

Ms Danielle Staltari
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Dear Ms Staltari

**Australian Engineered Stone Advisory Group's application for an authorisation
AA1000461**

Thank you for your request for information regarding the Australian Engineered Stone Advisory Group's (AESAG's) application for an authorisation.

Safe Work Australia leads the development of national policy to improve work health and safety (WHS) and workers' compensation arrangements in Australia. Safe Work Australia is an inclusive, tripartite body, working in partnership with governments, business and workers to:

- develop and evaluate national policy and strategies,
- develop and evaluate the model WHS legislative framework,
- undertake research, and
- collect, analyse and report data.

Occupational lung diseases, including silicosis, are priority conditions under the *Australian Work Health and Safety Strategy 2012-2022*. In 2018, Safe Work Australia agreed to implement an occupational lung diseases work plan incorporating key issues and projects to address them.

In response to your request for information, Safe Work Australia has undertaken a preliminary comparison of the model WHS laws and sections 3-9 of the Health and Hygiene Guidelines proposed by AESAG to form the accreditation standard for fabricators and stonemasons working with engineered stone (the proposed Accreditation Standard) (**enclosed**). This is our preliminary analysis and is not intended to be, nor does it form, legal advice.

Please note the enclosed preliminary analysis does not capture or compare the Accreditation Standard with individual jurisdictions' WHS laws. Instead, it is a comparison with the model WHS laws, which do not apply in a jurisdiction unless that jurisdiction has separately taken action to implement the model WHS laws as their own WHS laws. The model WHS laws have been implemented in all jurisdictions except Victoria and Western Australia.

Jurisdictions which have implemented the model WHS laws are expected to make variations to ensure the laws operate effectively in their jurisdiction. In some instances,


jurisdictions have made more substantial variations which may mean that the comparison table is not correct for that jurisdiction.

This letter and the enclosed preliminary analysis can be published, noting that it is intended for information only.

Last, please note that Safe Work Australia has not considered the merits of the AESAG application and does not have a position as to whether it supports that application or not.

I hope this information assists.

Yours sincerely



Amanda Johnston
General Counsel
Safe Work Australia

19 February 2020

The Accreditation Standard requirements compared to the model WHS laws¹

Accreditation Standard section	Corresponding provisions of the model WHS laws	Comparison
Section 3.1 Duties of a PCBU	Model WHS Act: <ul style="list-style-type: none"> • s 17 - Management of risks • s 46 – Duty to consult other duty holders • s 47 – Duty to consult workers 	The duties of a PCBU outlined in the Accreditation Standard are generally based on s 17, 46 and 47 of the model WHS Act. However, the duties have been paraphrased. Terms such as “worker” and “reasonably practicable,” which are used in section 3.1 of the Accreditation Standard, are defined terms in the model WHS Act. The second paragraph of s 3.1 of the Accreditation Standard indicates that a PCBU ‘may’ have duties to consult, co-operate and coordinate with other duty holders. This is inconsistent with the model WHS Act, which requires consultation, co-operation and coordination with other duty holders (s 46). Section 3.1 of the Accreditation Standard is not intended to be a comprehensive list of the duties of a PCBU. Note, for example, that it does not include the primary duty of care of a PCBU (s 19).
Section 3.2 Duties of a worker	Model WHS Act: <ul style="list-style-type: none"> • s 28 – Duties of workers Model WHS Regulations: <ul style="list-style-type: none"> • reg 46 – Duties of worker (in relation to use of PPE) 	The duties of a worker are mostly consistent with the corresponding provisions of the model WHS laws. However, the Accreditation Standard imposes some higher and lower obligations on workers than the model WHS laws: <ul style="list-style-type: none"> • The Accreditation Standard requires that a worker ‘<i>not undertake any activity</i>’ that adversely affects the health and safety of other persons, which is a higher standard than s 28 of the model WHS Act which requires a worker to ‘<i>take reasonable care</i>’ that their acts or omissions do not adversely affect the health and safety of other persons. • The Accreditation Standard provides that workers must ‘adhere to’ all reasonable health and safety policies or procedures that they have been ‘notified of and appropriately trained in’, whereas s 28 of the model WHS Act only requires a worker to co-operate with any reasonable health and safety policy or procedure that they have been ‘<i>notified of</i>’.
Section 3.3 Roles and responsibilities	Model WHS Act: <ul style="list-style-type: none"> • s 19(3)(f) – Primary duty of care 	This section generally sets out the rules and responsibilities that apply to the implementation of the Accreditation Standard. Section 3.3(d) of the Accreditation Standard is consistent with s 19(3)(f) of the model WHS Act, regarding supervision of workers.
Section 4 Health and Safety Policy	Model WHS Act: <ul style="list-style-type: none"> • s 48 - Nature of consultation 	There is no specific requirement under the model WHS laws to prepare a “Health and Safety Policy”. However, the model WHS Act does contain a duty to consult workers about WHS matters. The types of consultation listed in s 4 of the Accreditation Standard appear to be derived from s 48 of the model WHS Act.
Section 5.1	Model WHS Regulations:	Section 5.1 is generally consistent with the model WHS laws with a few differences/inconsistencies:

¹ The model WHS laws have been developed for implementation by all jurisdictions (that is, the Commonwealth, states and territories). However, the model WHS laws do not apply in a jurisdiction unless the jurisdiction has separately taken action to implement the model WHS laws as their own WHS laws.

Accreditation Standard section	Corresponding provisions of the model WHS laws	Comparison
Identifying RCS hazards	<ul style="list-style-type: none"> reg 34 – Duty to identify hazards reg 38 – Review of control measures reg 51 – Managing risks to health and safety (Hazardous atmospheres) reg 351 – Management of risks to health or safety (Hazardous chemicals) <p>Model WHS Act:</p> <ul style="list-style-type: none"> s 49(a) – When consultation is required 	<ul style="list-style-type: none"> Subsection 5.1(b) indicates that it is “best practice” to consult with workers. This is inconsistent with s 49(a) of the model WHS Act which requires consultation when identifying hazards and assessing risk. Subsection 5.1(c) provides an additional requirement to record hazards in a risk register. There is no such requirement under the model WHS laws. However, the <u>model Code of Practice: How to manage work health and safety risks</u> suggests that a PCBU may develop a risk register and contains an example. There is also an example of a risk register at Appendix A 1.2 of the Accreditation Standard. A Code of Practice that has been approved in a jurisdiction is admissible as evidence of whether or not a duty or obligation under the model WHS laws has been complied with, but is not mandatory.
Section 6.1 Assessing RCS Exposures Risk	<p>Model WHS Regulations:</p> <ul style="list-style-type: none"> reg 50 – Monitoring airborne contaminant levels reg 368 – Duty to provide health monitoring <p>Model WHS Act:</p> <ul style="list-style-type: none"> s 49(a) – When consultation is required 	<p>There is no requirement in the model WHS laws to have a risk assessment documented in writing for airborne contaminants, hazardous atmospheres or hazardous chemicals. However, the model Codes of Practice suggest that a risk assessment may assist a PCBU in identifying ways to manage risk (see, for example, the <u>model Code of Practice: Managing risks of hazardous chemicals in the workplace</u>).</p> <p>There are also specific duties under the model WHS laws for a PCBU to conduct air monitoring (reg 50) and health monitoring (reg 368).</p> <p>The requirement in s 6.1(b) of the Accreditation Standard for a PCBU to consult with workers during the risk management process is consistent with s 49(a) of the model WHS Act which requires consultation when identifying hazards and assessing risk.</p>
Section 7.1 Controlling RCS Risk	<p>Model WHS Act:</p> <ul style="list-style-type: none"> s 17 - Management of risks <p>Model WHS Regulations:</p> <ul style="list-style-type: none"> reg 35 – Managing risks to health and safety reg 36 – Hierarchy of control measures 	<p>This section is based on reg 36 of the model WHS Regulations. However, there are some inconsistencies in the way it has been paraphrased:</p> <ul style="list-style-type: none"> Section 7.1 of the Accreditation Standard paraphrases reg 36 of the model WHS Regulations, and lists the types of control measures available to manage risks. It does not make clear the order in which the control measures must be used in accordance with the model WHS Regulations. In s 7.1(c)(i), the Accreditation Standard states that “where possible” a PBCU “<i>should</i>” eliminate processes or equipment that generate and expose workers to RCS. This is inconsistent with the model WHS laws which <i>require</i> a duty holder to eliminate risks to health and safety so far as is reasonably practicable (s 17 of the model WHS Act). In s 7.1(c)(i), the Accreditation Standard has also replaced the defined term in the model WHS Laws - “reasonably practicable” with “where possible”. In our view, these phrases are not interchangeable, and the Accreditation Standard sets a lower threshold than the model WHS laws.

Accreditation Standard section	Corresponding provisions of the model WHS laws	Comparison
Section 7.2 RCS Engineering Controls	Model WHS Regulations: <ul style="list-style-type: none"> reg 36 – Hierarchy of control measures 	<p>Section 7.2 provides practical guidance on how to administer engineering controls. Section 7.2(a) indicates that engineering controls should be used where higher level controls do not control the risk to safe levels. This creates ambiguity as to the levels of controls. Under the model WHS Regulations, substituting, isolating and engineering controls are all the same level control, after elimination.</p> <p>Section 7.2(b) provides an additional requirement to document engineering controls in the risk register. As noted above, there is no requirement under the model WHS laws to have a risk register although a PCBU may do so in order to identify, assess and manage risks.</p>
Section 7.3 RCS Administrative Controls	Model WHS Regulations <ul style="list-style-type: none"> reg 36(4) – Hierarchy of control measures 	<p>Section 7.3 is based on the requirement under the model WHS Regulations to use administrative controls to minimise risk, so far as reasonably practicable, if a risk remains after using the higher level control measures. The Accreditation Standard provides additional guidance on the types of administrative controls that could be implemented to control RCS risk.</p> <p>Section 7.3 has paraphrased the model WHS laws. Of note, the Accreditation Standard states administrative controls shall be implemented where higher level controls do not control RCS risks to 'acceptable levels'. In contrast, the model WHS laws require a duty holder to minimise risks using higher level controls, so far as is reasonably practicable. The difference between the two phrases may result in different tests applying to when a duty holder can implement administrative controls, such that a duty holder may comply with the Accreditation Standard but not be fulfilling their duties under the model WHS laws.</p> <p>Section 7.3(b) lists respiratory protective equipment (RPE) and personal protective equipment (PPE) as administrative controls, which is inconsistent with the model WHS Regulations that list PPE as a lower level control than administrative controls.</p>
Section 7.3.1 Respiratory Protective Equipment	Model WHS Regulations: <ul style="list-style-type: none"> reg 36(5) – Hierarchy of control measures reg 44 – Provision to workers and use of PPE 	<p>As above, this section has been included under administrative controls. Under the model WHS laws, RPE is a type of PPE, which is a lower level control than administrative controls as in the hierarchy of controls (reg 36). To be consistent with the model WHS laws, there should be a standalone section on PPE/RPE after the section on administrative controls in the Accreditation Standard.</p> <p>The requirements provided by Section 7.3.1 are specific ways to comply with the requirements set out in reg 44 in relation to providing and maintaining PPE. These are additional to, but not inconsistent with, the model WHS laws.</p>
Section 7.3.1.1 Respiratory Protective Equipment Training Requirements	Model WHS Regulations: <ul style="list-style-type: none"> reg 39 – Provision of information, training and instruction reg 44 – Provision to workers of PPE 	<p>This section relates to RPE training. As above, there should be a standalone section on PPE/RPE after the section on administrative controls in the Accreditation Standard to be consistent with the model WHS laws.</p> <p>This section provides specific requirements relating to what must be included in training for RPE which appear to be derived from the reg 44(4) of the model WHS Regulations.</p>

Accreditation Standard section	Corresponding provisions of the model WHS laws	Comparison
Section 7.3.2 Personal Protective Equipment (PPE)	Model WHS Regulations: <ul style="list-style-type: none"> reg 36(5) – Hierarchy of control measures reg 44 – Provision to workers and use of personal protective equipment Reg 39 - Provision of information training and instruction 	As above, there should be a standalone section on PPE/RPE after the section on administrative controls in the Accreditation Standard, to be consistent with the model WHS laws. Substantively, this section combines existing requirements under the model WHS Regulations in relation to PPE, as well as providing additional guidance on how to comply with the PPE requirements. This section is not inconsistent with the requirements of the model WHS laws.
Section 8.1 Workplace personal exposure monitoring	Model WHS Regulations <ul style="list-style-type: none"> Reg 50 - Monitoring airborne contaminant levels 	Section 8.1 broadly reflects the requirements of regs 49 and 50 relating to managing risks of airborne contaminants. However, it refers to “workplace personal exposure monitoring” rather than “monitoring airborne contaminants”. This difference may give rise to confusion for PCBU’s trying to find the context for this requirement in the model WHS laws. Subsections 8.1(a), (c) and (d) are broadly consistent with the model WHS laws. However, there are some inconsistencies to note: <ul style="list-style-type: none"> Subsection 8.1(b) provides an additional requirement to the model WHS laws for the monitoring of RCS to be completed by a “competent person”. A “competent person” is a defined term under the model WHS Regulations. However, reg 50 does not require air monitoring (other than for asbestos-related work) be done by a “competent person”. As such, this reflects an additional obligation to the model WHS laws. Subsection 8.1(e) provides that workers must be provided with their exposure monitoring data (i.e. air monitoring), generally in a letter. There is a requirement under reg 50(3) for PCBU’s to ensure that the results of air monitoring are readily accessible to persons at a workplace who may be exposed to the relevant substance or mixture. However, it is not a requirement for a PCBU to provide this information to workers under the model WHS laws.
Section 8.2 Health surveillance and assessment	Model WHS Regulations: <ul style="list-style-type: none"> reg 368 – Duty to provide health monitoring reg 371 – Duty to ensure health monitoring is supervised by registered medical practitioner with experience 	Section 8.2 is comparable to the health monitoring provisions in the model WHS Regulations. While the Accreditation Standards refer to “health surveillance and assessment” the model WHS Regulations refer to “health monitoring”. This could cause confusion for some PCBU’s. Other notable differences to the model WHS laws include: <ul style="list-style-type: none"> In contrast to the model WHS Regulations, the Accreditation Standard prescribes a requirement to perform “health surveillance” pre and post-employment. While this is not a specific requirement of the model WHS Regulations, it is encouraged in Safe Work Australia’s guidance. Another difference is that reg 371 outlines the duty to ensure health monitoring is supervised by a “registered medical practitioner” with experience in health monitoring. The

Accreditation Standard section	Corresponding provisions of the model WHS laws	Comparison
		Accreditation Standard specifies that "health surveillance" should be undertaken by a "registered Occupational Physician".
Section 8.3 Verification of controls	Model WHS Regulations: <ul style="list-style-type: none"> reg 37 – Maintenance of controls reg 38 – Review of controls 	This Section is based on the requirements of the model WHS Regulations to maintain and review controls. It provides specific examples of ways to verify controls. As these are just suggestions, this does not reflect a departure from the model WHS Regulations.
Section 8.4 Incidents and investigations	Model WHS Regulations: <ul style="list-style-type: none"> reg 38 – Review of control measures reg 375 – Duty to give health monitoring report to worker reg 376 – Duty to give health monitoring report to regulator 	Section 8.4 draws on a number of requirements under the model WHS laws including reviewing control measures and health monitoring. Generally, these sections are consistent with the respective provisions of the model WHS laws. There is one inconsistency in subsection 8.4(a) where it says that organisations "should" ensure control measures are reviewed and improved when there has been high levels of exposure to RCS. It is a requirement under reg 38(2) of the model WHS Regulations to review and as necessary revise a control measure in such circumstances. This Section directs PCBUs to undertake their own internal investigations. This would be in addition to the incident reporting requirements and external investigation powers under the model WHS laws.
Section 9 Records	Model WHS Regulations <ul style="list-style-type: none"> reg 50 – Monitoring airborne contaminant levels reg 352 – Review of control measures reg 378 – Health monitoring records 	Section 9 provides record keeping requirements for workplaces that have potential to expose workers to RCS. Some of the record keeping requirements are consistent with the model WHS Regulations, while some are additional and unique to the Accreditation Standard. Subsection 9(d) provides an additional requirement to the model WHS laws on offering records to the Regulator if an operation ceases. It is unclear how this would work in practice, given it is not a requirement under the model WHS laws.