

GUIDE FOR APPLICANTS FOR EXEMPTIONS

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Table of Contents

Introduction.....	3
Exemption types.....	3
Scope	3
Who may apply for an exemption	3
General exemption	3
High Risk Work Licence Exemption	4
Major Hazard Facility Exemption.....	4
Engineered Stone Prohibition Exemption.....	4
Duration of an exemption	4
Recognition of interstate authorisations	4
How to apply	4
Fees	4
Granting/renewal/refusal	5
What does the regulator take into account when deciding whether to grant an exemption.....	5
Granting an exemption	7
Granting a conditional exemption	8
Refusing to grant an exemption.....	8
Cancellation/Amendment of an exemption	9
Application for review of decision relating to an exemption	9
Further information	10
Legislation	10
List of Jurisdiction Contacts.....	10
Checklists.....	11
Checklist for general exemption	11
Checklist for exemption from high risk work licence	11
Checklist for exemption for a major hazard facility	11
Checklist for exemption from the engineered stone prohibition.....	12

INTRODUCTION

The *Work Health and Safety (WHS) Regulations 20XX* ([jurisdiction]) has a general power which provides for [the WHS Regulator] to grant an exemption from compliance with any regulation of the WHS Regulations.

The granting of an exemption is based on an assessment by the [WHS Regulation] that the alternative agreed course of action will provide at least an equivalent level of health and safety to that achieved by complying with the relevant regulation of the WHS Regulations.

EXEMPTION TYPES

General exemption

Under Regulation 684, [the WHS Regulator] may grant a general exemption from compliance with any of the WHS Regulations.

Hazard specific exemptions

Hazard specific provisions in the WHS Regulations apply to the granting of an exemption:

- from holding a high risk work licence [Regulation 686]
- for a major hazard facility [Regulation 688], or
- for a product prohibited under the engineered stone prohibition [regulation 689A].

SCOPE

General exemption provisions are set out in the WHS Regulations 684 - 685 and exclude:

- exemptions requiring a person to hold a high risk work licence, that are set out in Regulations 686 – 687
- exemptions relating to a major hazard facility or a proposed major hazard facility, that are set out in Regulations 688 – 689, or
- exemptions of a type of engineered stone from the prohibition in regulation 529D, that are set out in Regulations 689A – 689E.

WHO MAY APPLY FOR AN EXEMPTION

General exemption

Any person or class of persons may apply to [the WHS Regulator] in writing for a general exemption [Regulation 684 (1)-(2)].

A person includes a body corporate (legal entity) such as a corporation or incorporated association or government entity (government department or government statutory body) or an individual.

A class of persons means a number of persons who have a common characteristic for example: operators of a specific tool or machinery.

[The WHS Regulator] may on its own initiative grant a general exemption [Regulation 684 (2)].

High Risk Work Licence Exemption

Any person or class of persons may apply to [the WHS Regulator] in writing for an exemption from the requirement to hold a high risk work licence [Regulation 686].

Major Hazard Facility Exemption

The operator of a major hazard facility or proposed major hazard facility may apply to [the WHS Regulator] for an exemption from compliance with any provision in the WHS Regulations relating to that facility [Regulation 688].

Regulation 533(1) of the WHS Regulations defines the operator of a major hazard facility to be: a person conducting the business or undertaking of operating the facility who has:

- management or control of the facility, and
- the power to direct that the whole facility be shut down.

Regulation 533(2) of the WHS Regulations defines the operator of a proposed major hazard facility to be:

- the operator of a proposed facility that is an existing workplace, or
- the person who is to be the operator of a proposed facility that is being designed or constructed.

Engineered Stone Prohibition Exemption

A person may apply to [the WHS Regulator] in writing for an exemption from the prohibition in Regulation 529D for a type of engineered stone [Regulation 689A].

Duration of an exemption

The exemption will last the length of time stipulated by [the WHS Regulator] under Regulation 692(h) unless [the WHS Regulator] amends or cancels the exemption earlier [Regulation 697].

Recognition of interstate authorisations

A general exemption, high risk work licence exemption or major hazard facility exemption, issued by [the WHS Regulator] is recognised in [jurisdiction] only.

An engineered stone prohibition exemption [regulation 689A] issued by [the WHS Regulator] will be recognised in all jurisdictions with a corresponding WHS law in relation to granting engineered stone prohibition exemptions. Please note that Victoria's Occupational Health and Safety laws do not provide for automatic mutual recognition of exemptions granted by other jurisdictions.

How to apply

Jurisdictional Note 1.

Fees

Jurisdictional Note 2.

Granting/renewal/refusal

WHAT DOES THE REGULATOR TAKE INTO ACCOUNT WHEN DECIDING WHETHER TO GRANT AN EXEMPTION

Key Principles:

The agreed national principles which guide exemption decision making which underpin the exemption decision making process are:

Consistency: Regulators will apply common criteria for the issue, refusal and variation of exemptions from the WHS Regulations.

Constructiveness: Regulators will use national guidance material to assist applicants to understand the exemption decision making process.

Transparency: The principles on which exemption decisions are made will be published on the website of Safe Work Australia. Regulators will make decisions by applying documented policies neutrally and objectively, with integrity and fairness. Appropriate confidentiality considerations will underpin the decision making process. Documented policies will also be published on the website of each WHS Regulator.

Accountability: At the time of refusing, cancelling, suspending or varying an exemption, an applicant will be advised of the right to apply for external review of the decision.

Proportionality: Exemption decision making should be proportionate to the risk and regulators should ensure that equivalent safety can be demonstrated.

Responsiveness: In making exemption decisions regulators will be timely and responsive to the needs of an applicant while ensuring that appropriate consultation has taken place.

Targeted: Regulators will only grant an exemption where exceptional circumstances justify the grant of the exemption and can grant an exemption on its own initiative, that is, without receipt of an application.

General exemption

In deciding whether or not to grant an exemption, [the WHS Regulator] must consider all relevant matters, including the following:

- whether granting the exemption will result in a standard of health and safety at the relevant workplace or in relation to the relevant undertaking, that is at least equivalent to the standard that would be achieved by compliance with the provision/s
- whether at least an equivalent standard of health and safety can be achieved by the Regulator granting a conditional exemption, where those conditions are complied with
- whether exceptional circumstances justify the granting of the exemption. Exceptional circumstances may include: emergency situations, practicality of applying a regulatory provision and technological change
- if the proposed exemption relates to a particular thing – whether the risk associated with that thing is not significant if the exemption is granted, and

- whether the applicant has carried out consultation in relation to the proposed exemption in accordance with Divisions 1 and 2 of Part 5 of the WHS Act.

[Regulation 685].

Exemption from holding a high risk work licence

[The WHS Regulator] must not grant an exemption from holding a high risk work licence unless it is satisfied that granting the exemption will result in a standard of health and safety that is at least equivalent to the standard that would be achieved without the exemption. In considering the exemption request, [the WHS Regulator] must have regard to all relevant matters, including whether:

- obtaining a high risk work licence would be impracticable
- competencies of the person to be exempted exceed those required for a high risk work licence, and
- any plant used by the person can be modified to reduce the risk associated with its operation.

[Regulation 687].

Exemption for a major hazard facility

[The WHS Regulator] must not grant a major hazard facility exemption unless satisfied that:

- one or more Schedule 15 chemicals are present or likely to be present at the facility
- the quantity of the Schedule 15 chemical/s exceeds the threshold quantity of the chemical/s periodically because the Schedule 15 chemical/s are solely the subject of intermediate temporary storage
- the Schedule 15 chemical/s are in one or more containers with the capacity of each container being not more than a total of 500 kilograms, and
- granting the exemption will result in a standard of health and safety in relation to the operation of the facility that is at least equivalent to the standard that would be achieved by compliance with the relevant provision/s. In considering this matter, [the WHS Regulator] must have regard to all relevant matters, including whether:
 - the applicant (operator of the facility) is complying with the WHS Act and Regulations
 - the applicant has processes and procedures in place which will keep the quantity of the Schedule 15 chemical/s present or likely to be present at or below the threshold quantity for the Schedule 15 chemical/s as often as practicable; and
 - the applicant has implemented adequate control measures to minimise the risk of a major incident occurring.

[Regulation 689].

Exemption from the engineered stone prohibition

[The WHS Regulator] must not grant an exemption in respect of a type of engineered stone from of the prohibition in Regulation 529D unless satisfied that granting the exemption will result in a standard of health and safety that is at least equivalent to the standard that would have been achieved without that exemption [Regulation 689D(1)]. In considering this matter, [the WHS Regulator] must have regard to all relevant matters, including:

- any submission provided to [the WHS Regulator] by the applicant together with the application, including:
 - any submissions made by the Safe Work Australia members representing the interests of workers in Australia,
 - any submissions made by the Safe Work Australia members representing the interests of employers in Australia
- any submissions received from a corresponding WHS regulator (the WHS regulator must consult with corresponding regulators)
- any submissions received from parties the WHS regulator may choose to consult with, including:
 - an employer organisation that includes employers engaged in work involving engineered stone,
 - a union representing employees whose work includes work involving engineered stone, or
 - a person who has qualifications, knowledge, skills, and experience relating to engineered stone
- the relevant matters in the Engineered Stone Prohibition common decision-making criteria published by Safe Work Australia in accordance with Regulation 689E (Attachment A), and
- whether the regulator is satisfied that, if the exemption were granted, the risk associated with the type of engineered stone that is the subject of the application would not be significant.

[Regulation 689D(2)]

Applicants should be aware that copies of their application will be shared with corresponding regulators and may be shared with any of the parties specified in Regulation 689C(3).

GRANTING AN EXEMPTION

If the [WHS Regulator] grants an exemption, the [WHS regulator] must prepare an exemption document that states:

- the name of the applicant for the exemption (if any)
- the person or class of persons to whom the exemption will apply
- the work or thing to which the exemption relates, if applicable
- the circumstances in which the exemption will apply,

- the provisions of the WHS Regulations to which the exemption applies
- any conditions on the exemption
- the date on which the exemption takes effect, and
- the duration of the exemption.

[Regulation 692]

[The WHS Regulator] must give a copy of the exemption document within 14 days after making the decision to grant the exemption to the applicant or, if the exemption was granted on [the WHS Regulator's] own initiative, each person to whom the exemption will apply [Regulation 694].

For exemptions that relate to a class of person or exemptions that relate to the engineered stone prohibition, [the WHS Regulator] must publish a copy of the exemption on the [appropriate government website] and in the [Government Gazette] [Regulation 695].

Additionally, if the exemption is an engineered stone exemption, [the WHS Regulator] must publish on [the appropriate government website] the reasons for the decision within 14 days after the day the exemption was granted [Regulation 695(3)].

GRANTING A CONDITIONAL EXEMPTION

In granting an exemption, [the WHS Regulator] may impose any conditions it considers appropriate on an exemption [Regulation 691]. Conditions that may be imposed include:

- monitoring risks
- monitoring the health of persons at the workplace who may be affected by the exemption
- keeping certain records
- using a stated system of work
- reporting certain matters to [the WHS Regulator], and
- giving notice of the exemption to person/s that may be affected by the exemption.

A decision to impose condition/s on an exemption is a reviewable decision [Regulation 691].

A person to whom an exemption is granted must comply with the conditions of the exemption, and also ensure that any person under their management or control also complies (eg, their workers) [Regulation 693].

REFUSING TO GRANT AN EXEMPTION

[The WHS regulator] may refuse to grant an exemption. If it refuses to grant an exemption, it must give the applicant written notice of the refusal within 14 days after making that decision, and the notice must state the reasons for the refusal [Regulation 696].

A decision to refuse to grant a an exemption is a reviewable decision [Regulation 676].

CANCELLATION/AMENDMENT OF AN EXEMPTION

[The WHS Regulator] may amend or cancel an exemption at any time [Regulation 697].

A decision to amend or cancel an exemption is a reviewable decision [Regulation 676].

If [the WHS Regulator] decides to amend or cancel an exemption, it must give written notice of the amendment or cancellation to the applicant, or, if the regulator granted the exemption on its own initiative, to each person to whom an exemption has been granted within 14 days after making that decision. The notice must state the reasons for the decision [Regulation 698 (1) and (3)].

If the exemption affects a class of persons, [the WHS Regulator] must publish a notice of amendment or cancellation of the exemption in the [jurisdiction] Government Gazette [Regulation 698 (2)].

The amendment or cancellation takes effect:

- on the publication of the notice in the [Government Gazette] or on a later date specified in the notice, or
- if a notice is not required to be published in the [Government Gazette] – on the giving of the notice to the applicant or on a later date specified in the notice [Regulation 698(4)].

APPLICATION FOR REVIEW OF DECISION RELATING TO AN EXEMPTION

The table in Regulation 676 sets out decisions that are reviewable (reviewable decisions) and who is eligible (eligible person) to apply for the review of a reviewable decision.

The applicant is the eligible person to request a review of the following decisions:

- to refuse to grant an exemption [Regulation 684, 686, 688 and 689A]
- to impose a condition on an exemption (Regulation 691)
- to refuse to grant an exemption [Regulation 696]
- to amend an exemption [Regulation 697], or
- to cancel an exemption [Regulation 697].

External review

If an applicant, licence holder or operator of a facility (depending on the type of exemption request) is dissatisfied with a decision made under Part 11.2, they can apply to the [External review body] for review of the decision.

Further information

Jurisdictional Note 4.

LEGISLATION

Jurisdictional Note 5.

LIST OF JURISDICTION CONTACTS

Jurisdiction	Name of regulator	Telephone	Website
New South Wales	SafeWork NSW	13 10 50	www.safework.nsw.gov.au
Victoria	WorkSafe Victoria	1800 136 089 or (03) 6166 4600	www.worksafe.vic.gov.au
Queensland	Workplace Health and Safety Queensland	1300 307 877	www.worksafe.qld.gov.au/
South Australia	SafeWork SA	1300 365 255	www.safework.sa.gov.au
Western Australia	WorkSafe WA	1300 307 877 or 1800 678 198	http://www.commerce.wa.gov.au/worksafe
Australian Capital Territory	WorkSafe ACT	13 22 81	https://www.worksafe.act.gov.au/
Tasmania	WorkSafe Tasmania	1800 136 089 or (03) 9641 1444	www.worksafe.tas.gov.au/
Northern Territory	NT WorkSafe	1800 019 115	www.worksafe.nt.gov.au
Commonwealth	Comcare	1300 366 979	www.comcare.gov.au

Checklists

CHECKLIST FOR GENERAL EXEMPTION

Checklist for general exemption	
	Application form is complete, including a signature in the declaration.
	If the proposed exemption relates to a thing, evidence that the risk associated with the thing, is not significant if the exemption is granted has been submitted.
	Evidence that consultation in relation to the proposed exemption has been undertaken in accordance with Divisions 1 and 2 of Part 5 of the WHS Act has been submitted.

CHECKLIST FOR EXEMPTION FROM HIGH RISK WORK LICENCE

Checklist for exemption from high risk work licence	
	Application form is complete, including a signature in the declaration.
	Copies of documents showing successful completion of competencies exceeding those required for the grant of the high risk work licence has been submitted.
	Documents that demonstrate that the plant used by the person or class of persons can be modified to reduce the risk associated with its operation has been submitted.

CHECKLIST FOR EXEMPTION FOR A MAJOR HAZARD FACILITY

Checklist for exemption for a major hazard facility	
	Application form is complete, including a signature in the declaration.
	Documents that demonstrate that the Schedule 15 chemical/s present or likely to be present will periodically exceed the threshold quantity because they are in intermediate temporary storage and in containers with a capacity to contain no more than 500 kg of the chemical has been submitted.
	Documents that the operator of the facility is complying with the WHS Act and Regulations, including Part 7.1 has been submitted.

	Documents that evidence processes and procedures are in place which will keep the quantity of the Schedule 15 chemical/s present or likely to be present at or below the threshold quantity as often as practicable has been submitted.
	Documents that evidence that that operator of the facility has implemented control measures to minimise the risk of a major incident occurring has been submitted.

CHECKLIST FOR EXEMPTION FROM THE ENGINEERED STONE PROHIBITION

Checklist for exemption from the prohibition on engineered stone	
	Application form is complete, including a signature in the declaration.
	Written notice provided to Safe Work Australia's social partners is attached.
	Submissions made to the applicant by Safe Work Australia's social partners (if any) are attached.
	<p>The application includes statements, claims and supporting evidence demonstrating that, if the exemption were granted, it would result in a standard or health and safety that is at least equivalent to the standard that would have been achieved without that exemption, including information or evidence:</p> <ul style="list-style-type: none"> • about the intended use of the type of engineered stone • that the risks associated with the type of engineered stone that is the subject of the application would not be significant, including information about any relevant control measures for processing the type of engineered stone safely , and • addressing the Engineered Stone Prohibition common decision-making criteria published by Safe Work Australia.

ATTACHMENT A: ENGINEERED STONE PROHIBITION COMMON DECISION-MAKING CRITERIA

Criteria	Comments
1. Evidence that exempted products can be regulated effectively – exempted products must be able to be differentiated from those covered in the prohibition.	Sufficient evidence is to be provided by the applicant that will allow the subject of an exemption application to be distinguished from engineered stone covered by the prohibition.
2. Compelling evidence the product can be worked with safely – for instance information related to the respirable crystalline silica generated from processing the product and any reasonably practicable control measures to mitigate other safety concerns.	This will ensure that worker health and safety plays a key role in decision making. Applicants will be required to provide evidence that supports worker safety when processing the product and any required control measures to mitigate other safety concerns will be put in place. This could include ensuring that product safety labels include the necessary control measures that will be required to work with the product safely.
3. Exceptional circumstances, such as a change in technology or composition which is proven to reduce the health risks to workers when processing a product.	To ensure that the exemption framework remains up to date, regulators will be required to consider the body of evidence regarding effectiveness of control measures for processing engineered stone as provided by the applicant.