Senate Standing Committee on Economics Inquiry into Non-Conforming Building Products:

Illegal importation of products containing asbestos

Australian Council of Trade Unions
Supplementary Submission, 24 October 2017
D No. 127/2017

INTRODUCTION

The Australian Council of Trade Unions (**ACTU**) thanks the Secretariat for the opportunity to make this supplementary submission in support of Recommendation 8 of the ACTU submission to the Senate Standing Committee on Economics Inquiry into Non-Conforming Building Products: Illegal importation of products containing asbestos (**Inquiry**).

Recommendation 8 called for the *Customs Act 1901* (Cth) (**Customs Act**) to be reformed in a manner which facilitates a greater number of successful prosecutions of entities and individuals that illegally import asbestos and asbestos containing materials (**ACM**). The recommendation in part responded to additional term of reference (asbestos) (c)(i) of the Inquiry, which enquires into 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 enforcement and restrictions and penalties imposed on importers of products containing asbestos.

Widespread suffering and death due to historical industrial use of asbestos has shaped Australia's hard line stance in respect of asbestos. In 2003, Australia imposed a strict prohibition on the sale, use and import of asbestos. The strictness of the Australian prohibition is almost unique: firstly, because it relates to all forms of asbestos, but chrysotile and other forms are not internationally recognised as dangerous; and secondly, because it requires nil asbestos content in all goods, where most customs administrations apply standards that provide for a maximum allowable limit of asbestos content.[1] The strict prohibition reflects established community standards in Australia that there is no acceptable level of risk in respect of asbestos.

The current regulatory framework for ensuring products containing asbestos are not illegally imported into Australia is failing the community, as evidenced by continued detections of asbestos and ACMs in imported goods and the very limited number of full investigations and subsequent prosecutions since the prohibition

[1] KGH Border Services, *Asbestos Importation Review Report*, Reference No. 1600018, March 2016 (**KGH Review**), 5.

was introduced in 2003.[2] The potential for asbestos contamination 'continues to be a sensitive issue affecting the national dialogue with the business community, workers' unions and the public at large, and remains of ongoing concern to the Australian Government'.[3]

In response, the Commissioner of the Australian Border Force (**ABF**) commissioned KGH Border Services to conduct a review to examine the effectiveness of the Department of Immigration and Border Protection's (**DIBP's**) internal processes and procedures for managing the asbestos border control (**KGH Review**).[4] The KGH Review found that the limited number of investigations and prosecutions is because it is difficult to prosecute against the honest and reasonable mistake of fact defence, which is available in relation to the importation offence as a strict liability offence.[5] The KGH Review recommended that the DIBP further prioritise the investigation to improve prosecution of offences related to asbestos importation.[6]

The ACTU notes that since filing its original submission in January of this year, the ABF has implemented a risk assessment of 100 per cent of goods coming into Australia and targets those at risk of containing asbestos,[7] and the *Building and Construction Legislation (Non-conforming Building Products — Chain of Responsibility and Other Matters) Amendment Bill 2017* (Qld) (**Queensland Bill**) has been introduced into the Queensland Parliament. The ACTU takes this opportunity to make further recommendations in response to these key events.

[2] KGH Review, 3 and 29.
[3] KGH Review, 3.
[4] KGH Review, 3.
[5] KGH Review, 29.
[6] KGH Review, 29.
[7] Department of Immigration and Border Protection Notice No. 2017/21, 'Assurances that imported goods do not contain asbestos'.

RECOMMENDATIONS

The ACTU submits that the Committee gives consideration to:

1. Narrowing the operation of the honest and reasonable mistake of fact defence (for example, by introducing specialised statutory defences), or changing the existing offence to an absolute liability offence by removing availability of the mistake of fact defence;

2. Creating an additional tier of serious offence that includes a fault element (for example, negligence) and attracts a higher penalty; and

3. Creating an alternative civil penalty regime which attracts significant penalties.

The ACTU further submits that the Committee also give consideration to:

4. The introduction of a mandatory testing regime requiring a sample of at risk goods to be tested in Australia prior to importation;

5. Incorporating aspects of the Queensland Bill into federal legislation and/or taking steps to develop a uniform national model bill based on the Queensland Bill, to be adopted by the states and territories.

RECOMMENDATION 1: RESTRICT OR REMOVE THE MISTAKE OF FACT DEFENCE

The importation of asbestos or ACMs is a strict liability offence. Where strict or absolute liability applies to an element of an offence, that element will be made out if it is shown that the physical elements were engaged in or existed. The prosecution is not required to prove fault. The difference between strict and absolute liability is that strict liability allows a defence of honest and reasonable mistake of fact to be raised while the application of absolute liability does not. Instances of absolute liability may also commonly involve displacement of the defence of mistake of fact by specialised statutory defences which narrow its scope, such as 'due diligence' or 'reasonable steps'.[8]

Australian legislatures can and often do raise, lower or remove the fault requirement to achieve certain results,[9] such as an effective enforcement scheme and optimum use of enforcement resources. However, because the requirement for proof of fault is a fundamental protection in criminal law, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (**Guide**) recommends that strict and absolute liability should only be used in limited circumstances and where there is adequate justification for doing so.[10] The Guide notes that applying strict or absolute liability to a particular physical element of an offence may be justified where:

- requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct;
- there are legitimate grounds for penalising persons lacking 'fault' in respect of that element, for example, because he or she will be placed on notice to guard against the possibility of any contravention; and
- in the case of absolute liability, there are also legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.[11]

The Attorney-General's Department has indicated that there may be legitimate grounds for penalising a person who made a reasonable mistake of fact where inadvertent errors, including those based on a mistake, ought to be punished.[12]

Further, application of strict or absolute liability to all physical elements of an offence is generally only considered appropriate where:

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[8] Commonwealth Attorney-General's Department and the Australian Institute of Judicial Administration, *The Commonwealth Criminal Code: A Guide for Practitioners* (**Criminal Code Guide**), March 2002, 121.
[9] Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2nd ed, 2017) 144.
[10] Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (**Guide to Framing Offences**), September 2011, 22.
[11] Guide to Framing Offences, 22-24.
[12] Cited by the Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002, 260.

- the offence is not punishable by imprisonment;
- the offence is punishable by a fine of up to:
  - 60 penalty units for an individual (300 for a body corporate) in the case of strict liability; or
  - 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability.[13]

However, a higher maximum fine may be used where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.[14] Offences of strict or absolute liability are most common and appropriate where the consequences for the community are serious and it is necessary to ensure the integrity of the regulatory regime, such as public health, environment or safety.[15] These are areas in which there are accepted community standards and a well-established public interest component.[16] The prohibition on the importation of asbestos and ACM is within this category. The object of offences in these areas is not to punish isolated acts of moral culpability but to promote higher standards of care in business, trade and industry and to protect public goods such as health and environment.[17]

In this case, the legislature has already determined that there is adequate justification for the offence to be a strict liability offence. However that framing is not working. As noted above, the KGH review identified that the limited number of investigations and prosecutions is because it is difficult to prosecute against the mistake of fact defence.[18] The successful prosecution of offences improves the deterrent effect of enforcement provisions. Conversely, non-compliance will arise if there are no consequences for a failure to comply with positive obligations – as can be seen in this case, asbestos and ACMs continue to be detected in imported goods despite the prohibition.

Offences of absolute liability are generally considered more appropriate and will provide a more effective deterrent where the defendant is well-placed to take extra care to ensure that the offence is not committed.[19] That is the way in which these offences operate to improve standards of care and behaviour. The ABF is

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[13] Guide to Framing Offences, 23.
[14] Guide to Framing Offences, 23, citing the Government Response to the Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002.
[15] See, eg: Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002, 284; Guide to Framing Offences, 24; Australian Capital Territory Standing Committee On Legal Affairs, *Strict and Absolute Liability Offences*, Report 7, February 2008; New South Wales Legislation Review Committee, *Strict and Absolute Liability*, Discussion Paper 2, June 2006; Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* ALRC Interim Report 127, August 2015; Janet McDonald, Criminal Enforcement Of Environmental Non-Compliance (1992) 4 Australian Environmental Law News 27, 31.
[16] Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002, 284.
[17] Law Reform Commission of Canada, *The Meaning of Guilt: Strict Liability*, 1974, 32, quoted in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (**Principled Regulation**), Report 95, December 2002, 67; Philip Clifford and Sharon Levy, 'Problems with Defending Crimes Against the Environment', proceedings of Environmental Crime conference held 1-3 September 1993, Hobart.
[18] KGH Review, 29.
[19] Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002.

clear that it is the responsibility of importers to ensure that they do not import asbestos or ACM, and provides guidance to importers to undertake this task.[20] Importers are encouraged to engage with their overseas suppliers early and confirm that asbestos was not used in the supply chain.[21] Importers are also encouraged to implement contractual obligations with their suppliers specifying nil asbestos content, testing for asbestos content prior to shipping the goods to Australia and regular risk assessment and quality assurance processes.[22] Importers may also seek to have their goods tested in Australia prior to importation.[23]

These steps are available to importers to ensure that they comply with the prohibition and avoid committing the offence. They could also form the basis of a specialised statutory defence, to provide importers with specific statutory guidance as to what are reasonable steps to avoid committing the offence. Any concerns about the potential unfair impact of reducing access to the defence of mistake of fact or introducing an offence of absolute liability could be mitigated by a departmental focus on education and encouraging and assisting importers to achieve compliance.

The ACTU therefore recommends that the Committee gives consideration to amending the offence to facilitate a greater number of successful prosecutions by:

1. narrowing the operation of the honest and reasonable mistake of fact defence (for example, by introducing specialised statutory defences); or

2. changing the existing offence to an absolute liability offence by removing availability of the mistake of fact defence.

[20] Australian Border Force, 'Managing the risk of asbestos at the border': https://www.border.gov.au/Importingandbuyinggoodsfromoverseas/Documents/asbestos-border-factsheet.pdf.
[21] Australian Border Force, 'Managing the risk of asbestos at the border': https://www.border.gov.au/Importingandbuyinggoodsfromoverseas/Documents/asbestos-border-factsheet.pdf.
[22] Australian Border Force, 'Managing the risk of asbestos at the border': https://www.border.gov.au/Importingandbuyinggoodsfromoverseas/Documents/asbestos-border-factsheet.pdf.
[23] Australian Border Force, 'Managing the risk of asbestos at the border': https://www.border.gov.au/Importingandbuyinggoodsfromoverseas/Documents/asbestos-border-factsheet.pdf.

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RECOMMENDATIONS 2 AND 3: CREATING A FLEXIBLE ENFORCEMENT REGIME

Recommendations 2 and 3 work together to create a flexible enforcement regime that offers the regulator options to secure compliance with the prohibition. The creation of an additional tier of serious offence that includes a fault element and the creation of an alternative civil penalty regime are intended to provide the regulator with a range of enforcement options that escalate in cost (to the regulator) and severity (to the defendant).

The ability to impose (or threaten to impose) a variety of sanctions means that the regulator is not forced to choose between low-cost, low-impact remediation and high-cost, high-impact criminal sanctions.[24] The regulator can tailor its response to actors who are subject to different motivational factors and to the circumstances of the case, such as degree of culpability or availability of evidence.[25] Research suggests that 'the bigger and more various the sticks, the more regulators will achieve success by speaking softly'.[26]

The Australian Law Reform Commission has said:

> *Provided that there are clear and consistent guidelines governing decisions about the choice of proceedings, and provided that regulators do act consistently, bearing in mind previous decisions in like cases, then the advantages to be obtained in permitting a choice of proceedings is clear.*[27]

It is expected that the regulator will be able to encourage voluntary compliance by commencing with the least severe option in the majority of cases (being education and encouraging voluntary compliance) and escalating up in response to continued or serious non-compliance (being the more serious fault-based criminal offence).[28]

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[24] Todd Lochner and Bruce E Cain, 'Equity and Efficacy in the Enforcement of Campaign Finance Laws' (1999) 77 *Texas Law Review* 1901-1902, quoted in Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice', (2009) 33 *Melbourne University Law Review* 911.

[25] For example, actors may be motivated by a sense of social responsibility, a concern with public image, or influenced solely by economic considerations: Principled Regulation, 111 and 124, quoting Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

[26] John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2 Current Issues in Criminal Justice 59, 59, quoted in Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice', (2009) 33 *Melbourne University Law Review* 911, 915.

[27] Principled Regulation, 125 [3.85] (emphasis added).

[28] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), cited in Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice', (2009) 33 *Melbourne University Law Review* 911, 911.

Recommendation 2: Create an additional tier of serious offence that includes a fault element

In a regulatory context, criminal sanctions may serve as a last-resort punishment for repeated or willful violations.[29] For example, in environment law regimes criminal prosecutions serve as the final sanctioning mode.[30] Criminal sanctions attach to conduct that is clearly deserving of moral censure and stigma, to indicate society's condemnation of that behaviour.[31] Having a serious offence at the top of the regulatory pyramid that carries significant sanctions stimulates greater voluntary regulatory compliance.[32]

There are various degrees of fault that can attach to a criminal offence, ranging from negligent (the least serious), to recklessness, knowledge or intention (the most serious). The reference to 'fault' in relation to negligence and recklessness indicates the blameworthiness of conduct which violates standards of appropriate behaviour, being a departure from appropriate standards of care (negligence) or unjustified risk (recklessness).[33] A person has knowledge of a circumstance or result if he or she is aware that it exists or will exist in the ordinary course of events.[34] A person has intention if he or she means to engage in the conduct.[35] The ACTU recommends that the Government give consideration to the creation of an additional tier(s) of serious offence(s) that include at least one, if not all, of these fault elements.

Environmental protection legislation provides a ready example of tiered hierarchy of offences. The *Protection of the Environment Operations Act 1997* (NSW) (**Act**), for example, establishes a three-tier hierarchy of pollution offences. Tier 1 are the most serious and involve willful or negligent activities that harm or are likely to harm the environment. They can attract penalties of up to $5 million and 7 years imprisonment. Tier 2 are serious offences that are strict liability offences, but which attract significant penalties. Tier 3 are the least serious. They are absolute liability offences for which a penalty notice can be issued. The Act also empowers the court to make a range of orders additional to financial penalties and imprisonment, including to prevent recurrence or to publicise the offence, and includes sentencing criteria, vicarious criminal liability for companies, directors and managers for the acts of their employees. Environmental regulators have reported that the range of regulatory options provide flexibility and a mechanism to tailor responses appropriately to specific contraventions and the individual circumstances of each case.[36]

The ACTU therefore submits that the Committee gives consideration to:

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[29] Principled Regulation, 72.
[30] Principled Regulation, 72.
[31] Principled Regulation, 130.
[32] George Gilligan, Helen Bird and Ian Ramsay, 'Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?' (1999) Centre for Corporate Law and Securities Regulation Research Report; Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice', (2009) 33 *Melbourne University Law Review* 911, 911.
[33] Criminal Code Guide, 13 and 15.
[34] Criminal Code Guide.
[35] Criminal Code Guide.
[36]. Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002.

1. creating an additional tier of serious offence(s) that includes a fault element (for example, negligence) and attracts a higher penalty.

Recommendation 3: Create an alternative civil penalty regime

The prohibition on importing asbestos or ACMs is a criminal offence. For the reasons discussed above in relation to Recommendations 2 and 3, the ACTU recommends that the Government gives consideration to establishing an alternative civil penalty regime for the same conduct.

Civil penalty provisions are founded on the notion of preventing or punishing public harm.[37] The contravention may itself be similar to a criminal offence and may involve the same or similar conduct, and the purpose of imposing a penalty may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court processes.[38]

Civil monetary penalties play a key role in regulation as they may be sufficiently serious to act as a deterrent (if imposed at a high enough level) but do not carry the stigma of a criminal conviction.[39] The deterrent aspect is commensurate with the level of penalties, which may be more severe than criminal penalties in many cases.[40] Further, the penalty must be sufficient to justify court proceedings.[41] The ACTU therefore recommends that a new civil penalty offence(s) attract significant penalties.

Civil sanctions are considered appropriate where there is a continuing relationship between the regulator and the regulated,[42] as is the case with importers. The greater flexibility and range of civil sanctions make them the preferred mode of control where persuasion, negotiation and voluntary compliance are views as the techniques most likely to achieve compliance.[43] Criminal sanction is suitable for the control of isolated conduct, while civil sanction is appropriate where continuous surveillance is desired.[44]

Civil penalties are also considered appropriate where there is corporate wrongdoing and imprisonment is not available.[45] The financial disincentive that civil penalties provide is most likely to be useful and effective to deter companies from breaching the importation prohibition.[46]

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[37] Principled Regulation, 73.
[38] Principled Regulation, 73.
[39] Principled Regulation, 77.
[40] Principled Regulation, 73.
[41] Guide to Framing Offences.
[42] Principled Regulation, 77.
[43] Principled Regulation, 77, quoting A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', Thesis, 1985, 120.
[44] Principled Regulation, 77, quoting A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', Thesis, 1985, 120.
[45] Guide to Framing Offences.
[46] Guide to Framing Offences.

A further reason for the introduction of a civil penalties regime is to increase the likelihood of successfully prosecuting offenders, given the lower standard of proof and simpler procedural process.[47] As already discussed, improved prosecution rates would improve the effectiveness of the prohibition. Criminal penalties are generally more likely to deter than civil ones, but only given effective enforcement.[48] If criminal penalties are difficult to obtain, as is the case in respect of the existing strict liability offence, an alternative civil regime might assist to generate compliance by securing improved prosecution rates.[49]

The ACTU therefore submits that the Committee gives consideration to:

1. creating an alternative civil penalty regime which attracts significant penalties.

[47] Principled Regulation, 77.
[48] Principled Regulation, 121.
[49] Principled Regulation, 121.

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RECOMMENDATIONS 4 & 5: RESPONDING TO RECENT EVENTS

Recommendation 4: Introduce a mandatory testing regime for at risk goods

As noted, the ABF has recently begun to risk assess 100 per cent of goods entering Australia, to target those considered at risk of containing asbestos.[50] 'At risk' goods may include goods that are known to contain asbestos, are supplied from countries with asbestos-producing industries, and/or are shipped from overseas suppliers previously identified as sending asbestos or goods containing asbestos to Australia.[51]

The ACTU submits that the Committee gives consideration to:

1. the introduction of a mandatory testing regime requiring a sample of at risk goods to be tested in Australia or at a NATA approved overseas laboratory prior to importation.

Recommendation 5: Adopt best practice from the Queensland Bill

The Queensland Bill in many respects represents a best practice 'chain of responsibility' approach to ensure that building products are fit for purpose. For example, the Queensland Bill:

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

The ACTU submits that the Committee gives consideration to:

[50] Department of Immigration and Border Protection Notice No. 2017/21, 'Assurances that imported goods do not contain asbestos'.
[51] Department of Immigration and Border Protection Notice No. 2017/21, 'Assurances that imported goods do not contain asbestos'.

1. Incorporating aspects of the Queensland Bill into federal legislation and/or taking steps to develop a uniform national model bill based on the Queensland Bill, to be adopted by the states and territories.

CONCLUSION

Improving the effectiveness of enforcement is critical to achieving the legislative policy of ensuring that products containing asbestos are not illegally imported to Australia. The Government has a range of options available to it to facilitate a greater number of successful prosecutions of entities and individuals that illegally import asbestos and ACM.

This supplementary submission recommends reforms of the current regulatory framework to improve the enforcement and prosecution of offences in respect of the illegal importation of asbestos and ACM into Australia. We note however that these options are not exhaustive, and urge the Government to do its job and take responsibility for the poor enforcement and ineffectiveness of the existing prohibition – both through law reform and additional resourcing for investigation and prosecution. This submission also makes recommendations to prevent importation of asbestos and ACM into Australia and to ensure that building products are fit for purpose.