

EXPLANATORY STATEMENT

Work Health and Safety Regulations 2011

Notice of a Disallowable Instrument

Work Health and Safety Exemption (Construction Induction Training Card — Workers) 2019

Introduction

The *Work Health and Safety Act 2011* (the WHS Act) and accompanying *Work Health and Safety Regulations 2011* (the WHS Regulations) provide the primary WHS legislation for the Commonwealth jurisdiction. They are based on model laws developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

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

In accordance with sub regulation 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* (LIA).

All terms used in the Instrument and Explanatory Statement have the same meaning as in the WHS Act and Regulations.

Work Health and Safety Exemption (Construction Induction Training Card — Workers) 2019

The purpose of the instrument to which this Explanatory Statement relates is to extend the *Work Health and Safety Exemption (Construction Induction Training Card — Workers) (August 2014)*. This will exempt a class of persons from compliance with sub-regulation 326(1) of the WHS Regulations. This class of persons are any workers who carry out construction work on sites located overseas and, in respect of whom, the Commonwealth, represented by the Department of Foreign Affairs and Trade (DFAT), has jurisdiction ('relevant workers').

The instrument exempts relevant workers from the requirements to keep available for inspection under the WHS Act, their general construction induction training card (CITC) or, in certain circumstances, a certificate indicating they have successfully completed general construction induction training (CIT) and are waiting for the issue of a CITC.

Sub-regulation 326(1) of the WHS Regulations provides that a worker carrying out construction work must keep available for inspection under the Act:

- their general CITC (sub-regulation 326(1)(a)); or
- where a worker has applied for but has not been issued with a CITC, a GIT certification (sub-regulation 326(1)(b)).

The exemption means that the relevant workers will not be required to keep a CITC or a GIT certification as evidence that they have successfully completed general construction induction training. The effect of the exemption will be to relieve the relevant workers of the requirement to successfully undertake CIT and to obtain a CITC.

Related Exemption

The WHS Regulations do not place a direct obligation on workers to undertake general CIT and to obtain a CITC. Instead, regulations 316 and 317 require DFAT, as the relevant person carrying out a business or undertaking (PCBU):

- to ensure that CIT is provided to the relevant workers; and
- to not direct or allow a relevant worker to carry out construction work without first sighting evidence that the worker has successfully completed CIT.

Comcare is extending an exemption previously granted to DFAT from the requirement to comply with regulations 316 and 317 of the WHS Regulations insofar as they apply to relevant workers on DFAT's construction sites overseas (*Work Health and Safety Exemption (Construction Induction Training) 2019*). This exemption is not a class exemption and is consequently not included in the exemption instrument to which this explanatory statement relates.

Comcare granted the exemption from regulations 316 and 317 on the grounds that exceptional circumstances justified the grant. Similarly, Comcare has granted an exemption to the class of workers who would otherwise be required to comply with sub-regulation 316(1) because of the following exceptional circumstances which Comcare considers justifies the grant of the exemption:

- General CIT is training delivered in Australia by a Registered Training Organisation for the specified VET course, *Work Safely in the Construction Industry* to familiarise workers with basic work health and safety principles including requirements mandated by Australian law.
- General CIT is not available to persons geographically outside of Australia.
- DFAT generally has no or limited control over the selection of workers on its overseas construction sites.
- DFAT's construction sites are located in a myriad of locations (low, medium and high-risk) around the world.
- Not all workers on DFAT's overseas construction sites are relevant workers — some are foreign nationals who are not bound by Australian WHS legislation and are therefore not required to undertake CIT.
- It would not be practicable to require DFAT to send all workers to Australia for CIT for the following reasons:
 - This could result in the intermittent suspension of work (with the associated extra costs) and, in some cases, would adversely affect the flow of work on construction sites.
 - The extra costs and work disturbances involved could result in the retraction of certain aid projects involving construction work.
 - This would not change the fact that a proportion of the workforce carrying out construction work would not have any obligation to undertake CITC.

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

As previously indicated, this exemption applies in relation to construction projects carried out overseas for which DFAT has direct or indirect responsibility.

Persons affected by these exemptions are workers subject to the obligations in sub-regulation 326(1) of the WHS Regulations who carry out construction work.

In accordance with section 18 of the LIA, Comcare is able to be satisfied that the nature of the exemption instrument is such that consultation would be unnecessary or inappropriate. In reaching this level of satisfaction, Comcare took into account the abovementioned exceptional circumstances and concluded that:

- consultation would not be reasonably practicable given the ever-changing contingent of affected workers and contractors overseas (the administrative complexities alone in arranging for consultation on the scale required would have been untenable);
- consultation about the proposed exemption would not likely achieve any useful work health and safety outcome; and
- the proposed exemption was unlikely to have a direct or substantial indirect effect on business or competition.

Commencement of exemption

The exemption is taken to have commenced on the day after it is registered on the Federal Register of Legislation.

The exemption will apply for five years unless the expiration date is amended, or the exemption is cancelled under regulation 697 of the WHS Regulations.

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
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The 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*.

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 of working conditions for all workers and develop appropriate enforcement measures.

One of the components of article 7 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 (WHS) legislation at the Commonwealth, state and territory levels.

At the Commonwealth level, this includes the *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulations 2011* (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 (CIT).

The Legislative Instrument grants an exemption from compliance with sub-regulation 326(1) under which the relevant workers would have to keep evidence of having successfully completed construction induction training.

While it is acknowledged that CIT is intended to contribute to WHS, Comcare considers that the practical challenges, resultant costs, work interruptions and possible withdrawal of some construction projects are such as to qualify as exceptional circumstances that justify the exemptions granted.

However, Comcare expects that the Department of Foreign Affairs and Trade (DFAT) must comply with all other requirements in the WHS Regulations (including those relating specifically to risk

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 19 June 2019]

management, hazardous work, hazardous manual tasks, work at heights, high risk work, electrical safety, and the maintenance and management of plant).

Conclusion

The disallowable Legislative Instrument is compatible with human rights because it seeks to balance the need for DFAT (representing the Commonwealth) to progress construction projects overseas with optimal WHS against some limited but very challenging practical barriers to the achievement of compliance in all instances. To the extent that it may limit rights, the exemption is reasonable, necessary and proportionate to the achievement of that legitimate objective.