EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Customs Act 1901

Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024

Legislative authority

The *Customs Act 1901* (the Act) concerns customs-related functions. It is the legislative authority that sets out the customs requirements for importation to and exportation from Australia.

Subsection 270(1) of the Act provides that the Governor-General may make regulations not inconsistent with the Act prescribing all matters, which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed, for giving effect to the Act.

Subsection 50(1) of the Act provides that the Governor-General may, by regulation, prohibit the importation of goods into Australia. Subsection 50(2) of the Act provides that the Governor-General may exercise this power by prohibiting the importation of goods absolutely, in specified circumstances or from a specified place, or unless specified conditions or restrictions are complied with.

The *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) control the importation into Australia of certain goods by prohibiting importation in accordance with section 50.

Purpose

The purpose of the *Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024* (the Amendment Regulations) is to amend the Prohibited Imports Regulations to prohibit the import of engineered stone benchtops, panels and slabs into Australia.

Background

The Government is taking action to strengthen the legislative framework under the Act in relation to engineered stone in order to safeguard workers from the health risks associated with silicosis, and to support the world-first domestic ban on the supply, manufacture, processing and installation of engineered stone benchtops, panels and slabs in Australia that started on 1 July 2024. The manufacture and processing of engineered stone produces respirable crystalline silica, which when inhaled, can cause fatal lung disease and other chronic illnesses including silicosis.

Amendments to the model Work Health and Safety Regulations (model WHS Regulations) to prohibit the supply, manufacture, processing and installation of engineered stone benchtops, panels and slabs came into effect on 1 July 2024 – with the ban implemented in the laws of all States and Territories and mirrored in the *Work Health and Safety Regulations 2011* (Cth). To support this domestic 'use prohibition', on 18 September 2024, the Government announced a ban on the importation of engineered stone benchtops, panels and slabs, to be implemented on and from 1 January 2025 by proposed amendments of the Prohibited Imports Regulations.

Impact and effect

The effect of the Amendment Regulations is to amend the Prohibited Imports Regulations, to provide that engineered stone benchtops, panels and slabs imported without a valid permit, confirmation or exemption would be classed as a prohibited import, meaning they can be seized at the border without a warrant. Most engineered stone products are imported into Australia and the importation ban will provide an extra layer of deterrence at the border. The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

Consultation

The Regulations were developed in consultation with the Department of Employment and Workplace Relations (DEWR), who also consulted with the relevant WHS authorities in the Commonwealth, states and territories.

Safe Work Australia (SWA) consulted widely on the impacts of prohibiting the use of engineered stone in developing the *Silica Decision Regulation Impact Statement: Prohibition on the use of engineered stone*. SWA received submissions from workers, businesses, employer and worker representatives, WHS professionals, medical professionals, academics, government agencies, industry and peak bodies.

DEWR has previously certified Regulation Impact Statements prepared by SWA, along with additional supplementary analysis, as an Impact Analysis Equivalent for the decision to ban the importation of engineered stone. A summary of the findings of the Decision Regulation Impact Statements is at Attachment A and the full statements can be viewed at https://oia.pmc.gov.au/published-impact-analyses-and-reports/import-ban-on-engineered-stone.

Details and operation

The Act does not impose any conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised. The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Amendment Regulations are set out in Attachment B.

A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is set out in Attachment C.

Paragraph 54(2)(b) of the Legislation Act has the effect that if a legislative instrument is prescribed by regulation for the purposes of that paragraph, then the instrument is exempt from the operation of sunsetting under Part 4 of the Legislation Act.

Item 21 of the table under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* prescribes the following instruments made under the Act as being exempt from sunsetting for the purposes of paragraph 54(2)(b) of the Legislation Act:

- a regulation made solely for the purposes of section 50 or 112 of the Act;
- a determination made under paragraph 153L(1)(c), 153P(2)(c) or 153Q(1)(c) or subsection 153ZIH(2) of that Act, or
- a tariff concession order made under Part XVA of that Act.

Sections 50 and 112 of the Act provide for the making of regulations in relation to prohibited exports and prohibited imports. The majority of regulations made under these sections are exempt from sunsetting because they relate to intergovernmental schemes or have the sole or primary purpose of giving effect to an international obligation of Australia. Subjecting these regulations to sunsetting may conflict with Australia's international obligations and with ongoing intergovernmental arrangements. As such, the Prohibited Imports Regulations are exempt from sunsetting under Part 4 of the Legislation Act.

Division 1 of Part 3 of Chapter 3 of the Legislation Act operates to automatically repeal a legislative instrument that has the sole purpose of amending or repealing another instrument. That Division applies to automatically repeal the Amendment Regulations. As the Amendment Regulations will be automatically repealed, the sunsetting framework under Part 4 of the Legislation Act is not engaged.

The two independent processes led by SWA – the *Decision Regulation Impact Statement: Managing the risks of respirable crystalline silica at work* (Silica Decision RIS), and the *Decision Regulation Impact Statement: Prohibition on the use of engineered stone* (Prohibition Decision RIS) – can be relied upon to satisfy impact analysis requirements.

The Prohibition Decision RIS provides analysis of the impacts of options under the model work health and safety laws (the model WHS laws) to prohibit the use of engineered stone. It builds on the evidence and analysis considered and set out in the Silica Decision RIS noting both documents are intended to be read together. Both these assessments have been prepared in accordance with the Regulatory Impact Analysis Guide for Ministers' Meeting and National Standard Setting Bodies and have been assessed by the Office of Impact Analysis (OIA) as meeting the requirements set out in the Guide.

Additional analysis has been undertaken on the impacts associated with a further option to include border measures, such as a customs ban, to complement the prohibition on the use of engineered stone. This option seeks to address the same problem outlined in SWA's Prohibition Decision RIS, relating to the rise in the number of silicosis cases in workers in recent years, which are significantly over-represented by engineered stone workers. The two independent SWA processes did not scope the impacts on implementing complementary border measures as these assessments were limited to options for addressing the problem through the model WHS laws.

Complementary border measures, such as a customs ban, would not have significant additional impacts on businesses, workers or the economy because implementation would complement the domestic WHS prohibition on the use of engineered stone benchtops, panels and slabs. The impacts on business, workers and consumers all flow from these WHS reforms. This is because a use prohibition on engineered stone would also have the effect of prohibiting the import of products under WHS laws. These laws provide that importers have a duty of care to ensure, so far as is reasonably practicable, that a product which will be used at a workplace is without risks to the health and safety of persons who would work with it. An importer would breach the duty of care importing a product which has been determined too unsafe to use in the way it is intended to be (i.e., fabricated).

Complementary measures at the border, such as a customs ban, will support the efforts of state and territory WHS regulators by providing an additional layer of enforcement and deterrence, given engineered stone benchtops, panels and slabs in Australia are predominantly supplied from overseas. In isolation, border measures like a customs ban would not address the problems associated with non-compliance when working with engineered stone benchtops, panels and slabs. A customs ban was put in place by the Commonwealth in 2003 when asbestos was prohibited in Australia (Australia's asbestos prohibition is implemented through both WHS laws and a customs ban). A customs ban for engineered stone benchtops, panels and slabs may be more targeted because asbestos is inherently dangerous to humans, whereas engineered stone benchtops, panels and slabs do not pose a risk when not being processed.

Overview of the Decision Regulation Impact Statement: Managing the risks of respirable crystalline silica at work

On 28 February 2023, SWA released the Silica Decision RIS which provides an analysis of the impacts of options, under the model WHS laws, to manage the risks of respirable crystalline silica (RCS) to improve the protection of the health and safety of workers.

The Silica Decision RIS was informed by an extensive consultation process, including a Consultation Regulation Impact Statement (CRIS) where SWA sought public comment on five regulatory and non-regulatory options to reduce workplace exposures to RCS in Australia. Submissions were received from governments, peak bodies, unions, employer or industry representatives, commercial enterprises, lawyers, insurance groups, academics, and individuals. As part of the feedback on the CRIS, unions, peak health bodies, and professional organisations called for a prohibition on the use of engineered stone. As a result of this feedback, an additional option to undertake further analysis and consultation on the impacts of the prohibition of use of engineered stone was included in the Silica Decision RIS.

On 28 February 2023, WHS Ministers considered the Silica Decision RIS and agreed to a nationally coordinated approach addressing this issue, including national awareness and behaviour change initiatives and implementing stronger regulation of high-risk RCS processes. WHS Ministers also agreed that SWA undertake further analysis and consultation on a prohibition of the use of engineered stone under the model WHS laws. The decisions of WHS Ministers were announced through a communique available on DEWR's website.

Overview of the Decision Regulation Impact Statement: Prohibition on the use of engineered stone

On 16 August 2023, SWA circulated an embargoed copy of the Prohibition Decision RIS to WHS Ministers. Intended to be considered together with the Silica Decision RIS, the Prohibition Decision RIS examines the impacts of implementing a prohibition on the use of engineered stone through the model WHS laws, which would have the effect of a domestic ban on these products.

The Prohibition Decision RIS was also informed by extensive consultation based on 3 implementation options. These include:

Option 1	Prohibition on the use of all engineered stone
Option 2	Prohibition on the use of all engineered stone containing 40% or more crystalline silica
Option 3	As for Option 2, with an accompanying licensing scheme for PCBUs working with engineered stone containing less than 40% crystalline silica.

How each of the 7 Impact Analysis elements were addressed by the 2 independent SWA processes is outlined in the supplementary analysis, with additional detail relating to the

impacts associated with complementary border measures, modelled on a customs ban on engineered stone.

COMMON ABBREVIATIONS AND ACRONYMS

Abbreviation or acronym	Meaning
ABF	Australian Border Force
Customs Act	*Customs Act 1901*
Customs Amendment Bill	*Customs Amendment (Expedited Seizure and Disposal of Engineered Stone*
Department	Department of Home Affairs
DEWR	Department of Employment and Workplace Relations
Prohibited Imports Regulations	*Customs (Prohibited Imports) Regulations 1956*
Model WHS Regulations	Model Work Health and Safety Regulations

Details of the *Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024*

Section 1 – Name of Regulations

This section provides that the title of the proposed Regulations is the *Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024* (Amendment Regulations).

Section 2 – Commencement

This section provides that the proposed Amendment Regulations commence on 1 January 2025.

Subsection 2 provides that any information in column 3 of the table is not to be part of this instrument. It also provides that information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

Section 3 – Authority

This section provides the authority under which the Amendment Regulations are made, is the *Customs Act 1901*.

Section 50 of the Customs Act provides that the Governor-General may, by regulation, prohibit the importation of goods into Australia and that the Governor-General may exercise this power by prohibiting the importation of goods absolutely, in specified circumstances or from a specified place, or unless specified conditions or restrictions are complied with.

Section 4 – Schedule

This section provides that each instrument that is specified in a Schedule to this instrument would be amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument would have effect according to its terms.

The instrument that is amended is the *Customs (Prohibited Imports) Regulations 1956*.

Schedule 1—Amendments

Item 1 – After regulation 5L

This item inserts new regulation 5M to impose a prohibition on the import of engineered stone benchtops, panels or slabs. Item 1 will:

- introduce new definitions;
- establish clear exemptions from the prohibition;
- introduce a permission scheme for the importation of engineered stone benchtops, panels or slabs;
- provide that a permission may specify conditions or requirements to which the importation is subject, and;
- allow the WHS Minister to authorise a person for the purposes of this section.

Subregulation 5M(1)

This subregulation inserts new definitions for ***Asbestos and Silica Safety and Eradication Agency***, ***authorised person***, ***Comcare***, ***corresponding WHS law*** and ***engineered stone*** into the Prohibited Imports Regulations.

Asbestos and Silica Safety and Eradication Agency

The ***Asbestos and Silica Safety and Eradication Agency*** (ASSEA) is defined as the Agency referred to in section 6 of the *Asbestos and Silica Safety and Eradication Agency Act 2013.* This definition is relied on in to subregulation 5M(5)(a) of the Amendment Regulations, which grants the Minister the power to authorise the Chief Executive Officer (CEO) of ASSEA to grant written permission to import engineered stone benchtops, panels or slabs.

Authorised Person

The term ***authorised person*** is defined as a person authorised by the Work Health and Safety Minister under subregulation 5M(5). This defined term is relied on in paragraph 5M(2)(a) of the Amendment Regulations, which grants the Minister or an authorised person the power to grant permission to import engineered stone benchtops, panels or slabs if the circumstances set out in subregulation 5M(3) are satisfied.

For the purposes of these regulations, an authorised person must be the CEO of ASSEA or equivalent to, or higher than, an SES officer in the department overseen by the Work Health and Safety Minister. This reflects the significance of decisions taken in relation to engineered stone, and the need for a senior officer with a robust understanding of the issues to grant permissions to import prohibited engineered stone.

Comcare

Comcare is defined as the body corporate established under section 68 of the *Safety, Rehabilitation and Compensation Act 1998.* This defined term is relied on in paragraph

5M(2)(b) which provides that Comcare may provide a confirmation that the importation of engineered stone is for a purpose set out by the Amendment Regulations.

Corresponding WHS law

This new definition provides that the term ***corresponding WHS law*** has the same meaning as section 4 of the *Work Health and Safety Act 2011*, which sets out the relevant Work Health and Safety Acts implemented by each of the states and territories.

This defined term is relied on in paragraph 5M(2)(d), which ensures that any engineered stone products exempted under the corresponding WHS law of a state or territory are also exempt from new regulation 5M of the Prohibited Imports Regulations.

Engineered Stone

This new definition provides that the term ***engineered stone*** in the Prohibited Imports Regulations has the same meaning as in the *Work Health and Safety Regulations 2011* (Cth) (the WHS Regulations (Cth)).

Regulation 529A of the WHS Regulations (Cth) provides for the meaning of 'processing' in relation to crystalline silica substances and related terms, including 'crystalline silica substance (CSS)' (at subregulation 529A(2)) and 'engineered stone' (at subregulation 529A(4)). Under regulation 529A, engineered stone is an artificial product that contains 1% or more crystalline silica (determined as a weight/weight (w/w) concentration), is created by combining natural stone materials with other chemical constituents (such as water, resins or pigments) and becomes hardened. However, paragraph 529A(4)(b) currently provides that 'engineered stone' does not include concrete and cement products, bricks, pavers and other similar blocks, ceramic wall and floor tiles, grout, mortar and render, plasterboard, porcelain products, sintered stone and roof tiles.

The terms 'benchtop', 'panel' and 'slab' are not defined and carry their ordinary meaning. For example, the prohibition on work with engineered stone in regulation 529D applies to engineered stone:

- benchtops, such as those installed in kitchen, bathrooms or prefabricated homes
- panels, such as kitchen splashbacks or large floor or wall tiles
- slabs, that might need to be cut to fit a variety of different installation settings
- other finished engineered stone products that are in benchtop, panel or slab form.

The purpose of the new defined term ***engineered stone*** is to ensure alignment between any engineered stone products banned under the WHS Regulations (Cth) and the Prohibited Imports Regulations.

The definition of ***engineered stone*** is contained in subordinate legislation, rather than the primary legislation of the Act to allow for greater responsiveness over time in the event of

novel and unanticipated forms of engineered stone as well as emerging developments in the industry. It also operates to ensure consistency in the approach to the domestic ban and the import prohibition. As the definition is provided for in regulations, it is also important to note that any future amendments of the defined term (by way of amending regulations) would also be subject to parliamentary scrutiny and disallowance.

Subregulation 5M(2)

This subregulation provides that the importation of engineered stone in the form of benchtops, panels or slabs is prohibited unless:

- the Work Health and Safety Minister or an authorised person has granted permission for the importation in writing and a copy of the permission is produced to a Collector on request at or before the time of importation; or
- a confirmation from:
    - Comcare, or
    - an authority of a State or Territory

  is in force stating that the proposed use of the engineered stone is for a purpose mentioned in paragraph 5M(3)(a), the confirmation is from the jurisdiction in which the goods are to be used for that purpose, and a copy of the confirmation is produced to a Collector at or before the time of importation; or
- the importation is of a kind of engineered stone benchtops, panels and slabs that is the subject of an exemption granted under subregulation 684(1) or 689A(1) of the *Work Health and Safety Regulations 2011*, or a corresponding WHS law, and a copy of the exemption is produced to a Collector on request at or before the time of the importation.

If one of these exemptions does not apply, the engineered stone benchtops, panels or slabs are a prohibited import in accordance with section 51 of the Customs Act. Prohibited imports are special forfeited goods under the Act and are subject to various provisions, including being able to be seized without a warrant.

Paragraph 5M(2)(a)

Paragraph 5M(2)(a) establishes a head of power that allows for the Work Health and Safety Minister, or a person authorised by the Minister, to grant a permission to import engineered stone benchtops, panels or slabs that is a prohibited import. An authorised person can only be the CEO of ASSEA or a person who is equivalent to, or higher than, an SES officer in the department overseen by the Work Health and Safety Minister, to ensure that the consideration to provide a permission is given the appropriate weight. A permission can only be granted if the requirements set out in paragraphs 5M(3) are satisfied.

The permission scheme, similar to the one created for the prohibition on asbestos, provides a means for imports of engineered stone benchtops, panels and slabs to be permitted for

genuine research and analysis or to sample and identify engineered stone, or in exceptional circumstances. Examples of exceptional circumstances, include, but are not limited to:

- if engineered stone waste from Antarctica needed to be imported to be disposed of in Australia;
- in the event an importer wished to import a novel and unanticipated form of engineered stone not previously considered or encountered.

A permission granted under this provision does not mean that an engineered benchtop, panel or slab is exempt from the domestic use ban provided for under WHS Regulations. Additional approvals may need to be sought from relevant WHS regulators, depending on the intended use of the import.

A copy of the permission is only required upon request or before the time of importation. This allows for flexibility in the process. For example, where a permission is given for a specified period of time and has been previously produced to a Collector, this allows a Collector to decide whether to request a further copy of the same permission for subsequent importation of engineered stone benchtops, slabs or panels within the specified period.

Paragraph 5M(2)(b) and (c)

Paragraphs 5M(2)(b) and (c) would allow for the importation of engineered stone benchtops, panels or slabs where there is a confirmation in force from:

- the Commonwealth regulator, Comcare, where the use of the engineered stone is permitted under the Commonwealth WHS Act (paragraph 5M(2)(b)), or
- the relevant WHS regulator in the State or Territory where the engineered stone is to be used (paragraph 5M(2)(c));

that states the product is being imported for either genuine research and analysis or to sample and identify engineered stone.

These paragraphs align the import prohibition with the domestic use ban enacted under model WHS legislative schemes, which excludes work that involves processing engineered stone benchtops, panels or slabs if the work is carried out for genuine research and analysis, or to sample and identify engineered stone as long as the work is controlled (e.g performed using all the appropriate safety measures listed in the WHS regulations) This provision ensures that a separate permission does not need to be granted under subregulation 5M(2)(a), where a Comcare or State or Territory confirmation is in force stating that the engineered stone benchtops, panels or slabs would be used for a permitted purpose. The confirmation must be from the jurisdiction in which the engineered stone benchtops, panels or slabs are intended to be used, or in the case of Comcare, where the use of the engineered stone is permitted under the Commonwealth WHS Act.

A copy of the confirmation is only required upon request or before the time of importation. This allows for flexibility in the process. For example, where a confirmation is given for a

specified period of time and has been previously produced to a Collector, this allows a Collector to decide whether to request a further copy of the same confirmation for subsequent importation of engineered stone benchtops, slabs or panels within the specified period.

Paragraph 5M(2)(d)

Paragraph 5M(2)(d) ensures that an exemption that is granted under subregulations 684(1) or 689A(1) of the *Work Health and Safety Regulations 2011*, or a corresponding WHS law, is recognised under the prohibited import scheme.

Subregulation 684(1) of the WHS Regulations provides that the regulator may exempt a person or class of persons from compliance with any of the regulations. Therefore, a WHS regulator may grant an exemption from regulation 529D, which prohibits a person conducting a business from carrying out, or directing or allowing a worker to carry out, work that involves manufacturing, supplying, processing, or installing engineered stone benchtops, panels or slabs.

Subregulation 689A(1) of the WHS Regulations provides that the regulator may exempt a type of engineered stone from regulation 529D, which prohibits a person conducting a business from carrying out, or directing or allowing a worker to carry out, work that involves manufacturing, supplying, processing, or installing engineered stone benchtops, panels or slabs. An exemption granted under subregulation 689A(1) in one jurisdiction will also apply in all other model jurisdictions with corresponding arrangements. The effect of this is that there will be mutual recognition of exemption decisions.

This provision aligns the import prohibition with the domestic use ban by recognising the two different types of exemptions which could apply to engineered stone benchtops, panels or slabs under the WHS laws. This ensures that a separate permission does not need to be granted under paragraph 5M(2)(a) to allow for the importation of engineered stone benchtops, panels or slabs where a regulator has granted an exemption from the domestic use ban.

A copy of the exemption is only required upon request or before the time of importation. This allows for flexibility in the process. For example, where an exemption is given for a specified period of time and has been previously produced to a Collector, this allows a Collector to decide whether to request a further copy of the same exemption for subsequent importation of engineered stone benchtops, slabs or panels within the specified period.

Subregulation 5M(3)

Subregulation 5M(3) provides the condition that a permission under paragraph 5M(2)(a) can only be granted if the Work Health and Safety Minister or authorised person is satisfied that the importation is for genuine research and analysis or to sample engineered stone, or, there are exceptional circumstances that justify the importation.

Examples of exceptional circumstances, include, but are not limited to:

- if engineered stone waste from an external Australian territory (e.g Antarctica) needed to be imported to be disposed of in Australia;
- in the event an importer wished to import a novel and unanticipated form of engineered stone benchtops, panels or slabs not previously considered or encountered.

There is no provision in the Amendment Regulations for a review of the decision by the Minister or an authorised person not to grant permission for the importation of engineered stone products. The Amendment Regulations have been developed to support the existing domestic use ban on engineered stone benchtops, panels and slabs, which took effect on 1 July 2024. The domestic use ban and the prohibition on the import of engineered stone benchtops, panels and slabs have been developed in recognition of the seriousness of the silicosis crisis among engineered stone workers. As the nature of engineered stone, and the resulting silica dust created during manufacture and processing, can pose such a serious danger to Australian workers, it is necessary that the Minister be able to reject a permit application decisively and promptly.

The decision to grant permission for importation is to be undertaken personally by the Minister or by a person authorised by the Minister. The prohibition's narrow focus on benchtops, panels and slabs ensures that an importer's legitimate need for a permit to allow for importation will be more easily understood, and the decision to grant or reject a permit will consequently be more robust.

Subregulation 5M(4)

Subregulation 5M(4) provides that a permission under subregulation 5M(2)(a) may be granted subject to conditions or requirements to be complied with by a person either before or after the importation.

There are multiple possible uses for engineered stone panels, slabs and benchtops. Allowing permissions to be subject to conditions or requirements grants an extra level of control over the domestic end use of a potentially dangerous good**.**

Subregulation 5M(5)

Subregulation 5M(5) allows the Work Health and Safety Minister to authorise a person who:

- is the CEO of ASSEA; or
- holds, or is acting in, a position in the Department that is equivalent to, or higher than, a position occupied by an SES employee;

to grant a permission for the purpose of subregulation 2(a). This will allow for the Minister to authorise a person to grant permission to import engineered stone benchtops, panels or slabs that is a prohibited import. An authorised person can only be the CEO of ASSEA or a person who is equivalent to, or higher than, an SES officer in the department overseen by the Work Health and Safety Minister, to ensure that the consideration to provide a permission is given

the appropriate weight. This subregulation supports the permission scheme set out in paragraph 5M(2)(a).

Statement of Compatibility with Human Rights

Issued by authority of the Minister for Home Affairs

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

Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024

This Disallowable Legislative Instrument, titled the *Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024*, is compatible with the 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 Disallowable Legislative Instrument

The *Customs (Prohibited Imports) Amendment (Engineered Stone) Regulations 2024* (Amendment Regulations) amends the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations) to prohibit the importation of engineered stone benchtops, panels and slabs into Australia from 1 January 2025.

The import prohibition complements the domestic use ban implemented by the Commonwealth and all states and territories under their respective work health and safety (WHS) laws. The import prohibition also complements the *Work Health and Safety Amendment (Penalties and Engineered Stone and Crystalline Silica Substances) Regulations 2024*, that have been implemented to prohibit the manufacture, supply, processing and installation of engineered stone benchtops, panels and slabs in the Commonwealth jurisdiction.

The Amendment Regulations will establish new regulatory obligations for the Australian Border Force (ABF) to undertake enforcement and compliance activities with respect to engineered stone benchtops, panels and slabs, and are to be implemented in parallel with the *Customs Amendment (Expedited Seizure and Disposal of Engineered Stone) Bill* (the Bill). The latter provides for expedited seizure and disposal of engineered stone products, to support the operational effectiveness of the import ban by allowing ABF officials to effectively administer a prohibited good at the border.

Background

In October 2023, Safe Work Australia (SWA) published the *Decision Regulation Impact Statement: Prohibition on the use of Engineered Stone* (DRIS). The DRIS recommended a range of options, including a licensing scheme, and prohibiting only high silica content engineered stone. Ultimately, Federal, State and Territory Governments agreed that the recommendation to implement a ban on the manufacture, supply, processing and installation of engineered stone benchtops, panels and slabs was appropriate, to protect Australian workers from the harms associated with respirable crystalline silica (RCS). On 1 July 2024,

amendments to the model WHS Regulations came into effect, prohibiting the use of engineered stone benchtops, panels and slabs in Australia. To support the use prohibition, the Government has agreed that the ABF will implement an import prohibition for engineered stone benchtops, panels and slabs.

Some jurisdictions have adopted transitional arrangements, delaying full implementation of the use prohibition until 31 December 2024. To accommodate this, the import prohibition will come into force from 1 January 2025, at which time, engineered stone benchtops, panels and slabs will be prohibited imports under the Prohibited Imports Regulations. As such, engineered stone benchtops, panels and slabs, will only be able to be imported into Australia with a valid import permit, confirmation or exemption. Engineered stone imported without a valid permit, confirmation or exemption will be a prohibited import and will be able to be seized at the border without a warrant.

Human rights implications

This Disallowable Legislative Instrument engages the following rights and obligations:

- The right to the enjoyment of safe and healthy working conditions under Article 7(b) of the *International Covenant on Economic Social and Cultural Rights* (ICESCR), read with the right to highest attainable standard of physical health under Article 12 of the ICESCR;

- The obligation on the State to prevent, treat and control occupational diseases, under Article 12(2)(c) of the ICESR; and

- The right to be presumed innocent until proven guilty according to law under Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR).

<u>The right to enjoy safe and healthy working conditions and to attain the highest standard of physical health</u>

Article 7(b) of the ICESCR provides that everyone has the right to the 'enjoyment of …[s]afe and healthy working conditions.'

The content of the right to a safe and healthy working environment 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 right to physical and mental health expressed in Article 12 of the ICESCR is engaged by the Amendment Regulations, as the United Nations Committee on Economic Social and Cultural Rights has stated that the right to attain the highest standard of physical 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 prevention of occupational diseases is a fundamental aspect of the right to safe and healthy working conditions. 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.

Workplace exposure to 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. 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.

The Amendment Regulations promote the right to safe and healthy working conditions and the right to attain the highest standard of physical health by prohibiting engineered stone benchtops, panels and slabs from being imported to Australia, thereby supporting the prohibition on the manufacture, supply, processing and installation of engineered stone benchtops, panels and slabs to protect the health and safety of workers in the engineered stone industry. This approach helps to create safer working environments and reduce silica-related diseases.

<u>The obligation on the State to prevent, treat and control occupational diseases</u>

The Amendment Regulations engage the obligation on the State to prevent, treat and control occupational diseases in order to fully realise the right to attain the highest standard of physical health.

The Amendment Regulations contribute to meeting the Government's obligation under Article 12(2)(c) by banning the importation of engineered stone benchtops, panels and slabs without a permit, confirmation or exemption, which promotes a work environment that reduces the exposure to RCS, and the resulting high risk of developing silicosis, as an occupational disease.

Right to be presumed innocent until proven guilty according to law

The Parliamentary Joint Committee on Human Rights has noted the imposition of strict or absolute liability will not violate Article 14(2) where it pursues a legitimate aim and is reasonable and proportionate to that aim.

Section 233(1)(b) of the Customs Act provides that a person shall not import any prohibited goods. Section 233(1AA) provides that contravention of section 233(1) is an offence. Section 233(1AB) provides that an offence under section 233(1AA) is a strict liability offence, including in relation to section 233(1)(b). By amending the Regulations to prohibit the importation of engineered benchtops, panels and slabs, the importation of such products without a permit will be an offence of strict liability under the Customs Act. Including strict liability as a feature of offences was carefully considered when the Customs Act was first introduced as the presumption of innocence can be seen to be limited by removing the requirement for the prosecution to prove fault in relation to one or more physical elements of an offence.

Offences arise in a regulatory context where, for reasons such as public safety, and the public interest in ensuring regulatory schemes are observed, the sanction of criminal penalties is appropriate. The offences also arise in a context where a defendant can reasonably be expected, because of their professional involvement, to know the requirements of the law, and the mental, or fault, element can justifiably be excluded.

The application of strict liability to a particular element means that the prosecution is not required to prove fault in relation to that matter. However, as per paragraph 6.1(2)(b) of the *Criminal Code Act 1995* (Criminal Code), the defence of mistake of fact under section 9.2 of the Criminal Code would be available in relation to these elements. This means where the accused produced evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, the conduct would not have constituted the offence, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

The legitimate objective of strict liability for prohibited item importation offences is to ensure defendants operating in the customs regulatory environment are held accountable for breaches of their positive duties to ensure a safe and healthy workplace. To the extent that strict liability offences limit the right to the presumption of innocence, the limitation is reasonable, necessary and proportionate in achieving the legitimate objective.

Conclusion

The Amendment Regulations are compatible with human rights because they promote the right to safe and healthy working conditions and the right to attain the highest standard of physical health by supporting the amendments to the model WHS Regulations, to protect Australian workers from exposure to RCS from processing engineered stone benchtops,

panels and slabs. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Tony Burke MP
Minister for Home Affairs