

Submission 120 - Australian Industry Group

The Australian Industry Group made submission 46 to the inquiry into non-conforming building products in the 44th Parliament.

This document is intended as a supplementary submission to the original submission 46.

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

Ai GROUP SUBMISSION

Australian Senate Inquiry into
Non – conforming Building
Products

JANUARY 2017



About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia alone and directly manages a number of those organisations.

Australian Industry Group contact for this submission

James Thomson
Senior Adviser – Standards and Regulation

Tracey Brown
Manager – National Safety & Workers' Compensation Policy and Membership Services

Inquiry terms of reference

On 23 June 2015, the Senate referred an inquiry into non-conforming building products (NCBP) to the Senate Economics References Committee for inquiry, with particular reference to:

- a. the economic impact of non-conforming building products on the Australian building and construction industry;
- b. the impact of non-conforming building products on:
 - i. industry supply chains, including importers, manufacturers and fabricators;
 - ii. workplace safety and any associated risks;
 - iii. costs passed on to customers, including any insurance and compliance costs; and
 - iv. the overall quality of Australian buildings;
- c. possible improvements to the current regulatory frameworks for ensuring that building products conform to Australian standards, with particular reference to the effectiveness of:
 - i. policing and enforcement of existing regulations;
 - ii. independent verification and assessment systems;
 - iii. surveillance and screening of imported building products; and
 - iv. restrictions and penalties imposed on non-conforming building products; and
- d. any other related matters.

Additional terms of reference—*asbestos*

On 13 October 2016, as part of its broader inquiry, the committee resolved to inquire into the illegal importation of products containing asbestos. The committee determined that it would report on this matter by 28 April 2017. The committee 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.

CONTENTS

INTRODUCTION

EXECUTIVE SUMMARY

PART 1 - ADDITIONAL NCBP PERSPECTIVES

PART 2 - ASBESTOS

INTRODUCTION

On 23 June 2015, the Senate referred an inquiry into non-confirming building products to the Senate Economics References Committee. 75 submissions were received and hearings were held in Canberra and Melbourne.

On 15 September 2015, the Senate granted an extension to the committee to report by 3 December 2015. On 23 November 2015, the committee was granted a further extension to report by 16 March 2016. On 15 March 2016, the Senate granted the committee an extension to report by 10 May 2016. On 4 May 2016, the Senate granted the committee an extension to report by 30 September 2016.

The Senate released an interim report “*Safety – not a matter of good luck*” with the key recommendation that the inquiry reconvene under the new Parliament.

This submission has been made in response to the Senate’s decision to reconvene the inquiry into NCBP and to be re-adopted in the 45th Parliament.

This submission should be read in conjunction with Ai Group’s submission dated August 2015 and our supplementary submission dated 27 January 2016.

This submission is broken into two parts namely:

Part 1 Additional perspectives on NCBP. This outlines additional perspectives that Ai Group has formed since our August 2015 submission.

Part 2 Asbestos – that responds to the expansion of the Inquiry’s terms of reference to include asbestos.

EXECUTIVE SUMMARY

Ai Group's submission in August 2015 made 12 recommendations for consideration by the Senate inquiry. In Part 1 of this submission we provide additional perspectives reinforcing a number of recommendations made in our first submission.

Our second submission makes an additional recommendation (No. 13) to include whole of life considerations as part of procurement policy.

Recommendation 13 – That the public and private sector procurers ensure that their procurement policy includes criteria covering conformance and whole of life cost considerations.

Part 2 deals with the expanded scope for asbestos and provides four new recommendations.

Recommendation 14: That appropriate enforcement and compliance tools are utilised to ensure compliance with the ban on the importation of asbestos containing products.

Recommendation 15: That case examples and industry learning is better utilised to build the state of knowledge, and capacity, of businesses to better manage the procurement of products that have a high risk of containing asbestos.

Recommendation 16: That prosecutions are pursued in circumstances where there has been a deliberate attempt to import asbestos containing products, whilst promoting them to be asbestos free.

Recommendation 17: That DIBP, and others, encourage businesses at risk of importing asbestos to consider accreditation in the Australian Trusted Trader Programme, whilst ensuring that this does not become the only way an *at risk* importation can be verified as not containing asbestos.

Recommendation 18: That collaborative approaches are formed with a broader range of stakeholders to maximise intelligence and build industry knowledge about the best ways to ensure that product is asbestos free.

PART 1 – ADDITIONAL NCBP PERSPECTIVES

Surveillance and enforcement

Ai Group has stated that there is a simple formula for achieving desired safety and quality outcomes from product conformance that equals:

effective standards and regulation plus

surveillance (and check testing) of the market plus

visible and meaningful enforcement

Since the publication of our report “*The Quest for a level playing field: The non-conforming building product dilemma*” in November 2013, Ai Group continues to observe a lack of proactivity by building regulators to initiate surveillance, testing and enforcement initiatives to identify NCBP. This lack of action amplifies the gaps and weaknesses in the building products conformance framework and results in increased risk to the Australian public.

Ai Group supported increasing surveillance activities by regulators in our 2015 submission.

“Recommendation 1 - That States and Territories improve surveillance and audit activities and implement stronger penalty regimes to improve conformance with the National Construction Code (NCC) and other building regulations.”

In recent high profile NCBP incidents there has been a flurry of regulator activity, usually under the glare of the media spotlight, once the issue is identified. Regulatory resources need to be applied proactively (i.e. before NCBP incidents) across the market in form of risk based surveillance, check testing and enforcement to deter those who deliberately flout the rules. Ai Group believes that, consistent with our recommendations, regulatory resources for surveillance and check testing can be more efficiently deployed when there are building product conformance obligations placed on suppliers in addition to obligations placed on builders at point of installation.

Ai Group is encouraged by the initiatives of the Building Ministers Forum who in their report “*Strategies to address risk related to non-conforming building product*” made the recommendation:

“Provide in-principle support for improvements to the regulatory framework to enhance the powers of building regulators to respond to incidences of NCBPs e.g. providing the ability to conduct audits of existing building work or take samples from a building for testing.”

This recommendation addresses the issue that building regulatory frameworks are focused on building practitioners rather than building products. In response to this QLD, as part of their proposed Building Plan, has recommended a number of additional powers for their building regulator including:

- *“audit and investigate buildings that are not active building sites*
- *enter a building and take samples of a building product for testing or seize evidence*
- *require parties other than building industry licensees, such as a retailer or manufacturer, to produce information about alleged non-conforming building products*

- *where appropriate, prosecute offences relating to supplying or installing a non-conforming building product*
- *apply to charge a cost recovery fee for any evidence-gathering and testing of proven non - conforming building products as testing can be expensive*
- *ban or prohibit a non-conforming building product (or provide the relevant Minister with this power)."*

Ai Group believes that if these powers are adopted and applied, building regulators will be better able to address the current gaps with product surveillance, check testing and enforcement. Ai Group notes the suggestion¹ by QLD to

"where appropriate, prosecute offences relating to supplying or installing a non-conforming building product".

This is welcomed and is consistent with Ai Group's recommendation in our first submission (see below) that point of sale obligations should be placed on suppliers to provide conforming product.

"Recommendation 7 - That the Commonwealth, and States and Territories evaluate the feasibility of building product legislation placing responsibility for product conformance at point-of-sale. The evaluation should consider:

- i. costs and benefits, and*
- ii. risks that arise with purchases made outside of Australian borders."*

This is an important change to regulations that will enhance regulators ability to conduct surveillance on product conformance prior to installation. This is a much more effective strategy to identify NCBP as arguably it is cheaper for surveillance and check testing to be conducted at point of sale then having to enter a building and remove a sample.

Ai Group notes to our knowledge there has not been any significant penalties handed down for those responsible for the Infinity Cable recall, Lacrosse Fire or the Perth Children's Hospital asbestos incident. We believe that an important element of conformance is a meaningful enforcement strategy that has significant deterrents for wrong doing.

Procurement policy and whole of life costings

The Australasian Procurement and Construction Council published a guide called "*Procurement of construction products: A guide to achieving compliance.*" It made the following statement

"As construction products are the key components of building and construction projects, their durability is significantly impacted by their quality which, in turn, significantly impacts on the lifespan of buildings and infrastructure assets. Replacement costs and environmental impacts can be profound if the life expectancy of building and construction assets is compromised or reduced. Furthermore, the reliable performance of building products is critical to achieving the safety objectives established by all Australian and New Zealand governments for the community and to meet community expectations for safety."

Unfortunately, in the debate on non-conforming building products (NCBP), a perspective that is often not considered is the adverse impact on the life expectancy of infrastructure. Procurement

¹ QLD Building Plan Fact Sheet 1 pg 3

policy that places all emphasis on minimising cost will exacerbate the problem. Procurers in both the private and public sector will often fall into the trap of believing that their role is to minimise product cost to the exclusion of other criteria including conformance and life expectancy.

A member has reported an extreme example of this.

“The e-auction was conducted by (name removed) in Queensland ... The crux of the deal was you submitted your best prices as an ‘entry card’ then by process of a ‘Dutch Auction’ the 4 participants were bidding lower to get preference by (name removed). We now suspect it was devised to force down the price of their current imported product and we were mere pawns in the process. We have notified (name removed) we would not be involved in another farce without recognition of Australian manufacture and ISO 9001 quality standard.

We have also flagged the hydrofluorocarbon issue with two of the imported products who went on to win their business. One of these is a new product to the Australian market which has a serious risk issue in hot weather the cans simply explode in our present summer conditions. The burst temperature is another critical factor not taken into consideration in the (name removed) screening process.

In summary, no recognition of Safety, Environment, QA or local manufacture were stipulated.”

NCBP, from a whole of life cost perspective, transfers costs from CAPEX that are then significantly magnified as increased OPEX over the life of a project. These costs are the burden of those tasked with the responsibility of ownership and maintenance. Irrespective of contractual obligations and expectations on an owner or operator, lower quality, cheaper products as a means to reducing infrastructure build costs will always deliver operational cost increases over the life of a facility.

A member that supplies the health care infrastructure market made the following observations:

“The Australian Health Care market is now exposed to the installation of product engineered for cost reduction at the expense of quality, performance and safety over the life of these facilities. One prominent Australian public hospital has seen a 30% failure rate within two years of opening on critical plumbing fittings that has resulted in closed wards, higher risk to patients and staff and excessive maintenance costs.

On other projects we have seen:

- *product replacement (replacing original cheaper product with fit for purpose, high quality product)*
- *excessive maintenance costs (to repair or maintain inferior product in high use or critical installations)*
- *operational inefficiency burdens through product failure (e.g. closure of facility, either temporarily or partly)*
- *health and safety risks as a result of poor product performance (e.g. increased risk of microbial growth or increased risk of negative health impact due to lack of clean, safe temperature water)”*

Ai Group recognises the inherent difficulty in establishing standards that can provide quantitative information to the procurer on the life expectancy a product however we strongly believe that it should be included as a qualitative criterion for at least consideration by all procurers.

Recommendation 13 – *That the public and private sector procurers ensure that their procurement policy includes criteria covering conformance and whole of life cost considerations*

Sector perspectives

Building sector

Since Ai Group's first submission to the Senate inquiry, the most significant issue to arise has been the incidence of asbestos in building products. The most public example was the Perth Children's Hospital. See Part 2 of this report for a full treatment on asbestos within the context of NCBP.

Electrical sector

Regulatory harmonisation

As previously mentioned Ai Group, in our August 2016 submission to the Senate, stated:

“Recommendation 3 – That States and Territories expedite the development of the Inter-Governmental Agreement to underpin the Electrical Equipment Safety System (EESS).”

Whilst negotiations amongst the jurisdictions have continued it has become apparent to industry that the NSW electrical regulator is not likely to be a signatory to the Inter-Governmental Agreement. This agreement will provide a legal basis to the scheme and hence NSW will not be a participant in it. This has created an inconsistent regulatory regime for suppliers resulting in an increased cost base and confusion in the market. Ai Group's 2013 report highlighted that NCBP exists in electrical supply chains where there is lack of harmonisation of regulations and enforcement regimes across jurisdictions.

An example of the difference between NSW's approach to electrical regulation and the other electrical regulators is the requirements in terms of supplier's compliance with revised Australian Standards. A recent example involved conformance to *AS/NZS 3105-2014 Approval and test specification - Electrical portable outlet devices* standard.

Ai Group understands that all jurisdictions had agreed that timers in power boards should have double pole switching as an incremental improvement in safety consistent with AS/NZS 3105-2014. Ai Group understands that that all States, except NSW, allow any prescribed product (including power board timers) with a valid approval certificate (that has a life of 5 years) to be sold into the market until the approval expires. In jurisdictions participating in the EESS, once the retailer has received the product, they can on-sell it until the approval expires or in some cases there is no time limit.

NSW had issued a Gazette notice on 20 February 2015 stating that from the 1 April 2016 all timers offered for sale, at any point in the supply chain, must comply with the new 2014 edition of AS/NZS 3105. The 2014 edition requires double pole switching. This means that from 1 April 2016 all product in NSW supply chains had to comply with this standard.

If this issue had been deemed by regulators as a significant safety concern (rather than an incremental improvement in safety) then a mandatory recall would have been initiated and all product removed from supply chains nationwide immediately. Given that the safety risk did not meet this threshold then Ai Group understands that suppliers in NSW simply on-sold their stock interstate and incurred additional costs. Ai Group understands that manufacturers had difficulty in meeting the NSW deadline and because retailers had returned all single pole stock there was a period of three months where consumers in NSW had little access to buy timers. In addition,

manufacturers incurred retooling costs earlier than would have been required if grandfathering arrangements in NSW had been consistent with other jurisdictions.

Ai Group notes that this situation is replicated whenever there is a change of Australian Standard for a prescribed electrical product. This creates confusion in the market and is unacceptable in a world moving toward harmonised standards and regulations.

Surveillance, check testing and enforcement

Ai Group supports increasing surveillance, audit and enforcement activities by all regulators. Ai Group has consistently maintained that our members will support regulatory regimes by funding their own surveillance and testing initiatives if regulators ensure that there are meaningful penalties and consequences for those supplying NCBP into the market. Ai Group recognises that Australia's electrical regulatory framework is arguably more effective than that for building regulations – this is due to electrical frameworks requiring a combination of:

- a. point of sale obligations placed on suppliers,
- b. marking requirements for prescribed product, and
- c. a central register of approved products.

Ai Group has also observed that electrical regulators are better resourced and more responsive than their counterparts in the building sector. Notwithstanding this, incidents in recent years including the Infinity Cable recall and the death of a nurse (due to contact with mains power from her head phones - attributed to a faulty non approved USB power supply) show that even our electrical regulatory framework is not always able to detect NCBP before it enters the market. It is worth noting that the Infinity Cable issue was first detected by industry surveillance and testing that eventually led to action by regulators.

It is disappointing that Ai Group continues to hear from members on the apparent lack of action by regulators when NCBP is detected.

Hager Pacific has undertaken investigation and testing and has identified non-compliance with the applicable standard for certain plugs and socket outlets in the Australian market. The Standard provides that socket outlets shall have a specified degree of protection (IP2X) when installed, providing a level of cover to prevent contact with mounting screws when removing the cover of the product. Given the public safety issue Hager believes that the need for enforcement exists now. By way of background -

- *IP2X is the lowest level of protection and in that sense is not onerous but is critical from a public safety perspective.*
- *Hager scrapped its old product when the Standard was introduced in 2006 and re-tooled (at a cost exceeding \$800,000) so that there was a long narrow slot preventing contact with the screws and thereby complying with the relevant Standard.*

Hager's surveillance and testing of the market revealed the following compliance issues -

(a) One brand range has no caps and is clearly non-compliant with the relevant Standard.

(b) A second brand is an imported product sold online and is also non-compliant. It has metal washers which is even more concerning reflecting a very poor product.

(c) A third brand provide slide caps which would meet compliance assuming the slides work. Slides can be easily be broken or removed on installation if the slides do not easily work.

(d) A fourth brand is imported and as it does not come with caps. It is not compliant with the standard.

Hager has notified and communicated with relevant regulators and industry bodies with responsibility regarding compliance and public safety of electrical products. The responses to date have been unsatisfactory in terms of appropriate enforcement action being taken and elevation of the issue as an important public safety and industry issue.

The widespread non-compliance is concerning in two respects -

(a) It represents an unfair competitive advantage in that Hager as well as some of its competitors have undertaken the capital expense as well as incurred losses associated with redundant stock to meet the relevant Standard.

(b) Compliance with the Standard is a relevant and important public safety issue.

Increased cost base due to NCBP

Ai Group, in our previous submissions, have highlighted examples (from our members NHP and Hager) on how their cost base is increased as a result of recalls. Reputable manufacturers and suppliers stand behind their products and thus over time are inevitably faced with having to finance a product recall. Unscrupulous operators (such as Infinity Cables) simply declare bankruptcy and thus leave the supply chain to pick up recall costs.

Another example where the cost base to reputable suppliers potentially will be increased by NCBP is the DC isolator on photo voltaic panel issue in QLD.

Ai Group understand that many thousands of DC isolators had been supplied in QLD on roof top solar electrical systems that may have an internal fault that has caused overheating and house fires. This led to a mandatory recall by the QLD Government for two isolator brands. These products do not conform with IEC 60947.3:2015 *Low-voltage switchgear and Controlgear, Switches, disconnectors, switch-disconnectors and fuse-combination units*. It is believed that the issue was triggered by the use of low cost (and low quality) isolators by sub-contractors who did not know the industry and particularly the dangers with high current DC reticulation. This problem was against a significantly increased demand for roof top solar panels due to overly generous State government gross feed in tariffs.

Members have pointed out that there is currently no issue with the technical specification in IEC 60947 however the problem has been caused by poor quality of the product from two manufacturers resulting in non-conformance. To address this industry and regulators are considering moves to increase the technical requirements on DC isolators so that water ingress protection is increased to IP 56 *no water* and that testing is done at 80 degrees Celsius.

Ai Group notes that either initiative will result in increased cost to all manufacturers supplying the Australian market. Australia's modification to the IEC standard also places it out of step with the rest of the world.

Another member has supplied a perspective that highlights the non-complying (as compared to the non – conforming aspect highlighted above) of the problem:

“ ... one of the major issues that we've encountered is that the product may be well designed, manufactured and tested to IP56, but poor installation practices compromise the effectiveness of preventing water ingress. Some contractors are either careless or clearly do not understand how to fit cable entries to enclosures to maintain the correct IP rating. This practice is not isolated to DC switches, but many other consumer electrical products that are exposed to the weather can suffer from this issue.”

Loss of sales – counterfeiting

Ai Group had been asked by the Senate inquiry to report on examples from members of counterfeiting (see our response in our supplementary submission dated 27 January 2016). In that submission (Annexure A Example 6) Ai Group profiled an experience from Schneider who manufactures the Clipsal 413QC Quick Connect product. This is a power socket that through innovative design can connect to a power cable without the requirement to remove the insulation from the conductors. This product had been counterfeited under the brand name of Zeger and then NADWAY. Since that submission Schneider has had additional issues:

“... the first state involved was Victoria (the electrical regulator acted promptly and chased them out of town) then NSW regional country Albury (electrical regulator was alerted and hopefully have taken enforcement action) then QLD (investigations by the electrical regulators are believed to be ongoing).

We have recently had an issue in WA with a counterfeited versions of Quick Connect. One of our loyal contractors was called to a job in a new building because lights were turning off and on of their own accord. When he removed a tile from the suspended ceiling, all he heard was incessant buzzing which after investigation showed that there was intermittent contact between the contacts and the copper conductors, which was causing arcing. Not only was the electrical continuity suffering but there was good chance that a fire could eventuate. All the units, and I believe there were many hundreds installed, had to be replaced, which the contractor did. Great for the contractor, not so good for the owner of the building”

The WA electrical regulator was alerted and have been very helpful and they are on the way to dealing with the supplier, hopefully.

This case study shows that unscrupulous operators continue to test regulatory boundaries in the Australian market and that regulators and industry must continue to work together to identify NCBP in supply chains and remove them quickly.

Plumbing sector

Ai Group's 2013's report on NCBP identified that plumbing products and architectural and decorative paints sectors as the least impacted by NCBP notwithstanding that lead based stabilisers were appearing in PVC fittings in supply chains.

A key reason for the lack of penetration of NCBP in the plumbing sector was due to the WaterMark Certification Scheme (WMCS). Part of this scheme is the requirement, administered by State and Territory regulation, that only plumbing products marked with a WaterMark can be installed legally

by a licensed plumber. The WaterMark is applied at point of manufacture under license from a Conformance Assessment Body (CAB) designating that the product complies with the relevant Australian Standard or Technical Specification.

The WMCS is under review by the owner of the scheme, the Australian Building Codes Board (ABCB), and a new scheme will be operational from 1 July 2017. Ai Group is confident that the new scheme will operate more effectively than the previous scheme and hence NCBP will be less likely. We do note that the Scheme relies on surveillance by the CAB. We believe that the Scheme will be more robust if conformance obligations are placed on product suppliers – we understand that early stage discussions with the jurisdictions are underway. An example of an effective regulatory scheme with obligations at point of sale is the Commonwealth’s Water Efficiency Labelling and Standards Scheme (WELSS). This scheme deploys inspectors throughout Australia to ensure that in scope appliances are carrying the correct labelling showing water efficiency at all retailers.

Our members, however, have reported that there are instances of NCP particularly with products supplied as part of a mechanical services system in commercial buildings. A member has observed:

“... our issue is not WaterMark per se but the effective policing of installations.

- I know of a hospital (public/private) that had two calorifiers installed...they were not WMCS approved when installed, but some 18 months after the installation the company that provided these vessels approached a CAB for certification which was eventually approved.*
- I know of a hospital that has 4 calorifiers...no WMCS approval*
- I know of a swimming pool that removed old heat exchange storage tanks and is now using an imported 5000 litre vessel...no WMCS approval*
- I know of an installation that is now using an imported ‘black’ steel vessel for DHW and Hydronic heating...no WMCS approval*

I could go on and on providing examples.

There are a number of companies that import tanks from overseas suppliers and sold into the Australian market...with no WMCS approvals.

Until the regulations are changed to force the supplier/manufacture to be held responsible...not the installer...for WaterMark, there will be ongoing examples of Non Compliance. Until those changes are made, all we ask as a company that complies, is to be able to compete on a level playing field...at the moment we are not.”

Once again this example points to the need of effective market surveillance, check testing and enforcement by regulators and the introduction of supplier obligations at point of sale. Such obligations would also assist in situations where plumbers have been forced by builders to install plumbing product even though it is not watermarked.

PART 2 – ASBESTOS

In Australia asbestos containing products have not generally been used in the built environment since the mid-1980s. A complete ban on the use of asbestos in Australia has been in place since 31 December 2003. Subsequently, Australia’s current approach to the management of asbestos predominantly relates to “legacy issues”; asbestos that was installed in buildings and structures prior to 1990.

The recent cases of asbestos being found in a range of products in Australia, including building and construction products, has significantly reduced confidence that asbestos containing products have not recently been installed in Australian buildings and structures.

In the context of building products, every time asbestos containing product is found in a workplace there is a significant level of concern amongst workers and employers about the implications for health and safety; the level of trust within the workplace diminishes significantly. The disruption to worksites and the cost of remediation are significant. The public concern is high. The impact on an organisation’s reputation is immeasurable. The immediate response is to assume that all imported product is likely to contain asbestos, and to react accordingly, by tightening controls and surveillance and generally making it harder to do business globally.

In short, there are no winners when asbestos containing product reaches a workplace.

However, a regulatory response that is not commensurate with the level of risk will unnecessarily disrupt the movement of legitimate products into Australia, putting at risk the financial security of individual businesses and potentially damaging the Australian economy.

There must be an appropriate balance of vigilance and practicality and a collaborative approach to achieving solutions.

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

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

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

A range of regulatory instruments and structures are in place to respond when a product is identified as containing asbestos:

- The Department of Immigration and Border Protection (DIBP) can hold products they suspect contain asbestos, and seize products if they obtain proof that the product contains asbestos or are not satisfied with the evidence purporting that the product is asbestos free. The importer is responsible for the cost of storage whilst the product is held, but the Commonwealth assumes the responsibility and cost of disposal once seizure has occurred. Penalties can be applied under the Customs legislation.
- The Australian Competition and Consumer Commission (ACCC) can take action and require product recalls if they identify that a consumer good contains asbestos; they can

also impose penalties. As building and construction products are not generally consumer goods, this role has limited application to the regulation of NCBP. However, the manner in which the ACCC responds to asbestos in consumer goods will influence community and business perceptions about the regulation and enforcement of the ban.

- Workplace health and safety regulators have a range of powers they can use to investigate the presence of asbestos in workplaces, require remediation and/or impose penalties.
- The Asbestos Safety and Eradication Agency (ASEA) has no regulatory powers. However, as a national coordinating body it has a role in influencing the activities of those that regulate these activities and the industry that is at risk of importing.

In addition to the above, The Heads of Workplace Safety Authorities (HWSA) has established an *Imported Materials with Asbestos Working Group* which includes the jurisdictional representatives of health and safety regulators that make up HWSA, plus ASEA, DIBP and ACCC. This Working Group has established a [Rapid Response Protocol](#) which specifies a process to “*enable government agencies to work cooperatively and efficiently across jurisdictions and portfolio lines when products have been identified as containing asbestos and there is concern such products may cross/have crossed state lines*”. Individual jurisdictions will determine their own regulatory activity as a consequence of the identification of asbestos containing product.

All of these approaches are valid and Ai Group particularly welcomes the Rapid Response Protocol. Remediation is a priority if asbestos containing products find their way into our workplaces or community. However, a focus on penalties and prosecution will not assist us to collectively achieve the desired outcome.

The desired outcome is an Australian community that is confident we have a coordinated and robust process to ensure asbestos containing product does not enter Australia.

The nature of the ban on the importation of asbestos containing product (customs laws) and the prohibition (under WHS/OHS regulations) on work that involves asbestos, means that a breach of these laws is a *strict liability* offence. Once it is proved that the offence has occurred, it is not necessary to prove that it was intended.

The relevant legislation is summarised below:

The importation of asbestos is restricted through the operation of Regulation 4C of the Customs (Prohibited Imports) Regulations 1956. With a few minor exceptions, all types of asbestos are banned from entering Australia, unless specific permission has been granted.

Regulation 419 of the Model Work Health and Safety (WHS) Laws adopted by most Australian jurisdiction, states:

- (1) A person conducting a business or undertaking must not carry out, or direct or allow a worker to carry out, work involving asbestos.

Maximum penalty:

In the case of an individual—\$6 000.

In the case of a body corporate—\$30 000.

- (2) In this regulation, work **involves** asbestos if the work involves manufacturing, supplying, transporting, storing, removing, using, installing, handling, treating, disposing of or disturbing asbestos or ACM.

- (3) Subregulation (1) does not apply if the work involving asbestos is any of the following:
- (a) genuine research and analysis;
 - (b) sampling and identification in accordance with these Regulations;
 - (c) **maintenance of, or service work on, nonfriable asbestos or ACM, fixed or installed before 31 December 2003, in accordance with these Regulations;**
 - (d) removal or disposal of asbestos or ACM, including demolition, in accordance with these Regulations;

Jurisdictions that have not adopted the Model WHS Laws have similar provisions in their Occupational Health and Safety (OHS) legislation. Like provisions have existed since the ban commenced on 1 January 2004.

In spite of these strict liabilities, if we consider health and safety obligations in a broader sense, organisations are required to do all that is reasonably practicable to eliminate or minimise risks, and officers are required to exercise due diligence (under WHS laws) or take reasonable take (in other jurisdictions) to ensure that the organisation is compliant.

When considering whether prosecution and penalties are appropriate it is relevant to consider this broader context. In reality, the high profile exposure of failure to achieve compliance and the cost of remediation may have a greater financial impact than anything that could be achieved through prosecution or penalty. The case studies that can be obtained from these organisations identifying where things went wrong can inform the broader business community, and build the state of knowledge that will help others to achieve compliance in the future.

A case in point is the information that has been published in the *Interim Report of the WA Building Commission into the Perth Children's Hospital Asbestos*. The Executive Summary states: "*The procurement processes used by John Holland were comprehensive and consistent with industry practice*".

Details of the procurement processes utilised by both the builder and the relevant subcontractor are outlined from page 21 of the report. From this information it is clear that both Australian organisations had specified non-asbestos product; the product was contracted to be sourced from a supplier that did not produce asbestos containing products. Subsequent inquiries indicate that the agent engaged to source the product has done so from a different, unidentified source.

This situation highlights the difficulties that are being faced by Australian organisations that are aware of the risk of asbestos product being imported into the country and have implemented sophisticated systems to reduce that risk. This is not an example of organisations that are careless about their legal obligations. And it is definitely not an example of an organisation attempting to sneak an illegal import into the country.

ASEA provide another example in their supplementary submission to the Inquiry, dated 27 August 2015. In this case the importer had been provided with a test report indicating the materials were asbestos free; three samples were subsequently tested by a NATA accredited laboratory that confirmed that one of the samples contained chrysotile asbestos. New samples were provided by the Chinese manufacturer who asserted that the product was asbestos free; once again one sample was identified as containing asbestos.

DIBP has the potential to play a significant enforcement role, as a key focus of their activities is to stop prohibited items from entering the country. It could be argued that the illegal importation of asbestos can be controlled in the same way as illegal importation of drugs and weapons. However, this is unlikely to be the case.

Asbestos is not imported by organised crime. Acknowledging once again that there may be some wilful importation, asbestos is imported by mostly unsuspecting companies in Australia who either would not even think of asbestos being an issue in today's world, or have received assurances from their supplier that it is asbestos-free. The suppliers that provide that assurance may be totally unaware that the definition of asbestos-free in Australia (absolutely none) is different to that in other countries where a product with 1% to 2% of asbestos is considered to be asbestos-free.

It is Ai Group's view that a different approach is required when regulating inadvertent illegal importation, compared to the importation of drugs and other similar products.

Ai Group welcomed the recent [Asbestos Importation Review Report](#) as a way forward to identify options to improve the role of DIBP in preventing illegal importation of asbestos. We are particularly encouraged to see the recommendations relating to increased engagement with industry to better understand the issues.

It is concerning, however, that the overarching statement in the Executive Summary, repeated again at the end of the report, is that *"the review analysed the current end-to-end border processes for asbestos and found that this management was effective; but identified opportunities for organisational and technical improvements"*. These seemed to be out of line with the identification of recently imported products in workplaces and the community more generally.

In response to the Report, an Interdepartmental Committee (IDC) was established in late 2016 to consider how to better address the illegal importation of asbestos, chaired by the Department of Employment. Ai Group will be watching the progress of the IDC deliberations with keen interest, and making contributions as appropriate.

Another area of concern was the approach taken by DIBP and subsequently Licensed Customs Brokers (LCBs) when the DIBP issued [Notice No. 2016/30](#) on 8 September 2016. In this document it was stated that *"Importers must provide sufficient assurance to demonstrate that imported goods do not contain asbestos ... If the ABF [Australian Border Force] suspects that imported goods contain asbestos, these goods will be held at the order for further testing ... It would be appropriate for LCBs to nominate a "yes" response to the asbestos CPQ [Community Protection Question] if they have doubts about the information that has been provided by their clients"*. There was no mention in this notice that there was a list of "high risk" products.

A Letter to the Editor that appeared in the [Lloyd's List Australia](#) illustrated the angst being felt by LCBs in the face of this notice, expressing concern about the lack of information provided by DIBP regarding how LCBs and their clients should provide the necessary assurance.

A number of our members reported that LCBs were requiring importers to provide "proof" that all their imported product did not contain asbestos, even if the products in question were not high risk. This was resulting in unwarranted delays in port, or at sea.

This scenario illustrates an approach which could be described as self protecting, rather than contributing to an increased level of understanding and compliance.

The Trusted Trader

DIBP recently introduced the Australian Trusted Trader (ATT) Programme, which involves a business demonstrating that it has established supply chain security processes and a history of trade compliance. The process of accreditation includes a self-assessment questionnaire and a compliance audit of the business' governance structure, systems and procedures.

Ai Group believes that DIBP should encourage participation in the ATT Programme by businesses that import products with a high risk of containing asbestos. This would enable DIBP to develop a greater understanding of supply chain issues related to asbestos and to disseminate this

information to relevant parties. It will also enable those accredited business to achieve a reduction in red tape, whilst ensuring that they do not become involved in the illegal importation of asbestos.

However, it is important that ATT accreditation does not become the only way in which an organisation can demonstrate compliance.

A Cooperative Approach

To date a significant amount of work has been undertaken by regulators to identify how to respond to the illegal importation of asbestos, once the product has found its way to Australian borders, Australian workplaces or Australian homes. To the best of our knowledge, the Asbestos Importation Review did not have any input from stakeholders and it is unclear how the IDC is planning to engage with stakeholders, although Minister Cash indicated in a recent meeting that she would like to receive input from industry and unions.

We note that the Report does have a focus on *Strengthening Engagement*, with reference to a recently established *Trade and Goods Compliance Advisory Committee (CAG)*. The Terms of Reference for the CAG outline that the purpose includes “maximising voluntary compliance and working with industry to co-design solutions to existing and emerging issues”. Minutes for the first three meetings of the CAG (March, June and September 2016) are available on the DIBP website www.border.gov.au. The range of issues discussed at these meeting is broad; it was promising to see that asbestos was discussed at two of these meetings.

We also note that multiple editions of the *Goods Compliance Update* issued quarterly by Australian Border Force (the operational arm of DIBP) provides information to importers about the current issues associated with the importation of asbestos.

However, it is noted that the 2016 membership of the above mentioned CAG is heavily weighted towards logistics organisations, rather than those making the purchasing decisions.

It is our view that more effort is required to enable organisations that make sourcing decisions to import products that have a higher risk of containing asbestos to work cooperatively with regulators and relevant others to identify - how others have dealt with these issues; the difficulties encountered in establishing that a product is definitely asbestos free; and what processes can assist organisations to manage the entire supply chain to minimise the risk that asbestos containing products will enter the country. This could be achieved by increasing the membership of the current CAG; an additional Border Force Advisory Group (focusing on building and construction products); or some other mechanism. However, this is achieved, the involvement of NATA would be valuable as they can bring important information to the table about the adequacy of testing. In addition, where appropriate, the involvement of the ACTU would be relevant to help inform the union movement about the difficulties organisations are facing in meeting their legislative obligations in this complex area of trade.

Ai Group is currently in discussion with the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions to identify how we can collectively contribute to improvements in this important area of concern.

Recommendation 14: That appropriate enforcement and compliance tools are utilised to ensure compliance with the ban on the importation of asbestos containing products.

Recommendation 15: That case examples and industry learning is better utilised to build the state of knowledge, and capacity, of businesses to better manage the procurement of products that have a high risk of containing asbestos.

Recommendation 16: That prosecutions are pursued in circumstances where there has been a deliberate attempt to import asbestos containing products, whilst promoting them to be asbestos free.

Recommendation 17: That DIBP, and others, encourage businesses at risk of importing asbestos to consider accreditation in the Australian Trusted Trader Programme, whilst ensuring that this does not become the only way an *at risk* importation can be verified as not containing asbestos.

Recommendation 18: That collaborative approaches are formed with a broader range of stakeholders to maximise intelligence and build industry knowledge about the best ways to ensure that product is asbestos free.



AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES

SYDNEY 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059 Tel 02 9466 5566 Fax 02 9466 5599

CANBERRA 44 Sydney Avenue, Forrest ACT 2603, PO Box 4986, Kingston ACT 2604 Tel 02 6233 0700 Fax 02 6233 0799

MELBOURNE Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004 Tel 03 9867 0111 Fax 03 9867 0199

BRISBANE 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004 Tel 07 3244 1777 Fax 07 3244 1799

ADELAIDE 45 Greenhill Road, Wayville SA 5034 Tel 08 08 8394 0000 Fax 08 08 8394 0099

REGIONAL OFFICES

ALBURY/WODONGA 560 David Street, Albury NSW 2640 Tel 02 6041 0600 Fax 02 6021 5117

BALLARAT Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350 Tel 03 5331 7688 Fax 03 5332 3858

BENDIGO 87 Wills Street, Bendigo VIC 3550 Tel 03-5440-3900 Fax 03 5444 5940

NEWCASTLE Suite 1 "Nautilus", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300 Tel: 02 4925 8300 Fax: 02 4929 3429

WOLLONGONG Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520 Tel 02 4254 2500 Fax 02 4228 1898

AFFILIATE: PERTH Chamber of Commerce & Industry Western Australia

180 Hay Street, East Perth WA 6004, PO Box 6209, East Perth WA 6892 Tel 08 9365 7555 Fax 08 9365 7550

www.aigroup.com.au