



Dr Brian Kennedy
Director
National Gallery of Australia
GPO Box 1150
Canberra ACT 2601]

Dear Dr Kennedy

Report of Investigation under the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (OHS(CE) Act)*

I am writing in accordance with section 53 of the OHS (CE) Act to provide you with the report of an investigation conducted by Comcare to assess actions taken by the National Gallery of Australia (the Gallery) to address recommendations made following investigations No's 1913 and 1997 conducted previously at the Gallery.

The investigator was directed to investigate the matter fully under the relevant provisions of the OHS (CE) Act to ascertain:

- whether the requirements of the Act were being complied with; and
- whether actions taken in response to recommendations made following these investigations were appropriate and complete, whether any actions remained outstanding and the timeframes within which these actions would be completed; and
- whether there was any other health and safety matter concerning the air-conditioning system and its maintenance at the Gallery which the Galley needed to address.

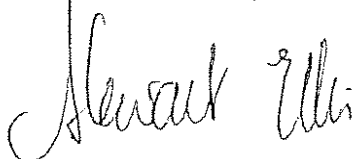
The investigator has concluded that the Gallery has taken reasonably practicable steps to comply with the majority of the recommendations of the previous investigations and that the progress of the implementation is acceptable. The investigator also found that there was evidence that the Gallery had contravened the OHS(CE) Act in relation to the use and handling of hazardous substances. As a result of his conclusions, the investigator has made a number of recommendations. A copy of the investigation report is at Attachment A.

In order to address these recommendations, I would appreciate it if you would provide to Comcare by 30 June 2003, a plan covering action taken or proposed to be taken in relation to each of the recommendations contained in this report. An indication of the expected date of completion of each action is also requested. This request is made under subsection 53(4) of the OHS (CE) Act.

As agreed prior to the commencement of this investigation, it is proposed that the steering Committee consisting of yourself, Mr Barry Leahy, Chief Executive of Comcare and a senior representative of the CPSU be convened to oversee the implementation of the action plan covering recommendations arising from this investigation.

The Senate Employment, Workplace Relations and Education Committee has requested a copy of the report of this investigation, as has the Ombudsman and Mr Brian Cropp (under the *Freedom of Information Act 1982*). Comcare will release the report in line with these requests.

Yours sincerely

A handwritten signature in cursive script that reads "Stewart Ellis". The signature is written in black ink and is positioned to the left of the typed name.

Stewart Ellis
General Manager
OHS(CE) Act Policy and Support

26 May 2003

FILENOTE

FILE COPY

On the afternoon of 26 May 2003, Tony Rhynehart and I met with Stewart Ellis from Comcare. Mr Ellis hand delivered a letter dated 26 May 2003 addressed to the Director which was accompanied by a copy of the report by Mr Wray.

Mr Ellis invited the Gallery to review the report and advise him of any corrections of a typographical or factual nature and to provide those comments within the next day or two so that the report could be issued as a final report. Mr Ellis advised that Comcare wished to finalise the report this week and proposed to provide a copy of the report to Comcare's Estimates Committee the following week.



Alan Froud
Deputy Director

26 May 2003

FILE COPY

Alan Froud

From: Alan Froud
Sent: Wednesday, 28 May 2003 9:17
To: 'stewart.ellis@comcare.gov.au'
Subject: Wray Report

Dear Stewart,

Thank you for the opportunity to respond to the final report from Mr Wray.

We note the many changes to the report made by Mr Wray and are keen to see the report finalised. We offer the following comments in respect of the final report in the short time allowed to us to consider it.

Whilst we will have other comments to make in the fullness of time we would be grateful if you could ask Mr Wray to consider these comments regarding the final report.

1. We have noted the following errors of a typographical nature

Page 2 - delete Investigator's line from Contents

Page 12 - first line delete "so"
- para 33 third last line "on to" not "onto"

Page 13 - para 36 second last line "it" not "its"
- para 40 third last line "been" not "be"

Page 15 - para 45 second sentence does not make sense.
- para 46 Ken Dyson not Doyle

Page 18 - para 60 Joy Pensko is not "an Occupational Safety officer"

Page 26 - para 94 3) second line supervisors not supervisor.

2. Para 21

The investigator asserts that droplets of water could travel "into the ductwork and beyond and so creating wet conditions in insulation." We assume the investigator is referring to air handling enclosures and not ductwork and believe that in the interest of accuracy these spaces should be correctly described. Moisture has never been detected in the ductwork.

We also note that the Gallery's air conditioning systems operate on an almost continual basis and that there would be little opportunity for the conditions to vary significantly from normal operating conditions. Even for routine maintenance the down time is very limited.

3. Para 22

Again the correct term is air handling enclosure not ductwork.

4. Para 26

The investigator's comments suggest that Gallery staff were dismissive of the investigator's assistance. This is not so. His comments were noted and accepted, with appreciation being expressed at the time. There was no indication that a formal response was expected, or indeed required. We would be happy to formally acknowledge his assistance should that be his wish.

5. Para 39

28/05/2003

We note that the investigator has still not quoted in full from the Hennessy Report and omitted to include the significant additional comment made in the Hennessy report: " Further tests were conducted and revealed nothing untoward."

6. Para 63

The investigator was provided with the timeline related to the decision to change to the use of Hypero 50. This timeline is supported by available evidence. Hypero 50 was collected on 18 February 2000 and first used on 19 February 2000.

7. Para 69 and 70

Our understanding is that it would not be possible to apply Hypero 50 with a pressure garden spray applicator and we believe Mr Robinson confused application of CLS5 with Hypero 50 which was introduced for the first time on 19 February 2000. Mr Allan Sims the contractor engaged by the Gallery to apply Hypero 50 in HVAC cleaning operations would be a logical point of reference regarding the methods of using Hypero 50. Our understanding is that Mr Sims was not asked to comment on the possible use of Hypero 50 in the manner suggested by Mr Robinson. The investigator also notes that Mr Dyson supported Mr Robinson's claims regarding spraying Hypero 50 with the garden spray. Mr Dyson left the employ of the Gallery on 22 February three days after Hypero 50 was first used and at no time was involved in HVAC cleaning using Hypero 50.

The claim that Gallery employees were exposed to a very hazardous substance in the worst possible way is not correct and not supported by available evidence.

8. Para 73

The investigator has failed to note the timeline provided by the Gallery supported by documentary evidence that clarifies the situation.

- Garry Cox resumed duties on 25 January 2000 (confirmed by leave records)
- the decision to use Hypero 50 was taken in the week commencing 14 February 2000; it was decided not to wait one week for the supply but to instead request Parliament House to loan the material;
- the first supply of Hypero 50 was collected from Parliament House on 18 February 2000;
- the first use of Hypero 50 was on 19 February 2000;
- replacement material was ordered on 25 February 2000 and delivered on 1 March 2000.

The statement that Mr Cox was on leave when the decision was taken on the use of Hypero 50 is incorrect as is the investigator's understanding of when Mr Sitauti was organising the loan from Parliament House.

9. Para 80

Para 80 says that the NGA submission of 19 April 2003 "seems to suggest that, as no elevated levels of bacteria or fungi have ever been detected in the Gallery, there has been no contravention of its OH&S obligations". We believe this is a complete misrepresentation of the NGA submission. The submission challenged the assumption that elevated levels of bacteria or fungi had existed. This is a matter that the investigator is not able to simply assume unless there is some evidence to support that assumption. He previously seemed to base this assumption on the fact that such bacteria and fungi breed in warm conditions. NGA pointed out that this was unwarranted because the conditions were cool. That meant that his assumption was invalid in the absence of any other evidence that there were in fact elevated levels of bacteria and fungi. This appears to remain a valid criticism.

But, in any event, the NGA submission did NOT go on to assert or imply that NGA had therefore not contravened its OH&S obligations - it said only, that numerous points, comments, inferences and erroneous conclusions flowed from the incorrect assumption. That does NOT amount to saying that NGA had thereby not breached any OH&S obligation.

We believe that para 80 should thus be removed - the investigator has wrongly and unjustifiably attributed to the NGA submission a proposition that it neither stated nor implied.

10. Para 91

At this paragraph the investigator alleges that there is evidence to show that the Gallery "has contravened the ... Act" in five particulars. (We note that in two instances, it is Regulations and not the Act which refer).

The Gallery notes the conclusion of the investigator but does not agree with his conclusion regarding Section 16 (1). We do not agree with the conclusion that employees were exposed to the vapours of a hazardous substance that were injurious to their health (see comments re paras 69 and 70). The investigator has not provided evidence of this, and seems to have placed more reliance on statements made by former staff than on statements made by ongoing Gallery officials who were in a position to know what happened. Even if the investigator did not agree with the Gallery we believe there is no evidence of actual injury and therefore believe the wording would need to be amended to "that could be injurious to their health".

Possible contravention of Reg 6.19 does not seem clear - that Reg is only breached where there is exposure to a hazardous substance "at a level that exceeds the appropriate exposure standard for the relevant period of time". The report contains no discussion of the relevant standard or period and thus there is a question on the face of the report about whether there is in fact any evidence to suggest a contravention.

Additionally, it seems to us that the findings of the report do not justify the language used in respect of some of the propositions in para 91:

- re section 16(2)(e), the report says that employees were not provided with training etc in the use etc of a hazardous substance "that placed their health at risk"- again, we cannot detect any evidence of their being actual injury and because of this we suggest that this should say "that could have placed their health at risk";
- re Reg 6.17, again the report says that the hazardous substance "placed their health at risk" when we suggest that it should say "that could have placed their health at risk";
- re Reg 6.19 it says that employees were exposed to levels of a hazardous substance "that would be injurious to their health" - in the absence of evidence that the exposure must necessarily have been injurious, we suggest that the report could only legitimately say "that could have been injurious to their health".

11. Para 93

The investigator's assertion that the Gallery has learned little about its OH&S role is unjustified given the efforts made by the Gallery to refurbish its HVAC system and other building refurbishment initiatives in train and our ongoing commitment to improvement of OH&S management including the recent engagement of the National Safety Council of Australia to work with the Gallery to improve OH&S management. It is surely logical to ask how a staff and management which had "learned little about its OH&S role and responsibilities" (Section 93 of the report) could be the same staff and management who in the opinion of "an internationally recognised team of researchers" (Section 44) had maintained an NGA environment which did not "constitute a threat to the health of employees working in the building" (Section 92).

We do not know what is meant by the investigator's remark about detailed information being "provided to NGA managers and staff both verbally by myself and in writing by Comcare" and suggest that he clarify this point by providing details of the information he is referring to. We are keen to have regard to all relevant advice and would wish to ensure that we are aware of all advice provided by Mr Wray and Comcare.

Other

The Gallery would be grateful if the issues raised above could be considered prior to the report being finalised. We will as foreshadowed consider the report in further detail and would anticipate providing further comments on the final report to Comcare in due course.

Please feel free to discuss these issues with me or have Mr Wray contact me should he wish to do so.

Alan

Alan Froud

From: Alan Froud
Sent: Wednesday, 28 May 2003 19:33
To: 'Ellis.Stewart'
Subject: RE: NGA report

Stewart,

Thank you for the prompt response you and Mr Wray were able to provide.

I would like to talk to you tomorrow about our Senate Estimates Committee hearing earlier this evening and how the release of the report should proceed.

Alan

-----Original Message-----

From: Ellis.Stewart [mailto:Ellis.Stewart@comcare.gov.au]
Sent: Wednesday, 28 May 2003 17:59
To: Alan Froud
Cc: Leahy.Barry
Subject: NGA report

Alan,

Bob Wray has considered the NGA's comments on his report which were provided to him by email today and has made changes to his report where he felt such changes were appropriate.

The revised version of his report is now enclosed.

If there are issues remaining in the report about which the NGA has concerns, these issues should now be raised by the NGA in its formal response to my letter dated 26 May 2003.

Stewart Ellis
General Manager
OHS (CE) Act Policy and Support
Ph (02) 62750607
Fax (02) 62748585

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