

Submission form



Proposed Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021

Note: Areas marked with an asterisk (*) denote required information.

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| Type of submission * | Individual <input type="checkbox"/> | Organisation <input checked="" type="checkbox"/> |
| Organisation name (where applicable) | Maurice Blackburn Lawyers | |
| First name * | | |
| Last name * | | |
| Email address * | | |
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Note: All submissions will be treated as public documents and will be published online unless clearly identified as being confidential. Where the submission is from an organisation, WorkSafe will publish the organisation's name not the author's name.

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Note: WorkSafe may use the information you have provided to inform you of further development of the proposed regulations.

Proposed Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021

Please provide your comments on the proposed Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021 below. Where possible, please indicate the section you are commenting on. General comments about the regulations are also welcome.

General comments

Maurice Blackburn is grateful for the opportunity to provide input into the Proposed Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021.

We congratulate Worksafe Victoria on the development of the draft regulations.

Below, we provide commentary based on our experience in assisting Victorian workers who have experienced the trauma of workplace-related silicosis.

We believe that the proposed regulations will greatly enhance Victoria's current regulatory regime in relation to crystalline silica – and we urge WorkSafe to perceive our commentary around the draft regulations as constructive and encouraging.

We would welcome the opportunity to discuss our input in greater depth, if that would be of benefit.

Specific comments

Regulations 1 – 5

We note that Regulation 5 contains definitions, including defining two categories of stone containing silica:

- 'engineered stone' which is defined as having a silica content greater than 40%; and
- 'crystalline silica substance' which is substances with a silica content greater than 1%.

We applaud the amendment to the definition of 'engineered stone' from stone with an 80% silica content to 40% silica content. Nonetheless, prolonged exposure to silica through dry cutting of stone with a silica content that is less than 40% is hazardous, albeit that it would take a longer period of exposure to develop disease.

We would advocate for a lower content of silica to meet the definition of 'engineered stone' or alternatively, the application

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| | <p>of the proposed amendments to crystalline silica substances as well as engineered stone.</p> <p>The amendments establish two tiers of controls: licensing and additional safety measures for workplaces using engineered stone and developing a risk assessment and hazard control statement for those engaged in 'high risk crystalline silica work', defined as a process likely to result in airborne concentration of respirable dust that exceeds half the exposure standard.</p> <p>While it is a step forward to capture a larger section of the engineered stone industry and make them subject to licensing and provide some requirements for crystalline silica substances, the controls on the latter is largely underpinned by employers' self-compliance. We would contend that workplaces based on work with both types of stone should come under the one system of licensing, or at least that risk assessments and control statements ought to be lodged and reviewed by the WorkSafe Authority.</p> <p>We are pleased to see that 319C in describing crystalline silica processes specifically includes tunnelling and quarrying. We are aware of a number of instances of poor dust controls in these industries and a lack of awareness of the hazards that are causing silica-related diseases among these workers.</p> <p>It remains to be seen whether the processes described in sub- regulations(a)-(d) of that regulation will adequately capture the processes that may expose constructions workers, road workers, miners, drillers, concreters and ceramic workers, all of whom can be at risk of prolonged exposure to silica dust in some settings in these industries. We would urge review of the adherence to these regulations in these high risk workplaces and using clearer language to specify these workers if there is a lack of compliance in these settings.</p> |
| <p><i>Part 4.5 – Crystalline silica Division 1 – Introductory matters</i></p> | <p>Please see our response above.</p> |
| <p><i>Part 4.5 – Division 2 – Duties of manufacturers and suppliers</i></p> | <p>We note that this applies to crystalline silica substances, not only engineered stone, which in our opinion is appropriate. It</p> |

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| | <p>creates duties on manufacturers and suppliers to provide information about the product to those purchasing the product for use in a workplace.</p> <p>It will not cover a duty to the workers or contractors working with the product who also require the information, but as long as the employer has a duty to provide this information, then workers should receive the information.</p> <p>At regulation 319G, which outlines the contents of the information manufacturers must provide to purchasers, we would like to see the inclusion of information regarding the health hazards of inhalation of silica particles in excess of the exposure levels.</p> <p>Furthermore, we note that 319H creates a requirement for manufacturers and suppliers to revise the information and provide revisions upon the next purchase of the product. In our submission, this could undermine the timely provision of vital information about the safe handling of a product.</p> <p>Where a large order of stock is delivered shortly before a revision is made, there may be an unduly long elapse of time before another purchase is made. It would be preferable to stipulate that the revised information must be provided upon the earlier event of the next purchase or within 60 days of the revision to all purchases within the previous 2 years.</p> |
| <p><i>Part 4.5 – Division 3 – Duties of employers and self-employed persons</i></p> | <p>We understand that the purpose of this subdivision 1 is to extend the ‘ban’ on dry cutting of engineered stone with power tools and extend it to other high-risk activities such as using compressed air. We are pleased this will apply to a larger number of products with the amendment to the definition of engineered stone to include a lower content of silica than the current definition.</p> <p>We submit this ‘ban’ should be extended to crystalline silica substances as the cutting, polishing and grinding with power tools and use of compressed air in handling silica-containing stone is extremely dusty and likely to exceed the allowable exposure levels. As wet cutting methods are practical and much safer, the expectation should be that silica containing stone be cut with wet methods.</p> |

We also note that sub-regulation 1(b)(iii) allows for use of local exhaust ventilation in place of a vacuum or wet cutting method. We do not see where it would not be practical to use one of the two superior dust control methods and are concerned that the inclusion of this sub-regulation allows for greater use of inferior dust control measures than are necessary.

Furthermore, the requirement to provide protective respiratory equipment to employees and ensure it is worn should certainly be extended to crystalline silica substances, not only engineered stone.

We also note that the employer's duty in Regulation 319L and 319MM to ensure that employees using power tools with engineered stone are properly trained on dust suppression methods and use of a respirator does not extend to subcontractors and should do so.

We note that the training that employers must undertake should extend to the provision of information about the product supplied to manufacturers in accordance with Division 2, and in accordance with our submission about the information manufacturers ought to supply, training about the health hazards of inhalation of crystalline silica should also be required to ensure workers have a good understanding of the importance of these protective measures.

We note that subdivision 2 creates obligations on employers and self-employed people who are not subject to the licensing provisions to conduct a risk assessment and provide it to health and safety representatives of employees and Worksafe inspectors on demand. The penalty of over \$16,000 for individuals and \$83,000 would appear to be a real deterrent if there is real apprehension of enforcement. However, it is not a guard against a poor quality risk assessment as long as one in some form can be produced.

In our view, if these risk assessments were required to be lodged with WorkSafe – if not brought into the licensing scheme itself – there would be greater monitoring of the quality of risk assessment and ability of WorkSafe to 'map' the industry and identify where more training is needed.

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| | <p>We note that regulation 319V, 319W and 319X provide for information to job applicants and current employees working with silica about the health hazards. However, there is no standard warning that must be issued which can allow employers to downplay the risks. If these provisions were read in accordance with the information that manufacturers and suppliers must supply (division 2) to purchasers of their product and this included information about the health hazards, it may be easier to create a standardised health message in the industry. In our submission, the education should include how to use respiratory protection when performing work with crystalline silica products.</p> <p>We would also argue that the risk assessments should be available to employees and former employees and subcontractors in a business for longer than the period during which a process is undertaken in order that historical practices can be reviewed in future workers compensation claims.</p> |
| <p><i>Part 4.5 – Division 4 – Licensing requirements</i></p> | <p>We support the Division 4 Licensing requirements. We are surprised that given the point is to prohibit work with engineered stone being carried out without a license that there is no corresponding penalty for working with the product without a license. There are penalties created for manufacturers and suppliers that sell engineered stone to purchasers without a license. There are also auxiliary penalties for failure to provide information, training and health monitoring to employees. It is a strange omission to not penalise the employers for carrying out work with this product without a license.</p> <p>We again point out that the requirement of employers to provide information to employees and job applicants about the dangers of engineered stone and proper training in control methods – in this part at regulation 319ZB, 319ZC and s19ZG - extends to employees and does not necessarily apply to contractors employers engage to conduct the same type of work.</p> <p>We agree with the provision requiring reports from health monitoring to be lodged with the WorkSafe Authority within 30</p> |

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| | <p>days of being received by an employer as we believe this will assist in WorkSafe’s ability to monitor workplaces where injuries are emerging.</p> |
| <p><i>Part 4.5 – Division 5 – Transitional provisions – Engineered stone licences</i></p> | <p>We note that regulation 319ZH defines the transition period as 12 months from the commencement of these amendments to the regulations.</p> <p>Notwithstanding that sub-regulation (2) requires employers using engineered stone to prepare and adhere to a control plan, we are concerned that a period of 12 months to undertake work with engineered stone without a license is too long.</p> <p>We note that there is a requirement for employers to apply for a license within 14 days of commencing work with engineered stone, which shows that the process is not onerous.</p> <p>If necessary, greater resources should be allocated to the WorkSafe Authority to ensure that license applications can be processed more quickly and the transition period reduced from 12 months to 6 months</p> |
| <p><i>Part 6.1 – Licences – Subdivision 6 – Additional provisions in relation to an engineered stone</i></p> | <p>We support the detail required in the application for an engineered stone license. We would like to see it extended to crystalline silica substances as the information required would also be prudent for all employers and self-employed people to provide in relation to work with crystalline silica substances.</p> <p>We note that Regulation 496 creates discretion for the Authority to cancel or suspend a license where there is not compliance with division 4.5. Regulation 537 also creates a wide discretion to exempt people from the regulations. We oppose wide discretion of the WorkSafe Authority to grant exemptions for compliance with the licensing requirements and regulations.</p> |

Regulatory Impact Statement

| General comments | |
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| <p>Maurice Blackburn congratulates Deloitte Access Economics and WorkSafe Victoria in the informative and comprehensive nature of the Regulatory Impact Statement (RIS).</p> <p>We note the overall purpose of the RIS as detailed in section 1.4.2:</p> <p>“The key purpose of this RIS is to assess the impact of different options for replacing the sunseting regulations”.</p> <p>We believe that the RIS provides an excellent basis for the assessment.</p> | |
| Specific comments | |
| <p><i>Executive summary</i></p> | <p>Maurice Blackburn believes that the Executive Summary provides an excellent overview of the RIS. The section on ‘The problem of silica dust’ is particularly useful in providing the necessary drivers for change, and the strong need to replace the sunseting regulations with something more ongoing.</p> <p>It also provides an excellent summary of the options under consideration.</p> <p>Maurice Blackburn believes the Executive Summary could be enhanced by some commentary about the regulatory environment outside of Victoria – and the important leadership role Victoria can play in developing best practice regulations which can/should form the basis of national benchmarks. It could mention the work of the National Dust Diseases Taskforce – and in particular the glacial pace at which reform at the national level is occurring.</p> <p>The section on ‘Impact Analysis’ is morbid but necessary. While we recognise that the main discussion on this can be found in Chapter 4, perhaps some mention of the immaterial costs to community and family in the Executive Summary might help to put a human face to the issue, for those who don’t read past the first 6 pages.</p> |
| <p><i>Part 1 – Background</i></p> | <p>The Background Chapter provides a thorough and well researched introduction to the RIS.</p> |

We are particularly pleased to see that the full gamut of where the risk of workplace silicosis can occur are detailed upfront – including:

- cutting, grinding, trimming, sanding or polishing of materials
- risk to workers employed within extraction and construction industries
- that it occurs in construction, installation and demolition tasks. It should be an aim of this process to ensure that installation of these products is as safe as their manufacture or manipulation.

In our experience, some of these elements get lost in consultation processes, due to the focuses on dry cutting, potential bans on material imports and the like.

We are also pleased to see that the propensity of natural stone products to cause silicosis (see section 1.3) – not just engineered stone – is mentioned. This again is an area that is overlooked in a number of consultations.

The analysis of the current Victorian legislative and regulatory framework, as described in section 1.2, is excellent and helpful.

We also appreciate that the RIS reminds readers that silicosis is incurable.

We also note the value of the discussion on page 10 of the Queensland Government's initiatives, and their impact on Victoria's decision making. It clearly demonstrates how one State making a move to ensure worker safety will encourage others to act, through increased media attention and public discussion. This 'virtuous circle' approach is a powerful tool for achieving change.

With the current lack of national leadership on this issue, it is imperative that States and Territories take the lead in developing what's acceptable. That the national benchmark for exposure standard for respirable crystalline silica is still 0.05 milligrams per cubic metre (per 8 hour shift) – rather than the internationally accepted requirement of 0.025 milligrams per cubic metre (per 8 hour shift) – is clearly unacceptable.

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| | <p>As mentioned earlier, we note section 1.4.2, which notes the main purpose of the RIS:</p> <p>“The key purpose of this RIS is to assess the impact of different options for replacing the sunseting regulations”.</p> <p>Since the temporary regulations were put in place, Maurice Blackburn has seen the Victorian response to workplace silicosis as a national benchmark. It is important that this consultation process does not see Victoria take a backward step, by failing to replace the temporary regulations with something more permanent.</p> |
| <p><i>Part 2 – The problem of silica dust</i></p> | <p>Chapter 2 provides an excellent, thorough analysis of the problem. The facts and figures presented here will, we are confident, be extremely useful in informing future inquiries on the nature and prevalence of silicosis in Victoria.</p> <p>We are particularly pleased to see the discussion in section 2.2.3 of the wider impacts of silicosis on workers – in terms of future employment prospects and impacts on lifestyle and family. These are important considerations.</p> <p>We note also the value of the documentation of consultations with the health profession on issues such as workers’ fear of being tested. The potential ‘career limiting’ results of testing positive are a real factor for many workers.</p> <p>Sections 2.3 and 2.4 provide an excellent analysis of the need for change from the status quo. In particular, they highlight:</p> <ul style="list-style-type: none"> - The need for external drivers/incentives for change, with real consequences for those who choose to ignore the rules, and - That industry cannot be relied upon to regulate itself. |
| <p><i>Part 3 – Options</i></p> | <p>Chapter 3 clearly articulates the three Options under consideration in the RIS.</p> <p>Maurice Blackburn is grateful that the RIS includes details of those options available to the research team, but were assessed as infeasible (section 3.3).</p> |

Maurice Blackburn agrees that the four options listed in section 3.3 are indeed unfeasible, and that it was a correct choice to leave them out of the viable options under consideration.

One of the rejected option - a ban on the supply and use of engineered stone (ref section 3.3.1) - has been a highly contested topic.

Maurice Blackburn has long advocated that a ban (either total or partial) of high silica content engineered stone may become the only practical step to mitigate the emergence of silicosis in the engineered stone benchtop industry in Australia, if other interventions are not implemented.

If licensing and workplace based solutions continue to fail to stem the tide of workplace silicosis cases, then the imposition of a ban may become the only meaningful way of preventing deaths and instances of severe chronic lung diseases.

It is worth noting that asbestos was banned in Australia a little over 80 years after it was first produced here. It has caused the deaths of tens of thousands of Australian workers. Even after the ban, it is still claiming hundreds of lives each year due to exposure decades earlier.

It is also worth noting that, in the lead up to the ban on asbestos, the asbestos industry argued passionately that a ban was unnecessary, too expensive to implement, and a disproportionate response to the issues at hand.

It should be noted that a ban would not provide a panacea for ending workplace silicosis. Even the cutting of a lower silica content product (or a natural stone), in a workplace with poor controls has and will lead to poor health outcomes for its workers.

Public attitudes toward a ban vary greatly. Whilst some laud engineered stone as an affordable alternative to real stone or marble, we believe that large numbers of consumers would be horrified with the thought that an essentially decorative product in their kitchen could have led to serious illness and death in its production and installation in their homes.

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| | <p>It is not difficult to believe that, should a ban be imposed, market forces would drive innovation and alternative products would be created to replace those silica-based products that are subject to the ban. This would be a very acceptable outcome.</p> <p>Maurice Blackburn agrees that the options presented in the RIS are better options for now.</p> <p>The consideration of a ban or partial ban should come after that.</p> |
| <p><i>Part 4 – Impact analysis and preferred option</i></p> | <p>Maurice Blackburn believes that the methodology adopted in the RIS is appropriate for the task – ie:</p> <ul style="list-style-type: none"> - Identify those options which will best address the issue - Compare those to the base case - Analyse the options based on cost and benefit <p>We also believe that the costs analysis is appropriate, focusing on:</p> <ul style="list-style-type: none"> - cost to business - cost to the community/government <p>We note that, in previous consultations, much of the resistance to meaningful change in reducing or eliminating workplace silicosis has been borne of arguments about cost of compliance. We applaud that this is ‘front and centre’ in this analysis.</p> <p>Similarly, the adequate resourcing of the regulator will be an essential component to the success of any regulation. We are pleased to see this also ‘front and centre’ in this analysis.</p> <p>We also believe that the benefits analysis is appropriate, focusing on:</p> <ul style="list-style-type: none"> - Quantifiable benefits (lives saved and illnesses avoided) and - Non-quantifiable benefits – future employment prospects, impact on families <p>The break-even quantification of ‘cost’ versus ‘required avoided non-fatality’ in Table 4.5 is instructive.</p> |

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| <p><i>Part 5 – Preferred option</i></p> | <p>Maurice Blackburn endorses the decision of the RIS to nominate “Licensing Scheme plus the full package of reforms” as the preferred option.</p> <p>We believe this would have better short-term and long-term outcomes than the other options.</p> <p>We agree with the statement on page 52 that:</p> <p>“This option is preferred because it takes a precautionary approach to addressing the risks of RCS exposure”.</p> <p>We also agree that, in relation to the preferred option:</p> <ul style="list-style-type: none"> - The approach to measuring the benefits is conservative - There are a range of non-quantified benefits (including health impacts, mental health impacts, family impacts and future work impacts) - The regulations provide an opportunity to introduce a risk framework for the construction industry, and - That a mid-term review of the proposed Regulations will be important to review data and conduct an early assessment of the effectiveness of the Regulations. <p>We believe that, should that option not be chosen for implementation, that the option “Licensing and full package of reforms for stone masons only” is a better alternative than “Licensing and a ban on dry cutting”.</p> |
| <p><i>Part 6 – Cost recovery and fees</i></p> | <p>Maurice Blackburn agrees with the principles of the cost recovery methodology described in Chapter 6:</p> <p>That for business:</p> <ul style="list-style-type: none"> - A user pays system is appropriate (“those who utilise services (or give rise to the need for a regulatory activity) pay for the cost of those services”) - That safety and compliance costs are reflected in the true cost of the product - That having those principles in place encourages efficiency <p>That for WorkSafe:</p> <ul style="list-style-type: none"> - Licensing fees should assist with ensuring that the regulator has appropriate capacity to run the program - The process described in 6.2.3 is appropriate. |

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| | <p>Maurice Blackburn agrees that the proposed fees, as set out in section 6.4 are appropriate and achievable.</p> |
| <p><i>Part 7 – Small business and competition impacts</i></p> | <p>While Maurice Blackburn is pleased to see a section of the RIS devoted to the specific issues associated with small businesses’ capacity to achieve compliance, we make no comment on the content of Chapter 7.</p> <p>To us, the important thing is that workers have an equal right to safety and appropriate care, regardless of the structure or size of the body that employs them.</p> |
| <p><i>Part 8 – Evaluation strategy</i></p> | <p>Maurice Blackburn agrees with the evaluation strategy described in Chapter 8.</p> |
| <p><i>Part 9 – Implementation strategy</i></p> | <p>Maurice Blackburn agrees with the implementation strategy described in Chapter 9.</p> <p>We believe that the transitional arrangements set out in section 9.3 are appropriate and achievable. We believe that the timeframes to implement the licensing and compliance framework should reflect a greater sense of urgency.</p> <p>With the sunset of the ban on the uncontrolled dry cutting of engineered stone scheduled for 19 February 2021, there is an obvious need to extend that until the licensing and compliance framework can be implemented. This should be of the highest priority for WorkSafe and the Victorian Government.</p> <p>Maurice Blackburn also notes the enforcement and compliance program described in section 9.4. The program needs to send a clear and unambiguous message to workplaces in relation to the consequences of non-compliance. Any licensing system is only as effective as the policing strategy that underpins it. Unless there are clear deterrents to poor corporate behaviour, the unacceptable levels of workplace silicosis will continue to escalate.</p> |

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Your submission will be published under your name or, where relevant, your organisation's name on the Engage Victoria website, unless you select the relevant check box to say that you do not wish to have your submission published. Your contact details will not be published regardless of whether you select the relevant check box.

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