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20 January 2020

Ms Danielle Staltari
Director – Adjudication
Australian Competition and Consumer Commission
E: adjudication@accc.gov.au

Dear Ms Staltari

Australian Engineered Stone Advisory Group's application for authorisation AA1000461

Thank you for your correspondence of 5 December 2019 inviting WorkSafe Victoria ("WorkSafe") to comment on the Australian Engineered Stone Advisory Group's (AESAG) application for authorisation.

WorkSafe is the health and safety regulator in the State of Victoria and also administers Victoria's workers' compensation scheme. WorkSafe welcomes the opportunity to comment on the AESAG's application ("the application") for authorisation to undertake the following proposed conduct:

- adopt industry Accreditation Standards for fabricators and stonemasons working with engineered stone;
- seek to require fabricators, to whom the members supply engineered stone, to comply with health and safety practices under the model work health and safety laws ("model 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.

WorkSafe understands that the proposed conduct may breach one or more of the *per se* provisions of the *Competition and Consumer Act 2010* ("the CCA Act") and therefore, the Australian Competition and Consumer Commission (ACCC) may only grant authorisation for the conduct if it is satisfied the conduct will meet the net public benefit limb of the authorisation test.

Industry-led accreditation schemes generally operate on a voluntary basis and can generate a net public benefit, particularly in markets for products or services where quality differences are difficult for consumers to discern, as they provide:

- a mechanism for firms to differentiate their products or services from their competitors by signalling that they meet certain quality standards; and
- information for consumers to assist them to identify firms that can provide products or services with the qualities they are seeking.

However, WorkSafe considers that if the accreditation scheme that forms part of the proposed conduct is to be associated with a refusal to supply engineered stone to non-accredited businesses, it

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would be more accurately characterised as a licensing scheme. Therefore an assessment of the likely public benefits and public detriments from the proposed conduct should be considered in this context.

Licensing can be an effective mechanism for addressing externalities and information constraints, both of which exist in the engineered stone market; however, appropriate consideration is required to determine whether the benefits to be achieved from such action will exceed the costs incurred. While AESAG's application for authorisation identifies the public benefits they are seeking to achieve and includes some discussion of the public detriments arising from the proposed conduct, these are only addressed qualitatively and no attempt has been made to quantify these.

Public benefits of proposed conduct

WorkSafe shares AESAG's concerns about the increasing number of diagnoses of silicosis and other silica-related diseases among fabricators and stonemasons working with engineered stone and agree that ensuring there is compliance with obligations under the *Occupational Health and Safety Act 2004 (Vic)* ("OHS Act") will reduce the risk of fabricators and stonemasons contracting silica-related diseases. Accordingly, WorkSafe is taking a strong approach to ensuring compliance with the OHS Act and is also undertaking a comprehensive program of work to increase awareness about the importance of addressing the risks of exposure to respirable crystalline silica (RCS) in Victorian workplaces. To date this has included:

- conducting over 1,000 visits to workplaces focusing on controlling the risks of RCS (including to the approximately 300 workplaces engaged in the fabrication of engineered stone in Victoria);
- issuing over 400 RCS related improvement notices to duty holders for contraventions of their obligations under the OHS Act and/or Regulations;
- providing education seminars for stonemasons on the risks of working with engineered stone and exposure to RCS;
- hosting a summit for the medical community on screening, diagnosis and management of silicosis;
- undertaking an awareness campaign highlighting the risks of working with engineered stone; and
- providing free health assessments for stonemasons in Victoria.

WorkSafe's compliance and enforcement activities have also been further enhanced by the introduction of a prohibition on the uncontrolled use of a power tool to cut, grind or abrasively polish engineered stone in the Occupational Health and Safety Regulations 2017 in August 2019.

WorkSafe notes that AESAG intends for the proposed conduct to increase compliance with the model WHS laws and that the Accreditation Standards do not include any requirements and/or obligations over and above what is required to comply with the model WHS laws. Therefore, any public benefits from the proposed conduct would only arise if there was an increase in the level of compliance over and above that which could be achieved without the members of AESAG engaging in the proposed conduct. However, WorkSafe considers that the proposed conduct may not necessarily achieve a sufficient increase in the level of compliance for a number of reasons.

WorkSafe has not been involved in developing the accreditation scheme and note that it has been designed with regards to the model WHS laws rather than the OHS Act, therefore we cannot be certain that Victorian fabricators who achieve accreditation are in fact compliant with their obligations. Furthermore, the proposed accreditation scheme will only provide assurance that a fabricator has implemented sufficient controls and developed a system of work that could comply with their obligations at a particular point in time.

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Addressing the risks of RCS in workplaces on a day-to-day basis requires that controls are used as intended and systems of work which reduce risks to health and safety are followed. WorkSafe considers that the potential to be subject to an unannounced inspection, which may result in enforcement action if non-compliance is identified, is essential for deterring non-compliant behaviour. However, the members of AESAG will not have the ability to undertake inspections of accredited fabricators. While the accreditation scheme will include annual compliance audits, these will be scheduled in advance and therefore may not reflect the actual day-to-day working conditions of an accredited fabricator.

The members of AESAG also lack other powers that WorkSafe considers would be necessary to ensure that the accreditation scheme achieved an increase in compliance, such as the ability to suspend or revoke a fabricator's accreditation between annual renewal periods or take punitive action against a non-compliant fabricator. While AESAG's application identifies that members may consider refusing to supply their products to non-accredited fabricators, taking such action would be contrary to their financial interests and consequently the members will face disincentives from taking such action.

While it is not implausible that, with regards to a particular fabricator, the members of AESAG may consider that the private benefits achieved from demonstrating a strong focus on safety to consumers exceed the value of the revenue foregone, the exact nature of this trade-off will vary across fabricators. Refusing to supply their products to a large fabricator will impose significantly greater costs on the members of AESAG than refusing to supply their product to smaller fabricators. The members of AESAG have not provided any detail as to how decisions to refuse supply will be made and how the inherent conflict of interest of such decisions will be managed. WorkSafe is concerned there is potential for this conflict of interest to result in smaller fabricators being more likely to be subject to a refusal of supply than larger fabricators.

WorkSafe also considers that any possibility of accredited fabricators on-selling AESAG member's products to non-accredited fabricators may impact on the ability of proposed conduct to achieve the public benefits sought. AESAG members are unlikely to be able to sufficiently monitor and identify on-selling of their products and even where on-selling was identified, it is not clear what actions the members of AESAG could or would take to address this. For example, do the members of AESAG also seek to restrict who an accredited fabricator can sell their products to and would they consider to refuse to supply an accredited fabricator who on-sold their product to a non-accredited fabricator.

WorkSafe is uncertain as to whether action by the members of AESAG to prevent on-selling would breach the CCA Act and/or would be covered by the authorisation being sought. However, if on-selling of AESAG members' products to non-accredited suppliers became widespread, this would significantly undermine the ability of the accreditation scheme to act as a mechanism for increasing compliance. This would also be detrimental to fabricators who have participated in the accreditation scheme on the understanding that this was the only way to access AESAG members' products as they will have incurred higher costs than their competitors unnecessarily. Taking actions to increase consumer awareness of the accreditation scheme and to encourage consumers to purchase from accredited fabricators could partially address the risk of on-selling should stronger action not be available, WorkSafe considers that this would be unlikely to fully address the issue.

Public detriments of proposed conduct

While the ability of the accreditation scheme to achieve the intended benefits is uncertain, the likely public detriments can be more readily identified. WorkSafe estimates the direct annual cost of the accreditation fees on fabricators in Victoria will be in the order of \$0.9m-\$1.3m. In addition to this, fabricators are also likely to incur administrative costs when completing documentation associated with the accreditation scheme and when participating in the onsite audit component of the accreditation scheme. Also, as noted above, the Accreditation Standards have been developed with regards to the model WHS laws, rather than the OHS Act which may create confusion among fabricators about the relevant obligations with which they must comply.

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Fabricators may also incur costs associated with air monitoring during the onsite audit. Based on the publicly available information about the audit process, WorkSafe has not been able to ascertain if air monitoring is a mandatory component of the onsite audit or whether evidence of existing air monitoring will be sufficient. Should air monitoring be mandatory during the onsite audit, WorkSafe estimates this would impose further costs of \$1.2m-\$3.0m on fabricators. While these cost impacts may appear to be modest, many fabricators are small businesses to whom costs associated with the accreditation scheme will represent a proportionally greater share of their cost base.

Consumers are also likely to face higher prices for fabricated engineered stone products if the proposed conduct is authorised. These may result from either increased costs associated with the accreditation scheme being passed on to consumers and/or through a reduction in the number of suppliers and therefore a reduction in the level of competition in the market for fabricated engineered stone products. Higher consumer prices for engineered stone could be considered to internalise some of the external costs that arise from unsafe fabrication practises; however, this would only represent an optimal outcome if the public benefits achieved from the proposed conduct were greater than or equal to the costs imposed.

Beyond those firms and consumers directly involved in the engineered stone market, the proposed conduct may also have a detrimental effect on the level of competition amongst firms providing occupational hygiene or occupational health and safety consultancy services to fabricators of engineered stone. AESAG's application notes that fabricators will be able to engage third-party assessors to provide auditing services and assess a fabricator's compliance; however, there does not appear to be any information available to third-party assessors outlining how they can participate in audits or what would be required of them to undertake an audit in accordance with the requirements of the accreditation scheme. Similarly, no information is provided for fabricators to assist them to identify and engage a suitable third-party assessor to conduct the audit and therefore the associated search costs may deter fabricators from considering third-party assessors.

Noting the prominent role of Greencap in developing and administering the accreditation scheme for AESAG, WorkSafe considers that it is likely that Greencap will have a considerable advantage in the provision of auditing services to fabricators over their competitors. Furthermore, pg. 8 of AESAG's Health and Hygiene Guidelines prohibit a fabricator from using the same third-party assessor for auditing and audit rectification (where required); however, it does not appear that the same restriction would apply where a fabricator had engaged Greencap for auditing services and audit rectification was required.

Net impact of proposed conduct

WorkSafe commends the members of AESAG for their commitment to addressing unsafe fabrication practices in workplaces working with engineered stone; however, noting the limitations that the members of AESAG will face in enforcing the accreditation scheme, WorkSafe considers that the public benefits achieved from the proposed conduct may not exceed the public detriments arising from the additional costs imposed on fabricators and the impact on firms providing occupational hygiene and OHS consulting services to fabricators.

WorkSafe considers that a net public benefit would be more likely to be achieved through a licensing scheme administered by a government regulator without a financial interest in the engineered stone market and with the powers necessary to detect non-compliance and initiate enforcement action against non-compliant parties (such as revocation of licenses or commencing prosecution action).

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Should you wish to discuss any of the matters raised in this response, please contact Dmitry Rozkin,
A/g Director – Legislation, Policy and Information Services [REDACTED]

Yours sincerely

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Colin Radford
Chief Executive
WorkSafe Victoria