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Adrian Breen
Branch Manager
Work Health and Safety Policy Branch
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Sent by email: whspolicy@jobs.gov.au

Dear Mr Breen

ACCC submission to the review of the Asbestos Eradication and Safety Agency

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the review of the role and functions of the Asbestos Safety and Eradication Agency (ASEA).

The ACCC is making this submission as a participant in the whole of government management and control of risks associated with asbestos, noting that the role of the ACCC in this area is relatively limited and is focused on asbestos in consumer goods.

Product safety issues involving asbestos come to the ACCC infrequently, but our experience is that the existing system is working effectively with respect to the safety of consumer goods, subject to continuing management and monitoring.

The ACCC would like to commend ASEA on its success in managing asbestos issues, including the Rapid Response Protocol. We consider that the process provides significant value in responding to and coordinating asbestos issues, and in facilitating access to information and technical expertise. We strongly support its continuation. We also request that the review keeps in mind the multifaceted nature of the issues associated with asbestos control, the need to balance and prioritise action, and the need to continue to consider the problem of asbestos in consumer goods.

Role of the ACCC

The ACCC is a whole of economy regulator that promotes competition and fair trading in markets to benefit consumers, businesses and the Australian community. One of the ACCC's key roles is to ensure that consumers can confidently participate in markets.

Through the administration of the Australian Consumer Law (ACL), the ACCC aims to minimise the risk posed by unsafe consumer goods and to prevent misleading behaviour and unconscionable conduct.

In addressing the safety of consumer goods, a key role of the ACCC is to seek to identify unsafe, or potentially unsafe, consumer goods, prevent or stop their supply and facilitate their removal from the market. Consumer goods are defined by the ACL as goods which are intended to be used, or of a kind likely to be used, for 'personal, domestic or household use'.¹

Our role with respect to consumer goods is achieved using the product safety provisions of the ACL. These provisions are administered and enforced by the ACCC jointly with state and territory consumer affairs agencies. The ACL sets out how the Australian and state and territory governments can regulate consumer goods to address safety hazards, and includes provisions to:

- make mandatory safety standards or information standards for consumer goods
- ban consumer goods from supply in Australia on an interim or permanent basis
- issue compulsory recall notices requiring suppliers to recall consumer goods, and
- issue safety warning notices advising the public of possible risks involved with particular consumer goods.

The ACCC manages a notification and publication system for the voluntary recall of consumer goods. The ACL requires suppliers to notify the Commonwealth Minister responsible for product safety within two days of initiating a voluntary recall action. The ACCC publishes the details of voluntary recall notifications on the Product Safety Australia website and works with suppliers to ensure they take satisfactory action to address the safety of recalled consumer goods. If a death or serious injury or illness is associated with a product, it is mandatory for the supplier to submit a report of the incident to the Commonwealth Minister, within two days of becoming aware of the incident.

The ACL sets out individual consumer rights which can provide a remedy where a consumer good is unsafe or causes loss or damage. This includes the right to a refund, repair or replacement where a good fails to meet the consumer guarantee of acceptable quality because it is not safe, and a right of action to recover compensation against a manufacturer of a defective consumer good that causes loss or damage. The ACCC would not normally take action on behalf of an individual consumer in relation to an individual consumer guarantee or defective goods claim.

Potential action by the ACCC is assessed and undertaken according to a risk-based and principles-based approach set out in our Compliance and Enforcement Policy.² The ACCC allocates resources to the issues that pose the greatest risk to consumers and prioritises action according to a published list of Product Safety Priorities.³ Consistent with the Government's Statement of Expectations,⁴ the ACCC seeks to avoid regulatory duplication of the supervisory activities of other regulators. In particular we consider whether outcomes could be achieved by using existing regulation administered by another regulator, in order to ensure an integrated regulatory framework and to minimise compliance costs.

Where a matter is captured by a specialist regime, such as that for managing asbestos, the ACCC will refer such matters to the most appropriate specialist agency for consideration.

¹ Section 2 of the Australian Consumer Law.

² ACCC 2018 Compliance and Enforcement Policy, available at: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

³ ACCC 2018 Product Safety Priorities, available at <https://www.productsafety.gov.au/publication/2018-accs-product-safety-priorities>.

⁴ Australian Government Statement of Expectations of the Australian Competition and Consumer Commission 2017, available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/ACCC_Statement_of_expectations.pdf

The ACCC does not hold the same level of technical expertise as specialist agencies and its role is limited to consumer goods and focused on the removal of products that are subject to recall or in breach of mandatory standards or bans.

Role of the ACCC in relation to asbestos

In the context of asbestos, the ACCC's product safety role is limited to managing the risk of asbestos in consumer goods and participating in the National Strategic Plan for Asbestos Management and Awareness and the Rapid Response Protocol.

The number of cases of consumer products containing asbestos is relatively small, with 10 cases in five years in the context of approximately 13,000 product safety cases per year.

The ACCC contributes to the monitoring, information sharing and rapid response functions with respect to asbestos through membership of a working group established by the Heads of Workplace Safety Authority (HWSA).

From the outset, it should be noted that supply of consumer goods containing asbestos is not illegal, unless the goods are subject to a mandatory standard or ban. The ACCC's primary functions with respect to consumer goods containing asbestos are to provide information to suppliers and consumers about risks, and to facilitate the recall of products identified as containing asbestos and posing a risk of harm to consumers.

The product safety recall system is the main management tool for dealing with consumer products containing asbestos. The mandatory injury reporting system is ineffective in relation to these products because there is a long latency period between exposure and harm and significant difficulty, after the fact, in associating any harm to specific consumer products.

Under the ACL, gas masks containing asbestos are permanently banned from supply in Australia. This ban was implemented in 1993 under the then *Trade Practices Act 1974*.

Notable examples of consumer goods that have been found to contain asbestos include:

- Motor vehicles – asbestos has been identified in vehicle components such as brake and clutch pads, under-vehicle splash protection and engine gaskets. People involved in vehicle repair were most likely to be at risk of exposure. A safety warning notice was issued by the Commonwealth Minister on 22 June 2017, on the recommendation of the ACCC, which resulted in an expanded voluntary recall.⁵ The voluntary recall of Polaris youth quad bikes affected approximately 13 000 product units.
- Children's crayons – in 2015 the ACCC alerted consumers to the presence of asbestos in crayons for children. The asbestos fibers in the products tested were bound within the crayon wax, were not accessible and could not be inhaled,⁶ so that the crayons represented a minimal safety risk. The ACCC advised consumers that these products did not meet the consumer guarantee of acceptable quality, and that consumers were entitled to seek a refund under the ACL.
- Earth crystals – in 2013 the ACCC published a voluntary recall alerting consumers to the presence of chrysotile asbestos in products known as earth crystals and provided

⁵ Consumer protection notice – Safety warning notice (Polaris), <https://www.productsafety.gov.au/publication/consumer-protection-notice-safety-warning-notice-polaris>.

⁶ Product Safety Australia, 'Asbestos in Crayons', available at <https://www.productsafety.gov.au/products/chemicals/asbestos-in-crayons>.

information on the degree of risk and on correct disposal⁷. The products were assessed as unlikely to represent a direct hazard to consumers, but were subject to state and territory environmental laws for disposal.

- Novelty “fire wallets” – On 28 November 2013, the Commonwealth Minister, on the recommendation of the ACCC, issued a safety warning notice on the presence of asbestos in novelty “fire wallets” designed to produce a large flame when opened. These products were supplied online, usually by small scale suppliers.

In warning consumers and suppliers and taking action on the supply of goods containing asbestos, the ACCC must assess the risk of individual products. In managing the risk, the ACCC has in place systems to identify potentially hazardous products, to assess the risk of products identified, to pass-on relevant information effectively and promptly, and to develop and implement management and control strategies on an individual basis.

Comment on current and future challenges in relation to asbestos control in Australia

The experience of the ACCC is that the current system, including the National Strategic Plan for Asbestos Management and Awareness and the Rapid Response Protocol, are functioning effectively and efficiently.

The system for identifying and responding to potentially hazardous products, including the identification and removal of consumer goods containing asbestos, has operated well. The system has facilitated the identification of potentially hazardous products, the collection and timely exchange of relevant information with experienced and specialist regulators, and the identification and conduct of appropriate responses.

Through fostering coordination between agencies, the timely transfer of information, and giving access to expertise, the current system has been of significant assistance to the ACCC in dealing with consumer products containing asbestos. As an illustration of the value of the system, we note the example of a tradesperson contacting the ACCC following the recall of quad bike parts containing asbestos. The person was extremely distressed over the possibility he had unknowingly been exposed to asbestos over an extended time and sought information and assistance. The ASEA network provided information and contacts that enabled the ACCC to direct him to expert advice, testing and counselling.

It is likely that as more consumers turn to online shopping, asbestos will continue to be found in consumer goods. Ongoing advocacy to improve consistency in the regulation and description of goods containing asbestos is required.

There are differences between international jurisdictions in the designation of the level of asbestos in products. Some jurisdictions permit certain amounts of asbestos to be used in products that are classified as ‘asbestos free’ and, as a result, some products permitted in overseas markets are prohibited from import into Australia. As a consequence, manufacturers, importers and retailers can be confused about what can or cannot be imported into Australia.

There is also a need to ensure that suppliers and the public are aware of the role and powers of the ACCC in relation to products containing asbestos. The remit of the ACCC concerns consumer goods, and other products containing asbestos, such as commercial products, will generally fall outside the power of the ACL.

⁷ Product Safety Australia, ‘Earth Crystals’, available at, <https://www.productsafety.gov.au/recall/earth-crystals-chrysotile-healing-crystals>.

The ACCC notes that the importation prohibition does not prevent the supply of products that contain asbestos within Australia. In situations where asbestos has been found in consumer goods, we have applied the general provisions of the ACL requiring consumer goods to be of acceptable quality to encourage the removal of products containing asbestos from the market and to enable consumers to seek a remedy from suppliers. In this context the ACCC continues to advocate for the adoption of what is called a 'General Safety Provision' which would make it explicit that supply of unsafe goods would be contrary to the ACL.

Risk communication and proposals for action need to strike a balance between alerting those at risk and effectively directing appropriate action without causing undue alarm. There is some continuing misunderstanding of the nature and degree of risk associated with the presence of asbestos in some products. While there is no safe level of asbestos, not all the risks associated with the presence of asbestos are the same. The risk to general consumers associated with naturally occurring asbestos in crayons and earth crystals is of a different order to the higher risk associated with tradespeople potentially exposed to asbestos in vehicle parts, and different again to the risks associated with legacy building and construction products.

Conclusion

The ACCC views the current system for managing asbestos issues, including the Rapid Response Protocol, as being of significant value in coordinating action, responding to asbestos issues, and in facilitating access to information and technical expertise.

We request that these efforts continue and that the review keeps in mind the multifaceted nature of the issues associated with asbestos control, the need to balance and prioritise action, and the need to continue to consider the problem of asbestos in consumer goods.

If you would like to discuss any aspect of the ACCC's submission, we would be happy to arrange a meeting. Please contact Neville Matthew, General Manager, Consumer Product Safety Branch on 02 6243 1066 or at neville.matthew@accc.gov.au.

Yours sincerely



Delia Rickard
Deputy Chair

