

Chapter 4

Increasing accountability and reducing exposure

4.1 This chapter begins by examining the importance of product testing and the need for greater accountability and individual and corporate responsibility. It then looks at the adequacy of Australia's work health and safety legislation and the role of relevant regulators in reducing the risk of asbestos exposure for workers. Finally, the chapter will consider issues around recall powers for consumer products containing asbestos and concerns about the importation of ships containing asbestos.

Accountability

Testing

4.2 National Association of Testing Authorities, Australia (NATA) is the national authority for accreditation of testing laboratories and a peak authority for accreditation of inspection bodies. NATA accredits testing laboratories for the identification of asbestos related to air monitoring and in bulk materials. Laboratories that hold accreditation for testing products and materials for the Australian regulatory requirements undertake analyses in accordance with the Australian Standard AS 4964 *Methods for the qualitative identification of asbestos in bulk samples*.¹

4.3 NATA is a signatory to the two international arrangements that facilitate the acceptance of test and inspection reports across international borders:

- the global International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement (MRA); and
- the regional Asia Pacific Laboratory Accreditation Cooperation (APLAC) Mutual Recognition Arrangement.²

4.4 Importantly, in relation to this inquiry, NATA highlighted a range of issues and challenges with identifying asbestos in imported products, including:

- the difference in international requirements and vocabulary around what is considered 'asbestos-free';
- test sampling may not be representative of the products being imported;
- testing methods and reports may not reflect Australia's strict zero-tolerance requirements; and
- there are no rapid screening tests or instruments that can be used at the border for an immediate result.³

1 National Association of Testing Authorities, Australia (NATA), *Submission 109*, p. 1.

2 National Association of Testing Authorities, Australia (NATA), *Submission 109*, p. 1.

3 National Association of Testing Authorities, Australia (NATA), *Submission 109*, pp. 2–3.

4.5 NATA informed the committee that since mid-2015, it had received a significant increase in enquiries requesting information around asbestos testing issues.

4.6 In response to these enquiries, NATA stated that it had produced two Industry User Guides (with input from the Department of Immigration and Border Protection (DIBP) and the Asbestos Safety and Eradication Agency (ASEA)) on how to use the services of accredited infrastructure to achieve compliance with Australian regulations.⁴ NATA also advised the committee that it had

...presented a summary of testing issues to the Commonwealth's interdepartmental committee on asbestos, and we are currently collating additional information from our counterparts around the world on methodologies and the availability of accrediting and testing infrastructure.⁵

4.7 Mr Paul Goldsbrough from the Queensland Office of Industrial Relations noted the difficulties of dealing with illegally imported asbestos in building products after it has already come into the country and been installed. In his view 'it would be desirable to have a more robust, up-front testing regime for imported products so that we are not put in the position where it is appearing in our workplaces'.⁶

4.8 The Housing Industry Association (HIA) observed that where asbestos is found in a building product, it is likely to be within the product. This makes discovery more complicated as the asbestos can only be found through destructive testing, which is unlikely to occur before a potential problem has been identified. It noted:

Customs, and all other parties in the supply chain, continue to rely on testing and certification undertaken by the manufacturer of building products to verify they meet relevant standards. If this documentation arrives with the product it is taken on face value.

In each of the recent incidences of asbestos in commercial construction materials, this appears to be exactly what occurred. The manufacturer has provided certification that the product is 'asbestos free'. However once tested on site in Australia after the material has been used, this has been found to be incorrect.⁷

4.9 Mr Andrew Mantle from Asbestos Audits & Environmental Audits Pty Ltd (AARMS) considered that given the large number of imports arriving each week in Australia (over 10,000 containers), it is unrealistic to think ABF has the capacity to screen and inspect every container. In his view the responsibility should lie with the companies importing the products:

4 National Association of Testing Authorities, Australia (NATA), *Submission 109*, p. 3.

5 Mr Neil Shepherd, Sector Manager, Life Sciences, National Association of Testing Authorities, Australia, *Committee Hansard*, 3 October 2017, p. 31.

6 Mr Paul Goldsbrough, Executive Director, Safety, Policy and Workers Compensation Services, Office of Industrial Relations, Queensland Treasury, *Committee Hansard*, 30 January 2017, p. 21.

7 Housing Industry Association, *Submission 199*, p. 2.

I think that the issue relates to a demanding of companies to comply with proving their product is asbestos free prior to it entering into Australia; that's the real issue. The ABF have provided a very detailed guidance to the customs and trade bodies, that anyone importing plant and equipment into Australia must provide proof that the goods are asbestos free. But, from our experience, self-declarations from companies in China or laboratory certificates from laboratories in China are not worth the paper they're written on. It's very easy for a Chinese company to simply declare their product to be asbestos free, because, under the terms of asbestos free in China—six per cent or less asbestos—they are actually complying with the Chinese regulation; they just are not complying with the Australian regulation.⁸

4.10 The Customs Brokers and Forwarders Council of Australia Inc. also noted that it is the responsibility of the importers to ensure they meet the regulatory requirements. In particular, it noted that the regulatory burden for compliance should be placed on importers, not on licenced customs brokers.⁹

4.11 The committee notes that ABF's website advises that:

Importers should not assume that goods labelled 'asbestos free' are in fact free of asbestos or that testing of goods undertaken overseas certified 'asbestos free' meet Australia's border requirements. Some countries can lawfully label or test goods, declaring them asbestos free, if they are below a certain threshold.¹⁰

4.12 However, Mr Mantle from AARMS, pointed out that:

There is no forced requirement [for product testing]; it is suggested. 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.¹¹

4.13 Most importantly, NATA notes that:

It must be highlighted at this point that the Australian Standard is not mandated. The requirement of the *Customs (Prohibited Imports) Regulations 1956* is that asbestos is not present and the subject of testing is

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

9 The Customs Brokers and Forwarders Council of Australia Inc., *Submission 137*, p. 2.

10 Australian Border Force, 'Asbestos', <http://www.border.gov.au/Busi/cargo-support-trade-and-goods/importing-goods/prohibited-and-restricted/asbestos> (accessed 7 November 2017).

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

not addressed. As such, there is no legal obligation to use AS 4964 and also no impediment to the use of another equivalent or better method.¹²

4.14 Mr Borowick from the ACTU considered:

The absence of mandatory testing has been a recipe for disaster, in our respectful view. The importation of non-complying products undermines the local industry and jobs because they are cheaper to manufacture and the local industry is denied the ability to compete on a level playing field and are put at a cost and competitive disadvantage.¹³

4.15 Mr Mantle from AARMS, noted that the European Union (EU), which like Australia, has a ban on the importation of all types of asbestos, could provide a model for testing requirements. He noted that 'from what I have seen of the EU requirements for certain processes, they are very intensive and very documented. They ensure a very high level of compliance'.¹⁴ He explained:

The EU have a range of regulations, and the EU have a number of very extensive testing organisations within China—their own people and their own staff—so European companies have operations within China. They are able to do this because the EU regulations force them to have this testing and these certifications done prior to delivery into Europe.¹⁵

Committee view

4.16 The committee acknowledges that where asbestos is contained in a building product, it is most likely to be bound within the product itself, making it difficult to discover without destructive testing.

4.17 Despite this, the committee believes that Australia needs a more robust, up-front testing regime for imported products than currently exists. Australia needs to strengthen its requirements to prevent the illegal importation of asbestos and to avoid Australian workers and the public being unnecessarily exposed to the risks of asbestos.

4.18 Noting that it is impossible for ABF to effectively screen and inspect all imported goods, the committee considers that at a minimum, where importers are importing materials that have been deemed a high risk of containing asbestos, it is appropriate for the Australian Government to require them to conduct laboratory testing to confirm they are not illegal prior to import. In implementing up-front testing requirements, the committee notes that the European Union has extensive testing requirements to support its asbestos importation ban which could provide a useful model for an Australian regime.

12 National Association of Testing Authorities, Australia (NATA), *Submission 109*, p. 4.

13 Mr Michael Borowick, Assistant Secretary, Australian Council of Trade unions, *Committee Hansard*, 17 October 2017, p. 3.

14 Mr Andrew Gordon Mantle, Managing Director, Asbestos Audits & Environmental Audits Pty Ltd, *Committee Hansard*, 3 October 2017, p. 28.

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

Recommendation 16

4.19 The committee recommends that where an importer intends to import goods that have been deemed high risk of containing asbestos, the Australian Government require the importer, prior to the importation of the goods, to conduct sampling and testing by a NATA accredited authority (or a NATA equivalent testing authority in a another country that is a signatory to a Mutual Recognition Arrangement).

Recommendation 17

4.20 The committee recommends that the Government examine the European Union's regulations and processes for testing of products for asbestos prior to import and determine if it is suitable to adapt them to benefit and enhance Australian requirements.

Due diligence systems

4.21 The committee heard evidence regarding a number of incidents of illegally imported asbestos. One of these incidents was the discovery of asbestos at the new Perth Children's Hospital. In July 2016, during work undertaken on the new Perth Children's Hospital it was discovered that composite roof panels that were custom manufactured for the atrium roof were found to contain chrysotile asbestos following analysis by a NATA accredited laboratory. John Holland was the contractor for the Perth Children's Hospital. Yuanda Australia was subcontracted to import the panels, which were sourced by Yuanda China from various suppliers for assembly in its factory.¹⁶ It was taken at face value that the supporting certification documentation back through the supply chain demonstrating the panels were asbestos free was correct.¹⁷

4.22 The WA Building Commission's audit of building products at the Perth Children's Hospital found a range of contributing factors leading to the presence of asbestos in the roof panels including:

- the product was sourced through a complex supply chain, in an international market, with differing legislative requirements in relation to asbestos;
- all stakeholders relied on country-of-origin documentation without further testing in Australia; and
- none of the organisations in the supply chain for the roof panels had a system to require asbestos testing for components and materials that do or may contain fibrous materials.¹⁸

16 Asbestos Safety and Eradication Agency, *Submission 90*, pp. 4–5.

17 Mr Richard Dorham Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, Western Australia, *Committee Hansard*, 9 March 2017, p. 41.

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

4.23 As noted in the previous chapter, Yuanda Australia advised that it had changed its practices in response to the incident at Perth Children's Hospital and 1 William Street in Brisbane.¹⁹

4.24 John Holland also advised that it had implemented a number of changes. Mr Lindsay Albonico from John Holland advised:

John Holland has implemented a number of changes and processes to strengthen its quality-management system and processes, including but not limited to updating standard contract templates to include a requirement that all materials must be certified as asbestos-free. Specifically, this requires testing to be in accordance with AS4964 2004 method for the qualitative assessment of asbestos in bulk samples. In this instance of international procurement, overseas laboratories must be recognised as being equivalent to a NATA accredited laboratory.²⁰

4.25 The WA Department of Treasury also had a role in respect to the Perth Children's Hospital, as its strategic projects division is responsible for the oversight of the delivery of the government's major building projects. Mr Richard Mann from the WA Department of Treasury advised that the department had changed its practises in direct response to the discovery of asbestos at Perth Children's Hospital:

This incident has certainly alerted us to an enhanced risk of a recurrence in imported material. In direct response, we have now included a provision in all our contract templates that allows us to direct the contractor to undertake testing in Australia of any imported materials. That will be assessed on a risk basis, but any materials, for example, of a fibrous nature, such as cement fibre sheet, with a potential to contain asbestos material would be a higher priority for testing if the compliance documentation, including any test certificates, were not adequate to convince us that the material was conforming.²¹

4.26 Another incident of illegally imported asbestos involved South Australian company Robin Johnson Engineering. In late 2015 it was discovered that several batches of asbestos cement board were imported by Robin Johnson Engineering over several years and installed as flooring in prefabricated switch rooms, which have then been on-supplied to other 'persons conducting a business or undertaking' (PCBUs) in South Australia, New South Wales, Queensland, Victoria and the Northern Territory. The switch rooms commonly contain control equipment, cabling and other heavy low and high voltage electrical equipment.²²

4.27 Robin Johnson Engineering advised that they no longer rely on the certificates they receive and have 'much more onerous testing regimes, and we test anything that

19 See paragraph 3.45.

20 Mr Lindsay Robert Albonico, Project Director, John Holland Pty Ltd, *Committee Hansard*, 9 March 2017, p. 46.

21 Mr Richard Dorham Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, Western Australia, *Committee Hansard*, 9 March 2017, p. 41.

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

could be contaminated with either asbestos or any other banned substances prior to them being shipped'.²³

Strengthening due diligence requirements

4.28 The above reports of individual organisations reviewing their own processes following the discovery of illegally imported asbestos, aligns with ASEA's view that due diligence needs to be reinforced when it comes to sourcing of products, suggesting:

An oversight arrangement should be used to strengthen and enforce everyone's compliance with due diligence requirements, an example being when a consultant is sent to supervise or monitor the work.²⁴

4.29 In particular, ASEA noted the significant risk posed by the failure of Australian companies to undertake due diligence before products are imported into Australia. ASEA explained:

For example, building materials imported into Australia from Chinese manufacturers and suppliers could contain ACMs, especially considering China is still a major producer of asbestos. In addition to mining asbestos, China imports approximately 50% of the world's mined asbestos, and has no legislative prohibitions on manufacturing or exporting chrysotile asbestos. Chinese manufacturers produce 11% of the global market's total supply of ACM. As a result, Australian companies must exercise a high level of due diligence, prior to the purchase of products from China that have the potential to contain ACM, to ensure that they do not breach provisions.²⁵

4.30 The CFMEU argued that the recent incidents exposed the weaknesses in due diligence systems of the companies' procurement processes.²⁶ It suggested looking to other industries for models of due diligence systems, such as those to prevent the importation of illegally imported timber, noting:

...the prohibition of the importation of illegally logged timber involves a high level legislative ban and also Regulations which outline the due diligence systems that importers must have in place.

These systems are liable to be audited from time to time (by in this instance the Department of Agriculture) in order to ensure that they are in compliance with requirements of the Regulations.²⁷

4.31 Engineered Wood Products Association of Australasia Ltd (EWPA) also identified the successful measures to deter the importation of timber products derived

23 Mr Robin Johnson, Managing Director, Robin Johnson Engineering, *Committee Hansard*, 31 July 2017, p. 33

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

25 Asbestos Safety and Eradication Agency, *Submission 90*, p. 2.

26 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 31.

27 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 36.

from illegally logged forests in foreign countries as a potential model for other products.²⁸

4.32 The CFMEU noted that updates to the Commonwealth Procurement Rules that commenced on 1 March 2017 mean that:

...identifying applicable Australian Standards and verifying compliance will become a feature of the Commonwealth procurement system and it makes sense to put some thresholds in place and for the Government to use its procurement document for construction work to encourage the use of these thresholds being utilised for Commonwealth funded projects and within the private sector.²⁹

4.33 The CFMEU held the view that minimum thresholds for the due diligence required under the Commonwealth Procurement Rules should be mandatory for both Commonwealth procurement officers and procurement officers of building code compliant companies eligible for Commonwealth funding.³⁰ It recommended that:

The Australia Government, for identified high risk products from high risk countries and regions, including for products which are at risk of containing asbestos require procurers to have a stakeholder agreed due diligence system in place for the prevention of the import and use of nonconforming building products.³¹

Committee view

4.34 Evidence to the committee found that recent incidents of illegal importation of asbestos in building products have highlighted the weakness in the due diligence systems of importers and contractors. The committee recognises that importers, contractors and subcontractors cannot be relied upon to provide asbestos-free products and that more prescriptive due diligence is required to ensure asbestos is not inadvertently imported to Australia.

4.35 While the committee notes that updates to the Commonwealth Procurement Rules from 1 March 2017 have increased the minimum thresholds for the due diligence required under the Rules, it is concerned that the requirements are not mandatory. The committee considers that for identified products from high asbestos risk asbestos countries and regions; and for products which are at risk of containing asbestos, procurers should be required to have a stakeholder agreed due diligence system in place.

Recommendation 18

4.36 The committee recommends that the Australian Government consider placing additional mandatory requirements on procurers of high-risk products

28 Engineered Wood Products Association of Australasia Ltd (EWPAA), *Submission 101*, p. 4.

29 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 37.

30 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 37.

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

to have a due diligence system in place for the prevention of the import and use of asbestos containing materials.

A model for best practice

4.37 The Queensland *Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017* (the act) was assented to on 31 August 2017. In its interim report on aluminium composite cladding, the committee considered that the Queensland legislation would go some way to ensuring accountability is spread more evenly across the supply chain from designers to manufacturers, importers, suppliers and installers and supports the act's intent. The committee also encouraged other jurisdictions to examine the act and consider developing similar approaches as a starting point to addressing this serious issue and recommended that the Building Minister's Forum give further consideration to introducing nationally consistent measures to increase accountability for participants across the supply chain.³²

4.38 The ACTU considered that the Queensland legislation provides a model for a best practice 'chain of responsibility' approach to ensuring products are fit for purpose. The ACTU recommended that the committee give consideration to 'incorporating aspects of the Queensland [Act] into federal legislation and/or taking steps to develop a uniform national model bill based on the Queensland [Act], to be adopted by the states and territories'. The ACTU supported the legislation as it:

- sets out clear statutory objects in respect of the regulation of building products;
- establishes a building products advisory committee that gives Minister, Queensland Building and Construction Commissioner and board advice about building products, with an emphasis on safety;
- requires the Queensland Building and Construction Commission to give relevant information to the health and safety regulator;
- clearly sets out the relationship between the Act and safety laws;
- requires a person in the supply chain who becomes aware of, or reasonably suspects, that a building product is a non-conforming building product, to notify the Queensland Building and Construction Commission; and
- empowers the Queensland Building and Construction Commission to direct a person to take remedial action in respect of a contravention of the act.³³

Committee view

4.39 The committee considers that the Queensland legislation would go some way to ensuring responsibility and accountability is spread more evenly across the supply chain from designers to manufacturers, importers, suppliers and installers. The

32 Senate Economics References Committee, *Interim report: aluminium composite cladding*, 6 September 2017, pp. 48–49.

33 Australian Council of Trade Unions, *Submission 127*, p. 11.

committee supports the intent of the Queensland *Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017* and believes that it provides a good starting model for best practice 'chain of responsibility' and should be adopted by other states and territories.

Recommendation 19

4.40 The committee recommends that other states and territories pass similar legislation to Queensland's *Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017*.

Work health and safety

Removal and remediation of asbestos

4.41 A number of submitters raised concerns about the removal of illegally imported asbestos and flagged the need to update workplace health and safety legislation. As noted in Chapter 2, all states and territories apart from Victoria and WA have adopted model workplace health and safety legislation.

4.42 Mr Goldsbrough from the Queensland Office of Industrial Relations advised that in response to recent incidents, Queensland's approach was:

...to direct businesses to submit a plan and a timeline for the removal of asbestos-containing materials. While we appreciate removal can be complex in certain circumstances, we are of the view that short-term methods such as signage and restricting access to affected worksites are not effective permanent solutions for managing the installation of asbestos-containing materials in contemporary buildings...It also has a significant potential to impact on the health and safety of the community, particularly in light of an increasing proportion of mesothelioma cases arising from non-occupational exposure. I suppose my take-home message is that as a regulator we have to be able to instil confidence in the community that we are able to manage this insidious issue.³⁴

4.43 Mr Goldsbrough made the observation:

The national model work health and safety laws which have been adopted in Queensland are silent on the issue of imported materials as work health and safety regulators relied on the importation ban and Australian Border Force to prevent the importation of asbestos. Essentially the work health and safety laws are geared to the in situ management or removal and so on.³⁵

34 Mr Paul Goldsbrough, Executive Director, Safety, Policy and Workers Compensation Services, Office of Industrial Relations, Queensland Treasury, *Committee Hansard*, 30 January 2017, p. 17.

35 Mr Paul Goldsbrough, Executive Director, Safety, Policy and Workers Compensation Services, Office of Industrial Relations, Queensland Treasury, *Committee Hansard*, 30 January 2017, p. 17.

4.44 The policy position of SafeWork SA is that asbestos installed post 2003 is illegal and must be removed. It outlined its approach as follows:

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.³⁶

4.45 SafeWork SA informed the committee that it had found it difficult to react to recent incidents of illegally imported asbestos as model work health and safety legislation 'wasn't really designed to find the imports after the fact'.³⁷

4.46 With regards to the switchrooms containing asbestos which was imported by Robin Johnson Engineering, SafeWork SA advised that they were 'awaiting the outcome of the case with SafeWork New South Wales on the ability to have the asbestos removed from the particular switch rooms that were built'. Mr Chris McKie, SafeWork SA, understood the trial would be happening over the coming months.³⁸ Robin Johnson Engineering is challenging a SafeWork NSW order to remove contaminated flooring from a switchroom at the Taralga wind farm. Robin Johnson Engineering's argument is that removing the contaminated material would create a greater risk than leaving it in situ.³⁹

4.47 Worksafe Victoria advised that they had 'worked closely with the relevant businesses to ensure that the asbestos was removed by agreement, rather than using legislative enforcement measures'.⁴⁰ Unlike the model health and safety laws that have been adopted in most jurisdictions Victoria has its own legislation:

Under regulation 237 of the OH&S [Occupational Health and Safety] Regulations 2017, duty holders must ensure, so far as reasonably practicable, that any risk associated with the presence of asbestos is eliminated by removing that asbestos. This obligation applies in relation to asbestos installed before and after the prohibition in December 2003 where it poses a risk.⁴¹

36 SafeWork SA, *Submisison 89*, p. 4.

37 Mr Chris McKie, Chief Inspector, Compliance and Enforcement, SafeWork SA, South Australia, *Committee Hansard*, 31 July 2017, p. 42.

38 Mr Chris McKie, Chief Inspector, Compliance and Enforcement, SafeWork SA, South Australia, *Committee Hansard*, 31 July 2017, p. 42.

39 Angelique Donnellan, 'Asbestos removal demand being challenged by RJE over Taralga wind farm switch room material', *ABC Online*, 7 February 2017, <http://www.abc.net.au/news/2017-02-07/asbestos-removal-demand-being-fought-in-nsw-court/8248836> (accessed 7 November 2017).

40 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 77.

41 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 76.

4.48 Mr Robert Kelly from WorkSafe Victoria advised the committee that where there has been noncompliance with a prohibition against the manufacture, supply, storage, transport, sale and use of asbestos contained in Division 4 of the OH&S Regulations 2017, WorkSafe Victoria can use the enforcement tools under the *Dangerous Goods Act 1985 (Victoria)*. The new OH&S Regulations did not commence until 18 June 2017. When Mr Kelly addressed the committee on 14 July 2017 he advised that WorkSafe Victoria had:

...yet to use the prohibitions contained in the regulations to compel a duty holder to remove illegally imported asbestos that had been fixed or installed in the building or structure. The power to order such removal is yet to be tested.⁴²

4.49 Mr Kelly advised that 'WorkSafe is intending to clarify this and to put it beyond doubt that it can compel such removal'.⁴³ He explained further:

That is being proposed. At the moment, with the Dangerous Goods Act, the use of the word 'use' asbestos—we need to strengthen that, because it can become in situ once it is installed. So, yes, it is illegally imported but it has been used and it is now in situ. If it is in situ, the way the legislation is written is that, as long as it is not disturbed or does not pose a risk, it can stay. We want to strengthen the legislation so that it says that, if it is illegally imported asbestos and it is installed, we have the clear power to compel them to remove it.⁴⁴

4.50 The Australian Manufacturing Workers' Union (AMWU) also expressed concern that the current health and safety laws do not require the removal of in situ asbestos meaning that 'a company can install in 2016 a substance banned in 2003, but the health and safety regulators are limited in their regulatory response'. The AMWU stressed:

It is therefore essential, that health and safety laws are changed to enable jurisdictions to require the removal of illegal asbestos product – and the removal/remediation/safe disposal of the ACMs is to be paid for by the importer and supplier.⁴⁵

4.51 The ACTU considered that measures to require the removal of illegally imported asbestos would create a significant financial disincentive to breaching the importation ban. As such, it supported the introduction of new legal obligations to require:

42 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 77.

43 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 77.

44 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 78.

45 Australian Manufacturing Workers' Union, *Submission 97*, p. 7.

...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.⁴⁶

4.52 While Master Builders' Australia acknowledged building industry participants throughout the supply chain should play a role in identifying and eradicating asbestos containing materials, it held the view that 'builders and building surveyors should not be liable for any cost associated with the use of a product they have obtained in good faith and with regard to available information, if that product should not have been made available for use and/or imported in the first place'.⁴⁷ Master Builders' Australia considered that:

...where a product containing ACM has entered Australia since 2004, the entity responsible for its importation should held liable for all the ramifications of its entry, use, installation, discovery, removal and safe remediation. Once again, given the cost associated with addressing ACMs, making those importing the product fully responsible would send the right signal of deterrence and have the secondary benefit of increasing the level of voluntary compliance and other assessment mechanisms to ensure products are ACM free. It would be expected that if the level of financial risk was significant, importer investment in their own processes would become a more attractive proposition.⁴⁸

4.53 Safework SA submitted that the current regulatory frameworks could be improved with particular reference to establishing responsibility for remediation of sites where illegally imported products containing asbestos has been found.⁴⁹

4.54 Safework SA observed that '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'.

4.55 Of particular concern was the potential for a significant time lag between installation and discovery of asbestos. Safework SA explained that if the company involved in the import, supply and/or fabrication of the building products ceases to exist it could make it extremely difficult to determine who has responsibility for remedial action.⁵⁰

4.56 SafeWork Victoria shared this concern noting that:

By the time the asbestos may be discovered, enforcement and remedial action may be inadequate to deal with the scale of the problem. Maximum fines for regulatory breaches may be significantly less than the cost of

46 Australian Council of Trade Unions, *Submission 127*, p. 9.

47 Master Builders' Australia, *Submission 125*, p. 9.

48 Master Builders' Australia, *Submission 125*, pp. 8–9.

49 SafeWork SA, *Submission 89*, p. 5.

50 SafeWork SA, *Submission 89*, p. 5.

removing the asbestos containing material, which may make duty holders reluctant to comply, particularly if the asbestos is in situ and not posing any risk.⁵¹

Committee view

4.57 The committee understands that the removal of asbestos can be expensive, time consuming and dangerous; and while the aim of Australia's regulatory framework is to stop asbestos at the border, recent incidents highlight the reality that asbestos containing materials remain ever-present in Australia.

4.58 While the committee acknowledges that all states and territories, apart from Victoria and WA, have adopted model workplace health and safety legislation, the committee is concerned that where asbestos containing materials are discovered, Australia's work health and safety legislation may operate to result in unfair cost impacts for individuals and be counter-productive to good health and safety outcomes.

4.59 The committee believes that this legislation needs to be strengthened to specifically provide that where illegally imported asbestos is discovered, it is mandatory that it be removed and disposed of, providing it is safe to do so; and that the costs of any such removal and disposal will be borne by the importer of the illegal asbestos. In addition, the committee considers that in cases where illegally imported asbestos is not discovered during installation, mechanisms should be developed to clearly establish who has legal responsibility for remediation of sites. The committee is particularly concerned about cases where at the time asbestos is discovered, the companies involved in the illegal importation of the asbestos, supply or fabrication have ceased to exist.

Recommendation 20

4.60 The committee recommends that Commonwealth, state and territory governments work together to develop nationally consistent legal obligations 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.

Role of the Federal Safety Commissioner

4.61 The committee notes the Federal Safety Commissioner's (FSC) powers are limited to companies that choose to become accredited in order to undertake Commonwealth-funded work. However, as outlined in the interim report on aluminium composite cladding, the committee is interested in the capacity of the FSC to play a role in ensuring compliance with the National Construction Code of Commonwealth funded construction work.⁵²

51 Mr Robert Kelly, Director, Specialist Services, Health and Safety, WorkSafe Victoria, *Committee Hansard*, 14 July 2017, p. 78.

52 Senate Economics References Committee, *Interim report: aluminium composite cladding*, 6 September 2017, pp. 51–53.

4.62 The functions of the FSC are described in Section 38 of the *Building and Construction Industry (Improving Productivity) Act 2016* and include:

- promoting workplace health and safety (WHS) in relation to building work;
- auditing compliance with National Construction Code performance requirements in relation to building materials;
- administering the Australian Government building and construction industry WHS Accreditation Scheme;
- promoting the benefits of the WHS Accreditation Scheme; and
- disseminating information about the WHS Accreditation Scheme.⁵³

Committee view

4.63 The issue of asbestos containing materials in building products is directly relevant to workplace health and safety in the building and construction industry and the committee notes that the functions of the FSC include promoting workplace health and safety in relation to building work. Therefore, the committee believes there is scope for the FSC to play a greater role in protecting workers from the risks of asbestos containing materials in building products.

Recommendation 21

4.64 The committee recommends that the Australian Government review and clarify the role of the Federal Safety Commissioner with regards to asbestos containing materials in building products in line with the Commissioner's responsibilities.

Recall powers of consumer products containing asbestos

4.65 Where a safety problem in a consumer good is identified, government regulators, including the ACCC may determine that the product is unsafe and needs to be recalled. In this regard, the ACCC manages the public recalls.gov.au website which provides a list of various consumer goods subject to safety recall.⁵⁴

4.66 A number of submitters gave evidence to the committee calling for the ACCC to use its powers for mandatory recalls in cases of illegally imported asbestos. However, it is important to note that the ACCC does not have jurisdiction in respect of non-consumer goods under the product safety regime.⁵⁵ Mr Neville Matthew from the ACCC explained the agency's powers:

53 Office of the Federal Safety Commissioner, *Fact Sheet: Federal Safety Commissioner*, last updated 13 April 2017, <http://www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/FederalSafetyCommissioner.pdf> (accessed 22 August 2017).

54 Australian Competition and Consumer Commission, *Submission 39*, p. 8.

55 Mr Timothy Grimwade, Executive General Manager, Consumer, Small Business and Product Safety, Australian Competition and Consumer Commission, *Committee Hansard*, 3 October 2017, p. 7.

Under the Consumer Law, a mandatory recall, which is a regulator initiated or minister initiated recall, is triggered when the minister is not satisfied that adequate steps have been taken in relation to a voluntary recall. Generally, there would be a voluntary recall first—and that's why we have a recall-monitoring team—but if that fails to adequately deal with the safety risk then we can recommend to the minister that he issue a compulsory recall.⁵⁶

4.67 Ms Renata Musolino from Asbestoswise did not believe that 'the ACCC is consistent in how it responds when asbestos is found in products'. Ms Musolino noted the example in 2012 of Great Wall and Chery vehicles, and Polaris quadbikes more recently, in which gaskets in the vehicles were found to contain asbestos. She noted:

There was no recall and we complained about that. The advice from the ACCC was to all people who may do services at that time to make sure that they replace the gaskets with non-asbestos containing [gaskets]. But these are work vehicles and vehicles out on farms. They may not get serviced for years and they may not get serviced by mechanics—they may be done at home. With the Polaris vehicles, there was also not a complete recall. They were banned for sale and they had to have them replaced when replaced—but 'safe to use in the meantime'. So a body like the ACCC needs to be far tougher and far more consistent—a good example of making it not worth their while to break the law.⁵⁷

4.68 In relation to Great Wall and Chery vehicles, the AMWU raised the risk to DIY maintenance workers and mechanics in the service and repair who did not receive the notice in 2012 will be potentially unnecessarily exposed. The AMWU submitted that:

The ACCC needs to have a broader range of sanctions available and must more effectively use its powers to issue compulsory recalls. Additionally ACCC must be required to publish a statement of reasons relating to any decision not to compulsorily recall asbestos containing products.⁵⁸

4.69 The ACTU argued that the ACCC should make greater use of its powers to compulsorily recall products which contain asbestos in order to limit the exposure of members of the Australian community to asbestos containing materials⁵⁹ In addition, the ACTU argued that there should be greater transparency surrounding the reasons behind ACCC decisions to conduct mandatory recalls:

In circumstances where the Australian Consumer and Competition Commission [ACCC] becomes aware of a product containing asbestos and subsequently determines not to issue a compulsory recall of that product,

56 Mr Neville Matthew, General Manager, Consumer Product Safety, Australian Competition and Consumer Commission, *Committee Hansard*, 3 October 2017, p. 3.

57 Ms Renata Musolino, Secretary, Asbestoswise, *Committee Hansard*, 14 July 2017, p. 71.

58 Australian Manufacturing Workers' Union, *Submission 97*, p. 7.

59 Australian Council of Trade Unions, *Submission 127*, p. 5.

the ACCC shall within thirty days of that decision publish a statement of reasons.⁶⁰

Committee view

4.70 In order to limit exposure of Australians to asbestos, the committee believes that the ACCC should make greater use of its compulsory recall powers in relation to products containing illegally imported asbestos and adopt a consistent approach when asbestos is found in products.

4.71 The committee is concerned that evidence to the inquiry indicated that where the ACCC does not recall a product containing illegally imported asbestos, information about such a decision is not made publicly available. The committee believes that where the ACCC makes a decision not to recall a product containing asbestos, both the public and industry would benefit from such knowledge. Indeed, the committee considers that where the ACCC makes a decision not to conduct a compulsory recall of a product that contains asbestos, it should publish its reasons so that the process is more transparent.

4.72 The committee acknowledges concerns raised by stakeholders about the potential impacts of product safety recalls on the public and industry, and is of the view that consideration should be given to introducing mandatory recall insurance to reduce the economic impact of such recalls.

Recommendation 22

4.73 The committee recommends that the Australian Competition and Consumer Commission conducts compulsory recalls where asbestos is found in consumer products, unless there are significant issues and risks associated with a compulsory recall, noting that legislative change may be required.

Recommendation 23

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

Recommendation 24

4.75 The committee recommends that the Australian Government review the Australian Competition and Consumer Commission's public reporting of asbestos containing materials in consumer products, both in relation to informing the public where there are risks to safety, and also monitoring and aggregating reporting of incidents over time.

60 Australian Council of Trade Unions, *Submission 127*, p. 6.

National public asbestos register

4.76 A number of submitters supported the development of a national public asbestos register which lists products found to contain asbestos, suppliers and buildings where asbestos is located.

4.77 The Australian Institute of Building Surveyors submitted that while more needs to be done to minimise the impact of product safety recalls on the public and industry, it also suggests that the Government consider introducing the following regulatory amendments which in strengthening the safety recall will seek to introduce registration and tracking of high risk products like asbestos:

- i. Product tracking where manufactures, importers and suppliers of all high risk products, (such as electrical), are required to have processes and procedures in place to enable the tracking and tracing of product found to be faulty and/or not compliant to Australian Standards.
- ii. Register of high risk products where sellers of high risk products are required to maintain a register of products sold. For example, a register of electrical products that require installation by an electrician [installation by a licenced tradesperson]
- iii. Mandatory recall insurance where manufacturers, importers and suppliers of high risk products are required to have a process in place to fund the removal and replacement of any product found to be faulty and/or not compliant to Australian Standards.⁶¹

4.78 The CFMEU also proposes establishing a register recording importers and suppliers of non-conforming building products. The CFMEU went further, suggesting that 'those listed on the register be banned from further supply and importation into Australia'.⁶² While Asbestoswise suggested that the development and maintenance of a public register could serve as a further deterrent to the illegal importation of asbestos.⁶³

4.79 Maurice Blackburn Lawyers provided a detailed proposal for a national public register:

Maintenance of a public register of imported non-conforming building products containing asbestos and suppliers. A national public register should be kept which details imported building products which have been found to contain asbestos, as well as identifying who the supplier of the products was, and any buildings where the products may now be located (if the product has already been used in construction).

The register should be able to be updated by relevant Commonwealth, State and Territory Governments and Agencies, as well as allow for private

61 Australian Institute of Building Surveyors, *Submission 124*, p. 12.

62 Construction, Forestry, Mining and Energy Union, *Submission 128*, p. 9.

63 Asbestoswise, *Submission 156*, p. 3.

persons and companies to make submissions to add information to the register. The register should be accessible to the public and user friendly.⁶⁴

4.80 Maurice Blackburn Lawyers considered that such a register would serve the following purposes:

- Assist prospective importers by identifying building products which are known to contain asbestos;
- Assist prospective importers by identifying suppliers who are known to have supplied asbestos-containing materials in the past;
- Act as a deterrence to overseas suppliers by “naming and shaming” offenders who supply asbestos-containing materials; and
- Assist relevant members of the public in identifying buildings known to contain asbestos materials, such as tradespersons who may be contracted to perform work on the buildings (thereby putting themselves at risk of exposure to asbestos).⁶⁵

4.81 Maurice Blackburn Lawyers noted that such a register could be extended to include other imported non-conforming building materials which may pose a public health hazard and did not need to be limited to asbestos-containing materials.⁶⁶

Committee view

4.82 The committee notes that a number of submitters to the inquiry supported the development of a national public asbestos register which lists products found to contain asbestos, suppliers, and buildings where asbestos is located. As stated previously, the committee is focussed on ensuring Australia takes all steps necessary to reduce the risk of illegal importation of asbestos and thereby reduce the related disease risk. The committee believes that developing a national public asbestos register which lists products found to contain asbestos, suppliers and buildings where asbestos is located, may assist in reducing this risk by raising public and industry awareness.

Recommendation 25

4.83 The committee recommends that the Australian Government establish a national public asbestos register.

Recommendation 26

4.84 The committee recommends that the Australian Government consider the merits of requiring importers and suppliers to hold mandatory recall insurance for potential asbestos containing materials.

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

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

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

Ships imported to Australia which contain asbestos

4.85 Among the range of products that the committee heard had been illegally imported to Australia, were ships. Mr Martin Byrne from the Australian Institute of Marine and Power Engineers explained:

The essence of our concerns relates not to the importation of asbestos materials as cargo in ships but, rather, to the occurrence of asbestos-containing materials in situ, in ships, in various locations, including in gaskets, flanges, insulation shields, lagging, gland packing and winch breaks. They're some of the major locations where we have experienced asbestos-containing materials being discovered.⁶⁷

4.86 Mr Paul Garrett from the Maritime Union of Australia advised the committee that the number of ships imported to Australia which contain asbestos 'has got to a point now where the workers make the joke that there has been that much asbestos brought in that the company should be charged for smuggling'. He elaborated the number and types of ships which had been imported:

One company that we deal with in harbour towage—and you've got to take into account that the asbestos ban came in on 31 December 2003—has imported 16 separate tugs since 2007 to replace their fleet under the general tonnage replacement plan. There have been more than 16 tugs, but the 16 tugs that have been imported from overseas have been built predominately in China or Vietnam and have had asbestos-containing material in their gaskets.⁶⁸

4.87 Mr Garrett noted further that:

You have to expect that every vessel that comes in these days contains asbestos because it's been built in Chinese yards to Chinese standards, which allow asbestos. In the absence of the Australian shipbuilding industry, this has become the norm.⁶⁹

4.88 Mr Byrne expressed concern regarding the Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017, which was introduced in Parliament on 13 September 2017. Mr Byrne expressed concern that the bill may increase the risk of Australian workers being exposed to asbestos. Of particular concern was the proposal in the legislation to:

...exempt foreign-flagged vessels seeking dry docking facilities in Australia from importation. The motivation is well-founded, in that they are seeking to facilitate dry-docking works being done in Australian dry docks. So they are trying to boost business for Australian dry-docking facilities. However, by providing the exemption from importation they therefore circumvent the

67 Mr Martin Byrne, Federal Secretary, Australian Institute of Marine and Power Engineers, *Committee Hansard*, 3 October 2017, p. 11.

68 Mr Paul Garrett, Assistant Secretary, Sydney Branch, Maritime Union of Australia, *Committee Hansard*, 3 October 2017, p. 12.

69 Mr Paul Garrett, Assistant Secretary, Sydney Branch, Maritime Union of Australia, *Committee Hansard*, 3 October 2017, p. 12.

asbestos prohibition in the import regulations and, at the same time... because they are foreign-flagged vessels they are not subject to Australian OH&S legislation.⁷⁰

Committee view

4.89 The committee is deeply concerned by the reported prevalence of new ships being imported into Australia containing asbestos. The committee notes that the Rural and Regional Affairs and Transport Legislation Committee is currently examining the Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017 (the bill) and is due to report on 4 December 2017. The committee draws to the attention of the Rural and Regional Affairs and Transport Legislation Committee the concerns raised during this inquiry that the bill may increase the risk of Australian workers being exposed to asbestos.

Next steps for the inquiry

4.90 Many of the concerns raised with the committee in relation to the illegal importation of asbestos and flammable aluminium composite cladding, the subject of the committee's previous interim report, have highlighted broader issues which apply equally to other types of non-conforming building products which have been drawn to the committee's attention.

4.91 The committee acknowledges the ongoing work of the Building Ministers' Forum and notes the release of its Senior Officers' Group's *Implementation plan: Strategies to address risks related to non-conforming building products* on 21 September 2017. The committee will continue to monitor the progress of the Building Ministers' Forum, and also its ongoing work on the issues of non-conforming and non-complaint building products. As the next step for the inquiry the committee will seek feedback from key stakeholders on the progress of Commonwealth, state and territory governments in addressing the serious issue of non-conforming building products. The committee will present its final report for the broader inquiry by 30 April 2018.

Senator Chris Ketter

Chair

70 Mr Martin Byrne, Federal Secretary, Australian Institute of Marine and Power Engineers, *Committee Hansard*, 3 October 2017, p. 18.

