

Regulatory Impact Statement

WORK HEALTH AND SAFETY AMENDMENT REGULATION 2022 (NO 1)

Subordinate Law SL2022-12

Prepared in accordance with the

Legislation Act 2001, section 34

Overview

This regulatory impact statement relates to the *Work Health and Safety Amendment Regulation 2022 (No 1)* (the proposed law). The proposed law will amend the *Work Health and Safety Regulation 2011* (WHS Regulation) to require a person conducting a business or undertaking (PCBU) to ensure that workers engaged in certain occupations are trained in a declared course in silica awareness.

Background

Stakeholders have expressed concern that there is a gap in training for workers who undertake high risk crystalline silica work which may lead to workers being exposed to unacceptable levels of respirable crystalline silica, unaware of the serious harm to health that respirable crystalline silica can cause.

Mandatory training has been legislated in the ACT in relation to asbestos awareness and working safely with asbestos since 2014. Awareness training was seen to be the most useful information source to address the significant risks posed by asbestos containing materials. In legislating mandatory training in the ACT in relation to silica awareness the ACT Government hopes to achieve the same positive benefits across industries with reductions in silica related illnesses.

Information required by section 35 of the *Legislation Act 2001*

(a) The authorising law

The *Work Health and Safety Act 2011* (WHS Act) is the authorising law for the proposed law. Section 276(1) of the WHS Act enables the Executive to make regulations in relation to any matter relating to work health and safety under the Act. Furthermore, subsection 276(2) provides that a regulation may make provision in relation to matters set out in schedule 3, including: the way in which duties imposed by the Act are performed, and matters relating to the regulation of specified activities at workplaces.

The proposed law would amend the WHS Regulation.

(b) Policy objectives of the proposed law

The objectives of the proposed law are:

- to provide protection for workers who may be required to carry out high risk crystalline silica work for a person conducting a business or undertaking by providing mandatory training;
- to address a gap in training and ensure workers that are likely to be required to perform high risk crystalline silica work are trained in how to do so safely;
- to ensure best practice for undertaking high risk crystalline silica work in the workplace;
- to reduce worker exposure to respirable crystalline silica; and
- in the longer term, to reduce the incidence of silica related diseases.

An increasing trend of accelerated silicosis has been observed in several Australian states since 2018.

Material containing crystalline silica poses a major risk to the health and safety of workers who undertake high risk crystalline silica work in the ACT. Activities such as cutting, grinding, sanding, drilling, loading or demolishing products that contain silica can generate particles of crystalline silica dust that may not be visible and are small enough to breathe into the lungs.

Silica dust is a harmful substance that, when inhaled into the lungs over a long period of time at low to moderate levels, or short periods and high levels, can cause a scarring of the lungs and leading to serious disease such as lung cancer, kidney disease, autoimmune diseases and silicosis. Silicosis is a serious and incurable disease which can cause damage requiring a lung transplant or lead to death.

(c) Achieving the policy objectives

The proposed law would require a person conducting a business or undertaking (PCBU) to ensure that any of their employees engaged in occupations identified as being at heightened risk of crystalline silica exposure complete the declared course/Course in Working Safety with Crystalline Silica Materials. This would be in addition to existing training requirements under the WHS Act and WHS Regulation. The training course provides participants with the skills and knowledge so they are effectively able to identify material containing crystalline silica and implement necessary controls.

The positive benefits of training in achieving work health and safety are widely recognised. For a substance as hazardous to health as crystalline silica, further training is warranted given the significant, proven risks to the health and safety of workers.

In July 2019, the Commonwealth Government established the National Dust Disease Taskforce (NDDT) to inform a national approach to the prevention, early detection, control and management of dust diseases in Australia. The key driver of the establishment of the NDDT was concern over the emerging trend of new cases of accelerated silicosis in Australia. The NDDT reported that there is evidence to suggest that nearly one in four engineered stone workers who have been in the industry since before 2018, are suffering from silicosis or other silica dust related diseases.¹ Although the WHS legislative framework already imposes a general duty on PCBUs to ensure the health and safety of their workers in the workplace, it has been identified that additional regulatory controls providing clarity around crystalline silica are required to protect workers from the risks of exposure to crystalline silica.

Workplace training and awareness is recognised as an effective risk management control and would be beneficial to workers at risk of exposure to silica dust. Workplace safety

¹ Data from Queensland and Victoria indicates that out of 1,509 workers screened, 362 were found to have silicosis: Sources: (i) "WorkCover screening outcomes" as at 31 May 2021 (<https://www.worksafe.qld.gov.au/claims-and-insurance/work-related-injuries/types-of-injury-or-illness/work-related-respiratory-diseases/silicosis> last checked 27/06/2021); (ii) "Silica-associated lung disease health screening research: Phase one final report" as at November 2020 (<https://www.worksafe.vic.gov.au/resources/silica-associated-lung-disease-healthscreening-research-phase-one-final-report> last checked 27/06/2021 (Taken from National Dust Diseases Taskforce Final Report).

training is important across all workplaces; every workplace has its hazards and education is one of the easiest ways that PCBUs can work with workers to ensure proper training is provided to address and avoid workplace hazards.

There are many known benefits to workplace safety training, including:

- stronger safety culture
- less injury and accidents
- increased efficiency and productivity – decrease in absences and uncertainty
- increased safety compliance - decreased necessity for micromanaging; and
- reduction in stress.

To maximise these benefits, training would be industry-specific, comprehensive and high quality.

The occupations that would be required to attend the course will be declared by the Minister by notifiable instrument and will be those most likely to be involved in high risk crystalline silica work.

Consistency of the proposed law with the authorising law

The objectives of the WHS Act include protecting the health and safety of workers, and improving safety outcomes in workplaces. The policy objectives of the proposed law are consistent with this.

Section 276(1) of the WHS Act enables the Executive to make regulations in relation to any matter relating to work health and safety under the Act. Furthermore, subsection 276(2) provides that a regulation may make provision in relation to matters set out in schedule 3, including: the way in which duties imposed by the Act are performed, and matters relating to the regulation of specified activities at workplaces.

Section 19 of the WHS Act imposes a duty of care on PCBUs to ensure, so far as is reasonably practicable, the health and safety of their workers. Subsection 19(3)(f) of the WHS Act states that a PCBU must ensure, so far as is reasonably practicable, “the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety”. The proposed law will support the operation of section 19 and strengthen the WHS Act’s training requirements when it comes to respirable crystalline silica. The WHS Regulation in its current form similarly places obligations on PCBUs to train their workers, in recognition that training is an important part of good work health and safety.

(c) While the proposed law would be a deviation from the national model WHS laws, deviation is warranted in response to local conditions and to optimise safety. This has particularly been the case in the regulation asbestos and is now becoming the case with the regulation of crystalline in the workplace. The ACT Government is committed to addressing silica dust exposure in the workplace as part of the ongoing focus of protecting workers from crystalline silica. In July 2019, the Commonwealth Government established the National Dust Diseases Taskforce (NDDT) to inform an approach to the prevention, early detection, control and management of dust diseases. The Taskforce released its Final Report in July 2021 containing recommendations to government, industry and unions, that support a range of regulatory and non-regulatory actions

designed to improve worker health and safety. At the national level, work is already underway to amend model laws to address the risk of silica dust exposure in the workplace and improve worker health and safety, including Safe Work Australia’s establishment of the model Code of Practice: *Managing the risks of crystalline silica from engineered stone in the workplace* in October 2021.

(d) The proposed law is not inconsistent with the policy objectives of another Territory law

The proposed law is not inconsistent with the policy objectives of any other Territory law.

(e) Reasonable alternatives to the proposed law

An alternative option is maintaining the status quo. Under this option, government, industry, unions and workers would rely on the primary duty of care provision under section 19 of the WHS Act which places a duty on PCBUs to ensure, so far as is reasonably practicable, the health and safety of workers. Maintaining the status quo would also provide the option of workers to undertake the Working Safely with Materials Containing Crystalline Silica course, without it being mandatory.

Mandating training courses that are nationally accredited gives some assurance that courses are comprehensive and high quality.

Workplace training and awareness is recognised as an effective risk management control. Workplace safety training has many benefits, including: creating a stronger safety culture and increasing talent retention; preventing injury and accidents in the workplace; increasing efficiency and productivity, including decrease in absences; increased safety compliance with a decreased necessity for micromanaging; and a reduction in stress.

The WHS Act and WHS Regulation contain existing training requirements. As part of the primary duty of care established by the WHS Act, section 19(3)(f) provides that a PCBU must, as far as it is reasonably practicable, provide information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the business or undertaking. Additionally, section 39 of the WHS Regulation states that a PCBU must ensure that information, training and instruction provided to a worker is suitable and adequate having regard to the nature of the work carried out by the worker, the nature of the risks associated with the work at the time the information, training or instruction is provided and the control measures implemented. A PCBU must ensure that information, training and instruction provided under section 39 is readily understandable by any person to whom it is provided.

<i>Benefits</i>	<i>Costs</i>
<p><u>No increased costs</u> Costs associated with training of certain workers would not be mandatory for certain workers.</p> <p><u>No additional regulation</u> Maintaining the status quo would not require any changes to the regulation.</p> <p><u>Training would be voluntary</u></p>	<p><u>Failure to meet policy objectives</u> Working with material containing crystalline silica dust poses a serious risk to health and safety of workers. Despite efforts to date of awareness raising about the risks of working with silica dust, they are point in time campaigns and rely on the safety and compliance culture of individual PCBUs. As a result, workers at risk of exposure to respirable crystalline silica (silica dust) are</p>

<p>PCBUs are able to voluntarily train their workers in a nationally accredited training course of unit in silica dust awareness would be or other training sessions.</p>	<p>likely to continue to risk unnecessary exposure to silica dust at work.</p> <p><u>Lack of effectiveness</u> The current requirements are not clear about who must be trained in the risks of working with respirable crystalline silica containing products, the quality and type of training. Without mandatory training, PCBUs may not ensure their workers are formally trained in silica dust awareness.</p>
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(f) Brief assessment of the benefits and costs of the proposed law

The proposed law imposes a direct economic cost on PCBUs in certain industries in ensuring that certain workers attend the required course. In consultation with WorkSafe ACT, it is estimated that there will be around 18,000 workers required to undergo training prior to 1 July 2023, and approximately 2,000 additional workers trained each year thereafter, with an expected training cost of up to \$160 per worker.

The estimated cost of providing training to workers for silica awareness is considered to outweigh the potentially high costs imposed on PCBUs, workers, and the community should a worker contract silicosis or other silica related dust diseases.

Benefits	Costs
<p><u>Achieves policy objectives</u> The proposed law provides a means to effectively achieve the Government’s policy objectives as outlined above. An expected outcome is improved health and safety practices when working with materials containing crystalline silica, and in the longer term, a reduction of the incidence of silicosis and other silica related dust diseases. Increases workers’ awareness of the risks of working with crystalline silica and exposure to respirable crystalline silica. This increased awareness has an ongoing impact as new workers continue to be trained in silica dust awareness.</p> <p><u>Positive flow on effects</u> Increasing the level of training of workers in certain occupations will raise their work health and safety competency, and that of the industries they work in generally. This has a positive focus on safety when working with crystalline silica containing products.</p>	<p><u>Increased costs for businesses</u> PCBUs covered by the mandatory training requirement would face costs associated with the training as mentioned above. These costs would be ongoing to ensure new workers complete the training.</p> <p><u>Costs may be passed on to consumers</u> Increased business costs may be passed on to consumers resulting in higher cost services.</p>

(g) Brief assessment of the consistency of the proposed law with Scrutiny of Bill Committee principles

The Standing Committee on Justice and Community Safety's (Legislative Scrutiny Role) Terms of Reference require the Committee to consider whether (among other things) a regulation:

- i. is in accord with the general objects of the Act under which it is made;
- ii. unduly trespasses on rights previously established by law;
- iii. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
- iv. contains matters which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

An analysis of the proposed law against each of these items follows.

i. Accordance with the general objects of the Act under which it is made

See above.

ii. Rights previously established by law

Section 22(1) of the *Human Rights Act 2004* (HR Act), provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

The nature of the right affected

The proposed law will create a strict liability offence for a PCBU that fails to ensure that a worker they engage in one of the required occupations is trained in the Course in Working Safely with Materials Containing Crystalline Silica. Strict liability offences engage the right to be presumed innocent under section 22(1) of the HR Act by removing the fault elements of an offence which in turn requires the defendant to prove mistake of fact (a defence to all ACT offences under the *Criminal Code 2002* (the Code)) or other defences available under the Code for strict liability offences.

Strict liability can be reasonably justified in certain circumstances:

- strict liability offences should only be used where a person knows, or ought to know, their legal obligations;
- strict liability offences must be relevant, rational and proportionate to their objective;
- examples of where strict liability offences are considered to be appropriate include regulatory regimes such as work health and safety, to support the integrity of the legislation, and where offences are minor with no custodial penalty.

The importance of the purpose of the limitation

The purpose of the WHS Act is to ensure the health and safety of workers while at work. A necessary role of the WHS Act and supporting legislation is to ensure the effective deterrence of behaviour and minimisation of risks that increase the likelihood of workplace injuries or deaths, or work-related diseases.

Exposure to respirable crystalline silica is a concern for workers in the ACT, particularly those in certain occupations where their work is more likely to generate high levels of respirable crystalline silica in airborne concentration. Given the significant risk that exposure

to respirable crystalline silica poses to health, it is important to establish a proper and consistent minimum training standard to better ensure a worker has the knowledge and skills to safely work with material containing crystalline silica. The proposed law will amend the WHS Regulation to require a PCBU to ensure that workers they engage that are in occupations where they may perform high risk crystalline silica work are trained in how to do so safely.

This strict liability offence arises in the regulatory context where for reasons such as worker and public safety, and in the interest of ensuring that regulatory schemes are observed, the sanction of a criminal penalty is justified. The offence also arises in a context where a PCBU can be reasonably expected, because of their professional involvement, to know the requirements of the law. As such, the mental or fault element can justifiably be excluded.

The nature and extent of the limitation

The offences in this Regulation Amendment are consistent with the existing application of the work health and safety legislation, specifically in applying strict liability to the physical elements of offences created under the work health and safety legislation. Both the WHS Act (under section 12A) and WHS Regulation (under section 6A) expressly state that under the WHS Act and WHS Regulation strict liability applies to each physical element of an offence.

Strict liability will apply under the proposed law where a PCBU fails to ensure that a relevant worker they engage is trained in the Course in Working Safely with Materials Containing Crystalline Silica.

The new offence does not impose a custodial penalty.

Any less restricted means available to achieve the purpose the limitation seeks to achieve

The limitation under the proposed law is considered to be the least restrictive means of ensuring that relevant workers are trained in how to work safely with materials containing crystalline silica.

iii. *Non-reviewable decisions*

The proposed law does not create any non-reviewable decisions.

iv. *Matters properly dealt with in an Act of the Legislative Assembly*

As outlined above, the authorising law, the WHS Act, provides the Executive with the power to make this Regulation. As such, the proposed law is within an express power granted to the Executive by an Act of the Legislative Assembly.