

Explanatory Statement

Subject: *Work Health and Safety Regulations 2011*

Work Health and Safety (Re-installation of existing engineered stone benchtops, panels or slabs) Exemption 2024

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 (WHS) legislation for the Commonwealth jurisdiction. They are based on model laws developed by Safe Work Australia (SWA) under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

Regulation 684 provides that the regulator may exempt a person or class of persons from compliance with any of the WHS Regulations. An exemption may be made on the regulator's own initiative.

Regulation 692 (2) provides that an exemption that exempts a class of persons is a legislative instrument.

All terms used in the Instrument and Explanatory Statement have the same meaning as in the WHS Act and WHS Regulations.

Prohibition on engineered stone benchtops, panels and slabs

In December 2023, Work Health and Safety (WHS) Ministers unanimously agreed to prohibit the use, supply and manufacture of all engineered stone. Ministers also agreed to appropriate exceptions for activities such as removal, repair, minor modification, and disposal of engineered stone products installed prior to the prohibition (legacy products), as well as appropriate exceptions for engineered stone products with trace levels of crystalline silica (under 1%).

On 1 July 2024, amendments to the WHS Regulations which implemented the prohibition on the manufacture, supply, processing and installation of engineered stone benchtops, panels and slabs came into effect in the Commonwealth jurisdiction.

Under regulation 529D, it is an offence for a person conducting a business or undertaking (PCBU) to carry out, or direct or allow a worker to carry out work that involves the manufacture, supply, processing or installation of engineered stone benchtops, panels or slabs.

There are limited exceptions to the prohibition for which work with engineered stone benchtops, panels or slabs is permitted. These are:

- for research and analysis
- to sample and identify engineered stone
- for removal, repair and minor modification of legacy engineered stone, and
- disposal of engineered stone.

This means that PCBUs are permitted to carry out, or direct workers to carry out, the repair, minor modification, removal or disposal of legacy engineered stone involving processing provided:

- the regulations relating to the processing of a crystalline silica substance are complied with, including assessing whether the processing is high risk
- the WHS regulator is notified of the work, and
- processing is controlled.

Work Health and Safety (Re-installation of existing engineered stone benchtops, panels or slabs) Exemption 2024

This Legislative Instrument operates to exclude from the prohibition in regulation 529D a class of persons being any PCBU who carries out, or directs or allows a worker to carry out the re-installation of an engineered stone benchtop, panel or slab that was removed in order for other work to be carried out in the premises, provided any processing of the stone is limited to minor modification required for its re-installation and the processing is controlled consistent with the exclusion for minor modification in regulation 529F.

This Legislative Instrument is required due to an unintended consequence of the amendments to the WHS Regulations which meant that the engineered stone prohibition has the effect of prohibiting a PCBU from re-installing an engineered stone benchtop, panel or slab in circumstances where, for example:

- an existing engineered stone benchtop, panel or slab has been removed to repair underlying cabinetry or plumbing, and
- the engineered stone benchtop, panel or slab merely needs to be put back in place after the repairs are complete.

The reason the re-installation in the above example is prohibited is that regulation 529D prohibits (amongst other things) the installation of engineered stone benchtops, panels and slabs. Further, the exceptions from the prohibition in regulation 529F do not apply in those circumstances – they merely permit the processing of the stone for the limited purposes of removal, repair and minor modification, and do not permit its installation (including re-installation).

SWA Members agreed that prohibiting the re-installation of engineered stone benchtops, panels or slabs as outlined above was not the policy intention of the prohibition in the amended model WHS Regulations.

As a result, Members agreed to an interim measure until amendments are made to the WHS Regulations to enable the re-installation of engineered stone benchtops, panels or slabs. Specifically, it was agreed that regulators could grant a class exemption on their own initiative under the general exemption power in regulation 684 of the WHS Regulations.

It was further agreed that regulators would apply a common approach to providing appropriate exemptions to address the identified re-installation issue.

This Instrument is consistent with the exemptions drafted in corresponding jurisdictions.

Relevant matters in granting an exemption

Regulation 685 provides that the regulator must consider all relevant matters before granting an exemption. The regulator (Comcare) considered all relevant matters in making the Instrument, including that the making of the instrument will result in a standard of health and safety that is at least equivalent to the standard that would be complied with.

In determining whether there is an equivalent standard of health and safety, SWA has advised that the health risks associated with the re-installation of an engineered stone benchtop, panel or slab are likely comparable to those arising from the installation of finished engineered stone products (e.g. a slab with a moulded sink for a vanity), which were excluded from the scope of the prohibition by WHS ministers. SWA has advised that granting an exemption would be an appropriate interim solution until regulation amendments are made to resolve the issue.

Further, Regulation 685(b) provides that a regulator may impose certain conditions to ensure granting the exemption will result in a standard of health and safety that is at least equivalent to the standard achieved by complying with the relevant provisions. In accordance with regulation 685(b), the Legislative Instrument imposes the following conditions:

1. the exemption only applies to the re-installation of an engineered stone benchtop, panel or slab:
 - a) associated with the repair or modification of underlying cabinetry or supporting structure, or to give access to repair or modify some other underlying component
 - b) in the same location from which it was removed, and
 - c) at the same address from which it was removed.
2. The exemption does not allow the installation of a replacement engineered stone benchtop, panel or slab if for any reason the original engineered stone benchtop, panel or slab cannot be re-installed.
3. The PCBU must:
 - a) provide notification to the regulator in accordance with regulation 529G
 - b) ensure that any processing of the engineered stone benchtop, panel or slab necessary to complete the re-installation is for the purpose of removal, repair or to make minor modification only, in accordance with regulation 529F, and
 - c) any processing is controlled.

Stakeholder consultation

SWA, which is responsible for the policy underpinning the model WHS laws, is a body made up of representatives from all jurisdictions, as well as the Australian Chamber of Industry and Commerce, the Australian Industry Group and the Australian Council of Trade Unions.

SWA Members consulted stakeholders within their jurisdictions or among their membership (whichever applies) on the prohibition of engineered stone benchtops, panels and slabs, the regulations and the identified unintended consequence and agreed that regulators could issue an exemption on their own initiative for the purposes of enabling the re-installation of engineered stone benchtops, panels or slabs.

The Legislative Instrument is consistent with the Instruments drafted by corresponding regulators.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for the 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 Statement of Compatibility with Human Rights is set out in Attachment A.

In accordance with sub-regulation 692(2) of the WHS Regulations, an exemption is a legislative instrument within the meaning of the *Legislation Act 2003*.

The exemption commences on the day after it is registered on the Federal Register of Legislation and has effect until amendments to the WHS Regulations are made to address the re-installation of existing engineered stone benchtops, panels or slabs issue.

Statement of Compatibility with Human Rights

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

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 of the Legislative Instrument

The *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulations 2011* (WHS Regulations) provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction. They are based on model WHS laws (model laws) developed by Safe Work Australia (SWA).

Regulation 529D, makes it an offence for a person conducting a business or undertaking (PCBU) to carry out, or direct or allow a worker to carry out work that involves the manufacture, supply, processing or installing engineered stone benchtops, panels or slabs.

There are limited exceptions to the prohibition for which work with engineered stone benchtops, panels or slabs is permitted. These are:

- for research and analysis
- to sample and identify engineered stone
- for removal, repair and minor modification of legacy engineered stone, and
- disposal of engineered stone.

This means that PCBUs are permitted to carry out, or direct workers to carry out, the repair, minor modification, removal or disposal of legacy engineered stone involving processing provided:

- the regulations relating to the processing of a crystalline silica substance are complied with, including assessing whether the processing is high risk
- the WHS regulator is notified of the work, and
- processing is controlled.

However, an unintended consequence of the WHS Regulations means that the engineered stone prohibition has the effect of prohibiting a PCBU from re-installing an engineered stone benchtop, panel or slab in circumstances where, for example:

- an existing engineered stone benchtop, panel or slab has been removed to repair underlying cabinetry or plumbing, and
- the engineered stone benchtop, panel or slab merely needs to be put back in place after the repairs are complete.

The purpose of the *Work Health and Safety (Re-installation of existing engineered stone benchtops, panels or slabs) Exemption 2024* is to enable persons conducting a business or undertaking (**PCBU**) who carry out, direct or allows a worker to carry out, work to remove an engineered stone benchtop, panel or slab from the underlying cabinetry in order to facilitate the repair or modification of cabinetry, or to give access to repair or modify some other underlying component, and then re-install the engineered stone benchtop, panel or slab when the work is completed.

Human Rights Implications

This Legislative Instrument engages the following human rights:

- The right to the enjoyment of just and favourable conditions of work under Article 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR)
- The right to physical and mental health under Article 12 of the ICESCR.

Rights to enjoyment of just and favourable conditions of work

Article 7 of the ICESCR 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 content of the right to just and favourable conditions of work can be informed by specific obligations in treaties of the International Labour Organization, including, the *Occupational Safety and Health Convention 1981* (No. 155) which requires the adoption of a coherent national policy on occupational safety, occupational health and the working environment.

The prevention of occupational diseases is a fundamental aspect of the right to just and favourable conditions of work. Its realisation requires the adoption of a national policy for the prevention of work-related diseases and deaths by minimising hazards in the working environment and ensuring broad participation in its formulation, implementation and review, of workers and employers and their representative organisations.

Australia complies with its obligation under Article 7 of the ICESCR through the harmonised system of Commonwealth, state and territory WHS laws (including the WHS Regulations).

Workplace exposure to respirable crystalline silica (RCS) is a serious issue threatening the lives of Australian workers. The increase in silicosis and other silica-related occupational diseases has led to urgent national reform.

Engineered stone contains crystalline silica, and when it is processed by cutting, grinding, trimming, sanding, polishing or drilling, dust containing RCS is released. RCS is also generated during mechanical processing materials containing crystalline silica, such as quarrying, tunnelling, crushing, cutting, drilling, grinding, or sanding. Other common material containing crystalline silica include natural stone, bricks, pavers, cement, grout, mortar and tiles. Inhaling RCS can cause silicosis and other silica-related diseases. Silicosis can cause permanent disability and death and has no cure except for lung transplantation.

On 1 July 2024, amendments to the WHS Regulations came into effect which promoted the right to safe and healthy working conditions by prohibiting the use, supply and manufacture of engineered stone benchtops, panels and slabs to protect the health and safety of workers in the engineered stone industry. Further amendments came into effect on 1 September 2024 that also prescribed additional obligations on PCBUs across all industries to take proactive measures to eliminate or minimise risks associated with working with crystalline silica substances (CSS), so far as is reasonably practicable. This approach helps to create safer working environments and reduce silica-related diseases.

Right to physical and mental health

The right to physical and mental health expressed in Article 12 of the ICESCR is engaged by the WHS Regulations as the United Nations Committee on Economic Social and Cultural Rights has stated that the right to health concerns safe and healthy working conditions.

Guidance from the Attorney-General's Department clarifies that where Article 12(2)(b) mentions 'industrial hygiene' this 'refers to the minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment'.

Promoting 'industrial hygiene' involves taking steps to protect the work environment by reducing workers' exposure to substances that impact upon human health including where workplace exposure to RCS results in people developing serious health conditions. The WHS Regulations which prohibit the use of engineered stone benchtops, panels and slabs aims to eliminate silicosis and other silica-related diseases among engineered stone workers.

The Legislative Instrument addresses an unintended consequence of the prohibition of engineered stone benchtops, panels and slabs which means that the engineered stone prohibition has the effect of prohibiting a PCBU from re-installing an engineered stone benchtop, panel or slab in circumstances where, for example:

- an existing engineered stone benchtop, panel or slab has been removed to repair underlying cabinetry or plumbing, and
- the engineered stone benchtop, panel or slab merely needs to be put back in place after the repairs are complete.

Prohibiting the re-installation of engineered stone benchtops, panels and slabs as outlined above was not the policy intention of the prohibition in the amended WHS Regulations.

SWA advises that the health risks associated with the re-installation of an engineered stone benchtop, panel or slab are likely comparable to those arising from the installation of finished engineered stone products (e.g. a slab with a moulded sink for a vanity), which were excluded from the scope of the prohibition by WHS ministers.

To ensure the right to physical and mental health and safety of those undertaking the re-installation of engineered stone benchtops, panels or slabs, this Instrument imposes certain conditions to protect the work environment by reducing workers' exposure to substances that impact upon human health including where workplace exposure to RCS results in people developing serious health conditions.

Conclusion

This Legislative Instrument is compatible with human rights because it seeks to promote the right to safe and healthy working conditions. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. because it will not result in a diminution of workers' rights to safe and healthy workplaces.