

20 January 2020

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Daniel McCracken-Hewson
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Dear Mr McCracken-Hewson

Application for Authorisation on behalf of members of the Australian Engineered Stone Advisory Group (AESAG) (AA1000461-1): Response to request for further information

We refer to your letter of 19 December 2019 requesting further information about the AESAG members' application for authorisation lodged on 29 November 2019.

The Members thank the Australian Competition and Consumer Commission (ACCC) for the opportunity to provide further information in response to its queries and to clarify the nature and scope of the conduct sought for authorisation.

We set out below the Members' responses to each of the ACCC's questions in the letter of 19 December 2019. The Members at first instance reiterate the following:

- There has been a recent and significant increase in Australia of stonemasons, who work with engineered stone, contracting silicosis and other related diseases. The Members consider that these cases are likely to have resulted from fabricators operating unsafe working environments in breach of the existing state/territory work health and safety laws relating to respirable crystalline silica (RCS) (WHS Laws).
- The Members recognise that, for many reasons, it is socially responsible and commercially prudent to be able to identify whether a fabricator is compliant with the WHS Laws.
- Once a fabricator's compliance or non-compliance with the WHS Laws can be established, each Member can use the information as part of its individual business practice to decide how to manage its relationship with the fabricator.
- Prior to the process contemplated by the accreditation standards; there was no mechanism (either through the state/territory regulators or otherwise) in place to allow the Members to determine if a fabricator was compliant with the WHS Laws.
- Each Member could implement its own independent process to determine whether a fabricator was compliant with the WHS Laws though this would arguably create economic, administrative and procedural inefficiencies.

- The primary rationale of forming AESAG, and of making this application, is to develop a single and cost effective (both from a Member and fabricator perspective) process to determine if a fabricator is compliant with the WHS Laws. The Members have sought to identify in their Application the broader benefits to the public resulting from the conduct sought to be authorised.
- Each state/territory has WHS Laws requiring fabricators to operate and maintain a safe working environment. It is the Members' understanding that the key substantive obligations under each state/territory work health safety laws in relation to RCS, which is generated when working with engineered stone, are the same (except for Queensland). Queensland has recently introduced more prescriptive and stringent obligations for fabricators working with engineered stone in its jurisdiction by way of the *Managing respirable crystalline silica dust exposure in the stone benchtop industry Code of Practice 2019* (the **Queensland Code**). We address how the accreditation standards deal with the differences between Queensland and other states/territories further at Question 2 below.
- Based on the Members' experience and knowledge of the industry, they are of the view that the current state/territory WHS Laws are not being complied with by some fabricators. While WHS regulatory frameworks exist in each state/territory, the Members consider there are currently gaps in the transparency and enforcement of those regimes. As a result, individuals are exposed to unsafe fabrication practices leading to unnecessary and significant risks.
- Having regard to the increased incidence of silicosis due to unsafe work practices, the Members are concerned about a lack of compliance of the WHS Laws by fabricators. To ensure that the fabricators, to whom they supply, are compliant with the current WHS Laws, the Members have engaged a third party (**Greencap**) to prepare the Health and Hygiene Guidelines (the **Guidelines**). The Guidelines underpin the accreditation standards and assist fabricators in complying with their existing WHS legal obligations to safely fabricate engineered stone.
- The Members seek approval from the ACCC to engage in the proposed conduct to establish a system that:
 - is independent, consistent and, in the Members' view, cost effective for fabricators and the Members;
 - assists fabricators by educating them on how to become compliant with the WHS Laws by offering guidance on practical and achievable steps to become compliant;
 - promotes greater compliance of the existing WHS Laws and allows Members to work with the Fabricators to achieve such compliance;
 - provides transparency to the Members about whether or not a fabricator, who participates in the accreditation process, is compliant with the WHS Laws; and
 - allows the Members to make an informed choice when considering whether to independently or collectively refuse to supply to fabricators that do not comply with the WHS Laws in Australia.
- The Members are committed to ensuring that they are satisfied that the fabricators, to whom they supply, are compliant with the law. Without the opportunity to implement the conduct sought to be authorised, namely the accreditation process (and the associated supply arrangements), the Members will have to decide, separately, the arrangements that they each wish to enter with fabricators. This includes deciding on arrangements they each may wish to put in place to ensure that the fabricators, that each Member supplies to, comply with their WHS legal obligations. This is likely to result in:

- a multiplicity of accreditation or similar processes in the industry and for fabricators seeking engineered stone from these entities; and
- inefficiencies for the industry and more costly processes for all relevant industry participants in seeking to achieve compliance with WHS legal obligations.

Response to ACCC questions

1. We understand the application for authorisation is made on behalf of non-AESAG members. What is the difference between being an AESAG and non-AESAG member in terms of how the proposed conduct will be put into effect?

The current members of AESAG consist of Caesarstone Australia Pty Ltd (Caesarstone), Smartstone Australia Pty Ltd (Smartstone), WK Marble & Granite Pty Ltd (Quantum Quartz) and Stone Ambassador Australia Pty Ltd (Stone Ambassador). The Members are of the view that other suppliers of engineered stone (non-members) will continue to remain an alternative source of supply of engineered stone to fabricators.

As such, to the extent that non-members of AESAG wish to ensure that the fabricators they supply comply with WHS Laws, the Members envisage that, with the ACCC's authorisation, other suppliers will:

- need to make their own decisions, independent of AESAG, about the approach they wish to take; and
- have access, if they wish, to the accreditation standards regime, including the Guidelines which are published as a public document, to test whether a fabricator is compliant.

AESAG would welcome other suppliers of engineered stone joining AESAG and, subject to the ACCC's determination, having the benefit of the conduct for which authorisation is sought.

2. Are there any standards in Health and Hygiene Guidelines (Accreditation Standards) which are different to the current Work Health and Safety (WHS) laws in each jurisdiction? Please explain how the standard is different from the current WHS Laws.

The Members engaged a third party (Greencap) to create the Guidelines. The Members briefed Greencap to create the Guidelines, in particular Sections 2-9 (for most state/territories other than Queensland) and in addition, Addendum A (which has been created specifically to take account of the increased obligations imposed on fabricators in Queensland by the Queensland Code) on the basis that:

- fabricators must comply with the WHS Laws of the states/territories in which they are located;
- the Guidelines are formulated by reference to the existing WHS Laws and are consistent with fabricators' existing obligations under the WHS Laws of their respective locations;
- the Guidelines explain to fabricators, in plain English (and will include other translated languages), what their obligations are under the WHS Laws, and how to comply with those obligations;

- the Guidelines represent practicable and achievable minimum steps that should be taken by a fabricator to comply with the WHS Laws and minimise the incidence and risks associated with respirable crystalline silica (**RCS**);
- material changes to the WHS Laws will be incorporated into the Guidelines such that the Guidelines reflect the WHS Laws as they exist in each state/territory; and
- the Guidelines do not specify obligations of a fabricator that are more onerous than that legally required by each state/territory of a fabricator for managing health risks associated with RCS.

The remaining portions of the Guidelines provide:

- practical guidance on how to comply with the obligations set out in Sections 2-9 and Addendum A; and
- a process which can be undertaken by fabricators to allow the Members to determine if a fabricator is compliant with the WHS Laws.

It is the Members' understanding that the key substantive requirements of all fabricators are consistent across all states/territories, except for Queensland where they are more prescriptive and stringent. The accreditation obligations/criteria relevant for a particular fabricator will therefore reflect the WHS legal obligations of the fabricator in the state/territory where it carries on its business. On that basis, the Members' intention is to establish the accreditation standards to assess a fabricator's compliance with their existing obligations to operate in a safe environment that is consistent with the WHS Laws.

Given Greencap has prepared the Guidelines, we would invite the ACCC to directly engage with Greencap further on this question.

3. How will the Accreditation Standards be updated to reflect changes made to the WHS Laws? Who will undertake this process? How will these changes be communicated?

As you are aware, the Guidelines were recently updated to reflect the recent Queensland Code. This was done by engaging with Greencap to prepare Addendum A to the Guidelines to reflect the additional requirements under the Queensland Code.

In the event that there are further statutory changes in the future, a similar process will be implemented. That is, where other substantive changes are made to the law that need to be reflected in the Guidelines - the members will request Greencap (or another third party who may be responsible for maintaining the Guidelines in the future) to update the Guidelines, either by amendment (where the change is relevant to all fabricators) or including another addendum as required (if the obligation is unique to a certain state/territory).

The Members envisage that such changes to the Guidelines would be communicated via the AESAG website, as well as communicated to fabricators directly through each Member's respective supply chain in advance of the law coming into effect.

4. **Section 10.1(e) of the Accreditation Standards states that fabricators may choose to utilise a third party occupational hygienist instead of Greencap Pty Ltd (Greencap).**

- (a) **Are there other parties who could undertake the accreditation who are not occupational hygienists? Why were occupational hygienists chosen?**

Occupational hygienists are the preferred supplier of auditing services for the reason that they have the requisite skills, equipment, and qualifications to soundly test and verify that a fabricator is compliant with the Guidelines that reflect the WHS Laws.

The Members understand there are a range of occupational hygienists throughout Australia that could assess a fabricator's compliance with the WHS Laws.

The Members are open to other service providers undertaking the accreditation auditing services, such as suppliers of WHS consulting and auditing services, provided they have the appropriate capability to make that assessment. The Members want to ensure that the auditing process is conducted with integrity and can be relied upon, so other parties will need to show that they have the requisite skills to provide this service.

The Members also consider that the rates offered by Greencap to provide the assessment services are competitive and are "scaled" to reflect the size and profits of different fabrication businesses. Nevertheless, fabricators are entitled to engage with other occupational hygienists, or other appropriate auditors, if they prefer.

- (b) **Are fabricators who use a third party accreditor required to respond to Greencap's 30 minute online survey? Is there a cost associated with using the online system for those fabricators who choose not to use Greencap?**

Fabricators using third party certifiers are not required to undertake the survey.

Should a fabricator decide to engage Greencap to complete the assessment, there is a \$150 registration fee to use its online system (CM3). At present, the fee is fully funded by the Members for fabricators to access the registration portal.

5. **Section 10.1(i) of the Accreditation Standards states that if a fabricator chooses to use a third party occupational hygienist and is found to not be compliant with the Accreditation Standards, the fabricator must not use the same occupational hygienist to assist with audit rectification.**

- (a) **Please explain the rationale for this requirement and why a fabricator needs to choose another occupational hygienist?**

The rationale behind using one third party for consultation and another third party for assessment is simply to avoid potential conflicts of interest for the occupational hygienists/WHs assessors. This requirement is intended to maintain the integrity of the separate consulting and assessment processes to ensure that assessors provide an independent review of the fabricator's compliance with the WHS Laws.

6. **Section 10.1 (j) of the Accreditation Standards states that accreditation will be valid for 12 months and must be renewed annually. Is this requirement in the Accreditation Standards consistent with the requirements in the WHS Laws? If not, why has this requirement been imposed?**

The legal obligation to comply with the WHS Laws is an ongoing one, meaning that fabricators must be compliant at all times.

The accreditation standards, including the Guidelines, are a compliance framework to assist and establish that fabricators are meeting their existing obligations under the WHS Laws. The proposal to conduct a 12 monthly audit process is a measure aimed at confirming that such compliance has been maintained.

The Members will review the process to determine the compliance by fabricators with the WHS Laws from time to time. The changes in process may include random or less frequent on-site audits. The key imperative is to enable greater transparency and ensure that the fabricators are operating safe working environments in compliance with the WHS Laws.

Similar to our response to Question 3, the Members intend to ensure that any such changes to the process would be communicated to fabricators.

7. How and by who will the decision be made to refuse the supply of engineered stone to a fabricator who does not meet the Accreditation Standards?

The 'decision to refuse' conduct will be made by the Members, individually or as a collective by some or all of the Members (a decision by some or all is not binding on any other Member and that a Member may change its decision at any time), based on the information they receive from Greencap or other WHS Assessors (such as occupational hygienists).

The Members consider it almost certain that each Member will make its own decisions to supply certain fabricators. However, as part of the AESAG association, the Members may be involved in discussions or the sharing of information about the compliance of certain fabricators, and may take decisions that may be alleged to be collective, depending on the particular factual circumstances.

The Members have therefore sought approval from the ACCC to engage in the proposed conduct to ensure that their decisions to supply fabricators are in accordance with the *Competition and Consumer Act 2010*.

To assist in providing further context to this issue, it is in the Members' interests to supply their products to as many fabricators as possible so as to maximise their sales. However, for socially responsible and commercial reasons, they want to be informed as to whether a fabricator is operating in accordance with the WHS Laws. On that basis, prior to any decision being made, the Members intend to work with the fabricators to give them the opportunity to become compliant with their existing WHS obligations.

(a) How will non-AESAG members be involved in the decision?

Non-members will **not** be involved in each Member's decision to refuse to supply certain fabricators. That is a matter for the Members.

Non-members may independently adopt the Guidelines, which are a publically available document, to assess whether a fabricator is compliant with their existing WHS Laws. Apart from that, non-members do not have any role in that process.

(b) Please outline the process which will be followed for refusing to supply engineered stone to a fabricator who is not accredited. For example, will

fabricators be given time to comply or rectify compliance issues, are there timeframes for warnings to be provided to the fabricator?

From 30 June 2020, any decision to potentially refuse to supply non-compliant fabricators will be considered by the Members (independently, and subject to the ACCC's authorisation, potentially collectively) on a case by case basis. Each Member also reserves its right to continue to supply a fabricator where other Members have decided not to and to change their decision at any time.

The Members are prepared to work with fabricators (and it is in their best interests to do so), and give them the opportunity, to rectify any non-compliance and bring their work environments to compliance with the WHS Laws before considering whether to not supply.

Where a fabricator is assessed by Greencap (or other assessor) to be non-compliant, the process will involve:

- Greencap, or another assessor, issuing a notice specifying areas of non-compliance;
- a reasonable period of time for the fabricator to seek to resolve areas of non-compliance after the initial review/audit. Depending on the nature of the non-compliance, as this may vary in different circumstances, the Members consider a period of 120 days to be a reasonable amount of time to rectify any areas of non-compliance;
- once the fabricator rectifies any areas of non-compliance, they can organise a further onsite audit; and
- AESAG will review Greencap's (or another assessor's) report and if satisfied that the fabricator complies with the Guidelines, the fabricator will be issued with an accreditation certificate.

8. The application states that AESAG members are seeking to ensure that fabricators are compliant with the Accreditation Standards by 30 June 2020. Please provide further detail as to the urgency for the refusal to supply element of the conduct for the request for interim authorisation.

The Members confirm that they will not seek to engage in the collective refusal to supply conduct during the interim period. If it provides the ACCC with additional comfort, the Members would be prepared to provide an undertaking not to collectively decide to refuse to supply prior to the ACCC's final determination.

The Members are seeking interim authorisation for the following reasons:

- Time is of the essence to ensure that fabricators are operating safe working environments. The effects from exposure to high levels of RCS is exacerbated by the concentration and frequency by which an individual is exposed. The sooner working environments are brought up to standard, the sooner individual stonemasons and the broader public will benefit.
- The Guidelines were provided to some 1,200 fabricators commencing in mid-November 2019. There has been a limited response from fabricators to date seeking to undertake audits in order to confirm that they are compliant with the WHS Laws.

- The Members are commencing a road-show in early February 2020 to communicate and educate fabricators about the accreditation standards. The road-show will involve the Members together explaining in some detail the rationale behind the accreditation standards, the Guidelines, and that they are together committed to the accreditation standards process, as well as the potential consequences for non-compliance with the WHS Laws.
- Given the lack of compliance to date by fabricators with the WHS Laws, the relatively few fabricators who have registered on the CM3 database and the even fewer number of fabricators who have scheduled an audit, the Members consider that they need to be able to say with certainty that they will begin considering whether to refuse to supply by June 2020 - and that such consideration may be made on a collective basis.
- In line with the Members' desire for greater transparency from the fabricators, the Members want to be transparent and give the fabricators greater certainty about this process. To that effect, the Members want to explain the entire process in a holistic way and inform the fabricators that their intention is to consider whether to not supply fabricators who they identify are not compliant with the WHS Laws.
- The members envisage that the time between the interim authorisation and 30 June 2020 will be the period of time in which fabricators can rectify any issues of non-compliance. This will give fabricators some certainty as to the timing of when the refusal may occur, and allow them sufficient time to bring their work environments up to standard before the potential refusal to supply is implemented.
- If interim authorisation is not provided at this stage, this may mean stonemasons will continue to be at risk longer than necessary.

Accordingly, the Members' request for interim authorisation is to ensure that they can educate, and make representations to the industry, about the accreditation standards and their intentions to refuse to supply non-compliant fabricators in the future.

If you have any questions or concerns, please do not hesitate to contact me.

Yours sincerely



Ayman Guirguis

Partner

