

MR FLUFFY: ACQUIRING A TOXIC LEGACY

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ABSTRACT

Asbestos has long been recognised as a deadly substance. Yet its presence in older buildings throughout Canberra and surrounding regions had been underappreciated for equally as long. Since early 2014, the revelation that more than one thousand homeowners may be exposed to airborne asbestos fibres has become a dominant public policy concern. This paper surveys the history of the installation of loose fill asbestos in these homes by the business known as Mr Fluffy, the unsuccessful removal program in the 1990s and removal program now underway in Canberra. Discourse surrounding this current removal program has contemplated whether contaminated homes could be compulsorily acquired by the Australian Capital Territory (ACT) government. This paper will also examine the legitimacy of any potential compulsory acquisition.

I. THE MR FLUFFY STORY

Between 1968 and 1979 ‘Mr Fluffy’ loose fill asbestos was installed in homes in Canberra and the surrounding region. Dirk Jansen through his company D. Jansen & Co. Pty Ltd (more commonly known and nicknamed as ‘Mr Fluffy’) marketed ‘Asbestosfluf’ as a safe, inexpensive but effective insulation product.¹

Asbestosfluf was installed by spraying the roof space with a layer of the material approximately 5cm thick across the ceiling. Asbestosfluf was comprised of 100% amosite asbestos (brown asbestos), a small minority of the Mr Fluffy houses in Canberra contained crocidolite asbestos (blue asbestos).² Crocidolite was marketed as a premium product, however it is more dangerous as the fibres are thinner. The asbestos used by Mr Fluffy was loose fill asbestos, comprised of crushed raw asbestos fibres. The crushed asbestos particles are significantly more likely to become airborne and cause health problems than sheet asbestos which was a commonly used building material.³

In 1968 Mr Major, a government occupational health expert, recommended to the ACT government that the Mr Fluffy business be stopped from installing more loose fill asbestos, and that asbestos products only be used for essential purposes.⁴ This recommendation was

¹ Advertisement, ‘New asbestosfluf the perfect thermal insulating material’ 30 March 1968 *The Canberra Times* (Canberra) 6; Advertisement, ‘Asbestosfluf the perfect thermal insulating material’ 7 March 1969 *The Canberra Times* (Canberra) 24.

² Explanatory Statement, *Planning and Development (Loose- Fill Asbestos Insulation Eradication) Amendment Regulation 2014* (ACT).

³ *Ibid.*

⁴ G Major, ‘Asbestos Hazard’ (Report, Occupational Health Section, July 1968).

made on the basis of health concerns for the both the installers and the wider community.⁵ No action was taken by the government in response to Mr Major's report and Mr Fluffy was permitted to continue installing loose fill asbestos until the ACT introduced asbestos controls in 1978.⁶

In 1972, Dirk Jansen's son took over D. Jansen & Co. Pty Ltd and launched J & H Insulations. The Asbestosfluf was rebranded and renamed 'Amoswool'. The new advertisements proudly boasted that the insulation material was 'completely harmless' and would 'add market value to the home'.⁷ The new advertisements did not mention that the product was composed of asbestos.

Loose fill asbestos was installed not only in Canberra, but also its surrounding regions including, Bungendore,⁸ Queanbeyan and Yass. A separate company called 'Bowers Asphalt' was responsible for installing loose fill asbestos in Sydney homes.⁹ In Canberra, some homeowners were able to purchase loose fill asbestos in bags so that they could install the product themselves.¹⁰ Homeowners transported the asbestos in trailers to the South Coast and installed it in their coast houses themselves, without using any protective gear.¹¹ It is believed that Mr Jansen also gave several tonnes of the loose fill asbestos to an unknown company somewhere in the Berrigan Shire in New South Wales (NSW).¹²

The proliferation of loose fill asbestos in NSW is unknown due to an absence of information regarding Mr Fluffy and Bower's Asphalt operations. Queanbeyan has the highest amount of contaminated houses in NSW which is expected given its close proximity to the ACT.¹³ The NSW government has located a total 53 affected homes, some of which have already been remediated or demolished at the owner's expense.¹⁴

In a study commissioned by the NSW government, PricewaterhouseCoopers has estimated

⁵ Ibid.

⁶ Lenore Taylor 'Up to 8000 ACT houses at asbestos risk' *The Canberra Times* (Canberra); Rod Campbell 'Authorities knew of asbestos risk' *The Canberra Times* (Canberra) 8 October 1987, 1.

⁷ Advertisement 'Insulate with Amoswool' *The Canberra Times* (Canberra); Letter from PricewaterhouseCoopers to NSW Department of Finance and Services, 18 November 2014 <[http://www.parliament.nsw.gov.au/prod/parlment/committee_nsf/0/51b23ac17a640195ca257db10001b85b/\\$FILE/PWC%20Interim%20Report.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee_nsf/0/51b23ac17a640195ca257db10001b85b/$FILE/PWC%20Interim%20Report.pdf)> 6; Lenore Taylor 'Asbestos Group Disappointed in Holding' *The Canberra Times* (Canberra) 1.

⁸ Emma Macdonald 'Bungendore family face ruin after their horrific Fluffy Discovery' *The Canberra Times* (Canberra) 14 December 2014.

⁹ Alexis Carey 'Revelations Rozelle's former Bowers Asphalt Pty Limited used Mr Fluffy-style loose-fill asbestos in Sydney buildings' *The Sydney Telegraph* (Sydney) 6 August 2014; Nicole Hasham 'Mr Fluffy asbestos in more than 300 NSW homes: government left with clean-up bill' *The Sydney Morning Herald* (Sydney) 12 November 2014; Emma Macdonald 'Mr Fluffy descendants express sympathy for affected families' *The Canberra Times* (Canberra) 24 July 2014.

¹⁰ Joint Select Committee on Loose-Fill Asbestos Insulation, Parliament of New South Wales, *Loose-Fill Asbestos Insulation* (2014) 17.

¹¹ ABC National, 'Mr Fluffy 2', *Stateline* 15 April 2005 (Kathleen Hyland) <<http://www.abc.net.au/stateline/nsw/content/2005/s1346621.htm>>; Diana Cozadinos 'Asbestos Alert' *Bay Post* (Batemans Bay) 20 April 2005.

¹² Letter from PricewaterhouseCoopers to NSW Department of Finance and Services, 18 November 2014 <[http://www.parliament.nsw.gov.au/prod/parlment/committee_nsf/0/51b23ac17a640195ca257db10001b85b/\\$FILE/PWC%20Interim%20Report.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee_nsf/0/51b23ac17a640195ca257db10001b85b/$FILE/PWC%20Interim%20Report.pdf)>

¹³ Ibid.

¹⁴ Kirsten Lawson 'Another Queanbeyan property tests positive to Mr Fluffy asbestos insulation' *The Canberra Times* (Canberra) 5 March 2015.

that it is likely that between 372 and 5376 NSW homes are affected by Mr Fluffy loose fill asbestos.¹⁵ In their interim report, their highest calculation of 5376 has captivated large amounts of media attention;¹⁶ however PricewaterhouseCoopers are not due to produce a final report until 30 April 2015. In the interim, a voluntary testing scheme is currently operating in NSW for concerned homeowners.¹⁷ However, given the lack of financial support or certainty for affected homeowners many are reluctant to participate in the program even if they suspect loose fill asbestos.¹⁸

Between 1989 and 1993, the Commonwealth government and the ACT government jointly funded a program to remove the loose fill asbestos from the 1060 identified affected homes. On 11 May 1989, the ACT became self-governing¹⁹ and the Territory became responsible for the administration of the removal program subject to a memorandum of understanding with the Commonwealth.²⁰ The memorandum set out the arrangements for the program; including a provision for further Commonwealth support should the houses require further remediation.

The removal program had three stages, the first stage was to inspect all residential Canberra homes constructed prior to 1979 to determine which houses were affected by loose fill asbestos; secondly to seal off the roof spaces in those affected homes and finally a removal phase to be conducted on the affected homes.²¹ At the time, the then general manager of the Asbestos Branch advised that the removal program would be unsuccessful as the remediation would not result in complete removal of loose fill asbestos.²² This was supported by evidence of homes that had privately undertaken asbestos removal continuing to reveal signs of residual asbestos.²³ The ACT Chief Executive of the Housing Industry Association also identified that the costly asbestos removal program would not remove all of the asbestos and that the only way to ensure all of the asbestos fibres were removed would be demolition.²⁴

Importantly, the program did not investigate the presence of loose fill asbestos in commercial properties despite information held by the Territory that a limited number of commercial buildings were believed to have loose fill asbestos.²⁵ There is evidence that Bowers Asphalt installed loose fill asbestos into commercial buildings in Sydney.²⁶ Neither the ACT government nor the NSW government are currently investigating the potential presence of loose fill asbestos in commercial properties.

The ACT 'removal program' concluded in 1993 and each homeowner received a notice of Completion of Asbestos Removal Work, advising that some residual asbestos may be present

¹⁵ Letter from PricewaterhouseCoopers to NSW Department of Finance and Services above n 12.

¹⁶ Emma Macdonald 'NSW government endorses asbestos inquiry and announces crisis package' *The Canberra Times* (Canberra) 19 December 2014.

¹⁷ Kirsten Lawson above n 14.

¹⁸ Joint Select Committee on Loose-Fill Asbestos Insulation above n 10.

¹⁹ *Australian Capital Territory (Self-government Act) 1988* (Cth).

²⁰ Asbestos Response Taskforce, ACT government, *Long Term Management of Loose Fill Asbestos* (2014).

²¹ Maurice Blackburn Lawyers, Submission No 34, to NSW Joint Select Committee on Loose Fill Asbestos Insulation, *Inquiry into Loose Fill Asbestos Insulation*, 31 October 2014,4.

²² Mark Hourigan 'Hidden costs in asbestos removal' *The Canberra Times* (Canberra) 1 August 1989, 1.

²³ Maurice Blackburn Lawyers above n 21.

²⁴ Mike Crowe 'Asbestos removal plan needs review' *The Canberra Times* (Canberra) 20 July 1991, 30.

²⁵ Emma Macdonald 'Fears of asbestos in commercial buildings' *The Canberra Times* (Canberra) 25 July 2013; Emma Macdonald 'Mr Fluffy asbestos in Ainslie shops' *The Canberra Times* (Canberra) 7 February 2014.

²⁶ Kirsten Lawson 'NSW Fluffy families overjoyed at buyback and demolition' *The Canberra Times* (Canberra) 19 December 2014.

in the home.²⁷ Crucially, this information was placed on the building file of the property but was not required to be disclosed on any contract for sale until 2004.²⁸

The Mr Fluffy crisis would not revive until 2013 with the discovery of the ‘Downer House’. Despite prior knowledge of the risks of residual asbestos after the removal program, the discovery of the Downer House revealed that residual loose fill asbestos had migrated down through the walls of the house.²⁹ The impact of the Downer House was heightened as the visual inspections conducted in the 1990s as part of the removal program had missed the presence of loose fill asbestos.³⁰

ACT Worksafe responded to the discovery of the Downer House by writing to Mr Fluffy affected homeowners previously identified by the removal program, and who had obtained certificates of removal, recommending that their houses be tested for the presence of residual asbestos. Many of those homeowners had purchased their home after the removal program, believing it to be free of asbestos. Many of the Mr Fluffy affected homeowners found that the loose fill asbestos had migrated into walls, cupboards down through their houses, some being forced to leave or seal off parts of their house.³¹

II. ACT BUYBACK

On 25 June 2014, The ACT government established the ACT Asbestos Taskforce (‘The Taskforce’) in response to what was dubbed the Mr Fluffy asbestos crisis. The Taskforce aimed to ‘*eradicate* the ongoing exposure risks from the continuing presence of loose fill asbestos insulation in Canberra houses.’³² The taskforce determined that the only safe way to fully eradicate the risks of the loose fill asbestos was for the demolition of the affected homes.

The ACT government received a loan from the Commonwealth to facilitate the Loose Fill Asbestos Insulation Eradication Scheme,³³ more commonly known as the ‘buyback scheme’ to pursue the demolition of the affected homes. ‘Under the scheme the ACT government will acquire, demolish, and safely dispose of all affected homes, remediate affected blocks and then resell them to defray overall Scheme costs.’³⁴ The loan received by the ACT government was received because of the memorandum of understanding entered into during the 1990s removal program, under which the Commonwealth agreed to indemnify the ACT government for the costs associated with future removal of Mr Fluffy asbestos in the Territory.

²⁷ Maurice Blackburn Lawyers above n 21.

²⁸ Ibid.

²⁹ Asbestos Response Taskforce above n 20.

³⁰ Emma Macdonald ‘Fears of asbestos in commercial buildings’ *The Canberra Times* (Canberra) 25 July 2013.

³¹ Kirsten Lawson ‘Katy Gallagher sets up a Mr Fluffy asbestos crisis taskforce’ *The Canberra Times* (Canberra) 25 June 2014.

³² ACT Asbestos Response Taskforce, ACT government, *The Loose Fill Asbestos Insulation Eradication Scheme—A Guide to the Voluntary Buyback Program* (2014) 1.

³³ Senator Eric Abetz ‘Commonwealth contribution to ACT ‘Mr Fluffy’ asbestos remediation programme’ (Media release, 28 October 2014)

<http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3473719/upload_binary/3473719.pdf;fileType=application%2Fpdf#search=%22Fluffy%20Asbestos%22>.

³⁴ Explanatory Statement, *Appropriation (Loose-fill Asbestos Insulation Eradication) Bill 2014–2015* (ACT) 2.

The ACT government announced the introduction of the buyback scheme on 28 October 2014. The buyback scheme was optional for all affected homeowners, and will close on 30 June 2015. Currently the Taskforce has received 948 applications for property valuations under the buyback but only 773 of those offers had been accepted.³⁵ It is anticipated that a small minority of affected homeowners will not opt into buyback scheme. The ACT government has reserved its right to acquire affected homes through compulsory acquisition.³⁶

Given the ongoing health risks associated with being in the property, the ACT government has imposed strict regulations on affected homes. The risk for home owners is that if they do not accept the buyback, and the ACT government chooses not to go ahead with the compulsory acquisition of their property, they will be required to comply with the stringent requirements imposed by the *Dangerous Substances Act 2004* (ACT).³⁷ The new requirements include the address of the house being added to a publically available register of loose fill asbestos affected properties. The costs of compliance will be borne by the homeowner, as the costs of compliance with the provisions of the *Dangerous Substances Act* will not be reimbursed or subsidised by the government in any way.

III. NSW RESPONSE

The NSW government was invited by the Commonwealth to participate in the 1990s removal program.³⁸ They declined the offer. Additionally, the NSW government also refused to partake in the investigation stage of the removal program to identify affected homes. The investigation would have revealed the number of affected houses in NSW, and failure to partake in this program means that the NSW government is currently unaware of the number of affected houses.³⁹

The Commonwealth views that the removal of asbestos in NSW is a matter for the state. ‘In NSW, the Commonwealth did not see itself as having a role; its role in the ACT program was because of its status as a former Territory administrator’.⁴⁰ It was left to the NSW government to fund the removal of the loose fill asbestos in NSW homes. Due to the concentration of affected homeowners, the Queanbeyan City Council is responsible for a large amount of lobbying to both the state and Commonwealth government for assistance with the Mr Fluffy crisis. The affected homeowners in Queanbeyan have petitioned for NSW and Commonwealth government assistance since the 1990s when the ACT removal process was conducted.⁴¹

While the affected ACT homes were being remediated in the 1990s, the NSW government instead offered asbestos testing to homeowners that provided the government with a sample.

³⁵ Asbestos Response Taskforce *Key Statistics* (13 May 2015) ACT government <<http://www.asbestostaskforce.act.gov.au/>>.

³⁶ Kirsten Lawson ‘Mr fluffy home owners will be forced to seal dwellings if they stay’ *The Canberra Times* (Canberra) 30 October 2014.

³⁷ Ibid.

³⁸ Meredith Clisby ‘Queanbeyan Homes still have asbestos’ *The Canberra Times* (Canberra) 3 July 2013.

³⁹ Joint Select Committee on Loose-Fill Asbestos Insulation above n 10.

⁴⁰ Adam Spence ‘Revealed: How the scandalous Mr Fluffy Legacy lives on’ *City News* (Canberra) 6 August 2014.

⁴¹ Joint Select Committee on Loose-Fill Asbestos Insulation above n 10.

A letter was sent to 5,000 NSW houses that were built before 1980 inviting them to have a home inspection to determine if their house contained asbestos, however only 272 houses were inspected.⁴² If an affected house was identified, any subsequent remediation was undertaken at the homeowners' expense as there was no government funding available. NSW currently rely on voluntary testing to identify loose fill asbestos affected homes.⁴³ As the extent of affected houses is yet to be determined, it is impossible to estimate the costs of any removal or demolition program in NSW. Homeowners in NSW are reluctant to come forward for voluntary testing, as unlike the ACT there is no expected funding for removal of the hazardous substance, the discovery of asbestos is likely to devalue the home.⁴⁴

The discovery of the Downer House and consequent actions by the ACT government placed greater pressure on the NSW government to take action. In response the NSW government created the Loose Fill Asbestos Insulation Taskforce to advise the government on the best solution.⁴⁵ The NSW commissioned and subsequently received their report highlighting the health risks of Mr Fluffy loose fill asbestos and recommending a demolition program similar to the ACT.⁴⁶ Importantly, the NSW government immediately implemented emergency funding for affected homeowners. The Loose Fill Asbestos Insulation Taskforce is currently considering the best course of action to deal with the Mr Fluffy crisis, which may include an option for NSW owners to rebuild on their own land after a demolition had taken place, an offer not extended to ACT residents in the buyback scheme.⁴⁷

The recent actions of the NSW government indicate a major turnaround when compared to the NSW government's actions in the 1990s. Prior to the report being received by the NSW government maintained that Mr Fluffy loose fill asbestos did not pose a health risk so long as it was contained.⁴⁸ The Heads of Asbestos Coordination Authorities was tasked with all NSW policies in relation to all forms of asbestos, rather than just the presence of loose fill asbestos.⁴⁹ Previously, there was no provision for NSW government funding for remediation, demolition or sealing of the property.

In the Queanbeyan City Council there is currently no legal requirement for an existing owner to disclose information about the property having loose fill asbestos insulation.⁵⁰ This is contrasted with the ACT approach where it is mandatory to have an asbestos report detailing the risk that asbestos may be present in the home included contract for sale.

⁴² Ibid.

⁴³ 'Free asbestos checks for Queanbeyan Homes built pre-1980' *The Queanbeyan Age*, (Queanbeyan) 28 October 2014

⁴⁴ David Butler 'Mr Fluffy's toxic asbestos legacy in Qbn' *The Queanbeyan Age*, (Queanbeyan) 26 June 2014

⁴⁵ Emma Macdonald 'NSW government endorses asbestos inquiry and announces crisis package' *The Canberra Times* (Canberra) 19 December 2014.

⁴⁶ Kirsten Lawson 'NSW inquiry calls for ACT-style buy back and demolition of Fluffy houses', *The Canberra Times*, (Canberra) 18 December 2014; Joint Select Committee on Loose-Fill Asbestos Insulation above n 10, 75.

⁴⁷ Kirsten Lawson 'NSW Fluffy Families overjoyed at buyback and demolition' *The Canberra Times* (Canberra) 19 December 2014.

⁴⁸ Kirsten Lawson 'Queanbeyan residents told Mr Fluffy asbestos homes are safe' *The Queanbeyan Age*, (Queanbeyan) 27 June 2014

⁴⁹ Joint Select Committee on Loose-Fill Asbestos Insulation above n 10, 67.

⁵⁰ 'Free asbestos checks for Queanbeyan Homes built pre-1980' *The Queanbeyan Age*, (Queanbeyan) 28 October 2014.

IV. COMPULSORY ACQUISITION

After the conclusion of the buyback scheme it is likely that the ACT government will have some affected homeowners who have not voluntarily entered into the scheme. As at 13 May 2015, 948 buyback applications had been received by the Taskforce, 909 offers had been made accepted but only 773 of the offers had been accepted. There were 73 homes that had not made buyback applications.⁵¹ The application period for the buyback scheme close on 30 June 2015. From these figures, it is highly likely that not all homes will accept the buyback offer, meaning the ACT government will have to consider alternatives which may include compulsorily acquiring the homes.

In May 2015, the ACT Asbestos Taskforce sent a letter to affected homeowners who had not accepted a buyback offer. The offer stated that after the buyback scheme closed, the government would become a 'purchaser of last resort' offering the market value of the home (which would consider the presence of asbestos), and remove the stamp duty concession and first right of refusal on the remediated block.⁵² The government has previously reserved its right to compulsorily acquire blocks. The announcement demonstrates that compulsory acquisition will be last resort for the ACT government and it will exhaust all potential avenues to acquire the property by agreement.

A. *The Process of Compulsory Acquisition*

The ACT is the only jurisdiction in Australia with an exclusively leasehold land tenure system. Under the leasehold land tenure system land is held subject to a crown lease from the Commonwealth. An acquiring authority of the Territory government may acquire a crown lease by agreement with the leaseholder or by a completion of the compulsory acquisition process under the *Land Acquisition Act 1994* (ACT).

To begin the compulsory acquisition process, the acquiring authority makes a pre-acquisition declaration that it is considering the acquisition of an interest in land for a public purpose.⁵³ The declaration must identify the acquiring authority, the land, the interest in the land and the public purpose for which the land is intended to be used.⁵⁴ The pre-acquisition declaration is given to a person with an interest in the land.⁵⁵ It must also be published in the Gazette and a daily newspaper, and a copy is given to the Registrar General.⁵⁶

The executive may determine that there is an urgent necessity for the acquisition and that it would be contrary to the public interest for the acquisition to be delayed, or that the making of a pre-acquisition declaration would result in disclosure of information prejudicial to the ACT.⁵⁷ In these circumstances, the executive may issue a certificate, disclosing what it

⁵¹ Asbestos Response Taskforce *Key Statistics* (13 May 2015) ACT government <<http://www.asbestostaskforce.act.gov.au/>>.

⁵² Letter from Andrew Kefford (Head of Asbestos Taskforce) to Affected Homeowners, 4 May 2015, 1 <http://www.asbestostaskforce.act.gov.au/_data/assets/pdf_file/0004/722749/MailOut-LongTermMgt-Letter-20150504.pdf>.

⁵³ *Land Acquisition Act 1994* (ACT) s 19(1).

⁵⁴ *Ibid* s 19(2).

⁵⁵ *Ibid* s 19(6).

⁵⁶ *Ibid* s 20(a)-(b).

⁵⁷ *Ibid* s 21(1).

believes to be the appropriate information relating to the proposed acquisition.⁵⁸ The result of the executive issuing a certificate is that a pre-acquisition declaration is not required,⁵⁹ and if a pre-acquisition declaration has already been issued then it ceases to have effect.⁶⁰ The certificate is forwarded to the any person affected by the certificate and published in the same way as the pre-acquisition declaration.⁶¹ It is unlikely that the executive will deem that there is an urgent necessity for the acquisition unless the Mr Fluffy is presenting an immediate health risk to the wider community.

Assuming a pre-acquisition declaration is made and no certificate has been issued by the executive, any person affected is given an opportunity to respond to the declaration by way of application to the executive within 28 days.⁶² The application for reconsideration of the declaration must be in writing and set out the reasons for seeking reconsideration.⁶³ The executive will reconsider the pre-acquisition declaration, giving consideration to the reasons that were specified in the application.⁶⁴ The executive is then empowered to revoke, confirm or vary the declaration, giving reasons for their decision.⁶⁵ If no application is lodged, the pre-acquisition declaration automatically becomes absolute 28 days after it is issued.⁶⁶

Once a pre-acquisition becomes absolute, the executive declares that the interest is acquired by way of compulsory acquisition,⁶⁷ publishes that declaration (which again must identify the land and the public purpose for which it is being acquired)⁶⁸ in the Gazette,⁶⁹ at which time the interest in the land is vested in the acquiring authority.⁷⁰

During the process of the compulsory acquisition, the owner of the property is not permitted to enter into an agreement with any other person in respect of the owner's interest in the land without first disclosing the existence of the declarations.⁷¹

If a person has their interest acquired by compulsory process, they are entitled to be paid compensation.⁷² Under s 45 of the Act, a dispossessed landowner is entitled to claim:

- (a) the market value of the interest acquired;⁷³
- (b) special value, that is value additional to the market value;⁷⁴
- (c) reduction in the market value of *other* land held by the person caused by the acquisition;⁷⁵

⁵⁸ Ibid s 21(2).

⁵⁹ Ibid s 21(3).

⁶⁰ Ibid s 22.

⁶¹ Ibid s 21(4)-(5).

⁶² Ibid s 23(1) and s 23(3).

⁶³ Ibid s 23(2).

⁶⁴ Ibid s 24(1).

⁶⁵ Ibid s 24(3).

⁶⁶ Ibid s 34(2).

⁶⁷ Ibid s 33(1).

⁶⁸ Ibid s 33(2).

⁶⁹ Ibid s 33(3).

⁷⁰ Ibid s 33(4).

⁷¹ Ibid s 31(1).

⁷² Ibid s 42.

⁷³ Ibid s 45(2)(a)(i).

⁷⁴ Ibid s 45(2)(a)(ii).

⁷⁵ Ibid s 45(2)(a)(iii).

- (d) other losses that were a direct, natural and reasonable consequence of the acquisition;⁷⁶ and
- (e) legal and other professional costs.⁷⁷

Unlike the buyback offer, the market value of the interest acquired is calculated at the date of the acquisition. For affected homeowners the market value of their property would be calculated including the presence of asbestos of the home. Even with remediated homes, the market value of the property is significantly reduced by the presence of asbestos. As an example, a Mr Fluffy property in Curtin sold above its land value, but well below the previous sale price.⁷⁸ The current buyback offer calculates the market value of the property ignoring the presence of asbestos.

B. Public Purpose Test

The main issue is whether the acquisition of loose fill asbestos affected houses can be held to be for a 'public purpose'. Public purpose is defined within the act and means 'a purpose in respect of which the Legislative Assembly or the Commonwealth Parliament has power to make laws'.⁷⁹

The ACT Legislative Assembly is empowered to make laws for the "peace, order and good government" of the Territory.⁸⁰ The Assembly has no power to make laws with regard to the acquisition of property other than on just terms.⁸¹ This is equivalent to the 'just terms' clause in s 51(xxxi) of the *Commonwealth Constitution*,⁸² which was included to prevent the arbitrary use of power when acquiring property.⁸³

For compulsory acquisitions, 'Public purpose' usually extends to the use of land for constructing new roads and railways, widening and deviations to existing roads, creating parks, reservoirs, sewerage works and drainage reserves. In the ACT, acquisitions appear occur mainly for the public purpose of building public roads or community developments.⁸⁴

The protection of community health and wellbeing by removing asbestos from local structures almost certainly falls within the Assembly's broad power to legislate for the "order" of the Territory. Hence, it is likely the acquisition of Mr Fluffy homes would be considered to be for a public purpose. (Specific term not tested)

Public health and safety is a core reason why Mr Fluffy homes would fall within the public purpose test. The ACT government has previously stated that the presence of loose fill asbestos is a health concern not only for residents of affected homes. The health risk extends to tradespersons or visitors to the property. Andrew Kefford, the head of the ACT Asbestos

⁷⁶ Ibid s 45(2)(c).

⁷⁷ Ibid s 45(2)(e).

⁷⁸ Elizabeth Byrne and Clarissa Thorpe 'Mr Fluffy home at Curtin sells above land value, but below previous sale price' *The Canberra Times* (Canberra) 14 September 2014.

⁷⁹ *Land Acquisition Act 1994* (ACT) dictionary.

⁸⁰ *Australian Capital Territory (Self government) Act 1988* (Cth) s 22(1).

⁸¹ *Land Acquisition Act 1994* (ACT) s 23(1)(a).

⁸² *Aerial Capital Group Ltd v ACT* [2013] FCA 1411.

⁸³ *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269.

⁸⁴ For a list of notifiable declarations see ACT government, *Lands Acquisitions Act 1994 – Notifiable Instruments* (15 May 2015) <<http://www.legislation.act.gov.au/a/1994-42/ni.asp>>.

Response Taskforce highlighted that there had been reports of situations where carers have refused to enter affected homes to care for residents due to the presence of loose fill asbestos.⁸⁵ There is a high risk of exposure to asbestos during natural disasters or emergency situations which may disturb the residual asbestos in the homes. As an example, hospitals and schools contained sheet asbestos became a health threat in Vanuatu after Cyclone Pam which broke up the asbestos sheeting, placing the community at risk of inhaling loose asbestos fibres.⁸⁶

The health impacts of asbestos are undoubtable, including asbestosis, lung cancer and mesothelioma. The extent of the health impacts may not be known for several years as mesothelioma has a latency period that spans across decades.⁸⁷ The nature of loose fill asbestos being comprised of small fibres increases the likelihood of a person inhaling them. In the ACT, there already are reported cases of people who have lived in loose fill asbestos affected houses being diagnosed with mesothelioma.⁸⁸ Consequently, the argument of public safety will likely satisfy the public purpose test.

Furthermore, acquiring Mr Fluffy homes in order to demolish their structures and remove extant asbestos seems to be the kind of public purpose endorsed by the High Court, which has said:

It follows that the power compulsorily to acquire land for a public purpose which is conferred by the Act is limited to a power to acquire land for some purpose related to a need for or proposed use (be it active or passive) or application of the land to be acquired. It does not extend to the acquisition of land merely for the purpose of depriving the owner of it and thereby achieving some purpose in respect of which the Parliament has power to make laws or, in relation to land in a Territory, a purpose in relation to that Territory.⁸⁹

The public purpose test is a core part of the limitation of state power in the area of acquisition. The public purpose test does not restrict the government from using the land from additional purposes. When no longer required for the public purpose the land can be disposed of by the acquiring authority. For affected homeowners, this means that the government's plan to recoup the costs of the buyback scheme by dividing and reselling blocks after they have been remediated falls within the public purpose test.

C. *Private Demolitions*

Some residents have indicated an intention to demolish their own homes rather than participate in the buyback scheme. It would be undoubtedly argued by those homeowners that if the demolition had taken place, there would be no public purpose behind any acquisition as the health risk has been abated. The nature of loose fill asbestos is that if a single fibre is left it

⁸⁵ Fluffy Owners and Residents' Action Group, Submission No 25 to NSW Joint Select Committee on Loose Fill Asbestos Insulation, *Inquiry into Loose Fill Asbestos Insulation*, 31 October 2014.

⁸⁶ ABC Radio Australia 'Rebuilding Port Vila Hospital includes removing asbestos' 20 March 2015 (Gary Bailey) < <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/rebuilding-port-vila-hospital-includes-removing-asbestos/1427533>>.

⁸⁷ Lenore Taylor 'Some cancer from ACT asbestos' *The Canberra Times* (Canberra) 21 July 1988, 1; David Douglas, 'Asbestos home insulation in the ACT' (Report, Australian Occupational Health Management, 26 July 1988).

⁸⁸ Kirsten Lawson 'Two Mr Fluffy homeowners diagnosed with mesothelioma' *The Canberra Times* (Canberra) 22 July 2014.

⁸⁹ *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193.

would pose a minimal but still existent health risk.⁹⁰ The ACT government, if pursuing compulsory acquisition wants to be satisfied that all of the risks associated with Mr Fluffy asbestos have been abated, and would argue that unless the property has been remediated to their standard there remains a public health and safety risk. If however, a homeowner has demolished and remediated their property in accordance with government standards then it is likely that the homeowner may be able to challenge the public purpose behind any acquisition.

IV. PRIVATE PROPERTY INTEREST V PUBLIC PURPOSE

Compulsory acquisition, by its nature reflects the idea that a public interest is paramount to the interests of a single landowner.⁹¹ The rights of a private landowner are interrupted for the purpose of pursuing a greater public good.

The power to compulsorily acquire privately owned land is one of the most significant powers that the government possesses, and must be carefully exercised.⁹² However, there is a legitimate need for the state too be able to acquire property, a role that exists with fee-simple and leasehold absolute use of land.⁹³ '[W]hat appears to be an assault on property rights in Australia and other developed nations from time to time, is little more than government exercising its statutory right to acquire or regulate the use of land'.⁹⁴ Simply put, when a homeowner purchases a piece of land some do not fully understand the rights of the government in relation to that land and the potential for a government to compulsorily acquire that land, is inherent in the purchase of a piece of land. Consequently, the anger and frustration of some homeowners, seeing the government 'take' their land, may not realise the right to acquire is an avenue that is available to the government for any piece of land.

Gradually, individual rights in relation to property have been eroded, but some safeguards remain. Justice Murphy has stated '[t]he exaltation of property rights over civic and political rights is a reflection of the values of a bygone era'.⁹⁵ Even with diminishing importance of property rights, the principle of no acquisition unless on just terms prevails. Constitutionally only the Commonwealth is required to acquire land on just terms.⁹⁶ The High Court has held that the territories are also bound by this requirement, but the state's acquisition laws are not bound by these obligations, in practice the states continue to apply just terms to potential

⁹⁰ Emma Macdonald 'Asbestos bombshell: Govt knew about Mr Fluffy risk 25 years ago' *The Canberra Times* (Canberra) 22 October 2014

⁹¹ Brian Schwarzwald 'Compulsory Acquisition' in Roy Prosterman and Tim Hanstad (eds) *Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia* (The World Bank, 1999) 226, 227.

⁹² Standing Committee on Public Administration and Finance, Parliament of Western Australia, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia* (2004) 43.

⁹³ Tom Allen *The right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000).

⁹⁴ Vince Mangioni 'The evolution of the Public Purpose Rule in compulsory acquisition' (Paper presented at Pacific Rim Real Estate Society, Sydney, 18 January 2009).

⁹⁵ *Attorney-General (Cth); Ex rel Mckinlay v Commonwealth* (1975) 135 CLR 1.

⁹⁶ Lorraine Finlay 'The Attack on Property Rights' (Paper presented at 22nd Conference of the Samuel Griffith Society, Perth, August 2010).

acquisitions.⁹⁷

By requiring governments to compensate landowners, it acts as a check on government power to restrain them from continually acquiring private property. In *ICM Agriculture Pty Ltd v Commonwealth* it was discussed that ‘legislatures will tend to experience undue temptation to acquire the property of citizens, and will tend to give into it, because this will usually be cheaper than employing some alternative technique.’⁹⁸ By requiring government to provide adequate compensation ensures that compulsory acquisitions occur only in pursuit of a public good.

...those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations. The chief purpose of the requirement of full compensation is indeed to act as a curb on such infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests.⁹⁹

The need to provide compensation for a compulsory acquisition acts to discourage government from interfering with the rights of individuals, unless they have a legitimate reason for doing so. For the ACT government, they must ensure that there is a public good, which may be the health concerns of the community prior to pursuing a compulsory acquisition.

Protects offered to homeowners are limited by the notion of parliamentary sovereignty. In 2009 the High Court declared a compulsory acquisition for re-development of land as unlawful.¹⁰⁰ The NSW legislature passed the *Land Acquisition (Just Terms Compensation) Amendment Bill*¹⁰¹ with the express purpose of overcoming the unfavourable High Court decision. For Mr Fluffy affected homeowners in both NSW and ACT, it is important to be cautious as legislative supremacy may overcome any successful judicial challenges to any potential compulsory acquisition.

Overall, the ACT has demonstrated a positive approach to balancing of individual and public interests. Mr Fluffy buyback scheme clearly presented a respect for private property rights, as it offered flexibility of timeframes, stamp duty concessions and more compensation than pure market value as the valuation excluded the presence of asbestos. The buyback program is an example of a territory governments not immediately resorting to the authoritarian compulsory acquisition powers to take land.¹⁰² These methods occur even when states are not bound by the just terms requirement. Overall, the response to the Mr Fluffy crisis in the ACT, in which compulsory acquisition was avoided in the first instance, illustrates a great respect for and consideration of private property interests.

⁹⁷ *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

⁹⁸ *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 5; Rochford ‘Basin Clawbacks: reducing over allocation and the right to water’ in C.A Brebbia and V Popov (eds), *Water Resources Management* (WIT Press, 2011) 803, 807.

⁹⁹ *Fredrick Hayek, The Constitution of Liberty* (University of Chicago Press, 1978) cited in *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51.

¹⁰⁰ *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac’s Pty Ltd v Parramatta City Council* [2009] HCA 12.

¹⁰¹ *Land Acquisition (Just Terms Compensation) Amendment Bill 2009* (NSW).

¹⁰² Graham L Fricke, QC, *Compulsory Acquisition of Land in Australia* (The Law Book Company, 2nd ed, 1982) 2.

V. CONCLUSION

Mr Fluffy presents a unique challenge for the ACT and NSW governments. The earlier removal program proved to be unsuccessful, as some houses were missed and others are now known to contain residual asbestos. This has left a toxic legacy with which the ACT Asbestos Taskforce is now grappling. A radical solution was developed: to buyback affected houses, demolish and remediate the blocks. Although the buyback program in the ACT has been successful to date—with the majority of affected homeowners opting into the program—there are a significant minority that do not appear inclined to accept a buyback offer. This leaves the ACT government in a precarious position, seeking to protect the public interest while respecting and upholding the rights of private landowners. The dangers of loose fill asbestos are such that it is plausible that the ACT government will acquire those houses that are not surrendered under the buyback scheme.

