CFMEU NSW
Level 2,63 Miller Street, Pyrmont, NSW 2009
Locked Bag 5015, Alexandria, NSW 2015
Ph 02 9749 0400
nsw.cfmeu.org
NSWQueries@cfmeu.org
ABN: 37 317 397 120

CFMEU RESPONSE TO SUPPLEMENTARY QUESTIONS

1. **Witnesses and submissions have described the regulations regarding dust monitoring and control as vague and unclear. Can you provide specific examples of these ambiguities and how they hinder worker safety?**

Prior to the adoption of the new Chapter 8A regulations for Crystalline Silica, the *Work Health and Safety Regulations 2017* (**WHS Regulations**) only required air monitoring if there was a change to the work process.

Chapter 8A, clause 529CE now requires a PCBU to conduct air monitoring in accordance with clause 50 of the WHS Regulations and to provide those results to the regulator if the airborne concentration exceeds the workplace exposure standard. Importantly the air monitoring is only required if the processing of a crystalline silica substance (**CSS**) is high risk. The task of determining what is "high risk" processing is left to the PCBU to determine having regard to the circumstances set out in clause 529CA.

Clause 529A defines crystalline silica substance as a material that contains at least 1% crystalline silica, determined as a weight/weight concentration. Crystalline silica means crystalline polymorphs of silica and includes, cristobalite, quartz, tridymite and tripoli.
Processing of crystalline silica includes tunnelling through a material that is CSS.

Where air monitoring occurs, clause 50 requires the PCBU to ensure that the results of air monitoring are readily accessible to persons at the workplace who may be exposed**.** How this should be provided is not clear. For the purposes of the regulation, it will be sufficient for the PCBU to provide copies of the documentation upon request by the worker.

The CFMEU considers that a harmful substance such as crystalline silica requires more prescriptive regulation to force PCBUs to firstly take the hazard seriously and secondly to ensure a best practice strategy for management and prevention. At a minimum the regulations should require:

a) Air monitoring to take place on all tunnelling projects and at various intervals throughout the tunnel, not just as the drill point
b) Air monitoring reports to be made available in lunchrooms and meal rooms
c) PCBUs to provide training to employee on how to read the air monitoring reports.
d) Air monitoring to occur frequently

e) To the extent that the air monitoring indicates a risk to the community at large, those reports should be made public.

By implementing the above recommendations, the requirements for air monitoring and reporting are clearly spelt out and not open to interpretation. This should be about harm prevention rather than reputational risk to the PCBU.

2. Lack of worker consultation regarding safety measures was raised as a concern during the hearing. Do you have any specific examples available where workers have failed to be properly consulted when it comes to developing workplace safety measures?

Before providing the examples, it is important to highlight what consultation under the WHS Act involves.

Section 47 of the *Work Health and Safety Act 2011* (**WHS Act**) requires PCBUs to consult as far as reasonably practicable with workers who carry out work for the PCBU and are likely to be affected by a matter relating to health and safety. The duty to consult is a penalty provision.

Section 49 sets out the circumstances in which consultation is required being:

a) When identifying hazards and assessing risks to health and safety arising out of the work to be performed
b) When making decisions about ways to eliminate or minimise those risks
c) When making decisions about the adequacy of facilities for the welfare of workers
d) When proposing changes that may affect the health and safety of workers
e) When making decisions about the procedures for:
    i. Consulting with workers, or
    ii. Resolving work health and safety issues at the workplace, or
    iii. Monitoring the health of workers, or
    iv. Monitoring the conditions at any workplace under the management or control of the PCBU
    v. Providing information about training workers, or
f) When carrying out any activity prescribed by the regulations

Section 48 requires consultation to provide at a minimum:

a) That relevant information about the matter is shared with workers
b) That workers be given a reasonable opportunity to:
    i. Express their views and to raise work health and safety issues in relation to the matter, and
    ii. Contribute to the decision-making process relating to the matter, and
c) That the views of the workers are taken into account by the PCBU, and
d) Thay the workers consulted are advised of the outcome of the consultation in a timely manner.

The requirements under s 48 were discussed in the decision of the Full Bench of the Fair Work

Commission in *CFMMEU v Mt Arthur Coal* [2021] FWCFB 6059, where the Full Bench noted that *"consultation is treated by the WHS Act as a matter of substance which is to occur prior to implementation."* The Bench also emphasised the importance of workers being provided an opportunity to be heard and express their views and that consultation must be real meaning it must not be a merely formal or perfunctory exercise. Importantly, the Bench stated at [108]: I*t is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action*.

It is unusual for PCBUs to comply with the requirements under s 48 of the WHS Act with many employers informing workers of the resolution of safety issues after the company has taken remedial action. By that point the workers have lost the opportunity to affect the decision-making of the PCBU even where they have safer or more effective ideas for resolving the dispute. In the CFMEU's experience, many PCBUs rely on a weekly site walk and the distribution of safe work method statements to meet their consultation requirements. Those activities even when taken together fall well short of the standard required under s 48 of the WHS Act.

The Hunter Power Project

The CFMEU has recently been assisting workers on the Hunter Power Project (**HPP**) in relation to health and safety matters on that project. The lack of consultation on that Project is woeful at best. Workers find that when they raise safety concerns those concerns are dismissed as "industrial issues" despite the seriousness of the safety issue. The PCBU has taken an adversarial approach to safety.

There have been two major incidents where the lack of consultation has been laid bare at the HPP. The first relates to the provision of an Emergency Response Plan in accordance with clause 34 of the WHS Regulations. The workers raised concerns about the adequacy of the plan and asked for details about how it was drafted. The PCBU refused to provide details or engage with the workers on how to administer and improve the plan. This led to multiple notifications to SafeWork from the HSRs on the HPP and the issuing of PINs.

The CFMEU understands that SafeWork attended in response to the request for service. The PCBU later notified the workers that SafeWork had ok'd the plan but refused to provide any further details. The lack of information caused the HSRs to lodge further requests for service on the same issues because the PCBU refused to consult on the plan, or the resolution of the issue identified by the workers.

The lack of communication from the PCBU to the workers lead to mass requests for service with SafeWork sending 6 inspectors to the site on a single day to try and resolve the issues. Despite requests for information on the rectification or improvement works, the PCBU refused to discuss with the workers what actions it had taken to resolve the improvement notices issued.

The second incident involved the failure of a winch which landed in a non-exclusion zone following the breakage. The PCBU did not discuss the incident with the workers or divulge how the incident occurred. When the HSRs requested details as to the testing taken out on

the other winch systems on the site they were merely told it had been done. More PINs were issued and SafeWork attended the site. Again, the PCBU refused to divulge the details of the incident and what investigations had been undertaken or what rectification works took place.

The CFMEU has reached out to SafeWork for assistance in facilitating better consultation on the HPP. SafeWork has indicated its support for that course of action although it is yet to take place.

Rozelle Interchange

During the initial construction at the Rozelle interchange, workers had raised concerns about fit testing of the masks and the management of airborne contaminants. Despite requests for air monitoring reports to be provided to workers the principal contractor claimed Legal professional Privilege and refused to share the information. Additionally, the workers were not consulted on the hazard silica dust posed or the fit testing requirements. There was very little communication between the PCBU and the workers about the hazards on the project. Many workers expressed to the CFMEU the lack of information flow on the project.

It is noted that the construction on the Rozelle Interchange occurred prior to the new Chapter 8A being adopted.

3. What barriers might workers experience in feeling able to participate in the development of workplace safety measure?

It is important to recognise that the WHS Act is intended to encourage PCBUs and workers to coordinate in the identification, management and rectification of safety issues at the workplace.

Unfortunately, as the HPP example above shows, there are PCBUs who will explicitly exclude workers from that process. Even when SafeWork became involved and instructed the PCBU as to its responsibilities under the WHS Act, consultation at the site was sparse at best. The HSRs issued PINs, lodged requests for service and yet still the PCBU fails to adequately consult on safety issues in the workplace. Even when they use all the powers available to them under the Act, the power imbalance between workers and the PCBU can leave workers feeling like there is no point because the PCBU won't listen and is rarely chastised for its failure to consult.

Section 104 of the WHS Act makes it an offence for a person to engage in discriminatory conduct for a prohibited reason. A prohibited reason may include (among other things):

a) Being or proposing to be an HSR
b) Undertaking or proposing to undertake a role under the Act
c) Exercising or proposing to exercise, performing or proposing to perform a function or power under the Act
d) Raising or proposing to raise an issue or concern.

There is great difficult in enforcing compliance with the victimisation provisions under the Act and often a worker does not have access to services that may allow them to enforce their

right not be subject to discriminatory conduct. As it is, to the best of the CFMEU's knowledge, there has only been one prosecution under s 104 of the Act: *SafeWork NSW v Qantas Ground Services Pty Ltd* [2023] NSWDC 468. The fact that there has only been one prosecution indicates either an unwillingness on the part of SafeWork to enforce the provision or a lack of evidence.

If SafeWork is unable (or unwilling) to prosecute to enforce the consultation rights of workers, what protection do workers have when they stick their head above the crowd. For many workers, the decision to speak up is a known risk to continuing employment.

The CFMEU encourages SafeWork to bring proceedings against PCBUs to enforce the consultation obligations and provide an example to PCBUs across the State. Until they are willing to do that, consultation under the Act will not be taken seriously by PCBUs.

4. Are you aware of SafeWork ever taking enforcement activity to ensure worker involvement in safety measures? Can you provide examples of when SafeWork has failed to enforce consultation requirements?

The CFMEU is not aware of SafeWork taking enforcement action against a PCBU for lack of consultation. SafeWork may take action in the form of improvement notices whilst at a workplace, but these are not publicised.

The HPP example above is a stark example of a workplace where SafeWork has failed to take enforcement action in relation to consultation. The CFMEU is not aware of SafeWork issuing any notices to the PCBU for its lack of consultation.

5. We heard evidence of the difficulty for workers to access and also to interpret air monitoring data. Can you provide details about these challenges and how they impact workers' ability to protect themselves from silica dust exposure?

The CFMEU encourages PCBUs to ensure that their employees are suitably trained on the use and identification of crystalline silica in the workplace.

CFMEU enterprise agreements require employers to schedule an agreed asbestos/silica awareness training course. The training is to be undertaken within three months of the commencement of the Agreement and within three months for any new employee. As part of the training participants learn to recognise the workplace health and safety risks and hazards inherent in working with crystalline silica containing products, and to determine and plan for the implementation of safe systems of work aimed at reducing exposure to within mandatory exposure limits. During the training workers are shown how to read and interpret air monitoring reports.

For those workers not employed under a CFMEU agreement, it is up to the discretion of the

PCBU as to whether they train the employees on the risks of crystalline silica and how to read air monitoring reports. In the CFMEU's experience for those workplaces without a CFMEU agreement, training is rare and not generally available to workers, only supervisors or safety officers.

As noted above, clause 50 requires any air monitoring reports to be accessible to workers. There is a lot of deviance when it comes to interpretation of accessible and having the reports in the site office where workers can request a copy, may be sufficient to meet the requirement. Such a request is likely to be met with questions as to why the worker wants the reports. It also has the effect of singling the worker out as a "troublemaker" which in most workplaces is sufficient to deter workers from making the request in the first place.

The CFMEU considers that air monitoring reports should be available in the lunch and meal rooms so that they are truly accessible by the workers without the need for the worker to identify themselves. Workers have a right to know if they are being exposed to hazardous materials and should be able to confirm whether their employer has been truthful about their exposure.

6. Can you elaborate on the CFMEU's position on the adequacy of SafeWork NSW's enforcement actions in relation to dust control regulations?

While there is no doubt that SafeWork has poured resources into the engineered stone sector, its activities in relation to silica dust in general still require more activity. There have been situations in workplaces where the Principal Contractor has not prioritised housekeeping resulting in a layer of dust on scaffolding being kicked up by workers as they walk through the structure. It is unusual for SafeWork to issue improvement notices to the PCBU for these hazards despite the risk they pose.

There was a situation where workers were working in a heritage building which had Sydney Sandstone. Part of the renovations required some of the stone to be cut on site, despite the obvious risk of dust in the air throughout the internal works, SafeWork inspectors only attended to the issues that were identified in the request for service, which did not include the dust exposure.

SafeWork's effectiveness in the tunnelling industry is hamstrung by the fact that a major PCBU holds a ComCare licence, excluding SafeWork from taking regulatory action. As we noted in our submission and during the hearing, the CFMEU would prefer SafeWork have jurisdiction in those areas rather than ComCare.

Ultimately, CFMEU delegates, HSRs and organisers have been well trained on the hazards of silica dust and have been enforcing wet cutting far longer than SafeWork. The skills and knowledge of our HRS and delegates has meant that there is less need to report dust matters to SafeWork. Our HSRs and delegates have the confidence to manage these issues themselves because they have the backing of a strong and knowledgeable union and have been managing the risks of silica dust longer than SafeWork.

7. You mentioned disagreements with PCBU's about fit testing. Could you elaborate on the specific nature of these disagreements and how they impact worker safety?

8. How often is fit testing conducted, and what are the specific challenges in ensuring proper fit testing for all workers?

The Rozelle Interchange was a site that resulting in more disputes about fit testing and adequate PPE than any other site.

Despite ongoing requests for appropriate PPE and fit testing, the Principal Contractor insisted on using P2 paper style masks. The masks were inadequate because the minute the worker started sweating the seal would pucker allowing dust to get in. When they were finally encouraged to shift to better quality masks, the company refused to get the workers individually fit tested. The CFMEU witnessed many workers who had beards or stubble working at the Rozelle Interchange indicating that the Principal Contractor was not enforcing proper use of PPE at the project.

The Principal Contractor complained that fit testing the workers was cost prohibitive and for that reason it was not intending to roll it out for all workers.

Over time the Principal Contractor has changed its position, although there are still many PCBUs in NSW who complain about the cost without considering the cost of exposing workers to hazardous materials.

The failure to get masks fit tested means that there is less likely to be a tight seal to the face. Without that seal, dust can still enter which is more likely to be ingested as it is contained in the mask. Once the dust enters it has nowhere to go but the worker's body. The only way to effectively reduce exposure is to ensure that workers are clean shaven and to have sturdy and fitted masks.

9. Witnesses spoke about the difficulty for the scheme in terms of a lack of centrally organised health records. Can you elaborate on this issue, and identify any recommendations?

The Committee heard evidence that icare does not have the resources to carry out screening on every exposed worker in NSW. For that reason, many employers outsource the screening to private clinics. The records from these private clinics are made available to the PCBU and the worker but not icare.

The benefit of icare having the records is that the worker enters the system and is notified when they should be rescreened to see whether there has been a change in their lungs. It allows icare to identify high risk workers early and identify when they need treatment early. The earlier the worker gets treatment the better their quality of life.

Screening through private clinics is a one time test. There is no mechanism for follow up and no reminder for the worker to undergo regular screening. Where there has been exposure, workers should be screened every 12 months at a minimum, but there is no repeat screening with private clinics. The use of private clinics relies on the worker to remember to get rescreened, which is highly unlikely to happen. A worker is only likely to be rescreened if there is further exposure and in that case it might be too late.

The use of private clinics can also be a tactic by PCBUs to hide exposure and not invite scrutiny from SafeWork as to its practices in relation to dust.

Ideally, icare would have enough resources to ensure it has the ability to screen every exposed worker, however that is unlikely to be viable.

In the alternate, the CFMEU supports the recommendation of the Australian Institute of Occupational Hygienists that all health monitoring screening data undertaken by a provider other than icare be submitted to icare on a routine basis. The CFMEU would suggest that the data be relayed as the screening occurs to ensure that there is no delay in icare entering the data into its system. Private clinics should be directed to provide the information no later than 7 days after the screening takes place.