ENVIRONMENT, NATURAL RESOURCES AND REGIONAL DEVELOPMENT COMMITTEE

Inquiry into the CFA training college at Fiskville

Melbourne — 28 January 2015

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Mr Alan Clayton, consultant to committee.

The CHAIR — I have apologies from two committee members — one had to leave because we are running so far behind; he had other commitments. Just before we get started, Mr Clayton, I will run through a few of the formalities, then we will go to your presentation. On behalf of the committee I welcome you and thank you for attending the hearing today to provide evidence. All the evidence that is taken at the hearing is under the provisions of the Parliamentary Committees Act 2003 and other relevant legislation and attracts parliamentary privilege. Any comments made outside the hearing will not be afforded such privilege. It is an act of contempt of Parliament to provide false or misleading evidence to the inquiry. The committee may ask for further information from you, and hopefully you will be able to provide that. All evidence is being recorded, and once it has been processed you will get a copy of the proof of the transcript prior to it becoming public to check it for accuracy.

By way of an introduction, the committee, in terms of ensuring that it had information on all aspects of the terms of reference, including justice for victims, invited Mr Clayton to prepare a paper to look at the various options for compensation and other ways to address, redress or provide some benefit to those who have been harmed as a result of the operations at Fiskville. Today we have invited Mr Clayton to provide a presentation on that paper, which will be a public document. After the presentation it will be open to committee members to ask a few questions on that. Thank you for coming today, and I pass it over to you.

Mr CLAYTON — Thank you very much. As you have the paper, I will be quite brief in this overview.

Visual presentation.

Mr CLAYTON — Essentially, as you mentioned, I was asked to address an element of the term of reference 5 of your committee in relation to making recommendations in relation to mitigation of harm and providing justice to victims and their families, and in particular to identify any Australian or overseas examples that might be of assistance to the committee in addressing term of reference 5. In relation to the mitigation, that has largely been through Robert Joy and the responses to that of mitigation of some of the legacy harms, so the paper that I have provided is in relation to providing justice.

In doing that there were three major guiding principles. The first was in terms of appropriateness. As with your last presenter, with the issue of the multiple uncertainties of what chemicals were used, what types of exposures and the like, there needs to be a response that is sufficiently flexible so that it can deal with (a) the range of persons affected and (b) that level of uncertainty where the existing legal response, is often difficult because of the hurdles that are required in order to access that legal remedy.

The second one is adequacy — that it cuts the mustard in relation to being adequate. In my paper I reference what the committee had found in responses in the hearings that you had had at the time of your interim report as to what might be considered in terms of adequacy and proportionate need. That is, any proposed arrangement sits within a universe of existing schemes, and it would be perverse to try and tackle, say, some of the work-related elements in a separate scheme when the same result could be done more efficiently through addressing some of the shortcomings of an existing scheme, such as the workers compensation scheme.

It was prepared on the assumption that this was a bespoke Fiskville-specific arrangement but recognising that it may well be, if the committee so determined, the nucleus of a more wide-ranging scheme. I am, for instance, thinking of the Hazelwood fires of February 2014 burning for 45 days, exposing emergency services workers to a similar type of hazardous exposures to smoke and particulate matter, and as well the population of Morwell and surrounding areas. But that is for the committee — —

The CHAIR — Way outside our terms of reference!

Mr CLAYTON — It may well be, but — —

The CHAIR — But still, all ideas are good and are to be considered.

Mr CLAYTON — In relation to those who were exposed to the perils of Fiskville as part of their employment, there is an arrangement with workers compensation schemes. Back in 1905 when workers compensation schemes had the requirement of personal injury by accident, a ship worker — Steel v. Cammell, Laird & Co. [1905] — put in a claim for lead poisoning. Because he could not point to a specific accident his

claim failed, and there was a disease schedule added to the existing British legislation which was picked up in Victoria in 1914.

The problem with the disease schedules — and that might go to part of what you are saying about non-cancer-related things you have heard about — is that they remain very static. In fact the Victorian provisions are extremely archaic and have not really been updated in half a century. There are a whole range of exemplars for expanding disease schedules through the International Labour Organisation. There was an update in 2002, which New Zealand has taken up, and another one in 2010, which none of the Australasian schemes have taken up. That has proved to be largely cul-de-sac. But there is some light on the hill in that Safe Work Australia, which is the body that has policy responsibilities for health and safety and workers compensation, started a project in August 2013 and commissioned Professor Tim Driscoll to provide a basis on which you could have diseases recognised on the basis of the latest scientific evidence of the causal link between diseases and exposure.

This was published in August 2015 and peer reviewed by Professor Malcolm Sim. It covers 47 diseases in seven disease categories. It has an eighth class, which is that of acute poisoning and toxicity relating to poisoning causing damage to a series of organs — heart, liver, kidney and the like — and other body functions such as the nervous system and blood, and lists more than 40 chemicals that could contribute to that poisoning. If you contrast it with the current Victorian schedule which only recognises two cancers under the Safe Work Australia disease schedule, which is based on the latest scientific evidence of exposure and consequence, there are 21 cancers recognised there. There is a whole range of other conditions which are seen to have that link between occupational exposure and the condition.

The other area where the workers compensation system could play a role is in relation to presumptive cancer legislation for firefighters which originated in North America, particularly Canada, and I believe you are going to be speaking to Dr Tee Guidotti, who is one of the pioneers of that. That was first adopted under the Comcare legislation in 2011. It has since been adopted in legislation in South Australia, Tasmania, Western Australia and the Northern Territory, and Queensland came to the party in September last year. You will know far more than I about the Hartland bill which stalled in Victoria.

The presumptive cancer legislation — the Australian standard is the 12 primary site cancers. That operates in all the legislation. In terms of the coverage of firefighters, the Commonwealth and Western Australia only cover professional firefighters, although the West Australians have committed to extending to volunteer firefighters as well. In the other jurisdictions, volunteer firefighters are covered although Tasmania and the Northern Territory, have some additional exposure requirements.

The question of retrospectivity — most of that legislation is made retrospective to the date of introduction rather than the date of assent. One of the shortcomings with the disease schedules — and could be with the presumptive cancer legislation — is unless you have got a mechanism for review, it remains stuck at the date that it came in while the scientific evidence has moved on and established a wider range.

In terms of having a Fiskville redress scheme, the first question is one that I see the committee has been grappling with: whether it is universal or there are conditions — there are certain threshold conditions or requirements that attain. It is not a necessary to have a one size fits all scheme. You can have universal access on some areas, such as access to counselling, medical treatment and the like, and if you come to an ex gratia lump sum, you may have some threshold requirement, A, to differentiate access to it, and B, the level of the lump sum that might be granted.

If you are going to have threshold conditions, the three basic criteria for differentiation are the qualitative assessment of risk, which is what essentially was the basis of the Joy report; there are the firefighter cancer risk studies; and then there is the weight of evidence approach. The weight of evidence approach, and you will probably explore that when you talk to Dr Guidotti, because the Royal Australian Air Force base at Point Cook had similar issues to Fiskville, it commissioned Dr Graeme Peel to review a number of cases and also commissioned Dr Guidotti to provide the state of the art as to what determination you could put on exposure to the hazards of firefighting and the contraction of particular conditions.

So in terms of what the scheme might address — and again this type of methodology has been taken up by the Royal Commission into Institutional Responses to Child Sexual Abuse — there is the question of a direct personal response, an apology. There is evidence about the therapeutic benefit of an apology. I think that the

New South Wales Ombudsman has set out the six Rs — recognition, responsibility, reasons, regret, redress and release — that might constitute a proper formal apology.

There is the question of access to treatment, care and support. Again, one of the problems with the civil justice system is that of delay. Therefore it is possible under this type of scheme to take that delay element out. In the F-111 deseal/reseal program, while they were waiting for the results of their extensive, which turned out to be a five-volume, SHOAMP study, they had the interim health scheme, in which experienced physicians sat down and recognised 42 conditions that could be there. You gave that access from the beginning, not delaying it, saying, 'Well, we've got to wait for this study. We're not going to do anything in the interim'. The last one is a monetary payout, and there is a methodology for that in the ex gratia payment arrangements in the F-111 scheme.

Structural aspects, if you are going to set out who is entitled, what their entitlements are, there is probably going to be a need to have some type of statutory basis in terms of the administrative aspects. Where is it going to be housed? Is it the department? Is it Justice and Regulation, which has the CFA and the MFB following there, or is that regarded as not independent enough and would you put it somewhere else? There is exploring of some of those models in the report.

Then there is the funding model. With Fiskville, the primary responsibility is the CFA — the overwhelming responsibility is the CFA. Therefore it would probably come through the fire services levy, seeing the CFA only raises, I think, 5 per cent of its revenue outside of the fire services levy. But if you said that there was regulatory failure in oversight by other bodies, you might have a shandy. What I set out is the system under the Japanese pollution scheme where under the respiratory element, the class 1 part of that scheme, it is shared 80 per cent between the emitters of sulphur dioxide and 20 per cent through an automobile fuel levy, but that is there, and I will not go into that. But three particular schemes which I saw as providing elements and insights that the committee might find helpful in fashioning its own recommendations and arrangements.

The CHAIR — That is — —

Mr CLAYTON — That is it; that is my presentation.

The CHAIR — Good. Okay, thank you.

Mr CLAYTON — You asked me for 10 minutes. I think I came close to it.

The CHAIR — I lost track of time. Perhaps I can just ask — and this is a question in terms of your paper and when you were talking about the disease schedule — I think you made reference that it is surprisingly — —

The cost, when we hear about all this, 'Let's add more illnesses to a disease schedule for compensation', that there will be this huge cost, but where there is a disease schedule that is much larger than the one in Victoria, in actual fact it is not in any way being the cost concern that authorities may have thought it would be.

Mr CLAYTON — You may be referring to the presumptive cancer legislation.

The CHAIR — Yes.

Mr CLAYTON — The chief fire officer in Alberta —

The CHAIR — Yes, that is right.

Mr CLAYTON — presented to the federal committee. I think Alberta brought in their scheme in 2003, and I think he reported that of the 13 500 firefighters in Alberta, between 2006 and 2010 there were only 19 cases. Some of the Australian schemes that have enacted presumptive firefighter cancer legislation require a review. In fact in Tasmania I think there is actually an annual review. The scheme actuaries, Finity, when they modelled the scheme thought they would have four cases; it turned out to be only one when they came back to do that review. So it is not as if the floodgates are going to open.

Ms WARD — We have talked about a number of established cancers and so on, if you like. What are your thoughts on emerging contaminants or chemicals of concern such as PFOS and PFOA? This would come into

what you are talking about with a review. How would you incorporate emerging contaminants that we are just starting to understand the implications of in terms of human health?

Mr CLAYTON — I think you would provide in the legislation that there had to be a review at X number of years apart in which there would be a comprehensive review of the scientific literature — you know, IARC, which is the leading international body, and the well-established academic discipline of looking at rigorous studies — and on that basis you could add to the list, so it is rigorously scientifically based.

Ms WARD — Thank you. What approach would you recommend for people who have not actually attended Fiskville but have adjoining properties, who have had livestock, soil and water contaminated through off-flow from Fiskville?

Mr CLAYTON — Because it is a bespoke or individualised Fiskville arrangement, you can accommodate that. So in terms of that, it probably would be good to have a register of everybody who has been affected, who is adjacent or was present in some form at Fiskville, including the students at the primary school when that was on the property; and then you can devise elements of the redress scheme to address that, including landowners whose property may have been devalued, who may not be able to sell their stock or whatever because the land has been contaminated and the like.

But it is really just an issue of scheme building, and if you say, 'These are the issues', it is not terribly difficult to at least have a range of possible responses on how you would do that.

Ms WARD — Thank you.

Mr RICHARDSON — Thank you, Mr Clayton, for coming in. I am curious to tease out a bit more, particularly in your submission to us page 20 and the table referencing *Health Risks and Occupation as a Firefighter* and the four particular levels there. I think there are a range of diseases, but a lot of them refer mostly to cancers.

Mr CLAYTON — Yes.

Mr RICHARDSON — In referencing that and the comments made there, were you present during Andrew Baker's presentation?

Mr CLAYTON — Yes, I was.

Mr RICHARDSON — Just in terms of the discounting that he referred to — because obviously such a scheme you are wanting to be easily accessible, mitigate stress and risk and the like — those in the top category, and some of those stand out to me as some referenced in the Monash study, what sorts of discounts for those levels would be appropriate or considered where you have a category, say, the third or the bottom category, you have been a career firefighter but you get thyroid cancer, for example? What are some of the approaches or what are some of the things that we can consider?

Mr CLAYTON — Starting with the existing scheme, if the workers compensation legislation was amended to pick up the Safe Work Australia schedule, that would probably pick up quite a number of those, and that has the same effect of reversing the onus of proof and then placing it on the employer to show that there is some other, more likely basis for the condition.

Depending on the type of cancer, there are the 12 primary site cancers under the presumptive legislation, and in the particularised Fiskville arrangement, you could, for instance, say, 'We will give universal access to counselling, healthcare and the like for anybody who can show the connection', but in relation to a monetary payment it could be gradated according to where you fitted under this categorisation. So with the F-111 deseal/reseal scheme, for group 1 the lump sum is $40 000; for group 2, $10 000, and group 3 gets access to the Comcare arrangements under section 7(2) of the Safety, Rehabilitation and Compensation Act under the reverse onus arrangement there. So again it is really a question of scheme design. These are the dilemmas, and the reason why we have this is because we are dealing with the areas of probabilistic causation, so we can say, 'As a system of mass justice and not requiring everybody to be put to an individual test, we will have these series of gradations and, according to that strength, the access to certain benefits might be gradated accordingly'.

The CHAIR — Just from your research and experience, how important do you think it is for these sort of schemes to involve those people that have actually been affected? In terms of developing a scheme, is it important to have those, say, that are affected by the contamination at Fiskville involved in how it is sort of set up and administered? Is that an important aspect?

Mr CLAYTON — I think it is, and again the whole literature and debate on redress schemes has put it as a prime element — almost co-design — by involving and hearing the voice and the concerns of those who are affected. It is much more likely to happen in a very small, particularised scheme than if you move to a statewide or whatever, so particularly in this type of response it is much more likely to happen.

The CHAIR — I guess the other question on that is earlier on we heard evidence, again from those people who were affected by the operations at Fiskville, about there is health monitoring and various surveillance programs that the CFA offers. For some people it seems to have worked out well but others are a bit suspicious and are concerned because they feel they had not been given the right information or the way they have been dealt with. In terms of these schemes, who do you think should administer them, again from the research and experience you have, the actual organisation that is responsible for the problems or someone else or something else?

Mr CLAYTON — Under the federal F-111 program there has been a series of reports, but one of those reports recommended that there be a person with knowledge and experience basically as a scheme administrator. In the course of doing that I had extensive conversations with David Janik, who was the person fulfilling that role under that scheme. In some of the American schemes which have been fashioned in response to particular events, there is somebody appointed as the scheme administrator who is independent and the like. So it is really up to the architects of such a scheme to say, 'All right, we want it structured in this way with these type of appeal rights' or whatever rather than having it necessarily administered by the body who is seen to have caused the injury or by an external body who is seen to be a contracted element to that or whatever.

The CHAIR — So most of the schemes that you know of are administered by an independent person or organisation?

Mr CLAYTON — I know of quite a number of where that is an element. There are others. The response to nuclear testing in the US comes under an agency created to do that. So it depends really on what the size of the scheme is, because you do not want to over-engineer having a huge bureaucracy form in what in the overall events is a relatively small scheme.

The CHAIR — Do we have further questions?

Mr RICHARDSON — Just one further, Mr Clayton. In terms of third parties and particularly the evidence we heard from an individual by the name of David Card, who had two bouts of testicular cancer at a very young age — and that appears on the high-risk category. Could you elaborate a little bit further on how you tease out third parties who were not career firefighters or volunteer firefighters but who potentially have a link from the time they were in the vicinity. His case in particular stood out as the likelihood of that occurring in the absence of that is very rare, but to have that so close. How would you approach those kinds of arrangements?

Mr CLAYTON — I think the starting point is the table you referred me to. So that if in fact it appears that the condition is correlated strongly to exposure by this particular occupation, then you put it much higher in terms of if you are going to have a gradated access to benefits. It is really a question of how using the universe of epidemiological knowledge you can actually fashion a just arrangement according to that knowledge.

Mr RICHARDSON — So for argument's sake, if you were to say it is a 1 in 100 000 chance that such an individual with a particular family history gets that, then it is working back from that risk rating that potentially could be a good basis and saying, 'Well, if you were not in that environment, then the likelihood is that particular percentage'.

Mr CLAYTON — No, you have got to be very careful about that. The whole question of epidemiology is what is happening at the population level may not necessarily be at the individual level and vice versa, so one of the issues in fashioning arrangements, particularly on a redress basis, is that, particularly with regard to ongoing health benefits and the like, you provide ready access. With the Australian participants in the British nuclear tests, if you were in any way, for 10 minutes or whatever or one day at Monte Bello, Emu Field or Maralinga

between these particular dates and you contract any cancer, you are entitled to a repatriation white card and your cancer will be treated, so you get away from having in every individual case. But you might then say, 'For other benefits we will provide some form of risk rating' either to access it or the level of access that you might do. It is really trying to devise what is a just system.

Mr RICHARDSON — That is your point about universal and then some elements being conditional.

Mr CLAYTON — That is right.

Mr RICHARDSON — I think that is helpful.

Mr CLAYTON — And you do not have to apply the same principles over every element of your redress scheme. You can have it differentiated.

Ms WARD — Would you see ongoing health monitoring for segments as a useful part of a scheme?

Mr CLAYTON — I think so, yes. If somebody as a result of that is found to have the condition, then they get immediate access to whatever medical and other support they need.

The CHAIR — I think we are talking via a video link tomorrow to Dr Guidotti. I know that in his most recent report, and I am not sure whether this is your area of expertise, he talks about looking at the population and what the likelihood of certain cancers is and occupation. One of the diseases is breast cancer in men in the firefighter population. But how does that work? We have had a number of witnesses who have spoken to us and presented evidence — women who have suffered from breast cancer who, for example, lived at Fiskville when their husbands were working there. How would you look at those ones where you have a population? In the firefighting community there are very few women; I think everybody understands that. How do you work some of those things out? I know it is a very specific one.

Mr CLAYTON — In terms of Fiskville-affected persons, you could have the register say anybody who has a connection with Fiskville falls within the category of a Fiskville-affected person. If they contract certain conditions, even though it may not rate highly in terms of the population-based studies or cancer-based studies, then it seems to me that can be addressed at least under the health and other support part of the scheme.

The CHAIR — All right. Thank you. What you have told us in your presentation has given us a good understanding, and of course we have read your paper as well. Hopefully having some of that on the public record also allows the general public to get a bit of an understanding of it too. Thank you very much for all the work that you have done. I apologise for our running so far behind.

Committee adjourned.