

SafeWork SA submission to:

**Senate Economics References Committee
Inquiry into non-conforming building products**

December 2016

This submission addresses the additional terms of reference of the Senate Economics References Committee's Inquiry into non-conforming building products regarding asbestos.

The illegal importation of products containing asbestos and its impact on the health and safety of the Australian community, with particular reference to:

a. the prevalence and sources of illegally imported products containing asbestos;

Background

An Australia-wide ban on the import, manufacture and use of all types of asbestos and asbestos containing material (ACM) took effect on 31 December 2003. Work health and safety (WHS) laws in all states and territories prohibit the manufacture, supply or use of asbestos.

In order to support the domestic ban:

- the importation of asbestos or ACM into Australia without permission is prohibited pursuant to Regulation 4C of the *Customs (Prohibited Imports) Regulations 1956*; and
- the exportation of asbestos or ACM from Australia without permission is prohibited pursuant to Regulation 4 of the *Customs (Prohibited Exports) Regulations 1958*, other than where lawful exceptions apply.

The *Work Health and Safety Regulations 2012 (SA)* (the WHS Regulations), which are based on national model Work Health and Safety Regulations (the model WHS Regulations), require that a person conducting a business or undertaking must not carry out, or direct or allow a worker to carry out, work involving asbestos.

In this regulation, work involves asbestos if the work involves manufacturing, supplying, transporting, storing, removing, using, installing, handling, treating, disposing of or disturbing asbestos or asbestos containing material.

The model WHS Regulations do not deal with the importation of asbestos, however, the model Work Health and Safety Act contains the following general duty for persons conducting a business or undertaking that import plant, substances or structures:

24—Duties of persons conducting businesses or undertakings that import plant, substances or structures

- (1) *This section applies to a person (the importer) who conducts a business or undertaking that imports—*
 - (a) *plant that is to be used, or could reasonably be expected to be used, as, or at, a workplace; or*
 - (b) *a substance that is to be used, or could reasonably be expected to be used, at a workplace; or*
 - (c) *a structure that is to be used, or could reasonably be expected to be used, as, or at, a workplace.*
- (2) *The importer must ensure, so far as is reasonably practicable, that the plant, substance or structure is without risks to the health and safety of persons—*

- (a) *who, at a workplace, use the plant, substance or structure for a purpose for which it was designed or manufactured; or*
- (b) *who handle the substance at a workplace; or*
- (c) *who store the plant or substance at a workplace; or*
- (d) *who construct the structure at a workplace; or*
- (e) *who carry out any reasonably foreseeable activity at a workplace in relation to—*
 - (i) *the assembly or use of the plant for a purpose for which it was designed or manufactured or the proper storage, decommissioning, dismantling or disposal of the plant; or*
 - (ii) *the use of the substance for a purpose for which it was designed or manufactured or the proper handling, storage or disposal of the substance; or*
 - (iii) *the assembly or use of the structure for a purpose for which it was designed or manufactured or the proper demolition or disposal of the structure; or*

Example—

Inspection, operation, cleaning, maintenance or repair of plant.

- (f) *who are at or in the vicinity of a workplace and who are exposed to the plant, substance or structure at the workplace or whose health or safety may be affected by a use or activity referred to in paragraph (a), (b), (c), (d) or (e).*
- (3) *The importer must—*
- (a) *carry out, or arrange the carrying out of, any calculations, analysis, testing or examination that may be necessary for the performance of the duty imposed by subsection (2); or*
 - (b) *ensure that the calculations, analysis, testing or examination have been carried out.*
- (4) *The importer must give adequate information to each person to whom the importer provides the plant, substance or structure concerning—*
- (a) *each purpose for which the plant, substance or structure was designed or manufactured; and*
 - (b) *the results of any calculations, analysis, testing or examination referred to in subsection (3), including, in relation to a substance, any hazardous properties of the substance identified by testing; and*
 - (c) *any conditions necessary to ensure that the plant, substance or structure is without risks to health and safety when used for a purpose for which it was designed or manufactured or when carrying out any activity referred to in subsection (2)(a) to (e).*
- (5) *The importer, on request, must, so far as is reasonably practicable, give current relevant information on the matters referred to in subsection (4) to a person who carries out, or is to carry out, any of the activities referred to in subsection (2)(a) to (e).*

Asbestos is still widely used in some countries. Despite being a prohibited import in Australia, goods containing asbestos are still being located at the border and more recently in workplaces across Australia. Certification provided to importers from overseas manufacturers that goods are

asbestos-free has sometimes been proven to be incorrect or unreliable for the purposes of the Prohibited Imports Regulations.

Local standards in some supplier countries may classify goods 'asbestos free' where they meet a certain low level of asbestos content.

In November 2015, SafeWork SA was notified by a local company, Robin Johnson Engineering (RJE) that a sample of imported fibro cement board, imported from China, tested positive for chrysotile asbestos.

RJE built 64 switch rooms containing asbestos floor sheeting, located in five states across Australia. In South Australia there are 11 buildings owned by five companies.

SafeWork SA's policy position is that asbestos installed post 2003 is illegal and must be removed.

There may be circumstances where, recognising the significant work and downtime cost impact associated with the removal of these products, as well as safety concerns associated with the removal, SafeWork SA will consider it appropriate that a planned, staged approach to removal is implemented. Any staged approach must be approved by the regulator.

In May 2016, SafeWork SA received an anonymous notification that Australian Portable Camps (APC) was using material containing asbestos imported from China in its constructions. Investigations have found asbestos was used in APC's own building, and also located in portable buildings (stock) and stock piles at the site, and in the soil. SafeWork SA and the Environment Protection Authority (SA) have issued compliance notices requiring the removal of the asbestos and have worked with APC to finalise a remediation strategy.

In July 2016, SafeWork SA was notified that Yuanda Australia used material containing asbestos on construction materials in Queensland and Western Australia.

Yuanda has been involved in approximately 80 construction projects in Australia since 2003, with four located in South Australia. They are the new Royal Adelaide Hospital, South Australian Health and Medical Research Institute, Tower 8 and Illuminate. Testing has since found no asbestos in the South Australian buildings.

In August 2016, SafeWork SA received a complaint that the Nyrstar Port Pirie Transformation Project imported vessels from China containing asbestos materials.

Eight vessels were imported at various times over the last eight months which had been positioned ready for installation in the construction of the new Acid Plant.

SafeWork SA prohibited all work on or in the vicinity of the asbestos and directed its removal. This removal is occurring with a view to all the asbestos being removed by the end of this year. Of concern in this matter is that the material was marked asbestos free and that the contract entered into by Nyrstar indicated clearly that material used in the manufacture of the vessels should not contain any ACM.

All of the instances of illegal importation into South Australia are being investigated by SafeWork SA with a view to potential prosecution for breaches of the work health and safety legislation.

b. the effect of illegally imported products containing asbestos on:

- i. industry supply chains, including importers, manufacturers and fabricators, and**
- ii. workplace and public safety and any associated risks;**

SafeWork SA notes the submission provided to the Senate Economics References Committee by the Asbestos Safety and Eradication Agency (ASEA).

In addition to the impacts and health and safety risks addressed in ASEA's submission, SafeWork SA also notes that there are duties right across the supply chain, and disputation surrounding duty holder responsibilities along the chain may result in cost impacts for individuals and may be counter-productive to good health and safety outcomes. These effects may be magnified where there has been significant passage of time between the illegal importation and the discovery of asbestos, if certain companies involved in the import, supply and/or fabrication of the building products cease to exist.

For example, a building product containing asbestos containing material (ACM) may be discovered in 2016 that relates to an importation of a building product in 2006. In the 10 years that passed, companies involved in the importation, supply or fabrication of the building products may cease to exist, thereby making it extremely difficult, if not impossible to apportion responsibility for any remedial action. In these cases a customer may be left with the responsibility and cost impact for remediation works. There is also the potential that duty holders will not report the asbestos, thereby placing their own workers, other workers and the public at risk.

c. possible improvements to the current regulatory frameworks for ensuring products containing asbestos are not illegally imported to Australia, with particular reference to the effectiveness of:

- i. policing, enforcement, surveillance and screening of imported products, including restrictions and penalties imposed on importers and end users of products containing asbestos;**
- ii. preventing exposure and protecting the health and safety of workers and other people affected by the illegal importation of products containing asbestos,**
- iii. establishing responsibility for remediation of sites where illegally imported products containing asbestos has been found;**
- iv. coordination between Commonwealth, state and territory governments and the role of the Australian Government in coordinating a strategic approach to preventing the importation of products containing asbestos;**

The key is clearly to prevent asbestos and ACM from entering Australia in the first place.

The recent instances of building products containing asbestos being imported into Australia is a cause for serious concern to SafeWork SA and the South Australian Government.

While there has been a ban on the importation of asbestos since 2003, recent examples indicate that there is an obvious need for tighter controls.

In August 2016, the Hon John Rau MP, Minister for Industrial Relations wrote to the Minister for Immigration and Border Protection calling for a strengthening of Australia's border control measures to ensure that the community is protected from asbestos-laden products.

The South Australian Government has called for an improved testing requirement for importers, as well as an improved compliance and testing regime by border surveillance authorities, particularly where products have been imported from countries with a known history of asbestos contamination. It is also essential that if Australian Border Force test material and discover it contains asbestos, information about the source company should be made publicly available.

It is noted that the model WHS Regulations were made at a time when it was presumed that the 2003 ban on asbestos would be upheld and so there was no need to contemplate mandatory testing of imported material for asbestos under the model legislation framework. It is suggested that the current regulatory regime in the model WHS Regulations should be revisited in light of the recent instances of illegal importation into Australia.

An option is the inclusion of a regulation in Chapter 8 of the WHS Regulations requiring that a person conducting a business or undertaking that seeks to import building material from overseas should have a regulatory obligation to test that product for asbestos upon its arrival in South Australia consistent with the testing regime contained in Regulation 423(2) (an extract of Regulation 423 is provided for your information at Attachment 1).

Summary

It is of great concern to SafeWork SA that work health and safety regulators are being increasingly left to deal with illegal asbestos once it arrives at workplaces. As identified above, the key to solving this problem is to prevent asbestos at the borders. While South Australia is looking at local options to deal with the issue, a consistent national regulatory and enforcement approach remains the best way to deal with the problem.

Attachment 1

423—Analysis of sample

- (1) A person with management or control of a workplace may identify asbestos or ACM by arranging for a sample of material at the workplace to be analysed for the presence of asbestos or ACM.
- (2) If a person with management or control of a workplace arranges for an analysis, the person must ensure that the sample is analysed only by—
 - (a) a NATA-accredited laboratory accredited for the relevant test method; or
 - (b) a laboratory approved by the regulator in accordance with guidelines published by Safe Work Australia; or
 - (c) a laboratory operated by the regulator.

Maximum penalty:

- (a) In the case of an individual—\$1 250.
- (b) In the case of a body corporate—\$6 000.

Expiation fee:

- (a) In the case of an individual—\$144.
- (b) In the case of a body corporate—\$720.