

EXPLANATORY STATEMENT

Work Health and Safety Regulations 2011

Notice of a Disallowable Instrument

Work Health and Safety Exemption (Construction Induction Training – ASC AWD Shipbuilder Pty Ltd and overseas technical specialists) (September 2014)

Introduction

The purpose of the instrument to which this Explanatory Statement relates is to grant an exemption from compliance with subregulation 326(1) of the *Work Health and Safety Regulations 2011* (**WHS Regulations**) to a class of persons, namely, workers who carry out construction work as technical specialists on ships under construction in the Air Warfare Destroyer program at ASC AWD Shipbuilder Pty Ltd's (**ASC AWD**) shipyard at Osborne, South Australia.

This exemption is one of a 'package' of four exemptions in the instrument. The remaining three relate to exemptions from regulation 316 and subregulations 317(1) and (2) of the WHS Regulations. These exemptions are granted to ASC AWD being a body corporate which is a public authority for the purposes of the *Work Health and Safety Act 2011* (**WHS Act**).

The exemptions applying to ASC AWD are not class exemptions. However, they have been included in the instrument that applies to technical specialists because all four exemptions have been granted subject to a condition imposed on ASC AWD. They are consequently linked and best described together.

Regulation 684 provides that the regulator may exempt a person or class of persons from compliance with any of the regulations in the WHS Regulations. Regulation 691 provides that the regulator may impose any conditions it considers appropriate on an exemption.

In accordance with subregulation 692(2) of the WHS Regulations, an exemption document that exempts a class of persons is a legislative instrument within the meaning of the *Legislative Instruments Act 2003*.

The exemptions

Summary of the exemptions

The exemptions relate to general construction induction training (**CIT**) which workers must successfully complete before commencing construction work. They also relate to general CIT cards (**CITC**) and, where a worker is waiting to be issued with a CITC, general construction induction training certifications (**GCITC**) issued within the preceding 60 days which are proof that a worker has successfully completed CIT.

Under the WHS Regulations, general CIT is training in the VET course—*Work Safely in the Construction Industry*. This course must be delivered in Australia by a registered training organisation. It involves about six hours of face-to-face or online training.

Very briefly, the effect of the exemptions will be to relieve ASC AWD of the obligation to ensure that technical specialists, as 'workers' under the WHS

Regulations, have successfully completed CIT before carrying out construction work.

The exemptions will also relieve the technical specialists of the requirement to keep their CITCs or GCITCs available for inspection under the WHS Act.

The exemptions will be granted on a number of conditions relating to the provision of on-site induction training to the specialists are provided before they carry out construction work.

Background and details of the exemptions

About 90 technical specialists have been recruited from overseas by ASC AWD to carry out highly skilled technical work on three ships while under construction as part of the Air Warfare Destroyer program at ASC AWD's shipyard at Osborne, South Australia. More specifically, the technical specialists will support the installation, set-to-work, integration and testing of platform and combat system hardware equipment fitted to the ships. The systems include power distribution, heating, ventilation, air conditioning, propulsion, above water radar and detection, communication and weapons.

Each technical specialist will carry out work on site intermittently for the duration of the Air Warfare Destroyer program as and when their particular specialist services are needed.

This work is treated as 'construction work' as defined in regulation 289 of the WHS Regulations because it involves the *'installation or testing carried out in connection with'* the construction or fitting out of a 'structure' being a ship and *'the installation, testing or maintenance of an essential service in relation to a [ship]'*.

The WHS Regulations do not place a direct obligation on the technical specialists (as 'workers') to undertake CIT or to obtain a CITC. Instead, they require ASC AWD, as the person carrying out a business or undertaking:

- to ensure that CIT is provided to any technical specialist who is to carry out construction work (regulation 316);
- to not direct or allow a technical specialist to undertake construction work unless he or she has successfully completed CIT (subregulation 317(1)); and
- to ensure that the technical specialist holds a CITC or a GCITC issued within the preceding 60 days (subregulation 317(2)).

Under subregulation 326(1), a technical specialist (being a worker) who carries out construction work must keep available for inspection under the WHS Act his or her CITC or a GCITC while awaiting the grant of a CITC.

The exemptions are granted from compliance with the above regulations.

Grounds on which Comcare has granted the exemptions

Comcare has granted exemptions from the above regulations on condition that ASC AWD ensures that each technical specialist successfully completes ASC AWD's on-site safety induction training (**ASC safety induction training**) before carrying out construction work. Details of the condition are listed in paragraph 7 of the exemption instrument.

When considering whether or not to grant the exemptions, Comcare noted that:

- the construction work to be carried out by the technical specialists will be very low risk;
- ASC safety induction training has been developed to cater specifically for the working environment on and around the ships under construction in the Air Warfare Destroyer program at the Osborne shipyard and:
 - is compulsory for workers at its Osborne shipyard;
 - has equivalent course content to the CIT except that this content is framed specifically in terms of ASC AWD's workplace;
 - is shorter than CIT because it need only cover ASC AWD's workplace;
 - includes a two-hour theory component, a one-hour walk-through of the workplace and a written exam for which a worker must score at least 80%;
 - is delivered by experienced and qualified trainers who hold at least a Certificate IV in Training and Assessment;
- ASC AWD ensures that suitable interpreters are available during training so that workers who are not fully conversant with English can achieve a satisfactory level of understanding of WHS requirements; and
- the technical specialists are very high-cost workers (there is significant global demand for their services) and, to require them to attend CIT in addition to ASC safety induction training, would increase the cost of the Air Warfare Destroyer program by an estimated \$440,00 to \$650,000.

The conditions Comcare has imposed on ASC AWD in respect of the exemptions will essentially convert training already provided by ASC AWD on a voluntary basis into a mandatory requirement. The conditions will also require ASC AWD to maintain documents of course content, keep records of course attendances and to issue site security passes only on the satisfactory completion of ASC safety induction training.

Comcare considers that the grant of the conditional exemptions will result in at least an equivalent standard of work health and safety as would have been achieved had the exemptions not been granted.

It is Comcare's view that the high additional cost of requiring the technical specialists to undertake general CIT may not in isolation be an exceptional circumstance justifying the grant of the exemptions. However, when considered together with the equivalent work health and safety standard achievable through the ASC AWD's application of the required training condition, the additional costs could arguably qualify as an exceptional circumstance.

Compliance with consultation requirements of the *Legislative Instruments Act 2003*

As previously indicated, these exemptions apply in relation to ASC AWD Shipbuilder Pty Ltd and technical specialists recruited from overseas to undertake work on the Air Warfare Destroyer program.

Comcare consulted extensively with ASC AWD Shipbuilder Pty Ltd before granting the abovementioned exemptions. Consultations focussed on whether there was a need for the grant of the exemptions and also on work health and safety issues, for example, the adequacy of ASC AWD Shipbuilder Pty Ltd's in-house safety induction training.

Comcare notes that ASC AWD Shipbuilder Pty Ltd consulted with its Australian-based workers who would be supervising or working with the technical specialists on the Air Warfare Destroyer program. Consultations were about the proposal for the technical specialists to undergo site-specific in-house safety induction training in substitution for general construction induction training, as defined in regulation 5 of the *Work Health and Safety Regulations 2011*.

Apart from the workers mentioned above, consultation was not carried out with the technical specialists themselves or workers or other parties not involved in the technical specialists' work. In accordance with section 18 of the *Legislative Instruments Act 2003*, Comcare was able to be satisfied that the proposed exemptions were such that consultation with these other parties would be unnecessary or inappropriate.

The exemptions are taken to have commenced on the day after they are registered on the Federal Register of Legislative Instruments.

They will apply for five years or upon completion of the Air Warfare Destroyer program (whichever is earlier) unless the expiration date is amended or the exemptions are cancelled under regulation 697 of the WHS Regulations.

A Statement of Compatibility with Human Rights has been completed for the exemptions, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the instrument is compatible with human rights. A copy of the Statement is attached.

Statement of Compatibility with Human Rights

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

Work Health and Safety Exemption (Construction Induction Training – ASC AWD Shipbuilder Pty Ltd and overseas technical specialists) (September 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

The purpose of the instrument to which this Explanatory Statement relates is to grant an exemption from compliance with subregulation 326(1) of the *Work Health and Safety Regulations 2011* (**WHS Regulations**) to a class of persons, namely, workers who carry out construction work as technical specialists on ships under construction in the Air Warfare Destroyer program at ASC AWD Shipbuilder Pty Ltd's (**ASC AWD**) shipyard at Osborne, South Australia.

This exemption is one of a 'package' of four exemptions in the instrument. The remaining three relate to exemptions from regulation 316 and subregulations 317(1) and (2) of the *WHS Regulations*. These exemptions are granted to ASC AWD being a body corporate which is a public authority for the purposes of the *Work Health and Safety Act 2011* (**WHS Act**).

The exemptions applying to ASC AWD are not class exemptions. However, they have been included in the instrument that applies to technical specialists because all four exemptions have been granted subject to a condition imposed on ASC AWD. They are consequently linked and best described together.

Regulation 684 provides that the regulator may exempt a person or class of persons from compliance with any of the regulations in the *WHS Regulations*. Regulation 691 provides that the regulator may impose any conditions it considers appropriate on an exemption.

In accordance with subregulation 692(2) of the *WHS Regulations*, an exemption document that exempts a class of persons is a legislative instrument within the meaning of the *Legislative Instruments Act 2003*.

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Summary of the exemptions

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Under the *WHS Regulations*, general CIT is training in the VET course—*Work Safely in the Construction Industry*. This course must be delivered in Australia by

a registered training organisation. It involves about six hours of face-to-face or online training.

Very briefly, the effect of the exemptions will be to relieve ASC AWD of the obligation to ensure that technical specialists, as 'workers' under the WHS Regulations, have successfully completed CIT before carrying out construction work.

The exemptions will also relieve the technical specialists of the requirement to keep their CITCs or GCITCs available for inspection under the WHS Act.

The exemptions will be granted on a number of conditions relating to the provision of on-site induction training to the specialists are provided before they carry out construction work.

Background and details of the exemptions

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The WHS Regulations do not place a direct obligation on the technical specialists (as 'workers') to undertake CIT or to obtain a CITC. Instead, they require ASC AWD, as the person carrying out a business or undertaking:

- to ensure that CIT is provided to any technical specialist who is to carry out construction work (regulation 316);
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The exemptions are granted from compliance with the above regulations.

Grounds on which Comcare has granted the exemptions

Comcare has granted exemptions from the above regulations on condition that ASC AWD ensures that each technical specialist successfully completes ASC AWD's on-site safety induction training (**ASC safety induction training**) before

carrying out construction work. Details of the condition are listed in paragraph 7 of the exemption instrument.

When considering whether or not to grant the exemptions, Comcare noted that:

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 - is compulsory for workers at its Osborne shipyard;
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The conditions Comcare has imposed on ASC AWD in respect of the exemptions will essentially convert training already provided by ASC AWD on a voluntary basis into a mandatory requirement. The conditions will also require ASC AWD to maintain documents of course content, keep records of course attendances and to issue site security passes only on the satisfactory completion of ASC safety induction training.

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Compliance with consultation requirements of the *Legislative Instruments Act 2003*

As previously indicated, these exemptions apply in relation to ASC AWD Shipbuilder Pty Ltd and technical specialists recruited from overseas to undertake work on the Air Warfare Destroyer program.

Comcare consulted extensively with ASC AWD Shipbuilder Pty Ltd before granting the abovementioned exemptions. Consultations focussed on whether there was a

need for the grant of the exemptions and also on work health and safety issues, for example, the adequacy of ASC AWD Shipbuilder Pty Ltd's in-house safety induction training.

Comcare notes that ASC AWD Shipbuilder Pty Ltd consulted with its Australian-based workers who would be supervising or working with the technical specialists on the Air Warfare Destroyer program. Consultations were about the proposal for the technical specialists to undergo site-specific in-house safety induction training in substitution for general construction induction training, as defined in regulation 5 of the *Work Health and Safety Regulations 2011*.

Apart from the workers mentioned above, consultation was not carried out with the technical specialists themselves or workers or other parties not involved in the technical specialists' work. In accordance with section 18 of the *Legislative Instruments Act 2003*, Comcare was able to be satisfied that the proposed exemptions were such that consultation with these other parties would be unnecessary or inappropriate.

The exemptions are taken to have commenced on the day after they are registered on the Federal Register of Legislative Instruments.

They will apply for five years or upon completion of the Air Warfare Destroyer program (whichever is earlier) unless the expiration date is amended or the exemptions are cancelled under regulation 697 of the WHS Regulations.

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 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

In Australia, the right to safe and healthy working conditions underpins the formulation of work health and safety legislation at the Commonwealth, state and territory levels.

At the Commonwealth level, this legislation includes 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 healthy working conditions. It is supported by the WHS Regulations which provide more specific obligations, including those applying to general construction induction training.

This Legislative Instrument grants the following exemptions:

- to ASC AWD, exemptions from:

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]

- regulation 316 which imposes duties on ASC AWD to ensure that technical specialists have successfully completed CIT (and that this training is current) before carrying out construction work on ships in the Air Warfare Destroyer program (**AWD program**);
- subregulation 317(1) which imposes duties on ASC AWD to not direct or allow a technical specialist to undertake construction work on the AWD program unless the technical specialist has successfully completed CIT (and that this training is current);
- subregulation 317(2) which imposes duties on ASC AWD to ensure that the technical specialists hold a CITC or, if waiting for the issue of such a card, a GCITC issued within the preceding 60 days; and
- to technical specialists carrying out construction work, an exemption from subregulation 326(1) which requires them to keep available for inspection under the Act, a CITC or GCITC.

ASC AWD requested Comcare's consideration of these exemptions on the basis that ASC AWD already voluntarily provides comprehensive on-site induction training to all workers in the AWD program. This training has been developed specifically to meet the work health and safety needs of the AWD program.

When deciding whether or not to grant the above exemptions, Comcare came to the view that attaching a condition to the grant of the exemptions requiring ASC AWD to provide on-site induction training to the technical specialists would achieve a standard of health and safety at least equivalent to that which would be achieved by compliance with the relevant regulations.

In this regard, Comcare notes that:

- the on-site induction training has the same course content as that provided in the CIT required by the regulations except that the former is tailored specifically to cover the work health and safety features of the AWD program workplace;
- ASC AWD will ensure that suitable interpreters are available, where necessary, to help technical specialists not fully conversant in English to gain a satisfactory understanding of the on-site induction training;
- the on-site induction training is delivered by appropriately qualified and experienced trainers;
- the type of construction work that the technical specialists will undertake is low risk and primarily concerned with the testing of systems installed in ships under construction.

While Comcare recognises that ASC AWD already provides training that meets the above requirements, the grant of the requested exemptions is on the condition that this training is provided. This converts what is presently a voluntary undertaking into a mandatory one.

Comcare believes that these exemptions will not affect work health and safety at the AWD program workplace. As a result, these exemptions are considered to be compatible with the right to safe and healthy working conditions.

Conclusion

This legislative instrument is compatible with human rights because it will not result in a diminution of workers' rights to safe and healthy workplaces.