

Office of the Minister for the Environment

Chair

Cabinet Economic Growth and Infrastructure Committee

Prohibiting the Importation of Asbestos Containing Products

Proposal

1. This paper seeks Cabinet's agreement to develop regulations to prohibit the importation of asbestos containing products (ACPs) and to introduce a permitting scheme to allow for exemptions from prohibition in specific, limited circumstances.

Executive summary

2. Exposure to asbestos causes a range of respiratory diseases and is a leading cause of work-related deaths and illness. Manufacturing or importing raw asbestos is not permitted under the Hazardous Substances and New Organisms (HSNO) Act 1996, but this restriction does not extend to manufactured products. ACPs can therefore be legally imported into New Zealand, which presents an ongoing health risk.
3. Targeted consultation (see appendix 1 for a summary of responses) carried out by the Ministry for the Environment (the Ministry) has shown that very few businesses still import ACPs, due to the awareness of the health risks of asbestos and the development of cost-effective alternatives in recent years. Imposing a prohibition on importing ACPs would therefore pose few costs for businesses, while providing positive health benefits.
4. In a few cases however, there would be potentially significant costs incurred by individual businesses that would be disproportionate to the risk of asbestos exposure. Allowing exemptions from a general prohibition would be justified in these cases.
5. I propose that a prohibition on importing ACPs be introduced by making an Order in Council under the Imports and Exports (Restrictions) Act 1988 (IERA). I propose that this be a conditional prohibition, where importation would generally be banned except in limited cases when a permit to import has been issued. Permits would only be granted where:
 - a. the importer can demonstrate that there is no alternative product available for importation that would fulfil the same function and that does not contain asbestos; or
 - b. that importing an alternative product would impose a cost that would be grossly disproportionate to the risk of asbestos exposure; and

- c. the importer can demonstrate that they, or the person who they have imported the goods on behalf of, are able to appropriately manage any risk of asbestos exposure.
6. The permitting scheme would be administered by the Environmental Protection Authority (EPA). This would result in an ongoing operational cost for the Authority, but the majority of this cost could be recovered from applicants by setting a fee to reflect the cost of processing and assessing permit applications.

Background

7. Asbestos is a naturally occurring mineral fibre that is highly toxic when inhaled. Exposure to asbestos is linked to a range of respiratory diseases and cancers. Asbestos related disease is most common in workers who have had significant exposure over extended periods of time.
8. The number of work-related fatalities associated with asbestos exposure was estimated to be approximately 170 in 2010, making it the single biggest cause of work-related disease mortality. Much of this is the result of historic exposure, as there is a long latency between exposure and disease symptoms developing.
9. A 2015 report from the Royal Society of New Zealand investigated the non-occupational risks of asbestos in New Zealand. The report concluded that “a prudent approach would be to follow the lead of many other countries that have banned continued importation and use of any [ACPs], and this should be brought to the Government’s attention”.
10. Under the HSNO Act, raw asbestos is not permitted to be manufactured in or imported into New Zealand. However, the scope of the HSNO Act does not extend to manufactured products and as a result, ACPs can be legally imported.
11. In 2014 the Ministry commissioned a research report titled *Inventory of New Zealand Imports and Exports of Asbestos-Containing Products* (the inventory). The inventory found that while asbestos has been used widely in the past in a range of products and building materials, there is only a small volume of ACPs currently being imported, primarily in the aviation and marine industries. In most cases where asbestos has historically been used, there are now viable non-ACP alternative products available and the use of these alternatives has become the established norm in New Zealand.
12. In August 2015, Cabinet authorised the Ministry for the Environment to undertake targeted consultation with selected industries that were identified in the inventory as being the most likely to still be importing ACPs [EGI-15-MIN-009 refers]. The aim of the consultation was to gain a greater understanding of the direct impact that a prohibition might have on businesses and to make a more robust assessment of the overall costs of prohibition. It was also intended to determine whether or not any exemptions from a prohibition might be justified.

Results of targeted industry consultation

13. The Ministry consulted with businesses and industry organisations in the marine, aviation and electricity generation and supply industries during September and October 2015. Water utility companies were also contacted, following feedback that this could be a potential source of ACP imports, as was the Council of

Trade Unions (CTU). In total, feedback was received from 29 different businesses and organisations (see appendix 1 for a summary of responses).

14. In general, there was little use of ACPs reported and most businesses were comfortable that a prohibition would have little or no impact on them. While many businesses reported that they had used ACPs in the past, greater awareness of the health risks of asbestos and the development of cost-effective alternatives mean that ACPs have been steadily phased out over the past few decades.
15. Despite this general move away from ACP usage, a few respondents did report some importation and use of ACPs. It was felt in some cases that a prohibition would impose costs on their business, although most respondents were unable to quantify this impact.

Other consultation

16. The New Zealand Defence Force (NZDF) identified current use of ACPs in two types of aircraft. They indicated that due to the nature of these aircraft and their age, there are no viable non-ACP alternatives. The expected replacement timeframe for these aircraft is between 2021 and 2023. Until at least that time, NZDF will need to keep using these aircraft to meet its operational commitments and will accordingly have a need to import a limited quantity of ACPs.
17. The NZDF also raised concerns about the possibility of overseas military forces visiting New Zealand and carrying replacement parts containing asbestos, or requiring replacements to be shipped to them while they were in New Zealand.
18. In order to ensure consistency with New Zealand's international trade obligations, the Ministry consulted with the Ministry of Foreign Affairs and Trade. In accordance with their advice, the Ministry formally notified the World Trade Organisation's Committee on Technical Barriers to Trade. No comments or concerns about a proposed prohibition were received from other WTO members.

Comment

19. While the findings of the inventory and the targeted consultation process have shown that there is little current use or importation of ACPs, a level of risk of exposure from imported products remains. Under current legislative settings, New Zealand remains open to the potential for future increases in imports from countries where ACPs are still readily produced and exported.
20. Imposing a prohibition would not impact on existing ACPs already in New Zealand, but would provide assurance that the current level of risk would not increase. It would effectively provide a date from which it could be assumed that asbestos will no longer be present in any new plant or structures, aside from a small number of permitted imports, all of which would be identified and recorded.
21. The primary benefit of imposing a prohibition would be to prevent the possibility of significant increases in future imports. It would provide an incentive to those remaining users of ACPs to shift to alternative products and provide a signal to overseas businesses that New Zealand is not willing to accept the health risks associated with asbestos exposure. In this regard a prohibition would bring New

Zealand into line with some of our major trading partners, such as Australia and the European Union, which have already banned all forms of asbestos.

22. Imposing a prohibition would entail some cost for a small number of businesses. Clear indications of cost are difficult to determine, as those businesses reporting ACP use were either unsure about exactly which products would need to be replaced or were unsure what the additional cost of sourcing and importing non-ACP replacements would be.
23. It should also be noted that some of the businesses that were consulted with were uncertain about whether or not the products they are importing contain asbestos. Imposing a prohibition on ACPs would incentivise these businesses to determine whether asbestos is present and to source alternatives if required (and possible). This may entail some cost to those businesses, but in many cases the products will be coming from other countries that already prohibit asbestos (such as Australia), so this process should be relatively simple.
24. I consider that on balance, the benefits of a prohibition would outweigh the costs that may be borne by some businesses. However, in a small number of cases it is possible that the costs would be significant, despite a relatively small risk of exposure (for example, if the quantity of asbestos in a product is very small and is entirely contained). Where the costs of a prohibition would be disproportionate to the limited risk of exposure posed by the use of ACPs, allowing for an exemption from prohibition would be appropriate.

Preferred policy response

25. I propose that a prohibition be introduced by making an Order in Council under the IERA. This approach is recommended because:
 - a. the purpose of the IERA is to regulate imports and exports and its provisions are well suited to prohibiting ACPs
 - b. a prohibition under the IERA could apply to all types and uses of ACPs
 - c. under the IERA, restrictions on the importation of goods into New Zealand are made in the public interest. I consider that preventing the significant and widely known health risks arising from asbestos exposure meets this public interest test
 - d. the IERA provides for exemptions, by allowing conditional prohibitions to be made under specific circumstances.
26. Other options considered were found to be less suitable, as they would either not effectively manage importation or would be an inefficient or overly complicated solution to the problem.
27. Currently, the Minister of Commerce and Consumer Affairs is responsible for the administration of the IERA and the Ministry of Business, Innovation and Employment is the administering department. I propose that administrative responsibility for the Order would be transferred to the Ministry for the Environment.

Allowing for conditional prohibitions

28. The IERA allows for a prohibition on imports to be absolute or conditional. An absolute prohibition would mean that no ACPs could be imported into New

Zealand under any circumstances. A conditional prohibition would allow for goods to be imported, subject to the granting of a license or permit or to conditions prescribed in the Order.

29. An absolute prohibition would maximise the benefits in terms of reduced risk of asbestos exposure. It would also be very simple to administer and would likely have minimal or no on-going costs to government except for enforcement. However, this option could have a significant impact on those businesses that do have a genuine need to import ACPs and may not be able to source cost-effective alternative products. I consider that there is the potential for an absolute prohibition to impose disproportionately high costs and other related implications, relative to risk of exposure, and therefore this option is not recommended.
30. A conditional prohibition would allow for ACPs to be imported in select circumstances. I propose that a permitting system be introduced to allow importation of ACPs where this can be appropriately justified. The Order would prescribe a set of conditions that would have to be met before importation and allow for the decision-making agency to issue permits on this basis. I propose that permits may be granted only if:
 - a. the importer can demonstrate that there is no alternative product available for importation that would fulfil the same function and that does not contain asbestos; or
 - b. that importing an alternative product would impose a cost that would be grossly disproportionate to the risk of asbestos exposure; and
 - c. the importer can demonstrate that they, or the person who they have imported the goods on behalf of, are able to appropriately manage any risk of asbestos exposure.
31. Placing these requirements in the Order itself would provide clarity on the circumstances in which ACP importation could be considered and ensure that any exemptions created through permitting would be justified in terms of costs relative to health risks.
32. A permitting system would provide the flexibility to allow for ACP imports on a case-by-case basis, as appropriate. It would act as a disincentive to those who may wish to import ACPs by requiring them to go through an application process, justify their need for imports, and demonstrate that any risks of exposure can be adequately managed. It would also mean that it would be possible to identify all future imports, where these are being used and by whom, and how they are being managed to ensure risks are minimised.
33. The IERA also allows for the permitting agency to impose additional conditions, for example, on providing information about the movement and location of the goods, or conditions on labelling, packaging, handling, or disposal of the goods. These can be applied as part of the permitting process. The decision on whether to grant a permit or not would be determined by the requirements set out in the Order.
34. Permits would be granted for a limited time, after which they would need to be renewed and evidence provided that the conditions can still be met. I propose that permits be granted for twelve months, which strikes a balance between

providing applicants with a degree of surety, while ensuring that the assessment based on the conditions outlined above is still applicable. I also propose that permits be able to be revoked, if the permit holder has failed to comply with a condition of the permit, or if information supplied in the application is subsequently found to be incorrect.

Administering a permitting system

35. I propose that the EPA be given the responsibility for assessing applications and granting permits (subject to conditions).
36. The EPA already administers permits under the IERA to allow for the exportation of banned or severely restricted hazardous chemicals and hazardous waste, and under the Ozone Layer Protection Act 1996 for the importation of goods containing ozone depleting substances. The EPA also has the technical expertise to assess health risks arising from hazardous substances.
37. Administering a permitting system would result in ongoing costs for the EPA. However, the IERA allows for applicants to be charged for the purposes of considering and granting permits. This would allow for the EPA to recover a significant portion of the cost of administering the permitting scheme. There would be some ongoing cost that could not be recovered however, such as compliance activity or activity to raise general public awareness of a prohibition.
38. Based on the EPA's current costs under the Ozone Layer Protection Act, the recoverable cost of considering and granting permits would entail an estimated fee of \$650 (excluding GST) per application. This is an average figure a significantly more complicated application could entail a greater cost. In these instances I propose that the EPA be able to recover the cost of the application by charging an additional hourly fee of \$116 (excluding GST) for additional time and resource required.

Compliance and Enforcement

39. New Zealand Customs would be responsible for stopping items identified as containing asbestos at the border and ensuring that a permit has been granted before they can be uplifted. Under the IERA, the Chief Executive of Customs is also responsible for commencing any prosecutions in regard to any offence under the Act.
40. The EPA does not have any enforcement powers under the IERA. The EPA would however, undertake activity to raise awareness and ensure requirements are understood. To the extent that it is able to, it would also support Customs in its enforcement at the border and other agencies that may enforce other legislation where this related to illegal imports of asbestos products.
41. While importers would have a legal obligation to ensure that they do not import ACPs, it is possible that ACPs would still enter the country in some cases. It is not always straightforward to identify asbestos in products without laboratory testing and it is possible that ACPs may still be imported either deliberately or unknowingly, by importers who may not be aware of the presence of asbestos in the products they are importing.
42. Should ACPs enter the country following the introduction of a prohibition, it would be possible to use the provisions of the Fair Trading Act 1986 to initiate a

product recall. As the product or products in question would be illegal products with a major safety risk attached, I am advised that there would be a strong lever for negotiating a voluntary recall and a strong case for a compulsory recall, should one be required.

Consultation

43. The Ministry of Business, Innovation and Employment, the Ministry of Health, the Ministry of Foreign Affairs and Trade, the Environmental Protection Authority, WorkSafe New Zealand, the New Zealand Customs Service, the New Zealand Defence Force, and Treasury have been consulted on this paper. The Department of Prime Minister and Cabinet has been informed of the proposals in this paper.
44. The Minister of Commerce and Consumer Affairs has seen this paper and has confirmed his agreement to its proposals.
45. The EPA notes that there are significant costs (estimated to be \$100,000) to implement and support the permitting scheme. This cost cannot be met from the existing EPA baseline and unless this is addressed, the EPA would not be in a position to undertake the new function.
46. I propose to release an exposure draft of the Order in Council for further stakeholder consultation, prior to final Cabinet approval and submission to the Executive Council.

Financial implications

47. Administering a permitting scheme for allowing selected importation of ACPs would entail costs for the EPA. The majority of the cost would be recovered from applicants, by setting an estimated fee of \$650 for each permit (with the discretion to charge an additional fee for complex applications), reflecting the anticipated costs involved with processing and assessing applications.
48. Remaining costs would not be able to be recovered by the EPA under the IERA. This includes costs for publicity, education and assisting enforcement activity. The EPA and Ministry for the Environment are continuing to work to establish the extent of this cost and options for funding.

Human rights

49. No inconsistencies between the proposal in this paper and Human Rights Act 1993 have been identified.

Legislative implications

50. Implementing the proposal in this paper would result in an Order in Council being made under the Imports and Exports (Restrictions) Act 1988.

Regulatory impact analysis

51. The Regulatory Impact Analysis requirements apply to the proposal in this paper. A Regulatory Impact Statement has been prepared and is attached as appendix 2.

52. The Ministry for the Environment's (MfE) Regulatory Impact Analysis Panel has reviewed the RIS prepared by MfE and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.
53. The RIS is written clearly and concisely and offers a level of analysis proportionate to the issue. The RIS could be more convincing in the use of available information to explain the scale and magnitude of the issues, and the possible impacts of the options. However, in most areas the elements of the proposal are clear and the impacts have been identified if not specified in detail. We view the RIS as adequate to support decisions makers.

Publicity

54. A press release will be prepared by the Minister for the Environment to announce the decision to introduce a prohibition. Further publicity will be planned for when the Order in Council has been drafted and approved by the Executive Council.

Recommendations

55. I recommend that the Cabinet Economic Growth and Infrastructure Committee:
 1. note that while raw asbestos is prohibited, asbestos containing products (ACPs) can currently be legally imported into New Zealand and that this presents a potential health risk
 2. note that on 12 August 2015 the Cabinet Economic Growth and Infrastructure Committee authorised the Ministry for the Environment to carry out targeted consultation with selected industries on the costs of a potential prohibition of ACPs
 3. note that the targeted consultation process found that a prohibition would have little or no impact on most businesses, but that some potentially significant costs were identified in a few cases
 4. agree that a conditional prohibition on the importation of ACPs be imposed by making an Order in Council under the Imports and Exports (Restrictions) Act 1988 (IERA)
 5. agree that the Governor-General may make this Order in Council prohibiting the importation of ACPs on a conditional basis, as it is in the public interest to do so
 6. note that the Minister of Commerce and Consumer Affairs, who has responsibility for the IERA, has been consulted and confirmed his agreement to making an Order in Council under the IERA
 7. agree that the conditional prohibition should allow for importation subject to the granting of a permit
 8. agree that the Environmental Protection Authority (EPA) be given responsibility for assessing applications and granting importation permits

9. agree that the EPA should grant importation permits only if:
 - 9.1. the importer can demonstrate that there is no alternative product available for importation that would fulfil the same function and that does not contain asbestos; or
 - 9.2. that importing an alternative product would impose a cost that would be grossly disproportionate to the risk of asbestos exposure; and
 - 9.3. the importer can demonstrate that they, or the person who they have imported the goods on behalf of, are able to appropriately manage any risk of asbestos exposure
10. note that the IERA allows for the permitting agency to place additional conditions on importation, including providing information about the movement and location of the goods, or conditions on labelling, packaging, handling, or disposal of the goods
11. agree that permits be granted for a twelve month period and that they can be revoked within this time if the permit holder has failed to comply with a condition of the permit, or if information supplied in the application is subsequently found to be incorrect.
12. agree that the cost of processing and assessing permit applications be recovered from applicants, by setting a fee for each permit, and that the EPA be given discretion to charge an additional hourly fee if this amount is deemed insufficient to process a particularly complex application
13. authorise the Minister for the Environment to issue drafting instructions to Parliamentary Counsel to give effect to the proposals agreed to in this paper
14. authorise the Minister for the Environment to make minor and technical policy decisions for drafting purposes, consistent with the decisions in this paper
15. authorise the Minister for the Environment to release an exposure draft of the Order in Council for consultation purposes.

Hon Dr Nick Smith
Minister for the Environment

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Appendix 1

Summary of industry consultation

Industry	Issues Raised
Aviation	<p>No businesses reported intentionally importing ACPs, but some were not able to be certain about whether imported parts contained asbestos or not.</p> <p>Two businesses felt there could be some costs from a prohibition as a result of this uncertainty. While there were few products in question (brake pads and engine gaskets respectively), it was felt that obtaining alternative products could be difficult and could potentially impose a cost on their business. They were unable to quantify this impact as they were unsure where they would be able to source alternatives from.</p>
Marine	<p>One business reported using engine gaskets containing asbestos and indicated that it would not like to see them regulated out of use. However responses from the rest of the industry suggested that ACPs are not widely used as cost-effective alternatives are available.</p> <p>Two businesses felt that an exemption should be allowed for historic restoration purposes, where the original parts still contain asbestos.</p>
Electricity generation and supply	<p>ACPs are still used for a range of functions in electricity generation, particularly in large scale pieces of machinery with long service lives. The industry is generally moving to source alternatives and replace existing ACPs, so it was not felt that a prohibition would impose significant costs.</p> <p>However, one submitter raised a concern that replacing failed parts in large pieces of machinery with non-ACP alternatives would be uneconomic unless it was as part of a major refurbishment or replacement project. For this reason, it was felt that exemptions should be allowed in certain limited circumstances.</p> <p>A second use identified was in a gasket used in a particular type of large LPG storage tank. Changing to an alternative design to avoid the use of this gasket was reported to be a complicated and expensive process, costing \$5,000-\$7,000 per tank, for up to 200 tanks in total.</p>
Water supply	<p>Water utility companies contacted reported no current use of, or need to import ACPs in the future. While the use of asbestos-cement water pipes was common in the past, the industry has moved on to modern alternatives and no longer uses asbestos.</p>

Worker representatives	The CTU expressed its support for a total prohibition on importing ACPs. It noted that it would be consistent with a petition presented by the CTU on this matter to Parliament earlier this year calling for a prohibition on ACPs.
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List of businesses and organisations consulted

Industry Sector	Business/Organisation name
Aviation	Eurocopter International Ltd
	Flightline Aviation
	Hamilton Aero Maintenance
	Heli Maintenance Ltd
	Helicare Ltd
	Helicraft
	Jem Aviation
	Pacific Aerospace
	Rotor-Craft Ltd
Marine	Action Engineering
	Antelope Engineering
	General Marine Services
	Lyttleton Engineering
	Sanford Ltd
	Shaw Diesels
	Ship Repair Ltd
	South East Resources Ltd
	Talley's Group Ltd
	Titan Marine
	Wallace and Cooper
	Whiting Power Systems
Electricity Generation and Supply	Contact Energy
	Electricity Engineers Association
	LPG Association
	Meridian Energy
Water Supply	City Care (Christchurch)
	Invercargill City Council
	Wellington Water
Worker representatives	Council of Trade Unions

Appendix 2

Regulatory Impact Statement