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Loose Fill Asbestos Insulation Eradication Scheme Exercising Your First Right of Refusal: Guidelines

These Guidelines have been developed to assist First Right Holders exercise their first right of refusal to repurchase the Affected Block they surrendered to the Territory under the Buyback Program, including the process to be followed for retaining Improvements on Remediated Blocks where possible.

OVERVIEW

The ACT Government's Loose Fill Asbestos Insulation Eradication Scheme (the Scheme) provides an enduring solution to the ongoing health, social, practical and financial consequences of the continuing contamination of more than 1,000 Canberra houses with loose fill asbestos insulation. Under the Scheme the ACT Government offered to acquire all Affected Blocks in the ACT on 28 October 2014 at their full market value, ignoring the presence of asbestos contamination and minor presentation and maintenance issues. All Affected Blocks surrendered to the Territory under the Scheme will be subject to demolition and remediation works.

The Scheme includes the opportunity for First Right Holders to purchase the Remediated Block they surrendered under the Buyback Program when it becomes available: the Buyback Guide indicated the Scheme provides for "a first right of refusal to purchase the affected block (***at full market value, to be determined at the time of purchase***) after it is remediated".

Remediated Blocks will be offered for sale in the following order:

- to First Right Holders, then
- to ACT Government agencies (e.g. Housing ACT or the Land Development Agency) for their purposes, then
- by public auction, tender or other method of disposal determined by the Territory.

After demolition and remediation works are complete and blocks have been removed from the Register, Remediated Blocks will be issued with a new Crown Lease to enable them to be sold. The new Crown lease will permit uses consistent with the relevant zoning under the Territory Plan.

Draft Variation 343 to the Territory Plan is currently being considered by the Legislative Assembly's Standing Committee on Planning, Environment, and Territory and Municipal Services, and may allow some Remediated Blocks to be used for unit-titled dual occupancy housing. The ACT Government is unable to enter into contracts to sell Remediated Blocks that are potentially subject to that Draft Variation until the relevant Legislative Assembly processes are complete.

These Guidelines should be read in conjunction with the following documents which set out the overarching policy framework for the Scheme and are available on the Asbestos Response Taskforce's website:

- *The ACT Government's Preferred Way Forward on Loose Fill Asbestos: Overview*
- *The ACT Government's Preferred Way Forward on Loose Fill Asbestos: Supporting Detail*
- *The Loose Fill Asbestos Insulation Eradication Scheme: A Guide to the Voluntary Buyback Program, and*
- *Policy: Voluntary Unit Buyback Program.*

TERMS USED IN THIS GUIDE

Affected Block: a block listed on the Register.

Availability Date: the indicative date on which a Remediated Block will be available.

Buyback Guide: the document titled *The Loose Fill Asbestos Insulation Eradication Scheme: A Guide to the Voluntary Buyback Program*.

Buyback Program: the voluntary buyback program component of the ACT Government's Loose Fill Asbestos Insulation Eradication Scheme.

Certificate of Occupancy: a certificate of occupancy issued under the *Building Act 2004* (ACT).

Contract for Sale: a contract for sale for a first grant Crown Lease in respect of a Remediated Block.

Deed of Surrender: the Deed between an Eligible Homeowner and the Territory providing for the surrender of the Crown Lease in respect of an Affected Block under the Buyback Program.

Eligible Homeowner: has the same meaning as set out in the Buyback Guide.

First Right Holder: an Eligible Homeowner who meets the eligibility criteria to hold and exercise a First Right of Refusal in accordance with these Guidelines.

First Right of Refusal: a right granted to Eligible Homeowners who elected in their Deed of Surrender to be offered the opportunity to repurchase their former Affected Block under the Scheme.

Improvements: a structure, garden, fixture or other enhancement on an Affected Block (e.g. free standing garage, sheds, retaining walls, paving and paths, plants, swimming pools, tennis courts).

Preserved Improvements: an Improvement on an Affected Block which the Territory and the First Right Holder have agreed will be retained, if possible.

Register: the Affected Residential Premises Register established under the *Dangerous Substances Act 2004* (ACT).

Remediated Block: an Affected Block which has been surrendered, has undergone demolition and remediation works and has been removed from the Register.

Scheme: the ACT Government's Loose Fill Asbestos Insulation Eradication Scheme.

Taskforce: the ACT Government Asbestos Response Taskforce (being part of the Territory).

Territory: the Australian Capital Territory being the body politic established by section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth).

Units Plan: a units plan established under the *Unit Titles Act 2001*.

FIRST RIGHT OF REFUSAL

Eligibility

The First Right of Refusal component of the Scheme was developed to provide legal certainty to Eligible Homeowners wanting the opportunity to return to their block and community. Eligible Homeowners who wished to retain the First Right of Refusal were required to indicate this in their Deed of Surrender. Under the Scheme, First Right Holders will be offered the first right to repurchase their former Affected Block when it becomes a Remediated Block, without having to compete in a public auction with other interested parties.

As set out in the *Policy: Voluntary Unit Buyback Program*, First Right of Refusal is not available in relation to an affected unit in a Units Plan.

Eligible Homeowners become First Right Holders if they meet **all** the following eligibility criteria – i.e. they:

- entered the Buyback Program
- are eligible to receive a First Right of Refusal under the Buyback Program
- elected to receive a First Right of Refusal in their Deed of Surrender, and
- surrendered the Crown Lease on their Affected Block in accordance with the Deed of Surrender.

Eligible Homeowners who have an extended settlement in the Deed of Surrender will be required to surrender the Crown Lease for the Affected Block before entering into a Contract for Sale for the Remediated Block.

First Right of Refusal for Owner Occupation

At the time of entering into a Contract for Sale of the Remediated Block, the First Right Holder will be required to sign a statutory declaration confirming they will:

- upon becoming the registered Crown Lessee of the Remediated Block, construct at least one residential dwelling on it in accordance with the purpose clause in the Crown Lease
- occupy at least one residential dwelling on the Remediated Block as their primary residence for at least six months following issue of Certificate of Occupancy or Units Plan (as applicable) for the Remediated Block and
- not sell or otherwise dispose of their interest in the occupied residential dwelling until they have occupied it as their primary residence for at least six months following the issue of the Certificate of Occupancy or the registration of the Units Plan (as applicable).

Multiple-unit developments

Where the First Right Holder seeks to build more than one dwelling on the Remediated Block (e.g. a unit-titled dual occupancy) the owner occupation obligations under the Scheme will apply to only one dwelling. This means the First Right Holder must live in, and may not sell, one of the dwellings until they have occupied it as their primary residence for at least six months from the registration of the Units Plan.

Restrictions on Transfer

The new Crown Lease will have a clause that prevents the re-sale of the Remediated Block for a period of six months from the issue of the Certificate of Occupancy for the new dwelling(s).

First Right of Refusal - a Personal Right

The First Right of Refusal is personal to the First Right Holder. Subject to limited exceptions set out below it cannot be sold or otherwise passed to any other person or company. It cannot be converted to a cash value.

In the event of the death of a First Right Holder before the Remediated Block is available for reoccupation, the Taskforce will be guided by the executor of the estate and may, at its discretion, permit the exercise of the First Right of Refusal by a nominated beneficiary in the First Right Holder's Will subject to the same conditions in relation to owner occupation. The intention behind this approach is to facilitate family members maintaining a connection to the neighbourhood of their former family home.

It could be the case, however, that the terms of a particular Will may frustrate the ability of the First Right of Refusal to be passed in this way.

As is the case in relation to other elements of the Scheme, the Taskforce will comply with orders of Courts that affect a First Right of Refusal.

Where a First Right Holder decides not to exercise their First Right of Refusal

At any time before exchange of the Contract for Sale of the Remediated Block, a First Right Holder may decide not to exercise their First Right of Refusal. The Taskforce should be informed of this decision in writing. For this purpose, each First Right Holder must complete and sign the Waiver of First Right of Refusal form provided by the Taskforce and available on its website.

Once this form is provided to the Taskforce, the First Right of Refusal cannot be reinstated.

There is nothing to prevent a former homeowner from bidding at any public auction for the new Crown Lease on the Remediated Block in circumstances where they have declined to exercise their First Right of Refusal. In such circumstances, the restrictions in relation to owner-occupation and time of residence would not apply.

Where a homeowner decides not to exercise their First Right of Refusal, the Remediated Block will be offered to Territory agencies for purchase at the same market value offered to the First Right Holder. If no agency wishes to purchase it, the Remediated Block will then be sold on the open market through a competitive process such as auction with a reserve price that is no lower than the price originally offered to a former First Right Holder.

PROCESS

The process for exercising a First Right of Refusal takes account of the fact that Affected Blocks were surrendered to the Territory by Eligible Homeowners in exchange for their independently assessed market value ignoring the presence of asbestos contamination and minor presentation or maintenance issues.

The sale of Remediated Blocks to First Right Holders or on the open market constitutes a second and separate market value transaction.

Step 1: Eligibility Requirements

The First Right Holder must continue to meet the eligibility requirements set out in these Guidelines if they are to exercise those rights.

Step 2: Notification of Indicative Demolition Schedule & Block Availability

Information regarding indicative timing of the demolition of the affected house and the subsequent Availability Date will be provided to the First Right Holder by the Taskforce. Demolition will be undertaken – subject to an overarching commitment to worker and community safety – with a view to:

- maximising efficiency for the Territory, and
- minimising community disruption.

The demolition schedule determined by the Taskforce in light of those key criteria takes account of a range of factors including:

- First Right of Refusal status
- title considerations
- clustering of affected properties
- industry capacity, and
- location specific issues such as bushfire risk, site access and transportation considerations.

Final Availability Dates will be determined in demolition contract schedules (which will themselves be influenced by industry capacity and program delivery variables including weather and the complexity of demolition).

Information on the indicative demolition schedule was released by the Taskforce at the end of August 2015.

Further information on indicative demolition scheduling and Availability Dates will be provided progressively by the Taskforce. Eligible Homeowners will initially be given a six month window during which the demolition works for the Affected Block are expected to be completed. They will subsequently be informed if the timing moves outside this window. As the timeline gets closer the Taskforce will make contact with them in relation to Improvement retention and more finely detailed timing estimates.

Step 3: Assessment of Affected Blocks

In preparing to hand over Affected Blocks for demolition works, the Taskforce will consult with contractors and asbestos assessors to settle the scope of demolition works for a particular Affected Block. In undertaking this assessment the Taskforce will identify the Improvements that **must** be demolished or removed in addition to the contaminated dwelling(s).

This decision will be based on:

- contamination – any Improvements that are, or are likely to be, affected by loose fill asbestos contamination will be removed
- demolition logistics – it may be necessary to remove some Improvements that cannot be protected or retained during the demolition works
- site integrity – to maintain site integrity it may be necessary to retain some Improvements (e.g. retaining walls, paths and vegetation) to prevent soil erosion or to ensure adequate drainage)
- assessment of the highest and best use of the Remediated Block – consideration will be given to retaining Improvements that add value to Remediated Blocks on the open market (e.g. driveways, gates, unaffected structures and landscaping) and removing Improvements that detract from the value on the open market (e.g. some swimming pools, dilapidated separate garages)
- legality - any unapproved building structures that should have approval will be removed. Unapproved retaining walls may be retained if the structural integrity of the Remediated Block or an adjoining property would be compromised by their removal (in which case the nature and status of those retained structures would be an explicit term in the Contract for Sale for the Remediated Block).

Step 4: Valuation of blocks and determination of price

As part of demolition scheduling, the Taskforce will determine the Availability Date for a Remediated Block.

Six months before demolition, the Territory will commence the process to determine the sale price for the Remediated Block. The sale price will be set as at the date of the valuation. This is consistent with the position outlined in the Buyback Guide that the Scheme provides for “a first right of refusal to purchase the affected block (**at full market value, to be determined at the time of purchase**) after it is remediated”.

The sale price will be determined by the Land Development Agency (LDA) taking account of independent market valuations in keeping with its normal land sale practices.

The sale price offered to First Right Holders for Remediated Blocks will not be negotiable.

Step 5: Offer to purchase Remediated Block

Once the LDA has set the sale price, the First Right Holder will receive a letter from the Taskforce offering to sell them the Remediated Block.

The First Right Holder will then be required to notify the Taskforce within 30 working days whether they would like to purchase the Remediated Block.

It remains possible for owners of Affected Blocks to reside in their houses, subject to the completion and continuation of mandatory Asbestos Management Plans, until close to the demolition occurring (and therefore be in possession of the sale price for the Remediated Block before they settle on the Deed of Surrender).

At this stage, Affected Blocks where the owners have exchanged on the Deed of Surrender but are yet to settle (i.e. move out and receive payment from the Territory) will be programmed for demolition in 2018. This reflects the fact that over 600 houses had already been surrendered to the Territory at the time the first indicative demolition schedule was being settled.

Affected Blocks where exchange is yet to occur are likely to be programmed for demolition into 2019.

Where it is efficient, and would minimise community disruption, unsurrendered properties may be incorporated into the existing demolition schedule. The Taskforce may request owners consider bringing forward the surrender date of their property to achieve this, but will not require it.

Step 6 - Identification of Preserved Improvements

Following the Taskforce's completion of the demolition scoping assessment and determination of the sale price, the Taskforce will work with the First Right Holder to identify possible Preserved Improvements. Preserved Improvements are those Improvements that the Taskforce would remove if the Remediated Block was being prepared for public sale but which the First Right Holder wishes to retain.

It is important to note that discussions about Preserved Improvements will not canvass retention of Improvements that the Taskforce has determined must be removed due to contamination, approval status or logistical factors.

Agreement to retention of one or more Preserved Improvements will not change the sale price. This recognises the Territory's stated intention that Remediated Blocks be sold at market value reflecting their highest and best use. This means, in effect, that Preserved Improvements are provided to the First Right Holder at no cost (notwithstanding they were also factored into the amount paid to Eligible Homeowners under the Buyback Program).

The Taskforce will not agree to requests from First Right Holders to conduct works beyond those it would undertake if the property was being prepared for public auction (e.g. earthworks such as site cutting or filling for a future house; removing trees, or removing an Improvement that the First Right Holder wants removed but which would be retained if the Remediated Block were being prepared for sale on the market).

If agreement cannot be reached on the identification of Preserved Improvements within 60 working days of the Taskforce providing a letter to the First Right Holder outlining the possible Preserved Improvements, the Taskforce will issue a Contract for Sale based on its scope of demolition works.

Step 7 – Issue of Contract for Sale

Offer to Sell

The terms of the Territory's offer to sell the Remediated Block will be set out in a Contract for Sale which will be provided to the First Right Holder or their nominated solicitor. The Contract for Sale will include standard terms addressing:

- price
- warranties and indemnities
- deposit arrangements (the Territory will accept a 5% part deposit on exchange, with 10% of the purchase price at risk on default by the First Right Holder)
- indicative Availability Date (indicated through a date range for expected settlement)
- a date for completion provision (i.e. a mechanism to set the final settlement date); and
- a schedule of Preserved Improvements (if applicable).

Exercise of First Right of Refusal- Crown Lease not surrendered

If at the time the Taskforce issues the Contract for Sale, the Crown lease for the Affected Block has not been surrendered it will be a precondition of entering into the Contract for Sale that the First Right Holder simultaneously surrenders the Crown lease on exchange of the Contract for Sale in accordance with the Deed of Surrender.

This will require the First Right Holder and all other occupants of the Affected Block to vacate the affected house before it is possible to enter into the Contract for Sale.

Loss of First Right of Refusal

If the First Right Holder does not exchange contracts within 60 working days of receiving the Contract for Sale of the Remediated Block the First Right of Refusal will lapse.

Where an Eligible Homeowner residing in an affected house under a delayed settlement decides not to exercise their First Right of Refusal (or where the First Right of Refusal lapses as set out above) they must at that stage either:

- proceed to surrender their Crown Lease in accordance with the Deed of Surrender (which may as late as June 2020); or
- rescind the Deed of Surrender and leave the Scheme entirely.

In the event the Contract for Sale for the Remediated Block is rescinded or terminated for any reason, the First Right Holder will forfeit the First Right of Refusal.

Notice to Complete

Once demolition has been completed and the Affected Block has been removed from the Register (and becomes a Remediated Block), a new Crown Lease will be issued enabling the Contract for Sale to be completed. Settlement on that contract will generally take place within 30 working days of notification from the Territory of that fact.

Notification of sale prices/issue of draft Contracts for Sale

The Taskforce will not provide indicative sale prices or issue draft contracts for sale for Remediated Blocks where:

- a Deed of Surrender has not been exchanged; or
- the Availability Date is more than six months into the future.

ADDITIONAL INFORMATION

Maintaining contact details with the Taskforce

It is essential that First Right Holders provide and maintain current contact details with the Taskforce in order to ensure they can be notified of the proposed demolition and sales process scheduling and have the opportunity to exercise their First Right of Refusal. This includes temporary changes of address such as long holidays.

If three attempts to make contact using the last provided contact details are unsuccessful, the Taskforce may deem the First Right Holder to have forfeited their First Right of Refusal.

Land Rent leases

Consistent with the Scheme documents released in October 2014, First Right Holders may be permitted to take up a Land Rent lease on a Remediated Block in accordance with the eligibility criteria for the Land Rent Scheme. *The ACT Government's Preferred Way Forward on Loose Fill Asbestos: Overview* stated "eligibility for the land rent scheme will be the same as for any participant in that scheme, as determined by the LDA at the time the resale process occurs".

The ACT Government will shortly introduce legislative and regulatory amendments to give effect to this undertaking. Those amendments will not affect eligibility criteria or the amount of land rent payable. They will permit Land Rent leases to be established in the context of the exercising of a First Right of Refusal under the Scheme. They will also ensure the conversion of a land rent lease to a normal lease at a future date occurs based on the market value of the block. In keeping with the intention of this element of the Scheme – which is supporting the return of former owners of Affected Blocks to their neighbourhood – those amendments will also require any subsequent sale of the block be as a normal lease (i.e. at full market value).

The ACT Government will be unable to offer land rent leases on Remediated Blocks until this package of amendments is passed by the Legislative Assembly.

Warranties and Liability for Improvements

The Territory will instruct demolition contractors to take due care and exercise due diligence with all works, but there is no guarantee that Improvements will not be accidentally damaged during the demolition process.

For Improvements identified by the Territory to be retained, as well as Preserved Improvements, the Contract for Sale will require the First Right Holder to indemnify the Territory against any liability for maintenance or damage at any time (including by the action of its contractors).

Damage

Where an Improvement (retained by the Territory or as a Preserved Improvement) is damaged or destroyed, the Taskforce will advise the First Right Holder of the extent of the damage. The First Right Holder will then be required to either:

- a) accept the Remediated Block in its current state; or
- b) rescind the Contract for Sale and recover any deposit paid.

In keeping with procedures outlined above, there will be no reduction in the sale price where a Preserved Improvement has been damaged or destroyed.

Maintenance

The Territory will not be maintaining Improvements on surrendered blocks, and will generally be disconnecting power supplies and emptying swimming pools and other water features. The Contract for Sale will set out that the First Right Holder will have no claim against the Territory in the event that Improvements or Preserved Improvements are not maintained or are otherwise defective. Any Improvements on the Remediated Block will be transferred on an “as is, where is” basis, and buyers will have no recourse against the Territory in relation to the condition of any Improvements.

Legal Advice

First Right Holders are encouraged to engage a conveyancing solicitor to facilitate this transaction.

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