

Chapter 3

Ongoing issues

3.1 Despite implementing a total ban on the manufacture, use, reuse, import, transport, storage or sale of all forms of asbestos and asbestos-containing materials (ACMs) within Australia from 1 January 2004, evidence to the inquiry highlighted some ongoing issues that require attention.

3.2 This chapter explores concerns raised by stakeholders about the risk of asbestos-related disease, the reality that Australian workers remain the last line of defence in asbestos detection, and the apparent lack of enforcement of the asbestos importation ban.

Asbestos-related disease risk

3.3 As noted in the previous chapter, exposure to asbestos can cause mesothelioma, cancer and asbestosis (fibrosis of the lungs).¹ While historically asbestos-related diseases have been most prevalent among workers involved in asbestos mining, milling, and manufacturing (the 'first wave') and workers, such as labourers and tradespersons, who are the end-users of asbestos containing material (the 'second wave'). Maurice Blackburn Lawyers explained that in recent decades a third wave has emerged, people who have never worked in what would be considered high risk industries, developing asbestos-related diseases.² The third wave of asbestos-related disease is characterised by low dose exposure, primarily in non-occupational contexts, such home renovations, using or working with products not known to contain asbestos or environmental exposure.³ In addition, Maurice Blackburn Lawyers stated:

Australia was one of the largest consumers of asbestos, per capita, between the 1950s and 1980s. The result has been Australia has suffered the highest incidence of asbestos-related diseases, per capita, in the world. It is estimated that over 10,000 Australians have died from malignant mesothelioma since the 1980s, that another 15,000 will be diagnosed in coming decades, due to the long latency period of the cancer, and the fact that Australians continue to be exposed to asbestos.⁴

3.4 Professor Bill Musk, appearing as a member of the Australian Medical Association (WA) and with experience and expertise in the epidemiology and the clinical care of patients with asbestos related diseases, explained to the committee that 'one of the features of asbestos is that it is indestructible—that is how it gets its

1 Australian Border Force, *Managing the risk of asbestos at the border*, p. 1, <http://www.border.gov.au/Importingandbuyinggoodsfromoverseas/Documents/asbestos-border-factsheet.pdf> (accessed 6 November 2017).

2 Maurice Blackburn Lawyers, *Submission 107*, p. 4.

3 Maurice Blackburn Lawyers, *Submission 107*, p. 5.

4 Maurice Blackburn Lawyers, *Submission 107*, p. 10.

name—so once it gets into the lungs it tends to stay there and is very hard to remove, and as long as it is there it can cause disease'. Professor Musk observed that while not every person that breathes asbestos will get an asbestos-related disease. He noted that the asbestos fibres sit in the lungs and are:

...removed by the defence mechanisms of the lung at a ballpark rate of about five per cent per year, but that means at the end of every year 95 per cent of them are still there, and as long as they are there they can give rise to cancer, asbestosis or things called pleural plaques or pleural thickening on the outside of the lungs.⁵

3.5 Mr Ian Johnstone appeared before the committee as a member of the Asbestos Disease Support Society. Mr Johnstone was diagnosed with mesothelioma in 2016, after being exposed to asbestos during his 33 years in the construction industry in Melbourne, beginning in the 1970s. Mr Johnstone explained:

The reason for me being here today is to try and stop any further person contracting mesothelioma. In this day and age, that people can still be exposed to this product, knowing now what I have and that there is no cure for my problem—it is a disease not caused by me but by others. I was diagnosed in July of last year and it has put a tremendous strain upon my family. It has made our lives change completely. I wish that upon no-one in the future.⁶

3.6 Ms Amanda Richards of the Asbestos Disease Support Society outlined the changing demographics of those being diagnosed with asbestos related diseases in recent years:

Up until 18 months ago, it was...people who had worked with asbestos products or had been part of the mining industry. What we are seeing now is younger people coming through. In the last 12 months we have had a few people in their 30s and 40s come through, who have since passed away. Just before Christmas I was contacted by somebody who was only 22 who had been diagnosed with mesothelioma and was trying to understand how she could possibly have got the disease when she had never worked with it, did not live in a house with asbestos in it et cetera. I believe that the next wave is starting. Some people get it from their parents refurbishing homes, but the younger ones are coming through now.⁷

3.7 Another witness described the experience of workers discovering they have been exposed to asbestos. Mr Steven Diston of the Electrical Trades Union of Australia (ETU) explained:

5 Professor Arthur William (Bill) Musk, Member, Australian Medical Association (Western Australia), *Committee Hansard*, 9 March 2017, p.17.

6 Mr John McGregor (Ian) Johnstone, Member, Asbestos Disease Support Society, *Committee Hansard*, 30 January 2017, p. 2.

7 Ms Amanda Marion Richards, Chief Executive Officer, Asbestos Disease Support Society, *Committee Hansard*, 30 January 2017, p. 3.

I do not know if you have ever been to a job where guys have been exposed to asbestos, but basically you end up with an angry roomful of people who want answers, and there are not many answers you can give these people. We got in a specialist in asbestos law from Slater and Gordon, and she sat down with these people. The long and the short of it is that if you have been exposed to asbestos, cross your fingers and hope. You put your name down on the [national asbestos register]...Employers will often say, 'You can put us down as the employer,' but employers come and go. One of the biggest things is the absolute futility of it: once you are exposed it is too late; there is nothing that can be done for you; we do not have double lung transplants available. Asbestosis or mesothelioma is a terminal sentence. I have been exposed to asbestos a lot, and it is just cross your fingers.⁸

3.8 Mrs Vicki Hamilton, OAM, Asbestos Council of Victoria/GARDS reminded the committee 'there is no safe level to asbestos'. She described a 'tsunami of asbestos products coming into our country' which needs to be stopped to prevent unwitting exposure through products bought online or at a retailer.⁹

3.9 The risk of asbestos exposure to the broader population has increased due to the rise of online purchasing. The Asbestos Safety and Eradication Agency (ASEA) also noted the risk arising from the increase in demand for sourcing building products through online platforms such as the Chinese e-commerce company, Alibaba. Overseas merchants are easily able to import and sell their goods through this online business model to consumers around the world. The reliability of these products can be severely questioned as a quick search on the Alibaba website will identify a vast array of asbestos products.¹⁰ The Asbestos Council of Victoria/GARDS Inc raised similar concerns in relation to goods purchased through eBay.¹¹

3.10 In light of what we know of the dangers of exposure to asbestos, Maurice Blackburn Lawyers, argued that 'we have a moral obligation to protect future generations of Australians by actively taking steps to prevent the importation and use of non-conforming building materials containing asbestos'.¹²

Workers—the last line of defence

3.11 Given the serious health risks associated with exposure to asbestos, the committee is worried about the ongoing risk to workers since the asbestos importation ban was imposed in 2003. Of particular concern to the committee was evidence that products containing illegally imported asbestos are most often discovered by workers. For example, the asbestos at the Perth Children's Hospital and 1 William Street in

8 Mr Steven Diston, Organiser, Electrical Trades Union of Australia, *Committee Hansard*, 14 July 2017, p.54.

9 Mrs Vicki Hamilton, OAM, Chief Executive Officer; Secretary, Asbestos Council of Victoria/GARDS Inc, *Committee Hansard*, 14 July 2017, p. 67

10 Asbestos Safety and Eradication Agency, *Submission 90*, p. 6.

11 Asbestos Council of Victoria/GARDS Inc, *Submission 104*, p. 1.

12 Maurice Blackburn Lawyers, *Submission 107*, p. 10.

Brisbane was discovered by workers with relevant occupational health and safety (OH&S) and asbestos awareness training.¹³

3.12 Mr Thady Blundell, representing the Asbestos Disease Support Society and Turner Freeman Lawyers noted that the discovery of asbestos at 1 William Street 'came about because a worker did not like the look of the dust and was concerned that it contained asbestos. That led to inquiries being made and the material being tested...So it was by chance'.¹⁴ Mr David Meir, ETU, observed:

It is always the workers because they are the ones dealing with it. We bear the brunt of everything. We are the ones drilling the holes and going, 'Oh, that looks a bit suss; what's this?' They get their health and safety rep over if they have got one or they call in the union to suss it out. They say to their boss, 'What's this?' If the boss is diligent, he will say, 'Oh, we'd better stop that,' or he will say, 'Oh, don't worry about it; just get it done and paint over it'.¹⁵

3.13 Mr Simon Pisoni from the Communications Electrical Plumbing Union (SA) explained that it was also workers who discovered asbestos at the Nyrstar project in Port Pirie, South Australia. Mr Pisoni explained:

Definitely our members are made aware of the sort of material that you should be cautious of. There's always that base knowledge of recognising what could contain asbestos and then having the ability to raise it as a concern and have any material tested. Even though the building of the plant at Nyrstar will be a new plant and you'd expect that there wouldn't be any asbestos...the concern was raised and, to their credit, Nyrstar went through the proper process of taking a sample and having it tested. To their disgust, it was found that the cladding was asbestos.¹⁶

3.14 Mr Peter Tighe, Chief Executive Officer of ASEA, observed that the illegal importation of asbestos has created a new challenge for awareness training. He noted:

The problem is that new people that come into the trade in that area and since 2003, since we've had zero tolerance—have an assumption that any new work don't have any association with asbestos. But there is the legacy of asbestos.¹⁷

13 Asbestos Safety and Eradication Agency, *Submission 90*, p. 4

14 Mr Thady Blundell, Lawyer, Asbestos Disease Support Society, Turner Freeman Lawyers, *Committee Hansard*, 30 January 2017, p. 2.

15 Mr David Mier, Assistant National Secretary, Electrical Trades Union of Australia, *Committee Hansard*, 14 July 2017, p. 59

16 Mr Simon Pisoni, Assistant Branch Secretary, Electrical and Plumbing South Australia, Communications Electrical Plumbing Union, *Committee Hansard*, 31 July 2017, p. 4.

17 Mr Peter Tighe, Chief Executive Officer, Asbestos Safety and Eradication Agency, *Estimates Hansard*, Education and Employment Legislation Committee, 27 October 2017, p. 11.

3.15 Mr Dave Kirner, Construction, Forestry, Mining and Energy Union (CFMEU), shared Mr Tighe's concerns about the renewed importance of asbestos awareness training:

We're now playing a catch-up game because asbestos is reborn in the building industry. We're having to go and talk to workers...starting at the ground again and distributing stickers about asbestos and the union document 'Asbestos kills' so they understand it. I was speaking to a group of three young workers the other day, probably between 19 and 22, and I said, 'You probably don't know much about asbestos, but it's highly dangerous.' One of them said, 'My grandfather died from that.' So we are having to now go back and redo all that.¹⁸

3.16 In relation to asbestos found on tugboats, Mr Paul Garrett from the Maritime Union of Australia advised the committee that workers discovered asbestos on vessels after due diligence checks had given the all clear and the vessel had been returned to service.¹⁹

Asbestos awareness training

3.17 Workers are often the last line of defence when dealing with illegally imported asbestos. As such, the availability of asbestos awareness training for workers is essential.

3.18 The CFMEU informed the committee that it was not a matter of luck that led to the discovery of asbestos by CFMEU members and subsequent successful remediation at the 1 William Street site. The site delegate who first became suspicious that asbestos was present had undertaken nationally accredited Asbestos Awareness Training. It noted that 'identifying asbestos is a highly specialised task'.²⁰ The CFMEU advocated for introduction of mandatory asbestos awareness training for 'a wide range of occupations in the construction industry and provide adequate funding for nationally accredited training for this purpose'.²¹

3.19 Maurice Blackburn Lawyers expressed concern that 'the Australian population is becoming increasingly unaware of the precise dangers that asbestos poses, as well as how to identify or protect themselves from products which contain asbestos'.²² It noted the building products containing asbestos pose a health risk to workers, but also to the general population of Australia. It explained:

The issue is especially vexing as there is a growing 'information gap' amongst workers and the general public. In Australia, public awareness

18 Mr Dave Kirner, District Secretary Forestry, Furnishing, Building Products and Manufacturing Division, Construction, Forestry, Mining and Energy Union, South Australia, *Committee Hansard*, 31 July 2017, p. 11.

19 Mr Paul Garrett, Assistant Secretary, Sydney Branch, Maritime Union of Australia, *Committee Hansard*, 3 October 2017, p. 16.

20 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 24.

21 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 11.

22 Maurice Blackburn Lawyers, *Submission 107*, p. 10.

concerning the dangers of asbestos peaked in the 1980s and 1990s in the wake of campaigning by activists, trade unions, parliamentarians and the media to ban the use of asbestos.²³

3.20 The risk to the broader population of illegally imported asbestos is amplified by the rise of online purchasing.

3.21 Maurice Blackburn Lawyers was particularly concerned that there is a growing assumption that asbestos is a danger of the past.²⁴ Mr Steve Diston from the ETU held a similar view, he had found that apprentices are being desensitised to asbestos. He noted further:

But I tell you that one thing that would be bloody handy would be that, in all the apprenticeship training, any apprentice should have asbestos awareness as a unit of competency in their apprenticeship. I am a licensed electrician as well. If you spend any time on Facebook groups about electrical advice, at least once a week there will be someone posting a picture of a material, saying, 'Do you reckon this is asbestos or not?' because we do not get trained in it. Unless you are at a decent union workplace where it is pushed, you are just not going to get that training.²⁵

3.22 Maurice Blackburn Lawyers was of the view asbestos awareness training should be a mandatory requirement in government contracts, asserting that:

Commonwealth, state and territory governments should adopt a standard condition in any contract with private industry for major public projects, that contractors provide asbestos awareness training to workers (and provide the Government with proof of that training), where such projects will include the use of imported building materials.

Such training should involve training workers to identify possible asbestos materials on the building site, as well as what precautions should be taken to avoid exposure.²⁶

3.23 At a Supplementary Budget Estimates hearing in October 2017, Mr Peter Tighe, CEO of ASEA observed:

Employers in the industry and employee organisations in the industry are starting to require asbestos education as a fundamental in place. We just registered a course with ASQA [Australian Skills Quality Authority] for the utilities sector for training of awareness for all players in that area—that means direct employees and contractors. I think that responds to the information that you're probably hearing about the need for universal asbestos awareness programs for those people who may come across it in their normal occupational areas. The secondary one, though, is this need for those people who are going to run across it as a non-occupational

23 Maurice Blackburn Lawyers, *Submission 107*, p. 9.

24 Maurice Blackburn Lawyers, *Submission 107*, p. 9.

25 Mr Steven Diston, Organiser, Electrical Trades Union of Australia, *Committee Hansard*, 14 July 2017, p. 60.

26 Maurice Blackburn Lawyers, *Submission 107*, p. 12.

understanding about what is going on. Certainly, in the trades and in the apprenticeship area, we're finding from our building construction advisory committee that they would like to move ahead with some universal training.²⁷

Committee view

3.24 The committee understands that identifying asbestos is a highly specialised task. However, the committee is deeply concerned by evidence that Australians working in the building and construction industry are becoming increasingly unaware of the precise dangers that asbestos poses, as well as how to identify or protect themselves from products which contain asbestos.

3.25 In order to mitigate the risk of exposure to asbestos, particularly asbestos that may have been illegally imported but is yet to be discovered, the committee believes that mandatory nationally accredited asbestos awareness training should be introduced for a wide range of occupations in the construction industry. To this end, the committee encourages the Australian Government to ensure adequate funding is provided for this purpose.

Recommendation 8

3.26 The committee recommends that the Australian Government require mandatory Asbestos Awareness Training for a wide range of occupations in the construction industry and provide adequate funding for nationally accredited training for this purpose.

Inadvertent procurement

3.27 The WA Building Commission's audit report in September 2016 found that the presence of asbestos containing material in the Perth Children's Hospital revealed that awareness of the risk of inadvertent procurement of asbestos containing materials (ACMs) within the supply chain appears to be low.²⁸

3.28 ASEA submitted that Australia needs to develop a holistic approach to supply chain management in order to address the problems regulators are currently facing with regards to imported ACMs. Following discussions with a wide range of stakeholders, from customs brokers to manufacturers to government representatives and customs staff, ASEA was of the view that 'changes to the supply chain must start at its roots'. It noted that many of its stakeholders were seeking more information from ABF in order to ensure they were compliant.²⁹

3.29 ASEA considered that asbestos awareness programs targeted at designers, architects or planners could have resounding impacts through the supply chain. Noting

27 Mr Peter Tighe, Chief Executive Officer, Asbestos Safety and Eradication Agency, *Estimates Hansard*, Education and Employment Legislation Committee, 27 October 2017, p. 13.

28 WA Building Commission, *Summary of Interim Report: Perth Children's Hospital asbestos*, September 2016, p. 2.

29 Asbestos Safety and Eradication Agency, *Submission 90*, p. 5.

that by focussing on the design, quality standard and contractual stipulation stage quality non-compliance could be weeded out.³⁰

3.30 ASEA also noted the importance of sourcing, particularly as the market is so attached to the cheapest option.³¹ Ai Group also noted that procurement policy that places all emphasis on minimising cost will exacerbate the problem.³²

3.31 In addition, ASEA advised that customs brokers need to be highly aware of these issues and high risk products. Noting that they need to continually liaise with suppliers and clients to meet their due diligence requirements.³³

3.32 The Construction Products Alliance, a collective of public and private organisations that is working to promote awareness of non-conforming building products, emphasised the importance of educating industry, clients and consumers about the countries that have not banned asbestos and the associated risks.³⁴

3.33 Mairin OHS&E Consulting, an Australian company which provides health and safety consultancy services, suggested that asbestos awareness programs focused on the risk of illegal importation of asbestos could assist ABF with its workload by raising the level of general awareness and the ability to identify high risk products before they enter Australia. It noted that the published information that is currently available online can be difficult to locate.³⁵

3.34 Ms Carolyn Davis noted:

Developing and promoting nationally consistent information is important and needs to involve all stakeholders. Solutions that focus on one part of the supply chain have not worked. A one-stop-shop for everyone to access consistent trusted information is a step in the right direction. Nationally agreed guidance on a national website would increase public and industry awareness of and confidence in the available information. A unified approach is needed that can be used to promote overseas especially to those involved early in the supply chain.³⁶

Committee view

3.35 There is no doubt that there is a real risk of inadvertent procurement of asbestos containing building materials within the supply chain, and the committee is concerned about the apparent lack of awareness of this risk. The committee is of the view that in order to stop asbestos containing building materials at the contractual stipulation stage, asbestos awareness programs need to be provided across the supply

30 Asbestos Safety and Eradication Agency, *Submission 90*, p. 5.

31 Asbestos Safety and Eradication Agency, *Submission 90*, p. 5.

32 Ai Group, *Submission 120*, p. 10.

33 Asbestos Safety and Eradication Agency, *Submission 90*, p. 5.

34 Construction Product Alliance, *Submission 116*, p. 4.

35 Mairin OHS&E Consulting, *Submission 93*, p. 5.

36 Ms Carolyn Davis, *Submission 118*, p. 8.

chain (including for example to architects and designers) and not limited to building and construction industry workers. As ABF is the operational arm of the Department of Immigration and Border Protection (DIBP) who enforces the ban on the importation of asbestos, the committee believes that they are best placed to develop and implement such training.

3.36 The committee is concerned by evidence that there is a lack of awareness across the supply chain of the risk of inadvertently procuring building materials containing asbestos. The committee considers that raising the level of awareness and the ability to identify high risk products before they enter Australia is paramount to reducing the risk of inadvertently importing asbestos. The committee notes that the information that is currently available online regarding this risk can be difficult to locate and believes that consideration should be given to developing a single online portal for the purpose of educating building industry participants, importers and consumers about the risk of inadvertently procuring asbestos containing building materials within the supply chain.

Recommendation 9

3.37 The committee recommends that the Department of Immigration and Border Protection and Australian Border Force consider the merits of developing and implementing a comprehensive education campaign for all importers of the risk and responsibilities regarding asbestos containing materials and the definition of asbestos containing materials used in other countries.

Recommendation 10

3.38 The committee recommends that the Asbestos Safety and Eradication Agency develop a one-stop-shop website to provide single point for participants across the supply chain to access information regarding the illegal importation of asbestos.

Enforcement of the asbestos importation ban

3.39 Mrs Hamilton from the Asbestos Council of Victoria/GARDS stated that since asbestos importation was banned in 2003, 'products containing asbestos have been flowing into our country with no checks'. She suggested:

We were foolish enough to think we could pass laws and everyone would obey them. No-one thought to do regular checks on products after the ban was initiated. We have only realised in recent times just what asbestos is in these products and how varied those products are and how wide-ranging they are, affecting all Australians, from the very young—children—right through to the old.³⁷

3.40 Mr Colin Brame from the Customs Brokers and Forwarders Council of Australia Inc. also noted that there were no measures put in place at the time of the ban to ensure it was enforced. He advised the committee that when the ban came into

37 Mrs Vicki Hamilton, OAM, Chief Executive Officer; Secretary, Asbestos Council of Victoria/GARDS Inc, *Committee Hansard*, 14 July 2017, p. 68.

force at the end of 2003, there were no industry wide notices advising of the changes, nor were there community protection questions put into the customs system for customs brokers to answer: 'do these goods contain asbestos?'³⁸

3.41 As such, customs brokers were not required to ask what due diligence had been done to ensure a product is asbestos free. Mr Brame explained that 'the law came out that there was nil asbestos into Australia but that did not flow into the customs side of things as a proactive question for us to follow up with importers and their suppliers'.³⁹

3.42 Mr Brame noted that it was not until August 2016 that ABF introduced the community protection question into the system, thirteen years after the ban was first imposed.⁴⁰

3.43 Mr Andrew Mantle of Asbestos Audits & Environmental Audits Pty Ltd (AARMS), a specialised asbestos surveying company, likened the current requirements to prevent the illegal importation of asbestos to asking 'the fox to guard the henhouse' noting:

At the moment, within Australia, whilst we have the regulations saying, 'A product has to be asbestos free or meet the Australian/New Zealand standard,' there is no testing of that product prior to its import into Australia. All we originally required was a declaration or some form of proof or documentation that states that the product is asbestos free.⁴¹

3.44 Mr Mantle considered that importers and companies were unlikely to undertake asbestos testing prior to import into Australia unless they had a shipment held at wharf by ABF.⁴² He explained that there is no mandatory requirement for importers to ensure products are asbestos free:

It is in the ABF leaflets that go out to the customs and trade brokers that they highly recommend that any products being imported must comply with the regulations, and that may require testing and further documentation. But to date,...I could not name five companies that are actively seeking to have building products tested or the factories in China audited to ensure that the products are asbestos free.⁴³

38 Mr Colin Brame, Director, Customs Brokers and Forwarders Council of Australia Inc., *Committee Hansard*, 30 January 2017, p. 43.

39 Mr Colin Brame, Director, Customs Brokers and Forwarders Council of Australia Inc., *Committee Hansard*, 30 January 2017, p. 43.

40 Mr Colin Brame, Director, Customs Brokers and Forwarders Council of Australia Inc., *Committee Hansard*, 30 January 2017, p. 44.

41 Mr Andrew Gordon Mantle, Managing Director, Asbestos Audits & Environmental Audits Pty Ltd, *Committee Hansard*, 3 October 2017, p. 27.

42 Mr Andrew Gordon Mantle, Managing Director, Asbestos Audits & Environmental Audits Pty Ltd, *Committee Hansard*, 3 October 2017, p. 26.

43 Mr Andrew Gordon Mantle, Managing Director, Asbestos Audits & Environmental Audits Pty Ltd, *Committee Hansard*, 3 October 2017, p. 30.

3.45 In relation to the incidents where products it had supplied were found to contain asbestos,⁴⁴ Mr Kevin Will from Yuanda Australia informed the committee that at 'no point previous were we ever asked to supply a certificate to say this product was not asbestos'.⁴⁵ He confirmed in a response to a question on notice that there was no such requirement imposed on Yuanda Australia.⁴⁶ Mr Will advised the committee that Yuanda Australia has now implemented its own testing regime 'which sees every batch of samples tested under procedures established by our Australian consultants, OccSafe. These test samples are then brought to Australia by a licensed importer in order to be tested in a NATA-accredited laboratory'.⁴⁷

3.46 Mr Michael Borowick, from the Australian Council of Trade Unions (ACTU) suggested that the apparent failure of enforcement of Australia's asbestos ban could also be due to a loss of momentum and shifting priorities of ABF. He posited:

I suppose there must have been a great deal of momentum in the lead-up to the ban being imposed in 2003. I wasn't involved at the time, but I'd say there would've been a whole number of things. Things had come together and there was momentum, and the Howard government at the time did the right thing....For some reason the momentum has dropped away. Perhaps, in terms of Border Force, the priority has been on people coming to Australia, drugs and guns, and asbestos hasn't been where the focus has been, and government hasn't given the appropriate direction to the relevant agencies to make it a priority.⁴⁸

3.47 Mairin OHS&E Consulting held a similar view:

It is our experience and view that in the sixteen (16) years since the ban came into effect there has been an overall growing complacency amongst importers and end-users on the risks associated with imported asbestos products entering Australian workplaces and homes. Policing and education on the extent of the asbestos importation problem by government departments (at both state and federal levels) during the same period, appears outwardly haphazard and under resourced with only a limited number of high profile cases being reported through popular media.⁴⁹

44 The incidents at 1 William Street Brisbane and the Perth Children's Hospital both involved products supplied by Yuanda Australia.

45 Mr Kevin Will, Managing Director, Yuanda Australia Pty Ltd, *Committee Hansard*, 30 January 2017, p. 25.

46 Yuanda Australia Pty Ltd: Answers to questions taken on notice from a public hearing on 30 January 2017 (received 20 February 2017).

47 Mr Kevin Will, Managing Director, Yuanda Australia Pty Ltd, *Committee Hansard*, 30 January 2017, p. 22.

48 Mr Michael Borowick, Assistant Secretary, Australian Council of Trade Unions, *Committee Hansard*, 17 October 2017, p. 5.

49 Mairin OHS&E Consulting PTY LTD, *Submission 93*, p. 1.

The tip of the iceberg

3.48 Mr Robert Kelly from WorkSafe Victoria provided evidence to the committee about recent use of the rapid response protocol to respond to incidents of asbestos.⁵⁰ He observed that in 2017, WorkSafe Victoria had seen an increase in reports of asbestos:

We are getting the calls more frequently, whether it is the gaskets, the brake pads or quad bikes.⁵¹

3.49 Mr David Clement of Asbestoswise expressed surprise at the number and range of incidents of asbestos, explaining:

That has slightly taken our breath away. On the argument that it is the tip of the iceberg, you look at how it has been identified: it has been identified by workers, by unions and by groups like [Asbestos Council of Victoria/GARDS]. In the case of the quad bikes, it was by a whistleblower. The majority of cases have not been identified by the authorities. I think what that tells us is that the tip of the iceberg may well be the case.⁵²

3.50 The ACTU also expressed the view that recent incidents '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'.⁵³

3.51 Mr Daniel Morgan from Coffey, a company which provides asbestos services, expressed the view that asbestos was so widespread in building products that 'the only way to completely stop it would be to use a domestic product'. He explained:

I personally feel that it would be impossible to stop it from coming in. There are so many building materials that could potentially contain asbestos, not limited to fibre cement. It is in mastics, it is in sealants, it is in glues, it is in thermal insulation. We are asked on a regular basis to go overseas and do checks for some major corporations in Western Australia. We are heavily involved in the maritime industry, where we do find asbestos gaskets on new ships that are stopped from coming into Australian waters because of the asbestos onboard. I believe that a very, very rigorous inspection process would not stem the tide of asbestos coming onto our shores.⁵⁴

3.52 Mr Dave Kirner from the CFMEU considered the recent influx of illegally imported asbestos products to be the next wave of danger to workers:

50 Discussed in more detail in Chapter 2 at paragraphs 2.29–2.30.

51 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 79.

52 Mr David Clement, President, Asbestoswise, *Committee Hansard*, 14 July 2017, p. 70.

53 Australian Council of Trade Unions, *Submission 127*, p. 3.

54 Mr Daniel Morgan, Principal Consultant, Coffey, *Committee Hansard*, 9 March 2017, p. 24.

I don't think there's enough public awareness. The first wave was in manufacturing, then the building workers and then the home renovators, and now it's back. Sadly, the Royal Perth Hospital was a tier 1 major project. The materials were imported by a major builder, a major contractor, and that's where we're finding the problems as well. So, on asbestos, I think there's a lot of work to do.⁵⁵

Stopping asbestos at the border

3.53 As noted in Chapter 2, since ABF's establishment on 1 July 2015, the Department of Immigration and Border Protection (DIBP) and ABF have significantly increased the strategic and operational focus on goods that pose a risk of containing asbestos. These include:

- undertaking risk assessments;
- commencing a sampling programme;
- enhancing risk profiles, establishing of a 'community protection question' for importers;
- requiring the testing of goods that are suspected of containing asbestos; seizure of goods containing asbestos;
- raising awareness and engaging with customs brokers and importers,
- international governments, customs agencies and suppliers; and
- increased engagement and coordination across jurisdictions.⁵⁶

3.54 The Construction Product Alliance observed that 'the reality is that, for imported products, the Federal Customs (Border Force) has limited capacity to physically check, at the point of arrival into the country, the many thousands of products or materials that may contain asbestos'.⁵⁷

3.55 The committee is aware that a large number of imports arrive in Australia each year. In 2016–17, ABF processed a total of 41.9 million air cargo consignments and 3.2 million sea cargo reports.⁵⁸

3.56 A number of submitters were of the view that the DIBP and ABF were under-resourced for the task of preventing the illegal importation of asbestos. The ACTU welcomed ABF's recent focus on an established problem, after years of government inaction. It expressed concern that the resources available to the DIBP and ABF may

55 Mr Dave Kirner, District Secretary Forestry, Furnishing, Building Products and Manufacturing Division, Construction, Forestry, Mining and Energy Union, South Australia, *Committee Hansard*, 31 July 2017, p. 11.

56 See paragraph 2.15.

57 Construction Product Alliance, *Submission 116*, p. 3.

58 Department of Immigration and Border Protection, *Corporate Plan 2017–18*, p. 18, <https://www.border.gov.au/ReportsandPublications/Documents/corporate-plans/corporate-plan-2016-17.pdf> (accessed 7 November 2017).

not be sufficient to effectively monitor and prevent the illegal importation of asbestos.⁵⁹

3.57 Mr Geoff Fary, former Chair of the Asbestos Management Review (2010–12) and the Asbestos Safety and Eradication Council (2013–16) noted that as there is now a history of illegal importation of asbestos, it is possible to predict both the high risk countries of origin and the types of products likely to contain asbestos (i.e. East Asia and in building materials, motor vehicles etc). As such, Mr Fary suggested:

It shouldn't be beyond the resources and wit of the [ABF] to identify appropriate targets for comprehensive inspection, testing and analysis.⁶⁰

3.58 On the other hand, the Housing Industry Association (HIA) stated that while a complete ban on asbestos would appear to be the highest level of regulation, enforcement is extremely difficult. It considered that the 'reality is that Federal Customs (Border Force) has limited ability, and even more limited resources, to physically check products at the point of arrival into the country'.⁶¹

3.59 In order to prevent the illegal importation of asbestos, HIA considered the most important change would be to ensure that building product manufacturers, regardless of their country of origin, understand the expectations of the Australian government in relation to product conformance requirements.⁶²

3.60 Mairin OHS&E Consulting suggested a dedicated specialist unit within ABF could prove useful to identify high risk imports. It explained:

Border Force is on the frontline for interception of imported asbestos goods but on balance appears to be under resourced to do so. Given the extent of biological and chemical contraband that they are responsible for preventing entering Australia this is understandable.⁶³

3.61 The DIBP informed the committee that it does not have dedicated staff who specialise in identifying asbestos. Rather, resources are applied according to the ABF's risk assessment processes and staff resources are not allocated to specific risks for regulated goods.⁶⁴

Committee view

3.62 The committee notes the large number of imports arriving each week in Australia which may contain asbestos, and recognises the work of the DIBP and ABF to increase the strategic and operational focus on goods that pose a risk of containing

59 Australian Council of Trade Unions, *Submission 127*, p. 14.

60 Mr Geoff Fary, *Submission 94*, p. 2.

61 Housing Industry Association, *Submission 119*, p. 1.

62 Housing Industry Association, *Submission 119*, p. 3.

63 Mairin OHS&E Consulting, *Submission 93*, p. 5.

64 Department of Immigration and Border Protection: Answers to written questions taken on notice (QoNs 18–54) (received 20 October 2017), p. 32.

asbestos. However, the committee considers that increased resourcing would increase ABF's ability to physically check products at the point of arrival into Australia.

3.63 The committee is concerned that ABF does not have dedicated staff who specialise in identifying asbestos. While the committee understands that resources are applied according to ABF's risk assessment processes and staff resources are not allocated to specific risks for regulated goods, the committee believes that the establishment of a dedicated specialist unit within ABF has the potential to increase the identification of asbestos at the border.

Recommendation 11

3.64 The committee recommends that the Australian Government review the Australian Border Force staff resourcing required to effectively monitor and prevent the illegal importation of asbestos.

Recommendation 12

3.65 The committee recommends that the Australian Government consider the merits of having a specialist unit within Australian Border Force to manage illegal asbestos importation.

Prosecutions and Penalties

3.66 The committee heard from a range of submitters that there is a need for a greater focus on enforcement, including prosecution and penalties, to effectively deter the illegal importation of asbestos. In responses to questions on notice provided in February 2017, the DIBP informed the committee that in recent years there have been three successful prosecutions for importing asbestos:

- In 2008, Alcan pleaded guilty to seven charges for importing equipment containing asbestos in breach of section 233(1) (b) of the Customs Act. The Court fined Alcan \$70,000 and costs of \$20,000.
- In 2012, the Court found an international engineering company, Clyde Bergemann Senior Thermal Pty Ltd (CBST), guilty of two counts of importing prohibited imports, namely chrysotile asbestos contrary to section 233(1) (b) of the Customs Act. The Court fined CBST \$64,000 including costs.
- In December 2014, the Court found a 50-year-old Australian man guilty of importing asbestos and fined him \$10,000 and costs of \$4,500.

3.67 In February 2017, the DIBP also noted that since ABF was established in 2015, four infringement notices for a total value of \$31,950 have been issued relating to asbestos. Three formal warning letters have been issued, with penalty action currently being considered for the remainder of the detections.⁶⁵

65 Department of Immigration and Border Protection: Answers to questions taken on notice from a public hearing on 30 January 2017 (QoNs 1-17) (received 24 February 2017), p. 7.

3.68 On 12 August 2017, it was reported that Yuanda Australia had received three infringement notices.⁶⁶ With reference to these infringement notices, Mr Borowick from the ACTU did not consider the penalties to be adequate, he stated:

The most notable incidence of asbestos importation to Australia in the last year has been that of Yuanda, a Chinese building products manufacturer. This asbestos was discovered on building sites throughout Australia, and there was evidence before the committee about that. After investigation Australian Border Force issued Yuanda with an infringement notice for each detection. An infringement notice cannot exceed \$15,750—a paltry amount for a company that has in excess of \$1 billion in revenue.⁶⁷

3.69 Mr Borowick also noted 'the ban hasn't had any real deterrent effect, and the reality is that you can import asbestos into Australia with impunity.'⁶⁸

3.70 The ACTU suggested that the quantum of penalties be reviewed, stating:

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.⁶⁹

3.71 Master Builders' Australia also considered that increasing penalties would be a positive step and would send an important message to the community and building industry participants. It stated:

In much the same way that the Commonwealth has established significant penalties for those who seek to import narcotics and firearms, penalties for those who import ACMs should be set at a level that is an appropriate disincentive against such conduct. A penalty regime that deters non-compliances with the law will be a positive step and send an important signal to the community and building industry participants.⁷⁰

3.72 Similarly, Mr Geoff Fary considered that 'what is required is the political will to prosecute and substantially penalise those parties found to be in breach'. He commented:

Australia having a comprehensive regulatory ban on the importation of asbestos containing products will amount to little if there are no effective consequences in place should the ban be flouted...The sad and disgraceful history of the asbestos industry is replete with examples of innocent people

66 Natasha Bitu, 'Asbestos breaches earn a slap on wrist', *Courier Mail*, 12 August 2017, p. 9.

67 Mr Michael Borowick, Assistant Secretary, Australian Council of Trade unions, *Committee Hansard*, 17 October 2017, p. 2.

68 Mr Michael Borowick, Assistant Secretary, Australian Council of Trade unions, *Committee Hansard*, 17 October 2017, p. 2.

69 Australian Council of Trade Unions, *Submission 127*, p. 12.

70 Master Builders' Australia, *Submission 125*, p. 8.

contracting incurable terminal diseases as a consequence of the greed of others who have taken the chance of flouting the law. Lots of publicity and provision of information has little of the deterrent factor of prosecution and penalisation of those found to be in breach of our laws.⁷¹

3.73 HIA warned that 'complacency leads to lax practices', and argued for better enforcement of existing regulations.⁷² The Construction Product Alliance made a similar argument:

With the appropriate level of enforcement and education by the relevant regulatory agencies, the existing regulatory system does provide a sound basis for the supply and use of conforming building products in Australia. However, the effective enforcement of the regulatory structure has failed, in part through lack of commitment to take strong action, and also as a result of the system failing to keep pace with the changing nature of the building product supply chain that is now a global marketplace.⁷³

3.74 Maurice Blackburn Lawyers maintained that the Australian Government needs to be more active in enforcing penalties. In its view, it may be necessary to adopt 'a zero-tolerance approach to perpetrators, and or a commitment of greater resources to investigations and prosecutions'.⁷⁴

3.75 The ETU considered the small number of prosecutions for illegal importation of asbestos was evidence the current system is flawed and argued for an independent review of the legislation and regulations governing the importation of asbestos.⁷⁵

3.76 The ACTU believed the current regulatory framework 'is failing the community, as evidenced by continued detections of asbestos and ACMs in imported goods and the very limited number of full investigations and subsequent prosecutions since the prohibition was introduced in 2003'.⁷⁶

3.77 The ACTU highlighted that the independent review conducted by KGH Border Services found that the limited number of investigations and prosecutions was due to the difficulty to 'prosecute against the honest and reasonable mistake of fact defence, which is available in relation to the importation offence as a strict liability offence'. The ACTU noted that the KGH Review recommended that the department further prioritise the investigation to improve prosecution of offences related to asbestos importation.⁷⁷

3.78 The ACTU noted that the importation of asbestos or ACMs is a strict liability offence. It noted:

71 Mr Geoff Fary, *Submission 94*, p. 2.

72 Housing Industry Association, *Submission 119*, p. 2.

73 Construction Product Alliance, *Submission 116*, p. 4.

74 Maurice Blackburn Lawyers, *Submission 107*, p. 11.

75 Electrical Trades Union, *Submission 86*, p. 15.

76 Australian Council of Trade Unions, *Submission 127-suppl 1*, pp. 1–2.

77 Australian Council of Trade Unions, *Submission 127-suppl 1*, p. 2.

The difference between strict and absolute liability is that strict liability allows a defence of honest and reasonable mistake of fact to be raised while the application of absolute liability does not. Instances of absolute liability may also commonly involve displacement of the defence of mistake of fact by specialised statutory defences which narrow its scope, such as 'due diligence' or 'reasonable steps'.⁷⁸

3.79 The ACTU recommended changing the existing offence to an absolute liability offence by removing availability of the mistake of fact defence, as 'offences of absolute liability are generally considered more appropriate and will provide a more effective deterrent where the defendant is well-placed to take extra care to ensure that the offence is not committed.'⁷⁹ Alternatively, the ACTU recommended 'narrowing the operation of the honest and reasonable mistake of fact defence (for example, by introducing specialised statutory defences).'⁸⁰

3.80 Ai Group argued that prosecutions should be pursued in circumstances where there has been a deliberate attempt to import asbestos containing products, whilst promoting them to be asbestos free. It noted:

Ai Group acknowledges that there may be some circumstances where organisations knowingly and willingly import asbestos containing products for commercial gain, promoting it as a product that does not contain asbestos; this may include counterfeit products that claim to be a branded product or part.

These organisations should be prosecuted to the full extent of the law, be required to recall all products and be responsible for the costs associated with removal and disposal.⁸¹

3.81 However, Ai Group drew a clear distinction between circumstances where illegal asbestos importation was unintentional. In its view:

...the complexities associated with ensuring that an imported product does not contain asbestos can result in an organisation inadvertently importing asbestos containing products, even after they have exercised a high level of care to minimise the risk of this occurring.⁸²

3.82 The DIBP informed the committee that ABF makes decisions on whether or not to prosecute based on the Prosecution Policy of the Commonwealth, whether there is sufficient evidence to prove the offence, and whether there are reasonable prospects of a successful conviction.⁸³

78 Australian Council of Trade Unions, *Submission 127-suppl 1*, p. 4.

79 Australian Council of Trade Unions, *Submission 127-suppl 1*, pp. 5–6.

80 Australian Council of Trade Unions, *Submission 127-suppl 1*, p. 6.

81 Ai Group, *Submission 120*, p. 16.

82 Ai Group, *Submission 120*, p. 16.

83 Department of Immigration and Border Protection: Answers to questions taken on notice from a public hearing on 30 January 2017 (QoNs 1–17) (received 24 February 2017), p. 7.

3.83 The DIBP noted that it is difficult to prosecute asbestos matters because of the availability of the mistake of fact defence. This allows an importer to avoid liability that flows from the prohibited importation by providing evidence that it has exercised due diligence. To do so, the company typically tries to show that it took all reasonable steps to prevent the infringement from occurring.⁸⁴

3.84 Mr Wayne Buchhorn from the DIBP provided the hypothetical example to demonstrate where the mistake of fact defence may be applied:

...if there were invoice evidence that stated that a product was asbestos free, that may satisfy the courts that the mistake of fact defence was available in that instance. So I would suggest it is a fairly high threshold to get over to prove that the company or the individual knew that they were importing asbestos.⁸⁵

Committee view

3.85 The committee notes evidence received from a range of submitters that there is a need for a greater focus on enforcement, including prosecution and penalties to effectively deter the illegal importation of asbestos. The committee also acknowledges the challenges of enforcing the existing importation of asbestos offence, and in this light, believes that a review of the relevant provisions of the *Customs Act 1901* (and other relevant legislation) should be conducted. The committee is particularly concerned that the mistake of fact defence is not operating as intended. In this context, while the committee acknowledges that there are complexities associated with ensuring that an imported product does not contain asbestos (see discussion on inadvertent procurement at 3.27 and due diligence at 4.21, it considers that the current threshold required to make out the mistake of fact defence should be increased.

3.86 The committee is concerned by the apparent lack of enforcement of the importation ban since it came into force on 31 December 2003, and considers that there needs to be a greater focus on prosecutions for importing asbestos. The committee believes that increasing the number of successful prosecutions and reviewing the quantum of penalties would have a significant deterrent effect on the illegal importation of asbestos.

Recommendation 13

3.87 The committee recommends that the Australian Government review the *Customs Act 1901* (and other relevant legislation) to address the challenges of enforcing the existing importation of asbestos offence, with the aim to close loopholes and improve the capacity of prosecutors to obtain convictions against entities and individuals importing asbestos. This review should include consideration of increasing the threshold required to use 'mistake of fact' as a legal defence.

84 Department of Immigration and Border Protection: Answers to questions taken on notice from a public hearing on 30 January 2017 (QoNs 1–17) (received 24 February 2017), p. 7.

85 Mr Wayne Buchhorn, Assistant Commissioner, Investigations Division, Department of Immigration and Border Protection, *Committee Hansard*, 30 January 2017, p. 41.

Recommendation 14

3.88 The committee recommends that the Australian Government prioritise prosecution of illegal asbestos importation cases.

Recommendation 15

3.89 The committee recommends that the Australian Government review the quantum of penalties for breaches of Australia's importation ban with a view to increasing them.