

Submission by the
Australian Council of Trade Unions (ACTU)
to the
Senate Economics Committee of the
Australian Parliament Inquiry into
Non-Conforming Building Products:
Illegal importation of products containing
asbestos
January 2017

Australia's asbestos legacy

In 2010, the Australian Government established the Asbestos Management Review. Its landmark report is just one of a number of reports and publications which comprehensively documents Australia's asbestos legacy.

In 2012, the Asbestos Management Review¹ said as follows:

Asbestos is a naturally occurring substance that has been mined and processed for thousands of years. It came into widespread industrial use in Australia during the second half of the 20th century, largely due its extraordinary tensile strength, low heat conduction and its chemical and termite resistance. Asbestos was widely used for insulation and as the key ingredient in products such as asbestos cement (AC or 'fibro') sheeting and roofing, water pipes, fire blankets, fillers and packing, as well as in items like motor vehicle clutches and brake linings, gaskets and pads.

Asbestos-related diseases (such as mesothelioma) can be contracted by breathing in tiny airborne particles when asbestos containing material is disturbed. Mesothelioma is fatal and incurable. The mortality rates associated with other asbestos-related diseases, such as lung cancer and asbestosis, are also very high.

The World Health Organization has stated that there is no minimum safe exposure level for any form of asbestos fibres. The National Health and Medical Research Council likewise has noted that '... asbestos is ... a highly toxic, insidious and environmentally persistent material that has killed thousands of Australians, and will kill thousands more this century'.

Australia was one of the highest users of asbestos in the world prior to the mid-1980s. Use of asbestos-containing materials (ACMs) was banned in this country from 31 December 2003. Not surprisingly, Australia has the highest reported per capita incidence of asbestos-related disease in the world. Due to extensive asbestos use throughout the nation, and incubation periods of up to 50 years or more between exposure and the manifestation of disease, the sad reality is that Australians will continue to contract and die from asbestos-related diseases for many years to come.

Of particular concern are recent studies that indicate the incidence of mesothelioma is increasing. Asbestos-related diseases have traditionally been linked to workers who have had direct contact with the material, either through mining or working with asbestos in manufacturing processes. A developing demographic whom asbestos-related diseases affect is appearing in the population, and includes 'do-it-yourself' (DIY) home renovators and their families. In the absence of timely and decisive intervention, many more people for generations to come will continue to contract these avoidable incurable fatal illnesses (our emphasis).

¹ Asbestos Management Review – Report – June 2012 (<https://docs.employment.gov.au/documents/asbestos-management-review-report-june-2012>)

Amongst the 12 recommendations made by the Asbestos Management Review was a recommendation that the Australian Government support and legislate for the establishment of a new national agency to have responsibility for the implementation, review, refinement and further development of a national strategic plan relating to asbestos.

As a consequence, the *Asbestos Safety and Eradication Agency Act 2013*² was enacted with cross party support.

History of regulation

Australia banned the importation of asbestos with effect from 31 December 2003. This measure was the responsibility of then Minister for Justice and Customs in the Howard Government, The Hon. Martin Ellison.

This initiative followed the regulation of asbestos workplaces by both ALP and LNP State Governments in the 1970's and 1990's.

The banning of the importation of asbestos was the corollary to preventing exposure in the workplace, given the often tragic consequences suffered by people exposed to asbestos fibres.

Background to the Inquiry - Ineffectiveness of the importation ban

Our submission is that in order for the ban to become effective, a number of reforms to the customs system as it relates to asbestos need to take place.

Despite the ban having been in place since 1 January 2004, significant amounts of asbestos continue to be imported into Australia.

The Australian Council of Trade Unions (ACTU) acknowledges the decision of the Senate to inquire into the effectiveness of the importation ban.

The ACTU rejects the view of the Australian Border Force (ABF) and the Australian Department of Immigration and Border Protection that the ban works effectively in protecting the Australian community.

How much asbestos is being imported illegally into Australia

There have in the last few years been a number of significant and newsworthy breaches of the importation ban.

In the view of the ACTU, these in all likelihood represent the tip of the iceberg and the real incidence of illegal importation is masked by a combination of the lack of enforcement and the ineffectiveness of the ABF in detecting ACMs.

Great Wall of China motor vehicles (2012)

In 2012, over 25,000 Great Wall of China and Chery vehicles were imported into Australia by Ateco Automotive. Despite the brake pads and exhaust systems containing asbestos, the

² *Asbestos Safety and Eradication Agency Act 2013* No.58, 2013

illegal importation was not detected by the ABF. This contraband product not only put at risk the lives of vehicle maintenance workers employed by car dealerships and service centres employing mechanics, but also individuals who service their own cars.

The regulatory response by the Australian Consumer and Competition Commission (ACCC) was totally inadequate. Whilst the ACCC issued a voluntary product recall for the 25,000 vehicles landed in Australia, they refused a request by the ACTU to issue a compulsory recall.³ Voluntary product recalls rarely deliver the necessary remediation the Australian community would expect.

Given the product recall was only voluntary, the ACTU holds major concerns that the number of vehicles on which remediation work was carried out was small and that many of the asbestos containing vehicles are still in circulation.

Children's Crayons (2015)

In mid-2015, asbestos support groups in the United States of America alerted Australian asbestos support groups to the manufacturing in China of asbestos laced crayons. This tip off led to the Gippsland Asbestos Related Disease Support Inc arranging for the testing of children's crayons for sale in Australia. This independent testing returned positive results confirming the detection of asbestos.

Subsequent testing conducted by the ACCC on a range of wax crayons identified traces of asbestos in the following products:

- Dora the Explorer Personalized 32 pack crayons
- Dora the Explorer Jumbo crayons
- Arti Crafti 16 piece crayons
- Peppa Pig 8 wax crayons

The ACCC statement also advised the independent testing had found traces of asbestos in:

- Disney 'Frozen' Jumbo Crayons
- Disney 'Mickey Mouse and Friends' Crayons

The ACCC response was to issue a product warning, however falling short of the more stringent option of issuing a product recall.⁴

In its statement, the ACCC said:

"The ACCC does not believe that traces of asbestos in crayons presents a safety risk to consumers because the asbestos is fixed within the crayon wax, which removes the risk of inhalation or ingestion. There is no need to panic."

³ The Australian Competition and Consumer Commission, <http://www.productsafety.gov.au/recall/ateco-automotive-pty-ltd-chery-vehicle-gaskets>, media release, 15 August 2012, accessed 13 January 2017

⁴ The Australian Competition and Consumer Commission, "ACCC Statement on asbestos in Crayons", media release, 11 September 2012, accessed 13 January 2017, available @ <https://www.accc.gov.au/update/accc-statement-on-asbestos-in-crayons>

Nevertheless presence of asbestos in crayons at any level is unacceptable because asbestos is a prohibited import and its presence means the product is not of acceptable quality. Also, the presence of asbestos triggers certain workplace safety obligations.

Where we have identified asbestos we have requested that suppliers of those goods to stop supplying them and offer consumers a refund or exchange for a product without asbestos."

In the view of the ACTU, this is another example of regulatory failure by the ACCC and its refusal to meet its obligations to enhance the welfare of Australians under the *Competition and Consumer Act 2010*.

Recommendation 1

To limit the exposure of members of the Australian community to ACMs, that the Australian product safety system administered by the Australian Consumer and Competition Commission make greater use of its powers to compulsory recall products which contain asbestos.

Late in 2016, Australian Border Force tested a further batch of 307,000 children's crayons. Tests confirmed the 307,000 children's crayons contained traces of asbestos.⁵ These crayons belonged to popular brands like Disney who were manufacturing their products in China. The ACTU remains concerned that other untested batches of potentially contaminated crayons from China remain in circulation in the Australian retail market.⁶

Recommendation 2

Following consultation with the Asbestos Safety and Eradication Council, Safe Work Australia, the Australian Border Force and other relevant government departments and agencies, the Australian Consumer and Competition Commission make all such necessary changes to the Australian product safety system as are necessary to provide the Australian community with greater protection against exposure to asbestos.

⁵ The Department of Immigration & Border Protection, Annual Report 2015-16, 15 September 2016, accessed 10 January 2016, pg.8 available @ [://www.border.gov.au/ReportsandPublications/Documents/annual-reports/annual-report-full-2015-16.pdf](http://www.border.gov.au/ReportsandPublications/Documents/annual-reports/annual-report-full-2015-16.pdf)

⁶ Australian Council of Trade Unions, "Asbestos Awareness Week: 307,000 contaminated crayons show action desperately needed to ensure community safety", media release, 22 November 2016, accessed 09 January 2017, available @ <http://www.actu.org.au/actu-media/media-releases/2016/asbestos-awareness-week-307-000-contaminated-crayons-show-action-desperately-needed-to-ensure-community-safety>

Recommendation 3

In circumstances where the Australian Consumer and Competition Commission becomes aware of a product containing asbestos and subsequently determines not to issue a compulsory recall of that product, the ACCC shall within thirty days of that decision publish a statement of reasons.

Yuanda Australia (2016)

Premier Colin Barnett described the asbestos scandal as "totally unacceptable".⁷

Another high profile and significant border breach in recent years has been that of Yuanda Australia who were found to be providing asbestos contaminated building products at some of Australia's largest construction projects. Yuanda Australia is majority owned by its parent company, Yuanda China Holdings Ltd. Last financial year, Yuanda Australia generated revenue to the tune of \$217million in the Australian market alone which demonstrates its reach into the domestic building and construction industry.⁸

In July 2016, Yuanda Australia provided gaskets to the "Tower of Power" development at 1 William St, Brisbane. Health and safety and other union representatives were suspicious that gaskets used to weld two pieces of aluminium together may contain asbestos and sought to have the gaskets tested. Workers using an angle grinder had already been cutting into these gaskets when the worker identified the plume of dust as asbestos. Testing confirmed these gaskets were contaminated with a significant amount of asbestos.⁹ Union health and safety representatives immediately took action with the builder to have the site shut down while remediation works took place.

In July last year, construction workers at the \$1.2 million Royal Children's Hospital development discovered asbestos in roof panels installed throughout the building. The discovery was made when a worker was cutting into one of the sealed panels when he found what he believed to be asbestos. Tests later confirmed the presence of asbestos in the 200 roofing panels.

Alarming 25 workers working in the immediate area had been exposed to plumes of contaminated dust when another worker had cut through the roofing panel with an angle grinder.¹⁰

⁷ ABC News 14 July 2016: <http://www.abc.net.au/news/2016-07-14/asbestos-found-in-perth-childrens-hospital-roof-panels/7628108>

⁸ Burrell Andrew, "Chinese-owned Yuanda Under Financial Pressure after Asbestos Scandal," *The Australian*, September 12, 2016, <http://www.theaustralian.com.au/national-affairs/health/chineseowned-yuanda-under-financial-pressure-after-asbestos-scandal/news-story/2733a59935abd5b2a8eae532a5f5e38>

⁹ O'Brien Chris "Asbestos found at Queensland Government's new executive building" *ABC News*, July 11, 2016, <http://www.abc.net.au/news/2016-07-11/asbestos-found-1-william-street-brisbane-cbd-executive-building/7587238>

¹⁰ Gartry Laura, "Asbestos found in \$1.2b Perth Children's Hospital, say WA Health Minister" *ABC News*, July 14, 2016, <http://www.abc.net.au/news/2016-07-14/asbestos-found-in-perth-childrens-hospital-roof-panels/7628108>

The incident also had another dimension. Workers and their unions on site raised the possibility that “the dust from cutting this material has gone through the ventilation system, if that’s the case it could have gone through the whole building”, Mick Buchan, the Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU), Construction and General Division Western Australia Branch Secretary was quoted as saying. He also said that 400 workers were on site that day.¹¹ Again the construction site was shut down for significant periods of times to ensure that no further workers’ health and safety were put at risk.

Unfortunately for the Royal Children’s Hospital, the site required extensive remediation works before it could be completed. Builder John Holland attempted to do a patch up job when remediating the roof panelling by only stripping the guts from the panels rather than the whole panels themselves. The CFMEU argue this cost cutting remediation practice is dangerous and puts further workers at risk to the exposure of asbestos.¹² A month after detection and a decision on the remediation method was yet to be made.

The costs for breaching Australia’s ban on asbestos at this site alone include worker exposure to deadly asbestos, construction delays, cost blowouts from remediation and loss of community trust in what should be an important public service building.¹³

Yuanda Australia has provided building materials to 69 large-scale developments across Australia over the last few years.¹⁴ Testing has been conducted at many of these sites to ensure workers and users of these buildings are not at risk from further contaminated building products.

The detection by workers at the above mentioned building projects in Perth and Brisbane led the ABF to target incoming imports by Yuanda Australia. On 6 September 2016, the ABF confirmed the arrival in Australia of yet more contaminated building products bound for the 1 William St Brisbane project.¹⁵ These ACMs had also been imported by Yuanda Australia.

It can be said with some certainty that the focus by the ABF on imported building products by Yuanda Australia only came about following the publicity surrounding the Royal Children’s Hospital project in Perth and the 1 William St project in Brisbane. In our submission, this situation is totally inadequate.

¹¹ Shepherd Briana, “Possible Asbestos Find at Perth Children’s Hospital Angers CFMEU” ABC News, July 14, 2016, <http://www.abc.net.au/news/2016-07-13/perth-childrens-hospital-asbestos-fears/7627046>

¹² Gabrielle Sophie & Titelius “Asbestos row: Deadlock over Perth Children’s Hospital remediation means more delays” *Perth Now*, August 22, 2016, <http://www.perthnow.com.au/news/western-australia/delays-continue-at-perth-childrens-hospital-amid-asbestos-fix-deadlock/news-story/38bf0b9ff47480da43e3e2a7ec14d7fc>

¹³ Perpetch Nicolas, “Perth Children’s Hospital Asbestos Find: AMA flags concerns over cleanup and worker safety” ABC News, July 14, 2016, <http://www.abc.net.au/news/2016-07-14/ama-flags-concerns-over-perth-childrens-hospital-asbestos-cleanup/7631062>

¹⁴ Burrell Andrew, Asbestos scandal sets off fears at 69 sites across Australia” *The Australian Newspaper*, July 15, 2016, <http://www.theaustralian.com.au/news/nation/asbestos-scandal-sets-off-fears-at-69-sites-across-australia/news-story/dba0698106eca94fabb95d5c5717d94f>

¹⁵ Horn Allyson and Smail Stephanie, “Asbestos found in second batch of building materials for Queensland Government tower” ABC News, September 7, 2016, <http://www.abc.net.au/news/2016-09-07/asbestos-found-second-batch-building-materials-qlld-govt-tower/7822136>

In each of the three confirmed asbestos detections, Yuanda Australia provided builders and regulators with fraudulent certification that the shipments were compliant with Australian law. In the case of John Holland in Perth, Yuanda provided the builder with test certificates stating the roof panelling complied with Australian regulations and was asbestos free.¹⁶ When independent tests commissioned by the WA Government and the CFMEU were conducted on the roofing panels, a concentration of 7.5% asbestos was detected.¹⁷ This is a very high level, even by Chinese lax building standards and above the Chinese unofficial “asbestos free” threshold of 5% asbestos content.

In our submission, there are a number of lessons to be learnt from the Yuanda episodes.

Most observers would consider central building district building sites to be highly regulated. The principal contractor at The Royal Children’s Hospital in Perth was John Holland, one of the largest builders in Australia and a Comcare licensee. The building contractors on the “Tower of Power” project in Brisbane are regulated by Workplace Health and Safety Queensland (WHSQ). Both sites were heavily unionised with many elected and trained Health and Safety Representatives.

These large scale construction projects have a significant degree of oversight and control that most building and construction sites in Australia would never have. Even with this level of oversight, it was the workers and their representatives on the projects, the last line of defence so to speak, that identified the presence of asbestos. As the Asbestos Industry Association President, Michael Shepherd best describes “the products we are detecting on building sites we’re detecting by pure chance”.¹⁸

The ACTU is particularly concerned by the increase in Chinese imports coming into Australia, and use in the building industry by small to medium sized operators where compliance with workplace health and safety standards are not at the levels attained at large scale building and construction projects. The Master Builders Association director, Michael McLean says:

“In WA, owner-builders are about 10 per cent of the (house building) market,” MBA executive director Michael McLean said. “That’s a couple of thousand new homes every year. What qualifications do a lot of these owner-builders have in accessing products for their homes? At least a builder has some experience or qualifications to make some assessment in these things. The industry and the public were in uncharted waters with easy access to imported

¹⁶ Gartry Laura, “Asbestos found in \$1.2b Perth Children’s Hospital, say WA Health Minister” *ABC News*, July 14, 2016, <http://www.abc.net.au/news/2016-07-14/asbestos-found-in-perth-childrens-hospital-roof-panels/7628108>

¹⁷ Flint John and Messurier Danielle, “Asbestos scandal: WA Builders warned of risk before discovery at Perth Children’s Hospital” *The Sunday Times*, July 17, 2016, <http://www.perthnow.com.au/news/western-australia/wa-builders-warned-of-asbestos-risk-before-discovery-at-perth-childrens-hospital/news-story/38e4421bba3c51f5fb28cfdaf9613cf>

¹⁸ Davis Ben, “Asbestos Discovered at No 1 William St” *ABC News Talk*, July 13, 2016, <http://www.4bc.com.au/news/asbestos-20160712-gq49k8.html>

products.“ Because of the internet, builders and members of the public are accessing products from all over the world.”¹⁹

China has made public comment that it foresees that it will increase the magnitude of products that it manufacturers utilising asbestos. A Chinese asbestos industry spokesperson informed *The Australian* in late 2016 that “our production... can’t keep pace with demand from the construction industry so we have to import from Russia”, the world’s largest producer of the six asbestos-family minerals.²⁰

Recommendation 4

Given that the vast bulk of asbestos being illegally imported into Australia has its origins in the People’s Republic of China (China), the ACTU respectfully requests that the inquiry recommend that the China-Australia Free Trade Agreement (ChAFTA) which came into force on 20 December 2016 be reviewed with the object of strengthening its provisions so as to prevent the importation into Australia of asbestos from China.

The discovery of roof panels containing asbestos at the Children’s Hospital site in Perth led to an argument about how to deal with the deadly product. The CFMEU unsuccessfully argued that the roof panels should be removed and replaced, given removing the asbestos from the panels was hazardous and would put the workers undertaking the work at unnecessary risk.

Given that the CFMEU proposal resulted in greater costs, it was opposed by the Western Australian Government and John Holland.

The ACTU submits that a new legal obligation should be created to require the removal and/or disposal of illegally imported asbestos (if it is safe to do so following consideration of the hazards likely to be faced by the workers undertaking the work) and to make importers responsible for the cost of such removal and/or disposal of asbestos. If adopted, this measure will create huge financial disincentive to breaching the importation ban.

Recommendation 5

That the inquiry recommend that a new legal obligation should be created to require the removal and/or disposal of illegally imported asbestos (if it is safe to do so following consideration of the hazards likely to be faced by the workers undertaking the work) and to make importers responsible for the cost of such removal and/or disposal of asbestos.

¹⁹ Flint John and Messurier Danielle, “Asbestos scandal: WA Builders warned of risk before discovery at Perth Children’s Hospital” *The Sunday Times*, July 17, 2016, available @ <http://www.perthnow.com.au/news/western-australia/wa-builders-warned-of-asbestos-risk-before-discovery-at-perth-childrens-hospital/news-story/38e4421bba3c51f5fb28cfddaf9613cf>

²⁰ Callick Rowan, “China ignore WHO warnings in asbestos boom”, *The Australian*, July 27, 2016, available @ <http://www.theaustralian.com.au/news/world/china-ignores-who-warnings-in-asbestos-boom/news-story/e50822ffb53cb79df85badffde13ca2c>

Australian Portable Camps (2010 onwards)

In June 2016, another iconic local company, Australian Portable Camps (APC) was found to have imported cement fibre sheets contaminated with asbestos from China. APC describes itself “as the biggest supplier of portable accommodation facilities to major projects around Australia”.²¹ Although detection only occurred at the end of 2015, APC were found to have imported the defective building products between 2010 and 2011 in more than 8000 sheets.

The ACTU and unions are particularly concerned by reports that 2000 of the sheets have been used in the construction of portable camps now located all around the country. The ACTU is concerned that the South Australian regulator who is investigating the incident may not be able to ensure that all the ACMs are removed from the retail chain²². Lack of information on the type of use and location of these camps presents workers and other users of these structures with unacceptable health and safety risks.

Due to the time lag from production to the detection of asbestos in this particular situation, the ACTU is concerned about the hurdles involved in notifying people who are in contact, who may come into contact with, and who may undertake refurbishment of or make alterations to the portable camps.

Robert Johnson Engineering (2016)

In December 2015, Yarra Trams were alerted to the presence of ACMs in four modular substations installed in the Melbourne CBD. The principle contractor for the project was Siemens, who in turn sub-contracted much of the construction work to Robin Johnson Engineering.²³ WorkSafe Victoria investigated the incident and confirmed Robin Johnson Engineering (RJE) had illegally imported ACMs used in the construction of the substations. WorkSafe Victoria determined not to prosecute RJE after they were advised that RJE had been deceived by the Chinese supplier in that the products were “asbestos free”

In 2016, workers on the Seaford line extension in Adelaide found traces of asbestos in fibre cement sheeting attached to the Ascot Park Feeder Station and Lonsdale Substation. Again

²¹ Burrell Andrew, “Fear asbestos sheets used at construction sites around the country” *The Australian*, July 27, 2016, available @ <http://www.theaustralian.com.au/news/fears-asbestos-sheets-used-at-construction-sites-across-country/news-story/afcf814848fbf858a8ec611fa270e29>

²² Donnellan Angelique, “Asbestos illegally imported from China provokes questions and answers in SA” *ABC News*, June 9, 2016, available @ <http://www.abc.net.au/news/2016-06-09/asbestos-illegally-imported-from-china-provokes-anger/7498190>

²³ Carey Adam, “Asbestos found in four new tram substations built in Melbourne last year”, *The Age*, February 15, 2016, available @ <http://www.theage.com.au/victoria/asbestos-found-in-four-new-tram-substations-built-in-melbourne-last-year-20160215-gmuf69.html>

the principle contractor was RJE and once again the company escaped prosecution by SafeWork SA for importing the contaminated fibre cement sheeting from China.²⁴

Reasons why the ban lacks efficacy

Six prosecutions in 13 years

Only 3 successful prosecutions in 13 years

The lack of prosecutions sends a message that there is little interest by the Australian Government and its agencies in enforcing the importation ban. The view in the community is that you can illegally import ACMs into Australia without any real regulatory consequence.

Australia's ban on the importation on asbestos lacks efficacy for the following reasons:

- Lack of Enforcement by Federal regulators
- Reluctance by agencies and regulators to prosecute
- Inadequacy of the fines
- Defences available under the legislation
- Reluctance by state and territory regulators to prosecute suppliers of asbestos
- The ABF lacks adequate resources to effectively enforce the ban
- The failure of the Australian Government to take steps to discourage breaches of the importation ban and to make the detection of asbestos at the border a priority issue

Since the asbestos ban came into effect in 2003, only two businesses and one individual have been successfully prosecuted by the Commonwealth authorities. Over the last 13 years, hundreds and possibly thousands of asbestos contaminated products have breached Australian borders, entering our country illegally.

Since 2003, the Commonwealth has attempted to prosecute just five companies for illegally importing asbestos into Australia, however only two of these prosecutions have been successful. The first prosecution took place in 2008 and was against Alcan (now Rio Tinto Alcan) who pleaded guilty to seven charges of importing equipment containing asbestos. Alcan were fined \$90,000 for their contravention of Australia's border protection laws.²⁵

The second successful prosecution was against an international engineering company, Clyde Bergemann Senior Thermal Pty Ltd (Clyde Bergemann). In 2012, Clyde Bergemann was penalised \$64,000 plus costs for importing prohibited asbestos in machinery parts predominantly destined for

²⁴ Donnellan Angelique, "Asbestos illegally imported from China provokes questions and answers in SA" *ABC News*, June 9, 2016, available @ <http://www.abc.net.au/news/2016-06-09/asbestos-illegally-imported-from-china-provokes-anger/7498190>

²⁵ Australian Broadcasting Corporation, [Alcan Fined for Asbestos Imports](#), News article, 19 December 2008, accessed 12 January 2017

the resources sector in WA.²⁶ The importation of the asbestos containing materials (ACMs) took place almost eight years after the importation ban came into effect.

The only other prosecution in the last 13 years has been the conviction of a 50-year-old Australian man in 2014 who was fined \$10,000 and required to pay \$4,500 costs in the Perth Magistrates Court for importing asbestos into Australia. The relevant product was a consignment of 1,600 gaskets made of chrysotile asbestos inside 200 brass constructed chrome plated hinges.²⁷

The Australian Border Force (formerly the Australian Customs and Border Protection Service (ACBPS)) may take a prosecution action against importers found to have imported goods containing asbestos, with penalties of up to \$170,000 for individuals, \$850,000 for companies, or three times the value of the goods – whichever is greater.²⁸

The ACTU is at a loss to understand why there is a lack of interest by Australian regulatory authorities to enforce the ban.

Recommendation 6

That the inquiry recommend that entities and individuals that breach the ban on the importation of asbestos be prosecuted.

Given the appalling record on successful prosecutions and the insignificant quantum of penalties applied to guilty parties, it's no wonder the system fails to protect the community. \$90,000 is akin to a slap on the wrist for a multi-billion company like Rio Tinto Alcan (Rio). These sort of judgments against companies like Rio do nothing to encourage importers to perform due diligence on the contents of products being brought into Australia.

Recommendation 7

That the inquiry recommend that the quantum of the penalties for breaches of Australia's importation be substantially increased so that they act as an effective deterrent against breaches of customs law.

Advice given to the ACTU is that offences under the *Customs Act 1901* as they relate to the importation of asbestos use strict liability rather than absolute liability. The defence of Mistake of Fact is not available in relation to absolute liability offences, but is available in relation to strict liability offences. The customs offences where absolute liability applies include those in relation to

²⁶ Australian Customs and Border Protection Service, [International engineering company ordered to pay \\$64 000 for importing asbestos gaskets](#), media release, 7 May 2012, accessed 19 August 2016.

²⁷ Australian Customs and Border Protection Service, [Importing asbestos costs Perth man \\$14,500](#), media release, 17 December 2014, accessed 19 August 2016.

²⁸ See: Legal & Constitutional Affairs Committee, ANSWERS TO QUESTIONS ON NOTICE, Immigration & Border Protection Portfolio Budget Estimates Hearing 2014-15, 26-27 May 2014 available online at http://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/bud_1415/DIBP/BE14-022.pdf

dealing with the importation of some guns, drugs and child pornography. Presumably, this is based on a view taken by Parliament that people who deal in such things ought to know what they are doing.

It has been argued that the defences available under the Act mean that in the vast majority of situations, there is little likelihood of a successful prosecution of those people and entities illegally importing asbestos and therefore under the prosecutions policy of the Commonwealth, no prosecution is brought.

Presumably, this is based on a view taken by Parliament that people who deal in such things ought to know what they are doing.

It has been argued that the defences available under the Act mean that in the vast majority of situations, there is little likelihood of a successful prosecution of those people and entities illegally importing asbestos and therefore under the prosecutions policy of the Commonwealth, no prosecution is brought.

Recommendation 8

That the *Customs Act 1901* (and other relevant laws) be reformed in a manner which facilitates a greater number of successful prosecutions of entities and individuals that illegally import ACMs.

The *Work Health and Safety Act 2011 (Cth)*²⁹ and the laws of the states and territories impose duties on persons conducting businesses or undertakings that import plant, substances and structures. Amongst the obligations of importers is to carry out, or arrange to carry out, any calculations, analysis, testing or examination that may be necessary for the performance of the duty.

Therefore, it is difficult to explain the reluctance of Comcare and the state and territory regulators to prosecute the suppliers of plant, substances and structures.

Comcare's inaction can be partly understood given its long time role as a passive regulator. In more recent times, its regulatory approach can best be characterised as reactive rather than proactive.

The situation with the states and territories is harder to comprehend. Since the 1980's, Victoria and New South Wales have had comprehensive asbestos regulation and their regulators have been the two best performers in the nation.

Recommendation 9

That the Australian Government engage with the states and territories through the Council of Australian Governments, Safe Work Australia, and the Asbestos Safety and Eradication Council about strengthening the legislative and other duties of persons that import, supply, sell, demolish and dispose of asbestos and asbestos-containing products, materials and structures.

²⁹ No. 137, 2011 as amended, section 24

The Australian Government's failure to deliver adequate regulatory oversight of our customs and border protection is a blight on our country. The lack of enforcement by federal regulators directly contributes to Australians coming into contact with deadly asbestos fibres and contracting an asbestos related disease.

Since his appointment as Minister for Immigration and Border Protection, the Hon. Peter Dutton MHR has refused to meet with representatives of the ACTU to discuss the asbestos tsunami and/or engage on the importation scandal drawn to his attention in items of correspondence.

His performance is to be contrasted with the former Minister for Employment, the Senator Hon. Eric Abetz who met with the Asbestos Safety and Eradication Council and never declined an invitation from the ACTU to engage on asbestos related matters. Similarly, the current Minister for Employment, Senator Hon. Michaela Cash regularly consults with the ACTU and employers on asbestos related matters and met with the Asbestos Safety and Eradication Council in 2016.

Whilst in 2016 Minister Dutton commissioned KGH Border Services to undertake an "independent" Asbestos Importation Review, he failed to respond to correspondence from the ACTU asking to be able to make a submission. Community based asbestos support groups were also prevented from making a submission. Given the terms of reference for the review were particularly narrow, it was viewed by many as another missed opportunity to tackle the asbestos importation tsunami.

In correspondence to the ACTU dated 5 December 2016, Mr Andrew Chandler, Acting First Assistant Secretary, Traveller, Customs and Industry Policy Division, Department of Immigration and Border Protection (DIBP) states:

"Since its establishment on 1 July 2015, the Department and ABF have significantly increased the strategic and operational focus on goods that pose a risk of containing asbestos."

The recent focus on an established problem is to be welcomed. The view of the ACTU is that it has come about as a result of extensive media coverage of customs breaches, most particularly the children's crayon scandal, and political pressure brought to bear by the ACTU and unions, asbestos support groups, Members of Parliament and others.

The consequences of Australian Government inaction has resulted in the workers, unions, the states and territories, and asbestos advocacy groups taking responsibility for detection of illegally imported asbestos products. The ACTU affirms this burden of responsibility is misplaced by the Australian Government.

The disinterest in enforcing the ban is compounded by the removal of resources from the ABF and the Australian Department of Immigration and Border Protection.

Recommendation 10

That the Australian Border Force (ABF) be given adequate resources to ensure its compliance activity is sufficient to effectively monitor and prevent the illegal importation of asbestos.

Whilst the DIBP may assert that preventing asbestos from crossing Australia's borders may rank amongst its priorities, and that of its "operational arm", the ABF, the priorities and activities of both remain opaque.

The ACTU contends that compliance with Australia's customs laws could be enhanced if both the DIBP and ABF were to regularly and systematically consult with a range of stakeholders rather than with just the customs agents and their representatives.

Recommendation 11

That the DIBP and ABF jointly establish a formal consultative mechanism to enable it to consult with a range of key stakeholders about issues relating to policy and practices relating to the importation of asbestos.

Summary of recommendations

Recommendation 1

To limit the exposure of members of the Australian community to ACMs, that the Australian product safety system administered by the Australian Consumer and Competition Commission make greater use of its powers to compulsory recall products which contain asbestos.

Recommendation 2

Following consultation with the Asbestos Safety and Eradication Council, Safe Work Australia, the Australian Border Force and other relevant government departments and agencies, the Australian Consumer and Competition Commission make all such necessary changes to the Australian product safety system as are necessary to provide the Australian community with greater protection against exposure to asbestos.

Recommendation 3

In circumstances where the Australian Consumer and Competition Commission becomes aware of a product containing asbestos and subsequently determines not to issue a compulsory recall of that product, the ACCC shall within thirty days of that decision publish a statement of reasons.

Recommendation 4

Given that the vast bulk of asbestos being illegally imported into Australia has its origins in the People's Republic of China (China), the ACTU respectfully requests that the inquiry recommend that the China-Australia Free Trade Agreement (ChAFTA) which came into force on 20 December 2016 be reviewed with the object of strengthening its provisions so as to prevent the importation into Australia of asbestos from China.

Recommendation 5

That the inquiry recommend that a new legal obligation should be created to require the removal and/or disposal of illegally imported asbestos (if it is safe to do so following consideration of the hazards likely to be faced by the workers undertaking the work) and to make importers responsible for the cost of such removal and/or disposal of asbestos.

Recommendation 6

That the inquiry recommend that entities and individuals that breach the ban on the importation of asbestos be prosecuted.

Recommendation 7

That the inquiry recommend that the quantum of the penalties for breaches of Australia's importation be substantially increased so that they act as an effective deterrent against breaches of customs law.

Recommendation 8

That the *Customs Act 1901* (and other relevant laws) be reformed in a manner which facilitates a greater number of successful prosecutions of entities and individuals that illegally import ACMs.

Recommendation 9

That the Australian Government engage with the states and territories through the Council of Australian Governments, Safe Work Australia, and the Asbestos Safety and Eradication Council about strengthening the legislative and other duties of persons that import, supply, sell, demolish and dispose of asbestos and asbestos-containing products, materials and structures.

Recommendation 10

That the Australian Border Force (ABF) be given adequate resources to ensure its compliance activity is sufficient to effectively monitor and prevent the illegal importation of asbestos.

Recommendation 11

That the DIBP and ABF jointly establish a formal consultative mechanism to enable it to consult with a range of key stakeholders about issues relating to policy and practices relating to the importation of asbestos.

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