

## **QUESTION TAKEN ON NOTICE**

**Parliamentary Inquiry : 02 August 2018**

HOME AFFAIRS PORTFOLIO

**(NCBP/055) – Brief to AGS - Yuanda Australia**

Asked:

On 24 May 2017—you'll have to correct me, if I'm wrong here, but it sounds like the brief of evidence provided to the Australian Government Solicitor didn't get over the thresholds in relation to proving the criminal element as to what the company knew and what due diligence they had taken. Firstly, are you able to provide a copy of the brief that was provided to the Australian Government Solicitor?

*Answer:*

The referral to AGS occurred in August 2017. The basis of the referral was to obtain legal advice about future asbestos referrals for prosecution rather than referring this particular matter for prosecution action. Given the purpose of the referral and because infringement notices had been paid there was no brief of evidence for advice about prosecution prospects. The referral to AGS set out the assertions of fact that would be established by the brief of evidence and included correspondence with Yuanda.

## **QUESTION TAKEN ON NOTICE**

**Parliamentary Inquiry : 02 August 2018**

HOME AFFAIRS PORTFOLIO

**(NCBP/056) – Increase to penalties**

Asked:

For substantial companies, that's not really much of an impediment. Is there anything being done about increasing the penalties under the infringement notice scheme?

*Answer:*

The Department of Home Affairs and the Australian Border Force are not currently reviewing the penalties applied under the Infringement Notice Scheme for unlawful asbestos importation.

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 02 August 2018

HOME AFFAIRS PORTFOLIO

### **(NCBP/057) – Guidance documents impact on the mistake of fact defence**

Asked:

Coming back to this issue of the defences available in relation to prosecutions—and I guess this comes back to the prosecution policy of the Commonwealth that you were talking about earlier—as I understand it, on 20 July last year, the Department of Immigration and Border Protection released guidance on assurances that imported goods do not contain asbestos. If that document had existed prior to Yuanda's importation of asbestos, is it the case that the mistake of fact defence would not have been so easy to use?

I'm not a lawyer. I really couldn't say what was in the minds of the DPP at the time when they got the brief of evidence to decide whether or not to prosecute. Okay. Is that something you can take on notice for me as to whether there is a view about it? Now that you've got that document out there—the guidance on assurances that imported goods do not contain asbestos—does that have an impact on the mistake of fact defence?

We're updating our guidance all the time, and through the IDC we're working on a number of products at the moment. In fact, we've only just updated our website, which is one of our main forms of getting information out to the public. We just updated that yesterday with a fact sheet specifically on motor vehicles. So we do that constantly. It's an evolving process. Again, I'm not a lawyer, but I guess that the more information is out there the better informed companies can be. They can voluntarily comply with the border prohibition. Our ultimate goal is to have everyone doing that rather than having to run through a compliance process, an INS or a judicial process. But I'll have to take that on notice. I think it's a technical legal question that I'm not able to answer.

Answer:

The Prosecution Policy of the Commonwealth sets out a range of factors that need to be taken into account, including that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured. Part of that assessment considers any lines of defence available to the alleged offender.

A common defence for importation offences is mistake of fact which is available under section 9.2 of the *Criminal Code* (Cth).

Mistake of fact can be raised where:

- (a) at or before the time of the conduct, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
- (b) had those facts existed, the conduct would not have constituted an offence.

The standard of proof for criminal matters, including customs prosecutions, is proof beyond a reasonable doubt. However, in raising a defence, such as mistake of fact, an accused only needs to point to sufficient evidence on the balance of probabilities to show that the defence applies. The onus then shifts to the prosecution to negate the defence beyond a reasonable doubt, by establishing that the belief was not honest and reasonable in the circumstances.

In the case of Yuanda and other importers, the guidance document titled “Assurances that imported goods do not contain asbestos” increases awareness for importers to have processes in place to ensure importations of goods do not contain asbestos. As such, the guidance document may assist to displace the mistake of fact defence where an importer claims to be unaware of the importation requirements, because it may be used to show that a mistake of fact was not reasonable. Whether that is so will depend of the facts in each case.

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 02 August 2018

HOME AFFAIRS PORTFOLIO – AUSTRALIAN BORDER FORCE

**(NCBP/058) – Asbestos testing process**

Asked:

Senator PATRICK: But in that particular instance the importer was clearly articulating the requirements for entry into Australia to the person they were dealing with overseas. After 250 times without a detection, at some point you'd have to say: 'You know what? This person's got their act together.' That doesn't mean you might not randomly test them. Is that a general occurrence? Is that an aberration?

Ms Dale: Not to my knowledge, but we can certainly take that on notice and have a look at the exact scenario and come back to you.

Answer:

The Australian Border Force (ABF) has requested further information on the Case Study used by the Commonwealth Ombudsman in report 04/2018 (*Investigation into delays in processing inbound Containerised Sea Cargo*) at page 16. On receipt of any additional information the ABF can provide a more detailed response. In general, the ABF targeting methodology for goods that may contain asbestos is designed to limit the number of interventions on goods and entities with a record of compliance.

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 06 August 2018

HOME AFFAIRS PORTFOLIO

**(NCBP/059) – Information sharing - additional data**

Asked:

CHAIR: Is there any more data or detail that the department can now offer that it couldn't back in 2015?

Mr Hutton: I might have to take that on notice, but I don't believe so. No. The same rules apply. It was just, I think, about whether or not the information we were gathering was going to be helpful. You could get down to weights and values and so on, but that may or may not be of any use to a regulator who actually wants to know addresses, supplier names and so on. I understand we have added fields to the data that we send out upon request by the states and territories, and we don't have a problem in doing so.

CHAIR: What does this information-sharing cover at the moment? What types of products and materials have you concentrated on?

Mr Hutton: I'll have to take that on notice.

CHAIR: Yes, if you could.

Mr Hutton: I can't remember off the top of my head, but I think there were five different types of products. I think that mainly they were building products. They were prefab, like demountable buildings and concrete sheeting. But I'll take that on notice.

CHAIR: I'd be interested in knowing whether external cladding was one of those as well.

Answer:

The full range of data available to share with state and territory building regulators under the Import Data Sharing Arrangement has not changed.

However, new statistical codes were implemented by the Department of Home Affairs and the Australian Bureau of Statistics in January 2018 into the tariff classification subheadings for aluminium composite panels with polyethylene content. Statistical codes are a way for importers to identify their particular product, in this case aluminium cladding, so that statistics regarding the importation of these goods can be collected more easily.

The data includes products which may be used as external cladding post-border, and covers the tariff subheadings under which these building products are described within an import declaration. This covers:

- aluminium cladding;
- prefabricated buildings;
- plasterboard sheeting;
- tiles and panels; and
- insulated electrical cables.

The data provided includes information on the declared goods description; importer and delivery details; the origin and date of import; the value of the goods; and details of the overseas supplier.

State and territory regulators can also make ad hoc requests where they identify a safety or compliance issue relating to an imported product. These types of requests assist the regulators to more efficiently respond to particular incidents.

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 02 August 2018

HOME AFFAIRS PORTFOLIO – AUSTRALIAN BORDER FORCE

**(NCBP/060) – measured data demonstrating a reduction in importations**

Asked:

Senator PATRICK: But with cladding, for example, you did have a couple of investigations. I think there was some in some electrical equipment in South Australia. In those instances, I would have thought that the importers would now be a lot more careful and you would see a reduction in the empirical data that you're receiving.

Ms Dale: That's exactly right.

Senator PATRICK: Do you have data that shows that that is acting as a deterrent?

Ms Dale: I don't have the data specifically, but in addition to that we have introduced a question on the import declaration. There's a question that pops up asking: does the material contain asbestos and have you taken the appropriate due diligence? So it's in the forefront of their mind to have the appropriate assurance, and it's much cheaper for them to test it in the origin country than to bring it here and hold it at the wharf or terminal and get it tested here. So they are much more aware. We get more information from importers and exporters to Border Watch and our various hotlines, as well.

Senator PATRICK: Maybe you could take this notice: is there any measured data that shows that, as a percentage of the amount of product that is imported into Australia, we are starting to achieve our objective, which is not to have the stuff sent here in the first place?

Ms Dale: We can certainly take that on notice and come back.

Senator PATRICK: I'd be interested in that. Thank you.

*Answer:*

The Australian Border Force (ABF) does not hold data that directly measures the quantity of imported goods not containing asbestos. The data for detections of imported goods containing asbestos shows an increase since 2013-14, however, this is due to the ABF refining targeting of high-risk goods. This does not indicate a trend in the intentional importation of asbestos or asbestos containing materials.



## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 03 August 2018

HOME AFFAIRS PORTFOLIO – AUSTRALIAN BORDER FORCE

**(NCBP/061) – Positive detections of asbestos**

Asked:

The number of positive detections of asbestos has increased over the past four years, going from 13 detections to 63, at the end of the 2016-17 financial year. As at 21 May 2018, there have been 61 positive detections of asbestos. Can you please provide details of;

- o what types of products have had positive detections; and
- o whether any of the positive detections relate to building products.

Answer:

Between 1 July 2017 and 21 May 2018 there were **64** positive detections for asbestos.

Asbestos was found in the following importations:

- Aircraft
- All-terrain vehicles
- Building products
- Motorbikes
- General machine parts
- Motor scooters
- Vehicles
- Vehicle parts

As at 21 May 2018, positive detections for asbestos occurred in three building products:

- Expanded polystyrene cement boards
- Flooring of a prefabricated house
- Wall panelling

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 07 August 2018

HOME AFFAIRS PORTFOLIO

**(NCBP/062) – Changes to asbestos testing and importation processes under the TPP**

Asked:

a) Are there any risks to our systems if for example Australia were to become a party to the agreement and be pressured in Mutual Recognition Arrangements with other economies and face pressure to not break these arrangements if standards deteriorate?

b) Can you review the evidence provided in original Question on Notice provided after the hearing held on 13 November 2015 and provide on notice another assurance if applicable, to the extent that you can, that the TPP 11 will not adversely impact recently implemented procedures for assurances, perhaps with a focus on the new 2017 requirements?

*Answer:*

The Trans-Pacific Partnership (TPP) will not impact on Australia's sovereign right to enforce controls on goods crossing the border where identified risks exist. This includes goods identified as being at risk for containing asbestos.

Goods suspected of containing asbestos will continue to be subject to current assurance measures at the border. This will include the application of Australian standards for the sampling and testing of asbestos.

## **QUESTION TAKEN ON NOTICE**

**Parliamentary Inquiry : 07 August 2018**

**HOME AFFAIRS PORTFOLIO – AUSTRALIAN BORDER FORCE**

**(NCBP/063) – Asbestos detections 2016-17 and 2017-18**

*Asked:*

Senate Estimates evidence given by the Department on 21 May 2018 indicated that for the 2016-17 financial year, in total, the number of positive detections was 63, and year to date, 2017-18 there had been 61.

- a) How many detections related to building products?
- b) What products were detected - can you provide a break down (including non-building products)

*Answer:*

Refer to NCBP/061.

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 07 August 2018

HOME AFFAIRS PORTFOLIO – AUSTRALIAN BORDER FORCE

**(NCBP/064) – Infringement Notice Scheme penalties**

Asked:

Answers given in Budget Estimates Questions on notice (BET18/040) indicated there were 20 infringement notices served and from 1 July 2017 to 30 April 2018 there were 57 notices served (comprising 39 infringement notices to individuals and 18 to corporations).

- a) How many of the notices were for building products?
- b) What products in question did the notices relate to - can you provide a break down? (including non-building products)
- c) Can you provide a breakdown of the infringements by product, penalty amount and whether it was an individual or corporate entity?
- d) Evidence at Senate Estimates on 21 May 2018 indicated that the number of consignments tested to the financial year to date then was just 328, which compared to 602 tests for the corresponding time the year before (Senate Estimates 22 May 2017), a 45 per cent decrease. Is Border Force spending less on testing than it was last year and is this due to fewer resources, less suspicious consignments or a better/profile alert system in your view?

Answer:

*a) How many of the notices were for building products?*

- 2

*b) What products in question did the notices relate to - can you provide a break down? (including non-building products)*

- Expanded polystyrene cement boards and prefabricated houses.

*c) Can you provide a breakdown of the infringements by product, penalty amount and whether it was an individual or corporate entity?*

- Expanded polystyrene cement board: infringement by a corporate entity with a penalty amount of \$9,450
- Prefabricated house: infringement by an individual with a penalty amount of \$3,150

d) *Evidence at Senate Estimates on 21 May 2018 indicated that the number of consignments tested to the financial year to date then was just 328, which compared to 602 tests for the corresponding time the year before (Senate Estimates 22 May 2017), a 45 per cent decrease. Is Border Force spending less on testing than it was last year and is this due to fewer resources, less suspicious consignments or a better/profile alert system in your view?*

- It is the responsibility of the importer to arrange and pay for asbestos testing.
- The decrease in examinations performed by the Australian Border Force (ABF) between 2016-17 and up to 22 May 2018 is attributable to better intelligence and targeting methodologies that identify consignments in high-risk categories.
- The ABF also has increased its communications concerning asbestos so industry is better informed and aware of their responsibilities in ensuring asbestos and asbestos containing materials are not imported into Australia.
- The introduction of the community protection question on importation declarations has ensured that importers must consciously declare whether there is a likelihood of asbestos present in their goods and to provide assurance that any asbestos has been removed prior to importation.