

EXPLANATORY STATEMENT

Select Legislative Instrument No. 96, 2014

Issued by the authority of the Minister for Employment

Subject – *Work Health and Safety Act 2011*

Work Health and Safety Amendment (Licences) Regulation 2014

Section 276 of the *Work Health and Safety Act 2011* (the WHS Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The WHS Act and the *Work Health and Safety Regulations 2011* (the WHS Regulations) commenced on 1 January 2012 and implement the model Work Health and Safety Act and Regulations (the Model WHS legislation) within the Commonwealth jurisdiction.

The *Work Health and Safety Amendment (Licences) Regulation 2014* (the Regulation) makes amendments to the WHS Regulations to:

- prescribe fees for the issuing, replacement and renewal of high risk work licences; and
- extend the transitional period in relation to one class of licence (the operation of reach stackers) until 31 December 2015.

Fee for the issuing, replacement and renewal of high risk work licences

Regulation 81 of the WHS Regulations provide that a person must not carry out a class of high risk work unless the person holds a high risk work licence for the class of high risk work. This duty is subject to transitional arrangements which provide that the duty does not apply until 1 July 2014 in a range of circumstances (see regulation 727 of the WHS Regulations).

Regulation 87 sets out the process for applying for a high risk work licence, including that an application must be accompanied by the relevant fee.

Regulation 98 of the WHS Regulations provides that a licence holder may apply to the regulator for a replacement document if their licence document is lost, stolen or destroyed. Subregulation 98(4) provides that this application must be accompanied by the relevant fee.

Regulation 100 of the WHS Regulations provides that a regulator may renew a high risk work licence on application by the licence holder. Regulation 101 of the WHS Regulations sets out the process for applying for a licence renewal, including that an application must be accompanied by the relevant fee.

Relevant fees are set out in Schedule 2 of the WHS Regulations. At present, no fee is prescribed for the issuing, replacement or renewal of high risk work licences.

The Regulation amends Schedule 2 of the WHS Regulations to prescribe the following fees in relation to high risk work licencing:

- \$65 for the issuing of a new or additional high risk work licence in accordance with regulation 87 of the WHS Regulations;
- \$30 for the replacement of a high risk work licence in accordance with regulation 98 of the WHS Regulations; and
- \$30 for the renewal of a high risk work licence in accordance with regulation 101 of the WHS Regulations.

Extension of transitional period for High Risk Work licence for reach stackers

Regulation 81 of the WHS Regulations provides that a person must not carry out a class of high risk work unless the person holds a high risk work licence unless an exception applies.

Regulation 5 of the WHS Regulations provides that ‘high risk work’ means any work set out in Schedule 3 as being within the scope of a high risk work licence. Item 23 of Schedule 3 to the WHS Regulations provides that the operation of a reach stacker of greater than three tonnes capacity that incorporates an attachment for lifting and travelling with a shipping container, but does not include a portainer crane, is a class of high risk work. This is a new class of licence that has been adopted by jurisdictions through the Model WHS legislation.

Schedule 4 of the WHS Regulations sets out the qualification requirements for high risk work licences. Item 23 of Schedule 4 sets out the relevant Vocational Education and Training course that a person must undertake in order to obtain a high risk work licence for the operation of a reach stacker. This is a new training course as the licence class did not exist before the implementation of the Model WHS legislation.

Regulation 727 of the WHS Regulations is a transitional provision which provides that the requirement under regulation 81 to hold a high risk work licence does not apply until 1 July 2014 if:

- the person is a member of the Defence Force; or
- a corresponding regulator has exempted the person from the duty to hold a licence under regulation 81 of the WHS Regulations as applying in a corresponding jurisdiction; or
- the person is otherwise exempted from the duty to hold a licence under another law of a state.

Regulation 727 originally contained specific transitional provisions relating to reach stacker licences which provided that the requirement to hold this type of high risk work licence would not commence until 1 January 2013. Due to delays in the development of the units of training competency in the Vocational Education and Training course for this licence, the transitional period was extended to 1 July 2014 by the *Work Health and Safety Amendment Regulation 2012 (No. 1)*.

Due to further delays in the implementation of the Vocational Education and Training course that is identified in item 23 of Schedule 4 of the WHS Regulations, it is still not practicable for persons to undertake this training before the expiration of the transitional period on 1 July 2014.

The Regulation amends regulation 727 to replace the existing transitional arrangements that expire on 1 July 2014 with an amended regulation which provides that a person who carries out

high risk work with a reach stacker meets the duties imposed on the person under regulation 81 of the WHS Regulations if the person holds a non-slewing mobile crane licence, a licence for high risk work with a slewing mobile crane (regardless of the crane capacity to which the licence relates) or a licence granted under a corresponding WHS law that is equivalent to either of those licences.

This amendment will provide operators with sufficient time to undertake the required training while also ensuring that persons operating reach stackers have undertaken a comparable level of training as is envisaged by the WHS Regulations.

Both state and territory representatives and employer and employee groups were consulted on the amendments through the Safe Work Australia process.

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 Regulation is compatible with human rights. A copy of the Statement is attached.

The Act does not impose any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (reference 17119).

The Regulation commences on 1 July 2014.

Statement of Compatibility with Human Rights

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

Work Health and Safety Amendment (Licences) Regulation 2014

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

Section 276 of the *Work Health and Safety Act 2011* (the WHS Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The WHS Act and the *Work Health and Safety Regulations 2011* (the WHS Regulations) commenced on 1 January 2012.

Regulation 81 of the WHS Regulations provides that a person must not carry out a class of high risk work unless the person holds a high risk work licence unless an exception applies. This duty is subject to transitional arrangements which provide that the duty does not apply until 1 July 2014 in a range of circumstances (see regulation 727 of the WHS Regulations).

Regulation 5 of the WHS Regulations provides that ‘high risk work’ means any work set out in Schedule 3 as being within the scope of a high risk work licence. Item 23 of Schedule 3 to the WHS Regulations provides that the operation of a reach stacker of greater than three tonnes capacity that incorporates an attachment for lifting and travelling with a shipping container, but does not include a portainer crane, is a class of high risk work. This is a new class of licence that has been adopted by jurisdictions through the Model WHS legislation.

The *Work Health and Safety Amendment (Licences) Regulation 2014* (the Regulation) makes amendments to the WHS Regulations to:

- prescribe fees for the issuing, replacement and renewal of high risk work licences; and
- extend the transitional period in relation to the requirement for a person to hold a high risk work licence in relation to the operation of reach stackers until 31 December 2015.

Human Rights Implications

A human right engaged by this Instrument, included in the section 3 definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*, is the right to just and favourable conditions of work contained in article 7 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR). The right to enjoy just and favourable working conditions has various components that require states to establish a minimum

standard for working conditions for all workers and develop appropriate enforcement measures. One of the components of article 17 is the right to safe and healthy working conditions. In relation to this right, the Committee on Economic, Social and Cultural Rights has stated that ‘people must be afforded minimum conditions of occupational health and safety, and States parties are responsible for adopting policies and laws to that end’.¹

The right to safe and healthy working conditions is primarily underpinned in Australia by work health and safety legislation at the Commonwealth, state and territory levels. At the Commonwealth level, this includes the *Work Health and Safety Act 2011* (the WHS Act) and the WHS Regulations. The WHS Act places high level duties on a range of entities that are designed to ensure safe and health working conditions. It is supported by the WHS Regulations which provides more specific obligations, including through the creation of licensing regimes for types of work that have been identified as being of high risk.

The Regulation also engages the right to work under Article 6 of the ICESCR which includes ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. The Committee on Economic Social and Cultural Rights has stated that the right to work affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.

Fee for the issuing, replacement and renewal of high risk work licences

The Regulation prescribes fees for the issuing, replacement and renewal of high risk work licences. In doing so, the Regulation limits the right to work because it hinders the opportunity for an individual to freely perform high risk work without obtaining a licence for a fee. However, because the fee is a nominal amount which would cover the administrative costs of issuing a licence, it is arguable that this limitation is reasonable, necessary and proportionate to the Regulation’s legitimate objective of facilitating the implementation of the Work Health and Safety laws.

Extension of transitional period for high risk work licence for reach stackers

The Regulation grants a temporary exemption from compliance with one of the above-mentioned licensing requirements (relating to the operation of reach stackers) in certain circumstances. The amendment is considered compatible with the right to safe and healthy working conditions for a number of reasons.

First, the Regulation provides that a person will only comply with the duties imposed on a person under regulation 81 when operating a reach stacker during the transitional period if that person holds a non-slewing mobile crane licence or a slewing crane licence. This is a comparable or ‘higher’ ranked licence class and will ensure that a person operating a reach stacker has had sufficient training to be able to operate the item of plant in a safe manner. As such, the transitional arrangements will not limit the right to safe and healthy working conditions.

Second, the extension of the transitional arrangements in relation to reach stacker licences does not alter the general duties that are owed by persons conducting a business or undertaking to workers under the WHS Act. In particular, section 19 of the WHS Act sets out

¹ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 16 (Rev. 1), The Committee on Economic, Social and Cultural Rights*, May 1996, No. 16 (Rev.1), available at: <http://www.refworld.org/docid/4794773cd.html> [accessed 22 May 2014].

the primary duty of care, namely that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of both workers engaged, or caused to be engaged, by that person and workers whose activities in carrying out work are influenced or directed by the person while the workers are at work in the business or undertaking. The extension of the transitional arrangements in relation to reach stacker licences that is made by this Legislative Instrument does not alter this or the other duties contained in the WHS Act that underpin the right to healthy and safe working conditions.

Conclusion

This Legislative Instrument is compatible with human rights because it seeks to facilitate a smooth transition to the new Work Health and Safety laws and, to the extent that it may limit rights, those limitations are reasonable, necessary and proportionate to the achievement of that legitimate objective.

Senator The Hon. Eric Abetz, Minister for Employment