australian council of trade unions

This is not compliance – workers need regulation not voluntary accreditation schemes

Submission by the Australian Council of Trade Unions to the Australian Competition and Consumer Commission regarding Australian Engineered Stone Advisory Group application for authorisation

ACTU Submission, January 2020
ACTU D. No 04/2020

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Introduction

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For more than 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 39 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The protection and enhancement of every worker's fundamental right to a safe and healthy working life has always been, and remains, a core goal of the ACTU and its affiliates.

The stated intention of the Application for Authorisation by the Australian Engineered Stone Advisory Group [AESAG} in establishing an accreditation scheme for Fabricators of engineered stone is to improve health and safety performance. This is commendable, but worryingly, the substance of the proposed scheme falls short of what is currently required by health and safety laws and therefore has the potential to undermine the current and future regulatory framework. Additionally, the timing and lack of consultation with unions, workers or work health and safety regulators prior to submitting the application raises serious concerns about the motivation for the application.

The ACTU submission to the National Dust Disease Taskforce, *Preventing dust diseases: strengthening the protections for workers*[1], recommended actions required to protect workers from respirable crystalline silica. These included:

- Reduction in exposure standard for respirable crystalline silica to 0.02mgm/m3. The Victorian Government has adopted this standard. Others have indicated a willingness to follow after some technical issues are addressed.

[1] ACTU Submission, 15 November 2019, ACTU D. No 51/2019

- All jurisdictions to adopt a Regulation based on Victorian Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2019. These regulations formalise the current administrative directives in some jurisdictions which are aimed at controlling "dry cutting of engineered stone products".

- A ban be implemented on the importation, manufacture and use of engineered stone with over 80 percent crystalline silica content i.e. using the definition from Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2019:

    - *Engineered stone means a manufactured composite stone material that contains resins and has a crystalline silica content of 80 per cent or greater.*

- During 2020, whilst the preparatory work for a ban is being conducted, regulators and industry must develop a strategy to encourage the use of non-crystalline silica products as replacements for engineered stone of greater than 80% crystalline silica. Our current health and safety laws provide the framework for such an approach.

None of the recommendations contained in the ACTU submission are adopted in the application.

Any system of product stewardship must be founded on practices to build upon regulatory compliance and achieve best practice. The application does not meet those objectives.

The Applicants also attest to their own failures so far to 'improve' industry standards and have not been fulfilling their health and safety duties as suppliers. Given their longstanding supremacy in the supply chain there are serious doubts about the ability to properly administer a self-regulatory scheme such as is proposed.

Recommendation

The application for Authorisation to the Australian Competition and Consumer Commission by members of the AESAG, including granting of an interim application, should be rejected in the interests of public and worker health and safety.

The Application

AESAG is seeking authorisation on behalf of itself including future members and other unspecified suppliers of engineered stone to:

- adopt industry accreditation standards for fabricators and stonemasons (Fabricators) working with engineered stone (Accreditation Standards),
- seek to require Fabricators, to whom Members supply engineered stone, to comply with health and safety practices under the "model" work health and safety (WHS) laws when working with the engineered stone in order to achieve accreditation, and
- consider whether to refuse to supply engineered stone where Fabricators do not meet the Accreditation Standards (Proposed Conduct).

Public Detriment

Over 300 cases of silicosis have been diagnosed since September 2018 and up to 20% of exposed workers fabricating engineered stone products are developing silicosis. This industrial epidemic was avoidable. As the UK organisation “No Time to Lose” notes, silica dust is one of the world’s most significant causes of occupational disease.

Silicosis is incurable, preventable and for a significant proportion of sufferers, a progressive disease, even if exposure ceases.

Engineered stone products, containing up to 95% respirable crystalline silica, are predominantly used for kitchen and bathroom bench tops. Over the last decade and a half, engineered stone bench tops have become a fashion item. There are many alternative products available.

As the ACTU submitted to the National Dust Diseases Task Force [2]

> *It is disturbing to think that the most apt comparison to the one we face today with engineered stone is the story about the obsession the world had in the late '90s and early 2000s with stone washed jeans. These jeans, manufactured in Turkey and other garment producing nations, were made by manually sand blasting jeans, at higher pressure, to produce the trendy distressed denim that teens, and even some adults, in the west craved. The consequences were deadly. Thousands of garment workers working in dust filled factories were being diagnosed with silicosis, an incurable but preventable disease normally found in construction workers who had experienced prolonged exposure to RCS., These workers, like with those in the engineered stone benchtop sector, had been working for just months or a few short years. Further, like with stone washed jeans our stone benchtops are a mere fashion item, one where effective and safe substitutes are available. As with sand blasting of jeans, we should consider bans of the importation and manufacture of engineered stone.*

Health organisations and the NSW Parliament have questioned the continued use of this product. In December 2019 the following organisations wrote a join letter to Professor Murphy Chair of the National Dust Disease Taskforce in support of consideration of a ban on engineered stone products:

- Cancer Council of Australia,
- Lung Foundation Australia,
- The Thoracic Society of Australia & New Zealand,
- Public Health Association of Australia
- Australian Institute of Health and Safety
- The Australian and New Zealand Society of Occupational Medicine Inc.[3]

On 26th September 2019 the NSW Legislative Council passed a motion calling on the Government to immediately consider the viability and impact of a state-wide ban on manufactured stone products. [4] A similar proposition was put to the Federal Minister for Health by one of the ACTU representatives on Safe Work Australia members group, Andrew Dettmer, National President Australian Manufacturing

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[2] Preventing dust diseases: strengthening the protections for workers, Submission by the ACTI to the National Dust Diseases Taskforce Consultation Paper, ACTU 15 November 2019

[3] Joint letter to National Dust Disease Task Force, November 2019. Supplied on request.

[4] NSW Legislative Council Hansard – 26 September 2019

Workers Union. In his response The Hon Greg Hunt, Minister for Health indicated a request had been sent to Safe Work Australia to *"consider the merits of putting in place importation controls on engineered stone products".*[5]

The ACTU continues to advocate for a ban on the importation, manufacture and use of such high silica content products.[6]

The continued use of these engineered stone products will jeopardise the health of the community and workers for decades to come. Kitchens and bathrooms will be renovated requiring on site re modelling and fabrication. Control of silica dust exposures in homes is nearly impossible without the use of similar risk control measures needed for the removal of asbestos containing materials.

As the ACTU submitted to the National Dust Disease Task Force:[7]

> *For a country such as Australia, which has the unenviable title as 'one of largest per capita burden of asbestos related disease' to now be facing the consequences of a failure to manage exposure to equally insidious substances such as respirable crystalline silica (RCS) and coal dust is as tragic as it is embarrassing.*

There is no "safe" level of exposure to respirable silica dust. Safe Work Australia's [8] analysis of the health effects of respirable crystalline silica noted that:

- SCOEL reports that no clear threshold for silicosis can be identified and that epidemiological evidence indicates that a concentration of 0.05 mg/m3 may result in a 5-10% silicosis risk and a 1% risk of death from silicosis in mortality studies.

In 1996, the International Agency for Research on Cancer reviewed the scientific evidence and concluded that crystalline silica in the form of quartz or cristobalite dust is carcinogenic to humans. It is classified as a Group 1 carcinogen, meaning it is a definite cause of cancer in humans[9].

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[5] Communication available on request, December 2018
[6] ACTU submission to National Dust Diseases Taskforce, November 2019
[7] Preventing dust diseases: strengthening the protections for workers, Submission by the ACTI to the National Dust Diseases Taskforce Consultation Paper, ACTU 15 November 2019
[8] SWA – 2019 Silica, crystalline (respirable dust)
[9] https://www.notimetolose.org.uk/wp-content/uploads/2018/03/Factsheet_Respirable_crystalline_silica_the_facts_MKT2730.pdf

The Guidelines and application do not mention these essential facts.

The application requests interim authorization within 28 days of lodgement. Given the irreversible and deadly health impacts from exposure to silica, an application such as this must be scrutinized and considered very carefully. As the application was lodged on the 29th November 2019 and hence legislative time lines included the Christmas New Year summer break, it is questionable whether the applicants were envisaging broad consultation and scrutiny of the Application.

There are several substantive shortfalls in the accreditation process proposed:

1. Usually certification or accreditation systems are devised to improve performance above any legislative requirements – this application is for "compliance" only.

2. The Application misrepresents current legislative requirements in several jurisdictions, meaning that some fabricators may make the false and misleading assumption that accreditation is sufficient for regulatory compliance.

3. The Application fails to mention the changing regulatory environment which again may mislead fabricators.

4. The Application reports there are between 750 to 1000 fabrication workshops with between 8 and 10 thousand workers and that engineered stone products account for 50% of installed benchtops[10]. During late 2019, WorkSafe Victoria reported visiting 930 workshops, Queensland regulator over 140 and NSW Safe work visited 246. Without including workshops in other states and territories this application appears to underestimate its own scope.

5. There are real doubts about the capacity of a private auditing and certifying body to undertake such work that will result in higher levels of compliance. This is particularly important as at least one regulator has noted that repeated visits have been required to achieve compliance and adoption of safer work processes

[10] The Application, pages 18 and 27

6. The Application asserts their engagement with state regulators [page 21] indicates that these bodies are generally supportive of the approach. ACTU affiliate unions have been involved in those state processes. Union representatives were not aware of the application until receiving correspondence from the ACCC on 20th December 2019. As members of those tripartite bodies and working groups, union representatives would have been aware of such sentiments if that was the case. Additionally, members of AESAG should have directly discussed such an approach with the relevant worker representative groups.

Duties of suppliers under health and safety laws

As suppliers, members of the AESAG have clear, non-transferrable duties under health and safety law. Suppliers must ensure, so far as reasonably practicable, that the product being imported or supplied is without risks to those who use, handle, store or carry out foreseeable activity at a workplace [WHS Act sections 24 and 25].

So far as is reasonably practicable requires the consideration of five factors:

- likelihood of hazard/risk occurring;
- degree of harm;
- what persons ought reasonably to know about eliminating or minimising risk;
- the availability and suitability of ways to eliminate or minimise risk, and after considering these factors, whether the cost is grossly disproportionate to the risk, and
- after considering these factors, whether the cost is grossly disproportionate to the risk.

The likelihood of a significant risk occurring, the degree of harm and the availability and longstanding knowledge about the effects of silica dust are well described. Engineered stone has higher silica content than other products, therefore the risks are foreseeable and must be controlled.

SafeWork Australia's guidance on reasonably practicable states that "*although the cost of eliminating or minimising risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of safety ahead of cost.*[11]

[11] https://www.safeworkaustralia.gov.au/system/files/documents/1702/guide-reasonably-practicable.pdf

The introduction of an Accreditation scheme does not change or modify those legal obligations.

The request for interim authorisation assumes that fabricators are currently not complying with the law. If that is the case, then suppliers have a current obligation to address that. The Application is potentially an admission of failure to comply with current laws [Section 3, page 17].

Some Specifics of Work Health and Safety Law

The ACTU review of the proposed Health and Hygiene Guidelines notes some inadequacies if these are to be used as evidence of compliance with health and safety laws. Our concerns include:

- PCBU is a legal entity under WHS laws, but not other regulatory regimes;
- Victoria has a regulation that prohibits dry cutting, other jurisdictions have done this administratively;
- the exposure standard for RCS is not consistent across jurisdictions, Victoria have adopted 0.02mgm/m3 for RCS;
- the Queensland Code is mandatory, whilst other jurisdictions use non mandatory guidance information. The application incorrectly asserts that the Queensland Code is guidance. Victoria is developing a Code.

The Application misrepresents the ability of H&S regulators to give advice about how to rectify noncompliance when it asserts that "noncompliance" notices "do not provide information or details about how the fabricator can rectify its noncompliance" [page 21]. The mandatory Queensland Code of Practice clearly outlines what compliance *looks like* for fabricators.

The application variously refers to alignment and compliance with Model WHS laws. Health and safety laws have as an objective the control "at source"any risks to worker health and safety. The application does not mention such an approach.

It is unsettling that the Applicants have chosen to selectively quote evidence from the Australian Institute Occupational Hygiene [AIOH] [page 21 and page 30]. The position is at odds with other

professional bodies such as the ACIGH. The ACGIH established a Threshold Limit Value [12]of 0.025mgm/m3 in 2010. In the USA, OSHA has implemented an action level of 0.025 mgm/m3 for general industry and maritime sectors. The AESAG fails to justify the selection of the 0.05mgm/m3 advice given its divergence from the advice of other bodies.

The Application quotes the AIOH as saying that at 0.05mgm/m3 'the likelihood of detectable silicosis and excess lung cancers should be negligible" [13] . As noted above other expert bodies estimate *concentration of 0.05 mg/m3 may result in a 5-10% silicosis risk and a 1% risk of death from silicosis in mortality studies*. The ACTU is not convinced that a 5-10% risk is "negligible".

A range of work health and safety laws, regulations, and codes are in the process of being reviewed to improve WHS outcomes in this area. For example, the workplace exposure standard for silica is in the process of being halved. Significant changes are also anticipated to come from state and national silica task forces. If the ACCC grants the authorisation on the basis of the proposed accreditation scheme, there is no guarantee that the accreditation scheme will keep up-to-date with rapidly emerging legal reforms in this area.

The self accreditation approach creates confusion about who holds responsibility for regulating work health and safety. Compliance with the self-accreditation standard does not necessarily guarantee compliance with state WHS laws. The application will confuse the role of the AESAG & regulators.

Third parties

The AESAG assert that the key benefits of the scheme are:

- Ability to verify compliance with laws
- Fabricators will be incentivized to comply with the law
- Ability of AESG members to assist in reduction of incidence of RCS related diseases.

[12] Another term for exposure standard
[13] Page 21

The ACTU holds serious concerns about each of these assertions:

- The ASEAG is proposing an alternative process for "achieving compliance" with health and safety law. This is a regulatory function for H&S regulators, not private enterprise. Third parties obviously can provide support, guidance and assistance to enterprises to meet compliance, but such third parties cannot "determine compliance".

- Cooperative fabricators may be incentivized to comply with the law, but those fabricators will still need to be able to demonstrate compliance to the regulator and incur costs to be accredited. The mechanism cannot be relied upon for compliance as it is a voluntary industry scheme. Compliance with H&S laws is mandatory not discretionary.

- AESAG members have existing obligations under H&S laws. Given the number of cases of silicosis diagnosed in this sector, questions need to be asked about current compliance with those laws.

The application covers an unknown group of companies ie "other current or potential future members of AESAG" [page 3]. It is highly inappropriate to consider giving authorisations to unknown corporate entities.

The third party, Greencap Pty Ltd was selected by an informal tendering process. There is no information documenting the robustness or independence of the tendering process.

The third party is to be for auditing and accreditation purposes. There is no information provided as to why or how one company will conduct both processes.

The Applicants note that a Fabricator, who is compliant with the ISO standards will be compliant with the Accreditation Standards. This is confusing.

Usually certification processes, eg Australian Standard certification – aim for "best practice" encouraging performance that creates healthier and safer conditions in excess of legal obligations – the applicants are not proposing any standards more stringent than current law.

The Applicants note that the proposed Accreditation Standards are not "overburdensome' on fabricators and are designed to promote existing legislative obligations. The applicants could easily be providing this type of assistance to entities within their supply chains without an Accreditation

scheme. There is nothing preventing provision of expert advice to fabricators to assist with health and safety performance.

The proposed guidelines create separate requirements for Queensland fabricators which are not applied across the nation. Since its adoption in 2019[14] this **mandatory** Code provides the most detailed assistance to fabricators. If applicants are wishing to improve performance, it is unclear why the provisions of the Queensland Codes haven't been adopted for all Fabricators and incorporated into the Guidelines, in full.

Mechanisms

Current AESAG membership includes 3 major suppliers with 75% of the market. The Application is for future members of the AESAG. It is unclear how any application can apply to unknown entities.

The Proposed Conduct notes that suppliers **may refuse** to supply engineered stone to Fabricators and members will **still reserve the right to individually supply** Fabricators [page 25].

These statements seriously undermine the basic tenet of the application ie the establishment of an accreditation scheme that "determines" compliance which will stop supply of engineered stone to fabricators who are deemed by a non-legislative third party.

Brief comment on H&S guidelines

The Guidelines are not particularly specific to Fabrication workshops but are general in nature e.g. general checklists for incident reporting, Safe Work Method statements, etc. This is in contrast the information in the guidance of all jurisdictions and the mandatory requirements of the Queensland Code of Practice

The Guidelines are focussed on lower order risk control measures such as record keeping, administrative controls, respiratory protection etc. There is no mention of substitution of safer products or complete isolation of workers from potential exposures. – both basic tenets of health and safety law,

[14] Managing-respirable-crystalline-silica-dust-exposure-in-the-stone-benchtop-industry-Code-of-Practice-2019

The Guidelines fall short of the requirements of the Queensland Code and potentially other Codes in development, particularly with respect to the requirement for PPE, air monitoring and incident reporting

The application, if granted, will provide the AESAG with unprecedented power over product supply. While lack of adherence to the self-accreditation scheme may be presented as the ostensible reason to withhold supply, granting the AESAG pseudo-regulator powers places AESAG in a privileged position to control the market for any purpose and presents a high risk for monopolistic market practices.

Conclusion

Proposals to improve of the health and safety performance of any supply chain should be a positive initiative. Unfortunately, despite the well documented health effects of silica dust, the applicants and the engineered stone fabrication industry have not protected the health of workers. The diagnosis of three hundred cases of silicosis since September 2018 is evidence of poor risk control.

The stated objective of the application is commendable, but its content falls short of what is currently required by health and safety laws and regulators. If authorisation were granted the current and future regulatory framework is likely to be seriously undermined.

The ACTU urges the ACCC to refuse the application and recommend that the Applicants formally engage with regulators, workers and their representatives to achieve better compliance and protection of workers in this sector.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

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