

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 235

Issued by the authority of the Minister for Employment and Workplace Relations

Subject – *Fair Work (Building Industry) Act 2012*

Fair Work (Building Industry - Accreditation Scheme) Amendment Regulation 2012 (No. 1)

The *Fair Work (Building Industry) Act 2012* (the Act) and the *Fair Work (Building Industry - Accreditation Scheme) Regulations 2005* (the Accreditation Scheme Regulations) establish the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme (the Accreditation Scheme). The Accreditation Scheme is administered by the Federal Safety Commissioner, and imposes obligations on certain persons who wish to enter into building contracts funded by the Commonwealth or Commonwealth authorities.

Section 78 of the Act provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed.

The Regulation amends the Accreditation Scheme Regulations to exempt the Commonwealth and Commonwealth authorities from the requirement under the Act to engage builders accredited under the Accreditation Scheme, when entering into contracts for building work with a joint venture in certain circumstances. This would be where the joint venture includes at least one accredited person and an unaccredited person who has applied for accreditation, but has been unable to provide a Work Health and Safety Management System for the purposes of an on-site audit by the Federal Safety Commissioner. Builders who have never operated in Australia as a head contractor are unlikely to be able to meet this requirement, even though they are well established outside Australia as a builder.

The Regulation also makes some minor technical amendments, for example, changing references from ‘OH&S’ (occupational health and safety) to ‘WHS’ (work health and safety), as the latter is now the preferred term. Details of this Regulation are set out in Attachment A.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement’s assessment is that the measures in the Regulation are compatible with human rights. A copy of the Statement is at Attachment B.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. It commences on the day after it is registered on the Federal Register of Legislative Instruments.

The Office of Best Practice Regulation agreed that the Regulation is likely to have only minor or machinery impact on business and the not-for-profit sector. Therefore, a Regulation Impact Statement was not required in this case (OBPR reference: 11967).

Consultations were conducted in relation to the development of the Regulation with the Office of the Federal Safety Commissioner, the Departments of Finance and Deregulation and Foreign Affairs and Trade. It is expected that the impact of the Regulation on the building and

construction industry will be minimal, however key affected industry stakeholders were also consulted.

Details of Fair Work (Building Industry - Accreditation Scheme) Amendment Regulation 2012 (No. 1)

Section 1 – Name of Regulation

This section provides that the Regulation is known as the *Fair Work (Building Industry - Accreditation Scheme) Amendment Regulation 2012 (No. 1)*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after they it is registered on the Federal Register of Legislative Instruments.

Section 3 – Amendment of Fair Work (Building Industry - Accreditation Scheme) Regulations 2005

This section provides that the *Fair Work (Building Industry - Accreditation Scheme) Regulations 2005* are amended in accordance with Schedule 1.

Schedule 1 – Amendments

Item [1] – Section 3, definition of AS 1885.1-1990

This item omits the definition of *AS 1885.1-1990* in Section 3. This is a consequential amendment to the removal of the definition of *lost time injury frequency rate* in Item 2 below.

Items [2], [3], [4] & [5] – Section 3, definitions of *claims incident rate, lost time injury frequency rate, Occupational Health and Safety Management and OH&S*

These items omit the definitions of *claims incident rate, lost time injury frequency rate, Occupational Health and Safety Management and OH&S* in Section 3 as they are not used in the Accreditation Scheme Sections.

Item [6] – section 3

This item inserts a number of new definitions.

Joint venture means an unincorporated enterprise constituted by two or more persons in common, each of whom is not an individual, and with at least one member being an accredited person and at least one member not being an accredited person. This item facilitates the amendment inserted by item 12 below.

OHSAS 18001:2007 means OHSAS 1800:2007 Occupational Health and Safety Management Systems – Specifications.

WHS means workplace health and safety.

Workplace Health and Safety Management System, or WHSMS, means a system that complies with the requirements set out in AS/NZ 4801:2001.

Item [7] – Section 3, note

This item substitutes the note that *accredited person* has the meaning given by subsection 35 (7) of the Act with a note that *accredited person* has the meaning given by subsection 35 (8) of the Act. This is a technical amendment.

This item inserts a note that the use of *builder* in the Accreditation Scheme Regulation has the same meaning as that given in subsection 35 (8) of the Act.

Item [8] – Section 3, note

This item omits the note that *Commonwealth building contract* has the meaning given by subsection 35 (7) of the Act as *Commonwealth building contract* is no longer defined in the Act.

This item substitutes the note that *Commonwealth authority* has the meaning given by subsection 35 (7) of the Act with a note that *Commonwealth authority* has the meaning given by subsection 35 (8) of the Act. This is a technical amendment.

Item [9] – Paragraph 6 (2) (a)

This item clarifies that an applicant’s WHSMS (see item 6 above) must be certified to either AS/NZS 4801:2001 or OHSAS 18001:2007 as those standards are in force when this Regulation commenced. The objective of these standards is to set auditable criteria for an occupational health and safety management system.

This item omits the reference to ‘the international OHSMS standard’ in subparagraph 6 (2) (a) (ii). This amendment is consequential to the amendment in item 4 above.

Item [10] – Subparagraph 16 (b) (i)

This item substitutes the reference to *the applicant* with a reference to *the accredited person*. This is a technical amendment.

Item [11] – Subparagraph 24 (1) (g) (ii)

This item amends the punctuation in subparagraph 24 (1) (g) (ii) and is consequential to the amendment inserted by item 12 below.

Item [12] – After paragraph 24 (1) (g)

This item inserts new paragraph 24 (1) (h) in subsection 24 (1).

The *Fair Work (Building Industry Act) 2005* (the Act) requires that certain building work funded by the Commonwealth or a Commonwealth authority must only be performed by builders accredited under the Accreditation Scheme, unless the building work is prescribed by the regulations (subsection 35 (4) of the Act). Section 24 of the Accreditation Scheme Regulation sets out the building work that is prescribed for these purposes.

Paragraph 24 (1) (h) adds to the circumstances listed in Section 24. The item provides that where building work is undertaken by a joint venture that includes an unaccredited person, and the conditions below are met, the building work is prescribed for the purposes of subsection 35 (4) of the Act and is therefore not work to which the Accreditation Scheme applies.

This item specifies the circumstances in which building work may be prescribed under this item. The following conditions must be met:

- the project must be undertaken by a joint venture;
- if a builder is not an accredited builder, the builder must be well established outside Australia, have never operated in Australia as a head contractor, have applied for accreditation, and have been unable to provide a WHSMS for the purposes of an on-site audit;
- an accredited person in the joint venture must give a written undertaking to take full responsibility for WHS for the duration of the project and a written undertaking that the building work will be carried out in accordance with its WHSMS for the duration of the project;
- each builder who carries out the building work must give a written undertaking that it will carry out the building work in accordance with the accredited member's WHSMS for the duration of the project; and
- a builder or an accredited person must supply evidence to the Federal Safety Commissioner that the above criteria are met prior to entering into a contract for building work on behalf of the joint venture.

Item [13] – Subsection 24 (2), definition of *subcontractor*

This item amends the definition of *subcontractor* in Section 24 (2) to ensure that it uses the term *builder* consistently with the definition of the term in Section 35 (8) of the Act.

Item [14] – Further amendments

This item substitutes all references to *OH&S* in the Accreditation Scheme Sections with *WHS* in line with item 5 above.

Statement of Compatibility with Human Rights

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

Fair Work (Building Industry-Accreditation Scheme) Amendment Regulation 2012 (No. 1)

This Legislative Instrument 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 Legislative Instrument

The *Fair Work (Building Industry) Act 2012* (the Act) and the *Fair Work (Building Industry - Accreditation Scheme) Regulations 2005* (the Accreditation Scheme Regulations) establish the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme (the Accreditation Scheme). The Accreditation Scheme is administered by the Federal Safety Commissioner, and imposes obligations on certain persons who wish to enter into building contracts funded by the Commonwealth or Commonwealth authorities.

The Regulation amends the Accreditation Scheme Regulations to exempt the Commonwealth and Commonwealth authorities from the requirement under the Act to engage builders accredited under the Accreditation Scheme to allow the Commonwealth or a Commonwealth authority to enter into contracts for building work with a joint venture that includes an unaccredited person.

Importantly, the exemption is subject to certain safeguards such as the requirement that the builder without accreditation must give an undertaking in writing that it will carry out building work in accordance with the accredited builder's safety standards. As such, safety standards in Australian workplaces will not be affected by the regulation.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Minister for Employment and Workplace Relations, the Honourable Bill Shorten MP