

WORK HEALTH AND SAFETY AMENDMENT (HAZARDOUS CHEMICALS)
REGULATIONS 2020

EXPLANATORY STATEMENT

Issued by authority of the Minister for Industrial Relations
under subsection 276(1) of the *Work Health and Safety Act 2011*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Work Health and Safety Amendment (Hazardous Chemical) Regulations 2020* (the Amendment Regulations) gives effect to an agreement between Safe Work Australia (SWA) members to adopt the Globally Harmonised System of Classification and Labelling of Chemicals (GHS), seventh revised edition (GHS 7).

The *Work Health and Safety Act 2011* (the Act) and accompanying *Work Health and Safety Regulations 2011* (the Principal Regulations) provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction. They are based on model WHS laws developed by SWA under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. Most jurisdictions have adopted the model WHS laws.

The Act provides for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces, in part by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

Subsection 276(1) of the Act provides that the Governor-General may make regulations in relation to any matter relating to WHS, and any matter or thing required or permitted by the Act to be prescribed or that is necessary or convenient to be prescribed to give effect to the Act.

Paragraph 276(3)(d) of the Act provides that the regulations may apply, adopt or incorporate any matter contained in any document formulated, issued or published by a person or body whether with or without modification, or as in force at a particular time or as in force or remade from time to time.

The purpose of the Amendment Regulations is to adopt the GHS 7 in the Principal Regulations for the Commonwealth. The Principal Regulations currently refer to the Globally Harmonised System of

Classification and Labelling of Chemicals, third revised edition (GHS 3), which was the most recent version of the GHS available when it was introduced to Australia in 2012. The GHS 7 was published by the United Nations in July 2017. Moving to the GHS 7 will allow Australia to stay up-to-date with trading partners and international best practice for chemical assessment and hazard communication.

Together with States and Territories, the Commonwealth regulates the labelling of hazardous chemicals under its WHS laws. Most jurisdictions have generally adopted the policy and model wording in the model WHS laws developed by SWA.

The amendments reflect agreement of SWA members on 27 November 2019 for the States, Territories and the Commonwealth to adopt the GHS 7 in their respective WHS legislation. SWA members agreed to a two-year transitional period for manufacturers, importers and suppliers that will permit chemicals to continue to be used at the workplace if they were correctly labelled at the time they have been purchased or produced.

The Amendment Regulations also update outdated references to Australian Safety Standards.

Details of the Amendment Regulations are at [Attachment A](#).

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence on 1 January 2021.

CONSULTATION

The Amendment Regulations follow consultations with stakeholders by SWA and the Commonwealth WHS Regulator, Comcare.

In July 2019, SWA publicly released a consultation paper and requested stakeholder feedback on the proposal to adopt an updated edition of the GHS. Interested parties were invited to provide submissions over a four-week period ending 28 July 2019. Feedback from consultations was considered by SWA members.

REGULATION IMPACT STATEMENT

In March 2019, the Office of Best Practice Regulation advised that moving from the GHS 3 to GHS 7 is covered by the original Regulation Impact Statement from when the GHS framework was first implemented in Australia and no further formal analysis was required (OBPR reference: 25148). Noting this advice, SWA consulted independently with industry and other interested stakeholders with a focus on transitional arrangements and practical measures to support implementation of the GHS 7.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Amendment Regulations are 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*. A Statement of Compatibility with Human Rights is set out at Attachment B.

NOTES ON SECTIONS

Section 1 - Name

This section provides that the title of the instrument is the *Work Health and Safety Amendment (Hazardous Chemicals) Regulations 2020*.

Section 2 - Commencement

This section provides for the instrument to commence on 1 January 2021.

Section 3 - Authority

This section provides that the instrument is made under the *Work Health and Safety Act 2011* (the Act).

Section 4 - Schedule(s)

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed according to the terms set out in the Schedule, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Work Health and Safety Regulations 2011

Item 1 – Subregulation 5(1), (definition of “GHS”)

This item repeals the definition of GHS, and inserts a new definition whereby GHS means the Globally Harmonised System of Classification and Labelling of Chemicals, seventh revised edition (GHS 7). The GHS 7 was published by the United Nations in July 2017. The definition of GHS in regulation 5(1) of the *Work Health and Safety Regulations 2011* (the Principal Regulations) refers to the GHS 7 published by the United Nations as modified under Schedule 6 of these regulations.

Item 2 – Subregulation 5(1), (definition of “GHS 3”)

This item inserts the definition of GHS 3 to regulation 5(1).

Item 3 – Subregulation 5(1), (definition of “hazardous chemical”)

This item repeals and inserts a new definition of hazardous chemical to clarify a substance, mixture or article is a hazardous chemical if it satisfies the criteria for any one or more hazard classes in the GHS (including those referred to in Schedule 6 to the Principal Regulations), but it is not a hazardous chemical under the Principal Regulations if the only hazard class or classes for which it satisfies the criteria are one or more of the listed hazard classes.

This item also removes “serious eye damage/eye irritation – category 2B” from the definition of *hazardous chemical* on the basis that Australia, as a general rule, does not require sub-categorisation of hazard classes. Should manufacturers and importers have sufficient data available, sub-categorisation into categories 2A and 2B can be undertaken but is not mandatory.

Item 4 – Subregulation 5(1), (definition of *manifest quantity*)

This is a consequential amendment and amends the definition to remove the reference to “column 5” and replaces it with a reference to “column 3”.

Item 5 – Subregulation 5(1), (definition of *placard quantity*)

This is a consequential amendment and amends the definition to remove the reference to “column 4” and replaces it with a reference to “column 2”.

Item 6 – Subregulation 223(6), Lasers

The Australian Standard “AS 2397 – Safe use of lasers in the building and construction industry” has been superseded. This item updates the superseded Australian Standard referenced in subregulation 223(6) to the current Australian Standard “Australian Standard 2397:2015 – Safe use of lasers in the building and construction industry” (AS2397:2015).

Item 7 – Regulation 338

This item amends regulation 338 by inserting (1) before “The supplier”. It is a consequential amendment related to the insertion of subregulation 338(2) in item 8 below. This amendment maintains consistency with the current provisions.

Item 8 – Regulation 338

This item amends regulation 338, by inserting subregulation 338(2). Subregulation 338(2) provides that subregulation 338(1) does not apply where the hazardous chemical was manufactured or imported before 1 January 2023 and was, at the time it was manufactured or imported, labelled in accordance with the GHS 3.

This item enables suppliers to on-sell GHS 3 labelled stock already in the supply chain. Existing labels may be used until stock runs out and end users are able to use existing labelled GHS 3 stock indefinitely.

In accordance with section 13.3 of the Criminal Code, a defendant who wishes to rely on the exception in regulation 338(2) will have an evidential burden of proof.

An evidential burden of proof should only be placed on a defendant where it is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. In the case of these amendments to regulation 338, this is suitable as the supplier is most likely to have the knowledge of the manufacture or importation date of a hazardous chemical (for example,

from the labelling of the chemical, or receipts of purchase from the manufacturer or importer) and therefore, be able to demonstrate the hazardous chemical's suitability to be labelled in accordance with the GHS 3.

Item 9 – Regulation 341

This item inserts subregulation 341(4) which provides that subregulation 341(1) does not apply to a hazardous chemical that was manufactured or imported before 1 January 2023 and was labelled in accordance with the GHS 3.

This subregulation enables persons conducting a business or undertaking (PCBUs) to use, handle or store a hazardous chemical that was already in the supply chain provided it meets the labelling requirements that applied at the time of supply.

As with item 8, a defendant who wishes to rely on the exception in 341(4) will bear an evidential burden of proof. This is suitable for these amendments as the PCBU is most likely to have the knowledge of the manufacture or importation date of a hazardous chemical (for example, from the labelling of the chemical, or receipts of purchase from the manufacturer or importer) and therefore, be able to demonstrate the hazardous chemical's suitability to be labelled in accordance with GHS 3.

Item 10 – Subregulation 342(1C)

This item inserts subregulation 342(1C) which provides that subregulation 342(1) does not apply to a hazardous chemical that was manufactured, or transferred or decanted from its original container at the workplace:

- before 1 January 2023, and
- if at the time it was manufactured, or transferred or decanted it was labelled in accordance with GHS 3.

This subregulation ensures that a PCBU does not need to relabel a hazardous chemical that was manufactured, or transferred or decanted from its original container at the workplace provided that it was correctly labelled in accordance with the labelling requirements that applied at the time of manufacture, transfer or decanting.

As with items 8 and 9, a defendant who wishes to rely on the exception in subregulation 342(1C) will bear an evidential burden of proof. This is suitable for these amendments as the PCBU is most likely to have the knowledge of the date that a hazardous chemical was manufactured, or transferred or decanted from its original container at the workplace (for example, from the labelling of the chemical, or log book records) and therefore, be able to demonstrate the hazardous chemical's suitability to not be relabelled.

Item 11 – Subregulation 342(2C)

This item inserts subregulation 342(2C) which provides that subregulation 342(2) does not apply to a container that contains a hazardous chemical if the container is labelled in accordance with subregulation 341(4) for manufacturers or importers, or subregulation 342(1C) for manufacturing, transferring or decanting at the workplace.

This subregulation ensures that a PCBU does not need to relabel a container that contains hazardous chemical if the hazardous chemical was already in the supply chain provided that the container meets the labelling requirements that applied at the time of supply.

As with items 8, 9, 10 and 11, a defendant who wishes to rely on the exception in subregulation 342(2C) will bear an evidential burden of proof. This is suitable for these amendments as the PCBU is most likely to have the knowledge of whether hazardous chemicals in a container met the labelling requirements that applied at the time of supply (for example, from the labelling of the chemical, receipts of purchase or log book records) and therefore, be able to demonstrate the container's suitability to not be relabelled.

Items 12 and 16 – Schedule 5

The Australian Standard AS 4343:2005 (Pressure equipment – Hazard levels) has been superseded. These items update references in item 1.1 of clause 1 of Part 1 and items 3.1 and 3.2 in clause 3 of Part 2 of Schedule 5 to the current Australian Standard, AS 4343:2014 (Pressure equipment – Hazards levels).

Items 13, 14, 15, 17, 18 and 19 – Schedule 5

The Australian Standard AS 1200:2000 (Pressure equipment) has been superseded. These items update references in paragraph 2(1)(ab) of Part 1 and paragraph 4(1)(a) of Part 2 to Schedule 5 to the current Australian Standard AS/NZS 1200:2015 (Pressure equipment).

Item 20 – Schedule 6, (note to Schedule heading)

This item amends the note to the heading of Schedule 6 by removing “definition of *GHS*” and replacing it with “definitions of *GHS* and *GHS 3*” which directs the reader to the definitions in subregulation 5(1).

Item 21 – Clause 1 of Schedule 6

This item amends clause 1 of Schedule 6 by removing “definition of *GHS*” and replacing it with “definitions of *GHS* and *GHS 3*” which directs the reader to the definitions in subregulation 5(1).

Item 22 – Clause 1 of Schedule 6, (note)

This item amends the note to clause one of Schedule 6 by removing “definition of *GHS*”, and replacing it with “definitions of *GHS* and *GHS 3*” which directs the reader to the definitions in subregulation 5(1).

Items 23 -36 – Schedule 6

These items update the page references included in the notes to Tables 6.1 – 6.5 in Schedule 6 to ensure that they are consistent with the GHS 7.

Items 26 and 29, 32, and 35 replace ‘Note 1’ with ‘Note’.

Items 23 and 24 make amendments to advise that Table 6.1 replaces Table 3.4.5 in the GHS (p 159) and GHS 3 (151).

Items 25 and 27 make amendments to advise that Table 6.2 replaces Table 3.6.1 in the GHS (p 174) and GHS 3 (p 166).

Items 28 and 30 make amendments to advise that Table 6.3 replaces Table 3.7.1 in the GHS (p 187) and GHS 3 (p 180).

Items 31 and 33 make amendments to advise that Table 6.4 replaces Table 3.8.2 in the GHS (p 197) and GHS 3 (p 192).

Items 34 and 36 make amendments to advise that Table 6.5 replaces Table 3.9.3 in the GHS (p 207) and GHS 3 (p 203).

Items 37 and 38 – Schedule 7

These items omit phrases from the text of clause 1 of Schedule 7 as they are inconsistent with the text of GHS 7.

Item 37 omits the phrase “: Product identifier and chemical identity” from paragraph 1(2)(a) of Schedule 7.

Item 38 omits the phrase “, including how the chemical may be safely used” from paragraph 1(2)(g) of Schedule 7.

Items 39 – Schedule 8

Consistent with the amendment to the definition of *hazardous chemical* in subregulation 5(1), this item removes the sub-categorisation for serious eye damage/eye irritation from item 13 of Table 8.1 in clause 2 by replacing “Category 2A” with “Category 2”.

Item 40 – Schedule 8, (table 8.2, item 3)

This item amends the table item by omitting the phrase “category 2A” and substituting with “category 2”.

Items 41 and 42 – Schedule 9

Items 41 and 42 make minor amendments to the wording in subclause 1(1) and the note.

Item 43 – Schedule 11

This item omits existing Table 11.1 in Schedule 11 and replaces it with a new table.

The new table amends item 1, column 2 to make clear that there are two sub-categories of ‘Flammable gases’, consistent with the GHS 7 – that is ‘Flammable gases – Category 1A’ and ‘Flammable gases – Category 1B.’ The placard and manifest quantities for Category 1A or Category 1B or any combination of these are 200L and 5000L respectively.

The new table also includes ‘Aerosols’ as a new hazard class, consistent with the GHS 7 classifications. Aerosols were previously included with ‘Gases under pressure’. There are now three categories of aerosols at item 43 of Table 11.1 to Schedule 11. The placard and manifest quantity for each of these categories or any combination of these are 5000L and 10,000L respectively.

Statement of Compatibility with Human Rights

Issued by the Minister for Industrial Relations

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

Work Health and Safety (Hazardous Chemicals) Amendment Regulations 2020

This legislative instrument is compatible with the human rights and freedoms recognised or declared by the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Work Health and Safety Amendment (Hazardous Chemical) Regulations 2020* (the Amendment Regulations) give effect to an agreement between Safe Work Australia (SWA) members to adopt the Globally Harmonised System of Classification and Labelling of Chemicals (GHS), seventh revised edition (GHS 7).

The *Work Health and Safety Act 2011* (the Act) and accompanying *Work Health and Safety Regulations 2011* (the Principal Regulations) provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction. They are based on model WHS laws developed by SWA under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. Most jurisdictions have adopted the model WHS laws.

The purpose of the Amendment Regulations is to adopt the GHS 7 in the Principal Regulations in the Commonwealth.

The amendments reflect agreement reached between SWA members to adopt GHS 7 with a two-year transitional period for duty holders that will permit chemicals to continue to be used at the workplace if they were correctly labelled at the time they have been purchased or produced.

The Amendment Regulations also update outdated references to Australian Safety Standards.

Human Rights Implications

Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to the ‘enjoyment of just and favourable conditions of work, which ensure, in particular... safe and healthy working conditions’.

Australia relevantly complies with its obligation under Article 7 of the ICESCR through a system of Commonwealth, State and Territory WHS laws (including the Act).

The GHS was developed by the United Nations to create a single worldwide methodology for chemical classification, labelling and safety data sheets. The GHS ensures that users are provided with practical, reliable and easy to understand information on chemical hazards, allowing them to take the appropriate preventative and protective measures for their health and safety. The GHS may improve health and safety outcomes, and provide significant trade benefits to industry through the use of internationally consistent criteria, labels and safety data sheets.

The Amendment Regulations enable the Commonwealth’s adoption of the GHS 7, which promotes safe and healthy workplaces via the provision of information about hazardous chemicals to users such as persons conducting a business or undertaking and workers, as well as others at workplaces.

Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to the law. To be consistent with the right, the burden of proving a criminal charge will be on the prosecution. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact may engage and limit the presumption of innocence.

Regulation 338 and subregulations 341(1), 342(1) and 342(2) of the Principal Regulations are offence provisions. Items 8 to 11 of the Amendment Regulations introduce exceptions to those offences. A defendant who wishes to rely on an exception will bear the evidential burden of proof in relation to each relevant matter.

This is appropriate where a matter is likely to be peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

- The exception in item 8 is suitable as the defendant is most likely to have the knowledge of the manufacture or importation date of a hazardous chemical (for example, from the labelling of the chemical, or receipts of purchase from the manufacturer or importer) and therefore, be able to demonstrate the hazardous chemical’s suitability to be labelled in accordance with GHS 3.

- The exception in item 9 is suitable as the defendant is most likely to have the knowledge of the manufacture or importation date of a hazardous chemical (for example, from the labelling of the chemical, or receipts of purchase from the manufacturer or importer) and therefore, be able to demonstrate the hazardous chemical's suitability to be labelled in accordance with the GHS 3.
- The exception in item 10 is suitable as the defendant is most likely to have the knowledge of the date that a hazardous chemical was manufactured, or transferred or decanted from its original container at the workplace (for example, from the labelling of the chemical, or log book records) and therefore, be able to demonstrate the hazardous chemical's suitability to not be relabelled.
- The exception in item 11 is suitable as the defendant is most likely to have the knowledge of whether hazardous chemicals in a container met the labelling requirements that applied at the time of supply (for example, from the labelling of the chemical, receipts of purchase or log book records) and therefore, be able to demonstrate the container's suitability to not be relabelled.

These exceptions are necessary to allow for usage of chemicals in supply chains and their storage at workplaces to remain compliant with the Principal Regulations without being re-labelled or disposed of unnecessarily. To the extent that the exceptions limit the presumption of innocence by imposing an evidential burden of proof on a defendant in relation to certain matters, this is reasonable, necessary and proportionate. For the reasons outlined above, a relevant duty holders will be best placed to establish when a chemical was manufactured, imported or purchased.

Conclusion

This legislative instrument is compatible with human rights.