 2018, the Ombudsman started a formal investigation under s 13 of the Ombudsman Act. A notice of investigation under s 16 of the Act was served on the former Secretary of the Department of Finance, Services and Innovation (which is now the Department of Customer Service) with a copy to the Executive Director, SafeWork.

The terms of reference were initially limited to the actions or inaction of SafeWork and its staff in the performance of functions under the WHS Act relating to asbestos management issues at Springwood Depot. The investigation was later expanded to include any other BMCC site, and ultimately focussed on four key sites – Wentworth Falls Preschool; Heatherbrae House; Springwood Depot and Lawson Mechanics Institute Carpark (Lawson Carpark). The events under investigation occurred between May 2017 and mid-2018. It is noted that neither the current Minister for Better Regulation and Innovation nor the current Secretary of the Department of Customer Service held those roles during the period under investigation. Specifically, the investigation examined whether:

- various notices (Improvement notices and Prohibition notices) issued at the four sites under the WHS Act were issued lawfully (Chapter 2)
- SafeWork Inspectors issued any notices because they were instructed to do so (i.e. whether they acted under dictation) rather than because they independently believed the notices were warranted (Chapter 2)
- SafeWork required BMCC to comply with standards and testing requirements that were higher than those recommended by relevant legislative guidelines and industry standards, and if so whether this was reasonable (Chapter 3)
- administrative practices around the issuing of notices were adequate (Chapter 4)
- conflicts of interests were appropriately managed (Chapter 4)

- the compliance actions taken in relation to BMCC were consistent (Chapter 5)
- SafeWork assessed and communicated risk from asbestos exposure consistently when decisions were made to issue notices (Chapter 6).

Context

SafeWork's compliance actions in relation to BMCC asbestos management were broader than those that are the focus of the Ombudsman's investigation.

SafeWork's actions also attracted considerable media interest and sparked a number of other investigations and inquiries, heightening the complexity of the situation.

The difficult environment had a significant impact on both SafeWork and BMCC staff, and this was reflected in the actions they took. The issues discussed and the conclusions drawn in this investigation must be understood within the broader context in which SafeWork's compliance actions occurred.

The dangers of asbestos and significant community concern about its management have not been ignored by this investigation. The Ombudsman's office has long recommended the need for better management of asbestos legacy by government agencies. We tabled two reports to Parliament in 2010 and 2017 that deal with this important issue.

SafeWork's vital role in regulating how asbestos is managed by workplaces is acknowledged. It is not suggested that SafeWork takes the risk from asbestos too seriously, or that BMCC did not need to improve its asbestos management practices. However, this investigation has highlighted a need to strengthen the independence of the regulator to ensure the compliance actions it takes are free from irrelevant considerations caused by external pressures. There is also a need to improve the way the risks from asbestos exposure in real life scenarios are assessed and communicated to the affected community.

1.2. The lawfulness of the notices issued

The Ombudsman's investigation (see Chapter 2) examined the allegation that senior executives of SafeWork inappropriately instructed SafeWork Inspectors to issue Improvement and Prohibition notices in the following instances:

- Prohibition notice 31989 (Wentworth Falls Preschool) on 28 November 2017
- Improvement notice 7-318316 (Wentworth Falls Preschool) on 6 December 2017
- Improvement notice 7-317886 (Heatherbrae House) on 1 December 2017
- Prohibition notices 31715 and 31716 (Springwood Depot) on 25 January 2018
- Prohibition notice 31717 (Lawson Carpark) on 13 March 2018.

The WHS Act requires a SafeWork Inspector to hold a reasonable belief about certain matters before they can exercise their discretion to issue a notice such as an Improvement or a Prohibition notice. As such, a reasonable belief is a precondition to the exercise of the power to issue a notice.

Regulatory agencies such as SafeWork must act and be seen to be acting independently, impartially and consistently. In regulatory environments authorised officers, such as Inspectors, are often directly and individually authorised by statute to make certain compliance and enforcement decisions. Part of the rationale for conferring discretion on such individuals is a recognition that compliance decisions frequently require a degree of technical expertise and professional judgment, which can only be exercised appropriately at the 'front-line' and in an environment that is independent and appropriately distanced from political and other irrelevant considerations.

The Wentworth Falls Preschool notices

The Wentworth Falls Preschool Prohibition and Improvement notices were issued contrary to law because the Inspector who issued them did not have a reasonable belief (as required by s 195 of the WHS Act) that they were warranted. In the absence of such belief, the Inspector had no power to issue the notices. He issued them because he was told to by his Director. The Inspector had no power to issue the notices, and the Director had no power to direct him to do so.

The Heatherbrae House notice

The Heatherbrae House Improvement notice was issued contrary to law, again because the Inspector who issued it did not have a reasonable belief as required by s 191 of the WHS Act. In the absence of such belief, the Inspector had no power to issue the notice.

The Springwood Depot notices

In the case of the two Springwood Depot Prohibition notices, it has not been possible to conclude whether or not they were lawfully issued because:

- (a) the relevant Inspector maintains that he held the belief as required by s 195 of the WHS Act, and that this belief was reasonable in the circumstances
- (b) there is no direct evidence to contradict that assertion (that said, the relevant Inspector did not make and keep adequate records of his decision-making or the evidence on which it was based, and as such there is also insufficient evidence available to corroborate his assertion), and
- (c) there was no evidence that the Inspector was expressly instructed by any senior executive of SafeWork to issue the notices, and again both he and SafeWork maintain that no such instruction was given.

However, the circumstances indicate that the Inspector is likely to have felt obliged to issue the notices because of views expressed by his Executive Director who was closely involved with the Springwood Depot actions. The relevant Inspector knew that the reason for his involvement was that another Inspector had previously declined to issue notices at that site. It would have been clear to the Inspector that the Executive Director expected the notices to be issued.

Even if the notices were issued lawfully (in the sense that the Inspector held the reasonable belief required by s 195 of the WHS Act), SafeWork's conduct in respect of those notices was unreasonable in so far as:

- (a) the Inspector's belief and reasoning were not sufficiently documented by appropriate records of evidence,
- (b) there was a failure to consider relevant contextual factors, and
- (c) most importantly, SafeWork's actions in sending in a second Inspector to, in effect, override decisions that had already been made by the first Inspector (despite no evidence that the first Inspector's decision had been incorrectly made) is an unreasonable approach to enforcement. At least in the absence of manifest error, it is unreasonable for a regulator to apply repeated and contradictory enforcement actions to the same set of circumstances. There is some analogy here with the rationale for rules in other contexts that prohibit 'double jeopardy'. In particular, regulated parties, such as BMCC in this case, should be entitled to some degree of certainty and finality in respect of decisions and actions by the regulator's enforcement staff.

The Lawson Carpark notices

It has not been possible to conclude whether the Lawson Carpark Prohibition notice was lawfully issued because the Inspector's evidence was that he had formed a reasonable belief that the notice was warranted on the basis of a verbal report from his Director.

The Inspector's reasoning was not otherwise supported by adequate records. The Inspector had not made appropriate inquiries, and he failed to consider whether BMCC had taken all practicable steps to control the situation (as he was required to do). Instead, he relied on the verbal report of his Director (who was also an Inspector) that the notice was justified.

There must be some doubt as to whether the express statutory requirement for an Inspector to form a reasonable belief can ever be satisfied merely by that Inspector being told that another Inspector has formed such a belief, and then accepting that testimony as a basis for holding that same belief themselves. Given the statutory function of Inspectors, it seems more likely that the legislative intent was that Inspectors are to form their own beliefs based on a direct examination of the relevant evidence, rather than merely on the basis of testimony of another Inspector.

In any case, the practice of Inspectors forming, or claiming that they have formed, the requisite reasonable belief and issuing notices solely based on the testimony of another inspector is unreasonable. If this is not an isolated circumstance, then the practice should be discontinued.

The relevance of s 162 of the WHS Act

In some of the scenarios above where notices were issued 'under dictation', this occurred in part because of an inadequate understanding of s 162 of the WHS Act. That section expressly allows SafeWork to give some direction to Inspectors in some circumstances.

In the case of ss 191 and 195 of the WHS Act, however, relevant enforcement notices can only be issued if the relevant Inspector holds a 'reasonable belief' as to the matters required by those provisions. This reasonable belief is referred to as a 'jurisdictional fact'. In the absence of such a reasonable belief, there is no legal authority (or jurisdiction) to issue the notice.

Moreover, that reasonable belief must be held by the Inspector personally. The fact that another Inspector or officer of SafeWork says that *they* believe the notice should be issued is not sufficient, or even relevant, even if that other Inspector or officer is more senior.

My office has obtained legal advice that clarifies the operation of s 162. It confirms that s 162 does not permit an Inspector to be directed to issue a notice in circumstances where he or she does not personally hold the reasonable belief required by the relevant statutory provision.

The cases identified above where notices have been issued by an Inspector not because they themselves held the reasonable belief but because they were directed by another person and/or because they felt an obligation to do so, is referred to as acting 'under dictation'. Acting under dictation is contrary to law.

Through dictation, consideration of political and media commentary, and anticipation of potential political and media reaction, became factored into the decisions to issue notices. Such considerations were not relevant to the exercise of powers under the WHS Act and should not have been taken into account. Doing so has the potential to undermine public confidence in both the legislated framework and in the ability of the regulator to administer it fairly and in accordance with the law.

1.3. Testing requirements

The Ombudsman's investigation (see Chapter 3) examined the allegation that unreasonable testing requirements were imposed on BMCC making it difficult for it to rely on the advice of its licensed contractors.

Wentworth Falls Preschool was closed due to a discovery of asbestos containing material (ACM) in a weathered piece of asbestos board on the fascia of the gazebo at one of the entrances. Even though initial air monitoring results were below all the asbestos exposure standards, SafeWork required BMCC to undertake additional tests and keep the Preschool closed for another two weeks. The tests were in excess of those recommended by legislated guidelines and industry standards and there was no evident justification for carrying them out.

BMCC was required to excavate 116 soil-sampling trenches to a depth of 500m² at Lawson Carpark and test the soil for asbestos fibres due to a find of four small fragments of suspected ACM on top of the mulch. The number and depth of trenches required to be excavated was almost ten times the number recommended by SafeWork Licensed Asbestos Assessors (LAAs), and over twenty times the minimum recommended by industry guidelines.

Both requirements resulted in a disproportionate and detrimental financial impact on BMCC and its ratepayers, making it difficult for BMCC to rely on the advice of its LAAs and occupational hygienists.

1.4. Administrative issues

The Ombudsman's investigation (see Chapter 4) examined a number of administrative issues such as the adequacy of record keeping, contents of notices and handling of conflicts of interests declarations.

There were significant variations between different SafeWork Inspectors in the extent of inquiries made before deciding to issue notices, as well as differences in the quality of record keeping and supporting documentation.

The contents of some notices did not fully comply with legislative requirements or SafeWork guidelines. The failure to a) provide a statement as to the nature of the contravention alleged to warrant the issuing of a notice, and b) to specify what was required to ensure compliance exposed SafeWork to the risk of a legal challenge.

The investigation did not find evidence of any conflicts of interests that affected the decisions of SafeWork or its Inspectors. However, it did find that declarations of potential conflicts of interests were not managed in accordance with SafeWork's policy or good administrative practice.

1.5. Consistency of compliance action

Chapter 5 reflects on the consistency of compliance action taken against BMCC.

Overall, the compliance actions were not in keeping with the principle of proportionality espoused by SafeWork's *Compliance Policy*.

In the 2017-2018 financial year, SafeWork issued a total of 46 improvement and prohibition notices across all councils in NSW. Ninety-three per cent of those notices were issued to BMCC.

BMCC has acknowledged there were some organisational failures in how it had managed asbestos, but also maintained it had been working toward fixing those issues.

Witnesses from both SafeWork and BMCC observed that BMCC's systems and processes were not substantially different to similar organisations. This is not to suggest that SafeWork should not take compliance action where it sees individual instances of non-compliance. However, the evidence suggests that the action taken against BMCC was inconsistent with action taken in similar situations.

The impact on BMCC in both human and financial terms has been significant. BMCC's submissions on this point are reproduced in part in 5.1.

SafeWork has submitted that its internal review mechanisms ensure consistency of decisions, and pointed out the BMCC had not availed itself of its rights in this regard. While internal review mechanisms are an important right, they are not a substitute for Inspectors making proper decisions in the first instance. Inspectors are required to exercise their powers in good faith and on the evidence before them. They should not adopt an irresponsible approach to their own functions on the assumption that any errors may be corrected by someone else on review.

1.6. Assessing and communicating risks from asbestos

Chapter 6 examines how risks from asbestos exposure were assessed and communicated.

This investigation found that risks were inconsistently assessed across the same scenarios by different SafeWork Inspectors.

While risk assessment of asbestos exposure is inherently challenging, SafeWork failed to ensure its Inspectors applied risk assessment guidelines consistently, and failed to communicate (both within SafeWork and to the community) those risks clearly and consistently.

When regulating risk in the workplace, the community ordinarily looks to the regulator to perform the role of 'expert.' In this case, SafeWork's failure to assess risk and to communicate that assessment of risk, in a consistent manner may have contributed to a heightened concern among the community and BMCC staff about the extent of risk.

1.7. Findings and recommendations

Findings

I make the following findings about SafeWork's conduct under s 26 of the Ombudsman Act:

1. The issuing of the following notices was contrary to law within the meaning of s 26(1)(a) of the Ombudsman Act:
 - a) Prohibition notice 31989 dated 28 November 2017 was not lawfully issued because:
 - the Inspector did not have a reasonable belief as required by s 195 of the WHS Act
 - in the absence of such belief, the Inspector had no power to issue that notice
 - the Inspector issued the notice under the direction of his Director, and
 - as the Inspector had no power to issue the notice, the Director had no power to direct the Inspector to issue the notice.
 - b) Improvement notice 7-318316 dated 6 December 2017 was not lawfully issued because:
 - the Inspector did not have a reasonable belief as required by s 191 of the WHS Act
 - in the absence of such belief, the Inspector had no power to issue the notice
 - the Inspector issued the notice under the direction of his Director, and

- as the Inspector had no power to issue the notice, the Director had no power to direct the Inspector to issue the notice.
- c) Improvement notice 7-317886 dated 1 December 2017 was not lawfully issued because:
- the Inspector did not have a reasonable belief as required by s 191 of the WHS Act, and
 - in the absence of such belief, the Inspector had no power to issue that notice.
2. The issuing of the following notices was unreasonable within the meaning of s 26 (1)(b) of the Ombudsman Act:
- a) Prohibition notices 31715 and 31716 were unreasonably issued because:
- although the Inspector who issued the notices stated that he held the belief required by s 195 of the WHS Act, the circumstances indicated that he likely felt obliged to issue the notices as a result of views expressed by his Executive Director
 - the Inspector's belief and reasoning were not sufficiently supported by the documented evidence
 - the Inspector failed to consider relevant contextual factors, and
 - the Inspector failed to make adequate records to support his reasoning.
- b) Prohibition notice 31717 was unreasonably issued because:
- the practice of Inspectors forming reasonable belief solely on the basis of the testimony of another Inspector is unreasonable
 - the Inspector failed to make adequate records to support his reasoning
 - the Inspector failed to make appropriate inquiries, and
 - the Inspector failed to consider whether BMCC took all practicable steps to control the situation (as he was required to do).
3. The conduct of SafeWork NSW was unreasonable within the meaning of s 26 (1)(b) of the Ombudsman Act insofar as SafeWork:
- sent a second Inspector to reinspect Springwood Depot with the purpose of that Inspector, in effect, overriding decisions that had already been made by a first Inspector, in circumstances where there was no objective evidence to suggest that the first Inspector's decision had been made in error
 - failed to explain s 162 of the WHS Act to its Inspectors and prepare sufficient guidelines on its application, which resulted in its Inspectors acting under the dictation of senior staff
 - failed to ensure that Inspectors applied assessments of risk of exposure to asbestos consistently
 - failed to ensure its compliance actions in relation to BMCC's asbestos management practices were in keeping with the principles of SafeWork's *Compliance Policy*
 - failed to apply its compliance framework in a consistent and proportionate manner, causing a disproportionate and detrimental impact on BMCC and BMCC ratepayers
 - failed to adequately communicate a balanced view on the risks of asbestos in the course of the BMCC compliance investigation, and
 - failed to manage potential conflicts of interests in accordance with the WHS Act and relevant policies.

Recommendations

Under s 26(2)(a) and (e) of the Ombudsman Act, I recommend that:

1. SafeWork apologise to the Blue Mountains City Council for the way it conducted its compliance activities in 2017-2018 and acknowledge the detrimental impact on Council, staff and ratepayers from its actions.
2. SafeWork make an ex-gratia payment pursuant to s 26A of the **Ombudsman Act 1974** to the Blue Mountains City Council to compensate it and its ratepayers, at least in part, for the unnecessary expenses they incurred in conducting additional testing for Wentworth Falls Preschool and Lawson Carpark. In so doing, SafeWork:
 - invite and consider a submission from Council as to its testing expenses
 - make every reasonable effort to determine and finalise the ex-gratia payment in consultation with Council within three months of the date of receiving Council's evidence of expenditure.
3. As a matter of priority, SafeWork develop a policy on the application of s 162 of the WHS Act that:
 - clarifies the circumstances in which Inspectors may be directed by the regulator, including any direction by the Minister, and
 - requires that all directions made pursuant to s 162 are made in, or reduced to writing as soon as practicable.
4. SafeWork organise and deliver training on the application of s 162 of the WHS Act as soon as the policy is developed.
5. Consideration be given to amending s 162 of the WHS Act so that it more clearly states the current legal position; that is, notwithstanding sub-sections (1) and (2) of that section, an Inspector may not be directed to exercise a compliance power if the power is one that can only be exercised by an Inspector who holds a prescribed belief or other mental state and that Inspector does not, in fact, hold that belief or mental state.
6. Consideration be given to amending the asbestos regulations to ensure that they can more properly deal with sensitive workplaces such as schools or hospitals.
7. SafeWork review and, where necessary, amend and improve its existing guidelines and training materials in light of findings from this investigation, including but not limited to:
 - the contents and evidentiary requirements for notices under the WHS Act, and
 - managing conflicts of interests.
8. SafeWork develop comprehensive guidelines supported by training on the assessment of risk, including serious and less serious risk, of asbestos exposure, which:
 - articulates where SafeWork as an organisation perceives the threshold between the risks described in ss 191 and 195 of the WHS Act to lie
 - sets out SafeWork's interpretation of 'serious risk' to staff and the community
 - describes the criteria staff should use to assess the severity of risk, and
 - guides staff on how to match the regulatory powers they have under s 195 of the WHS Act to the risks they observe in the field.

9. SafeWork develop guidelines for staff on how to communicate asbestos risks, having regard to contemporary best-practice research, which highlights, among other things, that:
 - audiences tend to simplify messages or reduce their complexity
 - experts need to be independent in order to ensure that what is said is credible and accepted by the community
 - risk messages should include some effective action that individuals can take to alleviate risk
 - messages should be matched to audience needs and values, and their particular economic, political, and sociological backgrounds, and
 - candour, openness, and transparency are the cornerstones of risk and crisis communication.¹
10. SafeWork introduce or improve existing quality assurance processes to ensure an appropriate level of consistency exists in decision-making and record keeping practices among different Inspectors and managers.
11. SafeWork develop and/or improve template documents to assist in documenting decisions and reasons for taking regulatory actions.

1. Covello V.T., von Winterfeldt D., Slovic P. (1988) Risk Communication. In: Travis C.C. (eds) Carcinogen Risk Assessment. Contemporary Issues in Risk Analysis (Sponsored by the Society for Risk Analysis), vol 3. Boston: Springer; Covello V.T., McCallum D.B., Pavlova M. (1989) Principles and Guidelines for Improving Risk Communication. In: Covello V.T., McCallum D.B., Pavlova M.T. (eds) Effective Risk Communication. Contemporary Issues in Risk Analysis, vol 4. Boston: Springer.

this page is intentionally blank

1. Introduction

1.1. Complaint

BMCC's January 2018 complaint included the following broad allegations that:

- SafeWork did not act independently but acted in a discriminatory manner toward BMCC that reflected media and political pressures
- Inspectors were inappropriately instructed by senior executives to change decisions already made about enforcement actions
- other Inspectors overturned the legitimate earlier decisions of their colleagues
- the recommendations of SafeWork Licensed Asbestos Assessors (**LAAs**) were set aside, which made it extremely challenging for BMCC to implement sound asbestos management practices and comply with SafeWork's requirements.

In support of its allegations, BMCC provided information about events that occurred in late 2017/early 2018 at Springwood Depot, a truck depot and recycling service site.

According to BMCC's complaint, on 4 December 2017, SafeWork Inspectors attended Springwood Depot as part of an investigation into BMCC's asbestos management practices. At the completion of the inspection, a SafeWork Inspector issued an 'Improvement notice' under s 191 of the WHS Act requiring BMCC to undertake certain remediation works.

In response to the Improvement notice, BMCC engaged the services of a SafeWork licensed occupational hygienist and a licensed asbestos removal company to carry out the required work.

On 22 December 2017, BMCC submitted 'clearance certificates' issued by the licensed contractors and evidence that work was completed to demonstrate to SafeWork that it had complied with the Improvement notice. This evidence was accepted by the SafeWork Inspector.

In late December 2017, BMCC staff raised a number of concerns with BMCC management about the work undertaken by the licensed contractors. In response, BMCC agreed to complete certain action items to address these concerns.

On 23 January 2018, a United Services Union (USU) staff representative closed two buildings at Springwood Depot citing more asbestos safety concerns. BMCC reported the matter to SafeWork, which prompted a follow up inspection on the same day by the same SafeWork Inspector who issued the Improvement notice on 4 December 2017.

Accompanied by BMCC management, USU and staff representatives, the SafeWork Inspector inspected the two closed buildings. According to BMCC, the Inspector confirmed that the requirements of the 4 December 2017 Improvement notice were fully satisfied (as certified earlier by the licensed contractors).

BMCC complained that, a day later, on 24 January 2018, the former Minister for Better Regulation participated in a radio interview and announced on air that a new team of SafeWork inspectors would be attending Springwood Depot.

BMCC was concerned they had not received prior notification of the Minister's announcement and that it was made only one day after a reinspection of the site had confirmed that the requirements of the Improvement notice had been satisfied.

As foreshadowed by the former Minister on radio, another SafeWork Inspector conducted a reinspection of Springwood Depot on 25 January 2018, which included reinspecting areas examined on both 4 December 2017 and 23 January 2018. The determinations made by the previous Inspector were overturned: one of the buildings was closed and two Prohibition notices under s 195 of the WHS Act were issued.

BMCC was not aware of any new evidence that would have warranted the reinspection and expressed a view that the reinspection was not at the initiative of an independent regulator but was rather initiated at the direction of the Minister, following the Minister's participation in the radio program interview.

BMCC pointed out that they were willing, and had been working with SafeWork, to address all relevant asbestos-related issues, but expected SafeWork to act in a way that was consistent with its approach to all other regulated entities.

1.2. Investigation

Our investigation started with Springwood Depot and, as more information became available, it was expanded to include other BMCC sites. Enforcement and other actions taken by SafeWork at the following four BMCC sites were examined:

- Wentworth Falls Preschool
- Heatherbrae House, also a childcare centre
- Springwood Depot
- Lawson Mechanics Institute Carpark (Lawson Carpark).

Following are the key events in the investigation.

Date	Key details
29 January 2018	Complaint from BMCC
14 February 2018	A Notice of investigation under s 16 of the <i>Ombudsman Act 1974</i> was served on the former Secretary of the then Department of Finance, Services and Innovation, with a copy to Mr E, then Executive Director SafeWork. At the outset, the investigation was limited to the actions or inaction of SafeWork and its staff in the performance of functions under the WHS Act relating to asbestos management issues at Springwood Depot from 1 September 2017 to the date of the notice.
30 July 2018	A further s 16 Notice was served which expanded the terms of the investigation to include the same conduct at any site in the BMCC local government area in the period 1 September 2017 to date.
August 2018	Interviews conducted with BMCC employees
October – December 2018	Hearings under s 19 of the Ombudsman Act
19 March 2019	The scope of the investigation was further expanded to extend the relevant period of the conduct to 19 March 2019.
5 November 2019	Statement of provisional findings and/or adverse comments were issued to individuals
18 December 2019	Submissions were received from individuals
30 March 2020	A statement of provisional findings and recommendations was issued to SafeWork, with a redacted version of that statement provided to BMCC

Date	Key details
18 May 2020	A submission to the redacted statement was received from BMCC
15 June 2020	Submission to the statement of provisional findings and recommendations was received from SafeWork
28 July 2020	Revised Statement of Provisional Findings and Recommendations provided to SafeWork
5 August 2020	Response received from SafeWork to Revised Statement
6 August 2020	Draft report provided to the Minister for Better Regulation and Innovation
11 August 2020	Consultation with the Minister for Better Regulation and Innovation
18 August 2020	Final report under s 26 of the Ombudsman Act.

The investigation methodology included:

- the review of extensive documentation obtained from SafeWork, BMCC and Licensed Asbestos Assessors (LAAs) that were contracted by BMCC to carry out work in response to SafeWork notices
- 9 interviews conducted pursuant to s 18 of the Ombudsman Act
- 10 hearings conducted under oath pursuant to s 19 of the Ombudsman Act
- the review of policies, procedures, legislation and relevant literature.

The investigation considered whether:

- notices (Improvement and Prohibition) issued to the four sites were lawfully issued (Chapter 2)
- testing requirements imposed on Wentworth Falls Preschool and Lawson Carpark were reasonable in the circumstances (Chapter 3)
- contents of notices and the management of declarations of conflicts of interests were adequate (Chapter 4)
- the compliance activities in relation to BMCC have been consistent and proportionate (Chapter 5)
- risk assessments from asbestos exposure in real life scenarios and the way the risks were explained and communicated to the affected community were consistent and transparent (Chapter 6).

The discussion of the above issues must be understood within the broader context of Safework's compliance activities in relation to BMCC, which were much broader.

1.3. Context

SafeWork's role in how workplaces manage asbestos

SafeWork carries out regulatory functions under the WHS Act and the Work Health and Safety Regulation 2017 (**WHS Regulation**) in relation to workplace health and safety. Its functions in investigating workplace compliance and enforcing the work health and safety laws of NSW, including issuing notices or other instructions to secure compliance, are the most relevant to this investigation. Of particular relevance are the powers of Inspectors to issue Improvement and Prohibition notices under Part 10 of the WHS Act. These powers were used by Inspectors to ensure BMCC complied with the relevant regulations in relation to asbestos management.

Safe management of asbestos in workplaces is a matter of significant community concern.

The extremely serious health consequences of asbestos inhalation have not been ignored by this investigation. SafeWork's vital role in ensuring workers and others who attend workplaces are protected from asbestos exposure is acknowledged and it is not suggested that SafeWork has taken the risk from asbestos too seriously.

The Ombudsman's office has had a long history of advocating for better management of the asbestos legacy by government agencies. In November 2010, the Ombudsman made a special report to the New South Wales Parliament titled *Responding to the asbestos problem – the need for significant reform in NSW*. In April 2017, a further report was tabled titled *Asbestos - How NSW government agencies deal with the problem*. It included the results of the office's monitoring of how government agencies in NSW dealt with asbestos since the first report. Although the 2017 report acknowledged the significant improvements since 2010 by various agencies, it also identified a continuing need for coordinated action and ongoing commitment to address this important public safety issue.

SafeWork performs an important function in terms of both educating and enforcing compliance with relevant regulations pertaining to asbestos. SafeWork's regulatory and compliance functions include ensuring that workplaces are complying with their obligations in relation to asbestos. These obligations include complying with prohibitions, general duties and the regulations in relation to asbestos management and associated risks to do with any work involving asbestos or ACM as specified by Chapter 8 of the WHS Regulation.

SafeWork has advised that asbestos is a priority area for its regulatory activity and intervention. Extensive resources are allocated for asbestos compliance monitoring activities including inspections, audits and other verification activities aimed at enhancing asbestos management practices and achieving sustainable compliance with WHS requirements.

SafeWork regularly receives asbestos incident notifications and requests to respond to asbestos-related issues. These notifications and requests are triaged to determine an appropriate regulatory response. Inspectors then conduct inspections and audits to assess the extent of compliance by workplaces with work health and safety laws and to develop and support compliance.

The operational background of SafeWork's compliance investigation of BMCC

SafeWork started compliance inspections after receiving complaints from BMCC staff in May 2017. The inspections were expanded when additional information was received through the United Services Union (USU). These activities are collectively referred to as SafeWork's compliance investigation.

SafeWork's compliance investigation of BMCC's asbestos management took place in a complex environment, involving multiple stakeholders and a number of concurrent investigations and inquiries.

The environment was characterised by difficult relationships between some BMCC staff and BMCC management. The USU was actively involved. Actions and decisions taken by both BMCC and SafeWork were subjected to intense and real-time media scrutiny. The Office of Local Government (OLG) became involved, as did the Environmental Protection Authority, the Independent Commission Against Corruption (ICAC) and, at a later stage, the Ombudsman. The then Minister for Local Government and the then Minister for Better Regulation maintained close and direct involvement in the events culminating in a public inquiry into BMCC, which is still ongoing. These factors created a complex and emotionally charged environment that presented unique challenges for both BMCC and SafeWork and placed significant pressures on the staff of both organisations.

One senior SafeWork executive described the environment in the following terms:

SafeWork's investigations were being undertaken in a climate of unrelenting media, public, ministerial and executive pressure. Every decision made by SafeWork staff involved in this matter was being examined and demands were being continually made to make decisions extremely quickly with the best information at hand. Our work was affected by leaks from staff of Blue Mountains City Council

(BMCC) to the media, then media interest, then Ministerial demands (by two Ministers), and then reactions to our work from BMCC. In many ways we were caught in the middle of historical matters not of our own making and agendas that had little to do with the safety of workers or the community.

The executive went on to explain that the environment resulted in unrealistic expectations placed on staff and said:

I was expected by all stakeholders to be fully informed of every decision my inspectors were making and to be scrupulous that there was justification for every single decision that was made. I was also required to report to my [superior] in almost real time for the higher profile matters.

This also occurred in an environment of sensationalist media commentary that was elevating community concern and fear throughout the Blue Mountains Community. At the same time the local council was being threatened with dismissal, based largely (and I believe mistakenly) on our compliance notices, so there was considerable pressure placed on our team by Council staff.

One of the Inspectors closely involved in the BMCC compliance investigation had the following to say about the impact of the environment on him personally:

I recall working extremely long hours, doing my best with proper intent to achieve what in effect was an unrealistic task within a short time frame. I did this with enthusiasm and commitment to achieve the right outcome for my manager, SafeWork and the community. I was commended throughout the process for my hard work and professional conduct both internally, by the PCBU and direct contact from the Minister.

Because of the BMCC matter, I have suffered many sleepless nights of worry and still am suffering stress levels far above normal that have ongoing effect on my personal behaviours and family life outside of work. I feel used, abused, let down, tarnished within SafeWork ... In effect, I feel abandoned. There has been no SafeWork debrief on the BMCC matter. There is in effect a silence surrounding the BMCC matter.

BMCC described some of the impacts on it in the following terms:

Council staff found themselves attacked on all sides. The repeated visits of SafeWork officers and the repeated issue of improvement notices and prohibition notices, often in doubtful circumstances, imposed huge mental and workload pressures on many staff across all levels of the organisation.

A number of senior employees resigned or left the Council as a result of the turmoil in which they were caught up and the pressures to which they were subject.

The first six months (7 May 2017 – mid-November 2017)

On 7 May 2017, SafeWork received a report from BMCC employees about asbestos management at council-owned and managed properties. The report was triaged in accordance with SafeWork's usual process and allocated to an Inspector within the Metropolitan Operations and Sector Initiatives Directorate (**MOSI**).

Following a number of site inspections and meetings with BMCC management, on 22 May 2017, the Inspector issued an Improvement notice that required BMCC to develop an organisation-wide Asbestos Management Plan (**AMP**) by 21 July 2017. BMCC's progress towards creating the AMP was slow and an extension of time was sought (at SafeWork's suggestion).

Some BMCC staff perceived this delay as reticence on the part of BMCC management to take action to remove or remediate ACM from various sites. They created an itemised list of their asbestos concerns, which they provided to the USU. The list contained 166 dot points and included asbestos-related concerns about 17 council-owned sites.

On 23 October 2017, the USU forwarded the list to BMCC management as an official complaint. The complaint, which later became known as the ‘**166 Letter**’, in summary raised allegations that:

- the BMCC Corporate Asbestos Register (CAR) was not prepared by a competent person
- BMCC staff had not received appropriate training on how to use the CAR
- when the CAR was updated, clearance certificates for specific rooms or issues at a site were mistakenly applied to whole site
- hazard assessments had not been completed at 283 council-owned or operated buildings
- BMCC failed to remove or repair damaged ACM at multiple sites despite being made aware of its existence.

The period of intense media scrutiny (mid-November 2017 – late January 2018)

In the weeks following the creation of the 166 Letter, BMCC staff and the USU continued to raise concerns about BMCC’s asbestos management. This included complaints to the Ombudsman, the OLG, the ICAC and BMCC councillors. One of the Councillors received a copy of the 166 Letter and forwarded it to SafeWork.

The 166 Letter was treated by SafeWork as a single request for service (**RFS**) and site visits were prioritised according to the information in the letter. Between November 2017 and January 2018, SafeWork undertook 36 inspections of sites identified in the letter and issued 31 statutory notices under the WHS Act.

Because of the escalating nature and increasing complexity of the issues, the MOSI Directorate sought the assistance of the Construction and Asbestos Services Directorate (**CAS**) within SafeWork. CAS provided specialist asbestos-related advice to MOSI as well as Inspectors to assist with on-site visits.

The asbestos issues at BMCC became the subject of intense, almost daily, media attention from early November 2017. At this point, SafeWork transferred management of the compliance investigation from MOSI to CAS. CAS assigned a manager and Inspectors from a CAS Team.

On 11 December 2017, the former Minister for Better Regulation was interviewed on radio. During the interview, the Minister announced that a full investigation by SafeWork would occur and stated:

I’ve ordered that SafeWork commence a full investigation into the asbestos management practices at Blue Mountains City Council and let me tell you this [radio host] if there is a breach of the law here... and we’ve already issued eight prohibition notices, then I think that’s very strong grounds for the Minister for Local Government to take further steps.²

Following this, on 13 December 2017, the former Minister for Local Government issued BMCC a Notice of Intention to Suspend the council under s 438K of the *Local Government Act 1993 Act* (LG Act). The reasons for the Notice of Intention to Suspend (as stated by the Minister) were:

- concerns that BMCC was not functioning effectively due to the volume and scope of recent regulatory notices issued by SafeWork and the EPA
- the significance of the problem identified in the notices
- SafeWork’s decision to launch a full investigation into BMCC’s asbestos management
- the level of community concern.

BMCC had seven days to respond and on 20 December 2017, it provided evidence of its efforts to comply with the WHS Act, including its action plan to manage asbestos-related issues. The evidence was considered by the Minister and she decided not to proceed with the suspension. Instead, on 22 December 2017, the Minister issued a Notice of Intention to issue a Performance Improvement Order (**PIO**).

2. Transcript, The [Radio] show, 11 December 2017.

The PIO, issued a month later on 22 January 2018, outlined three key areas of concern:

- (1) that on the available information, BMCC may have failed to comply with relevant statutory obligations insofar as improvement and prohibition notices issued by SafeWork in November 2017 indicated that BMCC may have contravened provisions of the WHS Act and the WHS Regulation.
- (2) BMCC may have failed to comply with relevant statutory obligations under the *Protection of the Environment Operations Act 1997* insofar as clean up notices were issued by the EPA in December 2017 in respect of various properties owned or controlled by BMCC.
- (3) there were significant reputational, legal and public health and safety risks facing BMCC in respect of its management of asbestos, including potential prosecution/liability issues as evidenced by issues identified in the SafeWork notices.

The clean-up notices issued by the EPA in December 2017, and the SafeWork investigation announced by the Minister for Better Regulation on 11 December 2017 were relied upon as further evidence supporting the PIO. The PIO required BMCC to develop and implement measures to strengthen internal reporting and improve its asbestos management. Relevantly, the PIO required BMCC to provide regular progress reports to the Minister for Local Government and SafeWork.

On 22 January 2018, the radio broadcaster who had earlier interviewed the Minister for Better Regulation re-commenced broadcasting after the Christmas/New Year break. He voiced his concerns about the December 2017 decision by the Minister for Local Government to issue BMCC with a Notice of Intention to issue a PIO instead of a suspension.

The following day, 23 January 2018, USU officials closed down two areas of Springwood Depot, citing unsafe working conditions caused by the presence of ACM. SafeWork Inspectors attended the Depot later that day. An agreement was reached on actions to be taken, which appeared to satisfy both the SafeWork Inspectors and Springwood Depot staff. The Inspectors explained to the staff they had assessed the risk from asbestos exposure at the Depot to be low and for that reason were taking no further action. The site was to remain closed while BMCC was organising to take the actions agreed to with the Inspector.

The revisit program (late January 2018 onwards)

The day after the agreement was reached in relation to Springwood Depot, on 24 January 2018, the former Minister for Better Regulation was again interviewed on the same radio program about the events of the previous day at the Depot. The host suggested that BMCC had not acted on workers' concerns and that this could constitute a breach of the terms of the PIO issued by the Minister for Local Government. The radio program host expressed dissatisfaction with the SafeWork Inspector's characterisation of the risks present on site as 'minor'. The Minister for Better Regulation expressed agreement with the host's sentiments and said that a team of Inspectors would reinspect Springwood Depot. The Minister undertook to keep the radio program informed.

The next day, on 25 January 2018, another Inspector reinspected Springwood Depot and issued two Prohibition notices requiring work at one of the areas of the Depot to immediately cease.

The media attention and criticism of BMCC, SafeWork and the Minister for Local Government for not taking tougher action against BMCC continued in late January 2018.

On 30 January 2018, Mr E, the Executive Director of SafeWork met with the Minister for Better Regulation's office as part of a regularly scheduled meeting to discuss the performance of SafeWork functions. During the meeting, the Minister's office and Mr E discussed ongoing issues with the BMCC.

Concerns were raised by the Minister's office that SafeWork had failed to gain the trust of BMCC staff and issues identified were not being resolved. During the course of the meeting, the Minister asked Mr E to reinspect all the BMCC sites to ensure the issues had been addressed.

Following this meeting, the revisit program was established to reinspect all the sites listed in the 166 Letter. This involved reinspecting 31 sites in 68 revisits. During the revisit program, issues identified which were able to be addressed were fixed at the time of the inspections. For any outstanding issues, Inspectors issued a small number of additional Improvement and Prohibition notices. These were all subsequently complied with by BMCC.

2. The lawfulness of notices issued

2.1. Overview

This chapter examines the allegation that senior executives of SafeWork inappropriately instructed SafeWork Inspectors to issue Improvement and Prohibition notices in the following instances:

- Prohibition notice 31989 (Wentworth Falls Preschool) on 28 November 2017
- Improvement notice 7-318316 (Wentworth Falls Preschool) on 6 December 2017
- Improvement notice 7-317886 (Heatherbrae House) on 1 December 2017
- Prohibition notices 31715 and 31716 (Springwood Depot) on 25 January 2018
- Prohibition notice 31717 (Lawson Carpark) on 13 March 2018.

The WHS Act requires a SafeWork Inspector to hold a reasonable belief about certain matters before they can exercise their discretion to issue a notice, such as an Improvement or a Prohibition notice. As such, a reasonable belief is a precondition to the exercise of the power to issue a notice.

Regulatory agencies such as SafeWork must act and be seen to be acting independently, impartially and consistently. In regulatory environments, authorised officers, such as Inspectors, are often directly and individually authorised by statute to make certain compliance and enforcement decisions. Part of the rationale for conferring discretion on such individuals, is a recognition that compliance decisions frequently require a degree of technical expertise and professional judgment, which can only be exercised appropriately at the ‘front-line’ and in an environment that is independent and therefore distanced from political and other irrelevant considerations.

The Wentworth Falls Preschool notices

The Wentworth Falls Preschool Prohibition and Improvement notices were issued contrary to law because the Inspector who issued them did not have a reasonable belief as required by s 195 of the WHS Act that they were warranted. In the absence of such belief, the Inspector had no power to issue the notices. He issued them under the direction of his Director. As the Inspector had no power to issue the notices, the Director had no power to direct him to do so.

The Heatherbrae House notice

The Heatherbrae House Improvement notice was issued contrary to law, again because the Inspector who issued it did not have a reasonable belief as required by s 191 of the WHS Act. In the absence of such belief, the Inspector had no power to issue the notice.

The Springwood Depot notices

In the case of the two Springwood Depot Prohibition notices, it has not been possible to conclude whether or not they were lawfully issued because:

- (a) the relevant Inspector maintains that he held the belief as required by s 195 of the WHS Act and that this belief was reasonable in the circumstances,
- (b) there is no direct evidence to contradict that assertion (that said, the relevant Inspector did not make and keep adequate records of his decision-making or the evidence on which it was based, and as such there is also insufficient evidence available to corroborate his assertion), and

- (c) there was no evidence that the Inspector was *expressly* instructed by any senior executive of SafeWork to issue the notices; and again both he and SafeWork maintain that no such instruction was given.

However, the circumstances indicate that the Inspector is likely to have felt obliged to issue the notices because of views expressed by his Executive Director. The Executive Director was closely involved with the Springwood Depot actions. The relevant Inspector knew that the reason for his involvement was that another Inspector had previously declined to issue notices at that site. It would have been clear to the Inspector that the Executive Director expected the notices to be issued.

Even if the notices were issued lawfully (in the sense that the Inspector held the reasonable belief required by s 195 of the WHS Act before such notices are able to be issued), SafeWork's conduct in respect of those notices was unreasonable in so far as:

- (a) the Inspector's belief and reasoning were not sufficiently documented by appropriate records of evidence,
- (b) there was a failure to consider relevant contextual factors, and
- (c) most importantly, SafeWork's actions in sending in a second Inspector to, in effect, override decisions that had already been made by the first Inspector, despite no evidence that the first Inspector's decision had been incorrectly made, is an unreasonable approach to enforcement. At least in the absence of manifest error, it is unreasonable for a regulator to apply repeated and contradictory enforcement actions by its inspectors or enforcement staff to the same set of circumstances. There is some analogy here with the rationale for rules in other contexts that prohibit 'double jeopardy'. In particular, regulated parties, such as BMCC in this case, should be entitled to some degree of certainty and finality in respect of decisions and actions by the regulator's enforcement staff.

The Lawson Carpark notices

It has not been possible to conclude whether the Lawson Carpark Prohibition notice was lawfully issued because the Inspector's evidence was that he had formed a reasonable belief that the notice was warranted on the basis of a verbal report from his Director.

The Inspector's reasoning was not otherwise supported by adequate records; the Inspector had not made appropriate inquiries, and he failed to consider whether BMCC had taken all practicable steps to control the situation (as he was required to do). Instead, he relied on the verbal report of his Director (who was also an Inspector) that the notice was justified.

There must be some doubt as to whether the express statutory requirement for an Inspector to form a reasonable belief can ever be satisfied merely by that Inspector being told that another Inspector has formed such a belief, and then accepting that testimony as a basis for holding that same belief themselves. Given the statutory function of Inspectors, it seems more likely that the legislative intent was that Inspectors are to form their own beliefs based on a direct examination of the relevant evidence, rather than merely on the basis of testimony of another Inspector.

In any case, the practice of Inspectors forming, or claiming that they have formed, the requisite reasonable belief and issuing notices solely on the basis of the testimony of another inspector is unreasonable. If this is not an isolated circumstance, then the practice should be discontinued.

The relevance of s 162 of the WHS Act

In some of the scenarios above where notices were issued 'under dictation', this occurred in part because of an inadequate understanding of s 162 of the WHS Act. That section expressly allows SafeWork to give some direction to Inspectors in some circumstances.

In the case of ss 191 and 195 of the WHS Act, however, relevant enforcement notices can only be issued if the relevant Inspector holds a 'reasonable belief' as to the matters required by those provisions. This reasonable belief is referred to as a 'jurisdictional fact'. In the absence of such a reasonable belief, there is no legal authority (or jurisdiction) to issue the notice.

Moreover, that reasonable belief must be held by the Inspector personally. The fact that another Inspector or officer of SafeWork says that *they* believe the notice should be issued is not sufficient, or even relevant, even if that other Inspector or officer is more senior.

My office has obtained legal advice that clarifies the operation of s 162. It confirms that s 162 does not permit an Inspector to be directed to issue a notice in circumstances where he or she does not personally hold the reasonable belief required by the relevant statutory provision.

The cases identified above where notices have been issued by an Inspector not because they themselves held the reasonable belief but because they were directed by another person and/or because they felt an obligation to do so, is referred to as acting 'under dictation'. Acting under dictation is contrary to law.

Through dictation, consideration of political and media commentary, and anticipation of potential political and media reaction, became factored into the decisions to issue notices. Such considerations were not relevant to the exercise of powers under the WHS Act and should not have been taken into account. Doing so has the potential to undermine public confidence in both the legislated framework and in the ability of the regulator to administer it fairly and in accordance with the law.

2.2. Reasonable belief

Reasonable belief is a precondition to the exercise of an Inspector's discretion to issue either an Improvement or a Prohibition notice under the WHS Act.

Prior to issuing a notice, an Inspector is required to form a reasonable belief as to a particular state of affairs. This requires the satisfaction of both a subjective and an objective test: the Inspector must genuinely hold the relevant state of mind, and there must be in existence facts that are 'sufficient to induce the state of mind in a reasonable person'.³

In order to have formed a reasonable belief, an Inspector is required to have considered the objective information available and have made reasonable inquiries to determine whether a serious risk to health and safety exists or is likely to occur.⁴

SafeWork's guidance document entitled *What is reasonable belief*⁵ defines reasonable belief as a state of being confident that the information available tends to support an argument rather than reject it. What is required is the existence of facts sufficient to induce that state of mind in a reasonable person. It is an objective test that precludes the arbitrary exercise of the power of the Inspector to issue a notice.

In order to issue a prohibition notice, the Inspector must form a reasonable belief for each of the three following elements and by implication, each element must be supported by evidence:

- that an activity is occurring or may occur at a workplace
- that the activity, if it occurs, involves or will involve a serious risk to the health and safety of a person
- that the serious risk is from an immediate or imminent exposure to a hazard.⁶

3. *George v Rockett* (1990) 170 CLR 104, 112; *Growthbuilt v SafeWork NSW* [2018] NSWIRComm 1002, [55]-[57].

4. *Growthbuilt v SafeWork NSW* [2018] NSWIRComm 1002, [95]-[96].

5. WHSDOM guidance material *What is reasonable belief?* Trim Ref: D14/160400, updated 9/08/2018.

6. WHSDOM guidance material *What is reasonable belief?* Trim Ref: D14/160400, updated 9/08/2018, p. 4.

In order to issue an Improvement notice, the Inspector must form a reasonable belief for each of the following elements and by implication each element must be supported by evidence

- that an activity is occurring or may occur at a workplace
- that a person is contravening or has contravened a provision of the WHS Act and that it is likely that the contravention will continue or be repeated.⁷

2.3. What is dictation?

The decision to issue notices is discretionary

The powers to issue Improvement notices (s 191) and Prohibition notices (s 195) under the WHS Act are conferred on SafeWork Inspectors and those powers are discretionary – an Inspector “may” issue the relevant notice in relevant circumstances.

In both cases, the discretionary power to issue the notice requires the Inspector to have first formed a certain ‘reasonable belief’:

- (a) In the case of an Improvement notice, the Inspector must have formed the reasonable belief that the workplace is contravening a provision of the WHS Act or has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.
- (b) In the case of a Prohibition notice, the Inspector must have formed the reasonable belief that an activity is occurring (or may occur) at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

Discretion must be exercised personally

At common law, a person empowered with a statutory discretion – either conferred directly by legislation (as in this case) or under delegation - must exercise it personally and cannot abdicate their responsibility by acting under the dictation of another person.⁸ A public official cannot be directed by another to exercise their statutory discretion in a particular way.⁹

Dictation can occur when a public official has been directed to exercise a statutory discretion in a particular way, but also where the official felt obliged to make their decision in a particular way, based on the conclusions of another person.¹⁰ In other words, there is no requirement to show that a person has acted under the explicit direction or command of another.

The rule against dictation does not mean that a person exercising a discretionary function cannot consider the views of other persons where they are entitled to take them into account, although there is often a fine line between taking into account what is said by another person and saying the decision was made at the direction of another person.¹¹

7. WHSDOM guidance material *What is reasonable belief?* Trim Ref: D14/160400, updated 9/08/2018, p. 4

8. *Habib v Minister for Foreign Affairs* [2010] FCA 1203; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404, 418, 429-430.

9. *Nashua Australia Pty Ltd v Channon* (1981) 36 ALR 215, 230-31 (NSWSC).

10. *Evans v Donaldson* (1909) 9 CLR 140; *Rendell v Release on Licence Board* (1987) 10 NSWLR 499, 506-507; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404, 418-419; *Ex Parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286, [23]-[33].

11. *Telstra Corporation Ltd v Kendall* (1995) 55 FCR 221 at [231].

The rule against dictation also does not preclude the application of an appropriate policy or other guideline, provided that policy or guideline is not inconsistent with the relevant legislation¹² and that the policy or guideline is not applied as a fixed determinative rule.¹³

However, in all circumstances a person exercising a discretionary function must exercise the function themselves, rather than in obedience to the views of another.^{14,15}

Section 162 of the WHS Act allows direction only in limited circumstances

The rule against dictation may be constrained or qualified by the statutory context in which a public servant exercises their powers. In the case of SafeWork Inspectors, s 162 of the WHS Act relevantly states that:

- (4) An inspector is subject to the regulator's directions in the exercise of the inspector's compliance powers.
- (5) A direction under subsection (1) may be of a general nature or may relate to a specified matter or specified class of matter.

Section 154 of the WHS Act allows the regulator (which, at the relevant time, was the Secretary of the Department of Finance, Services and Innovation) to delegate any power or function under the Act to a member of staff (other than the power of delegation).

In the instrument of delegations, the Secretary, in his capacity as the regulator SafeWork, had delegated his power (as regulator) under s 162 to the Executive Director and all SafeWork Directors.¹⁶ Importantly, this delegation was not subject to any conditions that would limit the circumstances in which a direction could be given by the Executive Director or other SafeWork Directors under s 162.

Evidence from SafeWork staff indicated a degree of confusion about the meaning of and practical application of s 162 of the WHS Act. Some Inspectors took the view that this section empowered the Secretary, the Executive Director and all Directors to direct Inspectors to issue notices even in circumstances where the Inspectors themselves did not have a reasonable belief that the objective circumstances of a case required a notice to be issued. Others took the view that Inspectors could not be directed to issue a notice unless they personally held the requisite reasonable belief.

A submission from one of the Inspectors stated that prior to late 2017 he was not aware of and had not received training on s 162 of the WHS Act, despite having been an Inspector for many years. The Inspector said that he was first made aware of s 162 when, on the evening of 28 November 2017 at Wentworth Falls Preschool, his manager told him he would be directed by the Director to issue a Prohibition notice instead of the Improvement notice he had planned to issue.

To clarify the power to direct under s 162 of the WHS Act, the Ombudsman sought an opinion from a private barrister with expertise in the relevant areas of law

That counsel advised that s 162 of the WHS Act does not empower the regulator to direct an Inspector to issue a notice where that Inspector had not personally formed the reasonable belief that is required by the WHS Act to have been formed before such a notice may be issued.

12. *Green v Daniels* (1977) 13 ALR 1.

13. *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 641.

14. *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 418; *The Queen v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189, 192-193, 201-202.

15. Also see *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

16. DFSI, *Instrument of Delegation: Work Health Safety Act 2011 and Work Health Safety Regulation 2017*, 3 May 2017.

As noted above, an Inspector may only issue a notice under ss 191 and 195 of the WHS Act if he or she forms the reasonable belief required by those sections. If no reasonable belief is formed, the Inspector does not have the power to issue a notice. Section 162 of the WHS Act does not have the effect of removing this precondition to the exercise of the power. Nor can s 162 be used to direct an Inspector to form a reasonable belief that he or she does not, in fact, hold.

Counsel advised that the regulator may direct an Inspector in the exercise of their discretion if (and only if) the Inspector already holds the requisite reasonable belief required under ss 191 or 195 of the WHS Act. That is, if an Inspector has personally formed and holds the reasonable belief that is required to be formed before he or she *may* issue an improvement or prohibition notice, then the regulator could direct the Inspector to issue such a notice even if the Inspector would (in the exercise of his or her discretion) not otherwise have issued that notice.

Counsel's advice has been provided to SafeWork and SafeWork has agreed with it in principle.

How a reasonable belief was formed and whether Inspectors acted under dictation is addressed separately in relation to each of the four sites, below.

2.4. Was the Wentworth Falls Preschool Prohibition Notice lawfully issued?

Summary of relevant facts

Inspector A and his manager, Inspector C, inspected Wentworth Falls Preschool on 28 November 2017, following media reports by a radio program that children were being exposed to asbestos at the preschool and that parents should immediately remove them.

Inspector A and Inspector C identified concerns with the encapsulation of a weathered piece of asbestos board on the fascia of the gazebo at one of the preschool entrances. Inspector A assessed the risk posed by the board and decided to issue an Improvement notice requiring the entrance to be isolated by fencing and not used until the Asbestos Containing Material (**ACM**) was removed.

Before Inspector A issued the Improvement notice, Inspectors A and C had a telephone discussion with their Director, Ms D, who was not at the preschool, about their observations. Following the phone call, Inspector A issued Prohibition notice 31989 instead of the Improvement notice he had originally planned to issue.

The Prohibition notice required BMCC to immediately cease work at the whole site, install barriers to prevent access to the gazebo, engage a Licensed Asbestos Assessor (**LAA**) to provide a scope of works and then conduct removal works in accordance with the LAA's report. The prohibition notice resulted in the preschool remaining closed for approximately two weeks.

The Inspector did not form a reasonable belief

When Inspector A assessed the risk of asbestos exposure from the weathered asbestos board, he:

- considered the location of the board
- assessed its condition, and
- determined what controls could be put in place to minimise any risk from it.

Inspector A was aware that works had been planned to remove the board in the near future and that no other work on the gazebo, where the board was located, had been planned. This was relevant to his assessment of risk, as it indicated that the ACM was unlikely to be disturbed and become friable and airborne.

Having completed his assessment, Inspector A formed the view that BMCC may have breached cl 420 of the WHS Regulation. Clause 420 required BMCC to ensure that exposure to airborne asbestos was eliminated as far as it was reasonably practicable or, if elimination was not possible, to ensure exposure was minimised as far as reasonably practicable. It also had to ensure that the applicable asbestos exposure standard for workplaces was not exceeded.

Inspector A believed that BMCC was contravening cl 420 because of:

- the weathered condition of the board
- the potential for it to become friable in the future, and
- his uncertainty about the effectiveness of the encapsulation.

On the whole, Inspector A concluded that BMCC had not undertaken all ‘reasonably practicable’ actions as required by cl 420 of the WHS Regulation. In his opinion, this warranted the issuing of an Improvement notice under s 191(1) of the WHS Act, but did not warrant the issuing of a Prohibition notice.

Contrary to his assessment and stated intention to issue an Improvement notice, Inspector A issued a Prohibition notice following telephone conversations with his manager and Director, Ms D. The prohibition notice required the preschool to close and LAAs to be engaged to inspect and remediate the site.

Ms D submitted that she did not direct Inspector A to issue a Prohibition notice. She described their telephone conversation as a collaborative discussion in which different views were put forward and it was ultimately agreed that a Prohibition notice was the appropriate and most practicable course of action. Ms D stated that Inspector A did not contest this view at the time, that both Inspectors A and C described the asbestos as being in poor condition and therefore possibly friable, and that Inspector A’s assessment of the asbestos as not friable was not relayed to her.

Notwithstanding Ms D’s denial, on balance, the evidence supports the conclusion that Ms D directed Inspector A to issue the Prohibition notice, despite him not holding a reasonable belief that a Prohibition notice was warranted.

First, both Inspector A and Inspector C made contemporaneous notes, on the day of the inspection, of Ms D’s ‘direction’ that a Prohibition notice be issued. Ms D made no contemporaneous notes of the conversations.

On 28 November Inspector A noted in his Inspector notebook:

Direct advice from Inspector C to with [sic.] direction phone advice from Director, Ms D to issue Prohib Notice to close facility, engage competent person to assess risk asbestos until report & made safe.

Inspector C noted in his Inspector notebook:

4:03pm call to CAS Director Ms D in the company of Inspector A to discuss findings of site inspection and measures to be taken. Given the location + observed deterioration of the ACM at both entry points to the centre Director Ms D directed Inspector A to issue a Prohibition Notice.

Second, oral evidence given to the Ombudsman under oath and recorded interviews (not under oath) confirm that a direction was made. Both Inspectors A and C separately recalled that Ms D gave a clear direction that a Prohibition notice be issued. Inspector C’s recollection is consistent with Ms D’s own testimony as to why she felt a Prohibition notice was necessary. Ms D did not recall giving a direction, but in response to questioning, Ms D accepted that if the Inspectors said that she had done so then she believed them.

Inspector C additionally recalled that Ms D said such action was necessary due to the presence of young children and parents who could be at immediate risk.

Third, BMCC employees who observed the Inspectors' conversations with Ms D stated that Inspector A appeared dismayed during the conversation and did not appear to be engaged in a collaborative discussion.

Fourth, in his submissions, Inspector A again stated that he was directed to issue a Prohibition notice. He submitted that his actions at the time were consistent with what he understood to be his obligations, training and authority as an Inspector, and what he understood at the time were lawful directions by his superior officers. He stated:

During the subsequent joint phone call I outlined my reasonable belief in respect to issuing an Improvement notice but was then given clear verbal direction from the Director that I was to issue a Prohibition Notice in relation to the asbestos risk and to close the facility.

The Director had no power to direct the Inspector

Ms D, a Director and delegate of the regulator, could only direct Inspector A under s 162 of the WHS Act to issue the notice if he held a reasonable belief on the facts that the notice was warranted. If Inspector A had formed such a belief, Ms D could have directed him to issue the notice even if he would not have otherwise exercised his discretion to issue it.

As Inspector A had not formed the reasonable belief, the precondition to the exercise of the direction had not been satisfied and Ms D had no power to direct him to issue the Prohibition notice.

Inspector A was placed in a difficult position. At the time he, like most SafeWork Inspectors, either believed s 162 of the WHS Act empowered the regulator to direct them, or were unsure about whether and in what circumstances that could occur. In his submissions Inspector A stated that before his call with Ms D he recalled asking his manager whether the Director could 'do this' [direct him] and was told words to the effect that she had the legal authority under the Act (s 162) to direct him.

It is evident that Inspector A was not aware that he was entitled (and indeed, obliged) to lawfully refuse to comply with Ms D's direction to issue the Prohibition notice. Inspector A's submission on this point was that 'he was under extreme pressure but acted professionally, properly, honestly, with integrity and followed what at the time he was told and thus believed to be a lawful direction from his superior that was said to surpass his responsibility to only act in accordance with reasonable belief'. The evidence supports this submission.

Irrelevant considerations may have been taken into account

Ms D was asked to explain why she directed Inspector A to issue the Prohibition notice. She explained that the notice was warranted because children were present at the premises and there was significant media interest in the matter:

Ms D: I also would have thought that given the circumstances that an Improvement Notice would not have been acceptable to the community.

CA: Okay. And when you say - - -

Ms D: It would not have been defensible because we wouldn't have known whether there was residual contamination in that preschool.

CA: And when you say given the circumstances, what circumstances specifically?

Ms D: You know, the media coverage, the allegations that children were at risk. If you're not sure, if you're not sure then you have to take a stronger level of intervention. So, we didn't know that there was contamination that might have migrated to the inside of that building. Then it was appropriate, and we would do it in other circumstances, that you would put a Prohibition Notice on it until you did

the requisite testing and understood the extent of the contamination areas. And that is something that you would do whether it was Wentworth Falls Preschool or any other situation where there was evidence of friable asbestos.

In her later submissions Ms D said she did not consider media interest or politics when she formulated in her mind what the best form of notice would be. She said that:

The health and safety of the children and the mental health of the community was foremost in my mind.

...

Insofar as media attention elevated unnecessary community distress this was a concern to me, but whether and what type of media attention was not an issue in terms of my decision.

It is unclear what Ms D meant when she referred to ‘the mental health of the community’. Although the WHS Regulation does not draw a distinction between adults and children for the purposes of asbestos exposure standards, the presence of children in a workplace may have been relevant in assessing whether the criteria for issuing a prohibition notice had been met. Children’s behaviour is less predictable or controllable, which makes hazard avoidance more challenging.

Media interest, on the other hand, would be an irrelevant consideration in determining whether a Prohibition notice should be issued.

As a matter of law, an irrelevant consideration is one that an administrator is forbidden from taking into account when exercising a power.¹⁷ Taking an irrelevant consideration into account can result in action being taken for ‘an extraneous or improper purpose’ or can render a decision ‘arbitrary or capricious.’¹⁸ The relevance or irrelevance of any consideration will turn on the construction of the legislation that confers the power.

Media interest, commentary or speculation is unable to rationally affect an assessment of the existence and severity of the risks that Improvement and Prohibition notices are designed to address. For that reason, it is irrelevant to the exercise of the discretion to issue a notice.

Conclusions

Prohibition notice 31989 dated 28 November 2017 was issued contrary to law because:

- the Inspector did not have a reasonable belief as required by s 195 of the WHS Act
- in the absence of such belief, the Inspector had no power to issue that notice
- the Inspector issued the notice under the direction of his Director
- as the Inspector had no power to issue the notice, the Director had no power to direct the Inspector to issue the notice.

17. *R v Trebilco; Ex parte F S Falkiner & Sons Ltd* (1936) 56 CLR 20 at 32-33.

18. *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 85, 89.

2.5. Was the Wentworth Falls Preschool Improvement notice lawfully issued?

Summary of relevant facts

In order to comply with Prohibition notice 31989 referred to in section 2.4 above, BMCC engaged a SafeWork licensed contractor, Regional EnviroScience. Regional EnviroScience conducted 'background air monitoring' at the Preschool. Background air monitoring is the generally accepted method for sampling the concentration of 'respirable' fibres in air. A respirable fibre is a fibre, which, due to its size, is more likely to become airborne, be inhaled, and reach the small airways and alveolar region of the lungs. Air monitoring does not, and is not required to determine whether any respirable fibres detected are asbestos fibres¹⁹. Further testing to determine the composition of any respirable fibres is only required if the air monitoring detects a concentration of fibres in excess of the applicable standard.

Regional EnviroScience's monitoring tests detected one respirable fibre inside the Preschool and a further two respirable fibres outside the Preschool.²⁰ The results were < 0.01 f/mL and were below two different applicable exposure standards.²¹ Based on these findings, a building/workplace would be considered fit for re-occupation even if the respirable fibres were found to be asbestos.

When relaying these results to his Manager and Director, Inspector A explained that the only way to confirm whether the three detected respirable fibres were asbestos fibres would be to test them using a scanning electron microscopy method (**SEM testing**). He also explained that, as the results were below the applicable standards, SEM testing would normally not be conducted.

Ms D was of the view that additional testing had to be conducted to confirm whether the fibres were asbestos. She directed Inspector A to keep the Preschool closed and issue another Improvement notice which required SEM testing.

At 11:16pm on 6 December 2017, Inspector A emailed Improvement notice 7-318316 directing BMCC to undertake SEM testing and further comprehensive dust sampling. The notice identified alleged contraventions of s 20 of the WHS Act and cl 420 of the WHS Regulation. The facts stated in the notice as supporting the Inspector's belief that those alleged contraventions were occurring were that workers 'may have been exposed to asbestos fibres as the air monitoring on 30 November 2017 detected respirable airborne fibres'.

The 30 November air monitoring membrane filters were sent to Microanalysis Australia in Perth, one of only two laboratories in Australia that perform SEM testing. The test confirmed there were no asbestos fibres present. The Preschool was reopened on 15 December 2017.

The Inspector did not form a reasonable belief

When questioned, Inspector A stated that he did not have the reasonable belief required by s 191 of the WHS Act when he issued the Improvement notice. He gave oral evidence that he told Ms D that he did not think he had the power to issue the notice because the number of respirable fibres found was well below the two exposure standards. He was also aware, and told Ms D, that the fibre that was detected by the air monitoring could be what he called a 'false positive' in the sense that it may not have been an asbestos fibre. Ms D acknowledged, but ultimately dismissed, these concerns.

19. *Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition.*

20. Regional EnviroScience, *Asbestos Site Assessment and Scope of Works for Remediation: Commercial Property [address]*, 5 December 2017, p. 27.

21. Regional EnviroScience, *Asbestos Site Assessment and Scope of Works for Remediation: Commercial Property [address]*, 5 December 2017, pp. 22 and 27.

Inspector A made a contemporaneous record in his notebook that Ms D directed him to keep the Preschool closed and issue an Improvement notice on 6 December 2017 requiring further testing.

Inspector A confirmed in his oral evidence that Ms D had directed him to issue the Improvement notice, and this was the reason why he issued it. This generally accords with Inspector C's recollection of events.

In her submissions, Ms D agreed that she issued a direction that the Preschool remain closed until further testing was conducted and said that she knew this was not supported by Inspector A.

Because I have concluded that the Inspector did not in fact hold the requisite belief, it is unnecessary for me to express a conclusion as to whether such a belief could, in the circumstances, have been reasonably held. As was the case with the Prohibition notice, Ms D could not direct Inspector A to issue the Improvement notice.

Conclusions

Improvement notice 7-318316 dated 6 December 2017 was issued contrary to law because:

- the Inspector did not have a reasonable belief as required by s 191 of the WHS Act
- in the absence of such belief, the Inspector had no power to issue the notice
- the Inspector issued the notice under the direction of his Director
- as the Inspector had no power to issue the notice, the Director had no power to direct the Inspector to issue the notice.

2.6. Was the Heatherbrae House Improvement notice lawfully issued?

Summary of relevant facts

Inspector A inspected Heatherbrae House, a childcare centre, on 30 November 2017. The inspection was in response to a complaint that a fireplace in a playroom, around which children sat during a weekly story telling time, contained ACM. Inspector A noted that there was ACM in the chimney, but that it was sealed and posed no risk. However, he observed some mortar dust from the chimney, which he recommended should be removed.

Inspector A's recommendation to BMCC to remove the mortar dust was to be implemented by way of an informal agreement, which was known as 'agreed actions'. Agreed actions were agreements between a workplaces and an Inspector that a compliance notice would not be issued on the condition that the workplace addressed the issue identified (see section 2.9 below). According to SafeWork's Compliance Policy in force at the relevant time, agreed actions were an appropriate tool to achieve compliance where a contravention was considered minor and the risk was low.

While Inspector A and Inspector C were inspecting another site later on the same day, Inspector C received a phone call from Ms D advising him she no longer wanted 'agreed actions' to be taken, which he relayed to Inspector A. Inspector A understood this to mean that he should take compliance action, particularly in the form of Improvement or Prohibition notices, wherever possible instead of using the 'agreed actions' approach, which was up until that time used by SafeWork Inspectors in accordance with the Compliance Policy to deal with minor issues.

Inspector A returned to Heatherbrae House and issued Improvement notice 7-317886, which required BMCC to secure the main playroom where the fireplace was located and to engage an LAA to undertake dust sampling. Tests confirmed there were no asbestos fibres present and the room was reopened on 2 December.

The Inspector did not form a reasonable belief

Improvement notice 7-317886 stated that Inspector A had a reasonable belief that BMCC was in breach of s 20 of the WHS Act and cl 420 of the WHS Regulation by exposing persons to the inhalation of asbestos fibres. The notice set out the basis for the Inspector's belief as 'dust at the base of the main playroom fireplace that may contain asbestos' and 'ACM in the flue.'²²

The ACM had been sealed with a timber board and sealant, and Inspector A did not observe any problems with the seal. His inspection report recorded that he did not observe any ACM in the fireplace itself but had issued the Improvement notice as a 'precautionary measure.'

In his oral evidence, Inspector A confirmed that he did not hold a reasonable belief that there was a contravention of s 20 of the WHS Act or cl 420 of the WHS Regulation at the time he issued the Improvement notice. Other than the presence of the sealed ACM in the chimney, there was nothing that supported a view that any of the dust contained asbestos. The subsequent dust sampling confirmed this.²³

The inspector felt obliged to issue the notice

The decision to issue the Improvement notice was influenced by the phone call between Inspector C and Ms D on 30 November 2017 in which Ms D told Inspector C that inspectors should take compliance action, rather than agreed actions, wherever possible.

Although Ms D could not recall the telephone conversation with Inspector C, she gave evidence that in general she did not agree with the practice of securing compliance through agreed actions. Ms D considered that if statutory (Improvement and Prohibition) notices were not issued, SafeWork would not be able to prosecute for any subsequent non-compliance. Around the time of the conversation with Inspector C, Ms D was in the process of changing SafeWork's Compliance Policy in relation to agreed actions. However, the policy of using agreed actions was not formally discontinued until July 2018.

It appears that Inspector A was also motivated to take an overly cautious approach partially due to his recent experiences at Wentworth Falls Preschool and because Heatherbrae House was another childcare centre. Ms D's recent direction to issue a notice in relation to Wentworth Falls Preschool left Inspector A uncertain of the threshold for issuing notices. The significant media scrutiny of SafeWork, including criticism of Inspector A's actions in particular, were also at the forefront of his mind.

In his submissions Inspector A confirmed that he 'felt compelled to take action and the only action available to him was to issue the notice', particularly because he was told by Inspector C that Ms D had said 'no more agreed actions and to issue notices'.

While dictation is established where a third person has given a direction about the exercise of a power, it may also occur in the absence of another person's direction where a decision-maker feels obliged to exercise a power because of another person's conclusions.²⁴ Although not expressly instructed to issue the notice, the circumstances in which Inspector A issued the notice, coupled with the fact that he felt obliged to do so, amount to Inspector A acting under dictation.

Policy was inconsistently applied and changed in an ad hoc manner

The circumstances of this case point to a broader failure to implement policy changes in a consistent and transparent manner. 'Agreed actions' were informal agreements between a workplace and an inspector that a formal compliance notice would not be issued on the condition that the workplace addressed any concerns identified. The SafeWork Compliance Policy in force at the time stated

22. Improvement Notice 7-317886, Issued 1 December 2017.

23. Airsafe Pty Ltd, *Clearance Certificate* – [address], 1 December 2017.

24. *Evans v Donaldson* (1909) 9 CLR 140; *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 506-507; *Bread Manufacturers; Ex Parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286 at [23]-[33].

that agreed actions were an appropriate tool to achieve compliance where the contravention was considered minor and the risk was low.²⁵ Any agreed actions were required to be recorded in the inspection report.²⁶

Some within SafeWork viewed agreed actions as an inappropriate mechanism to secure compliance, as they left SafeWork with no formal recourse if a workplace failed to take the action agreed to. Others thought agreed actions, if used appropriately, had a place within the compliance framework. Both views have merit.

On 30 November 2017, the Inspectors working on BMCC sites were told that formal compliance action was to be preferred to agreed actions in all circumstances. However, at this stage, SafeWork had not made any formal policy changes that reflected this approach. The agreed actions policy was reviewed by SafeWork in early 2018 and formally changed in July 2018.

While policies should be updated when necessary to reflect new or better practices, individual or selective changes made in an *ad hoc* manner inevitably result in confusion and potentially inconsistent application. If SafeWork took the view that practices or policies should change, its inspectors, workplaces and other stakeholders should have been informed first. Substantial changes, especially to long-standing practices such as agreed actions, should have been accompanied by appropriate training and guidance before the changes were implemented.

Conclusions

Improvement notice 7-317886 dated 1 December 2017 was issued contrary to law because:

- the Inspector did not have a reasonable belief as required by s 191 of the WHS Act
- in the absence of such belief, the Inspector had no power to issue the notice.

Although the Inspector was not expressly instructed to issue the notice, the circumstances indicate that he felt obliged to do so as a result of views expressed by his Director.

2.7. Were the Springwood Depot Prohibition notices lawfully issued?

Summary of relevant facts

Inspector A issued two Improvement notices to Springwood Depot on 4 December 2017. The notices required, among other things, a competent person to seal all exposed edges and holes found in the Waste Services Office, the Amenities Block and the Carpenters Storage Shed. This work was later done by SafeWork licensed contractors, who issued a clearance certificate on 21 December, which permitted reoccupation of the site.

Based on the certificates, Inspector A 'complied' the Improvement notices. To comply a notice is to accept that the workplace has satisfied the requirements and is not expected to take any further action. SafeWork policies permit remote compliance (that is, 'complying' a site in the absence of a physical inspection, on the basis of clearance certificates by licensed contractors).

Following the reoccupation of the Depot, towards the end of December, BMCC staff at the Depot raised concerns with BMCC management and the United Services Union (USU) about the quality of the contractor's work.

25. SafeWork NSW, Compliance Policy, September 2013, p.5.

26. SafeWork NSW, Notices and Directions – Issuing an Improvement notice, 11 November 2016, p.7.

On 22 January 2018, after the staff concerns were raised in the media, Inspector A was asked to reinspect the Depot. As a result of his reinspection on 23 January, Inspector A was satisfied that the notices had been complied with, that the risks that had warranted the issuance of the notices had been addressed, and that any concerns with the quality of the works done by the contractor were minor and could be easily addressed.

The following day the radio program made several disparaging remarks about Inspector A's actions, specifically his assessment that the asbestos at Springwood Depot presented only a minor risk. The former Minister for Better Regulation, who was on air at the time of these remarks, undertook to send a team of inspectors to Springwood Depot on the following day to 'get to the bottom' of what was going on.

In accordance with the Minister's undertaking, Inspector B, Assistant State Inspector, was sent by SafeWork Executive Director, Mr E and Acting Director, Ms F to reinspect Springwood Depot.

On 25 January 2018, Inspector B issued two Prohibition notices (for a copy of the complete notices see section 2.9):

- Prohibition notice 31715, which required work to cease in the Waste Services Office area of the Depot until remediation work had been completed and a clearance certificate issued. The reason recorded for this notice was that 'workers' health and safety was placed at risk from airborne asbestos fibres due to excessive dust on and around unsealed asbestos sheeting'.
- Prohibition notice 31716, which required work to cease in the shower room within the Amenities Block at the Depot until remediation work had been completed and a clearance certificate issued. The recorded reason was that 'worker health and safety was placed at risk from suspected ACM not noted in the asbestos register exposed in the shower room'.

The Prohibition notices were not sufficiently supported by the evidence

Inspector A had inspected Springwood Depot on 23 January 2018 and had observed the same circumstances as Inspector B did on 25 January 2018. Inspector A did not consider the presence of the dust or the unsealed ACM above it as presenting a significant risk that warranted the issuing of a Prohibition notice.

Inspector A noted in his inspection report the presence of what the workers suspected was asbestos containing dust on the server and the cracked panel above it. He formed the view that the accumulated dust and debris was common dust, as it was not generated from grinding/drilling or abrading ACM. BMCC had agreed they would organise a competent person to seal the cracked edges of the panel and clean the dust within seven days of Inspector A's inspection. In the circumstances, Inspector A considered that the risk of asbestos exposure was low.

The justification given by Inspector B that workers health and safety was being placed at serious risk from imminent exposure to airborne asbestos fibres due to excessive dust on and around the unsealed asbestos sheeting was also contradicted by the observations of the occupational hygienist, an LAA, from SLR Consulting. The hygienist attended Springwood Depot on 8 January 2018 to examine the concerns staff had about the contractor's work. The LAA's conclusion was that the concerns were not justified because they were based on observations that did not raise issues the staff thought they raised, but were predominantly aesthetic. The LAA confirmed that the immediate risks had been remedied.

Testing carried out after the Prohibition notices were issued confirmed the presence of asbestos fibres. This might support the view that the notices were justified. However, none of the tests established the actual concentration of asbestos fibres. What appears to have been the most comprehensive testing regime, undertaken by a contractor on 21 February 2018, who were engaged by BMCC for the purposes of responding to the Prohibition notices, noted that it could be assumed that the fibres were not at the reportable level and were not 'respirable'.

When asked to explain his decisions, Inspector B elaborated on what he thought would have given rise to the risk from exposure to asbestos. He gave as an example a scenario where someone could have disturbed the dust on top of the IT cabinet in the Waste Services Office by operating the server fans, or placing a coffee cup on top of the cabinet. However, at this time Springwood Depot had already been closed and BMCC had agreed to take further action.

Mr E submitted that based on his knowledge and experience, he had serious concerns about the situation at Springwood Depot. After hearing about the situation and reading relevant material he formed the view that there was ample grounds to issue a Prohibition Notice under s 195.

In support of his submission that there were ample grounds to issue a Prohibition notice, Mr E provided the following information:

- Inspector A's Improvement notice (7-318117) documented his reasonable belief that 'workers/other persons may be exposed to a risk to their health and safety from the inhalation of asbestos fibres at the workplace'.
- The two Improvement notices were deemed as complied with without a site inspection due to the impending Christmas shutdown, which was not an optimal approach to managing the health and safety where there was a history of non-compliance issues at the facility and low levels of worker trust in BMCC's asbestos management.
- Based on Mr E's 30-year career in asbestos risk management, he challenged Inspector A's conclusion that the site presented a low risk given the details of the report, and the photographic evidence concerning asbestos-contaminated dust.
- The *Code of Practice: How to manage and control asbestos in the workplace* (p15) identifies asbestos-contaminated dust (including dust left in place after past asbestos removal) as the highest risk as this form of asbestos material has the highest likelihood of airborne fibres the exposure pathway for asbestos-related diseases.
- USU had contacted SafeWork on 23 January 2018 (the day Inspector A returned from leave) advising they had stopped work in a number of areas of the Springwood Depot due to asbestos concerns.
- In his role of Executive Director, Mr E weighed up factors including the health risks to workers if they reoccupied a building when it was reasonably practicable to remediate and prevent unnecessary asbestos exposure prior to reoccupation. He also considered that there was difficulty in enforcing the non-binding agreed action that was suggested by the inspectors. Given the evident risks, no reasonable person in his position and with his knowledge and experience would have not provided advice to ensure that the actions of Safe Work did not put workers' health to an immediate risk of exposure to asbestos that was reasonably practicable to avoid.

It is not suggested that Mr E or Inspector B were not entitled to form an opinion and an assessment of the situation and the level of risk it presented that was different to Inspector A's assessment. However:

- Although Inspector A's December Improvement notices recorded that he formed a reasonable belief that workers may have been exposed to a risk of asbestos inhalation, there was no suggestion that the risk was so serious or imminent as to require a Prohibition notice.
- There was no suggestion that the dust was generated by asbestos removal work.
- The site had been closed at the time and BMCC agreed to keep it closed until the area was cleaned and the workers' additional concerns were resolved.
- SafeWork's policy allowed for notices to be complied without a visual inspection. The notices in question were Improvement notices and as such considered of lower risk than Prohibition notices and were 'complied' on the basis of the clearance certificate issued by a SafeWork licensed occupational hygienist, which is standard practice.

- SafeWork’s policy in force at the time expressly allowed agreed actions. This practice, according to Mr E’s evidence, was only formally revoked on 2 July 2018. At the relevant time, agreed actions were a legitimate and accepted means of dealing with minor concerns.

The Inspector failed to consider relevant contextual factors

To assess the likelihood of a particular activity eventuating in serious risk to health or safety, it is reasonable to expect that Inspectors would consider relevant contextual factors such as:

- the friability of the asbestos
- whether the workplace was seeking to undertake work on the ACM
- any potential control measures, and
- the prior conduct of the workplace.²⁷

In the case of Springwood Depot, Inspector B did not appear to give any consideration to these factors, including Inspector A’s recent observations about the same set of circumstances, the fact that the Depot was already closed and that qualified persons had been engaged to address the issues.

According to the evidence of Ms F, his manager, Inspector B, ‘specifically said he didn’t want to know [what Inspector A had looked at or notices he had issued] because he wanted to walk in there with a fresh set of eyes in the true sense of word’.

In his submissions Inspector B pointed out that the WHS Act does not prescribe any mandatory considerations that an Inspector is required to take into account when forming a reasonable belief that a notice is warranted. All that is required is that the decision be grounded in objective fact.

The submissions reasoned that the case of *Alcoa*²⁸ does not impose a test that Inspectors must have regard to certain, prescribed or mandatory ‘contextual factors’. Rather, as the extract from Inspector B’s submissions below explains, *Alcoa* references the standard relevant test for ‘reasonable grounds’ as set out in the case of *George v Rockett*,²⁹ namely:

The ... opinion that asbestos ... was likely to become dangerous, must be based on reasonable grounds. Reasonable grounds for the formation of ... opinion, require the existence of ‘facts which are sufficient to induce that state of mind in a reasonable person’: George at 488 For the following reasons, I am satisfied that the evidence before the Tribunal would be sufficient to induce that state of mind in a reasonable person ... ‘ (Emphasis added)

The Court in Alcoa then continued to consider the relevant factual and contextual factors influencing the Inspector’s decision in that particular case and whether they led to reasonable grounds but did not state that these same factors were mandatory considerations for every Inspector, or that any particular factors are always required to be assessed.

It is not suggested that an exhaustive list of prescribed and mandatory contextual factors exists and that they all must, without exception, be considered by Inspectors in every case. However, it is reasonable to expect that an Inspector will assess and balance the objective evidence before them and determine, on that available evidence, whether a serious risk to health and safety may eventuate. If the Inspector fails to consider available information, discards contrary facts or relies on out of date information, the reasonableness of their decision may be undermined.³⁰ This may leave the decisions open to legal challenge.

27. *Alcoa of Australia Ltd v Chaplyn State Mining Engineer Department of Mines and Petroleum* [2018] WAIRC 268.

28. *Alcoa of Australia Ltd v Chaplyn State Mining Engineer Department of Mines and Petroleum* [2018] WAIRC 268.

29. *George v Rockett* (1990) 170 CLR 104, 115.

30. *Kostopoulos v Commonwealth of Australia* [2012] NSWSC 1534.

The Inspector failed to make adequate records to support his decisions

Inspector B made no contemporaneous records at the time he issued the prohibition notices, of whether he considered the actions already taken by BMCC prior to 25 January 2018 to remediate the site.

Inspector B had access to records of recent inspections and the professional opinions of qualified and SafeWork licensed individuals. As he was making a contrary decision to the one that had already been made by Inspector A and communicated to BMCC, the reasons for his decisions would be expected to have made some reference to those materials.

The lack of supporting records and observations in this case, particularly when compared with Inspector A's well-reasoned and documented actions, makes it difficult to understand Inspector B's reasoning in issuing the Prohibition notice. A review of notices issued by Inspector B for other sites shows that the level of detail in these notices was generally consistent with his usual practice.

The Inspector was influenced by the opinions of his Executive Director

While Inspector A was reinspecting Springwood Depot on 23 January, Mr E, SafeWork Executive Director, was providing regular updates to the Minister in preparation for his interview by the radio program host scheduled to take place the next day.

Inspector A's evidence was that on 24 January 2018, after his reinspection on 23 January (but before the decision was made to send Inspector B to inspect the Depot), he had a telephone conversation with Mr E and Ms F. During that call, Mr E asked Inspector A to 'issue consecutive Prohibition notices to shut each workplace, one after the other in the Springwood Depot to address the possible asbestos risks'. Inspector A advised Mr E that his observations on 23 January 2018 did not support Prohibition notices, but Mr E was not satisfied with this position. Inspector A requested to be taken off the BMCC investigation, which was agreed to. Inspector B was then asked to reinspect Springwood Depot on 25 January 2018.

In his oral evidence to the Ombudsman, Mr E expressed his dissatisfaction with Inspector A's assessment and the actions he took on 23 January 2018. Mr E stated:

One of the things you do check before you reoccupy an area is you get the monitoring results, the testing results, but also the visual results and if you find any evidence of visual dust and contamination then the site is not cleared for reopening.

From photographs provided to him by Inspector A, Mr E could see dust on top of cabinets and believed it should have been cleaned before reoccupation was allowed. In his evidence, Mr E stated that:

In my mind, it wasn't so much about whether it had been low risk, it was you shouldn't reoccupy a site until it has been properly cleaned and properly remediated and that hadn't been properly remediated.

As a result, he believed that SafeWork needed to take some form of further action. Mr E also believed that 'some vicarious liability' may have attached to SafeWork for any failure to take action and SafeWork therefore needed to do more than what Inspector A had done on 23 January 2018.

According to his evidence, Mr E was more closely involved in the events leading up to Inspector B's Springwood Depot Prohibition notices than was his ordinary practice. He discussed the site with Inspector B prior to Inspector B's inspection, suggesting that Inspector B issue Prohibition notices for each building at Springwood Depot until they were cleared. This was a measure for which there was no statutory basis, and was resisted at the time by both Inspector B and his Acting Director Ms F, and Inspectors C and A before them.

Inspector B, Ms F and Mr E all recalled Inspector B stating during discussions before the inspection that he would make his own decision on the basis of what he found upon inspection. Mr E recalled, that upon hearing Inspector B say that, he [Mr E] ‘pulled his head in’.

Inspector B’s understanding of what he was expected to do at Springwood Depot involved ‘rectifying mistakes’ of some description. Mr E sent Inspector B an email in which he asked him to call before the inspection to discuss the ‘outcomes’ he, Mr E, expected from the inspection. He also asked Inspector B to identify, during his inspection, all ACM panels and any asbestos dust, and to ‘agree on make safe corrective actions for remediation/removal work’.

Mr E and Inspector B had a telephone discussion when Inspector B arrived at Springwood Depot on 25 January 2018. Inspector B only recalled discussing whether union representatives were in attendance on site. Mr E, on the other hand, recalled reiterating the previous day’s message: informing Inspector B of the areas he was concerned about and those he thought should not be occupied until SafeWork was sure they had been made safe.

Following his inspection but prior to issuing any notices, Inspector B called Mr E again to discuss the actions he proposed to take, and reported his observations. They discussed the issuing of notices. Inspector B stated in his evidence that Mr E was very supportive of him issuing a Prohibition notice. Mr E made it clear he expected Inspector B to take enforcement action and ensure the site remained closed.

Inspector B accepted that he had discussions with Mr E regarding his inspection of Springwood Depot and that Mr E was ‘very supportive of him issuing the prohibition notices’. However, he maintained that he held a reasonable belief that activities occurring at the Depot involved a serious risk to health and safety. In his submissions, Inspector B also disputed the suggestion that he may have been acting under dictation because:

- Mr E’s evidence records that Inspector B resisted the proposition that prohibition notices should be issued without meeting the required statutory basis
- other Inspectors’ evidence was that Inspector B told his colleagues he would only issue Prohibition notices where required after having determined the evidence and formed his own belief, and
- Inspector B himself was relatively senior and had significant training and experience in the issue of Prohibition notices.

The notices were the subject of discussion between Mr E and Inspector B. Their discussions before and after the inspection, viewed in the broader context, suggest that their focus was on achieving a particular outcome rather than satisfying themselves whether the conditions at Springwood Depot contravened specific WHS obligations.

In his submissions, Mr E strongly denied directing Inspector B and stated that Inspector B himself did not believe he was directed. Rather, according to Mr E’s submission, the preferred interpretation of the facts is that he believed there was a significant risk and communicated his concern to Inspector B because Inspector B needed to be briefed (as the new Inspector).

It has not been conclusively established that Inspector B was acting under dictation. However, at law, acting under dictation occurs not only when a person responsible for exercising a discretionary function is expressly directed to exercise that function in a certain way. A person is also said to be acting under dictation if the decision-maker felt *obliged* to decide the matter in a particular way because of another’s conclusions in relation to a matter, even though the other person may have given no explicit instruction that their approach should be followed.³¹

31. *Evans v Donaldson* (1909) 9 CLR 140; *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 506-507; *Bread Manufacturers; Ex Parte Mitchell James Holdings Pty Ltd* [2001] WASC 286 at [23]-[33].

Courts have recognised that the inference of dictation may be more strongly drawn where a decision is made by a relatively junior public servant. In *Nashua Australia Pty Ltd v Channon* the Court suggested that it would ‘introduce an element of naiveté into a decision... if one did not throw into the scales the likelihood or otherwise an officer in a branch of the Public Service not carrying out instructions that came from his superiors’.³²

Sending in a second Inspector to Springwood Depot was unreasonable

SafeWork and its Inspectors were under pressure particularly because of media broadcasts by the radio program. Its host had referred to allegations about BMCC’s asbestos management over 30 times in the three months prior to Inspector B’s issue of the Springwood Depot Prohibition notices.³³ The program’s host had criticised an earlier decision not to close Springwood Depot, as well as Inspector A’s professionalism, and had called for the sacking of the Council and the resignation of the Minister for Local Government.³⁴

The office of the former Minister for Better Regulation was aware of these broadcasts and had appeared on the radio program to answer questions about SafeWork’s actions in relation to BMCC’s asbestos management.³⁵

It is acknowledged that different Inspectors can legitimately form a different assessment of the same set of circumstances. However, once a decision is made, unless there is clear evidence of serious wrongdoing, the decision should be final. Workplaces, such as BMCC, are entitled to certainty and finality in relation to compliance decisions.

In the absence of clear evidence that Inspector A’s decision was contrary to law or policy, SafeWork should not have sent another Inspector to the Depot when Inspector A refused to change his decision. This is an unreasonable approach to enforcement.

Conclusions

It has not been possible to conclude whether or not Prohibition notices 31715 and 31716 dated 25 January 2018 were lawfully issued because:

- the Inspector maintains that he held the reasonable belief as required by s 195 of the WHS Act
- there is no direct evidence to contradict that assertion (that said, Inspector did not make and keep adequate records of his decision-making or the evidence on which it was based, and as such there is also no other direct evidence to support it); and
- there was no evidence that the Inspector was expressly instructed to issue the notices; and again both he and SafeWork maintain that no such instruction was given.

However, the circumstances indicate that the Inspector is likely to have felt obliged to issue the notices because of views expressed by his Executive Director. The Executive Director was closely involved with the Springwood Depot actions. The Inspector knew that the reason for his involvement was that the first Inspector had previously declined to issue notices. It would have been clear to the Inspector that the Executive Director expected the notices to be issued.

32. (1981) 36 ALR 215.

33. Transcript, [Radio] Show broadcast, 8 November 2017-23 January 2018.

34. Transcript, [Radio] Show broadcast, 23 – 25 January 2018.

35. Transcript, [Radio] show broadcast, 11 December 2017, 24 January 2018.

Even if the notices were issued lawfully (in the sense that the Inspector held the reasonable belief required by s 195 of the WHS Act before such notices are able to be issued), SafeWork's conduct in respect of those notices was unreasonable in so far as:

- the Inspector's belief and reasoning were not sufficiently documented by appropriate records of evidence
- there was a failure to consider relevant contextual factors, and
- most importantly, SafeWork's actions in sending in a second Inspector to, in effect, override decisions that had already been made by the first Inspector, despite no evidence that the first Inspector's decision had been incorrectly made, is an unreasonable approach to enforcement. At least in the absence of manifest error, it is unreasonable for a regulator to apply repeated and contradictory enforcement actions by its Inspectors or enforcement staff to the same set of circumstances. There is some analogy here with the rationale for rules in other contexts that prohibit 'double jeopardy'. In particular, regulated parties, such as BMCC in this case, should be entitled to some degree of certainty and finality in respect of decisions and actions by the regulator's enforcement staff.

2.8. Was the Lawson Carpark notice lawfully issued?

Summary of relevant facts

Lawson Carpark was constructed during the refurbishment of the Lawson Mechanics Institute in 2016 and 2017. In October 2017, an allegation was received by SafeWork that the soil used in the garden beds at the Lawson Carpark may have been contaminated by asbestos. The site was inspected by SafeWork and LAAs between November 2017 and February 2018 on at least four occasions. Each time no sign of asbestos contamination was detected.

On 12 March 2018, a BMCC employee reported to BMCC management that Lawson Carpark was contaminated with asbestos and sent through several photos showing what he believed to be asbestos contamination (**BMCC employee's report**).

BMCC emailed the BMCC employee's report to SafeWork on the same day, together with the previous clearance documentation and inspection reports for the site (**BMCC's email report**).

BMCC's email report noted that, although the site was clear of asbestos a short while ago, this was evidently no longer the case. The email report observed that the photographs taken by the BMCC employee showed that the site looked 'significantly re-contaminated, including large amounts of broken ACM, which appeared to be scattered across and throughout the mulch used to finish off the landscaping'.

BMCC's email report went on to say that during the last reinspection by SafeWork on 7 February 2018, the entire SafeWork inspection team was at the location for over 45 minutes and everyone inspected the area thoroughly, including walking through the garden beds. No traces of asbestos were found. The email's author noted that it was extremely difficult to believe that the level of contamination the photos were now showing had been there before, especially the pieces of ACM sitting on top of the mulch. The email noted that the Inspectors would have seen the ACM quite clearly, as would have the licensed contractors, during earlier inspections.

Early in the morning of 13 March, Ms D physically inspected the Carpark and observed small fragments of material on top of the mulch that she suspected may have contained asbestos. These samples were provided to SLR for testing. She verbally advised BMCC that a Prohibition notice would be issued.

A few hours later, after speaking with Ms D by phone, Inspector B, who was at the Sydney CBD office at the time, issued Prohibition notice 31717.

The Inspector failed to make sufficient records to support his reasonable belief

It is not clear from the documentation, such as Inspector B's contemporaneous notebook entries, what evidence Inspector B relied on to form a reasonable belief that the notice was warranted.

At 9:10am on 13 March 2018 following the phone conversation with Ms D, Inspector B wrote out Prohibition notice 31717 while at the Sydney office of SafeWork. He then scanned the handwritten notice into his computer.

The notice identified a potential breach of cl 420 of the WHS Regulation and required BMCC to cease all work and access into and around Lawson Carpark and 'engage an independent occupational hygienist to provide a site remediation report and ensure the site is remediated as per the recommendations.'

As required, the notice stated that the Inspector believed that 'work and access to Lawson Carpark involved a serious risk to the health or safety of person(s) emanating from an imminent exposure to a hazard' (in this case exposure to asbestos).

Inspector B recorded that, in forming this belief, he relied upon:

...photos & reports that show contamination in the carpark area involving suspected asbestos containing material.

About 20 minutes after he drafted the Prohibition notice, at 9:32am, Inspector B received a multimedia message from Ms D. The message, which contained a photo and no accompanying text, showed the area where the suspected ACM was found, had been taken while Ms D was inspecting Lawson Carpark earlier that morning.

At 9:52am, Inspector B emailed BMCC the scanned copy of the Prohibition notice. He also forwarded the notice to the BMCC employee who reported the ACM contamination, to Ms D at 9:53am and to Inspector L, Manager, at 9:57am.

The WHS Act required Inspector B to reasonably believe that:

- an activity was occurring at Lawson Carpark that involved or would involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard such as exposure to asbestos capable of being inhaled, or
- an activity could have occurred at Lawson Carpark that, if it occurred, would have involved a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard such as exposure to asbestos capable of being inhaled.

Once he formed such a belief and identified the particular activity that involved (or could have involved) a serious risk of exposure, Inspector B was also required to identify the specific provision of the WHS Act or WHS Regulation that he believed was being contravened by that activity.

The Prohibition notice stated that BMCC was potentially in breach of cl 420 of the WHS Regulation by 'work' and by allowing access to the carpark. As already noted above, cl 420 requires a workplace to ensure that:

- exposure of a person at the workplace to airborne asbestos is eliminated so far as is reasonably practicable, and
- if it is not reasonably practicable to eliminate exposure to airborne asbestos – exposure is minimised so far as is reasonably practicable.

The Prohibition notice relevantly recorded that the Inspector relied on evidence of photos from the site. However, it is unclear whether this was a reference to the photos in the BMCC employee's report, which Ms D forwarded to Inspector B in the evening of 12 March, the photo Ms D took and sent on 13 March 2018 shortly after Inspector B had already drafted the prohibition notice, or both.

The BMCC employee's photos of 12 March and Ms D's single photo of 13 March show different parts of the carpark's garden bed. The single photo Inspector B received from Ms D after he had already drafted the prohibition notice, but before he served it, was blurry. There was no accompanying message from Ms D as to whether the photo showed where asbestos fragments were found or if the area even contained asbestos fragments. The central focus of it was an exposed area of dirt and pebbles not covered with chip wood and it is assumed that one of the pieces of suspected ACM found on site must have been in this area. However, the photo did not indicate the location of the suspected asbestos and Ms D's inspector's notebook made no reference to any photos taken on site. Inspector B on his part could not recall seeing the photo, nor how it factored into his assessment of the risk on site. The photo taken by Ms D and received by Inspector B after he had prepared, but just before he served the Prohibition notice, could not therefore have supported a view that there was a serious risk of asbestos exposure.

When questioned how he formed the necessary belief required by s 195 of the WHS Act, Inspector B stated that he relied on Ms D's verbal report. However, on the notice Inspector B recorded that he relied on 'photos & reports that show contamination'. He also stated that he spoke to the BMCC employee who reported the contamination, but could not recall whether the employee provided any further relevant information.

Inspector B did not keep notes of either discussion. The only record is found in Ms D's Inspector's notebook where she recorded her observations of Lawson Carpark during the inspection in the morning of 13 March 2018. That record stated that she identified the presence of a number of small asbestos fragments but did not express a view as to whether the fragments were in bonded or friable condition.

In her submissions, Ms D stated that:

Inspector B and she agreed beforehand that they would liaise about what, if anything, was required to be done. They had agreed they would speak on the phone and she would send through any evidence, if it transpired there was anything detected on site and there was a need to take some action. On arrival (in the pouring rain, which explained the poor quality of the pictures she sent), the asbestos removalist, who was on site at the time and identified what he thought was friable asbestos sitting on the top of the garden bed near the front pedestrian road, raised this with her. The garden had been recently worked on and the bark chips had been washed away by the heavy rain. Ms D further stated that she and Inspector B were on the phone a number of times during her inspection and she relayed what she saw to him and the opinion of the asbestos removalist that it appeared to be friable asbestos.

In his submissions, Inspector B similarly stated that Ms D had reported suspected contaminated topsoil with the potential to release respirable fibres. Inspector B considered Ms D's verbal report to be a credible source of information, having worked with her on asbestos-related projects in the past.

Inspector B further stated that he relied on the 12 March 2018 email report from BMCC. Inspector B considered the email report to be persuasive because it indicated that, irrespective of the earlier clearance of the site, Lawson Carpark appeared to be 'significantly contaminated' with large amounts of broken ACM, scattered across and throughout the mulch.

Even if it is accepted that BMCC's report was sufficient to induce a reasonable belief in Inspector B's mind that the carpark was now significantly contaminated with ACM, it is difficult to understand what Inspector B specifically considered given the lack of contemporaneous records and supporting reasons.

In the period preceding the BMCC's report, the site had been inspected by SafeWork, including by Inspector B himself, and by different LAAs on six occasions without any ACM being physically sighted. The soil was tested twice by LAAs (in September and December 2017). On both occasions, the test results showed that ACM contamination was below the relevant reporting limit. Subsequently, the carpark had a clearance certificate issued in December 2017 by SLR. An *Unexpected Finds Procedure* outlined how any future finds of ACM should be dealt with. It specified that if ACM was found, the area

was to be isolated and an LAA engaged to collect the sample and test. If the test result was positive for asbestos, an LAA then needed to be engaged to draw up technical specifications for the removal of the asbestos. There is no reason why the Procedure should not have been relied on to deal with the suspected ACM found on this occasion.

Inspector B maintained in his submissions that the material before him at the time he issued the prohibition notice was sufficient to ground a reasonable belief. In support, he pointed out that there are no mandatory considerations that are required to be taken into account in forming a reasonable belief. Nor are there any restrictions in the WHS Act as to the form of the facts relied upon, such as restrictions on oral accounts or the opinions of other experienced persons in the industry.

The submissions maintained that Inspector B had relevant facts to form the reasonable belief that Lawson Carpark was contaminated with suspected ACM, such as Ms D's report, BMCC's email and the photos provided by Ms D and the BMCC employee. It is accepted that BMCC's 12 March 2018 email reported ACM contamination.

However, the reasonable belief that needed to be formed was not that the carpark was contaminated by ACM. Rather, there needed to be reasonable belief, both subjective and grounded in objective facts, that there was an imminent or serious risk to the health or safety of any person and that BMCC was not taking all practicable steps it could in order to control the exposure.

Inspector B also submitted that because he formed a reasonable belief he would have been free to accept direction from Ms D as s 162 of the WHS Act empowered Ms D to direct inspectors to issue a notice so long as that inspector had formed the reasonable belief referred to in s 195.

For an exercise of a discretionary power to be valid, it must be a real exercise of discretion by the decision-maker, not an acceptance by the decision-maker of someone else's conclusion.³⁶

The practice of forming a reasonable belief solely on the basis that the Inspector has received the testimony of another Inspector is unreasonable and should be discontinued if it is routinely practiced by SafeWork inspectors. The practice would be to say, in effect, that because another Inspector believes in a certain set of circumstances, it is therefore reasonable for the first Inspector to believe whatever the other Inspector believes.

The inspector failed to make independent inquiries

Inspector B did not make any independent inquiries to satisfy himself that the Prohibition notice was warranted in the circumstances.

In *Growthbuilt Pty Ltd v SafeWork NSW*, Chief Commissioner Kite explained the obligations of inspectors to balance the objective information available to them and make reasonable inquiries. While not required to conduct a full investigation, and not bound by the responses received to their inquiries, inspectors are required to take them into account in forming a view.³⁷ This is of particular importance because such a balanced approach 'does not allow an inspector to make assumptions and act on them without, at least, attempting to test, in a timely and practical manner, the validity of those assumptions'.³⁸

SafeWork's *What is reasonable belief* guidance document stipulates that the basis for the reasonable belief can be determined by making sufficient inquiries and an analysis of different types of information to reach the relevant conclusion upon which to issue the notice. The Guidance states that a conclusion is supported if information from one source is validated/verified by the same information from another source, rather than relying on one source only.³⁹

36. *Telstra Corporation Ltd v Kendall* (1995) 55 FCR 221. An individual who acts under dictation abdicates their decision-making responsibility: *Re Romato* at [25].

37. [2018] NSWIRComm 1002, [95].

38. *Growthbuilt Pty Ltd v SafeWork NSW* [2018] NSWIRComm 1002, [95]-[96].

39. WHSDOM guidance material *What is reasonable belief?* Trim Ref: D14/160400, updated 9/08/2018, p. 4.

Inspectors may consider the following when forming a reasonable belief:

- observations
- information obtained from speaking to persons who work at the workplace
- reviewing documents
- information from relevant codes of practice and other published guidelines
- advice provided by suitable technical specialists
- known prior history of the workplace.⁴⁰

Inspectors must collect evidence, including physical evidence, to support their decisions. The Guidance specifies that general rules of evidence need to be followed, which includes recording sufficient details in the Inspector's notebook to demonstrate how the opinion was formed.⁴¹

Ms J, the occupational hygienist from Regional EnviroScience who undertook the soil-sampling on 20 March 2018, told the Ombudsman that the information provided to her before the sampling indicated to her that there would *not* be a 'large amount of contamination.'

Another occupational hygienist from SLR expressed surprise when interviewed by the Ombudsman that Lawson Carpark had been closed pursuant to a Prohibition notice and observed that, given the site had previously been cleared, a more practical step would have been to investigate how any new asbestos had arrived on the site.

Given the history of the site and the requirements of SafeWork's guidance document *What is reasonable belief*, it is reasonable to expect that Inspector B would have made inquiries. At a minimum, Inspector B should have made inquiries with the LAAs responsible for the earlier soil testing reports.

The inspector failed to consider whether BMCC had taken all reasonable steps

Inspector B did not appear to give adequate consideration to whether BMCC had taken all practicable steps to control the situation.

Clause 420 of the WHS Regulation requires the workplace, as far as reasonably practicable, to take all steps to eliminate or minimise exposure to asbestos. Section 18 of the WHS Act defines the factors to be taken into account when determining whether all reasonably practicable steps have been taken. The provision requires an inspector to assess:

- (a) the likelihood of the hazard or the risk concerned occurring, and*
- (b) the degree of harm that might result from the hazard or the risk, and*
- (c) what the person concerned knows, or ought reasonably to know, about:*
 - (i) the hazard or the risk, and*
 - (ii) ways of eliminating or minimising the risk, and*
- (d) the availability and suitability of ways to eliminate or minimise the risk, and*
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

The requirement to take 'reasonably practicable' steps to maintain and provide a safe working environment does not entail taking every possible step towards those ends; 'reasonably practicable' means something less than physically possible or feasible.⁴²

40. Ibid, p.4.

41. WHSDOM guidance material *What is reasonable belief?* Trim Ref: D14/160400, updated 9/08/2018, p. 4.

42. *Slivak v Lurgi (Aust) Pty Ltd* (2001) 205 CLR 304, [53].

A contravention of a requirement to take 'reasonably practicable' steps is not established by a 'bare demonstration that a step could have been taken and that, if taken ... might have had some effect on the safety of a working environment'.⁴³

In deciding to issue a Prohibition notice, an Inspector would need to turn his or her mind to what steps could reasonably practicably be taken, as opposed to all steps that could possibly be taken.

The evidence does not indicate that any consideration was given by either Ms D or Inspector B as to whether BMCC had taken all steps that were reasonably practicable in the circumstances. Nor is it obvious what steps BMCC could have reasonably taken beyond those already taken. BMCC had already:

- had the site tested in November 2017 by an LAA, who reported that the fill was not contaminated with asbestos and prepared an Unexpected Finds Procedure for BMCC to use in relation to the site,⁴⁴ and
- had the site inspected by another LAA on 20 December 2017, who issued a clearance certificate.⁴⁵

Before either an Improvement or a Prohibition notice can be issued, an Inspector must have a reasonable belief that either the WHS Act or the WHS Regulation is or is likely to be contravened. According to cl 420 of the WHS Regulation, a workplace is obliged to eliminate the risk of exposure to airborne asbestos as far as reasonably practicable. If this is not possible, it is obliged to minimise the risk as far as reasonably practicable. This requirement, however, is not an obligation to ensure there is absolutely no risk from asbestos on site at any time.

Asbestos of unknown origin that appears on top of the soil would be expected to be dealt with in accordance with an appropriate asbestos management plan (including any procedures for unexpected finds) and removed in accordance with the WHS Regulation (WHS Regulation cls 419 and 429). The mere find of a piece of asbestos in soil would be insufficient to show that the workplace had failed to take all reasonably practicable steps to eliminate or minimise the harm of asbestos.

Conclusions

It has not been possible to conclude whether or not Prohibition notice 31717 dated 13 March 2018 was lawfully issued because the Inspector accepted the verbal report of his Director and stated that he formed a reasonable belief that the notice was warranted on the basis of her report.

However, the issuing of the notice was unreasonable because:

- the practice of Inspectors forming reasonable belief solely on the basis of the testimony of another inspector is unreasonable
- the Inspector's reasoning was not supported by adequate records
- the Inspector has failed to make appropriate inquiries
- the Inspector failed to consider whether BMCC took all practicable steps to control the situation (as he was required to do).

43. *Baida Poultry Pty Limited v R* (2012) 246 CLR 92, [15].

44. [Licensed Asbestos Assessor] – *Unexpected Finds Procedure* (Report), 30 November 2017.

45. [Licensed Asbestos Assessor] – *Asbestos Clearance Certificate – 610.17816.00000.0190* (Report), 21 December 2017.

2.9. Supporting Information

Wentworth Falls Preschool Statement of Facts

Date	Key Details
28 November 2017	An initial inspection occurred shortly after a radio program warned that children were being exposed to asbestos at the Preschool and that parents should immediately remove their children from the premises.
	Inspector A and his Manager, Inspector C, attended the site and identified a concern about a weathered piece of asbestos cement approximately 10 x 15 cm on the fascia of the gazebo at the Day Street entrance of the Preschool.
28 November 2017	BMCC staff advised the inspectors that the ACM had been encapsulated ⁴⁶ by Airsafe on 17 November and produced a copy of the report.
28 November 2017	After closer inspection, Inspector A formed a view that the ACM had not in fact been properly encapsulated, was in poor condition and posed a risk because the material was within reach of staff, parents and any children who may have been carried into the preschool. Inspector A was of the view that an improvement notice was warranted to ensure the risk was managed and remediated.
	Inspector A discussed his intention to issue an Improvement notice with BMCC staff. It was agreed that fencing of two metres would be erected to isolate the Day Street entrance to the Preschool, and the side entrance would be used until the exposed edges of the ACM were properly encapsulated. Inspector A recorded this in his inspector notebook, noting that he gave a verbal direction to remove the ACM and advised that an Improvement notice would be served.
	While still on site, Inspectors A and C received a phone call from their Director, Ms D. Ms D disagreed with Inspector A's assessment of the risks present on site and said that a Prohibition notice should be issued to temporarily close the Preschool.
	Despite having reservations about this course of action, Inspector A issued Prohibition notice 31989. The Notice required BMCC to immediately cease work at the whole site, install barriers to prevent access to the gazebo, engage an LAA to provide a scope of works and then conduct removal works in accordance with the LAA's report. On the same day, Inspector A also issued two Improvement notices requiring the Asbestos Register to be updated and the ACM to be labelled.
30 November 2017	BMCC engaged Regional EnviroScience to provide a scope of works to comply with the Prohibition notice. Regional EnviroScience inspected the Preschool and conducted 'background air monitoring' during the inspection.

46. As defined by Dr Leela Kempton and Professor Tim McCarthy, 'Encapsulation is the process of covering the ACM in a penetrative or bridging compound to contain the fibres in a resilient matrix to prevent the release of airborne fibres': see p.6 Dr Leela Kempton and Professor Tim McCarthy, 'A Review of Asbestos Stabilisation and Contaminant Practices (Report),' Asbestos Safety and Eradication Agency, 18 May 2017.

Date	Key Details
5 December 2017	Regional EnviroScience produced two reports. The first report scoped the requirement to remediate the site. ⁴⁷ The second report listed all identified asbestos and ACM on site and reported on the results of the air monitoring tests. ⁴⁸
	The two reports were provided to Inspector A who noted that the ACM had been partially removed, but there was a remaining ACM strip under the roof tiles. He considered that strip to be a risk, but one that could be adequately addressed by installing construction fencing to prevent access to the area and removing it outside school hours as soon as possible.
	The air monitoring tests detected one 'respirable' fibre inside the Preschool and a further two fibres outside the Preschool. ⁴⁹ Air monitoring does not determine whether respirable fibres detected are asbestos fibres.
	The results of the air monitoring were below the two relevant exposure standards. ⁵⁰ The building/workplace would therefore normally be considered fit for re-occupation.
5 December 2017	Inspector A emailed his manager that Prohibition notice 31989 could be lifted (as it had been 'complied') because he was satisfied that most of his concerns had either been addressed or could easily be controlled.
	Inspector A also advised his manager that air monitoring had been conducted in four locations at the Preschool and that there were three 'countable' fibres in two of the four locations, and that one of these fibres was inside the Preschool. He noted a concern that in the event the air monitoring results were made public, they could be misinterpreted by those unfamiliar with exposure standards as suggesting there had been exposure to asbestos fibres. For obvious reasons, this could lead to undue panic. Inspector A also pointed out that the results may in fact have been what he referred to as 'false positives', and were in any case below the relevant exposure standards. He concluded by saying that the only way to confirm whether the fibres detected by the air monitoring were asbestos fibres would be to test them using a scanning electron microscopy method (SEM testing).
10:05 am on 5 December 2017	Inspector A advised BMCC by email that in order for the Prohibition notice to be lifted and the site reopened, a construction fence needed to be installed and a broken tile sealed or repaired. Following this, he advised that an Improvement notice would be served requiring the remaining ACM strip under the roof tiles to be removed within two weeks.

47. Regional EnviroScience, *Asbestos Removal Control & Waste Management Plan: [address]* 5 December 2017.

48. Regional EnviroScience, *Asbestos Site Assessment and Scope of Works for Remediation: Commercial Property 2 Day Street Wentworth Falls NSW 2782*, 5 December 2017.

49. Regional EnviroScience, *Asbestos Site Assessment and Scope of Works for Remediation: Commercial Property 2 Day Street Wentworth Falls NSW 2782*, 5 December 2017, p. 27.

50. Regional EnviroScience, *Asbestos Site Assessment and Scope of Works for Remediation: Commercial Property 2 Day Street Wentworth Falls NSW 2782*, 5 December 2017, pp. 22 and 27.

Date	Key Details
	Following Inspector A's email advice, disagreement ensued among SafeWork staff on what action should be taken in response to the results of the air monitoring. Inspector A was of the view that NSW Health could be engaged to explain the results to members of the public so there was no misinterpretation. Ms D was of the view that additional testing had to be conducted to confirm whether the one indoor fibre detected by the air monitoring was asbestos. Ms D directed Inspector A to keep the Preschool closed and issue another Improvement notice requiring for further testing and surface dust sampling.
6:00 pm on 6 December 2017	Inspector A called BMCC to inform them that, contrary to his earlier advice, the Prohibition notice could not be lifted because there was one indoor fibre detected by the air monitoring which required further investigation. Inspector A further informed BMCC that he would be serving another Improvement notice requiring SEM testing.
11:16 pm on 6 December 2017	Inspector A emailed Improvement notice 7-318316 to BMCC.
	The notice identified contraventions of s 20 of the WHS Act and cl 420 of the WHS Regulation. The facts stated in the notice to support the contraventions were that workers 'may have been exposed to asbestos fibres as the air monitoring on 30 November 2017 detected respirable airborne fibres'. The Improvement notice directed BMCC to undertake SEM testing of the sample found in the air monitor filter and to undertake further comprehensive dust sampling of the site.
8 December 2017	The membrane filters from the air monitoring conducted on 30 November 2017 were sent by Regional EnviroScience on behalf of BMCC to Microanalysis Australia in Perth. Subsequent SEM testing results concluded that none of the fibres 'had the elemental composition indicative of asbestos'. ⁵¹
15 December 2017	After receiving the SEM results and more than two weeks after the Preschool had been closed, Inspector A lifted the Prohibition notice and the Preschool was allowed to resume operation.

51. Microanalysis Australia, Fibre characterisation by scanning electron microscopy (SEM) with elemental analysis by energy dispersive spectroscopy (EDS), 8 December 2017, p 2.

Heatherbrae House Statement of Facts

Date	Key Details
23 October 2017	The allegation in the 166 Letter regarding Heatherbrae House (mistakenly referred to in the letter as the Lawson Library) indicated that the open access to the chimney through the fireplace had ACM and noted that preschool children sat around the fireplace during story telling time once a week.
Morning of 30 November 2017	<p>Inspector A inspected Heatherbrae House and recorded in his inspector's notebook that he did not observe any ACM risk:</p> <p><i>Observed fireplace in main play room. Opening to chimney has recently installed plywood & sealed by grey sealant. Observed loose mortar dust on base of fireplace, mortar appears easily disturbed. Recommend paint mortar to seal to prevent dust. I used a dust pan to remove mortar. Agreed action... No ACM risk observed...Sighted the Asbestos register which records ACM in chimney & enclosing. Believe ACM was added in the past for combustion heater with flue, thus was not enclosed to open fireplace. Register bonded low risk. Recommend cushions in area may have been exposed to mortar dust – replace cushions.</i></p>
	In accordance with Inspector A's recommendation, BMCC agreed to replace cushions, which may have been exposed to mortar dust.
Later on 30 November 2017	While doing other inspections in the area, Inspector A reflected on what he observed that morning in light of other recent events. Around 1pm, he called a State Inspector for a second opinion on what he observed at Heatherbrae House. He became concerned that, given the ACM at the site, there may have been a risk of ACM dust even if there was no direct evidence of its presence. The two Inspectors agreed that, in the then current environment, a 'precautionary approach' was best and BMCC should be asked to undertake dust sampling.
2:15 pm	While Inspectors A and C were inspecting St John's Oval in Blaxland, Inspector C received a phone call from Ms D. He told Inspector A that 'Ms D doesn't want agreed actions.' Inspector A understood this to mean he should take compliance action, particularly in the form of notices, wherever possible, instead of using the 'agreed actions' approach, which was up until that time used by SafeWork Inspectors to deal with minor issues.
4 pm	Inspector A returned to Heatherbrae House and discussed the mortar dust issue with the Manager of the childcare service, who agreed to ensure there was no access to the area around the fireplace until she received Inspector A's further instructions. Airsafe conducted a visual inspection of Heatherbrae House on the same day and took nine dust samples.
1 December 2017	Inspector A served Improvement notice 7-317886, which required BMCC to secure the main playroom where the fireplace was located and engage an LAA to undertake dust sampling.
1 December 2017	Airsafe's tests confirmed the dust particles did not contain asbestos. Airsafe issued a clearance certificate, which was emailed to Inspector A.
2 December 2017	Inspector A emailed BMCC, confirming that the Improvement notice was considered complied with and the room could be reopened for normal use.

Springwood Depot Statement of Facts

Date	Key Details
4 December 2017	<p>Inspector A inspected Springwood Depot and issued two Improvement notices:</p> <ul style="list-style-type: none"> Improvement notice 7-318116, requiring the Asbestos Register to be updated to include ACM found in the Waste Services Office and the Carpenters Storage Shed Improvement notice 7-318117, requiring BMCC to engage a competent person to seal all exposed edges and holes found in the Waste Services Office, the Amenities Block and the Carpenters Storage Shed.
	<p>BMCC contracted a company to undertake remedial works to comply with the two notices.</p>
21 December 2017	<p>SLR Consulting issued a clearance certificate and an asbestos encapsulation certificate certifying that the contractor had completed the remediation works to the required standard. The certificates indicated the areas subject to the Improvement notices were safe to reoccupy.</p>
22 December 2017	<p>Based on the certificates, Inspector A complied the two notices pending a site inspection in the New Year.</p>
End of December 2017	<p>Springwood Depot staff raised concerns about the quality of the encapsulation work carried out by the contractor.</p>
Early January 2018	<p>BMCC agreed to take additional actions, including testing of the site, further encapsulation, further remediation works and cleaning.</p>
22 January 2018	<p>A radio program covered events at BMCC and Springwood Depot. Due to the heightened media attention, Inspector A was asked to reinspect the Depot on 23 January 2018.</p>
23 January 2018	<p>During the reinspection, Inspector A determined that additional notices were not warranted because, in his opinion, what he had observed was low risk, which meant the legislative threshold for issuing notices was not met. Instead, Inspector A suggested ways to address the concerns raised by staff.</p>
	<p>Inspector A took three small fragment samples, two from top of the IT cabinet in the Waste Services Office and one from the key return area. These were tested by a NATA accredited laboratory conducting polarised light microscopy.</p> <p>The test results (which were not received until 30 January 2018) showed that the samples tested positive for asbestos fibres, although concentration levels had not been measured.</p>
24 January 2018	<p>Airsafe also undertook dust sampling in the Waste Services Office following the actions agreed to with Inspector A on 23 January and the earlier agreement with staff on 8 January 2018.</p> <p>The samples were tested on the same day, with nine of ten testing positive for asbestos. Concentration levels were not measured. These test results did not become available to SafeWork until 9 February 2018.</p>

Date	Key Details
24 January 2018	A radio program covered the events of 23 January. The radio program host made several disparaging remarks about the work undertaken by Inspector A, specifically about his assessment that the asbestos at Springwood Depot presented only a minor risk. The Minister, who was on air at the time, undertook to send a team of Inspectors to Springwood Depot on the following day to 'get to the bottom' of what was going on.
25 January 2018	<p>In accordance with the Minister's undertaking, Inspector B, Assistant State Inspector, was asked by Executive Director Mr E and Acting Director Ms F to reinspect Springwood Depot.</p> <p>Inspector B's reinspection on 25 January 2018 resulted in him issuing two Prohibition notices:</p> <ul style="list-style-type: none"> • Prohibition notice 31715, which required work to cease in the Waste Services Office area until remediation work had been completed and a clearance certificate issued. The reason recorded for this notice was that 'workers' health and safety was placed at risk from airborne asbestos fibres due to excessive dust on and around unsealed asbestos sheeting'. • Prohibition notice 31716, which required work to cease in the shower room within the Amenities Block until remediation work had been completed and a clearance certificate issued. The recorded reason for this notice was that 'worker health and safety was placed at risk from suspected ACM not noted in the asbestos register exposed in the shower room'
31 January 2018	Inspector A provided the test results of the samples he collected on 23 January to Inspector B.
	BMCC took a number of actions and further tests to comply with the two Prohibition notices.
12 February 2018	SLR Consulting collected 30 samples, which were also tested by two NATA accredited laboratories using polarised light microscopy. Ten of the samples tested positive for asbestos fibres.
21 February 2018	The contractor engaged by BMCC to undertake actions to comply with the two Prohibition notices also undertook testing of 35 samples. Three tested positive for asbestos fibres: one in the Amenities Block Male Locker room and two in Waste Services Office IT server cabinet. As with the previous test results, this test did not measure concentration levels.
13 April 2018	Prohibition notice 31715 was complied by Inspector L.
1 June 2018	Prohibition notice 31716 was complied by Inspector B.

Springwood prohibition notices

Prohibition 31715 in notice relation to the Waste Services Office at Springwood Depot stated:

I, Inspector B reasonably believes [sic] on 25-1-18 at 11:00

...

that an activity may occur at the workplace that will involve a serious risk to the health or safety of a person emanating from an imminent exposure to a hazard and that this activity is likely to contravene a provision of the:

Work Health Safety Act 2011, section 19 Work Health Safety Regulation 2011, cl 420

I direct the person with control over the following activity:

Work in the waste services offices

To stop the carrying on of activity or stop the carrying on of the activity in the following way:

Cease all work in the waste services offices

Until an Inspector is satisfied that the following matters that give or will give rise to the risk have been remedied.

Basis for Inspector's belief

Workers health and safety placed at risk from airborne asbestos fibres due to excessive dust on and around unsealed asbestos sheeting.

Prohibition Notice 31716 in relation to the Amenities Block stated:

I, Inspector B reasonably believes [sic] on 25-1-18 at 11:00

...

that an activity may occur at the workplace that will involve a serious risk to the health or safety of a person emanating from an imminent exposure to a hazard and that this activity is likely to contravene a provision of the:

Work Health Safety Act 2011, section 19 Work Health Safety Regulation 2011, cl 422

I direct the person with control over the following activity:

Work in the amenities block shower room

To stop the carrying on of activity or stop the carrying on of the activity in the following way:

Prevent access to the amenities block shower room

Until an Inspector is satisfied that the following matters that give or will give rise to the risk have been remedied.

Basis for Inspector's belief

Workers health and safety placed at risk from suspected ACM not noted in the asbestos register exposed in the shower area.

Lawson Carpark Statement of Facts

Date	Key details
September 2017	A BMCC staff member inspected the Lawson Stockpile site and identified suspected ACM. Airsafe was engaged by BMCC to inspect and conduct soil testing.
26 September 2017	Airsafe reported that two of three suspected ACM fragments contained asbestos but with concentration levels below the relevant reporting limit.
23 October 2017	The 166 Letter alleged that the soil which had been moved from the Lawson Carpark to the Lawson Stockpile site was identified by Airsafe as contaminated with asbestos fragments. Concerns were expressed that affected workers, SafeWork and the community had not been notified.
14 November 2017	An Inspector and a State Inspector inspected the Lawson Stockpile and the Lawson Carpark sites.
16 November 2017	The Inspector issued Improvement notice 7-316750, which required BMCC to identify all individuals who had worked on the site during the relevant period and provide each person with a health risk assessment. It also required BMCC to make sure these individuals had been made aware of Council's Employee Assistance Program and the National Asbestos Exposure Register (NAER). ⁵²
	Although not required by SafeWork, BMCC instructed Airsafe to prepare an Unexpected Finds Procedure for the Lawson Stockpile and the Lawson Carpark sites. The Unexpected Finds Procedure specified the process that should be applied in the event that material that could contain asbestos had been discovered or damaged.
23 November 2017	Airsafe conducted a visual inspection of Lawson Carpark and took 10 soil samples.
5 December 2017	In response to the allegation in the 166 Letter, on 5 December 2018 the Inspector from the earlier inspection and Inspector A inspected the Lawson Stockpile and Lawson Carpark sites again in the company of BMCC staff and BMCC contractors SLR and Empire Contracting. None of the individuals present identified any visual signs of asbestos contamination during this inspection.
7 December 2017	Airsafe reported that no asbestos was found at concentration levels that reached the relevant reporting limit. The report recommended that when suspected ACM was found work should cease in the area until samples had been collected and analysed by competent personnel in accordance with the newly created Unexpected Finds Procedures.
20 December 2017	An SLR consultant attended the Lawson Carpark and conducted a visual inspection for any ACM on the surface of the garden beds.

52. The NAER was created by the Australian Government to record the details of members of the community who think that they may have been exposed to asbestos. The purpose of the NAER is to make sure that there is a record of asbestos exposures and also so that the data gathered can be used to identify potential risks to members of the community.

Date	Key details
21 December 2017	SLR issued a certificate confirming the areas inspected on 20 December 2017 were free of visible surface based asbestos contamination. The certificate declared that in the opinion of SLR the relevant area was fit for re-occupation and for normal works to proceed.
7 February 2018	Inspector B reinspected Lawson Carpark in accordance with the announcement on the radio program made by the Minister for Better Regulation on 24 January 2018 that all BMCC sites would be re-inspected. Inspector B did not identify any issues at the site and did not issue any notices.
12 March 2018	A BMCC employee reported to BMCC management that Lawson Carpark was contaminated with asbestos and sent through several photos showing what he believed to be asbestos contamination.
12 March 2018	BMCC's Chief Safety Officer, reported this to SafeWork's Ms D and Inspector L at 6:45pm. He attached the previous clearance documentation and inspection reports for the site from both Airsafe and SLR as well as the BMCC employee's photos of the suspected ACM.
	The Chief Safety Officer's email noted that although the site was clear a short while ago, it evidently was not clear any longer. He pointed out that the photographs sent by the BMCC employee showed that the site looked significantly re-contaminated, including large amounts of broken ACM, which appeared to be scattered across and throughout the mulch used to finish off the landscaping. The Chief Safety Officer further pointed out that during the reinspection on 7 February, the entire inspection team was at that location for 45+ minutes and everyone inspected the area thoroughly, including walking through the garden beds. Neither Inspector B nor anyone else found traces of anything. The Chief Safety Officer therefore found it difficult to believe that the level of contamination the photos were showing had been there before, especially sitting on top of the mulch. He noted that they would have seen it quite clearly as would have both Airsafe and SLR.
8:08 pm on 12 March 2018	Ms D forwarded the Chief Safety Officer's email and attachments to Inspector B, asking him to call her first thing the next morning.
6:50 am on 13 March 2018	Ms D inspected Lawson Carpark. According to her inspector's notebook entry, she observed small fragments of material she suspected may have contained asbestos and verbally advised BMCC that a Prohibition notice would be issued.
13 March 2018	A few hours later, after speaking with Ms D, Inspector B, who was at the Sydney office, issued Prohibition notice 31717. The notice directed all work in, on and around the garden beds to cease and required BMCC to 'engage an independent occupational hygienist to provide a site remediation report and ensure the site was remediated as per the recommendations.'
13 March 2018	SLR prepared an Asbestos Site Assessment and Scope of Works document, which noted that SafeWork had found two asbestos fragments on top of the soil at Lawson Carpark. ⁵³

53. [occupational hygienist] *Asbestos Site Assessment and Scope of Works for Remediation 284 Great Western Highway Lawson NSW 2783* (Report), 3 April 2018.

Date	Key details
8:00 am on 14 March 2018	The occupational hygienist from Regional EnviroScience met a representative of BMCC's asbestos response team at Lawson Carpark to discuss further testing of the garden beds by taking samples from a 100mm depth every 2 x 2m ² .
	On the same day, Inspector L inspected Lawson Carpark to follow up on BMCC's progress in complying with the Inspector B's Prohibition notice. Inspector L recorded in his Inspector's notebook that he requested BMCC's Chief Safety Officer, carry out further comprehensive testing.
	The precise terms of the 14 March 2018 soil-sampling instruction were not recorded by Inspector L, but other documentary evidence indicates that he instructed BMCC to undertake sampling at depths of 500mm at 2m ² intervals rather than 100mm as recommended by the occupational hygienist. These sampling instructions were in addition to the requirements of Prohibition notice 31717, which merely directed BMCC to engage an occupational hygienist to create a 'site remediation report'.
	One of the Regional EnviroScience consultants working on site, queried the sampling instructions because in his opinion they were excessive and unwarranted in the circumstances.
	The Chief Safety Officer agreed to the testing specifications given by Inspector L, despite also being of the view that it did not appear to be warranted.
	Regional EnviroScience was subsequently told by BMCC that the sampling instructions were what SafeWork required and proceeded to undertake sample in accordance with the instruction. ⁵⁴ Test trenches were excavated in 116 squares to depths ranging from 500mm-600mm. Each bucket of soil taken from the test trenches was also inspected visually. ⁵⁵
3 April 2018	<p>Regional EnviroScience finalised its report, Asbestos Site Assessment and Scope of Works for Remediation Report.</p> <p>ACM was found in eight of the 116 test trenches. All but one of the eight trenches returned concentration results that fell below the relevant asbestos investigation criteria for parks and public areas.</p> <p>The one result that returned levels above criteria was a piece of asbestos pipe found in grid box 97. The pipe was removed and no other suspected ACM was sighted.</p> <p>The Regional EnviroScience report concluded that no further investigation or remediation of Lawson Carpark was required, apart from the requirement to update the Asbestos Register to reflect the ACM found.</p>
5 April 2018	Ms D emailed BMCC's Chief Safety Officer (copying Inspector L) to advise that she had spoken to Inspector L and the notice could be lifted that day.

54. [occupational hygienist] *Asbestos Site Assessment and Scope of Works for Remediation 284 Great Western Highway Lawson NSW 2783* (Report), 3 April 2018.

55. *Ibid.*

Notices under the WHS Act

The primary instrument used by SafeWork Inspectors for achieving compliance with work health and safety legislation are statutory notices such as Improvement and Prohibition notices issued under Part 10 of the WHS Act.

Improvement notices are focused on improving practices, remedying contraventions and fixing safety issues that are not a serious risk to health and safety. A workplace can generally continue operating while Improvement notices are being actioned, with the aim being to correct unsafe work practices quickly. For example, an Improvement notice may require a business to fix a slip hazard or to train workers in the safe use of plant and equipment, while continuing day-to-day business.

Prohibition notices are aimed at to immediately stop activities that involve serious risks from eventuating in injury or death. A Prohibition notice may include directions to stop an activity or to change the way the activity is done, in order to prevent illness or injury. For example, if scaffolding is not safe to be used, a Prohibition notice can be issued to stop work immediately on or around the scaffolding until the issue is fixed.⁵⁶

Improvement notices

SafeWork's procedure on issuing Improvement notices⁵⁷ specifies that Improvement notices are issued to remedy systems of work or hazards, which do not or will not pose a serious and immediate or imminent risk to the health or safety of any person, or to address contraventions of the WHS Act or WHS Regulation.

Inspectors are expected to issue Improvement notices if they have a reasonable belief that there is a contravention or likely contravention, unless:

- a prohibition notice is appropriate in the circumstances
- the situation is remedied while the Inspector is present at the workplace
- the issue is the subject of an agreed action plan
- or some other appropriate action is considered by the Inspector to achieve the desired outcome.

Notices are expected to give a clear picture of what compliance is or looks like and allow the workplace to comply with work health and safety requirements.

Inspectors are expected to '*clearly identify*' within the notice the reason for its issue.⁵⁸ Terms such as *unsafe systems of work* are considered insufficient.⁵⁹ The notice should state what injuries are likely to occur and state the risk.

Inspectors must check notices for compliance after the compliance date and no later than ten days following the compliance date. Where it is reasonably practicable, compliance should be checked via a workplace visit.⁶⁰

Where compliance is checked by photographs, documents or by means other than visiting the workplace, the information should be verified through contacting a health safety representative or worker representative or by other means.⁶¹

56. <https://www.safework.nsw.gov.au/compliance-and-prosecutions/improvement,-prohibition-and-penalty-notices>

57. WHSDOM Procedure *Issuing an improvement notice* 8/08/2018.

58. WHSDOM Procedure *Issuing an improvement notice* 8/08/2018.

59. WHSDOM Procedure *Issuing an improvement notice* 8/08/2018.

60. WHSDOM Procedure *Issuing an improvement notice* 8/08/2018.

61. <https://www.safework.nsw.gov.au/compliance-and-prosecutions/improvement,-prohibition-and-penalty-notices>

Prohibition notices

SafeWork's procedure for issuing prohibition notices (**Notices and Directions procedure**)⁶² states that a prohibition notice is issued to prevent and rectify a workplace activity that involves, **or will involve a serious and immediate or imminent** risk to a person's health and safety (emphasis added).

The Notices and Directions Procedure instructs Inspectors to issue prohibition notices where:

- a) *an activity involves a serious risk to the health or safety of any person arising from an immediate or imminent exposure to a hazard*
- b) *the activity is not occurring but where the inspector reasonably believes the activity will occur.*⁶³

It also provides that:

- c) *the notice must relate to a particular part of the workplace, a particular activity, or a particular work procedure. A notice must not prohibit **all** activity at the workplace.*⁶⁴
- d) *a notice may be issued after an Improvement notice has been issued, if the degree of risk has increased since the improvement notice was issued.*⁶⁵
- e) *a notice is expected to give a clear picture of what compliance is or looks like and to provide directions that will allow the PCBU to comply with the work health and safety requirements.*⁶⁶

Prior to issuing a prohibition notice, an Inspector is required to assess the gravity of the risk associated with the activity occurring at the workplace. If the risk is sufficiently serious and a prohibition notice is issued, a workplace may be shut down indefinitely.⁶⁷ The relative seriousness of this form of enforcement action is also reflected in the maximum potential penalty for the breach of a prohibition notice, which in the case of an individual is \$100,000 and in the case of a body corporate is \$500,000. Furthermore, a prohibition notice remains in place indefinitely until an Inspector is satisfied that the matters that give, or will give rise, to the risk have been remedied.

Agreed actions

Agreed actions were informal agreements between a workplace and an Inspector that a compliance notice would not be issued on the condition that the workplace addressed the issue identified. The SafeWork Compliance Policy suggested that agreed actions were an appropriate tool to achieve compliance where the contravention was considered minor and the risk was low.⁶⁸ Agreed actions issued were required to be recorded in the inspection report.⁶⁹

Some within SafeWork viewed agreed actions as an inappropriate mechanism to secure compliance. This was primarily because in the event the workplace failed to take the agreed action, SafeWork would have no formal recourse to either ensure compliance or take further enforcement action against the workplace. Others thought that such a tool had an appropriate place within the compliance framework, if used appropriately.

62. WHSDOM Procedure Notices and Directions – Issuing a prohibition notice 07/06/2016, p. 4.

63. WHSDOM Procedure Notices and Directions – Issuing a prohibition notice 07/06/2016, p. 4.

64. WHSDOM Procedure Notices and Directions – Issuing a prohibition notice 07/06/2016, p. 4.

65. WHSDOM Procedure Notices and Directions – Issuing a prohibition notice 07/06/2016, p. 5.

66. WHSDOM Procedure Notices and Directions – Issuing a prohibition notice 07/06/2016, pp. 5-6.

67. WHS Act 195(2); *Alcoa of Australia Ltd v Andrew Chaplyn State Mining Engineer Department of Mines and Petroleum* [2018] WAIRC 268, [102].

68. SafeWork NSW, Compliance Policy, September 2013, p.5.

69. SafeWork NSW, Notices and Directions – Issuing an Improvement notice, 11 November 2016, p.7.

On 30 November 2017, Inspectors working on BMCC sites were told that formal compliance action, as opposed to agreed actions, was to be preferred in all circumstances. At this stage, SafeWork had not made any formal policy changes that reflected this approach.

However, in early 2018 the policy around the use of agreed actions was reviewed by the SafeWork Operational policy area. They came to the view that agreed actions had been used in circumstances where notices should have been issued. In July 2018, following this review, the policy was formally changed and Inspectors were no longer able to use agreed actions.

Licensed Asbestos Assessors (LAAs)

The WHS Regulation requires asbestos assessors (who provide air monitoring and clearance certificates in relation to friable asbestos removal work) to be licensed. Only an individual holding the qualifications set out in cl 493 of the WHS Regulation may apply for an asbestos assessor licence. Typically, an applicant for an asbestos assessor licence must have two years of industry experience and submit evidence to demonstrate their competence. LAAs can:

- conduct air monitoring for Class A asbestos removal work
- conduct clearance inspection work for Class A Asbestos removal work
- issue clearance certificates in relation to Class A asbestos removal work.

Class A asbestos removal work can include:

- any amount of friable asbestos or ACM
- any amount of asbestos contaminated dust or debris
- any amount of non-friable asbestos or ACM.⁷⁰

LAAs are an integral part of the work health and safety regulatory scheme. Both PCBUs and SafeWork rely on LAAs to ensure compliance with the WHS Act.

The WHS Regulation also regulates the removal of certain types and quantities of asbestos. An asbestos removal licence is required in these circumstances to ensure, so far as is reasonably practicable, the health and safety of workers and other persons is not put at risk from work carried out as part of the removal process.

A workplace that commissions the removal of asbestos at the workplace must ensure asbestos removal work is carried out only by a licensed asbestos removalist who is appropriately licensed to carry out the particular type of work to be done.

70. Based on Applicant Guide for Asbestos Licences and Notifications, SafeWork NSW, August 2019.

3. Testing requirements

3.1. Overview

This chapter examines the allegation that unreasonable testing requirements were imposed on BMCC making it difficult for it to rely on the advice of its licensed contractors.

Wentworth Falls Preschool was closed due to a discovery of Asbestos Containing Material (ACM) in a weathered piece of asbestos board on the fascia of the gazebo at one of the entrances. Even though initial air monitoring results were below all the asbestos exposure standards, SafeWork required BMCC to undertake additional tests and keep the Preschool closed for another two weeks. The tests were in excess of those recommended by legislated guidelines and industry standards and there was no evident justification for carrying them out.

BMCC was required to excavate 116 soil-sampling trenches to a depth of 500m² at Lawson Carpark and test the soil for asbestos fibres due to a find of four small fragments of suspected ACM on top of the mulch. The number and depth of trenches required to be excavated was almost ten times the number recommended by Licensed Asbestos Assessors (LAAs), and over twenty times the minimum recommended by industry guidelines.

Both requirements resulted in a disproportionate and detrimental financial impact on BMCC and its ratepayers, making it difficult for BMCC to rely on the advice of its LAAs and occupational hygienists.

3.2. Was the additional testing of Wentworth Falls Preschool reasonable?

Summary of relevant facts

Regional EnviroScience conducted background air monitoring at Wentworth Falls Preschool on 30 November 2017 while undertaking work on behalf of BMCC in response to Prohibition notice 31989. The air monitoring detected two 'respirable' fibres outside the Preschool and one 'respirable' inside the Preschool.

Improvement notice 7-38316 issued by Inspector A on 6 December 2017 directed BMCC to undertake scanning electron microscopy method (SEM) testing of the fibre found inside the Preschool (to determine whether it was asbestos) and to undertake further comprehensive dust sampling of the whole site.

The notice identified that Wentworth Falls Preschool was contravening s 20 of the WHS Act and cl 420(2) of the WHS Regulation. Clause 420(2) of the WHS Regulation requires that a workplace ensure that the 'exposure standard for asbestos is not exceeded at the workplace'.

The facts supporting the Inspector's belief that this contravention was occurring, as stated in the notice, were that workers might have been exposed to asbestos fibres because air monitoring conducted on 30 November 2017 detected 'respirable' or 'airborne' fibres.

The air monitoring results were below all asbestos exposure standards

The results of the background air monitoring conducted on 30 November 2017, which was relied on to issue the Improvement notice, were below 0.01 f/mL.

The **workplace exposure standard** prescribes the maximum permissible level of airborne concentration of particular substances at a workplace.⁷¹ The workplace exposure standard is defined by cl 5 of the WHS Regulation to mean the relevant standard found in the *Workplace Exposure Standard for Airborne Contaminants* as published by SafeWork Australia on its website and as updated from time to time.

The workplace exposure standard for all types of asbestos is 0.1 f/mL or 0.1 fibres per mL of air.⁷² This was the standard that applied to Wentworth Falls Preschool and as shown by the background air monitoring of 30 November 2017, the Preschool was well below it.

Another standard, referred to as the **workplace clearance standard**, applies to workplaces where asbestos removal work had occurred and a clearance inspection is carried out in accordance with WHS Regulation cl 473.

The workplace clearance standard is prescribed by cl 474(4)(b) of the WHS Regulation and is <0.01 f/mL. The LAA who conducts the clearance inspection after asbestos removal work had occurred must not issue a clearance certificate unless they are satisfied that the air monitoring (undertaken as part of the clearance inspection) showed that asbestos was below 0.01 f/mL. This is to ensure that the area where the asbestos removal work occurred is clear of airborne asbestos fibres before it can be safely reoccupied.

According to cl 475 of the WHS Regulation, air monitoring is only required when the volume of ACM removed is greater than 10 m².

In the case of Wentworth Falls Preschool, only minor repairs (the replacement of a tile and the encapsulation of ACM) were carried out between 28 November 2017 and 6 December 2017. There was no construction work either that would have required air monitoring or notification to SafeWork (as is required by cl 66 of the WHS Regulation).

Because no asbestos removal work had occurred, the workplace clearance standard did not apply. Regardless, the air monitoring results of 30 November 2017 had already confirmed that the concentration was below the workplace clearance standard. As at 5 December 2017, BMCC had therefore met the most stringent legislative and industry standards and the site could have been lawfully re-occupied.

Not only was BMCC not permitted to reopen the Preschool but it was required to undertake further testing by SEM to confirm whether the two fibres were in fact asbestos.

The air monitoring test results did not warrant SEM testing

Both the Australian Standard and the National Association of Testing Authorities, Australia (**NATA**) guidance material suggest that Polarised Light Microscopy (PLM) is the preferred testing methodology for airborne fibres unless there is reason to suspect the fibres detected during sampling may not be Chrysotile, Crocidolite or Amosite (all identifiable through PLM).⁷³

The site in question was a preschool, not a construction site. SafeWork received a copy of the Asbestos Register for the site on 5 December 2017. The register indicated that all ACM identified on site was Chrysotile asbestos (which was identifiable through PLM): no other type of asbestos had been previously identified. There was no evidence of asbestos fibres of a kind that warranted SEM testing.

71. WHS Regulation 2017 cl 420.

72. SafeWork Australia, *Workplace Exposure Standards for Airborne Contaminants*, 18 April 2013, p. 15.

73. National Occupational Health and Safety Commission, Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition, 2005, URL: www.safeworkaustralia.gov.au/system/files/documents/1702/guidancenote_membranefiltermethodforestimatingairborneasbestosfibres_2ndedition_nohsc3003-2005_.pdf; National Association of Testing Authorities, *Working with Accredited Asbestos Facilities*, 2016, URL: www.nata.com.au/component/phocadownload/category/115-industry-guides

Ms J, the Regional EnviroScience occupational hygienist engaged by BMCC to conduct testing at the Preschool after the Improvement notice was issued was interviewed in the course of the Ombudsman investigation.

Ms J was of the view that SEM testing was not called for at the Preschool because the amount of fibres detected by the air monitoring was consistent with background levels of respirable fibres naturally occurring in the environment.

Advice published by the Commonwealth Department of Health accords with Ms J's opinion, stating that the '[a]mbient background air usually contains between 10 and 200 fibres in every 1000 litres.'⁷⁴ Ms J could not recall having been asked to undertake further testing in similar circumstances in the past.

In other words, if SafeWork wished to keep the site closed, or conduct further analysis on the fibres detected during air monitoring, it would have needed to demonstrate the reasons for doing so. Possible reasons might have included:

- some basis for disregarding the test results from 30 November, such as the filter samples had been contaminated
- the fact that construction work had taken place at the site after the return of test results
- reason to believe the asbestos fibres may not be identifiable by PLM, the standard qualitative testing methodology, or
- some other significant public interest for doing so.

None of these considerations were applied to the Preschool site.

The 2016 NATA Industry user guide No. 7 *Working with NATA accredited Asbestos Facilities* indicates there were no NATA accredited laboratories for asbestos testing using SEM. This is not because NATA will not accredit laboratories using SEM testing, but because a standardised methodology had not been developed to ensure inter-laboratory consistency in results and there was at that time insufficient demand for this type of accreditation. In other words, rather than opting for PLM, which is internationally recognised, SafeWork directed BMCC to undertake a testing methodology that does not yet have an established set of criteria for national accreditation.⁷⁵

The extensive testing and minor remediation work at the Preschool cost \$18,646 and may have abated the concerns of some segments of the community. The course of action taken by SafeWork in this matter, however, may have also had the opposite effect and unduly amplified the perceptions of the risk faced by the community despite the test results showing acceptable levels.

When determining whether notices should be issued, Inspectors are required by the WHS Act to consider the facts before them and apply the relevant standards as prescribed by the WHS Act and regulations.⁷⁶

The Improvement notice required BMCC to meet an unidentified and indeterminate standard rather than the legislated standard, without any apparent justification. This approach has the potential to undermine public confidence in both the adequacy of the legislated standards and in SafeWork's ability to administer the scheme fairly, consistently, and in accordance with the law. It could also impact on the ability of workplaces to rely on clearance certificates as evidence of compliance, and may, as happened in this instance, substantially increase compliance costs.

74. Commonwealth Department of Health, *Who is at risk of developing asbestos-related diseases?*, 6 March 2013, (URL: <https://www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc-asbestos-health-asbestos-risk-diseases>)

75. National Association of Testing Authorities, *Working with Accredited Asbestos Facilities*, 2016, URL: www.nata.com.au/component/phocadownload/category/115-industry-guides

76. *Growthbuilt Pty Ltd v SafeWork NSW* [2018] NSWIRComm 1002, [94]-[96].

Conclusions

The requirement imposed by Improvement notice 31989 to carry out scanning electron microscopy testing of airborne fibres was unreasonable. The factors that support that conclusion include:

- the initial air monitoring results were below all asbestos exposure standards, which meant the reoccupation of Wentworth Falls Preschool should have been allowed
- there was no other evidence to necessitate the additional testing and continued closure of the Preschool.

3.3. Was the soil-sampling requirement imposed at Lawson Carpark reasonable?

Summary of relevant facts

After BMCC received Prohibition notice 31717, an occupational hygienist from Regional EnviroScience met with BMCC's asbestos response team at Lawson Carpark to discuss further testing of the garden beds where small fragments of ACM had been observed. The hygienist recommended taking samples from a 100mm depth every 2 x 2 m².

On 14 March 2018, Inspector L followed up on BMCC's progress in complying with the Prohibition notice. He requested further comprehensive soil-sampling and testing.

The precise terms of Inspector L's 14 March soil-sampling direction to BMCC were not recorded by him, but other documentary evidence indicates he instructed BMCC to undertake sampling at depths of 500mm at 2 x 2 m² intervals, rather than the 100mm recommended by the Regional EnviroScience occupational hygienist. Inspector L's sampling instructions were in addition to the requirements of Prohibition notice 31717, which merely directed BMCC to engage an occupational hygienist to create a 'site remediation report'.

Test trenches were subsequently excavated in 116 squares to depths ranging from 500mm-600mm. Each bucket of soil taken from the test trenches was also inspected visually.

ACM was found in eight of the 116 test trenches. All but one of the eight returned concentration results that fell below the relevant asbestos investigation criteria for parks and public areas.⁷⁷ The one result that returned levels above was a piece of asbestos pipe found in grid box 97. The pipe was removed and no other suspected ACM was sighted.

The Prohibition notice was 'complied' by SafeWork on 5 April 2018.

The soil-sampling requirement exceeded those in the applicable guidelines

The current asbestos removal Code of Practice under the WHS Act - *How to safely remove asbestos (Asbestos Code)* came into effect on 1 January 2012.⁷⁸ The Asbestos Code relevantly states 'where guidance on the assessment and remediation of contaminated sites is sought, the Assessment of Contaminated Sites National Environmental Protection Measure (NEPM) should be referred to'.

Based on NEPM Schedule B2 and the EPA *Contaminated Sites – Sampling Design Guidelines (EPA Guidelines)*, Regional EnviroScience advised BMCC on 14 March 2018 that the appropriate testing methodology was the hand-picking/raking method in order to assess to a 95% level of confidence

77. NEPM Schedule B1 p 30; Regional EnviroScience Report, Asbestos Assessment and Scope of Works for Remediation: Lawson Carpark (Report), April 2018, p. 19

78. The Hon Greg Pearce MLC, Minister for Finance and Services, 'Work Health and Safety Act 2011 – Notice of Approved Codes of Practice', *New South Wales Government Gazette*, No 127, 16 December 2011, p. 7194. This code is based on a national model code of practice developed by SafeWork Australia under the harmonisation of national work health and safety legislation.

whether the Lawson Carpark was contaminated. This methodology would have involved taking 12 samples at a depth of 100mm in grid areas of up to 10m², which was already over the minimum of five samples recommended by the EPA Guidelines.

Ms J, the Regional EnviroScience occupational hygienist, confirmed in her evidence to the Ombudsman that the hand-picking/raking method was the most appropriate one for the circumstances. Ms J's advice was consistent with both the EPA Guidelines and the NEPM.⁷⁹ This was also the method used by Airsafe in November 2017 during their compliance inspection of the site.⁸⁰

The Prohibition notice simply required BMCC to engage an independent occupational hygienist to provide a site remediation report and ensure the site was remediated in accordance with those recommendations. However, Inspector L required BMCC to use the 'Test Pit and Trenches' sampling method.⁸¹ This method is far more extensive and expensive, and is generally reserved for circumstances where the suspected contamination extends below the surface of the soil, as opposed to circumstances where fragments are found above ground. The Test Pit and Trenches method typically requires samples to be taken from the suspect areas at a depth of 300mm below the likely limit of contamination or the likely depth of soil disturbance.⁸²

Approximately 150 tonnes of soil had been removed from the Lawson Carpark in July 2017, and only 27m³ of soil (approximately 40 tonnes) had been reintroduced to fill the garden bed. According to the estimate of Regional EnviroScience's occupational hygienist, the suspected contaminated fill at Lawson Carpark extended, on average, to 100mm below the surface of the garden bed.

SafeWork's requirement to sample to a depth of 500mm may have been appropriate if the amount of reintroduced material equalled 375 tonnes, more than double the amount of soil that was initially removed. As this was not the case, there was no basis to suspect that soil at a depth of 500mm was contaminated with asbestos.

The Carpark area was approximately 500m². Inspector L required a total of 116 samples to be taken. Applying the EPA Guidelines, a minimum of 5 samples would be required for comparable sites.⁸³ The number of samples required by SafeWork was almost ten times the number recommended to BMCC by Regional EnviroScience on 14 March 2018 and over twenty times the minimum recommended by the EPA Guidelines.

Inspector L acknowledged the LAA's opinion that a 95% confidence level could be reached by only taking 12 soil samples and that if similar testing was required at every site they 'would be digging up everything'. However, he pointed out that this did not mean the testing was inappropriate or unreasonable, it only meant that it was extensive.

In its submissions, SafeWork acknowledged the sampling advice of the occupational hygienist, but pointed out that on BMCC's own evidence the area had had an *average* of 100mm of fill added to the garden bed, meaning the depth in some areas would be less than 100mm and more than 100mm in others.

If SafeWork wanted BMCC to conduct soil-sampling significantly more onerous than the code or industry standard, the reason should have been explained and documented. This was not done.

79. EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995, *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2.

80. *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2, pp. 73-75. See also EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995; and Western Australia Department of Health, *Guidelines for the Assessment, Remediation and Management of Asbestos-Contaminated Sites*, May 2009; Statement of Information (Voluntary), Ms J, 10 October 2018, pp. 43-45.

81. [occupational hygienist] *Asbestos Site Assessment and Scope of Works for Remediation 284 Great Western Highway Lawson NSW 2783* (Report), 3 April 2018, p. 7.

82. *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2, p. 74.

83. EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995, p. 8.

The discretion to vary the requirements was not justified

It is acknowledged that the EPA Guidelines only prescribe minimum standards and expressly state they are not to be taken as a 'blanket approval' by the EPA for minimum sampling. Assessors must be prepared to defend their use of the minimum sampling as prescribed by the Guidelines implying that in most circumstances more should be done.⁸⁴

In its submissions, SafeWork emphasised that the issue of prohibition notices is a discretionary power and while there was guidance material available as to the appropriate level of testing it was also discretionary in this case.

It is acknowledged that Inspector L had a discretion to vary or increase the requirement if the circumstances warranted. However, discretionary powers must be exercised reasonably. Discretionary decisions may be considered unreasonable within the meaning of s 26 of the Ombudsman Act if they are inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained.

The sampling requirement was not justified by the evidence because the facts indicated that Lawson Carpark was clear of asbestos contamination a short while before the discovery of the ACM. The discovery amounted to a find of four small fragments on top of the garden beds.

SafeWork pointed out that the clearance certificate issued by Airsafe on 23 November 2017 detailed a walkover and visual inspection of the site. In addition, samples were taken at 7 metre intervals at depths varying from 50-100mm. The clearance certificate issued by SLR Consulting on 21 December 2017 stated that it applied to visual above ground surfaces only, a limitation noted in the certificate itself. However, this in itself does not justify the requirement for the level of testing which was contrary to the recommendations of the occupational hygienists.

Inspector L made the following submissions:

- Strict compliance with the Asbestos Code is not required and the Code relevantly states on page 3:

Codes of practice are admissible in court proceedings under the WHS Act and Regulations. Courts may regard a code of practice as evidence of what is known about a hazard, risk or control and may rely on the code in **determining what is reasonably practicable in the circumstances to which the code relates. The WHS Act and Regulations may be complied with by following another method, such as a technical or an industry standard, if it provides an equivalent or higher standard of work health and safety than the code.** (emphasis in the original submission)
- Crucially, this situation is expressly contemplated by subsection 275(4) of the WHS Act, which provides:

Nothing in this section prevents a person from introducing evidence of compliance with this Act in a manner that is **different from the code** but provides a standard of work health and safety that is **equivalent to or higher than the standard required in the code.** (emphasis in the original submission).
- Nothing in the WHS Act requires a SafeWork Inspector to consider or apply the Asbestos Code. Further, the WHS Act does not provide that the Asbestos Code is to be used exclusively when determining what is 'reasonably practicable' in the circumstances.
- Additionally, Schedule 28 to the NEPM provides at 6.1 that:

The **site assessor should exercise professional judgement** to select and develop an appropriate sampling design, based on accurate and reliable site-specific information (as integrated in the CSM) as far as practicable to obtain sufficient representative data to address the DQOs. For example, if the objective is to establish whether a site is contaminated, a limited number of samples located in those areas most likely to be contaminated may be sufficient,

84. EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995, p. 8.

however, a greater number of samples and effort would be required to delineate known contamination. An explanation of, and justification for, the sampling design selected should be provided in the assessment report. (emphasis in the original submission)

- The EPA Guideline does not have the significance under the NEPM that has been attributed to it as it is only listed in the bibliography to Schedule 82 of the NEPM. It follows that, strict compliance with the Asbestos Code is not required.
- Further, Schedule 82 to the NEPM headed 'Sampling' provides (at 7.5.4) that:
 - Samples for inorganic and non-volatile components should be taken at various depths towards the centre of the stockpile from 300 mm below the stockpile surface.
 - ... Samples for volatile and semi-volatile compounds should be taken without delay from a freshly excavated surface 500 mm or greater depth below the stockpile surface.
- In light of the above, the appropriate soil-sampling design and methodology to be adopted in any circumstance is within the discretion of the Inspector, even where reasonable minds could differ on the outcome. The fact that Regional EnviroScience considered one particular method was appropriate does not, in turn, establish that the soil-sampling option agreed upon with BMCC in the presence of Inspector L was not appropriate.
- The preliminary views expressed by Regional EnviroScience before and at the site visit did not appropriately consider the site and any potential contamination prior to ultimately providing their recommendation for soil-sampling. Accordingly, the preliminary views of Regional EnviroScience were not sufficient to establish that Inspector L's assessment was not reasonable and appropriate in the circumstances as at 14 March 2018.
- Inspector L had knowledge only of the sensitive circumstances pertaining to the site, and only some understanding of the site's history, as BMCC had not provided full disclosure at the relevant time. At the time Inspector L's knowledge of the site was that it was:
 - (a) previously used as a public theatre;
 - (b) currently in use as a car park; and
 - (c) that BMCC representatives had stated that it represented a risk to council workers and members of the public.
- In ordinary circumstances where a site is not part of a reinspection program such as this one, Inspector L would most commonly require a soil-sampling method that involved a visual inspection and sparrow picking for the removal of non-friable asbestos with sign off by an occupational hygienist. However, in this situation, he agreed with those present at the site visit that more rigorous testing was required due to the limited knowledge about the site.
- Based on paragraph 11.3.1 of Schedule 82 to the NEPM, the circumstances prevailing at the site warranted a departure from the prescribed minimum. Accordingly, Inspector L was not acting in a manner inconsistent with the WHS Act in requiring a more comprehensive testing method than the prescribed minimum in the EPA Guidelines. He was in fact acting in a manner entirely consistent with its requirements given the circumstances with which he was presented at the site.
- Regional EnviroScience was the independent occupational hygienist engaged for the purpose of BMCC complying with the prohibition notice. As was appropriate under the terms of the notice, BMCC acted upon the advice of Regional EnviroScience in determining what was required to be undertaken in order to comply with the Notice.
- It is correct that, in order to comply with the notice, BMCC chose to undertake a sampling process over and above what is prescribed by the Asbestos Code. In any event, even if Inspector L had actually required the use of the particular sampling method used, s 275(4) of the WHS Act provides that compliance can be established by meeting a standard that exceeds that set out in the Asbestos Code.
- All parties present at the Lawson Carpark on 14 March 2018, including him, agreed with a soil-sampling depth of 500mm. The soil-sampling method selected was decided upon by the group

collectively, taking into consideration the options given by the Regional EnviroScience LAA present at the time. Inspector L simply agreed with those present as to the suitable sampling method and his role was to assist BMCC to comply with the Prohibition notice.

- Although the LAA questioned the sampling methodology on 16 March 2018, Inspector L considered that the Test Pit and Trenches Method used to comply with the Prohibition notice had secured the site from further asbestos management investigations of the garden beds and any doubts of widespread contamination on the site.

It is not accepted that Inspector L was assisting BMCC comply with the Prohibition notice, that he simply agreed to a testing methodology arrived at by consensus, or that BMCC chose to undertake a sampling method over and above what was advised by the independent occupational hygienist. The evidence suggests otherwise.

An email from BMCC's Chief Safety Officer on 14 March 2018 to a number of BMCC staff and Inspector L and Ms D recorded the discussions in the following terms:

*This morning SafeWork NSW, myself, [BMCC employee] and a number of union delegates and the ART were on site at the carpark and SafeWork NSW afforded **specific directions** to EnviroScience on how the testing was to proceed. In short, testing will be surface and 'at depth' testing, down to 500mm. (emphasis added).*

Early in the morning of 14 March 2018, another BMCC employee, emailed the Chief Safety Officer saying:

*Met with X [a Regional EnviroScience consultant] this morning – can you give her a ring to let her know what type of testing SafeWork **stipulated**. (emphasis added).*

Another email from the same employee to the LAA, on 14 March 2018 stated:

*Hi – we were asked to get a quick peer review of our methodology which you sent through today. Can you confirm X's and Y's comments below. Due to the sensitivities around this we are trying to tick all the boxes when we get further down the track. I believe we are ok with his comments in relation to soil depth as [occupational hygienist] is now excavating to 500mm rather than 100-200mm **based on SafeWork's comments with her onsite today**. Apparently **they initially asked for 1000 mm** but [the occupational hygienist] talked them around to 500mm which is a great outcome. (emphasis added).*

The discussions that occurred about the sampling requirement on 14 March 2018 and shortly after cannot be characterised as Inspector L agreeing with BMCC's choice or the occupational hygienist's advice. The contemporaneous emails support BMCC's claim that SafeWork gave specific directions and that BMCC understood them as directions, even if they attempted to question their reasonableness.

There is no question that an Inspector has discretion to require a sampling methodology that exceeds the minimum requirements in the relevant guidelines. However, such a requirement must be warranted by the circumstances and must be reasonable.

The fact that nothing prevents a person from introducing evidence of WHS Act compliance in a manner that is different from the Asbestos Code but provides a standard of work that is equivalent or higher than the one specified by the Code, is not relevant to the question of whether requiring a higher standard was reasonable in any given case.

The impact on BMCC was not given due consideration

The extensive sampling requirement had a detrimental financial and practical impact on BMCC and consequently on its ratepayers. The soil-sampling and testing for Lawson Carpark cost \$74,841.⁸⁵ That amount does not include BMCC's costs in hiring vehicles to assist in digging the trenches or restoring the garden beds following the testing. In contrast, the testing completed by Airsafe in November

85. Regional EnviroScience, Invoice 6746, 24 April 2018.

2017, which adhered to the EPA Guidelines, cost \$1,452. Regional EnviroScience recommended testing similar to that undertaken by Airsafe, which met the requirements of the Asbestos Code and could have been relied on as evidence of compliance by BMCC in any court proceedings.

When determining whether a particular decision is invalid because it amounts to an abuse of power, courts have considered the impact of the decision on the rights of others, the responsibility of the agency to take account of the effect of its actions, and alternatives open to the agency to address the issue in dispute.⁸⁶ The cost to BMCC and ultimately BMCC ratepayers would have been significantly less had SafeWork directed it to undertake testing in accordance with the LAA's recommendation. Instead, the cost to BMCC of complying with Inspector L's direction was much higher. In the circumstances, the direction was unreasonable.

Conclusions

The soil-sampling requirement imposed at Lawson Carpark in March 2018 was unreasonable because:

- it exceeded the applicable guidelines
- the Inspector's discretion to vary those guidelines was not supported by the circumstances, and
- the impact on BMCC was not considered.

3.4. Supporting information

Asbestos and risks to health

Asbestos is the name given to a group of naturally occurring minerals found in rock formations. Asbestos fibres are not visible to the naked eye. They are very light, remain airborne for a long time, and can be carried by wind and air currents over large distances before settling down. Larger fibres and particles tend to settle more quickly. Asbestos fibres do not dissolve in water or move through soil. They are generally not broken down to other compounds and remain virtually unchanged over long periods. Asbestos-containing building products are classified as either 'friable' (soft, crumbly) or 'bonded' (solid, rigid, non-friable).

Friable asbestos products usually contain high levels of asbestos (up to 100% in some instances), which is loosely held in the product, meaning that asbestos fibres may be released into the air. For this reason, friable asbestos products are dangerous, as they may be inhaled by people living or working in the vicinity.

Bonded asbestos products are made from a bonding compound (such as cement) mixed with a relatively small proportion (usually less than 15%) of asbestos. They are solid, rigid and non-friable. They are commonly known as 'fibro', 'asbestos cement' and 'AC sheeting'. When in good condition, bonded asbestos products do not normally release any asbestos fibres into the air and are considered a very low risk for people who are in contact with them, as long as appropriate safety precautions are used when they are disturbed. However, when bonded asbestos products are damaged or badly weathered (including by hail damage), they may become friable.

Asbestos fibres can pose a risk to health if airborne; inhalation is the main way that asbestos enters the body. Breathing in asbestos fibres can cause asbestosis, lung cancer and mesothelioma. According to information published by NSW Health, the risk of contracting these diseases increases with the number of fibres inhaled and the risk of lung cancer from inhaling asbestos fibres is also

86. *Edelsten v Wilcox* (1988) 83 ALR 99, [113]-[114].

greater for people who smoke. People who develop health problems from inhaling asbestos have usually been exposed to high levels of asbestos for over a long time. The symptoms of these diseases do not usually appear until about 20 to 30 years after the first exposure to asbestos.⁸⁷

On 1 January 1988, asbestos was banned for use in building products in NSW. Prior to this, asbestos was commonly used as wall cladding, in eaves and in wet areas such as bathrooms and laundries. It was not until 31 December 2003 that all products containing asbestos were banned throughout Australia. Fibro sheeting that may contain asbestos is still present in many buildings built before 1988. Local government areas are faced with the legacy issues from asbestos present in ageing buildings and the Blue Mountains is not unique in this regard.

It is well-established that asbestos is a hazardous substance capable of causing cancer in humans. The Australian Mesothelioma Registry (**AMR**) reported that in the 2016-2017 reporting year, it had received 700 notifications of people newly diagnosed with mesothelioma. Also during the same period 575 patients had died (90.4% of these deaths were recorded as being due to the disease).⁸⁸ SafeWork has advised that by comparison, in 2018, in Australia 144 people died as a result of work-related traumatic injuries.

There are, generally speaking, two risk factors for developing asbestos-related diseases: the number of fibres inhaled and the individual's general health.

The risk of falling ill increases in proportion to the number of fibres an individual has inhaled over the course of their life. This is determined by the number of fibres inhaled at each exposure and how regularly the individual is exposed to asbestos. Exposure to asbestos is measured in terms of 'dose' (the number of fibres breathed in during a single exposure event), and 'cumulative dose' (the frequency of exposure events and the number of fibres inhaled during each event).

The general health of the individual also effects their likelihood of developing an asbestos-related disease. Studies have shown that smokers are more susceptible to developing asbestos-related diseases. The age of the individual when the majority of the exposure events occur had also been shown to influence the likelihood of developing an asbestos-related disease.⁸⁹

Air monitoring

Air monitoring falls into two broad categories: exposure monitoring and control monitoring. According to the *Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition (Guidance Note)*:

- **Control monitoring** means monitoring using static or positional samples to measure the level of a hazardous substance in an area. Static samples are taken at fixed locations between one and two metres above floor level. Control monitoring is designed to assist in assessing the effectiveness of implemented control measures. Control monitoring is not representative of actual occupational exposures and should not be used for that purpose. In an interview with the Ombudsman, the principal of EnviroScience further clarified that control monitoring could be described as 'what it is expected to be like during the normal course of your day, during normal work' as opposed to what asbestos exposure would be like during or immediately after removal work.

87. NSW Health: [https://www1.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/\\$FILE/asbestos-feb13.pdf](https://www1.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/$FILE/asbestos-feb13.pdf), accessed 10 January 2020.

88. Australian Mesothelioma Registry, Mesothelioma in Australia 2016: 6th Annual Report, 2017, p. v, URL: www.mesothelioma-australia.com/media/11836/amr-report-2016-6th.pdf

89. Environmental Health Standing Committee, Asbestos: A guide for householders and the general public, 2013, pp. 16-17 [www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/\\$FILE/asbestos-feb13.pdf](http://www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/$FILE/asbestos-feb13.pdf)

- **Exposure monitoring** means monitoring in a person's breathing zone to measure their likely exposure to a hazardous substance. Exposure monitoring is designed to reliably estimate exposure so that it can be compared with the occupational exposure standard or provide an estimate of a person's exposure.⁹⁰

Both qualitative and quantitative methodologies are used to understand the concentration of respirable fibres in air samples. The Guidance Note confirms the Membrane Filter Method (**MFM**), which is what was used by Regional EnviroScience for the background air monitoring, is the most appropriate and commonly used technique.

MFM is a quantitative method that uses a microscope to count the number of respirable fibres in a testing sample. Respirable fibres have a certain length to diameter ratio that can be inhaled into the lower lung. MFM detects the presence of respirable fibres, and does not distinguish between different types of respirable fibres. In other words, MFM can produce results that over-estimate asbestos concentration and/or include false-positives because the respirable fibres counted could include asbestos and non-asbestos fibres. The only way to ascertain whether respirable fibres caught during air monitoring are asbestos fibres is to perform a qualitative analysis of the fibres.⁹¹

Australian Standard AS 4964 *Method for the qualitative identification of asbestos in bulk samples* is the default qualitative test method used by National Association of Testing Authorities, Australia (**NATA**) accredited laboratories. The Australian Standard requires Australian laboratories to use Polarised Light Microscopy (**PLM**) as the principal method to determine whether a fibre is, in fact, an asbestos fibre.⁹² PLM uses a conventional microscope and polarised light to identify the composition of a sample. PLM can only identify the three most commonly used types of asbestos – Chrysotile, Crocidolite and Amosite. If the presence of other types of asbestos is suspected, they must be reported as 'mineral fibres of unknown type'. In instances where the results of an analysis identify 'mineral fibres of an unknown type', the Australian Standard recommends further investigation using another method. One such method is SEM, which produces images of a sample by scanning the surface with a focused beam of electrons. The electrons interact with atoms in the sample, producing signals that contain information about the surface and composition of the sample.⁹³

The Guidance Note suggests using PLM or SEM in situations such as construction sites that are likely to involve a mixture of dusts that look similar under the microscope such as vermiculite, talc and gypsum. It also suggests these techniques are useful where there is a potential risk to public health and safety.⁹⁴

SEM has not been selected as the default testing methodology, despite having the advantage of being able to identify all six types of asbestos and smaller fibres not able to be identified using PLM. Safe Work Australia considers MFM and PLM are sufficient methods of analysis in most circumstances as SEM is costly and slow. The Guidance Note states SEM is, '*not considered useful or necessary as the exposure standard has been developed from results of asbestos exposure measured by the MFM*'.⁹⁵

90. National Occupational Health and Safety Commission, Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition, 2005, pp 15-16, URL: www.safeworkaustralia.gov.au/system/files/documents/1702/guidancenote_membranefiltermethodforestimatingairborneasbestosfibres_2ndedition_nohsc3003-2005.pdf

91. National Occupational Health and Safety Commission, Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition, 2005, URL: www.safeworkaustralia.gov.au/system/files/documents/1702/guidancenote_membranefiltermethodforestimatingairborneasbestosfibres_2ndedition_nohsc3003-2005.pdf

92. Standards Australia, Method for the qualitative identification of asbestos in bulk samples, 2004.

93. National Association of Testing Authorities, Working with Accredited Asbestos Facilities, 2016, pp. 8-9, URL: www.nata.com.au/component/phocadownload/category/115-industry-guides

94. National Occupational Health and Safety Commission, Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition, 2005, URL: www.safeworkaustralia.gov.au/system/files/documents/1702/guidancenote_membranefiltermethodforestimatingairborneasbestosfibres_2ndedition_nohsc3003-2005.pdf

95. National Occupational Health and Safety Commission, Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition, 2005, p. ix URL: www.safeworkaustralia.gov.au/system/files/documents/1702/guidancenote_membranefiltermethodforestimatingairborneasbestosfibres_2ndedition_nohsc3003-2005.pdf

Soil-sampling guidelines

Investigating and assessing the level of soil contamination is complex. Several guidelines provide parameters for what appears to be standard practice used by LAAs and accepted by the courts as evidence of compliance with a duty or obligation under the WHS Act.

The WHS Act provides for the Minister to approve codes of practice for the purposes of the Act. Compliance with an approved code is admissible in proceedings for an offence against the WHS Act as evidence of compliance with a duty or obligation under the Act.⁹⁶ The court may also have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates, and rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.⁹⁷ A code can only be approved, varied or revoked following a process of consultation between the Governments of the Commonwealth and each State and Territory, unions and employer organisations.⁹⁸

The current Code of Practice on asbestos removal - *How to safely remove asbestos (Asbestos Code)* came into effect on 1 January 2012 and has remained in effect, with amendments, since that time.⁹⁹ The Asbestos Code relevantly states '*where guidance on the assessment and remediation of contaminated sites is sought, the Assessment of Contaminated Sites National Environmental Protection Measure (NEPM) should be referred to. The contaminated sites NEPM is published by the Environment Protection Heritage Council (EPHC)*'.¹⁰⁰

The NEPM has a number of schedules. Both schedule B1 (*Guideline on Investigation Levels for Soil and Groundwater*¹⁰¹) and B2 (*Guideline on Site Characterisation*) provide guidance on investigating asbestos contamination in soil.¹⁰²

Schedule B2 prescribes the assessment method for asbestos soil contamination. The first step involves a preliminary site investigation, which entails an evaluation of the site history and a site inspection.¹⁰³ Sampling is not usually recommended during a preliminary investigation unless it is required to confirm that suspect material contains asbestos.¹⁰⁴

After the preliminary investigation, if deemed necessary, a detailed site investigation is recommended, which usually requires sampling. Schedule B2 provides a table of recommended sampling methods for evaluating asbestos contamination and the circumstances in which each is appropriate.¹⁰⁵

For further advice on designing samples, the NEPM refers to the Western Australian Guidelines for the Assessment, Remediation and Management of Asbestos-Contaminated Sites in Western Australia (**WA Guidelines**) and the EPA's Contaminated Sites – Sampling Design Guidelines published by the Environmental Protection Authority in 1995 (**EPA Guidelines**).¹⁰⁶

96. WHS Act ss 274, 275(2); *SafeWork NSW v Universal Property Group* [2018] NSWDC 19, [16] and [37].

97. WHS Act s 275(3).

98. WHS Act s 274(2).

99. The Hon Greg Pearce MLC, Minister for Finance and Services, 'Work Health and Safety Act 2011 – Notice of Approved Codes of Practice', *New South Wales Government Gazette*, No 127, 16 December 2011, p. 7194. This code is based on a national model code of practice developed by SafeWork Australia under the harmonisation of national work health and safety legislation.

100. SafeWork NSW, *Code of Practice - How to Safely Remove Asbestos*, September 2016, p. 47. WHS Act s 274(3) provides that a Code of Practice may apply, adopt or incorporate any matter contained in a document formulated, issued or published by a person or body.

101. NEPM Volume 2.

102. NEPM Volume 3 *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth).

103. *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2.

104. *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2, pp. 63-75.

105. *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2, pp. 73-75.

106. *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth), Schedule B2, pp. 69 and 104; EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995.

Schedule B1 states that, ‘for ACM in sound condition, the use of a basic criterion of 0.01% w/w asbestos in soil is adopted for Australian sites as a conservative approach.’¹⁰⁷ Schedule B1 draws on the WA Guidelines and sets out different screening criteria for soils depending on the use of the site.

Schedules B1 and B2 stress the assessment and management of asbestos contamination should, ‘take into account the very low human health risk posed by most occurrences of soil contamination by bonded asbestos.’¹⁰⁸ Schedule B1 states that, ‘[i]t is an inappropriate response to declare a site a human health risk on the basis of the presence of ACM alone.’¹⁰⁹

When conducting a site assessment the following steps are considered:

- Consider the site history, noting whether there have been incidents that may have significantly disturbed the soil, such as construction and demolition.
- Conduct a preliminary visual assessment of the site, ‘followed by, only if necessary, a detailed site assessment (see Schedule B2 and WA guideline).’
- If the preliminary site assessment indicates the extent of contamination to consist only of scattered ACM fragments on the surface, then remediation is relatively simple.
- the exposed surface of the site under assessment should be free of visible ACM fragments and all ACM should be removed from the top 10cm of soil as far as practicable.
- Alternatively, a 30cm layer of topsoil can be layered over the site.¹¹⁰

Individuals who assess the level of land contamination can calculate the appropriate number of samples to be tested based on the EPA Guidelines. For example, for a 500m² site, the EPA Guidelines recommend a minimum of 5 samples.¹¹¹ The EPA Guidelines note that the minimums recommended are not to be taken as a ‘blanket approval’ by the EPA for minimum sampling work, and that assessors must still be prepared to defend their use of the minimum sampling prescribed by the Guidelines.¹¹²

107. National Environment Protection (Assessment of Site Contamination) Measure 1999, Schedule B1 Guideline on Investigation Levels for Soil and Groundwater, 2011, p. 11, URL: www.nepc.gov.au/system/files/resources/93ae0e77-e697-e494-656f-afaaf9fb4277/files/schedule-b1-guideline-investigation-levels-soil-and-groundwater-sep10.pdf

108. National Environment Protection (Assessment of Site Contamination) Measure 1999, Schedule B1 Guideline on Investigation Levels for Soil and Groundwater, 2011, p. 10, URL: www.nepc.gov.au/system/files/resources/93ae0e77-e697-e494-656f-afaaf9fb4277/files/schedule-b1-guideline-investigation-levels-soil-and-groundwater-sep10.pdf

109. National Environment Protection (Assessment of Site Contamination) Measure 1999, Schedule B1 Guideline on Investigation Levels for Soil and Groundwater, 2011, p. 11, URL: www.nepc.gov.au/system/files/resources/93ae0e77-e697-e494-656f-afaaf9fb4277/files/schedule-b1-guideline-investigation-levels-soil-and-groundwater-sep10.pdf

110. National Environment Protection (Assessment of Site Contamination) Measure 1999, Schedule B1 Guideline on Investigation Levels for Soil and Groundwater, 2011, pp. 10- 11, URL: www.nepc.gov.au/system/files/resources/93ae0e77-e697-e494-656f-afaaf9fb4277/files/schedule-b1-guideline-investigation-levels-soil-and-groundwater-sep10.pdf

111. EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995, p. 8.

112. EPA, *Contaminated Sites – Sampling Design Guidelines*, September 1995, p. 8.

4. Administrative issues

4.1. Overview

This chapter examines a number of administrative issues such as the adequacy of record keeping, contents of notices and handling of conflicts of interests declarations.

There were significant variations between different SafeWork Inspectors in the number of inquiries made before deciding to issue notices, as well as differences in the quality of record keeping and supporting documentation.

The contents of some notices did not fully comply with legislative requirements or SafeWork guidelines. The failure to indicate the nature of the contravention alleged to warrant the issuing of a notice and what was required to ensure compliance had the potential to expose SafeWork to a risk of legal challenge.

The investigation did not find evidence of any conflicts of interests that affected the decisions of SafeWork or its Inspectors. However, declarations of potential conflicts of interests were not managed in accordance with SafeWork's policy or good administrative practice.

4.2. Were the contents of notices adequate?

Summary of relevant facts

Section 196 of the WHS Act prescribes the information that must be provided in a prohibition notice, as well as information that may be included in the notice (see 10.1).

Prohibition notice 31715 (Springwood Depot Waste Services Office – see 2.9) issued by Inspector B specified the activity that involved a serious risk as 'work in the waste services office' and the 'activity' that needed to cease as 'all work in the waste services office'.

The notice further stated that the activity was likely to contravene cl 420 of the WHS Regulation. Clause 420 requires a workplace to ensure that:

- (a) *exposure of a person at the workplace to airborne asbestos is eliminated so far as is reasonably practicable, and*
- (b) *if it is not reasonably practicable to eliminate exposure to airborne asbestos – exposure is minimised so far as is reasonably practicable.*

As the basis for his belief that BMCC may have contravened cl 420, Inspector B stated that workers were at risk from airborne asbestos fibres 'due to excessive dust on and around unsealed asbestos sheeting.' In his notebook, he recorded 'unsealed ACM + excessive dust on & beside server.'

Prohibition notice 31716 issued by Inspector B specified the activity that involved a serious risk as 'work in the amenities shower room'. BMCC was directed to prevent access to that room.

The notice further stated that the activity was likely to contravene cl 422 of the WHS Regulation. Clause 422 requires a workplace to ensure, as far as reasonably practicable, that all asbestos or ACM at the workplace is identified by a competent person, and provides that a failure to do so constitutes an offence.

As the basis for his belief that BMCC may have contravened cl 422, Inspector B stated the 'workers health and safety placed at risk from suspected ACM not noted in the asbestos register exposed in the shower area'.

The statement does not describe how the activity identified contravened or was likely to contravene cl 422, that is, how working in the shower room contravened the requirement to identify all asbestos or ACM in the workplace.

The notices did not comply with the requirements of the WHS Act

Prohibition notice 31715 and Prohibition notice 31716 did not state the matters that gave rise to the serious risk (as required by s 196(1) (b)) or specify how the risks might have arisen. Similarly, Inspector B's report and his Inspector's notebook did not include any supporting consideration of how the risks might have eventuated.

In the case of Prohibition notice 31716, even assuming BMCC had not identified all the ACM in the Amenities Block (in breach of cl 422); it is unclear how this lack of documentation by itself involved a serious risk to health and safety that would warrant the issue of the Prohibition notice.

Even when an Inspector reasonably believes there has been a breach, more is required to show that the breach in fact involves a **serious** risk to health and safety and warrants the issuing of a Prohibition notice (as opposed to an Improvement notice).

Both Prohibition notices identified the activity that involved the risk as routine occupation of, and work at, the workplace.

SafeWork's procedure document, *Issuing a prohibition notice*¹¹³, which gives guidance on issuing notices states that a notice must relate to a **particular** activity or **particular work procedures** and that notices must not prohibit **all** activity at the workplace (emphasis added).

When issuing a notice, Inspectors must identify the particular contravention and the activity causing the contravention. This is necessary if a workplace is to comply with the notice, and provides the grounds on which non-compliance can be successfully prosecuted. Failure to identify what needs to be done to remedy any contravention may lead to the workplace undertaking inadequate actions and remaining non-compliant.

In his submissions, Inspector B acknowledged that compliance with s 196 was mandatory. However, he maintained that the provision only requires that the matters in s 196(1)(a)-(c) be 'stated' (and in the case of s 196(1)(b), 'briefly' stated). According to Inspector B's submission, there is no obligation on an Inspector to provide any further description or particulars or 'reasons' in a Prohibition notice beyond what is required by s 196. In this case, according to Inspector B's submission, both notices provided sufficient detail.

Inspector B further stated that he was cognisant of SafeWork's guidance materials on issuing notices.¹¹⁴ That guidance in fact requires Inspectors to state the basis for their decision to issue a notice, including what they observed that led to their belief that there was a serious and immediate or imminent risk to health or safety.

Even if it were accepted that the two notices met the requirements of s 196 in a strictly narrow and technical sense, it is clear that such practices are not in accordance with either SafeWork's expectations of Inspectors or good administrative practice.

Inspector B further submitted that an interpretation of the notice content requirements other than the listing of factors would significantly impede the statutory purpose of practical and swift elimination or minimisation of risks by imposing unnecessary administrative burdens on Inspectors to comply with s 196. The ability to act swiftly must be balanced against the administrative requirement to record the basis for decisions. If Inspectors' recorded decisions were reduced to a mere stating

113. WHSDOM Procedure: Notices and Directions - Issuing a Prohibition Notice.

114. D14/160400 "WHSOOM Guidance Material: What is Reasonable Belief?" and D13/095576 - "WHSDOM Procedure: Notices and Directions - Issuing a Prohibition Notice".

of the factors listed in s 196 and were not supported by more comprehensive and contemporaneous records, the practice would be reduced to a mere 'tick box' exercise rather than a genuine and considered application of rigour to the decision-making process.

It is of particular concern that the notices in this case were not supported by more detailed reasons in the Inspector's report or notebook. Such practices do not assist external reviews of decision-making, such as this investigation, to readily identify whether decisions were justified by the factual circumstances. This in itself increases the administrative burden in the long term.

Inadequate content of notices may expose SafeWork to undue risks and inefficiencies, including increased potential for legal challenges. In some circumstances, a failure to include information that must be included in a notice may lead to it being considered invalid due to its defects.¹¹⁵

Conclusions

The Springwood Depot Prohibition notices did not fully comply with the requirements of s 196 of the WHS Act and SafeWork's guidelines because they failed to properly identify:

- the provision of the WHS Act that the Inspector believed was being, or was likely to be, contravened by an activity
- the activity causing the contravention
- matters that gave rise to the serious risk warranting the Prohibition notice.

4.3. *Were conflicts of interests appropriately managed?*

Summary of relevant facts

During the course of the Wentworth Falls Preschool events, SafeWork became aware of two potential conflicts of interests.

On 23 November 2017, Inspector C made an oral report to Ms D that he believed he had a potential conflict of interests. This specifically related to him knowing individuals who worked at the BMCC, that he lived in the BMCC local government area and knew individuals in the local community who used BMCC's facilities.

Ms D did not require Inspector C's declaration to be provided in writing and advised him to 'just declare it if you feel there is potential and remove yourself'.

Following his conversation with Ms D, Inspector C spoke with Inspector A and encouraged Inspector A to declare in writing any circumstances that may be perceived as a conflict of interests.

On 28 November 2017, Inspector A emailed Ms D a list of his potential conflicts of interests. They included that:

- until 2009, he had worked for BMCC as a regulatory officer
- he knew a number of BMCC staff and management
- he and his family resided in the BMCC local government area
- his spouse was due to commence work in the local government area, and
- he and his family attended facilities that had been identified by the USU as having asbestos issues.

¹¹⁵. *Adams v Lambert* (2006) 228 CLR 409, 418.

Section 158 of the WHS Act requires an Inspector to provide written notice of any potential personal interest that could conflict with the proper performance of his or her functions.¹¹⁶ Where the regulator becomes aware that an Inspector has a potential conflict of interests and considers that the Inspector should not deal with a matter, the regulator is required to give a direction to the Inspector not to deal with the matter.¹¹⁷

As stated in the explanatory memorandum to the Work Health and Safety Bill 2011, the effect of these provisions is that, on receipt of information about an Inspector's potential conflict of interests, the regulator is required to consider whether the Inspector should continue to deal with the matter.¹¹⁸

The conflicts of interests policy that applied to SafeWork staff, including Inspectors, at the relevant time was the Department of Finance, Services and Innovation Code of Ethics and Conduct (**DFSI Code**). The DFSI Code was general in nature and did not refer to the applicable statutory requirements for Inspectors stated in the WHS Act. It briefly explained the meaning of actual and perceived conflicts of interests and outlined an employee's responsibilities in relation to such conflicts as follows:

- declare any conflict of interests situation in writing to your manager immediately
- discuss with your manager how the conflict of interests is to be managed and agree on this in writing
- follow agreed management plan for managing the conflict always taking into account how the situation would be perceived by others
- always put the Department's interests ahead of your personal interests
- err on the side of prudence.¹¹⁹

Some strategies on how to deal with conflicts of interests were also listed.

The DFSI Code also required staff to immediately declare any close personal relationships to their manager in accordance with divisional work practices. Staff and managers were then to work actively together to ensure appropriate steps were taken to manage the real or perceived conflict of interests. The DFSI Code required senior executives to declare any real or perceived conflicts of interests in writing and enter into a written agreement about the management of real or perceived conflicts.¹²⁰

The declarations were not dealt with in accordance with policy

There was no evidence that either Inspector C's or Inspector A's declarations were recorded on a conflicts of interests register or that a management strategy for conflicts of interests was documented.

Ms D stated in her evidence that she discussed Inspector A's list of potential conflicts with Mr E, Inspector C and another SafeWork Inspector. In her evidence, Ms D stated that:

Ms D: Well, yeah. I guess, we formed a view that with a conflict of interest, if you reveal it, that it doesn't – unless it's impacting on the decisions that you make.

Ms D: Sorry, about Inspector A, is that he's a man of great integrity and that the perception that he might have known people would not impact the decisions that he made. I don't believe that they do.

116. WHS Act 2011 s158(1).

117. WHS Act 2011 s158(2).

118. The Explanatory Memorandum, Work Health and Safety Bill 2011 (NSW), p.1 adopts the explanatory memorandum of SafeWork Australia. See Explanatory Memorandum, Work Health and Safety Bill 2011 (SafeWork Australia), cl 564-565.

119. DFSI, *Code of Ethics and Conduct*, 2 November 2015, section 3.

120. Department of Finance, Services and Innovation, Code of Ethics and Conduct, pp. 20-21, URL: www.finance.nsw.gov.au/sites/default/files/DP0019.pdf

The Ombudsman asked Ms D to explain how any potential for *perceived* conflicts of interests were planned to be managed. In her evidence, Ms D stated that:

I think our strategy was to ensure that whatever action they took was evidence based, and that the integrity of their work would – because there’s always the option for the Council to appeal notices if they don’t agree with what’s issued, that we thought, I guess, you know, we thought that the integrity of their work and the ability of the Council to object to any notices that they issued would be sufficient.

Mr E said that he could not recall any discussions in relation to the Inspectors having raised issues about conflicts of interest. Mr E did note, however, that had any such declaration been made it would have had to be recorded on SafeWork’s conflicts of interest register.

In her subsequent submissions, Ms D pointed out that the whole team – including herself - who worked on the investigation lived in the Blue Mountains. She pointed out that it was normal for Inspectors to issue notices in areas where they lived, as they tend to work near where they live if possible and this was unavoidable. Ms D did not consider there was a specific conflict and there was nothing unusual about the situation. She explained that when Inspector A raised the specific issue about his wife, this was discussed between his manager and Inspector A and was then escalated to the Executive Director.

Mr E’s submission was that he also did not believe at the time of the relevant events, or at the time of his submission, that the matters raised by the Inspectors with Ms D were an actual or potential conflict of interests. The matters raised were the unavoidable reality of the Inspectors living in the Blue Mountains local government area. In Mr E’s view, that did not mean they had a conflict of interests in the particular matter where they were inspecting premises owned or operated by BMCC. In support, he pointed out that he was not aware of any of the potential perceived or actual conflicts of interests raised by third parties as a result of the Inspectors’ involvement. However, the fact that no-one complains about a conflict does not mean there is no conflict.

SafeWork staff who were interviewed were asked to explain the rationale behind the decision to allocate the BMCC investigation to members of the Construction – South team, who had declared potential conflicts. Witnesses provided the following explanations:

We have an asbestos demolition unit so named, why Construction South?’ And I think it was words to the effect that, ‘Logistically the manager and the two senior people of the asbestos demolition unit lived on the Central Coast and logistically it just would not have functioned as it should have’, and I have to agree with that being the case but still being said, yeah.

One staff member has a family matter that meant that he was just not in a position to be away from home and commit to the kind of travel from the Central Coast to the mountains; whereas Inspector A lives locally. Inspector A and Inspector C live locally, as do I. So, we thought to take a bit of pressure. You know, it wasn’t one reason. It was a number of different things.

In addition, there were two people in the team, with family members who have either been diagnosed with Mesothelioma or have died from Mesothelioma.

It is important to emphasise that there is no evidence that either Inspector A or Inspector C acted other than in accordance with their duties and obligations as SafeWork Inspectors in carrying out their duties as Inspectors during the BMCC compliance investigation.

However, there is no evidence that consideration had been given to whether there may have been a perceived conflict of interests. For example, another Inspector in Inspector A’s situation could have taken, or could have been perceived as wishing to take, a more lenient approach on the workplace because they were previously employed there or because they had ongoing relationships or associations with the affected individuals. Conversely, they could have taken a more stringent approach because the situation was close to home.

There appear to have been legitimate and practical reasons why members of Construction South had to be involved in the BMCC compliance investigation. It is also accepted that the mere fact of residing in a particular council area would not, of itself, give rise to a real conflict of interest that would preclude a staff member of a regulator from making decisions in respect of that council.

However, in this case, there were other declarations made by relevant staff (including familiarity with staff at BMCC and, in one case, prior employment at BMCC) that should have been documented and further examined to determine whether any conflicts of interests, real or perceived, could have arisen.

In this case, there was no record of the management's consideration of the declarations and of any decisions about whether a conflict arose and, if so, how it could be managed. This was a failure to comply with DFSI policy and the principles of good administrative conduct.

Given the legislative and policy framework in place, there should have been:

- written declarations in instances where staff could have a real or perceived conflict of interests.
- written management plans that demonstrated that:
 - declarations had been assessed, and
 - the rationale behind the course of management action adopted.

Conclusions

There was no evidence of actual conflicts of interests. However, declarations of potential conflicts of interests were not managed in accordance with SafeWork's policy or good administrative practice. There was no record of the management's consideration of the declarations and no record of any decisions about whether there was an actual or perceived conflict that warranted a management strategy.

5. Consistency of compliance action

This chapter reflects on the consistency of compliance action taken against BMCC.

Overall, the compliance actions were not in keeping with the principle of proportionality espoused by SafeWork's *Compliance Policy*.

In the 2017-2018 financial year, SafeWork issued a combined total of 46 Improvement and Prohibition notices across all councils in NSW. Ninety-three per cent of those notices were issued to BMCC.

BMCC has acknowledged there were some organisational failures in how it had managed asbestos, but also maintained it had been working toward fixing those issues. Witnesses from both SafeWork and BMCC observed that BMCC's systems and processes were not substantially different to similar organisations. This is not to suggest that SafeWork should not take compliance action where it sees individual instances of non-compliance. However, the evidence suggests that the action taken against BMCC was inconsistent with the measures imposed in similar situations.

The impact on BMCC in both human and financial terms has been significant.

SafeWork has submitted that internal review mechanisms ensure that decisions are consistent and pointed out BMCC did not avail itself of its rights in this regard. While internal review mechanisms are an important right, they are not a substitute for Inspectors making proper decisions at first instance. Inspectors are required to exercise their powers in good faith and on the evidence before them and should not assume that any errors would be corrected on review.

5.1. Were the compliance actions against BMCC consistent?

The actions were inconsistent with the proportionality principle

As discussed in chapter 3, the additional testing required in the cases of Wentworth Falls Preschool and Lawson Carpark was unnecessary and unreasonable. This had a significant resourcing and financial impact on BMCC.

In 2017-2018 financial year, SafeWork issued 46 Improvement and Prohibition notices across all councils in NSW. Forty-three (93%) of those were served on BMCC. By way of comparison, in the 18 months between Quarter 3 2016 and Quarter 4 2017, SafeWork issued 18 Improvement notices and no Prohibition notices across all councils in NSW.

The high number of notices issued against BMCC compared to other councils cannot be explained by:

- a disproportionately high presence of ACM in poor condition in BMCC owned or operated premises, compared to other local government areas, or
- BMCC's systems and processes being well below those of other councils.

Although there are records detailing the amount of asbestos consumed in Australia annually from 1920 through to 2003,¹²¹ information on the subsequent dispersion of asbestos into various product stocks is not documented. It is only possible to conclude that properties built prior to 1987 are likely to contain asbestos. In this regard, the BMCC local government area is assumed to be representative of suburbs built prior to 1987.

121. For more detail on the amount of asbestos consumed in Australia annually, see www.asbestossafety.gov.au/sites/asea/files/documents/2017-12/ASEA_National_Asbestos_Profile_interactive_Nov17.pdf

With reference to BMCC's asbestos management and its systems and processes, BMCC has acknowledged that 'there have been organisational failures in relation to those matters.'¹²² However, witnesses from both SafeWork and BMCC sought to highlight that BMCC's systems and processes were not substantially different to the majority of similar organisations. Witnesses also suggested that most organisations would not have copies of their Asbestos Registers clearly identified and easily accessible on site as required by cls 422 and 424 of the WHS Regulation. One witness recently employed by another local government in NSW gave evidence that that council's practices and levels of compliance were no different to BMCC's.

DFSI's guidance material states that 'regulators should establish thresholds at which an instance of non-compliance will move from requiring one type of enforcement response to another.'¹²³

To maximise the effectiveness of regulation, regulators must tailor their use of enforcement tools based on the severity of, and reasons for, non-compliance. Adapting responses to non-compliance consistently and transparently enhances the regulator's credibility and authority.

The stated goal of SafeWork's *Compliance Policy* is to ensure actions taken by staff are fair and consistent across duty holders in similar circumstances. The Policy lists seven principles, most relevantly that:

- a graduated approach to achieving compliance is to be preferred; the use of lesser action tools is to be considered before the use of more severe tools
- a response is to be proportionate to the non-compliance
- where there is a contravention of the legislation, dependent on the level of known and foreseeable risk, a notice is to be issued (unless the contravention is remedied at the time of detection)
- for all low-level risk matters, where the contravention is minor in nature and the risk is low, an agreed action is an appropriate tool to achieve compliance.¹²⁴

SafeWork has submitted that, considering the volume of issues raised about BMCC's asbestos management and the level of community concern, an appropriately significant response and allocation of Inspector resources was required. Inspections and audits are a routine feature of both proactive and responsive work and Improvement and Prohibition notices are regularly used for identified areas of non-compliance to drive continuous improvement in health and safety.

According to SafeWork's submissions, its extensive involvement with BMCC was not unique or unusual and was part of a Directed Engagement strategy. Directed Engagement is a targeted, scalable intervention with a workplace to improve its capability/commitment and secure compliance with WHS legislation. Directed Engagements are generally characterised by a sustained program of work by SafeWork and the workplace to achieve the desired compliance outcomes. The Directed Engagement with BMCC included both targeted guidance, direction and high-level engagement with BMCC for a designated period of time and a graduated series of compliance and enforcement activities. SafeWork advised that Directed Engagement is one of the suite of compliance tools available to it. It has a documented risk based approach.

It is noted that the Directed Engagement framework was approved by SafeWork's authorising body (the WHSDOM Review Committee) on 23 November 2017 with an effective start date of 3 July 2018.

122. Blue Mountains City Council, www.bmcc.nsw.gov.au/asbestos/asbestos-management

123. Department of Finance Services & Innovation, Guidance for regulators to implement outcomes and risk-based regulation, 2016, p. 48, URL: http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance_for_regulators_to_implement_outcomes_and_risk-based_regulation-October_2016.pdf

124. SafeWork NSW *Compliance Policy*, 20 September 2013, p. 5.

It is not suggested that BMCC's practices had no room for improvement or that SafeWork as the regulator should not take action on non-compliance just because it is common. However, the level and type of action taken against BMCC was inconsistent and excessive in light of SafeWork's own policy and guidelines, and, as such, was unreasonable and disproportionate.

The detrimental impact on BMCC

BMCC articulated the impact of SafeWork's actions on both the wellbeing of its staff and its finances in the following terms:

SafeWork's actions also resulted in significant financial and operational impacts on our organisation. The former included the costs of testing and the engagement of licensed asbestos assessors and licenced asbestos removalists. The Council has expended over \$10 million in relation to asbestos management since November 2017. A significant portion of this expenditure has been in response to disproportionate regulatory action taken by SafeWork.

There was also the dislocation of Council activities and functions as senior staff were seconded to specific roles in relation to Council buildings and sites that were the subject of SafeWork investigation and testing requirements. Council lost a significant amount of staff time responding to the requests and directions of SafeWork. In response to SafeWork's actions the Council was frequently required to seek legal and expert advice. On four occasions Council required both legal and expert advice in order to appeal notices issued by SafeWork and on all four occasions the notices were overturned.

The diversion of the Council's resourcing to respond to SafeWork's directions came at a cost to the Blue Mountain community as well as the organisation. For example, in late 2017, the Council diverted resourcing from its Major Projects team to a number of asbestos remediation projects responding to SafeWork's directions. This diversion impacted on the delivery of Council's Asset Work Program in 2017/18, with five projects to the value of more than \$1.2 million being deferred or withdrawn.

The Council accepts that the pressures suffered by our organisation were the result of a combination of factors and that [the radio] broadcasts were a very significant element in that mix. However, by continuing to respond to [the media] campaign, SafeWork conveyed the message to Council staff that SafeWork was not acting as an independent regulator.

SafeWork have themselves acknowledged the profound impact of this period on the Council and on the health and safety of the Council's staff. The senior SafeWork representatives who took part in the discussions relating to the Council's Enforceable Undertaking (EU) proposal requested that the Council include in its proposed EU actions the conduct of the Queensland Government "People at Work" survey. This survey is intended to assist an organisation to recover from traumatic events by addressing the psychological health and recovery of its workforce.

The events of that period were akin to the result of combining all of the elements prescribed in a formula. It is impossible to separate the elements once they are combined. However, each element is an essential component of the ultimate result. The pressure imposed on the Council through the repeated interventions of SafeWork, in apparent response to [the radio] broadcasts, was an essential element in the adverse outcomes suffered by the Council and its staff.

If the cooperative and constructive engagement that prevailed in the period from May 2017 to November 2017 had continued, the outcome of the events of 2017- 2018 could have been very different to the actual outcomes. It is however important to note that even after November 2017, Blue Mountains City Council continued to be diligent in working cooperatively with SafeWork staff on reinspection programs and site visits and in the Multi-agency Asbestos Management Committee, which the Council initiated and which met throughout 2018. This Committee included representatives from SafeWork NSW, EPA, Council's governing body, Council's leadership team, staff and union representatives.

5.2. Are internal review mechanisms sufficient to ensure consistency?

In its submissions, SafeWork stated that the internal review process is a key factor in helping ensure Inspectors make more consistent decisions.

SafeWork pointed out that BMCC was notified of its right to seek internal reviews of the notices but did not do so, although it had applied for internal reviews on other occasions. SafeWork submitted that the reasonableness of its conduct and that of its staff should be viewed in the light of the checks and balances that these review mechanisms provide. It conceded that there may be good reasons why BMCC did not seek such reviews and that notice recipients may simply accept a notice and comply with its terms. However, SafeWork submitted that internal (and external) review avenues are an important mechanism to support consistent decision-making in a scheme where individual Inspectors have significant discretion in when and how notices are issued. This is particularly the case where such decisions are often made ‘on the spot’ and under pressure.

Internal and external review mechanisms are an important means of improving the quality and consistency of agency decision making. However, if SafeWork’s submission was intended to suggest that the existence of such mechanisms is sufficient to guard against Inspectors making unreasonable decisions in the first instance, that suggestion is rejected.

The availability of a right to internal review is not relevant to the decision to issue a compliance notice. When determining whether to issue a compliance notice, an Inspector must apply the statutory tests under the WHS Act. The Inspector must consider whether they have a reasonable belief that:

- there has been or there will likely be a contravention of the WHS Act
- there is or will be a serious risk to health or safety of a person emanating from an immediate or imminent exposure to a hazard.

The Inspector may also issue directions to the workplace on the measures to be taken to remedy the risk, activities or matters to which the notice relates. These directions must be complied with. None of these statutory tests includes any consideration of the existence of an internal review mechanism in determining whether a notice should be issued.

The purpose of internal review mechanisms is to allow a relatively quick, inexpensive and simple means of reviewing the merits of a decision. This recognises that decision makers may make mistakes and allows the regulator to change decisions made in error. These processes also allow for peer review to determine whether there are deficiencies or discrepancies in decision making practices and should seek to provide feedback to decision makers at first instance¹²⁵. The internal review mechanism, however, is not a substitute for Inspectors making sound decisions at first instance. Inspectors are still required to exercise their powers in good faith and on the evidence before them and should not assume that any errors would be corrected on review.

Workplaces may decide not to appeal a decision due to the potential costs involved and to preserve their relationship with the regulator. While internal reviews are relatively inexpensive, they are not cost-neutral. Workplaces may still need to consult lawyers or obtain expert evidence to demonstrate errors in an Inspector’s decision making. Reviews may also take some time to resolve the issue and therefore may delay the workplace in continuing their business. The cost of an appeal may be greater than the cost of compliance. Furthermore, workplaces may believe that seeking a review of an Inspector’s decision may sour their relationship with the regulator, which could lead to more attention from the regulator. For these reasons, even where a workplace has a case that may lead to a decision being overturned, it might decide not to seek a review and simply comply with the notice.

125. See ARC *Internal Review of Agency Decision Making*, Report No 44, Commonwealth of Australia, Canberra, November 2000.

The relevant BMCC employee was asked why reviews were not requested in many cases and advised that:

...Council effectively had no-one to advise them that a lot of this stuff is not right. So all Council was doing was listening to - as you would expect - what the regulators were saying. Which is: "this is an issue; we're going to give you a notice; we require you to do this; we require you to do that". And, quite frankly, you wouldn't expect Council to do anything different than what it did. The regulators have the power. It wasn't until I started that we started to look, you've got this wrong; this is not correct. These processes and procedures, you've got this quite wrong. But prior to that, Council had no-one there. So even [employee name], who had done a B Class [WHS qualification] - his substantive role wasn't asbestos. He effectively fell into the role. He's not a senior manager. He's a coordinator. So he's not going to muscle up to SafeWork. It actually takes a fair bit of gumption to do it.

BMCC's submission pointed out the impact of seeking internal reviews of notices:

In response to SafeWork's actions the Council was frequently required to seek legal and expert advice. On four occasions, Council required both legal and expert advice in order to appeal notices issued by SafeWork and, on all four occasions, the notices were overturned.

Conclusions

The regulatory actions taken by SafeWork at the four BMCC sites examined by this investigation were not in keeping with SafeWork's Compliance Policy. The actions were not in line with the proportionality principle and were inconsistent with actions taken in similar circumstances. The actions had a disproportionate and detrimental impact on BMCC.

6. Assessing and communicating risks from asbestos

This chapter examines how SafeWork assessed and communicated risk from asbestos exposure.

SafeWork Inspectors inconsistently assessed risks across the same scenarios.

While risk assessment of asbestos exposure is inherently challenging, SafeWork failed to:

- ensure its Inspectors applied risk assessment guidelines consistently, and
- communicate (both within SafeWork and to the community) those risks clearly and consistently.

When regulating risk in the workplace, the community ordinarily looks to the regulator to perform the role of 'expert.' In this case, SafeWork's failure to assess risk and to communicate that assessment of risk in a consistent manner may have contributed to a heightened concern among the community and BMCC staff about the extent of risk.

6.1. Was risk from asbestos assessed consistently by Inspectors?

Assessing the seriousness of the risk of exposure is challenging

Sections 191 and 195 of the WHS Act give effect to the distinction between 'lower' and 'higher' risks by providing Inspectors with the ability to issue Improvement notices to remedy contraventions and prohibition notices to stop activities that involve serious risks to the health or safety of a person from an immediate or imminent exposure to a hazard.

Sections 36 and 37 of the WHS Act give form and context to the concept of 'serious risk to health and safety' by defining 'dangerous incident' (risk events) and 'serious injury or illness' (consequences of unmanaged risk).

'Serious injury or illness' is defined as an injury or illness requiring the person to have immediate treatment as an in-patient at a hospital, various other immediate treatments or medical treatment within 48 hours of exposure to a substance. 'Dangerous incident' is defined as an incident in relation to a workplace that exposes a worker or any other person to a 'serious risk to a person's health or safety' emanating from an immediate or imminent exposure to a range of prescribed events.

Applying these definitions to risk scenarios involving asbestos and other carcinogenic dusts such as silica dust is not straightforward because of the long latency periods. Safe-Work Australia attempts to address this in its explanatory manual:

The use of 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard' in subclause 195(1) has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For a prohibition notice to be issued, the risk would have to be considered 'serious' and be associated with an immediate or imminent exposure to a hazard.¹²⁶

With regard to asbestos, the serious injury or illness or the impact that might result from non-compliance – such as mesothelioma or other asbestos related diseases - is well-documented. However, without air monitoring, an Inspector's ability to distinguish between 'serious risk' and other ordinary risks is difficult. Asbestos fibres are not visible to the naked eye and the likelihood of developing mesothelioma is also dependent on the general health of the individual and the volume of exposure to friable asbestos that individual has over their lifetime.

126. SafeWork Australia, Explanatory Memorandum: Model Work Health and Safety Bill, (2011) p. 71 URL: www.safeworkaustralia.gov.au/system/files/documents/1705/model-whs-act-explanatory-memorandum-1august2016.pdf.

In hearings, witnesses articulated the challenges Inspectors face when assessing the seriousness of risk associated with an asbestos exposure. One Inspector described the difficulty of quantifying the level of risk and calibrating the degree of certainty that it would eventuate.

An Inspector must have an understanding of asbestos health risks before he or she can assess the level of risk posed to workers by exposure to it. However, the understanding of SafeWork staff of asbestos health risks varied considerably. The Ombudsman heard many different descriptions of asbestos risk, including:

- One fibre of asbestos can kill.
- There is no safe level of exposure to asbestos.
- The risk posed by asbestos is a dosage issue, the higher the exposure the greater the risk.
- The risk of asbestos is dependent on the activity taking place in relation to the asbestos. In other words, bonded ACM in good condition does not pose a health risk in and of itself, however once someone starts drilling into the ACM (for example), the level of risk increases.

In NSW, the belief that ‘one fibre kills’ has been solidified in the collective consciousness through negligence verdicts against James Hardie and the Jackson inquiry.¹²⁷ From the 1990s, popular culture has reinforced the knowledge of the harmful effects of asbestos.¹²⁸

What is less well known in the community, is that the ‘ambient or background air usually contains between 10 and 200 asbestos fibres in every 1000 litres.’¹²⁹ Most people will breathe in asbestos fibres while going about their day-to-day activities. Despite this daily exposure to small amounts of asbestos, the majority of people do not fall ill as a result.¹³⁰

The WHS Regulation itself implies that a view has been taken as to what is an acceptable level of residual risk and sets the workplace clearance standard accordingly at 0.01 f/mL.

Ms J, occupational hygienist, was asked by the Ombudsman whether there was a safe level of exposure to asbestos. She stated:

“It depends who you ask. But it’s a very emotive issue.

According to workplace exposure standards, you can be exposed to a level of asbestos over an eight-hour working period that would be acceptable. That’s what we call an ‘occupational exposure’.

...

[M]ost of the time, in the standard working environment, in an office or a place of work, apart from naturally occurring asbestos, you’ve generally got the fibre levels effectively at a zero and that “zero” is...for the method of testing, less than 0.01 fibres per millilitre of air.”

127. In 2001 James Hardie established the Medical Research and Compensation Foundation (MRCF) with a total of \$293 million dollars in funds, saying that this fund would be able to meet all the future asbestos claims. James Hardie then relocated its company to Holland leaving behind the compensation fund, which was found to have a massive financial shortfall.

In 2004 a judicial inquiry into the conduct of James Hardie was commenced (Jackson Inquiry). The Jackson Inquiry, was critical of James Hardie’s actions and, after public and government pressure, the company was forced to finalise a new compensation deal. The Report of the Special Commission of inquiry into the Medical Research and Compensation Foundation can be accessed here: www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/special-commission-of-inquiry-into-the-medical-research-and-compensation-foundation.

128. In the late 1990s, the diagnosis of Asbestos Lady, Marvel’s asbestos-wearing character, with mesothelioma suggested no-one was impervious to the toxicity of asbestos. The Simpsons also began to educate viewers on the risks associated with asbestos. Closer to home, Midnight Oil, in their song *Blue Sky Mine*, gave voice to the experience of the Wittenoom asbestos mine workers who contracted various asbestos-related diseases.

129. Environmental Health Standing Committee, *Asbestos: A guide for householders and the general public*, 2013, p. 17 [www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/\\$FILE/asbestos-feb13.pdf](http://www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/$FILE/asbestos-feb13.pdf).

130. Environmental Health Standing Committee, *Asbestos: A guide for householders and the general public*, 2013, p. 17 [www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/\\$FILE/asbestos-feb13.pdf](http://www.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc/$FILE/asbestos-feb13.pdf).

Ms J explained that there are two reasons why the standard is not set literally at zero but is instead set at 0.01 fibres to a millilitre of air:

- (a) *First, the air may contain respirable fibres “like a cotton fibre or a ceramic fibre or a slither of mineral or something like that”, that’s “not asbestos, [but] can still be respired and get into the small parts of your lungs” and these fibres would be counted with asbestos air monitoring.*
- (b) *Second, there will be asbestos fibres in the air as a result of previous “industrialisation, mining, [as well as] naturally occurring asbestos and farming and forestry practices and things like that”. This means that: “We have a background level of asbestos fibres in our air that we’re breathing every day, all of us.”*

Mr E articulated the challenge of encapsulating the exposure standards in the regulations within the general duty of people to discharge their obligations in the legislation as follows:

It is very challenging and one of the reasons why we have exposure standards is purely for that very point, because you can’t necessarily quantify the risk for when you’re exposed to carcinogenic substances. At any level, exposure can be harmful due to genetic disposition, all sorts of things, so for the purposes of Work Health and Safety Legislation, while exposure standards, you wouldn’t expose people to those thresholds that are actually put in place so that the regulator has a tool to actually be able to say well if you go over that, if you meet that exposure standard we can definitively prove that there’s a breach of the legislation.

SafeWork staff involved in the BMCC compliance investigation had been criticised in the media for using the words ‘low risk’ to describe the hazards posed by asbestos. The Ombudsman asked for SafeWork’s view on the most appropriate/accurate description of the risk posed by asbestos. SafeWork provided the following response:

Asbestos fibres can pose a risk to health when inhaled causing diseases such as asbestosis, lung cancer and mesothelioma. The risk of developing an asbestos-related disease depends on the type of asbestos, how many fibres are breathed in and how often.

SafeWork notes that if asbestos fibres are in a stable material (i.e. non-friable) such as in asbestos-cement sheeting (fibro) and in good condition they pose little health risk. However, where fibro or other bonded asbestos sheeting is broken, damaged or mishandled, fibres can become loose and airborne posing a risk to health. Disturbing or removing it unsafely can create a hazard.

In materials such as pipe lagging and sprayed roof insulation asbestos, fibres are not bound in a matrix (i.e. friable). High concentrations of fibres are much more likely to be released into the atmosphere when these materials are disturbed or removed.¹³¹

There was lack of consistency in assessing the level of risk in the BMCC case

During the hearings, witnesses attempted to articulate the distinction between ‘serious’ and ‘less serious’ asbestos risk. To do this, they drew comparisons between real world examples they had encountered through their work as Inspectors.

One witness contrasted the Springwood Depot example, which involved two holes in a wall behind a poster, with the demolition of a house with mechanical excavators that had resulted in fragments of ACM strewn over a large area. In the witness’s opinion, the risk involved in the second scenario would warrant a Prohibition notice, whereas the first would not.

131. Letter from former Secretary Department of Finance, Services and Innovation, to former Deputy Ombudsman, 13 February 2019.

Another witness juxtaposed the potential for exposure to friable asbestos in the Springwood example and the aftermath of the bushfires that swept through the Blue Mountains in 2013. The witness recalled seeing people on their hands and knees picking through the ash covered ruins of their homes (likely made from ACM, given the age of the houses) looking for any valuables that survived the blaze. In this situation, individuals were disturbing dust that probably contained asbestos fibres and exposure was highly likely. In the Springwood case, it would be hard to demonstrate that individuals had been exposed to asbestos concentrations that exceeded the exposure standards.

Witnesses also sought to highlight that the level of risk associated with asbestos increases or decreases depending on the activity occurring and the protective measures in place. One witness explained that a sheet of bonded ACM in good condition did not represent a risk to health and safety. However, risk begins to manifest when a person decides to drill holes or cut into the ACM, as this activity will create dust that contains asbestos fibres. This risk can, in turn, be managed by ensuring the power tools have extractions on them and the appropriate Personal Protective Equipment (PPE) is worn.

Communicating the risk arising from asbestos exposure is challenging

Some witnesses suggested that the 'risk thresholds' in the WHS Regulation and community appetite for risk with regard to asbestos do not align. The difference in perceptions of risk represents a challenge for SafeWork and Inspectors when they need to communicate with the community about the level of risk present in any given scenario. One witness explained:

we...need to recognise...that a lot of the legislation that we've produced does leave residual risk... Sometimes we forget that not everybody has accepted that level of residual risk and there'll be questions...

Much of the communication around risk in the BMCC case involved providing reassurances to staff. A substantial amount of testing took place at the case study sites as well as at other sites across the BMCC local government area. As discussed above, many of the results fell within the standards prescribed by the WHS Regulation and the relevant guidelines. In such circumstances it would be appropriate to, 'communicate [to the relevant stakeholders] that the news is "good news" and hence anxiety about the residual risk is unwarranted, while avoiding false reassurance – i.e. the belief that low risk means no risk.'¹³²

The evidence suggests that SafeWork Inspectors demonstrated compassion for the anxieties expressed by BMCC staff and the community about exposure to asbestos. Inspectors made attempts to provide information about the risks posed by asbestos in the workplace, explain air-monitoring results and put the risks present on site in context with other risks. These actions align with the principles that should guide risk communication set out in, *Schedule B8 Guideline on Community Engagement and Risk Communication*¹³³ of the NEPM.

SafeWork, as the regulator, did not make public statements explaining the results of air monitoring conducted at BMCC sites or give context to the risks present on site.

One Inspector described the challenges in the following terms:

So the disconnect is internally. Internally we resource the public perception of this is really dangerous stuff. You have to do something about it because one fibre can kill. The political perception is linked to the public perception and that's the nature of politics. I get that. So we resource that public expectation of response to asbestos, and we issue notices accordingly. So if I see a friable risk I'll issue a prohibition notice. If I see a non-friable risk I'll probably issue an improvement notice but I'll put the 'stop work' on it. So in construction we do that. Other teams don't. If you go to policy there's probably

132. Ayers, Susan. *Cambridge Handbook of Psychology, Health and Medicine*, Second edition. Cambridge: Cambridge University Press, 2007, p. 376.

133. National Environment Protection (Assessment of Site Contamination) Measure 1999, Schedule B8 Guideline on Community Engagement and Risk Communication, 2011, URL: www.nepc.gov.au/system/files/resources/93ae0e77-e697-e494-656f-afaaf9fb4277/files/schedule-b8-guideline-community-engagement-and-risk-communication-sep10.pdf.

something in policy that says you should never put 'stop that activity' on an improvement notice, but some of us do it regularly because we don't believe it warrants a prohibition notice, but we'll put the direction on the improvement notice. Stop work, or stop doing that activity. Get the hygienist in to assess it.

Another one said:

...the biggest problem that you have with asbestos is, you know, you can tell people we breathe in 5000 asbestos fibres every day and it doesn't kill us and it's not going to kill you. But then we're saying to people but you've still got to treat it properly; you can't intentionally break it and do all these other things. I suppose there's always that fine line of where do you go and where do you not? Where that ends up, I don't know. If you follow the codes of practice, and if asbestos is in good condition and it's on a wall and it's got a crack in it or whatever, it's still not going to hurt you. It doesn't pose a risk of exposure to asbestos. You're not going to get an asbestos-related disease from that. So we should be saying things like that. Definitely agree. But where do we draw a line and say well it doesn't matter if it's all broken now and you don't have to fix that? That's about managing risk, you know? You should try and look after that.

The challenging position SafeWork was in is acknowledged. SafeWork had to:

- conduct its regulatory activities under intense and often critical media scrutiny
- navigate the complexities of what appeared to be an industrial dispute between some BMCC staff and management
- communicate technical information (in an emotionally charged environment) about asbestos and exposure standards that might contradict stakeholders' preconceived understanding of asbestos risk, and
- communicate this technical information in a way that would not be perceived as biased towards any party and was able to be understood by the community.

However, the consequences of SafeWork's silence on asbestos risk in this case may have contributed to an uninformed and unduly alarmist reaction among the community and BMCC staff. The community ordinarily looks to the regulator to perform the role of 'expert' in relation to risk in the workplace. Research suggests that a risk information vacuum could contribute to the social amplification of risks:

When experts refuse to provide information, or when they are seen as untrustworthy, a hungry public will fill the void, often with rumors, suppositions, easy to blame targets and fakes.¹³⁴

The difference between high and low risk is not sufficiently defined

Work health and safety regulators are responsible for regulating risk in the workplace as well as preparing matters for prosecution. These two roles require different approaches to the definition of risk.

Preparing matters for prosecution requires knowledge of how the WHS Act definition of 'serious risk' has been applied in case law. In other words, SafeWork should be aware of the judicial treatment of the applicable legislative definitions. The DFSI *Guidance for regulators to implement outcomes and risk-based regulation* (DFSI guidance material) suggests regulators should be aware of the risk thresholds established in the law but, at the same time, they should 'focus on practical risk examples, rather than defining risk in an abstract sense.'¹³⁵

134. Bourrier M. (2018) Risk Communication 101: A Few Benchmarks. In: Bourrier M., Bieder C. (eds) Risk Communication for the Future. Springer International Publishing, 2018. URL: www.springer.com/gp/book/9783319740973.

135. Department of Finance Services & Innovation, Guidance for regulators to implement outcomes and risk-based regulation, 2016, p. 22, URL: http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance_for_regulators_to_implement_outcomes_and_risk-based_regulation-October_2016.pdf.

SafeWork's *Serious risk and immediate and imminent exposure* policy appears to be intended to guide staff in how to identify the threshold between 'serious risk' and 'less-serious risk'. The document defines serious risk as 'a significant risk that is neither trivial nor slight, which has a real chance of materializing.'¹³⁶ The guidance document refers to the case of *Fallas v Mourlas* [2006] NSWCA 32 and the Oxford dictionary definitions of 'serious' and 'risk':

Serious – significant or worrying because of possible danger or risk; not slight or negligible

*Risk – a situation involving exposure to danger.*¹³⁷

This definition of risk does not address the associated concepts of probability, hazard and consequence.

SafeWork's *Serious risk and immediate and imminent exposure* policy document only provides one example of 'serious risk':

For example: an illustration of where a "serious risk" would be present is where a person is operating a tractor without rollover protection at a workplace that is not flat or even-surfaced. It is clear in these circumstances that the person is engaging in an activity which involves a serious risk to their health or safety that emanates from an immediate or imminent exposure to a hazard.

*In this case the hazard to which they are exposed is the tractor rolling over and the risk is one which has a real chance of materializing because there are no rollover protectors fitted to the tractor and it is being operated on uneven ground. In these circumstances an inspector is clearly empowered to issue a prohibition notice to immediately put a stop to the activity.*¹³⁸

The probability of harm, the timeframe within which harm will occur and the nature of harm presented in this example are all clear cut. This is a useful example to convey the basic principles of risk assessment but it does not capture the complexities of assessing the probability of harm where friable asbestos and other hazardous dusts and gases are concerned.

In all the documentation provided to this office and information available on SafeWork's website, there is a focus on 'serious risk' at the expense of 'less-serious risks'. This is not surprising, as a fundamental principle of risk-based regulation is to target resources at those risks that are both serious and likely to eventuate.

However, the unintended consequence of this focus is that the material did not satisfactorily guide Inspectors on how to understand and assess the relationship between 'lower' and 'higher' risks and select the regulatory tools most appropriate and proportionate to the level of risk observed. The result in the case of BMCC was that conflicting categorisations of risk were made on the same factual scenarios.

In evidence, Ms D acknowledged this is a challenge for SafeWork. Ms D noted the amendments to the WHS Act in 2011 moved the regulation of work health and safety issues from a system of prescriptive standards to a risk-based approach that requires an assessment of certain criteria against one another. This meant SafeWork had to reconsider the way it provided guidance to staff:

Well, I think it's reflected in the fact that we have to take a risk-based approach to our compliance. Often, because it's performance-based compliance, our guidance material - we've gone away from prescriptive, in this situation you will do this, and you will do that. There is a space open for risk because not every situation is the same. You could never - you'd be producing a room full of documents to cover every potential scenario that might arise. So, there's room for discretion.

136. SafeWork NSW, WHSDOM guidance material: Serious Risk and immediate or imminent exposure, 30 October 2014, p. 5.

137. SafeWork NSW, WHSDOM guidance material: Serious Risk and immediate or imminent exposure, 30 October 2014, p. 4.

138. SafeWork NSW, WHSDOM guidance material: Serious Risk and immediate or imminent exposure, 30 October 2014, p. 5.

However, to increase consistency and accuracy in risk assessment, any evaluation of the likelihood and impact of a breach of the law ought to be founded on criteria that have been set out in advance and are industry specific.

The diverse range of risk scenarios Inspectors encounter and the changing nature of industry make it necessary to articulate the different assessment criteria and case study examples for the various industries. This needs to include risk types an Inspector is required to regulate. This view is supported by a December 2018 review of the model work health and safety laws, which suggested, 'the model WHS Regulations and Codes be examined through an industry specific lens to identify whether they adequately address the changing nature of work in each industry.'¹³⁹

Conclusions

An assessment of risk provides the foundation for regulatory actions and decisions taken by SafeWork Inspectors in all practical situations. The actions taken at the four BMCC sites showed that SafeWork Inspectors were inconsistent in their assessment of 'serious risk' from exposure to asbestos in the following scenarios:

- the frayed ACM on the fascia of the gazebo at Wentworth Falls Preschool
- the risk posed by asbestos fibres identified by the background air monitoring conducted at Wentworth Falls Preschool
- dust and fragments of ACM found on the IT cabinet at Springwood Depot
- the piece of bonded ACM and drill holes in ACM identified in the Amenities Block at Springwood Depot.

One factor contributing to the inconsistency is the challenging nature of assessing the seriousness of risk from exposure to asbestos. This is partly caused by the long latency period of some diseases resulting from exposure to asbestos. Despite this inherent challenge, there was a lack of consistency among Inspectors in characterising risk, defining risk and identifying risk assessment criteria.

SafeWork also failed to adequately communicate, internally and externally, the risks from asbestos exposure during its compliance investigation into BMCC.

139. Boland, Marie., Review of the model Work Health and Safety laws: Final report, 2018, p. 28 URL: www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf.

7. Findings under section 26 of the Ombudsman Act

Findings

I make the following findings about SafeWork's conduct under s 26 of the Ombudsman Act:

1. The issuing of the following notices was contrary to law within the meaning of s 26(1)(a) of the Ombudsman Act:
 - (a) Prohibition notice 31989 dated 28 November 2017 was not lawfully issued because:
 - the Inspector did not have a reasonable belief as required by s 195 of the WHS Act
 - in the absence of such belief, the Inspector had no power to issue that notice
 - the Inspector issued the notice under the direction of his Director, and
 - as the Inspector had no power to issue the notice, the Director had no power to direct the Inspector to issue the notice.
 - (b) Improvement notice 7-318316 dated 6 December 2017 was not lawfully issued because:
 - the Inspector did not have a reasonable belief as required by s 191 of the WHS Act
 - in the absence of such belief, the Inspector had no power to issue the notice
 - the Inspector issued the notice under the direction of his Director, and
 - as the Inspector had no power to issue the notice, the Director had no power to direct the Inspector to issue the notice.
 - (c) Improvement notice 7-317886 dated 1 December 2017 was not lawfully issued because:
 - the Inspector did not have a reasonable belief as required by s 191 of the WHS Act, and
 - in the absence of such belief, the Inspector had no power to issue that notice.
2. The issuing of the following notices was unreasonable within the meaning of s 26 (1)(b) of the Ombudsman Act:
 - (a) Prohibition notices 31715 and 31716 were unreasonably issued because:
 - although the Inspector who issued the notices stated that he held the belief required by s 195 of the WHS Act, the circumstances indicated that he likely felt obliged to issue the notices as a result of views expressed by his Executive Director
 - the Inspector's belief and reasoning were not sufficiently supported by the documented evidence
 - the Inspector failed to consider relevant contextual factors, and
 - the Inspector failed to make adequate records to support his reasoning.
 - (b) Prohibition notice 31717 was unreasonably issued because:
 - the practice of Inspectors forming reasonable belief solely on the basis of the testimony of another Inspector is unreasonable
 - the Inspector failed to make adequate records to support his reasoning
 - the Inspector failed to make appropriate inquiries, and
 - the Inspector failed to consider whether BMCC took all practicable steps to control the situation (as he was required to do).

3. The conduct of SafeWork NSW was unreasonable within the meaning of s 26 (1)(b) of the Ombudsman Act insofar as SafeWork:
- sent a second Inspector to reinspect Springwood Depot with the purpose of that Inspector, in effect, overriding decisions that had already been made by a first Inspector, in circumstances where there was no objective evidence to suggest that the first Inspector's decision had been made in error
 - failed to explain s 162 of the WHS Act to its Inspectors and prepare sufficient guidelines on its application, which resulted in its Inspectors acting under the dictation of senior staff
 - failed to ensure that Inspectors applied assessments of risk of exposure to asbestos consistently
 - failed to ensure its compliance actions in relation to BMCC's asbestos management practices were in keeping with the principles of SafeWork's *Compliance Policy*
 - failed to apply its compliance framework in a consistent and proportionate manner, causing a disproportionate and detrimental impact on BMCC and BMCC ratepayers
 - failed to adequately communicate a balanced view on the risks of asbestos in the course of the BMCC compliance investigation, and
 - failed to manage potential conflicts of interests in accordance with the WHS Act and relevant policies.

8. Recommendations

Under s 26(2)(a) and (e) of the Ombudsman Act, I recommend that:

1. SafeWork apologise to the Blue Mountains City Council for the way it conducted its compliance activities in 2017-2018 and acknowledge the detrimental impact on Council, staff and ratepayers from its actions.
2. SafeWork make an ex-gratia payment pursuant to s 26A of the Ombudsman Act 1974 to the Blue Mountains City Council to compensate it and its ratepayers, at least in part, for the unnecessary expenses they incurred in conducting additional testing for Wentworth Falls Preschool and Lawson Carpark. In so doing:
 - invite and consider a submission from Council as to its testing expenses
 - make every reasonable effort to determine and finalise the ex-gratia payment in consultation with Council within three months of the date of receiving Council's evidence of expenditure.
3. as a matter of priority, SafeWork develop a policy on the application of s 162 of the WHS Act that:
 - clarifies the circumstances in which Inspectors may be directed by the regulator, including any direction by the Minister, and
 - requires that all directions made pursuant to s 162 are made in or reduced to writing as soon as practicable.
4. SafeWork organise and deliver training on the application of s 162 of the WHS Act as soon as the policy is developed.
5. consideration be given to amending s 162 of the WHS Act so that it more clearly states the current legal position; that is, notwithstanding sub-sections (1) and (2) of that section, an Inspector may not be directed to exercise a compliance power if the power is one that can only be exercised by an Inspector who holds a prescribed belief or other mental state and that Inspector does not, in fact, hold that belief or mental state.
6. consideration be given to amending the asbestos regulations to ensure that they can more properly deal with sensitive workplaces such as schools or hospitals.
7. SafeWork review and, where necessary, amend and improve its existing guidelines and training materials in light of findings from this investigation, including but not limited to:
 - the contents and evidentiary requirements for notices under the WHS Act
 - managing conflicts of interests.
8. SafeWork develop comprehensive guidelines supported by training on the assessment of risk, including serious and less serious risk, of asbestos exposure, which:
 - articulates where SafeWork as an organisation perceives the threshold between the risks described in ss 191 and 195 of the WHS Act to lie
 - sets out SafeWork's interpretation of 'serious risk' to staff and the community
 - describes the criteria staff should use to assess the severity of risk
 - guides staff on how to match the regulatory powers they have under s 195 of the WHS Act to the risks they observe in the field.

9. SafeWork develop guidelines for staff on how to communicate asbestos risks having regard to contemporary best-practice research, which highlights, among other things, that:
 - audiences tend to simplify messages or reduce their complexity
 - experts need to be independent in order to ensure that what is said is credible and accepted by the community
 - risk messages should include some effective action that individuals can take to alleviate risk
 - messages should be matched to audience needs and values, and their particular economic, political, and sociological backgrounds
 - candour, openness, and transparency are the cornerstones of risk and crisis communication.¹⁴⁰
10. SafeWork introduce or improve existing quality assurance processes to ensure an appropriate level of consistency exists in decision-making and record keeping practices among different Inspectors and managers.
11. SafeWork develop and/or improve template documents to assist in documenting decisions and reasons for taking regulatory actions.

8.1. SafeWork's response to the provisional recommendations

In response to provisional findings and recommendations proposed by my office during this investigation, SafeWork advised that it has recently undergone an internal Strategic WHS Regulatory Review Program (**SRRP**) to inform and improve SafeWork's operational policy and regulatory practice. The SRRP demonstrates that steps have already been taken by SafeWork to respond to some of the issues identified by my office.

In particular, the SRRP identified that a dedicated Inspectorate refresher program was needed to ensure that actual practice aligns to SafeWork's policies and procedures. Under the SRRP, SafeWork is developing an Inspectorate Refresher Training Program for all holders of Inspector authorities. The program will include:

- ongoing refresher training for all Inspectors
- ongoing refresher training for all managers of Inspectors
- onboarding program for new managers
- risk of Regulatory Capture (all Authority Holders)
- conflict of interest Strategic Plans (all managers).

As part of the program, SafeWork is reviewing existing guidance material and policies to determine their adequacy in providing the Inspectorate with a solid understanding of the policy intent of the legislation. SafeWork advised that it would include guidance on s 162 of the WHS Act in its review of existing guidance material and in the development of the training elements.

SafeWork's acceptance of the recommendations to improve the assessment and communication of risk from asbestos exposure and the development of decision-making templates is acknowledged, as is the advice that SafeWork has already commenced work to embed a quality assurance function in its processes.

140. Covello V.T., von Winterfeldt D., Slovic P. (1988) Risk Communication. In: Travis C.C. (eds) Carcinogen Risk Assessment. Contemporary Issues in Risk Analysis (Sponsored by the Society for Risk Analysis), vol 3. Boston: Springer; Covello V.T., McCallum D.B., Pavlova M. (1989) Principles and Guidelines for Improving Risk Communication. In: Covello V.T., McCallum D.B., Pavlova M.T. (eds) Effective Risk Communication. Contemporary Issues in Risk Analysis, vol 4. Boston: Springer.

This office also notes SafeWork's advice that amending the WHS Act, as recommended, is not straightforward because of the national Model Work Health and Safety Act and Model Work Health and Safety Regulation, which imposes certain consultation obligations on the participating states, including NSW.

8.2. Reporting requirement

I have required SafeWork to report on the progress of its implementation of the recommendations within three months of the date of this report and two monthly after until such date as all recommendations have been implemented.

Appendix 1: Key Legislative Provisions

8.3. Work Health and Safety Act 2011

162 Inspectors subject to regulator's directions

- (1) An inspector is subject to the regulator's directions in the exercise of the inspector's compliance powers.
- (2) A direction under subsection (1) may be of a general nature or may relate to a specified matter or specified class of matter.

...

191 Issue of improvement notices

- (1) This section applies if an inspector reasonably believes that a person—
 - (a) is contravening a provision of this Act, or
 - (b) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.
- (2) The inspector may issue an improvement notice requiring the person to—
 - (a) remedy the contravention, or
 - (b) prevent a likely contravention from occurring, or
 - (c) remedy the things or operations causing the contravention or likely contravention.

192 Contents of improvement notices

- (1) An improvement notice must state—
 - (a) that the inspector believes the person—
 - (i) is contravening a provision of this Act, or
 - (ii) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated, and
 - (b) the provision the inspector believes is being, or has been, contravened, and
 - (c) briefly, how the provision is being, or has been, contravened, and
 - (d) the day by which the person is required to remedy the contravention or likely contravention.
- (2) An improvement notice may include directions concerning the measures to be taken to remedy the contravention or prevent the likely contravention, or the matters or activities causing the contravention or likely contravention, to which the notice relates.
- (3) The day stated for compliance with the improvement notice must be reasonable in all the circumstances.

...

195 Power to issue prohibition notice

- (1) This section applies if an inspector reasonably believes that—
 - (a) an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard, or
 - (b) an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.
- (2) The inspector may give a person who has control over the activity a direction prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.
- (3) The direction may be given orally, but must be confirmed by written notice (a prohibition notice) issued to the person as soon as practicable.

196 Contents of prohibition notice

- (1) (1) A prohibition notice must state—
 - (a) that the inspector believes that grounds for the issue of the prohibition notice exist and the basis for that belief, and
 - (b) briefly, the activity that the inspector believes involves or will involve the risk and the matters that give or will give rise to the risk, and
 - (c) the provision of this Act that the inspector believes is being, or is likely to be, contravened by that activity.
- (2) A prohibition notice may include directions on the measures to be taken to remedy the risk, activities or matters to which the notice relates, or the contravention or likely contravention referred to in subsection (1) (c).
- (3) Without limiting section 195, a prohibition notice that prohibits the carrying on of an activity in a specified way may do so by specifying one or more of the following—
 - (a) a workplace, or part of a workplace, at which the activity is not to be carried out,
 - (b) anything that is not to be used in connection with the activity,
 - (c) any procedure that is not to be followed in connection with the activity.

Appendix 2: Glossary

Abbreviation	Full Title
ACM	asbestos containing material
Airsafe	Airsafe OHC Pty Ltd
AMP	Asbestos Management Plan
BMCC or 'Council'	Blue Mountains City Council
CAR	Corporate Asbestos Register
CAS	Construction & Asbestos Services Directorate
DFSI	Department of Finance, Services and Innovation
EPA	Environmental Protection Authority (NSW)
Guidance note	Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition
ICAC	Independent Commission Against Corruption
LAA	Licensed Asbestos Assessor
MFM	Membrane Filter Method
MOSI	Metropolitan Operations and Sector Initiatives Directorate
NATA	National Association of Testing Authorities, Australia
NCEP	National Compliance and Enforcement Policy
NEPM	National Environmental Protection (Assessment of Site Contamination) Measure
OLG	Office of Local Government
PCBU	Person Conducting a Business or Undertaking
PIO	Performance Improvement Order
PLM	Polarised Light Microscopy
PPE	Personal Protective Equipment
Regional EnviroScience	Regional EnviroScience Pty Limited
RFS	Request For Service
SafeWork	SafeWork NSW
SEM	Scanning Electron Microscope
SLR Consulting	SLR Consulting Australia Pty Ltd
USU	United Services Union
WA Guideline	Guideline for the assessment, remediation and management of asbestos-contaminated sites in Western Australia YEAR?

Abbreviation	Full Title
Workplace exposure standard	Workplace exposure standard for Airborne Contaminants
WHS Act	<i>Work Health and Safety Act 2011</i>
WHS Regulation	Work Health and Safety Regulation 2017
166 Letter	Itemised list of asbestos concerns dated 23 October 2017



NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
National Relay Service: 133 677

Email nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au