

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations
Work Health and Safety Act 2011

Notice of a Disallowable Instrument

Work Health and Safety (Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace) Code of Practice 2022

The *Work Health and Safety Act 2011* (the WHS Act) and accompanying *Work Health and Safety Regulations 2011* (the WHS Regulations) provide the primary work health and safety legislation for the Commonwealth jurisdiction. They are based on model laws developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

Section 274 of the WHS Act provides that the Minister may approve codes of practice for the purposes of the WHS Act. Section 275 of the WHS Act provides that an approved code of practice is admissible in proceedings under the WHS Act as evidence of whether or not a duty or obligation under the WHS Act has been complied with. A court may have regard to the code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code of practice relates, and may rely on the code of practice in determining what is reasonably practicable in the circumstances to which the code of practice relates.

The purpose of this instrument is to approve the new *Work Health and Safety (Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace) Code of Practice 2022* (the Code). The Code provides practical guidance to duty holders on meeting their obligations under the WHS Act and the WHS Regulations.

In accordance with paragraph 273B(1)(d) of the WHS Act, this instrument is a legislative instrument within the meaning of the *Legislation Act 2003* (Legislation Act).

Consultation

Prior to approving a code of practice, the Minister must be satisfied that the Code has been developed in consultation with the Commonwealth, State and Territory governments, unions and employer organisations (WHS Act s 274(2)). The model Code was developed through Safe Work Australia's tripartite consultation process. Safe Work Australia is comprised of representatives from the Commonwealth, each State and Territory, the Australian Council of Trade Unions, Australian Industry Group and the Australian Chamber of Commerce and Industry.

Incorporated documents

Subsection 274(3) of the WHS Act provides that approved codes of practice made under the WHS Act may apply, adopt or incorporate material from other documents in force at a particular point-in-time or from time-to-time. This displaces the presumption under s 14(2) of the Legislation Act in relation to documents incorporated from time-to-time. The Code references a number of other documents to provide guidance to readers about where to find additional information on particular hazards and risks. These include other codes of practice, and guidance material developed by Safe Work Australia.

Codes of Practice

The Code references a number of other codes of practice, which under s 273B(1)(d) of the WHS Act are legislative instruments and available on the Federal Register of Legislation. As legislative instruments, these codes of practice are incorporated from time-to-time.

Safe Work Australia Guidance Materials

The Code also refers to a number of guides published by Safe Work Australia. These documents provide detailed practical guidance to duty holders about how to manage specific hazards and risks. These materials are subject to ongoing review, are incorporated from time-to-time, and are available on the Safe Work Australia website

<https://www.safeworkaustralia.gov.au/resources-publications/guidance-materials>

Sunsetting

The *Legislation (Exemptions and Other Matters) Regulation 2015* at regulation 12, item 68, provides that an instrument made under subsection 274(1) of the WHS Act is a legislative instrument that is not subject to sunsetting. The Code is a legislative instrument made under s 274(1) of the WHS Act and is therefore exempt.

Commonwealth approved codes of practice are exempt from sunsetting because they form part of an intergovernmental scheme for a nationally consistent framework to secure the health and safety of workers and workplaces. The Commonwealth and all states and territories formally committed to the harmonisation of work health and safety laws by signing the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. As such, the codes form part of an intergovernmental scheme and it is appropriate to exempt them from sunsetting.

This particular code adopts as an “approved code of practice” the model Code of Practice: Managing the risks of respirable crystalline silica from engineered stone in the workplace which was developed through the tripartite Safe Work Australia process. Other jurisdictions will implement the model code resulting in consistent regulation of respirable crystalline silica in Australia.

Privacy

The Code at part 3.3 provides guidance about a person conducting a business or undertaking’s duties under the WHS Regulations Chapter 7 Part 7.1 Division 6.

The WHS Regulations require health monitoring for a range of work, including work with respirable crystalline silica. Health monitoring for workers exposed to crystalline silica primarily involves screening the changes in a worker’s body that may indicate the development of silica related-injury, illness or disease. Health monitoring is necessary to:

- detect the early signs of adverse health effects
- help identify control measures that are not working effectively; and
- assist in protecting workers from the risk of exposure to silica dust.

The WHS Regulations require a person conducting a business or undertaking to ensure health monitoring occurs and to provide certain information to the relevant health practitioner. Information provided to a health practitioner includes personal information in the form of the worker’s name, address, date of birth and details about the work they do. The disclosure of this information is necessary for the health monitoring to be undertaken and would be subject to patient confidentiality once received by the health practitioner.

The WHS Regulations also require the person conducting a business or undertaking to take all reasonable steps to obtain a health monitoring report from the registered medical practitioner who carries out the monitoring. Records are required to be kept confidential (regulation 378) but disclosure is required in certain circumstances:

- The report must be given to the worker
- If the report indicates the worker may have contracted a disease or includes recommendations that remedial measures occur at the workplace, the report must be provided to Comcare, the Commonwealth work health and safety regulator (regulation 376)

- This ensures that the regulator has appropriate visibility over injuries and illnesses and can undertake monitoring, compliance and enforcement activities as appropriate.
- Reports must be shared with other persons conducting a business or undertaking which are also obliged to arrange for monitoring of the same worker (regulation 377).
 - This is necessary because more than one person conducting a business or undertaking may have a duty in relation to the same worker (WHS Act section 16), for example if the workplace is shared by two employers. It is important that duty holders cooperate and coordinate activities to ensure the health and safety of affected workers.

A health monitoring record will contain a range of sensitive information. Regulation 374 provides that it must contain the name and date of birth of the worker and the results of the monitoring which would pertain to the person's health.

There are a range of protections which apply to the information once it is received:

- Information obtained by Comcare in performing functions under the WHS Act is subject to strict confidentiality provisions (section 271). Information collected by Comcare that is personal information is also subject to the requirements of the *Privacy Act 1988* (Privacy Act) which governs its collection, use, disclosure, storage and disposal.
- The Commonwealth WHS jurisdiction is unique in that it applies to the Commonwealth, public authorities and non-Commonwealth licensees (large companies). These entities would be subject to the Privacy Act. There may be scope for contractors to be provided information where the Commonwealth entity and the contractor are both responsible for a worker's health monitoring. Whether the Privacy Act applies would be a question of fact.

Regulation Impact Statement and other matters

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement (RIS) was not required to implement the Code in the Commonwealth jurisdiction (OBPR ID: OBPR22-02928). OBPR confirmed with Safe Work Australia that a RIS was also not required during the development of the model Code of Practice: Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace (OPBR ID: 26432).

A Statement of Compatibility with Human Rights has been completed for this Legislative Instrument, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the instrument is compatible with human rights. A copy of the Statement is attached.

In accordance with the WHS Act, the Minister has notified the approval of the Code in newspapers and copies of the Code (and applied, adopted and incorporated documents) are available for inspection, without charge, at Comcare offices during normal business hours. Copies are also published on the Comcare website www.comcare.gov.au.

The Code commences on the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Work Health and Safety (Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace) Code of Practice 2022

This Legislative Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Legislative Instrument, to which this Human Rights Compatibility Statement relates, approves the *Work Health and Safety (Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace) Code of Practice 2022* (the Code). The Code provides practical guidance to duty holders on meeting their obligations under the *Work Health and Safety Act 2011* (the WHS Act) and the *Work Health and Safety Regulations 2011* (the WHS Regulations).

The WHS Act and accompanying WHS Regulations provide the primary work health and safety legislation for the Commonwealth jurisdiction. They are based on model laws developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

Section 274 of the WHS Act provides that the Minister may approve codes of practice for the purposes of the WHS Act. Section 275 of the WHS Act provides that an approved code of practice is admissible in proceedings under the WHS Act as evidence of whether or not a duty or obligation under the WHS Act has been complied with. A court may have regard to a code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code of practice relates, and may rely on a code of practice in determining what is reasonably practicable in the circumstances to which the code of practice relates.

Human rights implications

Article 7 of the International Covenant on Economic, Social and Cultural Rights provides that everyone has the right to the ‘enjoyment of just and favourable conditions of work, which ensure, in particular...[s]afe and healthy working conditions’. The instrument promotes the right to safe and healthy working conditions by providing duty holders with practical guidance for working with engineered stone. The guidance will assist them to meet their obligations under the WHS Act and the WHS Regulations.

Conclusion

The instrument is compatible with human rights because it promotes the protection of human rights.

Minister for Employment and Workplace Relations, the Hon Tony Burke MP