

**Submission
No 15**

INQUIRY INTO 2024 REVIEW OF THE DUST DISEASES SCHEME

Organisation: CFMEU Construction and General Division NSW Branch

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2024 REVIEW OF DUST DISEASES SCHEME

CFMEU SUBMISSIONS

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Table of Contents

1	Introduction	2
2	Work Health and Safety	2
2.1	Oversight of SafeWork	4
2.2	Data management	4
2.3	Access to information	6
2.3.1	Health monitoring requirements.....	6
2.3.2	Key Industries.....	7
2.3.3	Regulatory priorities.....	8
2.4	Air monitoring	9
2.4.1	The rights of permit holders.....	11
2.5	Arrangements with other regulators	12
3	Benefits Scheme	14
3.1	Retraining and work assistance	14
3.1.1	icare’s discretionary efforts.....	14
3.1.2	Examples from workers compensation.....	14
3.2	Weekly benefits	19
3.2.1	The calculation.....	19
3.2.2	Weekly benefits vs social security.....	21
3.3	Dependents	22
4	Conclusion	23
5	List of Recommendations	24

1 Introduction

The Construction, Forestry and Maritime Employees Union (**CFMEU**) welcomes the opportunity to make submissions to this inquiry.

The CFMEU represents approximately 25,000 members in the building and construction industries in NSW. The CFMEU plays an important role in promoting safety standards throughout the construction industry and has a long history of advocating for safe workplaces that are free of dust contamination. The safety and wellbeing of our membership is our primary concern, and we are committed to ensuring, where possible, our members are working in safe environments.

Our members are regularly exposed to unsafe products in their workplace and are reliant on the CFMEU and their health and safety representatives (**HSRs**) to help minimise the hazards posed by those products. Our membership is conscious of the risk posed by silica dust and asbestos. Over the last few years, we have seen the silica knowledge in our membership increase significantly as they grapple with the risks associated with working with sandstone, concrete, bricks and engineered stone. It often seems to our membership that their knowledge is far more advanced than that of their employers.

Any that any review of the Dust Diseases Scheme must encompass to aspects:

- The effectiveness of SafeWork NSW as regulator of work health and safety responsible for compliance, enforcement and prevention
- The adequacy of the compensation scheme as managed by icare

Through this submission, we hope to highlight where both areas could be improved to promote safer workplace practices and ensure that the *Workers Compensation (Dust Diseases) Act 1942* (NSW) (**Dust Act**) remains relevant well into the future.

2 Work Health and Safety

SafeWork NSW has a responsibility under the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) to ensure that workplaces in NSW are aware of their work health and safety

obligations and to ensure that workplaces either eliminate the risk or introduce controls sufficient to minimise the risk. Theoretically, the better SafeWork NSW performs in its duty, fewer people will come to rely on the compensation scheme.

SafeWork NSW has a sketchy past with management of dust diseases in NSW, specifically the management of silica dust as a risk. The Auditor-General report found that SafeWork NSW took too long to actively and sufficiently respond to the emerging WHS risk of silica in manufactured stone.¹ This was despite many many recommendations from this Committee imploring them to do more to help alleviate and control the risk. Thankfully sense prevailed and on 1 July 2024 NSW adopted a ban on manufactured stone, bar for a transitional period,² because apparently protecting workers in NSW is not as important as businesses being permitted to fulfill their contracts.

The focus on engineered stone, while important, has meant that other industries have not received the same level of scrutiny, in particular quarrying and tunnelling. SafeWork NSW's response to the sector has been the same as their response to manufactured stone, slow, piecemeal and unfocussed. The construction unions including the CFMEU, have been highlighting the silica risk associated with tunnelling for years.

SafeWork NSW was quite rightly called out for its slow response to the risk of engineered stone but in attempting to recover its reputation and undo the damage its ineffectiveness caused, they took their eye off the dust risks associated with tunnelling work at a time when NSW was facing an infrastructure boom. It is almost as if SafeWork NSW is unable to effectively deploy its resources to meet its obligations under the WHS Act. The restructure recommended by the McDougall review and announced by the Minister on 22 February 2024,³ cannot come soon enough. As it is, the restructure

¹ New South Wales Auditor-General, 'Effectiveness of SafeWork NSW in exercising its compliance functions' (Performance Report, 27 February 2024).

² If a PCBU has entered into a contract for the installation of engineered stone prior to 31 December 2023, they have until 31 December 2024 to have the product installed.

³ SafeWork NSW, 'NSW Government to transform SafeWork NSW into standalone work, health and safety regulator' (22 February 2024) <<https://www.safework.nsw.gov.au/news/safework-media-releases/nsw-government-to-transform-safework-nsw-into-standalone-work-health-and-safety-regulator>>

appears to be moving at a snail's pace while workers in NSW continue to wait for SafeWork NSW to lift its game.

2.1 Oversight of SafeWork

While the CFMEU values the work undertaken by the Law and Justice Committee in holding SafeWork NSW to account for its lack of action in the manufactured stone industry, there is a need for more thorough oversight on an ongoing basis. Not for the first time, the CFMEU recommends that the NSW Government legislate to give the Law and Justice Committee ongoing oversight of the work, health and safety landscape in NSW. The Hon Robert McDougall KC supported this proposition in his Final Report stating:

There should be a provision made for regular parliamentary review of its performance, and it should be subject to the oversight of a parliamentary committee such as the Standing Committee on Law and Justice.⁴

Sadly, he chose not to make this a formal recommendation despite the recommendation of the CFMEU. We ask this Committee to formalise a recommendation that the NSW Government legislate to introduce a provision that provides for parliamentary oversight of SafeWork NSW.

RECOMMENDATION 1: The NSW Government amend the *Work Health and Safety Act 2011* or the *State Insurance and Care Governance Act 2015* (whichever is the most appropriate) to include a provision appointing the Standing Committee on Law and Justice as the “*designated committee tasked with supervision of the work health and safety regime and the regulatory and educational functions of the designated regulator under the Work Health and Safety Act 2011.*”

2.2 Data management

The Auditor-General's report found significant flaws in SafeWork NSW's data management system noting that manual searches of the system are needed to identify

⁴ Hon Robert McDougall KC, 'The Independent Review of SafeWork NSW' (Final Report, 15 December 2023) 9.

relevant case data for analysis and reporting.⁵ Importantly for this Inquiry, the Auditor-General made the following observation:

There was no systematic method to identify all silica related incidents. The search terms were not standardised and relied on judgement, for example: 'silic' (potentially capturing 'silica' and 'silicosis') and 'benchtop', though SafeWork NSW advised that consultation with subject matter experts informed these searches. There is a high-risk of false positives and incomplete analysis without time sensitive manual review of each identified case. WSMS was not readily able to provide data on silica-related complaints without workarounds and manual file review (which proved unreliable) and requiring significant effort from data staff in both the Audit Office and SafeWork NSW.⁶

This raises questions about the veracity of the data that has been provided in previous inquiries and in Budget Estimates. If SafeWork NSW is unable to reliably report on its activities how can workers and persons conducting a business or undertaking (**PCBUs**) have confidence in it as a regulator.

We note that the Auditor-General recommended that by the 1 December 2024 the Department of Customer Service:

- develop a formalised data governance process for the use of WSMS data and identify the data custodian for WSMS
- resolve key limitations currently experiences with WSMS including by:
 - clearly setting out the strategy, including preferred timing and technical design, for a replacement system
 - in consultation with NSW Treasury, preparing a business case for system replacement, including robust assessment of costs, benefits and risks.⁷

The CFMEU acknowledges that the Graeme Head AO, Secretary of the Department of Customer Service, accepted the Auditor-General's recommendation, but this Committee may want to request SafeWork NSW provide an update on this recommendation. Until SafeWork NSW can produce reliable data, they will continue to fall short of their regulatory capability to the detriment of workers in NSW. The fact that all the publicity surrounding silica, silicosis and silica exposure did not inspire SafeWork NSW to address its data failings is a travesty and has potentially lead to more workers being exposed than would have if SafeWork had the data to tell them where to look.

⁵ New South Wales Auditor-General, 'Effectiveness of SafeWork NSW in exercising its compliance functions' (Performance Report, 27 February 2024).

⁶ Ibid at 17.

⁷ Ibid at 7.

While SafeWork NSW and the NSW Government assess the feasibility of a new data management system, SafeWork NSW could reduce the inconsistencies by mandating the inclusion of certain terms to allow for better categorisation of its data.

RECOMMENDATION 2: SafeWork NSW develop a set of mandatory terms for inspectors to use when inputting data to reduce the inconsistency and hopefully increase the reliability of the data moving forward.

2.3 Access to information

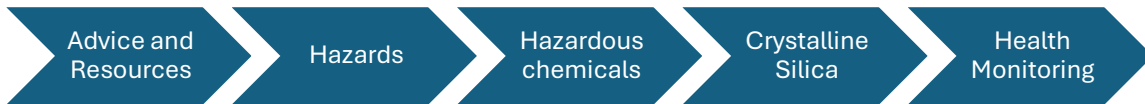
Effective prevention and regulation starts with education. The ability to access relevant guidance and information is fundamental to success of the hierarchy of regulation. In 2024, workers and PCBUs want to be able to access relevant guidance materials wherever they are making a user-friendly website a must. Unfortunately, the SafeWork NSW website is not fit for purpose. It is difficult to navigate, time consuming to find the information with key information requiring a journey through several pages just to uncover it.

The following examples highlight the difficulties in obtaining information of importance from the SafeWork website.

2.3.1 Health monitoring requirements

If you want to find information about health monitoring requirements, the website becomes a choose your own adventure exercise. It is not immediately apparent from the homepage where the information is located. Clicking on each of the available categories does little to illuminate the situation.

The below flow chart shows the process we followed to find information about health monitoring related to crystalline silica:



Clicking on health monitoring brings up an explanation of the risk posed by crystalline silica and explains that *“As the PCBU, it is your responsibility to determine if there is a ‘significant risk’ to determine whether you need to undertake health monitoring.”* While it explains that any report issued through the health monitoring process must be provided to SafeWork in certain circumstances, concerningly it does not suggest providing the report to the exposed worker (hopefully just an oversight and not intentional). The section also provides a link to the icare website about free lung screening.

Each of these sections could benefit from some links back to the legislation. Even a hyperlink so that PCBUs and workers are able to understand their actual obligations not just SafeWork’s explanation of their obligations.

2.3.2 Key Industries

Clicking on the ‘Your industry’ tab brings up a list of industries. Presently tunnelling and quarrying are not included in that list. If you presume that information might be included under ‘Building and Construction’, you would sadly be mistaken. In the section dedicated to ‘Building and Construction’ there are no references to tunnelling work despite the significant volume of tunnelling work that has occurred in NSW in the last 6 or so years.

Clicking on ‘Crystalline Silica as a construction hazard’ takes you to a page that provides some information about natural silica exposure, but it is poorly set out and again provides no specific reference to tunnelling or quarrying.

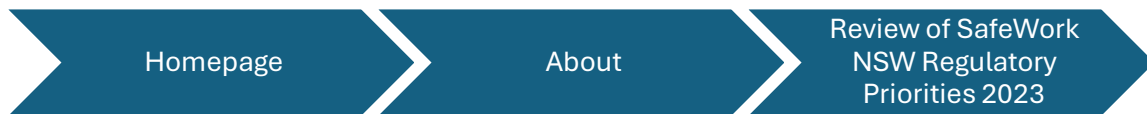
Suffice to say, tunnelling presents risks that are not necessarily present in above ground construction and excavation. The lack of air flow in a tunnel compared to open air increases the risk associated with silica dust and requires different control measures than above ground excavation.

The evidence suggests that tunnelling will represent the next cluster of silica cases so with that in mind, the SafeWork NSW website should at least provide easier access to guidance for PCBUs acting in that industry. Tunnelling should be specifically called out as a sub-industry on the website.

2.3.3 Regulatory priorities

Each year SafeWork sets its regulatory priorities. Its current priorities include “reduce the incidence of worker exposure to dangerous substances in the workplace, particularly silica and dangerous chemicals”.

If you are a PCBU or worker in NSW, you would struggle to find this information on the website. We found the information by googling SafeWork NSW regulatory priorities. If you were to try and access them through the website this is the journey you would need to take:



There is nothing intuitive about how the website functions. The priorities page does not link back to other parts of the website that provide guidance on how to manage these particular hazards which seems to be a missed opportunity.

The regulatory priorities of the safety regulator should be front and centre on the main homepage, or at the very least the homepage should contain a clear link to the regulatory priorities for PCBUs and workers to understand the activities of the regulator better.

SafeWork NSW should take some lessons from the SIRA Claims Management Guide on how to manage a cluster of important information and make it navigable and user friendly. In constructing the claims management guide, SIRA consulted with stakeholders about the language to be used, the useability and its prominence on the website. Over time changes have been made following feedback from users meaning the

guide is easy to use for injured workers, case managers, representatives and employers.

SafeWork NSW could also take some lesson from icare in how it managed its mental health claims hub. Again, icare engaged in a consultation process that involved injured workers, case managers and representatives and engaged behaviouralists to ensure that the language used was accessible for vulnerable workers. Where stakeholders raised concerns these were actioned and now the mental health hub offers a lot of important information to injured workers and employers in a format and language that is easily accessible and in a manner that is easy to navigate.

RECOMMENDATION 3: SafeWork NSW to consider undertaking a review of the website in consultation with relevant stakeholders including unions and employers to work out the best method for arranging and presenting the information. As part of this process, SafeWork NSW should engage with SIRA and icare to understand how they managed their consultation processes.

RECOMMENDATION 4: The SafeWork NSW website be amended to:

- Highlight tunnelling and quarrying as key sub-industries with their own dedicated pages
- Move the regulatory priorities to the homepage, or provide a clear link to the regulatory priorities
- Where applicable, reference back to legislation either explicitly or via hyperlink
- Provide a link to the NSW legislation website so workers and PCBUs can easily access the Act and Regulations.

2.4 Air monitoring

During the 2018 review, the CFMEU called for mandatory air monitoring and the use of controls in all circumstances where workers may be exposed to silica dust.⁸

⁸ Standing Committee on Law and Justice, *2018 review of the Dust Diseases Scheme* (Report No 69, February 2019).

The issue of air monitoring arose again in the 2019 review with the Committee questioning the adequacy of the provisions. SafeWork NSW argued that the air monitoring requirements were only triggered if there is a change in work practice so that exposure levels are affected.⁹ Curiously SafeWork NSW argued that “there are other visible inspections that are done to determine whether safety standards are being met.”

The Committee unsatisfied with the evidence and arguments presented by SafeWork NSW made the following comment:

With regard to air monitoring requirements, the Committee does not believe that current obligations on employers are clear or adequate in ensuring the air is regularly monitored for excessive levels of exposure to silica dust. There should be no doubt as to the circumstances under which air monitoring should occur and it should certainly not be left to employers to make a judgement as to whether they need to do this or not.¹⁰

The issue of air monitoring again arose in the 2021 Review of the Dust Diseases Scheme, with participants lamenting the lack of prescription regarding air monitoring requirements, particularly when compared to other states. In his evidence, Professor Driscoll argued for a stronger focus on monitoring silica exposure in tunnelling at the time rather than waiting until more silicosis cases emerge.¹¹ Alarmed at the evidence that had been presented, the Committee provided its support for the stepping up of efforts in industries outside of manufactured stone to ensure that air monitoring occurred regularly, leading the Committee to issue the following recommendation:

That the NSW Government, in consultation with key stakeholders, implement measures to enhance air quality and monitoring and reporting in relation to respirable crystalline silica, to ensure that:

- There are clear and appropriate standards in place for air monitoring
- Air monitoring is carried out regularly in workplaces according to relevant standards
- The results of air monitoring are recorded appropriately
- The results of air monitoring are reported to SafeWork NSW when the workplace exposure standard is exceeded and immediate regulatory action is taken in response.

⁹ Ibid at 65.

¹⁰ Ibid at 66.

¹¹ Standing Committee on Law and Justice, *2021 Review of the Dust Diseases Scheme* (Report No 80, June 2022) 30.

If SafeWork NSW has taken action on this recommendation, the CFMEU was excluded from the consultation despite having workers engaged in tunnelling works who are impacted by silica dust. If that consultation has not taken place, that is several more years where the requirements for air monitoring have remained opaque and subject to self regulation.

SafeWork NSW's response to calls for legislative and regulatory change has always been the same, it's a harmonised law and it must be changed federally. That speaks to an overall unwillingness to do anything proactive. Other States have amended their legislation to bring in changes that have not been adopted federally, other States have taken the courageous act of caring about their workers enough to want to protect them from emerging hazards. The CFMEU is tired of hearing SafeWork NSW tell the workers of NSW that change isn't possible, when we all know that change is possible if only SafeWork NSW was willing.

The CFMEU again calls for air monitoring to be mandatory in all industries where workers are likely to be exposed to silica or other dusts that lead to dust diseases. Relying on self-regulation is not sufficient to stop the tide of silica cases. More must be done.

RECOMMENDATION 5: The *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulations 2017* (NSW) be amended to require air monitoring in all industries where workers are likely to be exposed to silica and other dusts that cause dust diseases.

2.4.1 The rights of permit holders

Under the WHS Act, NSW WHS permit holders have a right to enter premises to investigate suspected contraventions of the WHS Act. Section 118 of the WHS Act allows a permit holder to inspect any work system, plant, substance and structure or other thing relevant to the suspected contravention and consult with workers. In exercising that power, permit holders are not permitted to delay, hinder or obstruct any person or

disrupt work at the workplace.¹² Tellingly, there is nothing in the WHS Act that prevents a permit holder from using a portable air monitoring device as part of their investigation.

There are PCBUs who have been denying entry permit holders access to the workplace if they have and intend to use a portable air monitoring device even if the device is essential for a thorough investigation. It is almost as if those PCBUs don't want permit holders to discover that the air exceeds the workplace exposure standard, because the device certainly does not delay, hinder, obstruct or disrupt work.

In a State where the number of inspectors is short of the ILO standard and where workers have been unable to rely on the WHS regulator to do their job effectively, often unions are the only ones taking proactive and reactive steps to help maintain safe and controlled workplaces.

To the extent it is necessary, the WHS Act should allow for the use of devices relevant to the investigation of suspected contraventions including portable air monitoring devices and mobile phones.

RECOMMENDATION 6: SafeWork NSW seek advice as to whether the WHS Act permits the use of portable air monitoring devices by entry permit holders exercising their rights under the Act.

RECOMMENDATION 7: If the legal advice obtained by SafeWork NSW finds it necessary, section 118 of the WHS Act be amended to explicitly permit the use of electronic devices which are necessary for the investigation of suspected contravention including but not limited to portable air monitoring devices and mobile phones.

2.5 Arrangements with other regulators

SafeWork's jurisdiction to derived from the WHS Act and thus does not extend to PCBUs who hold a ComCare licence. When it comes to construction, this means SafeWork NSW

¹² *Work Health and Safety Act 2011* (NSW) s 146.

has no jurisdiction over the work health and safety practices of John Holland, who has been responsible for some of the big tunnelling projects in NSW, including the Rozelle interchange. This does not mean that SafeWork NSW can abrogate its responsibilities for other subcontractors engaged on those projects. Workers in NSW have a right expect that SafeWork NSW is doing all it can to regulate the sector even if that means working in tandem with the ComCare inspectorate.

In January 2024, in response to questions asked by unions about their activities in relation to NSW tunnelling projects, Comcare advised that:

- In 2022-23 it had undertaken 27 inspections at Sydney tunnelling sites
- In 2023-24 (Jul-Sept) it had undertaken 6 inspections at Sydney tunnelling sites
- In 2022-23 it had received 13 health monitoring reports regarding potential/actual exposure to silica
- In 2023-24 (July-Sept) it had received 0 health monitoring reports regarding potential/actual exposure to silica

Given these statistics relate to a sole PCBU it would seem, at least on the surface, that ComCare is taking the risk of silica dust in tunnelling projects seriously. What is unclear is whether SafeWork was also involved in these regulatory efforts to ensure that the subcontractors engaged on those projects are abiding by their obligations.

The CFMEU suggests that the Committee may want to request SafeWork NSW provide details of any MOU that exists between it and ComCare regarding information gathered from tunnelling sites as a result of ComCare's activities and what arrangements, if any, to ensure the timely referral of matters outside of each regulators jurisdiction.

Where a formal practice or arrangement is in place, SafeWork NSW should inform the relevant industry stakeholders, including unions, of the details of those arrangements as a matter of transparency and to ensure that each regulator is held to account.

RECOMMENDATION 8: SafeWork NSW inform relevant stakeholders in the tunnelling industry, including PCBUs and unions, about any arrangements that exist between itself and ComCare regarding inspections and activities in NSW tunnelling sites.

3 Benefits Scheme

3.1 Retraining and work assistance

3.1.1 icare's discretionary efforts

icare has previously advised this Committee that it provides funding for occupational rehabilitation and retraining¹³ but that this support is discretionary and is only affordable because of the assets of the scheme.¹⁴ The CFMEU is aware that icare has been providing rehabilitation and retraining funding where possible. However, the fact that these payments are discretionary raises questions about the longevity of this practice. A better approach would be to amend the legislation to mandate these programs.

3.1.2 Examples from workers compensation

The workers compensation system provides some insight into programs that could be adopted in the dust diseases scheme to assist workers to return to work in non-dust related industries.

3.1.2.1 Legislative Provisions

Section 64B of the *Workers Compensation Act 1987* (NSW) (**the 1987 Act**), requires a pre-injury employer to pay compensation for the cost of work assistance provided to assist the worker to return to work with a new employer up to \$1,000. Work assistance under this provision is defined to include education or training, transport, childcare, clothing, equipment or any similar service or assistance.¹⁵ The *Workers Compensation Regulation 2016* (NSW) (**WC Regulations**) places limits on the availability of that assistance requiring that the offer of new employment must be made in writing and must be for a period not less than 3 months.¹⁶

Section 64C of the 1987 Act applies to 'workers with high needs' being those with more than 20% WPI,¹⁷ who have received or have been eligible to receive, weekly benefits for

¹³ Standing Committee on Law and Justice, *2019 Review of the Dust Diseases Scheme* (Report No 73, March 2020) 41.

¹⁴ Above n 13, 62.

¹⁵ *Workers Compensation Act 1987* (NSW) s 64B(1).

¹⁶ *Workers Compensation Regulations 2016* (NSW) reg 9.

¹⁷ *Workers Compensation Act 1987* (NSW) s 32A.

an aggregate period of more than 78 weeks.¹⁸ Under this provision, the pre-injury employer is liable to pay compensation for the cost of education or training provided to assist the worker to return to work up to \$8,000. The WC Regulations require the education and training to be consistent with the retraining or employment objectives of the injury management plan established for the worker and to be provided by a registered training provider.¹⁹

Unfortunately, neither of these provisions are tied to CPI thus the amounts allocated are static. If similar provisions were to be adopted by the dust diseases scheme, then the amounts must be increased in line with CPI to ensure that they have practical application into the future.

3.1.2.2 Programs provided by the Authority

Section 53 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**the 1998 Act**) allows SIRA to institute, administer or co-ordinate vocational re-education and rehabilitation schemes for injured workers and allows SIRA to draw from the Operational Fund in order to fund those programs.

Over time, SIRA has developed a number of programs to provide financial incentives to new employers to engage workers with a work-related injury and to fund retraining to assist injured workers to find alternate employment. Each of these programs are dependent on the worker being detached from their pre-injury employer.

The following table sets out the programs currently advertised on the SIRA website:

¹⁸ *Workers Compensation Act 1987* (NSW) s 64C(1).

¹⁹ *Workers Compensation Regulations 2016* (NSW) reg 10.

Name of program	Eligibility	What is involved
Work trial Program	<p>You are receiving or are entitled to receive weekly benefits under the 1987 Act</p> <p>You have capacity for work but your pre-injury employer cannot provide suitable work</p> <p>You have not accepted a commutation or WID settlement</p>	<p>A work trial program places the worker with a new employer for a short-term work arrangement (up to 12 weeks)</p> <p>The rehabilitation provider helps the worker find a work trial host and undertakes a workplace assessment to match capacity to the requirements of the job</p> <p>Any costs relating to travel and essential equipment are covered by the insurer or SIRA</p> <p>The worker will continue to receive weekly payments from the insurer – no payments from host employer</p> <p>Work Trial Guidance Material</p>
Training program	<p>You are receiving or are entitled to receive weekly benefits under the 1987 Act</p> <p>You have not accepted a commutation or WID settlement</p>	<p>Training course should:</p> <ul style="list-style-type: none"> • Be provided by an RTO or a higher education provider • Result in formal qualifications recognised by the Australian Quality Training Framework or provide an industry recognised licence or certificate • Be the best match for the worker’s circumstances – proximity to residence, timeliness and availability, most suitable delivery method <p>Expenses covered may include:</p> <ul style="list-style-type: none"> • Compulsory course fees • Text book and stationary expenses – up to \$500 for one year full time study • Accommodation if the course involved a period of external study <p>Only available if the worker either doesn’t have an entitlement under s 64C or if the worker has exceeded the cap under that section</p> <p>Training Program Guidance Material</p>

<p>JobCover Placement Program</p>	<p><u>Worker eligibility:</u> You are receiving or are entitled to receive weekly benefits under the 1987 Act You cannot return to your pre-injury employer because of your injury You have not accepted a commutation or WID settlement</p> <p><u>Employer eligibility:</u> Able to offer employment for a minimum of 12 months Able to provide a minimum of 64 paid hours per month or a return to pre-injury hours Hold a current workers compensation policy or self-insurance licence</p>	<p>Three benefits are available to employers:</p> <ul style="list-style-type: none"> • Incentive payments of up to \$27,400 for up to 12 months • Worker’s wages not included in the new employer’s workers compensation premium for two years • The new employer is protected against the costs associated with the worker’s existing injury during the first two years of employment <p>Incentive payments increase according to the length of time the worker remains employed:</p> <ul style="list-style-type: none"> • Up to \$400 per week for the first 12 weeks (max \$4,800) • Up to \$500 per week for next 14 weeks (max \$7,000) • Up to \$600 per week for next 26 weeks (max \$15,600) <p>JobCover Placement Program Guidance Material</p>
<p>Transition to work</p>	<p>Cannot return to work with pre-injury employer Have a barrier or need that is preventing you from finding or accepting new employment Are receiving or are entitled to receive, weekly benefits or recently stopped weekly payments because you started working Havent accepted a commutation or WID claim Have used your entitlements to new employment assistance</p>	<p>Provides funding of up to:</p> <ul style="list-style-type: none"> • \$200 to help you job-see or start work • \$5,000 to address immediate or short-term barriers that prevent you from accepting an offer of new employment <p>The funding may be used for:</p> <ul style="list-style-type: none"> • Travel costs • Relocation and accommodation • Child care • Clothing and related expenses <p>Transition to work guidance material</p>
<p>JobCover 6</p>	<p><u>Worker Eligibility:</u></p>	<p>Provides three benefits to employers:</p>

	<p>You have capacity for work and are looking for new employment You are receiving or are entitled to receive weekly benefits under the 1987 Act You have not accepted a commutation or WID settlement <u>Employer Eligibility:</u> Have offered employment for an agreed period for a minimum of 64 paid hours per month or a return to to pre-injury hours Hold a current workers compensation policy or a self-insurance policy</p>	<ul style="list-style-type: none"> • Incentive payments of up to \$10,400 for up to 6 months (\$400 per week) • Exemption of your wages from their workers compensation premium calculation for two years • Protection against the costs of changes to your existing injury for up to two years <p>JobCover6 guidance material</p>
<p>Section 64C – Education or training assistance payments</p>	<p>You have been assessed as having a permanent impairment of more than 20 per cent You have received weekly benefits for a period of more than 78 weeks You will participate in education and training that is consistent with your injury management plan Ensure the training is provided by an RTO or a registered higher education provider</p>	<p>Provides for a cumulative total of \$8,00 for expenses related to training and may include:</p> <ul style="list-style-type: none"> • Course fees • Other related expenses (e.g. text books, travel) <p>Guidance Material</p> <p>Section 64C of Workers Compensation Act 1987</p>

While the CFMEU is not suggesting that these programs should be wholly copied and transported into the dust diseases scheme, they do provide some handy examples of programs that might be worth considering. Appropriate consultation with stakeholders to determine the needs of the workers and to assist in the establishment of these programs is a must. This should not be an icare only project.

There is a lot of knowledge among the support organisations in the dust disease scheme as well as industry stakeholders, including unions, and in the representatives on the Dust Diseases Board. Tapping into all that knowledge is likely to result in a more focused, useful and user-friendly set of programs.

RECOMMENDATION 9: The *Workers Compensation (Dust Diseases) Act 1942* (NSW) should include a provision akin to s 64C of the *Workers Compensation Act 1987* (NSW) with two amendments:

- It should be available for all workers who have contracted a dust disease regardless of impairment level
- The amount allocated should increase in line with CPI.

RECOMMENDATION 10: In the alternative, the *Workers Compensation (Dust Diseases) Act 1942* (NSW) should include a provision akin to s 53 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) with two amendments:

- It should require icare to establish some programs for the retraining, re-education and redeployment of those who contract dust diseases
- It should require icare to consult with industry stakeholders, including unions, and the Dust Diseases Board to establish the most appropriate way to establish those programs.

3.2 Weekly benefits

3.2.1 The calculation

The changes to the 1987 Act as a result of the passage of the *Workers Compensation Legislative Amendment Act 2012* did not apply to claims under the Dust Act.²⁰ Weekly

²⁰ *Workers Compensation Legislative Amendment Act 2012* (NSW), s 4.

benefits payable to workers under the Dust Act continue to be calculated in accordance with the pre-2012 *Workers Compensation Act 1987* (NSW). This means that while weekly benefits are not subject to the work capacity regime or the time limits on workers compensation, they are still subject to the 26 week step down to the statutory rate..

It is important to recognise that most claimants in the dust diseases scheme come from industries in which workers are expected to work in excess of 50 hours per week resulting in higher than average weekly wages. For most if not all of these workers, lodging a claim is going to result in a significant financial disadvantage. This disadvantage acts as a deterrent to workers making timely dust claims.

The biggest impact is on workers who remain on weekly benefits beyond week 26. The average construction worker on workers compensation with total incapacity at week 26 is still likely to reach the weekly benefit cap of \$2523 per week²¹ whereas a worker in the dust scheme with total incapacity at week 26 is entitled to a maximum weekly benefit of \$593.40²² with additional payments for dependents. A \$1100 difference per week.

The difference was less problematic when the claimants were nearing, at, or past retirement age, but with the statistics showing an increase in claims in younger work groups, we should consider whether a new weekly benefit regime is possible so that workers are not discouraged from making claims and exiting their unsafe but financially advantageous industries.

Any change must be financially sustainable to ensure the scheme can survive into the future, but we cannot continue to punish workers for having a dust disease by financially starving them into remaining in unsafe work.

²¹ Workers Compensation Benefits Guide <<https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/workers-and-claims/Workers-compensation-benefits-guide.pdf>>

²² Ibid.

RECOMMENDATION 11: The NSW Government and icare to give consideration to changing the weekly benefits provisions having regard to the differential between amounts paid under workers compensation scheme compared to the dust diseases scheme.

3.2.2 Weekly benefits vs social security

The 2018 Review of the Dust Disease Scheme received evidence as to the interplay of weekly benefits and entitlements under the *Social Security Act 1991* (Cth). This led the Committee to recommend:

That the NSW Government, through the Council of Australian Governments, liaise with the Commonwealth Government to ensure that periodic compensation paid to Workers Compensation (Dust Diseases) Scheme participants are not treated as income by Centrelink, to ensure that participants who receive benefits such as the Age Pension do not have their benefits reduced on account of their involvement in the Scheme.²³

In its response to the review, the NSW Government stated that it supported the recommendation but that it was a matter for the Commonwealth government. No further information was provided about whether the NSW Government would have those discussions or even if those discussions took place.

We understand that icare was considering making a submission regarding the payment of weekly benefits to those who have passed retirement age. We understand that the recommendation would recommend removing weekly benefits for this cohort of workers.

The CFMEU does not support any amendments that would automatically disentitle workers to weekly benefits merely because they have reached retirement age. That was never the intention of the dust diseases scheme.

There are other options that should be canvassed before we consider taking benefits from injured and sick workers.

²³ Above n 8.

3.2.2.1 *Discussions with Commonwealth Government*

The CFMEU would like to see the current NSW Government act upon the recommendation from the 2018 review and open a dialogue with the Commonwealth Government to see if change is possible. At the very least, there should be a discussion about whether workers who qualify for benefits under the Dust Act can retain their non-monetary benefits available to social security recipients.

RECOMMENDATION 12: The NSW Government to liaise with the Commonwealth Government on behalf of dust disease sufferers to develop a practice whereby workers being paid under the dust Act continue to receive their pension, or at least retain the non-monetary benefits available to social security recipients.

3.2.2.2 *Orders to reduce weekly benefits*

The workers compensation scheme provides a useful example of how this particular problem could be managed.

Section 45 of the 1987 Act allows the Commission to order that the weekly payment is not payable or is reduced to a specified amount or in a specified manner, if: *“the worker, or any spouse or other person related to the worker, would as a result be qualified to receive any pension, allowance or other benefits under the Social Security Act 1991 of the Commonwealth or under any other Act or law.”*

Rather than removing the entitlement to weekly benefits for those beyond retirement age, a provision akin to s 45 should be considered. This allows the worker to make a choice about their benefits, rather than having an outcome imposed against them.

RECOMMENDATION 13: The *Workers Compensation (Dust Diseases) Act 1942* (NSW) be amended to include a provisions similar to s 45 of the 1987 Act.

3.3 Dependents

The CFMEU has been made aware the administration burden that affects families following the death of a loved one who is a recipient under the Dust Act. Eligibility for ongoing entitlements for dependents are means tested. Once the loved one passes away,

their dependents must gather substantial financial records in order to prove their eligibility. This can be an incredible burden on families as they try to manage their grief and make arrangements for themselves and their loved ones.

To reduce the burden on families in the immediate aftermath, a 3 month 'cooling off' period could be adopted where dependent benefits are paid for a period of three months to allow for the worst stages of grief to pass before more documentation is requested to justify payments beyond the cooling off period.

This small change would come as a relief to many, but especially families with young children who are grappling with life without their loved one.

RECOMMENDATION 14: The *Workers Compensation (Dust Diseases) Act 1942* (NSW) be amended to provide for a three month cooling period before any means testing takes place to determine the eligibility for ongoing dependent benefits.

4 Conclusion

Workers exposed to deadly dust at work deserve a regulator who is proactive, communicative and reliable to help reduce the risk of them contracting a deadly dust diseases. Unfortunately, SafeWork NSW has been failing in their duty in recent years. It is hoped that adopting the recommendations of the Auditor-General and the recommendations in this submission, will help turn our lacklustre regulator into an agency that workers in NSW can rely upon.

The CFMEU value the proactive work undertaken by icare's Dust Diseases Care in rolling a vocational rehabilitation and training, but the discretionary nature of this help means that at any time it can be withdrawn. These programs should be enshrined in legislation to ensure their longevity and to ensure that workers exposed are able to make positive changes to their employment.

The CFMEU would welcome the opportunity to provide the Committee with oral evidence at any future hearings.

5 List of Recommendations

RECOMMENDATION 1

The NSW Government amend the *Work Health and Safety Act 2011* or the *State Insurance and Care Governance Act 2015* (whichever is the most appropriate) to include a provision appointing the Standing Committee on Law and Justice as the “*designated committee tasked with supervision of the work health and safety regime and the regulatory and educational functions of the designated regulator under the Work Health and Safety Act 2011.*”

RECOMMENDATION 2

SafeWork NSW develop a set of mandatory terms for inspectors to use when inputting data to reduce the inconsistency and hopefully increase the reliability of the data moving forward.

RECOMMENDATION 3

SafeWork to consider undertaking a review of the website in consultation with relevant stakeholders including unions and employers to work out the best method for arranging and presenting the information. As part of this process, SafeWork should engage with SIRA and icare to understand how they managed their consultation processes.

RECOMMENDATION 4

The SafeWork NSW website be amended to:

- Highlight tunnelling and quarrying as key sub-industries with their own dedicated pages
- Move the regulatory priorities to the homepage, or provide a clear link to the regulatory priorities
- Where applicable, reference back to legislation either explicitly or via hyperlink
- Provide a link to the NSW legislation website so workers and PCBUs can easily access the Act and Regulations.

RECOMMENDATION 5

The *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulations 2017* (NSW) be amended to require air monitoring in all industries where workers are likely to be exposed to silica and other dusts that cause dust diseases.

RECOMMENDATION 6

SafeWork NSW seek advice as to whether the WHS Act permits the use of portable air monitoring devices by entry permit holders exercising their rights under the Act.

RECOMMENDATION 7

If the legal advice obtained by SafeWork NSW finds it necessary, section 118 of the WHS Act be amended to explicitly permit the use of electronic devices which are necessary for the investigation of suspected contravention including but not limited to portable air monitoring devices and mobile phones.

RECOMMENDATION 8: SafeWork NSW inform relevant stakeholders in the tunnelling industry, including PCBUs and unions, about any arrangements that exist between itself and ComCare regarding inspections and activities in NSW tunnelling sites.

RECOMMENDATION 9

The *Workers Compensation (Dust Diseases) Act 1942* (NSW) should include a provision akin to s 64C of the *Workers Compensation Act 1987* (NSW) with two amendments:

- It should be available for all workers who have contracted a dust disease regardless of impairment level
- The amount allocated should increase in line with CPI

RECOMMENDATION 10

In the alternative, the *Workers Compensation (Dust Diseases) Act 1942* (NSW) should include a provision akin to s 53 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) with two amendments:

- It should require icare to establish some programs for the retraining, re-education and redeployment of those who contract dust diseases

- It should require icare to consult with industry stakeholders, including unions, and the Dust Diseases Board to establish the most appropriate way to establish those programs.

RECOMMENDATION 11

The NSW Government and icare to give consideration to changing the weekly benefits provisions having regard to the differential between amounts paid under workers compensation scheme compared to the dust diseases scheme.

RECOMMENDATION 12

The NSW Government to liaise with the Commonwealth Government on behalf of dust disease sufferers to develop a practice whereby workers being paid under the dust Act continue to receive their pension, or at least retain the non-monetary benefits available to social security recipients.

RECOMMENDATION 13

The *Workers Compensation (Dust Diseases) Act 1942* (NSW) be amended to include a provisions similar to s 45 of the 1987 Act.

RECOMMENDATION 14

The *Workers Compensation (Dust Diseases) Act 1942* (NSW) be amended to provide for a three month cooling period before any means testing takes place to determine the eligibility for ongoing dependent benefits.