



Australian Government

Department of Employment

SENATE ECONOMICS REFERENCES COMMITTEE
INQUIRY INTO NON-CONFORMING BUILDING PRODUCTS

**SUBMISSION OF THE
DEPARTMENT OF EMPLOYMENT**

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Introduction

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Economics References Committee Inquiry into Non-conforming Building Products, with particular reference to the Inquiry's additional terms of reference addressing the importation of products containing asbestos.

Purpose of submission

2. This submission provides the Committee with information on:
 - relevant legislation banning the import and export of asbestos and work health and safety (WHS) legislation governing the removal and management of asbestos in workplaces
 - the coordination of Commonwealth, state and territory government responses to incidents of imported asbestos, and
 - Australian Government actions to coordinate a strategic approach to preventing the importation of products containing asbestos.

Work health and safety and customs legislation

Asbestos import and export prohibition

3. Australia was one of the highest users of asbestos and asbestos containing material in the world up until the mid-1980s¹, when bans concerning its use started to be imposed.
4. A total ban on the manufacture, use, reuse, import, transport, storage or sale of all forms of asbestos and asbestos-containing materials (ACMs) within Australia came into effect on 31 December 2003 under Commonwealth, state and territory work health and safety legislation. The ban is complemented by import and export prohibitions under the *Customs (Prohibited Imports) Regulations 1956* and the *Customs (Prohibited Exports) Regulations 1958*.
5. Australia has a 'zero tolerance' importation prohibition meaning that all forms of asbestos and goods containing asbestos are prohibited with no allowance provided for trace levels of asbestos. Other countries, such as the United States, continue to permit the import, manufacture and use of certain materials that have traditionally contained asbestos². In countries like Russia and China, while there are bans on the import and use of certain forms of asbestos, such as amphibole asbestos, other forms of asbestos such as chrysotile remain widely used³.
6. Regulation 4C of the *Customs (Prohibited Imports) Regulations 1956* prohibits the importation of asbestos, or goods containing asbestos, except in very limited circumstances, such as where the Minister for Employment has provided permission to import asbestos for the purpose of research, analysis or display.
7. Importers are responsible for ensuring that materials they import into Australia do not contain asbestos. The penalty for illegally importing asbestos or ACMs is \$180,000 for individuals (\$900,000 for corporations), or up to three times the value of the goods.
8. Regulation 4 of the *Customs (Prohibited Exports) Regulations 1958* prohibits the exportation of asbestos, or certain goods containing asbestos, from Australia unless a permission or exemption has been granted or a lawful exception applies.

¹ Asbestos Management Review Report – June 2012, p. 2

² <https://www.epa.gov/asbestos/us-federal-bans-asbestos> (accessed on 12 January 2017)

³ http://ibasecretariat.org/asbestos_ban_list.php (accessed on 12 January 2017)

Work health and safety legislation approach to managing asbestos

9. The development of the model WHS laws and regulations from 2008 provided an opportunity to develop nationally harmonised laws that continued the existing domestic ban on asbestos and ACMs, but also harmonised requirements for identifying, managing and removing asbestos and ACMs from workplaces, including nationally consistent training and licensing for asbestos removalists.
10. It also provided an opportunity to revise the definition of asbestos to clarify the scope of the domestic ban on asbestos as applying to 'asbestiform' varieties of the six minerals that have had commercial use as asbestos, rather than fibrous forms of those minerals which is not as clear. However, the import and export prohibition in the *Customs (Prohibited Imports) Regulations 1956* and *Customs (Prohibited Exports) Regulations 1958* continue to apply to the fibrous forms of those minerals.
11. The model WHS Act and Regulations have been adopted in all jurisdictions except Victoria and Western Australia and commenced in most jurisdictions from 1 January 2012. Victoria and Western Australia have similar laws on the management of asbestos and ACMs in workplaces as the model laws.
12. Under the model WHS Act and Regulations, ACMs already in situ prior to 1 January 2004 are not required to be removed. Only when ACMs require maintenance, service, or are damaged is removal considered as a control measure to protect against risks to health.

General work health and safety duties

13. The model WHS Act imposes a primary duty on a person conducting a business or undertaking (PCBU) to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking, and that other persons' health and safety is not put at risk by work carried out as part of the conduct of the business or undertaking: see s 19(1) and (2). Section 19(3) also expressly requires a PCBU to do certain things in relation to the workplace, such as to ensure, so far as is reasonably practicable:
 - the provision and maintenance of a work environment without risks to health and safety
 - the provision and maintenance of safe plant and structures
 - the safe use, handling and storage of plant, structures and substances, and
 - that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.
14. The primary duties in s 19 apply to all PCBUs in relation to all workplace hazards, including asbestos.
15. There are also a number of 'upstream' duties in ss 20 – 26 of the model WHS Act that are relevant to asbestos in the workplace. For example:
 - s 21 provides that a person with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person.
 - s 24 provides, among other things, that an importer must ensure, so far as is reasonably practicable, that imported plant, substance or structure is without risks to the health and safety of persons who use, handle or store plant or substance at a workplace, or who construct a structure at the workplace.

Work health and safety regulations on asbestos

16. In addition to these general duties under the model WHS Act, the model WHS Regulations specify additional requirements applying to asbestos: Part 8. The model WHS laws are also supported by model codes of practice, guidance material and information sheets that deal expressly with asbestos.
17. The general duties of the model WHS Act and the model WHS Regulations and Codes of Practice apply equally to all asbestos and ACMs, including ACMs that are in situ prior to the implementation of the total

ban from 31 December 2003 and any materials imported following the implementation of the ban that are found to contain asbestos.

18. Regulation 419 of the model WHS Regulations prohibits a PCBU from carrying out, or directing or allowing a worker to carry out, work that involves manufacturing, supplying (including the sale of), transporting, storing, removing, using, installing, handling, treating, disposing or disturbing asbestos or ACMs, except in prescribed circumstances.
19. Regulation 422 imposes a duty on a person with management or control of a workplace to ensure, so far as is reasonably practicable, that all asbestos or ACMs at the workplace is identified by a competent person. Identification may occur by sending a sample for analysis at a laboratory that is either National Association of Testing Authorities (NATA) accredited, or a laboratory approved or operated by the relevant Work health and safety regulator: reg 423.
20. If asbestos or ACMs at the workplace is identified its presence and location must be clearly indicated by a label (if it is reasonably practicable to do so); reg 424. Asbestos at the workplace must also be recorded in an asbestos register: reg 425-426, and an asbestos management plan prepared: reg 429-430.
21. Should a PCBU decide to remove asbestos or ACMs at the workplace, the PCBU must comply with the requirements prescribed in the Regulations for the removal of asbestos, including provision of training, health monitoring, air monitoring, competencies, licensing and regulator notification of removal work. Nationally consistent units of competency have been developed for asbestos awareness, Class A and B asbestos removal license holders, asbestos assessors and removal supervisors, and for the issuing of clearance certificates.
22. There are a number of options available to work health and safety regulators to enforce compliance with these obligations. For example, a work health and safety regulator can issue improvement notices or prohibition notices, seek an injunction against a person who does not comply with such a notice, accept enforceable undertakings, and/or pursue a criminal prosecution against a PCBU for an offence against the model WHS Act.

Asbestos Codes of Practice

23. The model Code of Practices: *How to manage and control asbestos in the workplace* and *How to safely remove asbestos* have been developed to provide guidance on PCBU's obligations under the model WHS laws and provide examples of best practice when dealing with asbestos or ACMs in the workplace. They also include information on the restrictions around management of asbestos related risks and removal of asbestos or ACMs, including:
 - identification and confirmation through testing of asbestos at the workplace
 - asbestos registers
 - asbestos management plans
 - air monitoring and the workplace exposure standard
 - health monitoring
 - safe work practices
 - asbestos removal control plans
 - limiting access and signage
 - removal processes (methods, enclosures, tools and equipment, PPE, decontamination)
 - waste containment and disposal, and
 - clearance inspections.

Coordination of agencies with asbestos responsibilities

24. Asbestos safety is a complex policy and operational area that requires coordinated efforts to be taken by a number of Commonwealth, state and territory government agencies with responsibilities across a broad range of areas including; workplace safety, border protection, environmental protection, public health and consumer safety.
25. The sections below outline the responsibilities of the Department of Employment and its portfolio agencies.

Department of Employment

26. The Department of Employment has broad responsibilities for developing policy to protect the safety of Australian workers. Asbestos presents a significant threat to Australian workers. The department has responsibility for developing policy in relation to the asbestos import and export bans to the extent that it supports the domestic workplace ban.
27. The Department also has responsibility for Australian Government policy on the national harmonisation of work health and safety laws and for the Commonwealth's own work health and safety jurisdiction under the *Work Health and Safety Act 2011 (Cth)* and *Work Health and Safety Regulations 2011*.

Safe Work Australia

28. Safe Work Australia is the independent body that leads the development of policy to improve WHS and workers' compensation arrangements across Australia. This includes developing and revising, if necessary, the model WHS laws and monitoring their implementation in jurisdictions.
29. In addition to the development of model WHS laws relating to workplace asbestos, Safe Work Australia contracts a consortium led by the Cancer Institute NSW to manage the Australian Mesothelioma Registry (AMR). The AMR collects and reports data on new cases of mesothelioma diagnosis based on notifications from jurisdictional cancer registries, as well as information on asbestos exposure experiences through surveys and interviews of mesothelioma patients.
30. Safe Work Australia is not a work health and safety regulator and does not have any responsibility for enforcing work health and safety laws and regulations in Australian workplaces. Safe Work Australia also does not have any role in relation to the laws that prohibit the importation of ACM into Australia.

Comcare

31. Comcare is the Commonwealth work health and regulator responsible for enforcing the *Work Health and Safety Act 2011* and *Work Health and Safety Regulations 2011* in workplaces covered by those laws (which include Commonwealth departments and agencies and private sector licensees). Comcare also has functions and responsibilities for managing asbestos-related claims under the *Safety Rehabilitation and Compensation Act 1988* and the *Asbestos-related Claims (Commonwealth Liabilities) Act 2005*.
32. Comcare's regulatory duties include responding to incidents where imported asbestos is discovered in workplaces. For example, Comcare responded to the discovery of asbestos in recently installed roof panels at the Perth Children's Hospital, where licensee John Holland Pty Ltd is the lead building contractor. Comcare engaged closely with Western Australian work health and safety and building regulators as part of a combined response to this incident. An investigation into this incident is ongoing.

Asbestos Safety and Eradication Agency

33. The National Strategic Plan for Asbestos Management and Awareness was launched by Commonwealth, state and territory work health and safety Ministers in August 2015. The National Strategic Plan represents an agreed national approach to tackling the threat of asbestos. The aim of the Plan is to prevent exposure to asbestos fibres in order to eliminate asbestos-related disease in Australia. To achieve this, the Plan has six strategies to achieve that aim covering awareness, best practice, identification, removal, research and international leadership.

34. The Asbestos Safety and Eradication Agency is responsible for liaising with Commonwealth, state and territory governments to encourage, coordinate, monitor and report on the implementation of the National Strategic Plan. To facilitate this function, the Agency has a function to liaise with Commonwealth, state and territory governments on asbestos safety and commission, monitor and promote research about asbestos safety.
35. The Agency is not a regulator. It does not have any responsibility for enforcing laws on the management of asbestos in workplaces or in the community. The Agency also does not have any function to implement programs that contribute to achieving the outcomes of the National Strategic Plan relating to the identification, management and removal of asbestos.
36. The Agency plays an important role working across Commonwealth, state and territory government agencies to coordinate the implementation of the National Strategic Plan and liaise about asbestos safety. This work has included assisting Commonwealth, state and territory regulators to respond to imported asbestos incidents through its participation on the Heads of Workplace Safety Authorities (HWSA) Imported Materials with Asbestos Working Group.

Heads of Workplace Safety Authorities Imported Materials with Asbestos Working Group

37. The HWSA Imported Materials with Asbestos Working Group was established in 2013 following the discovery that motor vehicles with gaskets containing asbestos were being imported into Australia. The Working Group includes representatives from:
 - the Asbestos Safety and Eradication Agency
 - Commonwealth, state and territory work health and safety regulators
 - the Australian Competition and Consumer Commission
 - the Department of Immigration and Border Protection/Australian Border Force
 - Safe Work Australia, and
 - WorkSafe New Zealand and the New Zealand Ministry for the Environment.
38. The Working Group was established to respond to incidents where imported goods that may contain asbestos have been identified in workplaces or in the community and share information with the Department of Immigration and Border Protection and Australian Border Force to help them prevent further import incidents.
39. The Working Group has developed a rapid response protocol for responding to incidents. The protocol ensures that relevant information is shared by all government agencies and enables a nationally uniform enforcement approach to be undertaken in response to incidents. The protocol allows for quick communication to the community about the safe handling and disposal of goods that contain asbestos.
40. Imported asbestos incidents where the Working Group has enacted the rapid response protocol have included when asbestos was detected in crayons and in cement fibre boards that were imported for use within Australian construction.

Commonwealth Government coordination

41. As stated above, dealing with the presence of asbestos in supply chains is a complex policy and operational issue that reaches across a number of policy and regulatory areas. Effectively addressing this issue requires a coordinated approach from relevant Australian Government departments and agencies, in consultation with state and territory government agencies and regulators and stakeholders.
42. The Department of Employment and the Department of Immigration and Border Protection co-chair an Interdepartmental Committee (IDC) to improve the coordination of asbestos policy and regulatory issues across the Commonwealth. The IDC consists of a number of Commonwealth policy departments and

agencies, reflecting the wide reach of asbestos issues across portfolio lines and the need for a coordinated approach to holistically address asbestos issues. The IDC includes:

- the Department of Employment
- the Department of Immigration and Border Protection
- the Department of Foreign Affairs and Trade
- the Department of Industry, Innovation and Science
- the Department of Environment and Energy
- the Department of Infrastructure and Regional Development
- the Treasury
- the Australian Competition and Consumer Commission, and
- the Department of Health.

43. Relevant Commonwealth agencies such as the Asbestos Safety and Eradication Agency and Safe Work Australia will actively participate on the IDC. The IDC will also engage with relevant state and territory government agencies with responsibilities for asbestos issues, such as work health and safety, building and environmental regulators, and stakeholders with an interest in asbestos issues.

44. The asbestos IDC will:

- enhance consultation and coordination of Commonwealth agencies' efforts in addressing policy and regulatory issues on asbestos
- clarify agencies' roles and responsibilities in managing asbestos policy and regulatory issues across the supply chain, and
- identify risks and gaps in asbestos management across the supply chain and coordinate proposals to resolve these risks and gaps.

45. The asbestos IDC first met in September 2016 and will run for 12 months. It meets every 1-2 months and has met three times up to 18 January 2017.

Conclusion

46. The Department is committed to working closely with other Commonwealth agencies, state and territory governments and stakeholders to address issues with asbestos entering supply chains in order to prevent ACMs from entering Australia.

47. Commonwealth, state and territory work health and safety regulators and other relevant regulators are working closely together to respond to incidents where imported asbestos is discovered in workplaces or the community to protect workers and the public from exposure to asbestos fibres.

48. The Department will continue to work closely with the Department of Immigration and Border Protection to consider approaches to strengthen the asbestos import and export prohibition. The Department will also continue to work with state and territory work health and safety regulators to ensure work health and safety protections for workers.