



Submission of the Australian Manufacturing Workers' Union as to the likely public benefits and effect on competition, or any other public detriment, from the proposed arrangements of Australian Engineered Stone Advisory Group (AESAG)

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

1. Introduction

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to provide a submission in relation to the proposed arrangements of Australian Engineered Stone Advisory Group (AESAG). The AMWU has played and continues to play a leading role in advocating for health and safety in Australian workplaces.
2. We understand that AESAG is seeking authorisation on behalf of itself, future members and other 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).
3. We have considered the proposal in relation to the likely public benefits and detriments which might arise. The authorisation is unnecessary and contrary to compelling public policy factors. Our position is based on our concern for our members' safety at work, as well as systemic implications of the Proposed Conduct for workplace health and safety.
4. The recent wave of silica related illnesses has been well documented and alarm in relation to these preventable diseases is justified. The focus on engineered stone has arisen as a result of the relative short exposure time before the onset of disease when compared to traditional exposures such as quarrying, tunnelling and the manufacturing of cement, together with the prevalence of exposure and illness.
5. The AESAG Members (the Members) note shortcomings in compliance with WHS laws in relation to engineered stone. AESAG seeks to impose a scheme whereby Fabricators would apply for accreditation to obtain supply of Engineered Stone. The accreditation would be against a scheme of AESAG's design which differs from WHS laws in certain respects. The accreditation would be to AESAG's satisfaction but inspections would generally be conducted by another firm, Greencap Pty Ltd (Greencap). Fabricators would pay a fee for this inspection and accreditation.
6. It would be a matter for AESAG to determine whether a level of non-compliance with its standards was acceptable, or to vary the standards from time to time. If a Fabricator was found to be falling short of AESAG's standards, AESAG may or may not decide to refuse supply, which would be a matter for AESAG's discretion. The factors taken into consideration in making this decision would be determined by AESAG. The decisions would not be subject to review, unlike, for example, a state work health and safety authority's decision to order that work cease due to an unacceptable safety risk. Government work health and safety authorities do not play a role in the proposed scheme, nor do unions or workplace health and safety representatives.
7. The scheme fails to address the concerns it ostensibly sets out to remedy. It risks legitimising a highly dangerous product through a scheme beset with uncertainty, conflicts of interest, and a lack of transparency.

2. Dangers of self regulation

8. The proposal arises in the context of a major health crisis.¹ Indeed, the concern is so grave that the Members have reported to a NSW parliamentary inquiry that they have been refused insurance cover due to the risk of silicosis associated with their product.² Calls to ban engineered stone are gaining prominence as the devastating effects of silicosis emerge.³
9. In the AMWU's view the Proposed Conduct is akin to a consortium of asbestos manufacturers seeking the power to selectively refuse supply in the name of public health. In some respects, the silicosis crisis is even more serious than the risks of asbestos. Young workers are increasingly being diagnosed with silicosis due to the shorter latency period of Accelerated Silicosis and the shorter duration of exposure required to contract the disease.
10. Allowing manufacturers of an extremely dangerous product to engage in cartel like behaviour is not an appropriate response to the proliferation of a potentially fatal substance. AESAG has not pointed to any evidence drawn from research in work health and safety, public health, or consumer and competition regulation, to support a view that the Proposed Conduct will have the desired effect.
11. The Proposed Conduct ignores the first and most effective method of controlling risk in the hierarchy of work health and safety management – elimination of the hazard.⁴ The AMWU is concerned by the failure to consider well established and effective methods of risk management, and the novel self regulatory scheme proposed in their stead. This failure to engage with work health and safety principles is perhaps unsurprising. The Proposed Conduct is said to be undertaken for the protection of workers but has not involve employees or their representatives in its design, nor will it in implementation.
12. The Applicants do not propose a scheme for mandatory reporting of infractions of relevant workplace health and safety laws. Rather than assisting in enforcement and strengthening the role of regulators, the Applicants propose to use their market power to enforce workplace health and safety laws.
13. The proposal fails to recognise the statutory roles of relevant state and federal agencies, and seeks to usurp and erode their important functions. Authorisation of the Proposed Conduct would be out of step with the legislative and bureaucratic framework established to protect workers' safety. It is of course important that employer and employee organisations take a leading role in driving change to ensure the safety of workers. It is the role of elected Health and Safety representatives to advocate for safety in the workplace and ensure compliance, and the role of government agencies to enforce and prosecute where there is non-compliance. These important stakeholders have no place in the scheme designed by AESAG.
14. Legal and regulatory frameworks are not ordinarily protected and enforced in Australia through cartel like organisations. Breaches of occupational health and safety legislation can lead to criminal prosecutions. The proposed arrangement does not recognise the systemic

¹ The Lancet, 'Editorial: The World is Failing on Silicosis' vol 7, issue 4, 1 April 2019.

² Michaela Whitbourn, 'Insurers refused cover to stone suppliers over lung disease risk', 7 December 2019, Sydney Morning Herald.

³ Lin Fritschi and Alison Reid, 'Engineered stone benchtops are killing our tradies. Here's why a ban's the only answer', 8 November 2019, <<https://theconversation.com/engineered-stone-benchtops-are-killing-our-tradies-heres-why-a-bans-the-only-answer-126489>>; Michael Atkin, 'Silicosis surge prompts more calls for a ban on engineered stone products', 16 September 2019, <<https://www.abc.net.au/news/2019-09-16/silicosis-surge-prompts-call-for-ban-on-engineered-stone-product/11516138>>.

⁴ Safe Work Australia, 'Model Code of Practice: How to Manage Health and Safety Risks', 7 December 2011, 18.

issues involved with allowing cartel like organisations to refuse to trade as a means of enforcing law of immense public importance.

15. Self-regulation can confer important reputational benefits and allow businesses to be seen in a more favourable light.⁵ The AMWU welcomes employers taking action to address health and safety hazards but the protection of workers from silicosis must be more than a public relations exercise. The AMWU is concerned that the Proposed Conduct could give a false sense of security and confer a veneer of legitimacy to an incredibly dangerous product.
16. In concerning echoes of past conduct of producers of hazardous products, at least one Member has funded research that is said to demonstrate the safety of their product,⁶ and AESAG now contend that a self-regulated arrangement is the appropriate response to the health crisis. Although the Members emphasise health concerns as the reason for the Proposed Conduct, the AMWU notes with concern a tendency to minimise the most serious health effects and the safest remedies.
17. AESAG has published a website entitled 'Questions and Answers'.⁷ To the question "Has anyone ever died from working with quartzstone products?", AESAG answers,

Stonemasons work with many raw products that produce silica dust during cutting and polishing. The risk of silicosis can be avoided by following the safety procedures and guidelines we provide to all fabricators. Whilst deaths have been reported around the world, it is not possible to associate them with a single product category.

18. The contention that it is not possible to link deaths to working with quartzstone products obscures the very real dangers of working with engineered stone. The death of Gold Coast stonemason Anthony White in March 2019 was widely reported as the first death in Australia caused by occupational exposure.⁸ Further deaths are anticipated as diagnoses have proliferated.
19. To the question "Should consumers be concerned about the safety of engineered quartz surfaces?" AESAG answers: "Not at all. Quartz surface are safe for consumer use and meet the most stringent health and safety regulations of every state and territory in Australia."
20. The lack of frankness in confronting the fatal risks of exposure to crystalline silica is concerning, and underscores the importance of an independent authority designing and ensuring safe workplace practices.

3. Consequences of non-compliance are uncertain

21. The Applicants propose to "consider whether to refuse to supply" engineered stone to fabricators who do not meet their accreditation standards but reserve the right to individually supply fabricators regardless of this factor.⁹ The consequences of non-compliance are therefore a matter for the Members to determine on a case by case basis.

⁵ Organisation for Economic Co-operation and Development, 2015, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests*, 11.

⁶ AESAG, 'Answers to Questions on Notice', 2 December 2019

<<https://www.parliament.nsw.gov.au/lcdocs/other/12894/AQON%20-%20AESAG.pdf>>.

⁷ AESAG, 'Questions and Answers', 2018, <<http://aesag.com.au/news/questions-answers/>>.

⁸ See eg Else Kinsella, 'Silicosis death of Anthony White sparks calls for action to address 'nationwide epidemic'', 13 March 2019, <<https://www.abc.net.au/news/2019-03-13/silicosis-victim-dies-from-disease/10895774>>.

⁹ AESAG, 'Application for authorisation to the ACCC', 29 November 2019, 25.

22. The fact that a non-compliant fabricator may nonetheless be supplied with engineered stone and that the penalty appears to be entirely discretionary undermines the integrity of the scheme and its objects. It also leaves the scheme open to abuse, as AESAG could favour certain fabricators for reasons unrelated to safety. Unfair or erroneous decisions to refuse supply would not be subject to review.
23. It is notable that the counterfactual set out by the Members indicates that if they are denied the opportunity to engage in the proposed conduct then “the Members will continue to undertake individual initiatives to combat unsafe fabrication practices, including individually considering whether or not to supply certain fabricators, though this may be less effective than engaging as a collective”.¹⁰ If the Members are individually committed to ensuring safety through denial of supply to operators who breach WHS laws, the utility of coordination is not clear.
24. The level of compliance required by AESAG is not strict. AESAG has published materials which detail the consequences of falling short of the Accreditation Standards as follows:
- Do we need to be 100% compliant with all the standards outlined in the Health & Hygiene Guidelines?*
- To achieve initial accreditation, if you are unable to achieve 100% compliance, you are required to have a clear plan and timeline to achieve 100% compliance. There are non-negotiable areas of compliance which your Greencap assessor will discuss with you; these include areas such as wet cutting and PPE.*
- What happens if we fail and my business is considered non-compliant with the Health & Hygiene Standards?*
- Greencap will issue a confidential notice specifying the areas of non-compliance and will assist you in addressing these areas if required.*
25. The fact that Fabricators who are non-compliant will be allowed to continue work, with no mandatory reporting to regulatory authorities, and at worst refusal to supply will be “considered”, means that there is no benefit from the scheme. Instead it will impose questionable costs on business, strengthen the market power of dominant parties, and act as window dressing for an incredibly unsafe industry.

4. Inappropriate timing

26. AESAG seeks interim authorisation on the basis yet no particular urgency is identified in the application. In fact, the application comes at an inopportune time. Self regulation is often initiated in the shadow of forthcoming government regulation¹¹ and the present application is no exception. As AESAG notes, ‘there is growing momentum for significant legislative reform which is expected to occur in 2020’.¹²
27. Regulation of engineered stone has become a focus for governments around Australia. In Victoria, the *Occupational Health and Safety Regulations 2019* (Vic) were amended in August 2019 to prohibit dry cutting. The NSW Standing Committee on Law and Justice is currently

¹⁰ Ibid., 29.

¹¹ Organisation for Economic Co-operation and Development, ‘Industry Self-Regulation: Role and Use in Supporting Consumer Interests’, 23 March 2015, 11.

¹² AESAG, ‘Application for authorisation to the ACCC’, 29 November 2019, 20.

undertaking a review of the dust diseases scheme in NSW. The Committee's final report is due on 25 March 2020.¹³ The National Dust Disease Taskforce has indicated it will be engaging in consultation in 2020 to develop recommendations to Australian Health Ministers.¹⁴

28. AESAG's scheme is intended to have stonemasons accredited by 30 June 2020. Many parts of the scheme have already begun, with AESAG advising that fabricators could register for accreditation from October 2019.¹⁵ Given that AESAG has already begun seeking fees for Greencap to accredit fabricators, and does not intend to conclude accreditation before 30 June 2020, the need for interim authorisation is not clear.
29. AESAG seek that the duration of the authorisation be ten years, double the ordinary period authorisation. This is inappropriate given the rapidly changing regulatory environment in relation to engineered stone and the experimental nature of the Proposed Conduct. The fact that the onset of disease may take years has no relationship to the suggestion that the Proposed Conduct should also continue for several years. Rather, if authorised, the Proposed Conduct should be subject to prompt review.

5. Flaws in the inspection and accreditation regime

30. The WHS laws on which the Accreditation Guidelines are said to be modelled apply already to Fabricators. The benefit of an accreditation system which does not go beyond the applicable minimum standards is illusory.
31. In fact, the Accreditation Standards fall short of relevant standards. For example, the current Workplace Exposure Standards, applicable under the model WHS laws, provide for an eight-hour time weighted average of 0.05 mg/m³.¹⁶ The proposed Accreditation Standards indicate that a Person Conducting a Business or Undertaking should specify a maximum exposure standard of 0.1 mg/mg³. This misinformation appears notwithstanding that AESAG is aware of the amended standard.¹⁷ The standard could well be revised down further, given that the American Conference of Government Industrial Hygienists has recommended a limit of 0.025 mg/m³,¹⁸ WorkSafe Victoria recommends 0.02 mg/m³,¹⁹ and the Cancer Council reports that there is no evidence to support a safe level of silica dust exposure.²⁰
32. Greencap is the agency recommended by AESAG to undertake inspections and accreditation. Greencap is not a statutory body with relevant accountability and transparency standards, nor are its aims or priorities necessarily related to the public interest. The Proposed Conduct involves the payment of fees to Greencap assessors for an assessment against standards created by Greencap. Under the scheme, Greencap will be funded by the very parties it is

¹³ See <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2538>>.

¹⁴ See <<https://consultations.health.gov.au/ohp-regulatory-policy-branch/national-dust-disease-taskforce/>>.

¹⁵ AESAG, 'FAQs', <<http://aesag.com.au/media/1044/aesag-accreditation-faqs-final-281019.pdf>>.

¹⁶ Safe Work Australia, 'Workplace Exposure for Airborne Contaminants', 16 December 2019, 36.

¹⁷ AESAG, 'Accreditation Details', 26 August 2019, available at <<http://aesag.com.au/media/1049/aesag-accreditation-details-procedure-sept-2019.pdf>>, 1.

¹⁸ American Conference of Government Industrial Hygienists, 'Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices', 2012.

¹⁹ WorkSafe Victoria, 'Stonemasons: Preventing crystalline silica exposure', 3 January 2020, <<https://www.worksafe.vic.gov.au/stonemasons-preventing-crystalline-silica-exposure>>.

²⁰ Cancer Council, 'Silica Dust', 3 November 2019, <<https://www.cancer.org.au/preventing-cancer/workplace-cancer/silica-dust.html>>.

required to assess and investigate. There is no suggestion of any measures to ensure the independence of assessors, nor any remedy if independence and integrity are lacking. This can be contrasted with the highly regulated system of inspections by statutory authorities.

33. It appears that businesses will be required to pay fees to Greencap even where they are in compliance with WHS legislation. There is no indication that any unfavourable or inappropriate assessment will be subject to review. Similarly, a favourable assessment and accreditation will not be able to be contested, for example by workplace Health and Safety Representatives.
34. The assertion that Greencap is independent of AESAG is not supported by any detail. The arrangement between Greencap Pty Ltd and AESAG remains opaque. AESAG indicates that it has conducted an “informal tender process” and “negotiated affordable charges for Fabricators” in terms of fees payable to Greencap and that no portion of the accreditation fees are paid to AESAG, but there is no clarity on whether other amounts are exchanged between Greencap and AESAG for services provided.²¹

6. Conclusion

35. The seriousness of the hazard and the consequences of exposure demand a transparent and strong response. Exposure to crystalline silica is potentially fatal and must be subject to a system of regulation and enforcement characterised by integrity and a commitment to the public interest. Employers are ill placed to create their own system of workplace health and safety regulation, assessment and accreditation. The proposed standards differ in important respects from those that exist across Australian jurisdictions. The inspection regime transfers costs from the public to fabricators themselves, but in so doing cedes oversight from the public to industry. The Proposed Conduct is said to be for the protection of workers, but has been designed without consultation or consideration of statutory authorities with that very remit, much less workers and their elected representatives. AESAG have designed a scheme which vests a great deal of power in businesses which control 77% of the market, and none in the hands of workers who urgently need safe workplaces.

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²¹ AESAG, ‘Application for authorisation to the ACCC’, 29 November 2019, 23; AESAG, ‘FAQs’, <<http://aesag.com.au/media/1044/aesag-accreditation-faqs-final-281019.pdf>>, 9.