

Submission 128 - Construction, Forestry, Mining and Energy Union (CFMEU)

The CFMEU made submission 74 to the inquiry into non-conforming building products in the 44th Parliament.

This document is intended as a supplementary submission to the original submission 74.

All submissions received in the 44th Parliament can be accessed via the following link:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming_products/Submissions

CFMEU submission into the Senate References Committee on
Economics inquiry into:

The effects of non-conforming building products on the Australian Building and Construction Industry

CFMEU

Executive Summary

The Construction, Forestry, Mining and Energy Union (the CFMEU) is Australia's principal trade union in construction, forestry and furnishing products, mining and energy production.

This submission, provides commentary on governments' and industry's current approach toward the serious problem of non-conforming building products.

The submission utilises the union's distinct, specialised knowledge of this issue derived by it being the representative of workers in construction, manufacturing and mining sectors of the economy.

Section 1 provides an introduction outlining why the problem of the increased prevalence of non-conforming building products is a risk to the jobs and health and safety of CFMEU members and the public. This section also includes a summary of recommendations which the CFMEU suggests the Committee should consider commending to the Federal Government for action. The introduction also provides a recent history of the CFMEU's advocacy in this space. Conference resolutions passed at the 2014 and 2016 CFMEU National Conferences about the issue form Appendix 1.

The following sections provide evidence in support of the recommendations outlined in this section.

Section 2 provides an outline of governments current approaches to non-conforming building products.

Section 3 provides considerable detail on two specific examples of the import of products tainted with asbestos. The products were discovered by CFMEU members at two large, high profile Australian construction sites last year: the Executive Building site on 1 William Street in Brisbane (the Executive Building) and the Perth Children's Hospital (the PCH).

The focus on these incidences in this section includes analysis of the procurement processes, which led to the import of the products, including looking at various points of the procurers' respective supply

chains. This section does not however, go into detail about how the products breached the asbestos prohibition at the border. This issue is a matter under investigation by the Department of Immigration and Border Protection (DIBP) and as such only limited information is available.

Section 4 makes some observations about the DIBP's and the Australian Border Force's (ABF) approach at the border, including their role of enforcing the asbestos prohibition. It also includes some policy ideas to improve the effectiveness of the prohibition in comparison to recent results which has seen asbestos tainted products breach the border and enter the community.

Section 5 provides some commentary on some additional building products which do not contain asbestos but do not feature in the CFMEU's first submission to this Committee's inquiry which was submitted in the period of the 44th Parliament.

Key Points

- The increasing use in Australia of non-conforming building products is of great concern and distress to CFMEU members.
- Dodgy imported products undermine local jobs and unduly risk the health and safety of workers and the public.
- We have, for a number of years, been calling on governments at all levels and of all persuasions, to crack down on non-conforming imported building products.
- Our advocacy has included participation in this Committee's inquiry in the 44th Parliament through a submission¹ and by providing verbal evidence at a public hearing in November 2015.²
- Our advocacy has also included calls for safeguards to be put in place due to increasing imports of non-conforming building products as a result trade liberalization in the form of free trade agreements which have reduced barriers to entry for imported goods and resulted in associated decline of key sectors in the domestic manufacturing industry including the building products and materials sectors.
- Despite some movement in recent times, governments have been sluggish in response to legitimate and growing industry and community concern about non-conforming building products.
- We are grateful that the Senate has deemed it necessary to continue to interrogate the issue with refined terms of reference which focus on asbestos.
- The issue of increasing imports of products containing asbestos is of great concern to CFMEU members due to the risks associated with asbestos exposure to workers and the public.
- An analysis of recent events point to sensible reforms which the Government should commit to in order to address the consequences of increased imports of non-conforming building products and in order to improve the management of the asbestos prohibition.

¹ CFMEU, 'Submission', Senate Standing Committee on Economics; Economics References Committee, Non-conforming building products, September, 2015, available online @

<http://www.aph.gov.au/DocumentStore.ashx?id=7e8a5c8f-5825-4a77-b1a5-8b26821be9d3&subId=403373>

² Smith, Mr. Zachary, ACT Branch Organiser, Construction and General Division, CFMEU, and WACEY, Mr. Travis Kent, National Policy Research Officer, Forestry, Furnishing, Building Product and Manufacturing Division, CFMEU, Canberra, Economics References Committee Senate Committee, Friday, 13 November 2015, Non-conforming building product, transcript p 24-29, available online @

http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/0305d1e1-8ffc-40e3-944d-51eca7dd7f5d/toc_pdf/Economics%20References%20Committee_2015_11_13_3995_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/0305d1e1-8ffc-40e3-944d-51eca7dd7f5d/0000%22

Section 1: Introduction, Recommendations, Governments' Approach

Introduction

Jobs and occupational health and safety always have and always will be core business of the CFMEU. For this reason we have been concerned about the increasing prevalence of non-conforming building products for some time.³ We remain alarmed by the current situation.

For our members in the manufacturing industry, non-conforming building products are a threat to their job security. Manufacturers of conforming, Australian made product get unfairly undercut by inferior, non-conforming product. For example, the review ordered by the Commissioner of the ABF to examine the effectiveness of the DIPB's internal processes and procedures for managing the asbestos border control in 2016 (The ABF Asbestos Review) stated:

"Many countries...still produce and use asbestos as a cheap input for materials used to supply industries such as building and construction."⁴

Australian manufacturers of building and construction products and materials who compete against imports have a right to a level playing field. They should not be penalised in the market by having to compete against products which do not reach Australian safety and regulatory standards. There is a cost to ensuring that a product is up to scratch and having to foot this cost should not provide a comparative, competitive cost advantage to competitors who produce dodgy products. When reputable Australian based suppliers make claims that their products are asbestos free (ore meet other regulatory and

³ See Appendix 1: CFMEU National Conference Resolutions 2014 and 2016

⁴ KHG Border Services, 'Asbestos Importation Review Report', March 2016, p 3, available online @ <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/asbestos-importation-review.pdf>

performance requirements), the consumer and downstream user can have confidence that this is the case. For imported products this is not always the reality.

In 2012, the former Prime Minister's Manufacturing Taskforce, of which the CFMEU was a member, reported that:

"Australian manufacturers are increasingly finding that they are competing against products that do not conform to regulatory requirements and do not meet standards to which domestic businesses adhere. This places complying and conforming businesses at a cost and competitive disadvantage."⁵

Regulatory requirements exist for a good reason. Ensuring all competitors in a market are required to meet the same Australian Standards, ensures that local companies aren't undercut on their prices by companies importing dodgy products. Without this assurance, the job security and livelihoods of our members are placed at risk.

For our members in the construction and mining industries (who are subject to the installation and use risks associated with substandard, non-conforming product) the requirement that products they use are fit for purpose, safe and reliable is literally a life and death matter.

Regulations, which ban the import on asbestos are a good case in point. All forms of asbestos have been banned in Australia since December 31, 2003. Asbestos is a deadly product that has been proven to cause cancer. Australia has one of the highest incidence rates of mesothelioma in the world stemming from the large scale mining and use of asbestos. The ban on manufacture and importation of asbestos are milestones that were achieved through hard work by Australian unions, amongst other organisations and individuals. However, the ban has not been sufficient to stop substantial amounts of product

⁵ Prime Minister's Manufacturing Taskforce, 'Report of the Non-Government Members', Smarter Manufacturing for a Smarter Australia, August 2012, p 65, available online @ <http://www.digecon.info/docs/0114.pdf>

containing asbestos still entering the country in recent times, including building products. For this reason we are glad that the Senate has reconvened the inquiry and that the Committee has adopted the following additional terms of reference for this part of the inquiry:

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

- a. the prevalence and sources of illegally imported products containing asbestos;
- b. the effect of illegally imported products containing asbestos on:
 - i. industry supply chains, including importers, manufacturers and fabricators, and
 - ii. workplace and public safety and any associated risks;
- c. possible improvements to the current regulatory frameworks for ensuring products containing asbestos are not illegally imported to Australia, with particular reference to the effectiveness of:
 - i. policing, enforcement, surveillance and screening of imported products, including restrictions and penalties imposed on importers and end users of products containing asbestos;
 - ii. preventing exposure and protecting the health and safety of workers and other people affected by the illegal importation of products containing asbestos,
 - iii. establishing responsibility for remediation of sites where illegally imported products containing asbestos has been found;
 - iv. coordination between Commonwealth, state and territory governments and the role of the Australian Government in coordinating a strategic approach to preventing the importation of products containing asbestos;
- d. any other related matters.”

CFMEU support for other submissions

We are affiliated to the Australian Council of Trade Unions (ACTU) which has made a submission to this inquiry and made some recommendations. We support their recommendations. In addition we also support the submissions of other Australian unions active within the construction industry including the Electrical Trades Union (ETU) and the Australian Manufacturing Workers Union (AMWU) in addition to the submission of the Global Union Federation the Building and Wood Workers International (BWI).

Recommendations

We make the following recommendations:

1. That the offences in the Customs Act 1901 (and other applicable laws) be reformed to allow for a greater number of successful prosecutions for individuals and entities that illegally import Asbestos Containing Materials (ACMs);
2. That the penalties for illegally importing asbestos be increased so that they act as an effective deterrent against breaches of the law;
3. That the law be reformed to create an obligation to remove and dispose of ACMs if they contain asbestos illegally imported into Australia on or after 1 July 2017 at the cost to suppliers, importers, contractors and PCBU's;
4. A register be established recording importers and suppliers of non-conforming products. Those listed on the register be banned from further supply and importation into Australia;

5. That the Australian Border Force (ABF) be given adequate resources to monitor the illegal importation of asbestos;
6. That the ABF and the Australian Consumer and Competition Commission (ACCC) jointly establish a formal consultative mechanism to enable it to consult with key stakeholders about issues relating to the importation of asbestos;
7. Following consultation with the Asbestos Safety and Eradication Council (ASEA), Safe Work Australia, the ABF and other relevant government departments and agencies, the ACCC make all such necessary changes to the Australian product safety system as are necessary to provide the Australian community with greater protection against exposure to asbestos;
8. To limit the exposure of members of the Australian community to ACMs, that the Australian product safety system administered by the ACCC make greater use of its powers to compulsory recall products containing asbestos;
9. In circumstances where the ACCC becomes aware of a product containing asbestos it must issue a recall of the product;
10. That the Australian Government engage with the states and territories through the Council of Australian Governments, Safe Work Australia, and the ASEA about strengthening the duties of persons that import, supply, sell, demolish and dispose of asbestos and asbestos-containing products and materials;

- 11.** That the Parliament disallow the *Code for the Tendering and Performance of Building Work 2016* due to the fact that its application by the anti-worker Australian Building and Construction Commission (ABCC) will likely be used to seek to prevent workers including in their enterprise bargaining agreements a requirement to be provided adequate Asbestos Awareness Training;
- 12.** The Australian Government require Asbestos Awareness Training for a wide range of occupations in the construction industry and provide adequate funding for nationally accredited training for this purpose;
- 13.** The Australian Government direct State & Territory Safety Regulators and Comcare to prosecute those companies who are found to have exposed their workers to any form of asbestos;
- 14.** 10% of all products with the potential to contain ACH to have samples taken prior to installation to verify compliance;
- 15.** The Australian Government enact interim bans on identified high risk products from high risk countries and high risk companies until a system is provided which provides confidence to all stakeholders that products are free of asbestos, safe and fit for purpose;
- 16.** 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 non-conforming building products;

17. As per our recommendation in our previous submission to this inquiry: The Australian Government develop, fund and support an intelligence-led, risk-based approach to standards compliance assurance on imported products, including new and invigorated processes for sampling, testing, labelling and penalties for false and misleading conduct regarding claims to adherence to regulation and standards. Appropriate governance and regulatory mechanisms should be formed through consultation with governments, unions, industry and stakeholders;
18. The Australian Government prevent any international attempts to undermine Australia's asbestos importation ban and approach to standards conformity assurance on imports in all international forums including the China Australia 'Committee on Technical Barriers to Trade', Conference of the Parties for the Rotterdam Convention and the World Trade Organization;
19. The Australian Government ensure the above items are on the next agenda of the Building Ministers Forum (BMF) and invite unions to participate in the BMF consultative process in recognition that workers and their representatives are key stakeholders in the building and construction industry.

Section 2: The Governments' Current Approach to Non-conforming Products

The issue of non-conforming and non-complying building products has gained a lot of publicity in recent years. This attention has been attracted in part due to spectacular examples of product failure. For example a heavy focus of this inquiry in the 44th Parliament was on the:

- *Infinity Cables* scandal which involved 40,000 houses installed with non-conforming cable which if remain without remedy will cause fires and electrical shocks and

- Fire at the *Lacrosse Building* at the Docklands (and subsequent revelations about the widespread use of the non-compliant cladding product in Australia's high rise industry)

Despite the increased public awareness of the issue and indeed justified public anxiety caused by these incidences and other examples, governments' reactions have been lackluster.

This Committee, in its Interim Report- "*Safety- Not a matter of Luck*" (the Interim Report) took the view that:

"Clearly there has been a serious breakdown in the regulation and oversight of both non-conforming and non-compliant building products, which requires determined action. The committee notes progress already underway, especially the work of the SOG [Senior Officers Group]. Given the seriousness of the problem, the various areas of glaring weakness in the regulatory regime, including the certification process, and the disjointed regulation of the use of building products, both manufactured in Australia and overseas, the committee has formed the view that it should continue its inquiry."⁶

The Committee needs to be aware that the progress referred to in the Interim Report appears to have significantly stalled. The Seniors Officers Group (SOG) was formed by COAG's BMF at its meeting on 31 July 2015. The role of the SOG was to "investigate and develop a national strategic response to issues of non-conforming building products."⁷

⁶ Senate Economics References Committee, 'Interim report, Safety—'not a matter of good luck'', 4 May 2016, p 18, available online @ http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming_products/~media/Committees/economics_ctte/Non-conforming_products/Interim_Report/report.pdf

⁷ Department of Industry, Innovation and Science, Website, Senior Officers' Group on non-conforming building product, details available online @ <https://industry.gov.au/industry/IndustrySectors/buildingandconstruction/Pages/default.aspx>

On 19 February 2016, the BMF agreed in-principle on the strategies outlined in the SOG's report.⁸⁹

The SOG then sought feedback on the report, via public submissions, on the best way to implement the strategies.¹⁰ The feedback was mixed with a peak industry body in the sector, the Building Products Innovation Council (BPIC), although agreeing in principle with most of the recommendations, finding a lack of alignment between the report and its recommendations.¹¹ The BPIC also indicated several areas of concern to industry that do not appear in the report.¹²

Almost 12 months after the SOG's report was published, the Department of Industry's Website still read:

"The SOG is currently analysing the feedback to develop an implementation roadmap."¹³

At the December 14 2016 meeting of the BMF, it was stated that the Ministers agreed to accelerate the work of the SOG in relation to addressing the health and safety risks posed by non-conforming building products (NCBPs).¹⁴

This acceleration is clearly overdue.

In addition to this, more transparency around the detail and justification behind the BMF's endorsement at the forum of the implementation of a package of measures to address the health and safety risks associated with the non-compliant use of cladding in high rise buildings (to be progressed through the

⁸ Ibid

⁹ The report is: 'Strategies to address the risks related to non-conforming building products' and is available online @ <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf>

¹⁰ Department of Industry, Website.

¹¹ BPIC, 'Submission in Response to the Building Ministers' Forum Senior Officers' Group Report: Strategies to Address Risks Related to Non-Conforming Building Products', April 13, 2016, p 1. Available online @ <https://www.bpic.asn.au/download/BPICSubmission-BMFSGReportintoNCPs-FINAL.pdf>

¹² Ibid.

¹³ Department of Industry, Website.

¹⁴ BMF, 'Communiqué', December 14, 2016, available online @ <https://industry.gov.au/industry/IndustrySectors/buildingandconstruction/Documents/BMF-Communique-14-December-2016.pdf>

Australian Building Codes Board (ABCB)) is required.¹⁵ This is a necessary in order the give confidence to the community that risks associated with the widespread use of the non-compliant product is being appropriately mitigated.

Regarding asbestos, the Federal Government should be playing a leadership role in ensuring that the asbestos prohibition is effective and working as intended. The ABF Asbestos Review confirmed this, finding that:

“Each year the Strategic Command Group identifies the operational priorities for the ABF’s compliance and enforcement focus. Those priorities are communicated at all levels of operations within the ABF, and relevant supporting areas of the DIBP. Given the range of risks managed at the border, including risks associated with criminal and terrorist activities, the adoption of asbestos enforcement as a strategic priority may not be viable.”

“One way to increase asbestos interceptions is to place strategic importance on the enforcement of asbestos at the border. This could be achieved by endorsement of Executive Management, through the organisational governance structure.”¹⁶

The Department for its part maintains that:

“Management of the risk of asbestos at the border is a priority for the Australian Border Force.”¹⁷

And the BMF of December 14, 2016 stated:

¹⁵ See *ibid.*

¹⁶ KHG Border Services, ‘Asbestos Importation Review Report’, p 15.

¹⁷ DIBP, QUESTION TAKEN ON NOTICE SUPPLEMENTARY BUDGET ESTIMATES HEARING : 17 October 2016 IMMIGRATION AND BORDER PROTECTION PORTFOLIO (SE16/145) - Penalty Infringement Regulations - Programme 1.1: Border Enforcement, p 2 available online @ http://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-145.pdf

“Ministers share the concerns of the Australian industry and community about the use of products containing asbestos in Australia.”

However, the Minister responsible for the prohibition of asbestos importation, the Hon. Minister Peter Dutton undermines the broad recognition (within the DIBP, the ABF and within the industry and community) of the strategic importance of asbestos enforcement at the border. This was most stunningly demonstrated when the Minister articulated excuses on behalf of importers engaging in the crime of asbestos importation with unscientific commentary about what is causing their importation activity.¹⁸

Also of concern is the uncritical nature in which the BMF Communique reported on the interim report on the discovery of asbestos within imported atrium roof panel products used in the construction of the new Perth Children’s Hospital (PCH Interim Report). The BMF simply noted the findings and stated they agree that: “All tiers of Government should consider the findings from this report.”¹⁹

We are on the record as being more critical of the PCH Interim Report. We are critical that the report failed to address why it was that the John Holland Group (JHG) did not halt work on the project, before asbestos was even discovered on the site, given it was in the public realm due to the previous discovery at the Brisbane site that *Yuanda* products may be contaminated with asbestos. In addition to this, we are perplexed about why the PCH Interim Report failed to attempt to establish why it was that JHG kept

¹⁸ The Minister provided on radio an unsourced assertion that there is “40% additional cost in building a block of units because of CFMEU involvement – and obviously that has some behaviors, including driving builders to use this product...” See: Andrew Purell and Rebecca Puddy, ‘Dutton blames CFMEU for companies importing asbestos products’, The Australian, August 5 2016, available online @ <http://www.theaustralian.com.au/national-affairs/industrial-relations/dutton-blames-cfmeu-for-companies-importing-asbestos-products/news-story/1a5112379d420fc081bcb7f80ee7b581>

¹⁹ BMF, Communiqué.

workers operating in the vicinity of the asbestos discovery while tests were being carried out on the tainted products to confirm that they contained asbestos.

A more robust consideration from all tiers of government of the event is necessary and can be provided by a more thorough examination of the incident. We take the opportunity to provide some more detail below.

Section 3: Case Studies

Case Study Part 1A: Discovery of Asbestos in Yuanda Products at the Executive Building in Brisbane

There is no more serious example of how Australia's faltering prohibition on asbestos impacts workers than when our members were exposed to asbestos at the Executive Building site in Brisbane and the PCH site in Perth last year.

By way of background we provided a caution through this inquiry in the 44th Parliament and also the Joint Standing Committee of Treaties' (JSCOT) inquiry into the China–Australia Free Trade Agreement (ChAFTA) (and the Senate inquiry into that agreement) that industry sources were concerned about China because it is: “The ‘world champion’ and ‘market leader’ when it comes to producing non-conforming goods.”²⁰

When it came to asbestos we warned how China is the second largest producer of products with asbestos and that due to...“The likely increase of the import of non-conforming products, materials and

²⁰ For original citation from Mr Innes Willox, Chief Executive of the Australian Industry Group see: Madeleine Morris, ABC, June 24, 730 report, ‘The battle to keep potentially lethal building products out of Australia’, available online @ <http://www.abc.net.au/7.30/content/2015/s4261394.htm>

goods from China under ChAFTA (facilitated by tariff removal on imported goods)”²¹ the importation of products containing asbestos would increase under the agreement unless safeguards were put in place.

The Department of Foreign Affairs and Trade’s (DFAT’s) response to community concern about the issue provided no comfort:

“ChAFTA will not make any changes to Australia’s safety regulations or import/export prohibitions. There are no changes to restrictions on the import of asbestos and other dangerous products.”²²

The reason the assurance from DFAT provided no comfort was due to the fact that there was already evidence of asbestos imports from China circumventing the existing prohibition. For instance we reported to this Committee in our previous submission:

“A spike in imports from China of materials with asbestos including plasterboard, engine and exhaust gaskets in Chinese made cars and more recent cases of asbestos-tainted imported toys (such as crayons carrying Disney, Teenage Mutant Ninja Turtles and Power Rangers labels, a CSI-style science kit with ‘forensic dusting powder’ that contained asbestos and a necklace made from cancer causing chrysotile asbestos). China is the second largest producer of products with asbestos and border security officials have admitted that they are unable to stop the flood of Chinese imports laced with it.”²³

²¹ CFMEU, ‘Submission’, Senate Standing Committee on Economics; Economics References Committee, Non-conforming building products, p 8, also see CFMEU, Submission to the JSCOT, Treaty tabled 17 June 2015: The Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China (ChAFTA) August 2015, available online @ <https://www.cfmeu.org.au/sites/cfmeuvc-7-x.com.au/files/uploads/Sub%2080%20-%20REVISED%20-%20CFMEU%20JSCOT%20ChAFTA%20-%2017%20August%202015%20%281%29.pdf>

²² DFAT, ‘ChAFTA: myths versus realities’, 17/07/15, available online @ <http://dfat.gov.au/news/news/Pages/chafta-myths-vs-realities-.aspx>

²³ CFMEU, ‘Submission’, p 5.

The Committee on Technical Barriers to Trade

The ChAFTA includes a provision that the parties will establish a “Committee on Technical Barriers to Trade”. The coordinator for Australia on this committee is the Department of Industry. The text of the agreement states that the Committee’s functions shall include:

- (a) reviewing and monitoring the implementation and administration of this Chapter, including in light of any developments under the WTO Committee on Technical Barriers to Trade as well as the TBT Agreement, and, if necessary, developing recommendations for supplementing this Chapter;
- (b) upon a Party’s written request, consulting on issues concerning technical barriers to trade arising under this Chapter. Where a Party declines a request from the other Party to consult on an issue relevant to this Chapter, it shall, on request, explain its reasons for its decision;
- (c) providing information on standards, technical regulations and conformity assessment procedures of a Party in response to all reasonable requests for information from the other Party;
- (d) discussing and developing appropriate project proposals on technical assistance and cooperation as needed and agreed by the Parties, and monitoring implementation;
- (e) establishing ad hoc working groups to discuss specific technical issues as needed and agreed by the Parties;
- (f) reporting to the FTA Joint Commission on its findings and the outcome of its discussions; and
- (g) carrying out other functions as may be delegated to it by the FTA Joint Commission.²⁴

²⁴ TBT Chapter, ChAFTA, available online @ <http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-chapter-6-technical-barriers-to-trade.pdf>

When asked about whether the ABF were briefing the Government ahead of the next meeting of the TBT committee about what is now required to assess positive evidence of conformance with Australian standards in regards to products with a high risk of containing asbestos (see section 4 of this submission) the DIPB responded:

“Asbestos is a prohibited import and is not a Technical Barrier to Trade. As a result, asbestos is not discussed as part of the High Level Dialogue on Technical Barriers to Trade.”²⁵

We support the way that Australia administers our import prohibition on asbestos being off limits in terms of this dialogue in this TBT Committee and want this position to be confirmed by the Department of Industry and DFAT. In addition we note that The WTO Agreement on technical barriers provides broad exemptions for the purpose of “protection of human health or safety”²⁶ and the ChAFTA agreement states:

“Nothing in this Chapter shall prevent a Party from adopting or maintaining, in accordance with its rights and obligations under the TBT Agreement, standards, technical regulations and conformity assessment procedures.”²⁷

China should be forbidden from attempting to influence Australian processes for regulation of dangerous sub-standard, non-conforming building products in this TBT Committee and elsewhere, in full accordance with Australia’s WTO rights.

²⁵ DIPB, QUESTION TAKEN ON NOTICE SUPPLEMENTARY BUDGET ESTIMATES HEARING : 17 October 2016 IMMIGRATION AND BORDER PROTECTION PORTFOLIO (SE16/143) - Importation of asbestos - Programme 1.1: Border Enforcement, p 7, available online @ http://www.apb.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-143.pdf

²⁶ WTO Agreement on Technical Barriers to trade, available online @ https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

²⁷ TBT Chapter, ChAFTA

Despite our warnings, the agreement was signed without the Government putting in appropriate safeguards against the inevitable rise of imports containing asbestos from China as a result of the further liberalisation of trade. Our recommendations were ignored. Our recommendations included that, before the Government signed the ChAFTA agreement, they first:

- “Secure a commitment from the Chinese government that any action taken by the government to ensure Chinese exports conform to Australian safety and quality standards cannot be challenged under the investor chapter, the chapter on TBT or any other part of the ChAFTA by Chinese investors, Chinese exporters or the Chinese Government.”
- “Develop, fund and support an intelligence led, risk-based approach to standards compliance assurance on imported products. Including new and invigorated processes for sampling, testing, labelling and penalties for false and misleading conduct regarding claims to adherence to regulation and standards”²⁸

Prior to finalising the agreement the Government also did not pass the *Fair Trade (Australian Standards) Bill* (which was before parliament at the time). The bill, moved by former Independent Senator John Madigan, would have required trade agreements that Australia enter into to include a binding requirement that goods sold to a purchaser located in Australia, by a company or entity located overseas comply with all applicable product standards that apply in Australia.²⁹

As soon as ChAFTA was signed and implementing legislation passed the parliament, and the agreement came into effect (20 December 2015), tariff free Chinese building products’ began entering Australia.

²⁸ CFMEU, ‘Submission- ChAFTA’, p 48/49

²⁹ CFMEU, ‘Submission’, p 3. Information about the bill is available online @ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s920

Our concerns were validated, just over 6 months later, in July 2016, when asbestos materials were found at the Queensland State Government project at the 1 William Street, Brisbane site (the Executive Building). The 41-storey skyscraper, which is intended to host 5,000 government workers was very nearly installed with ACM (in the form of asbestos laden interface and isolators inserted between steel spigots and steel locating sockets {designed to prevent steel to steel contact and noise})

Around 216-240 pieces of this gasket like material imported from China would have become a permanent part of the building. This would have exposed the public and public sector workers to the product which testing subsequently proved after discovery had a very high (40-50%) content of chrysotile asbestos.

This level of exposure would have been a reality if it was not for the discovery of the material on the site by the CFMEU site delegate and safety representative in the course of their duties.



Asbestos products found at the Executive Building Site, Brisbane

The Importance of Asbestos Awareness Training for Construction Workers

This important discovery by CFMEU members and subsequent successful remediation at the 1 William Street site was not a matter of luck. Identifying asbestos is a highly specialised task.

Fortunately the site delegate who first became suspicious had undertaken nationally accredited Asbestos Awareness Training.

Under the Queensland CFMEU Enterprise Bargaining Agreement of which the builder concerned (*Brookfield Multiplex*) is a party to, all new employees must attend Asbestos Awareness Training with approved trainers.

The clause of the agreement states:

“The Employer agrees that it will, within three months of the commencement of this Agreement, schedule a nationally accredited asbestos awareness training course, for each employee covered by this Agreement.

Further, the Employer agrees that it will, within three months of each new Employee commencing employment, ensure that the Employee successfully completes a nationally accredited asbestos awareness training course.”³⁰

Asbestos Awareness Training: Under Attack from the Federal Government

It is not clear whether asbestos awareness training clauses in agreements, such as the one above, will be targeted by the ABCC.

Section 11 requirements of the *Code for the Tendering and Performance of Building Work 2016* which passed the Parliament in the Senate in November 2016 suggests it might. Section 11 of the Building Code (Content of agreements and prohibited conduct, arrangements and practices) states:

(1) “A code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:

(a) Impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;”³¹

The Master Builders Association of Queensland labels the clause on their website when describing the CFMEU agreement as one of the “restrictive practices built into the claims” and an “irregular or indirect extra.”³² This suggests that this key clause in the agreement which had the impact of

³⁰ CFMEU, ‘BROOKFIELD MULTIPLEX AUSTRALASIA PTY LTD AND CFMEU UNION COLLECTIVE AGREEMENT 2015 – 2019’, *Building, metal and civil construction industries*, COMMISSIONER LEE, MELBOURNE, 19 APRIL 2011, p 24/25. Available online @ <https://www.fwc.gov.au/documents/documents/agreements/fwa/ae418636.pdf>

³¹ Code for the Tendering and Performance of Building Work 2016, available online @ <https://www.legislation.gov.au/Details/F2016L01859>

³² Master Builders Association- Queensland, ‘CFMEU EBA 2015–19’, available online @ <https://www.mbqld.com.au/employment-and-wages/enterprise-agreements/cfmeu-eba-201519>

contributing to the prevention of the exposure of many more construction workers, public sector workers and the public to asbestos may be deemed 'non code compliant' according to the ABCC.

There are also further concerns about the Code for the Tendering and Performance of Building Work 2016 when it comes to asbestos management.

The relatively efficient way that the asbestos was dealt with after the CFMEU delegate made the discovery might also be hampered by other requirements of the Code in the future situations. For example, the Code states that:

"A code covered entity must comply with work health and safety laws, including work health and safety training requirements and asbestos safety requirements, to the extent that they apply to the entity in relation to building work..."

However in addition to this the code continues:

"...including strict compliance with procedures for the election of health and safety representatives and right of entry requirements..."³³

This red tape may actually have the effect of hindering, in some instances the most efficient specialised; identification, safe and licensed removal, safe transport and safe and legal disposal of asbestos and therefore the productivity of the site, not to mention pertinent health and safety outcomes.

Case Study Part 1B: Discovery of Asbestos in Yuanda Products at the Perth Children's Hospital

Following the discovery of asbestos at the Executive Building site in Brisbane, the CFMEU issued a National Safety Alert on *Yuanda*, the supplier of the products concerned. Additionally, the discovery of asbestos in Brisbane was widely reported in the media. Despite this high level of publicity over the asbestos risk identified with *Yuanda* products the principal contractor for the \$1.2 billion Perth Children's Hospital (PCH), John Holland Pty Ltd (JH), who were also using *Yuanda* products, failed to halt work on the PCH project, even though they ought to have known of the heightened risk of contamination with asbestos that *Yuanda* products installed and being used at the PCH project posed.

³³Code for the Tendering and Performance of Building Work 2016

Just days after the discovery of asbestos at the Executive Building site, 25 workers at the PCH project were working directly on an area in the hospital that were later discovered to be asbestos-affected as result of a worker cutting into unitised roof panels with an angle grinder to install a mechanical smoke exhaust system into the north atrium roof. The use of the angle grinder on the panels created plumes of contaminated dust that spread through parts of the building. Workers, including CFMEU members, working on site became suspicious and alerted the CFMEU, who then commissioned independent testing to be undertaken on material that had been cut from the panels. The independent testing company confirmed 10-15% chrysotile asbestos in the panels.

One worker on the PCH project described the level of dust as *“so thick that could barely see his hands in front of his face at times”*³⁴. As a result of the level of dust exposure, workers are now concerned that their family members may have been exposed to the asbestos dust via the clothes that they were wearing on the days that the cutting of the panels occurred. At the time the panels were cut there were up to 400 workers on the PCH project each day and there are concerns that more than the 25 workers working in the immediate vicinity of the cutting work may have been exposed to the dust as it could have filtered to the ground floor through the air conditioning system. The level of concern by the workers is evidenced by the more than 400 workers that signed an asbestos register that the CFMEU established.

All 150 of the roof panels in question on the eighth floor of the building had to be remediated. This only occurred after tests were completed. While testing was undertaken, workers on the PCH project were required by JH to continue operating in the vicinity, further increasing their risk of exposure.

³⁴ Laura Garty, ‘Asbestos found in \$1.2b Perth Children’s Hospital, says WA Health Minister’, 14 July 2016, available online @ <http://www.abc.net.au/news/2016-07-14/asbestos-found-in-perth-childrens-hospital-roof-panels/7628108>

When JH eventually agreed to remediate the panels they decided to cut into the panels and remove the asbestos material from inside their galvanized iron shell rather than completely replacing the panels. Notwithstanding a request to attend to evaluate the safety of the process, the CFMEU safety adviser was denied access to attend the trial deconstruction process on a panel. Indeed, CFMEU permit holders, including the CFMEU safety adviser, were repeatedly denied right of entry to the PCH project during the asbestos exposure incident, excluding on one occasion that followed the commencement of legal proceedings in the Federal Court to obtain injunctive relief.

The WA Health Minister responsible for the PCH project continued to support JHG's remediation plans despite our warnings and the view of the *Australian Medical Association* WA President, Dr Andrew Miller, that the State Government should "spare no expense" in ensuring asbestos remediation was performed properly.³⁵

Subsequently, the patch up job has resulted in the collapse of a ceiling section of the building when temporary protective covers on the atrium roof let water through the building following heavy rainfall.³⁶ This resulted in numerous gyprock sheets throughout the building needing to be replaced.

The PCH project has had a well-documented history of construction problems including: the installation of 935 fire doors that were not compliant with Australian fire standards; 450 metres of faulty water

³⁵ Regina Titelius and Sophie Gabrielle, 'Asbestos row: Deadlock over Perth Children's Hospital remediation means more delays', Perth Now, August 22, 2016, available online @ <http://www.perthnow.com.au/news/western-australia/delays-continue-at-perth-childrens-hospital-amid-asbestos-fix-deadlock/news-story/38bf0b9ff47480da43e3e2a7ec14d7fc>

³⁶ Regina Titelius, 'Perth Children's Hospital: 'Suspected moisture' to blame as sections cut out to allow plasterboard to dry', Perth Now, September 25 2016, available online @ <http://www.perthnow.com.au/news/western-australia/perth-childrens-hospital-suspected-moisture-to-blame-as-sections-cut-out-to-allow-plasterboard-to-dry/news-story/b58bba21fead637287b03ccfb6132f85>

pipes that needed replacing³⁷; and a continuing issue with water being contaminated with lead³⁸.

Documents obtained through a freedom of information application by the Opposition revealed that there were more than 10,000 construction defects between October 2015 and March 2016³⁹. In addition, a number of its subcontractors (including *Yuanda*), who have performed work on the PCH project, have claimed that JHG failed to make payments for work completed on the PCH project⁴⁰. These problems have contributed to the critical delays in the scheduled handover of the building to the WA State Government and the commencement of medical services at PCH to the children of WA.



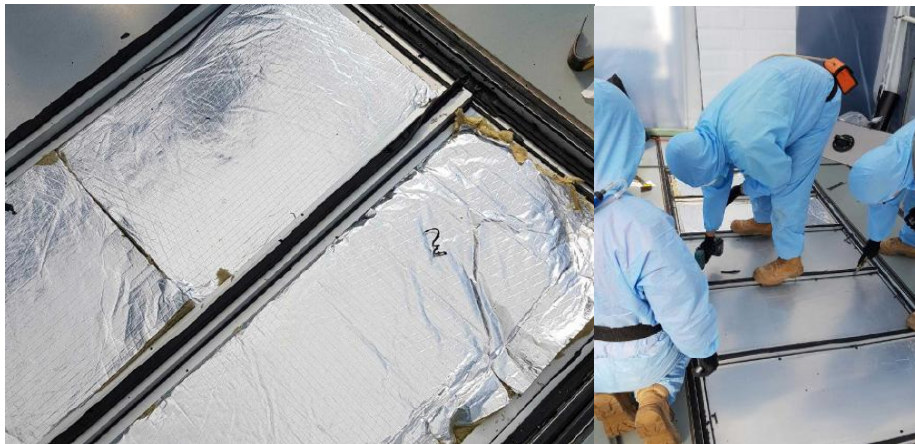
³⁷AAP, 'WA hospital asbestos 'can be done safely'', August 21, available online @ <http://www.news.com.au/national/breaking-news/concerns-over-wa-hospital-asbestos-removal/news-story/94ddbf1b928bb191e227fe0b00d4a7e3>

³⁸ AAP, 'Sixteen lead contamination sources at Perth Children's Hospital', available online @ <http://www.perthnow.com.au/news/western-australia/sixteen-lead-contamination-sources-at-perth-childrens-hospital/news-story/25feef980b82f73b1e4b166c4e808f53>

³⁹ Gareth Parker, 'Perth Children's Hospital defects: Reports reveal depth of problems', available online @ <https://thewest.com.au/news/wa/10000-hospital-defects-but-government-defends-its-oversight-ng-b88345174z>

⁴⁰ Jonathan Barrett and Paul Entwistle, 'John Holland faces \$8.6m claim at Perth children's hospital', Australian Financial Review, June 25, 2015, available online @ <http://www.afr.com/business/construction/john-holland-faces-86m-claim-at-perth-childrens-hospital-20150625-ghx9ze#ixzz4WCtjJEKi>

Asbestos chip(s) found at the Perth Children's Hospital following breakage of internal cement fibre sheeting of roof panel



The roof panels

Case Study Part 2: An Analysis of the Procurement Processes

By way of background, when providing evidence to the JSCOT inquiry into the ChAFTA, Chief Executive Officer of the Master Builders Australia, Mr Harnisch testified that the construction industry will benefit from an FTA with China due the fact that a lot of their members are increasingly using products made in China, that many of these products have become cheaper as a result of tariffs being removed, and that the increased use of Chinese products is a growing trend that *'will be unstoppable as time goes on'*⁴¹

In one of this inquiry's (non-conforming building products) previous hearings in the 44th parliament in February 2016 Senator Xenophon asked Mr Harnisch whether he would like to qualify the comments he

⁴¹Harnisch, Mr Wilhelm, Chief Executive Officer, Master Builders Australia Ltd, Joint Standing Committee on Treaties, Treaty tabled on 17 June 2015, 07/09/2015, Canberra, p 16 of transcript, available online @ http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/29036158-7cb1-437e-bff4-0ab8af50f86d/toc_pdf/Joint%20Standing%20Committee%20on%20Treaties_2015_09_07_3763_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/29036158-7cb1-437e-bff4-0ab8af50f86d/0001%22

made in the public hearing at the JSCOT inquiry in light of the issue of non-conforming building products.

Mr Harnish responded:

“Not at all. Before I made that comment, I spoke to a number of my members, who in fact do use products from China. They do not have a problem with it. I asked, ‘How come you are not having a problem and others seem to have one?’ They make sure that when they enter into an agreement in terms of purchasing building materials from China, in this case, they have a very close relationship. They buy volume, so one of the approaches they take in making sure that it complies with Australian standards and regulations is to actually have a person full time at that manufacturing plant at the time of production, so what rolls out of the factory is a complying product. Therefore that reduces that risk.”⁴²

The fact is that an analysis of both the processes which lead to the procurement of the asbestos tainted products in the above examples shows that the processes outlined by Mr Harnisch to prevent non-conforming products entering Australia are not being followed. This is notable as the interim report by the WA building commissioner asserted that the procurement by JHG was consistent with industry practice.⁴³

What we do know about the procurements is that both were from the Chinese owned company *Yuanda*.

Yuanda Australia is a major player in the Australian construction industry earning \$217.2m in revenue in

⁴² Harnish, Mr Wilhelm, Chief Executive Officer, Master Builders Australia Ltd, Melbourne, Economics References Committee Senate Committee, 15 February 2016, p 45 of transcript, available online @ http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/766d2cab-638c-4fd6-9fe9-53d3b6463fff/toc_pdf/Economics%20References%20Committee%202016%2002%2015%204168%20Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/766d2cab-638c-4fd6-9fe9-53d3b6463fff/0000%22

⁴³ WA Department of Commerce, ‘Perth Children’s Hospital Interim Report’, September 2016, p 1, 26 and 31, available online @ https://www.commerce.wa.gov.au/sites/default/files/atoms/files/perth_children_hospital_interim_report_atrium_13_september_final.pdf

Australia in 2015.⁴⁴ The asbestos discovered in the above examples has triggered an audit of *Yuanda's* supplies to 69 different construction sites around Australia which *Yuanda* had supplied or were supplying.

Yuanda is a large company in China. It employs 8000 people, and has been praised by top leaders in China, including President Xi Jinping, as an example of Chinese reform. Its parent company *Shenyang Yuanda Aluminium Industry Engineering Co.* is chaired by Kang Baohua, who controls 56 per cent of the company and whose personal wealth is estimated at \$US1.15 billion.⁴⁵ This is not a two bit operation and therefore should not act like one.

Yuanda's respective explanations for the both incidences, ultimately, expose the weaknesses of their own due diligence systems when it comes to the procuring of product from their own Chinese based suppliers. For example for the Executive Building project procurement in question *Yuanda Australia* relied on *Yuanda China* which specified an asbestos free product and then relied on a supplier to provide it. *Yuanda China's* supplier stated about the product on its website: "Made of good grade non asbestos Fire, rubber and heat-resisting packing material, compressing it to thick paper."

It was only after *Yuanda China* was alerted that the product contained asbestos (after the discovery) that they contacted the supplier of the product, Hejian City Jjiulong Chemical Building Materials Co., Ltd., and the supplier acknowledged that the product did contain asbestos. Only at that late stage was a Material Data Sheet requested by *Yuanda China* (the MDS acknowledged an asbestos content of 16 percent) (lower than testing indicated))

⁴⁴ Andrew Burell, 'Chinese-owned Yuanda under financial pressure after asbestos scandal', The Australian, September 12, 2016, available online @ <http://www.theaustralian.com.au/national-affairs/health/chineseowned-yuanda-under-financial-pressure-after-asbestos-scandal/news-story/2733a59935abd5b2a8eae532a5f5e38>

⁴⁵ Ibid.

According to the PCH Interim Report the procurement process which resulted in the asbestos containing roof panels appears to be a similar story.

The PCH Interim Report outlines how this occurred:

“As part of John Holland’s purchasing system, each building product goes through an acceptance process. This includes the examination of a sample of the building component that will make up the building product. The sample of fibre cement sheeting used in the Unitized Roof Panel was provided by Yuanda (Aus) early in the project. John Holland signed off on the sample on 25 January 2013; however, it was not tested for asbestos at that time. In July 2016, after the asbestos incident, it was tested for asbestos and found to not contain asbestos.”⁴⁶

The report also explains how JHG began using *Yuanda* in the first place:

“According to the tender report, the tender was for the Perth Children’s Hospital building facades, comprising 12 façade types, including the atrium roof...

John Holland preselected tenderers by assessing:

- Financial stability in conjunction with project size and annual turnover;
- Ability to complete the entire façade works from concept to handover, in particular detailed design whilst working with John Holland to control costs;
- Technical competency and the ability to deliver all façade types (i.e. unitised, curtain wall etc.);
- Manufacturing and installation capacity; and

⁴⁶ WA Dep Commerce, Interim Report, p 26/27.

- Willingness to accept contract terms and conditions whilst working with John Holland to achieve a successful project.

With this in mind, John Holland assessed active subcontractors in the international market and contacted 12 companies in total, supplying them with an expression of interest form for the PCH. Four potential contractors were provided an 'Invitation to Tender' on 6 July 2012. John Holland then determined that Yuanda (Aus) was the preferred tenderer."⁴⁷

Given the façade is such a significant part of the project, JHG's decision to subcontract to *Yuanda* was a significant decision with the price on offer by the subcontractor obviously a major commercial element of the consideration.

Yuanda (Aus) ordered the roof panels from *Yuanda China*. Interestingly, *Yuanda China* commenced production of the roof panels using plasterboard before being advised that the product was not consistent with the specification (and sample provided in 2013) which required fibre cement sheeting.⁴⁸ The report does not pass comment on why cement fibre was substituted for plasterboard in the manufacturing process of the roof panels by *Yuanda China* despite this being against the requirements of original specification. It is likely due to it being a cheaper product than asbestos free fibre cement sheeting.

After being advised that fibre cement sheeting was required, *Yuanda China* contracted an agent, *Shenyang Dingyisheng Business Trading Co., Ltd. (SDB)*, to supply non-asbestos fibre cement sheets and specified that they were to be procured from *Zhejiang Headerboard Building Materials Co., Ltd. (Headerboard)*

⁴⁷ Ibid, p 21.

⁴⁸ Ibid, p 27.

According to the report it appears that that SDB subsequently got the fibre cement sheets from either:

- Headerboard who supplied ACM, despite Headerboard's advertising as an asbestos-free manufacturer; or
- An alternative supplier (contrary to SDB's contract with *Yuanda China*).

The CFMEU in our previous submission to this inquiry provided some evidence about why products from China were considered high risk, citing an article in *The Economist*:

“Many manufacturers offshored to China looking for cheaper production costs and were initially delighted and stunned by how quickly factories became proficient and puzzled by how much could be done so well, so fast, so cheaply...They were right to wonder... The result is ‘Quality fade’ as the Chinese factories transform what were, in fact, profitless contracts into lucrative relationships...The production cycle is the opposite of the theoretical model of continuous improvement when: After resolving teething problems and making products that match specifications, innovation inside the factory turns to cutting costs, often in ways that range from unsavoury to dangerous. Packaging is cheapened, chemical formulations altered, sanitary standards curtailed, and on and on, in a series of continual product debasements.”⁴⁹

Perhaps, especially in the context of a tense relationship between principle contractor (in this case JHG) and Subcontractor in this case (*Yuanda Australia*)⁵⁰ quality fade can become more likely.

As per our evidence in the previous inquiry, again from *The Economist*

⁴⁹ The Economist, May 14, 2009, ‘Poorly made: Why so many Chinese products are born to be bad’, available online @ <http://www.economist.com/node/13642306>

⁵⁰ See: Barrett and Entwistle, ‘John Holland faces \$8.6m claim at Perth children's hospital’.

“...The first line of defence against compromised products are the factory's clients, the importers.”⁵¹

In this case the Chinese manufacturer's (*Yuanda China's*) partner is *Yuanda Australia*, not just a wholly owned subsidiary but an entity that according to reports is surviving due to the “ongoing support and funding” from parent company *Yuanda China*. It has combined losses of \$11.4 million over the past two years and outstanding debts to its parent entity of almost \$40m.⁵²

This is not to suggest that *Yuanda Australia* or *Yuanda China* necessarily deliberately sought to try to continue to mitigate costs by using a fiber cement panel product containing asbestos as opposed to one without containing it, after being told not to continue to provide plasterboard in the roof panels because that was not consistent with the agreed specification. However, *Yuanda China's* agent may have sought the cheaper product with asbestos, or their supplier in turn might have done this without their knowledge.

What is likely is that somewhere in the complex supply chain, someone (or multiple parties and individuals) probably did try to improve their margins through either subconscious or deliberate product debasement. In any event, the issue exposes a major chink in the due diligence and chain of custody system of *Yuanda* in terms of its supply chain.

Yuanda has major difficulties in terms of guaranteeing that its supplies are asbestos free as evidenced by the above examples. This demonstrates the big challenge faced by even the best intentioned Australian company to ensure products sourced from China are conforming. Testing of product therefore has to be constant in the supply chain and verified as opposed to an ‘honour system’ which has resulted in these incidences.

⁵¹ The Economist, Poorly made.

⁵² Andrew Burell, ‘Chinese-owned Yuanda under financial pressure after asbestos scandal’.

There were changes to the building code (featured in the *Code for the Tendering and Performance of Building Work 2016*) designed to address the situation of standards non-conformity. However, based on the Executive Building and the PCH examples it is hard to see how the new requirements would have stopped the above importations or indeed the widespread standards non conformity that occurs in the industry. This is due to the fact that, in these cases (and usually), the point of failure is in the supply chain far removed from any initial declaration from the principal contractor to the funding entity as required in the code.⁵³

What is lacking in the new arrangements is a prescriptive expectation for what due diligence needs to occur throughout the supply chain for the project's required products and materials. What is needed are due diligence system in place for all building industry participants and suppliers involved in the project designed to guarantee compliance with the expectation that conforming products will be procured.

For example, 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.

⁵³ The new requirement: For funding entities to ensure before a contract is entered into in respect of Commonwealth funded building work, the preferred tenderer to provide, among other things information "whether the building materials to be used to undertake the building work comply with relevant Australian standards published by, or on behalf of, Standards Australia."...is likely therefore to be, by itself, ineffective.

No such prescriptive due diligence system applies for the importation of products with a risk of containing asbestos although as the next section will explore ‘advice’ from DIPB and the ABF on what is expected is becoming more and more prescriptive which is a positive. For the changes to the building code to have any major effect, a system of due diligence must be mandated for high risk products from high risk countries (products and countries which can be listed by proclamation or Ministerial direction)

Due to recent changes to *Commonwealth Procurement Rules* to commence in March a system for 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.

Changes to procurement rules include:

“Specifications and Standards

Where an Australian standard is applicable for *goods* or services being procured, tender responses **must** demonstrate the capability to meet the Australian standard, and *contracts must* contain evidence of the applicable standards (see paragraph 10.37)”

And:

“Contract Management/Standard Verification

Where applying a standard (Australian, or in its absence, international) for goods or services, *relevant entities must* make reasonable enquiries to determine compliance with that standard:

- a. this includes gathering evidence of relevant certifications; and

b. periodic auditing of compliance by an independent assessor.”⁵⁴

Minimum thresholds for the due diligence required to achieve the above policies should become mandatory for Commonwealth procurement officers AND procurement officers of building code compliant companies eligible for Commonwealth funding. Some innovative ideas have already been proposed which companies might choose to utilise to partially assist in satisfying due diligence requirements. For instance *Product Presence Pty Limited* and *ProductWise* have come up with some suggestions for systems in evidence put in this inquiry whereas the BMF reports the SOG will explore the practicality and benefits of a third-party certification for building product conformity.⁵⁵

Like how the ‘Illegal Logging Due Diligence’ requirements are outlined in Regulations which were formed by the Government with the advice of the Illegal Logging Working Group which was a group of timber industry stakeholders including trade unions it would be expected that due diligence requirements for procurement of building products would undertake similar consultation in their formulation.

Section 4: The Status of the Asbestos Ban at the Border

As outlined in Section 1 asbestos is a prohibited substance and import of asbestos and ACMs has been banned since the end of 2003. However the ABF have conceded that they are: “Not able to guarantee that all imported goods will be free of asbestos.”⁵⁶

⁵⁴ John Sheridan - FAS Technology & Procurement, Amendments to the Commonwealth Procurement Rules from 1 March 2017, available online @ <https://www.finance.gov.au/blog/2016/12/01/Amendments-to-the-Commonwealth-Procurement-Rules-from-1-March-2017/>

⁵⁵ See *Product Presence* and *ProductWise* submissions available @ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Submissions and the BMF Communique for further detail.

⁵⁶ John Ferguson, ‘Made in China, (with asbestos)’, *The Australian*, February 23 2015, available online @ https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwizgrS_ws_RAhWMEpQKHUDsCwsQFggZMAA&url=http%3A%2F%2Fwww.theaustralian.com.au%2Fnational-affairs%2Fforeign-affairs%2Fmade-in-china-with-asbestos%2Fnews-

The ABF argue that:

“Importers are responsible for ensuring the goods they import are free from asbestos and must declare this on import documentation.”⁵⁷

The problem is that, as outlined in the Section 3, we cannot rely on importers to ensure goods they import are free of asbestos under current requirements.

In the ABF Asbestos Review the independent reviewer outlined how:

“For most businesses involved in international trade, a rational cost/benefit analysis of investment in compliance is not justified by the incentives that government offer to promote voluntary compliance...”⁵⁸

This committee, in the Interim Report found:

“The current Prohibited Imports Regulations include penalties for breaches of up to \$170,000 the committee notes that the Department reported that, since 2009, only \$64,000 in fines, penalties and costs were imposed relating to asbestos importation offences.”⁵⁹

And that:

“Since the adoption of supplementary legislation in February 2014, imposing infringements (Infringement Notice Scheme) on the importation of asbestos-containing products, only two infringements have been issued against importers of goods containing asbestos.”⁶⁰

[story%2Fe7e2ff6ab0663099409e6006325193b9&usg=AFQjCNEGmILGvGQ0s5yYpWGSnobhFv7jfw&sig2=Yp5eKOoCGHQVGEpL9srJpg&bvm=bv.144224172,d.dGo](https://www.khgservices.gov.au/~/media/Files/Asbestos/Asbestos_Importation_Review_Report/Asbestos_Importation_Review_Report.pdf?d=144224172&dGo)

⁵⁷ Ibid.

⁵⁸ KHG Border Services, Asbestos Importation Review Report, p 5.

⁵⁹ Committee, Interim Report, p 16.

⁶⁰ Ibid.

Indeed the DIPB reports that the maximum penalty that can be imposed, upon conviction, for Customs Act 1901 offences in relation to asbestos are:

- For individuals \$180,000 or three times the value of the goods (if the Court can determine the value of the goods), whichever is the greater; and
- For corporations \$900,000 or 15 times the value of the goods (if the Court can determine the value of the goods), whichever is the greater.⁶¹

And that:

“The importation of asbestos is also a strict liability offence under section 233(1) (b) of the Customs Act 1901. Penalties can therefore be applied under the Customs Act 1901 Infringement Notice Scheme for asbestos detections that do not proceed to prosecution. These penalties range from \$2700 for an individual to \$8100 for a body corporate.”⁶²

The ALP has called for the Government to significantly increase the penalties available, describing them as “meagre” and a “light touch.”⁶³

Whereas Senator Xenophon has called for “a substantial increase in penalties for importers of deadly asbestos products – including jail time”⁶⁴

DIPB have recently outlined the penalties applied to importers as follows:

| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|--|------|------|------|------|------|------|
| | | | | | | |

⁶¹ DIPB, Penalty Infringement Regulations, p 2.

⁶² Ibid.

⁶³ Susan McDonald and Stephanie Smail, ‘Opposition calls for tougher penalties to stop importers of asbestos-laden building products’, 25 October 2015, available online @ <http://www.abc.net.au/news/2015-10-25/opposition-calls-for-tougher-asbestos-penalties/6882576>

⁶⁴ Nick Xenophon, ‘Move for Jail Time for Importers of Asbestos’, 26 July 2016, available online @ <http://www.nickxenophon.com.au/media/releases/show/move-for-jail-time-for-importers-of-asbestos-building-products/>

| | | | | | | |
|--|---|----------|---|----------|----------|----------|
| Court imposed fines and costs | - | \$64,000 | - | \$14,500 | - | - |
| Penalties issued through the Infringement Notice Scheme | - | - | - | \$7650 | \$15,300 | \$16,200 |

“Since the ABF was stood up, three penalties and four warning letters have been issued or are in the process of being issued. One detection is still subject to an active investigation. A further ten detections are currently being considered for penalty action. When asbestos is detected at the border, the ABF also writes to the relevant suppliers advising them of actions being taken against their goods at the border (though these are not recorded as formal warning letters).

There have been no revocations or suspensions of licenses to date relating to the importation or exportation of asbestos.”⁶⁵ (The ABF was established in July 2015)

This Committee in the Interim Report also noted that the ASEA recommend:

“Increased surveillance and screening of imported building products as well as a greater willingness to enforce the penalties available under the Prohibited Imports Regulations would

⁶⁵ DIPB, Penalty Infringement Regulations, p 3.

assist in reducing the incidence of non-conforming building products being imported into Australia.”⁶⁶

The ABF Asbestos Review concurred stating:

“An incentive for voluntary compliance is to undertake and publicize enforcement actions that result from instances of non-compliance. A higher level of investigation of asbestos related cases is needed to support compliance activities of ABF officers. This would also encourage improvements in data collection management to ensure that the required evidence is properly gathered and managed with a view to ensuring successful prosecutions.”⁶⁷

They recommended:

“Where possible, further prioritise the investigation to improve prosecution of offences related to asbestos importation. To assist with investigations and prosecutions, further appropriate information should be collected and managed at earlier stages of intervention.”⁶⁸

Following October Senate Estimates, Senator Carr tabled a written question to DIBP:

“A review conducted by Swedish firm ‘KHG Border Services’ completed in March 2016, recommended the ABF move to “prioritise” prosecution Does DIBP agree with the recommendation to “prioritise” prosecution and if so, how are they implementing that recommendation?”

The DIBP responded that it agrees with the recommendation of the review and that it is prioritising resources to enhance operational and investigative outcomes.⁶⁹ However, they added:

⁶⁶ Committee, Interim Report, p 16.

⁶⁷ KHG Border Services, Asbestos Importation Review Report, p 11.

⁶⁸ Ibid, p 29

⁶⁹ DIPB, Penalty Infringement Regulations, p 3.

“It is important to note that the Department and its operational arm, the Australian Border Force, are bound by and adhere to the Prosecution Policy of the Commonwealth. The Policy requires that Department consider whether a prosecution is in the public interest. The Policy provides a two-stage test that must be satisfied before commencement of a prosecution:

- a. There must be sufficient evidence to prosecute the case, and
- b. It must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest. In determining whether there is sufficient evidence to prosecute a case, there must be prima facie evidence of the elements of the offence and a reasonable prospect of obtaining a conviction. The existence of a prima facie case is not sufficient. The policy requires consideration of any lines of defence open (the ‘mistake of fact’ defence is often used in these cases) to the alleged offender and any other factors that could affect the likelihood or otherwise of a conviction.”⁷⁰

The independent review of the system which culminated in the ABF Asbestos Review was limited by its terms of reference and therefore not able look at some of the key barriers to improved prosecutions in relation to breaches of the ban because: “An examination of Australia’s broader asbestos regulatory framework was outside of the scope of this review.”⁷¹ However they did add their take on this barrier to prosecutions:

“There have been a limited number of full investigations and subsequent prosecutions of asbestos related offences, as it is difficult for the DIBP to prosecute against a mistake of fact defence. This defence mitigates an importers liability when an importer can provide evidence that it has exercised due diligence to ensure the goods do not contain asbestos. To do so, the

⁷⁰ Ibid.

⁷¹ KHG Border Services, Asbestos Importation Review Report, p 3.

company typically tries to show that it took all reasonable steps to prevent the infringement from occurring. An overseas laboratory testing certificate showing an “asbestos free” result may be enough evidence for the Court to find that the importer has exercised the required level of due diligence, even where the testing is not done in accordance with Australian standards. Lack of available evidence, which can only be gathered by undertaking a full investigation, makes it difficult to develop strong prospects of successful prosecution.”⁷²

For this reason, it is very important that the sort of due diligence that importers are expected to go through is clear. The September 8 Departmental Notice No. 2016/30⁷³ and the ABF’s Fact Sheet “Managing the risk of asbestos at the border”⁷⁴. Both represent a significant improvement in terms of articulating what should be expected.

It is also worth reproducing an indication of the expectations that the ABF have in this regards outlined in response to questions on notice and recently communicated to stakeholders including manufacturers in China:

Expectations of the Department of Immigration and Border Protection

“Importers must provide sufficient assurance to the ABF to demonstrate that imported goods do not contain asbestos. One of the ways importers can provide assurance is through the sampling and testing of their goods by an accredited testing laboratory. On completion of testing, laboratories issue

⁷² Ibid, p 29.

⁷³ “Assurances that imported goods do not contain asbestos” (to clarify the assurances that importers need to provide and demonstrate to the Australian Border Force (ABF) that goods imported into Australia do not contain asbestos) DIPB, No. 2016/30, ‘Assurances that imported goods do not contain asbestos’, 8 September 2016, available online @ <https://www.border.gov.au/Customsnotices/Documents/2016-30.pdf>

⁷⁴ ABF, ‘Managing Risks of Asbestos at the Border’, available online @ <https://www.border.gov.au/Importingandbuyinggoodsfromoverseas/Documents/asbestos-border-factsheet.pdf>

‘certificates’ certifying that the samples contain no asbestos content. Goods being imported can be tested prior to the importation by a laboratory in Australia or overseas.”⁷⁵

“Importers, who wish to have their goods tested in Australia, prior to the importation, must first seek permission from the Minister of Employment to import sample for analysis purpose, through the Asbestos Safety and Eradication Agency (ASEA). Once the permission has been granted, importers organise sampling and testing. The samples must be from the actual shipment to be imported. The testing must be undertaken by an Australian testing laboratory that is accredited by the National Association of Testing Authorities (NATA).”⁷⁶

“Certification of samples tested outside Australia must be from an overseas testing laboratory that is accredited by the NATA equivalent testing authority in that overseas economy. The local testing authority must be a signatory to a Mutual Recognition Arrangement (MRA) with NATA.

Any other certificates provided by manufacturers or third parties will not be accepted by the ABF as evidence of compliance with Australian standards.”⁷⁷

“When presented with testing certification from an accredited testing laboratory, the ABF will seek additional assurances to verify whether the samples tested have been drawn from the actual

⁷⁵ DIPB, ‘Importation of asbestos’, p 4.

⁷⁶ Ibid.

⁷⁷ Ibid, p 5.

batch/consignment - specific to the goods being imported to Australia. For example, if the testing certificate is more than twelve months old, the ABF would seek further assurance from the importer and supplier that the goods follow the same manufacturing process as the goods that were tested or are from the same batch.

If sufficient assurance cannot be provided, the certificate will not be accepted and the goods would remain subject to customs control until further information can be produced to provide additional assurance. The ABF reserves the right to require further testing on importation, if deemed necessary.”⁷⁸

“Whilst in China, Commander Dale clarified Australia’s import requirements in relation to asbestos. This included the requirement that testing is conducted by NATA accredited laboratories in Australia or if testing is conducted overseas, a laboratory that is accredited to undertake asbestos testing by a NATA-recognised equivalent international accreditation authority, as well as the types of assurances the ABF will seek at the border in relation to asbestos.”⁷⁹

“NATA is the recognised testing authority in Australia. All testing must be conducted by a NATA-accredited laboratory. NATA also has MRAs in place with overseas testing authorities, which in turn accredit laboratories in their countries. The ABF only accepts certificates from laboratories accredited by NATA to undertake testing for asbestos when such testing is conducted in Australia. If testing is

⁷⁸ Ibid.

⁷⁹ Ibid.

conducted overseas, the testing certificate must be from a laboratory that is accredited by a NATA recognised equivalent testing authority to undertake testing for asbestos.”⁸⁰

Given this is the standard of the ABF, it should also be the standard which importers are required to adhere to in terms of their due diligence for ensuring products that they import does not contain asbestos. If the above does not form part of their due diligence they should not be able to rely on the ‘mistake of fact’ defence. This should also be the standard of assurance which should be demanded by Licensed Custom’s Brokers (LCB’s). We support the requirement outlined in *Departmental notice No. 2016/30*:

“When answering the asbestos Community Protection Questions (CPQ’s), it would be appropriate for LCBs to nominate a “no” response (declaring that the goods do not contain asbestos), if they are satisfied that their clients (and / or suppliers) have provided sufficient assurances. If LCBs consider that sufficient assurances have not been provided, it would be appropriate to nominate a “yes” response (declaring that the goods do contain asbestos) to the asbestos CPQ. It would be appropriate for LCBs to nominate a “yes” response to the asbestos CPQ if they have doubts about the information that has been provided by their clients.”⁸¹

It should be the case that the rules around due diligence are clearer and there are less grounds for old or fraudulent certificates to be used as a “mistake of fact” defence.

This Committee promised in its Interim Report it:

⁸⁰ Ibid.

⁸¹ DIPB, No. 2016/30, ‘Assurances that imported goods do not contain asbestos’.

“Will further consider means by which foreign governments could be encouraged to ensure compliance certification carried out within their sovereign borders is bona fide. Mechanisms could range from formal representations through DFAT to more punitive approaches, such as restrictions on the importing of certified goods from countries where fraudulent certification is not being addressed.”⁸²

In light of recent events we have also argued for a ban on materials from China unless they can be guaranteed to meet Australian Standards.

“Until we have systems in place to ensure that any product which comes in from overseas is asbestos free then we really need to consider what we are importing and if that means not importing similar products until that can be resolved then that is what we should do.”⁸³ - CFMEU Western Australian Branch Secretary Mick Buchan.

In the past we have also called for import restrictions to be slapped on companies found to have manufactured building products that do not comply with Australian Standards.⁸⁴

Senator Xenophon has captured some of this thinking by arguing that Australia should consider imposing WTO sanctions on countries that do not have robust regulatory systems that prevent goods containing asbestos from being exported.⁸⁵ He has promised to introduce legislation to require mandatory testing of all products that may contain asbestos from countries that have failed to have

⁸² Committee, Interim Report, p 16.

⁸³ See: Eliza Borello, ‘Perth Children's Hospital asbestos report prompts call for temporary ban on Chinese building materials’, ABC News, 13 September, 2016, available online @ <http://www.abc.net.au/news/2016-09-13/perth-hospital-asbestos-report-sparks-call-for-ban-on-imports/7840632>

⁸⁴ CFMEU, ‘Ban urged on companies importing unsafe products’, Monday 4 May 2015, available online @ https://www.awa.org.au/sb_cache/associationnews/id/512/f/Ban%20urged%20on%20companies%20importing%20unsafe%20products.pdf

⁸⁵ See: Laura Tingle, ‘Nick Xenophon raises WTO spectre on asbestos-laced goods’, Australian Financial Review, July 26, 2016, available online @ <http://www.afr.com/news/politics/nick-xenophon-raises-wto-spectre-on-asbestos-laced-goods-20160726-gqe7i6#ixzz4WDTK8zRU>

appropriate regulatory and certification measures in place and has suggested other possible remedies. Such remedies include a 'watch list' for companies known to have supplied non-conforming building products for import or those knowingly importing non-conforming products and increased resources to allow for greater checking of imports and chain of responsibility laws.

"A watch list could also ensure companies known to have done the wrong thing are avoided in favour of those who provide Australian standard products, which would not only be a deterrent but enable buyers to increase their chances of purchasing complying materials"⁸⁶

It is our union's long standing position that for identified high risk products from identified high risk countries, if importation is to occur, the importation must be accompanied by credible, independent verification which guarantees the product is asbestos free or else the products must be arranged to be tested in Australia before clearance from customs.

The DIPB told this inquiry in a written answer to a question they took on notice that Russia, China, India, Brazil, Kazakhstan and Canada have been identified as high risk countries in relation to goods that may contain asbestos and that countries with expanding manufacturing bases and/or increased trade with Australia, such as Vietnam and Zimbabwe, are also closely scrutinised.⁸⁷ They also mentioned Singapore and Thailand to this inquiry in verbal evidence. In addition, in a written response to a question on notice from Senator Carr following senate estimates the DIPB confirmed that Indonesia is also a country of interest given they use asbestos in building products.⁸⁸

⁸⁶ Xenophon, 'Move for Jail Time'.

⁸⁷ DIPB, Response, QUESTION TAKEN ON NOTICE, Parliamentary Inquiry : 13 November 2015 IMMIGRATION AND BORDER PROTECTION PORTFOLIO (NCBP005) – Parliamentary Inquiry - Identification of non-conforming building products, p 6, available online @ <http://www.aph.gov.au/DocumentStore.ashx?id=d2c51215-06cf-4cc8-92b3-fbc9bcea8ea8>

⁸⁸ DIPB, Importation of Asbestos, p 1.

In response to a written question at Senate Estimates from Senator Xenophon, the DIBP conceded that ABF has identified over 50 countries that import, export or mine asbestos or where there is evidence that asbestos is used in manufactured goods.⁸⁹

The DIBP explains:

“A proportion of goods imported from these countries include goods which do not present a risk of containing asbestos (such as live animals, food products, flowers and wooden articles). All other goods imported from these countries are risk assessed through the use of profiles targeting the presence of asbestos. Of those, 44 per cent of sea cargo consignments are subject to further assessment at the border, which may include further document verification, inspection or testing.”⁹⁰

The DIBP further noted, in response to a series of questions from Senator Carr, that:

“Asbestos profiles can be purely commodity based, entity based (i.e. importer and/or supplier) or combined with other key risk indicators such as country of origin. Some can be broad due to the nature of the risk (i.e. commodity based profiles, commodity-origin profiles), whilst others can be very specific and limited to certain entities.”⁹¹

The DIBP also states that in the 2015/16 financial year 1167 consignments matched a profile or alert for asbestos and of these 117 consignments were tested for asbestos with 13 positive results.⁹²

⁸⁹ DIPB, QUESTION TAKEN ON NOTICE SUPPLEMENTARY BUDGET ESTIMATES HEARING : 17 October 2016 IMMIGRATION AND BORDER PROTECTION PORTFOLIO (SE16/018) - Asbestos - Inspection of containers - Programme 1.2: Border Management, p 1, available online @ http://www.apb.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-018.pdf

⁹⁰ Ibid

⁹¹ DIPB, Importation of Asbestos, p 4.

⁹² DIPB, Response, QUESTION TAKEN ON NOTICE SUPPLEMENTARY BUDGET ESTIMATES HEARING : 17 October 2016 IMMIGRATION AND BORDER PROTECTION PORTFOLIO (SE16/144) - Non-conforming building products - Programme 1.1: Border Enforcement, p 6, available online @

We support an 'intelligence led risk based approach' to asbestos detection at the border and no one, including the CFMEU advocates for every container or package to be inspected for asbestos. However current testing of asbestos account for just one in every 324, 786 consignments (34.9m air cargo consignments and 3.1 million imported sea cargo consignments)⁹³ imported into Australia which seems low and highlights the importance that the intelligence that is relied upon is extremely robust. We doubt that ABF has enough funding allocated for the specific purpose of sufficient intelligence gathering and the quantum amount of required testing for adequately effective surveillance at the border.

On the DIPB website the list of products they considered high risk for containing asbestos and ACM is reproduced below:

- Asbestos bitumen products used to damp proof
- Asbestos rope
- Asbestos tape
- Brake linings or blocks
- Cement flat sheeting or panels
- Cement pipes, tubes or fittings
- Cement shingles or tiles (external or ceiling)
- Clutch linings or brake disc pads
- Crayons

http://www.apf.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-144.pdf

⁹³ Figures from DIPB and ABF, Annual Report 2015-2016, 2 May 2016, p 34, available online @

<https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/annual-report-full-2015-16.pdf>

- Diaphragms
- Ducts
- Electrical cloth and tapes
- Electrical panel partitioning
- Fire blankets
- Fire curtains
- Fire resistant building materials
- Furnaces
- Gaskets or seals
- Gloves
- Heat resistant sealing or caulking compounds
- Heating equipment
- Industrial talc
- Lagging and jointing materials
- Mastics, sealants, putties or adhesives
- Mineral samples for display or therapeutic purposes
- Mixtures containing phenol formaldehyde resin or cresylic formaldehyde resin
- Motor vehicle parts such as friction materials
- Pipe spools

- Raw materials from mining activities
- Sheet vinyl backing
- Sheeting
- Textured paints or coatings
- Tiles
- Yarn and thread, cords and string, whether or not plaited.⁹⁴

However, as conceded by the DIPB profiles overlapping the high risk goods and the high risk countries is not enough to guarantee the effective prevention at the border. The DIPB reports that it is aware of a number of instances where asbestos was detected post-border.

“These instances are *usually* a result of consignments not matching against asbestos profiles in place at the time.”⁹⁵ (italics our emphasis)

It is unclear from the DIPB’s responses whether or not there were existing asbestos profiles in place for the products imported by *Yuanda Aus*. Asked in Senate Estimates to provide an explanation as to how it is that imported asbestos was used in those particular buildings (the Executive Building the PCH) the DIPB took the question on notice and simply confirmed an ongoing investigation into the matter:

“In July 2016, the Australian Border Force (ABF) commenced a number of operational activities in response to the detection of asbestos in building products imported by Yuanda Australia and related companies for use in two building sites, the Perth Children’s Hospital and the Executive Building at 1 William Street, Brisbane. Asbestos was detected in composite roof panels that

⁹⁴DIPB, ‘Products at Risk of Asbestos’, list available online @ <http://www.border.gov.au/Busi/cargo-support-trade-and-goods/importing-goods/prohibited-and-restricted/asbestos>

⁹⁵DIPB, Importation of Asbestos, p 3.

were custom manufactured for the Perth site and in steel brackets at the Brisbane site. A criminal investigation into Yuanda Australia and affiliates is ongoing. As such the ABF is unable to provide further comment at this stage. The ABF continues to target all imports to Yuanda related companies and from Yuanda related suppliers.”⁹⁶

As part of its inquiries the Committee should query and receive advice (in camera if necessary) from the DIBP and/ or the ABF if each of the post- border detections outlined in this submission (the *Yuanda* products) and post-border detections of products and materials outlined in other submissions (including the ACTU submission and the ASEA’s submissions to this inquiry) matched what were existing profiles when they were actually imported or did not.

Section 5: Additional Matters

As outlined above, we participated in this Committee’s inquiry into this matter in the 44th parliament. We made a submission and provided subsequent verbal evidence in November 2015.

In our submission, we highlighted our concerns around non-conforming and non-compliant building products in addition to a number of other non-conforming and/or non-complying products, materials and equipment.

The building products we provided evidence on included:

- cladding;
- electrical cable;

⁹⁶ DIPB, ‘Response’, QUESTION TAKEN ON NOTICE SUPPLEMENTARY BUDGET ESTIMATES HEARING : 17 October 2016 IMMIGRATION AND BORDER PROTECTION PORTFOLIO (SE16/021) - Asbestos - Imported for use in Children's Hospitals in Perth - Programme 1.2: Border Management, p 2, available online @ http://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-021.pdf

- engineered wood products like formply, plywood and LVL beams;
- steel products;
- windows and glass products;
- doors;
- plastic pipes and fittings;
- asbestos laden building products;

The additional products we provided commentary on included:

- clothing (such as jeans) and bedding;
- mattresses;
- food (such as berries);
- flat pack furniture and kitchens;
- car parts;
- Childrens' toys.

Since providing the submission and verbal evidence there has been a number of other products which have come to our attention which are of concern. We take the opportunity to outline our concerns briefly.

Precast concrete panel/element cast in components

Precast concrete panels and other elements (columns, beams etc.) rely on cast in components for lifting, handling, temporary bracing and permanent tie-in to the structure.

Generally, cast in components include;

- Lifters (edge and/or face lifters – subject to the design of the element) where a crane's clutch can be attached to lift the element,
- Ferrules – a threaded shaft cast into elements to enable temporary braces etc. to be bolted onto the element to provide support to the element during construction and
- Stich plates which enable the panel/element to be bolted or welded tying it into the structure.

These components' properties requirements are set out in the Australian Standard AS3850 and deviation from these standards can lead to component failure. Component failure can lead to panel collapse the consequences of which can be fatal for construction workers and the general public.



Precast panel collapse into public car park, Donvale, Victoria, 2005.

Lifters

Precast panels/elements are lifted by attaching the crane's clutch to cast in lifters. Generally panels are lifted (and rotated if necessary) by "edge" lifters.

In accordance with the requirements of AS3850, "Lifting inserts shall be manufactured from ductile materials" and have "reliable homogenous mechanical properties." (*Clause 2.5.2.1, AS3850, part 1.*)

While in the past lifters have been generally manufactured in Australia, a growing number of lifters are being manufactured overseas with little if any oversight of imported components to ensure compliance with the relevant Australian Standard.

As the properties of the material used in manufacture are crucial to the safe use and operation of cast in components, deviation from the stated requirements can lead to failure placing workers and the general public at risk of collapse during the lifting and construction process.



Panel collapse during installation, Brunswick Vic. August 2011

While the collapse in the above incident was due to the use of the wrong type of lifter during panel manufacture, this type of incident is likely to occur if the properties of the material used to make lifters deviates from the property requirements in AS3850.



Cast in edge lifter tension test (photo supplied by R. Mackay-sim, 20th June 2014)

Ferrules

In evidence outlined in the Australian Industry Group's report: *The Non-Conforming Products Dilemma* the Australian Steel Institute (ASI) commented:

"The construction products industry in Australia is faced with a choice: it can follow a path of the lowest cost denominator in which case be exposed to the worst in quality the world can produce, or, it can implement product conformity systems similar to what is in place in most of the developed world that inform the client of achievement of levels of quality compliance benchmark. Nowhere is this better demonstrated than in the area of structural bolts where Australia has followed a path of lowest global cost, at the expense of functionality and safety,

whilst other countries like the USA and the UK have quickly implemented compliance procedures and have avoided our costly failures.”⁹⁷

The report provided evidence which suggested that “thousands of the poor quality bolts were used in the construction of a hangar that collapsed at RAAF Fairbairn in 2003. The bolts later failed when tested to Australian standards. The hangar’s collapse at RAAF Fairbairn in 2003 seriously injured 12 workers”.⁹⁸

We made reference to dyna bolts in our verbal evidence provided at the public hearing in Canberra in November 2015 and physically showed the committee some samples of non-conforming bolts intercepted prior to being able to be used in the Canberra construction industry.

We are increasingly aware and alarmed of ferrules being used in the construction industry (in applications such as bracing inserts for precast concrete panels) which do not conform to Australian Standards for strength requirements. The direct outcome of the use of non-conforming, substandard ferrules could be fatal/serious injuries to workers and/or the public resulting from precast concrete panel collapses.

We are aware of a number of incidences of the use of ferrules in recent years which have, during the installation of the panels broken along the ferrule’s shaft. Subsequently after testing of the products it has been proven that they have failed the hardness requirements of Australian Standards. As recently as the 1st December 2016 a ferrule failed during the installation on a precast panel in Brunswick, Victoria.

⁹⁷ The Australian Industry Group, The quest for a level playing field; The non-conforming building products dilemma, November 2013, p 8, available online @ http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Publications/Reports/2013/REPORT_NCP_FINAL.pdf

⁹⁸ Citing: Ewa Kretowicz, ‘Faulty bolts blamed for Fairbairn site accident, Canberra Times, April 1 2012’, available online @ <http://www.canberratimes.com.au/act-news/faulty-bolts-blamed-for-fairbairn-site-accident-20120331-1w5t9.html>



For reference: materials, components and equipment requirements are contained in Part 1, of AS 3850. Prefabricated concrete elements. Whereas PART 2 contains the testing requirements in Appendix A. Some of the suspicious products of concern are imported and are believed to be sourced from India. In addition to failing strength requirements there are instances that, in contravention of the standard as

specified in Section 2.4.1 of Australian Standards 3850 (Tilt up construction), the ferrules have not been marked with the manufacturer's name or symbol.

Stich plates

Stich plates (or fish plates) are cast into the panel/element to enable the element to be tied into the structure by bolting or welding.

Their size, dimensions and the type of steel they are manufactured from are crucial to the safe and secure tying into the structure. While the main industry suppliers have traditionally supplied reliable components consistent with the engineering requirements of the structural drawings, there is evidence that a growing number of precast manufacturers are sourcing cheaper plates from suppliers who solely import components.

Reid Ramsett, one of the main suppliers to the industry of precast components have indicated that they intend to vacate the cast in plate field as they cannot manufacture quality stich plates in accordance with the Australian Standard while trying to compete with cheap foreign manufactured plates that are being supplied to the industry.

Reports from welders working on a number of Victorian construction sites confirm that they are coming across more incidents involving cast in stich plates of incorrect depth, plates out of the dimensions stated in the structural drawings and plates made from "mongrel steel" that display qualities inconsistent with quality component manufacturing.



The back of a typical cast in plate

Bricks

We have evidence that suggests that General Purpose Bricks are being supplied on the Australian market which are under fired (i.e. they are not fired at the right temperature and/or for long enough) resulting in bricks that are soft / not durable and very susceptible to moisture. On questioning about the failure, it appears that the manufacturer has maintained that it is not their fault but the purchasers for not specifying and purchasing Exposure Grade Bricks.



These bricks were not fit for purpose

Regardless of who is correct (the claimant or the manufacturer) the product failure is caused by either non-conforming or non-complying product. If the issue is non-complying product then the non-compliance may have been caused by a number of factors. For example, it has been put to us that the requirements for the use of the conditions for Exposure Grade Bricks is not widely known by tradesmen; is not raised in Owner-Builder's courses (which bricks are often procured for); and is not always a condition of construction certificates etc.

If the issue is indeed non-compliance some remedies suggested to us include:

- Disclosure, packaging and labelling regulations be introduced to ensure that the distinction between Exposure Grade and General Purpose Bricks becomes common knowledge;
- The criteria requiring Exposure Grade bricks be uniform and regulated;
- The term "Non-Exposure Grade" bricks replace the term "General Purpose" bricks.

Appendix 1

CFMEU National Conference Resolutions 2014 and 2016

In 2014, The CFMEU National Conference which is the key decision making body of our union's 120,000 strong membership passed the following resolution:

CFMEU National Conference Resolution 2014-

Australian Standards

"Imported manufactured building products and materials that do not conform to Australian safety and performance standards undercut and cost Australian manufacturing jobs. They also endanger lives and the health and safety of workers in the construction industry and in mining communities.

A report by an Industry Association in November 2013 found the widespread use of non-conforming products across the building and construction sector. The report found 92% of surveyed companies in steel, electrical, glass and aluminium, engineered wood, plastic pipe and fittings and paint sectors reported non-conforming imported products in their supply chains. A recent recall of sub-standard cable imported from China which cost Australian manufacturing jobs and was installed in 40,000 houses and could cause electrical shock and fire is just one of many cases in point.

Prior to the 2013 election, the now Abbott Coalition Government made many commitments that, if elected, they would ensure that they would change Australia's standards regime so that imported products comply with the same standards as locally-made goods. However despite a year in Government no such measures have been taken.

The 2014 CFMEU National Conference:

1. Endorses the Union's campaign to ensure imported manufactured products conform to Australian Standards.
2. Commits itself to a campaign directed at the Abbott Coalition Government to meet their commitment to the Australian people by:
 - Establishing an agency or commission charged with standards conformity compliance assurance for imports
 - Ensuring all pertinent Australian Standards related to building and construction products and materials are enforced on Australian projects
 - Overhauling and strengthening the penalty regime for falsely and misleadingly claiming a product meets the requirements of Australian Standards."

The CFMEU at its 2016 National Conference passed the following resolution:

CFMEU National Conference Resolution 2016-

Imported Building Products and Imported Asbestos

"This CFMEU National Conference acknowledges the 2003 ban on Asbestos Importation into Australia has failed.

This is putting working people and their families' lives at risk. This year more than 700 people across Australia will lose their lives due to the exposure of Chrysotile Asbestos.

Australian workers are still the front line in detecting asbestos coming in to our schools, kindergartens, childcare centers, trains, tram substations, building and construction sites, hospitals and other government buildings.

We note with grave concern the recent discovery of deadly asbestos laden materials in inferior imported building products at 1 William Street in Queensland and the Perth Children's Hospital Project (PCH) in Western Australia.

This is completely unacceptable, particularly on the State Government funded Perth Children's Hospital Project (the Project), which will look after sick kids in the WA community in the future.

Many workers that have been impacted by asbestos exposure are extremely stressed and will now live with years of anxiety, not only for themselves, but for the health of their families.

We condemn the Federal Government for their lackluster approach to the importation of inferior building products. It is completely unacceptable that companies are getting away with importing cheap substandard building products to save a buck.

These products often do not meet Australian standards. This is largely going undetected in our community.

Construction companies and importers must come to understand that Australia will not accept this deadly substance in our workplaces. There must be strong consequences for those who expose our community to harm, whether it be through ignorance or willful breaches of our laws.

The CFMEU has consistently been at the forefront of campaigning against substandard building projects, which pose a significant threat to workers health. We resolve to continue to advocate for improved Border Protection Policies, which will protect construction workers and the wider community, including but not limited to advocating for:

1. Increased surveillance and screening of imported building products as well as a greater preparedness to enforce the penalties available under current regulations
2. Ensuring compliance certification carried out within foreign countries sovereign borders is bona fide;
3. Increasing the penalties for importing the hazardous product; and
4. The implementation of a more stringent regime to scrutinise building products on construction projects.

This Conference calls on the Federal Government to:

5. Direct all State & Territory Safety Regulators to prosecute negligent companies who import asbestos and thereby breach both State and Federal regulations.
6. Direct State & Territory Safety Regulators to prosecute those companies who are found to have exposed their workers to any form of imported Chrysotile Asbestos; and
7. Create an obligation on the owners and operators of buildings, components and infrastructure to remove and dispose of asbestos containing materials which have been commissioned or installed contrary to Australian law.

Further this conference acknowledges the collaborative work of the BWI and APHEDA in the push to create asbestos bans in South East Asia and the need for the CFMEU to support this ongoing work.