

REPLACEMENT EXPLANATORY STATEMENT

Issued by authority of the Chief of the Defence Force

Work Health and Safety Act 2011

Work Health and Safety (Operation Sovereign Borders) Declaration 2024

The instrument is made under subsection 12D(2) of the *Work Health and Safety Act 2011* (WHS Act). The instrument commences on the day after the instrument is registered and is a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

Purpose

Operation Sovereign Borders (OSB) is a military-led, whole-of-government border security operation established in 2013. The purpose of OSB is to protect Australia's borders and maritime interests, combat people smuggling in the region and prevent people from risking their lives at sea. To give effect to this purpose, operational personnel, including members of the Australian Defence Force and Australian Border Force, are required to engage in a range of high-risk activities (OSB activities) to protect and secure Australia's maritime approaches. These OSB activities are:

- the interception, boarding, control or movement of a vessel suspected of carrying illegal maritime arrivals, as part of:
 - i. deciding whether to move the vessel outside of Australia; or
 - ii. moving the vessel outside of Australia; and
- the control or movement at sea of a person suspected of being an illegal maritime arrival, for the purposes of:
 - i. deciding whether to move the person to a place outside Australia; or
 - ii. moving the person to a place outside of Australia; or
 - iii. moving the person to or from a vessel for the purposes of moving a person to a place outside of Australia.

The operational personnel who undertake these OSB activities fall within the meaning of 'worker' set out in section 7 of the WHS Act. The consequence of being a 'worker' for the purpose of the WHS Act is that OSB operational personnel are subject to provisions of the WHS Act that apply to workers and are required to comply with relevant work health and safety obligations in the course of performing their duties.

Subsection 12D(1) of the WHS Act provides that no actions taken by a person, or a person refraining from taking any action, under the Act are to prejudice Australia's defence. Subsection 12D(2) relevantly provides that the Chief of the Defence Force may declare that certain provisions of the

WHS Act do not apply (or apply subject to modifications set out in the declaration) in relation to specified activities, specified members of the Defence force or members of the Defence force included in a specified class.

The purpose of the instrument is to declare that the following provisions of the WHS Act do not apply to the OSB activities:

- worker duties (paragraphs 28(a) and (b) and paragraphs 29(a) and (b))
- duty to preserve the site of a notifiable incident (section 39)

The effect of the instrument is that when operational personnel engage in the OSB activities, they will not be subject to these provisions of the WHS Act. All activities that do not fall within the scope of being an OSB activity will still be subject to these (and other) provisions of the WHS Act.

Details of the instrument

Details of the instrument are set out in **Attachment A**.

Consultation

The Office of Impact Analysis was consulted in relation to this instrument and confirmed that a regulation impact analysis was not required for the instrument [OIA24-06884].

Extensive consultation was undertaken with relevant stakeholders throughout the drafting and development of the Declaration. This included consultation with representatives of the Australian Defence Force and Australian Border Force personnel embedded in Maritime Border Command (MBC) within the Joint Agency Task Force for Operation Sovereign Borders. As MBC is responsible for coordinating whole-of-government maritime security outcomes, which protect the Australian maritime domain, MBC personnel are particularly affected by the Declaration, and as such were closely consulted on its development. Consultation was also undertaken with relevant representatives of the Department of Defence and the Department of Home Affairs.

Parliamentary scrutiny

The instrument is subject to disallowance under section 42 of the Legislation Act.

A Statement of Compatibility with Human Rights has been prepared in accordance with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement provides that the instrument is compatible with human rights because it promotes the protection of human rights, and to the extent that it may limit human rights, those limitations are necessary, reasonable and proportionate for achieving the legitimate objective of the instrument. The Statement is included at **Attachment B**.

The instrument was made by General Angus J. Campbell, AO DSC, Chief of the Defence Force, under subsection 12D(2) of the WHS Act, with the approval of the Honourable Tony Burke MP,

Minister for Employment and Workplace Relations, in accordance with the requirements of subsection 12D(3) of the WHS Act.

Details of the *Work Health and Safety (Operation Sovereign Borders) Declaration 2024*

Section 1 Name

This section provides that the name of the instrument is the *Work Health and Safety (Operation Sovereign Borders) Declaration 2024*.

Section 2 Commencement

This section provides that the instrument will commence on the day after the instrument is registered. This means that the instrument will come into effect on the day after it is registered on the Federal Register of Legislation.

Section 3 Authority

This section provides that the instrument is made under subsection 12D(2) of the *Work Health and Safety Act 2011* (WHS Act), which provides that the Chief of the Defence Force may, by instrument in writing, declare that specified provisions of the WHS Act do not apply, or apply subject to certain modifications as set out in the declaration, in relation to:

- a specified activity; or
- a specified member of the Defence Force; or
- members of the Defence Force included in a specified class of such members.

This declaration-making power is limited by subsection 12D(3), which provides that a declaration made under subsection 12D(2) may only be made with the approval of the Minister for Employment and Workplace Relations and, if made with that approval, has effect according to its terms. Additionally, subsection 12D(4) of the WHS Act provides that, in making a declaration under subsection 12D(2), the Chief of the Defence Force must take into account the need to promote the objects of the WHS Act to the greatest extent consistent with the maintenance of Australia's defence.

Section 4 Definitions

This section provides the meaning for key terms used throughout the instrument.

- *Act* means the *Work Health and Safety Act 2011*.
- *illegal maritime arrival* means an unauthorised maritime arrival or a person who would be an unauthorised maritime arrival if the person enters Australia.
- *unauthorised maritime arrival* has the same meaning as in the *Migration Act 1958*.

Section 5 Provisions of Act declared not to apply to specified activity

Subsection 5(1) of the instrument provides that the following provisions of the WHS Act do not apply to an activity specified in subsection (2) or (3) of the instrument:

- paragraphs 28(a) and (b)
- paragraphs 29(a) and (b)
- section 39

Paragraphs 28(a) and (b) of the WHS Act form part of the duties of workers at a workplace. These provisions require that, while at work, a worker must take reasonable care for their own health and safety (paragraph 28(a)) and take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons (paragraph 28(b)).

Similarly, paragraphs 29(a) and (b) of the WHS Act form part of the duties of other persons at the workplace. This duty requires that a person at a workplace (regardless of whether they have another duty under Part 2 of the WHS Act) must take reasonable care for their own health and safety (paragraph 29(a)) and take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons (paragraph 29(b)).

Section 39 of the WHS Act establishes the duty of a person with management or control of a workplace at which a notifiable incident has occurred to ensure, as far as is reasonably practicable, that the site where the incident occurred is not disturbed until an inspector arrives at the site or any earlier time that an inspector directs. Section 35 of the WHS Act provides that a **notifiable incident** means the death of a person, the serious injury or illness of a person or a dangerous incident, with those terms further defined in sections 36 and 37.

The effect of subsection 5(1) is that the provisions of the WHS Act concerning the worker duties, the duties of other persons at a workplace and the duty to preserve incident sites do not apply in relation to any of the activities set out in subsection (2) or (3) of the instrument.

An exemption from paragraphs 28(a) and (b), and paragraphs 29(a) and (b), of the WHS Act is required because OSB operational personnel work in a hazardous, high-tempo environment, where they are required to perform high-risk activities such as intercepting and boarding vessels, as well as controlling and moving uncooperative or agitated people outside of Australia. When performing these activities, personnel may encounter scenarios where vulnerable people are in positions of risk or danger and personnel must respond decisively. These circumstances may not allow personnel the time to contemplate whether a decision would adversely affect the health and safety of themselves or other persons involved. In these complex situations, individual personnel could feel challenged to make decisions to act (or not act) if they perceived an apparent discrepancy between a direction and the duty of reasonable care. Whether such a perceived discrepancy is legitimate, the perception of a conflict between the two obligations in a high-pressure situation could cause an individual to delay critical action, leading to adverse impacts on the health and safety of others.

Personnel undertaking the relevant OSB activities are highly trained, equipped and directed to carry out these activities in accordance with the objective of the WHS Act so far as it is compatible with the defence of Australia. However, there is a limitation to the specificity and relevance of training that can be provided to individuals on the provisions of the WHS Act and its intended application within the context of the OSB operational environment, noting the uniqueness of the workplace and the variety of unexpected situations personnel may encounter in the course of operational activities. While the worker duties are qualified by the standard of ‘reasonable care’, for the limited range of OSB activities, it is not preferable for there to be any uncertainty in the mind of personnel regarding whether they may incur individual liability as a result of performing these high-risk activities. By exempting paragraphs 28(a) and (b), and paragraphs 29(a) and (b) of the WHS Act, the instrument places the issue beyond doubt and provides absolute certainty to operational personnel that they cannot be held in breach of these WHS Act worker duties when performing the specified OSB activities.

An exemption from section 39 of the WHS Act is required, as compliance with this provision during the course of performing OSB activities would be significantly challenging, if not impossible due to the operational environment in which such activities take place. This is because OSB activities, such as the interception and boarding of vessels suspected of carrying illegal maritime arrivals, occur on and around marine vessels located in Australia’s surrounding oceans. For example, in a situation where operational personnel are required to board a distressed vessel carrying illegal maritime arrivals, the person in management or control of that operation would have significant difficulty establishing and preserving an incident site on that vessel if a notifiable incident occurred. This could be due to any number of contributing factors, including hazardous sea and weather conditions, upset or agitated illegal maritime arrivals who may not understand or comply with verbal directions and an unsafe incident site location (e.g. a non-seaworthy vessel). Accordingly, it is not desirable to further increase the risk to personnel undertaking OSB activities by requiring them to make a judgement as to whether they can safely secure an incident site under such circumstances.

Subsection 5(2) provides that an ‘activity’ (to which the provisions of the WHS Act mentioned in subsection 5(1) of the instrument do not apply) is the interception, boarding, control or movement, under OSB, of a vessel suspected of carrying an illegal maritime arrival as part of:

- deciding whether to move the vessel to a place outside Australia; or
- moving the vessel to a place outside Australia.

The purpose of this provision is to specify the particular types of activities undertaken as part of OSB that are exempt from the provisions of the WHS Act set out in subsection 5(1) of the instrument.

Subsection 5(3) provides that an ‘activity’ (to which the provisions of the WHS Act mentioned in subsection 5(1) of the instrument do not apply) is the control or movement at sea, under OSB, of a person suspected of being an illegal maritime arrival as part of:

- deciding whether to move the person to a place outside Australia; or
- moving the person to a place outside of Australia; or

- moving the person to or from a vessel in the course of either of the processes mentioned above.

Similar to subsection 5(2), the purpose of this provision is to specify the particular types of activities undertaken as part of OSB that are exempt from the provisions of the WHS Act set out in subsection 5(1) of the instrument.

Subsection 5(4) provides that the transfer of movement of a person suspected of being an illegal maritime arrival to an offshore regional processing centre is not part of the activities mentioned in subsection 5(2) or 5(3) of the instrument.

The purpose of this provision is to clarify that the transfer or movement of a person suspected of being an illegal maritime arrival to an offshore regional processing centre is not an activity that is exempted from the application of the provisions of the WHS Act mentioned in subsection 5(1). The effect of this provision is that operational personnel will be required to comply with the provisions of the worker duties set out under paragraphs 28(a) and (b) and paragraphs 29(a) and (b) of the WHS Act when transferring illegal maritime arrivals to an offshore regional processing centre. Additionally, personnel with management or control of the workplace will also be required to comply with the duty to preserve an incident site under section 39 of the WHS Act, in the event that a notifiable incident occurs when transferring or moving an illegal maritime arrival to an offshore regional processing centre.

Schedule 1 Repeals

This Schedule provides that instruments specified in an item to the schedule are repealed.

Item 1 of Schedule 1 to the instrument repeals the *Work Health and Safety (Operation Sovereign Borders) Declaration 2013*.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Statement of Compatibility with Human Rights

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

Work Health and Safety (Operation Sovereign Borders) Declaration 2024

This 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 Instrument

The *Work Health and Safety (Operation Sovereign Borders) Declaration 2024* (the instrument), made pursuant to subsection 12D(2) of the *Work Health and Safety Act 2011* (the WHS Act) provides that specified provisions of the WHS Act do not apply in relation to specified activity of Operation Sovereign Borders (OSB). The provisions excluded by the instrument are:

- paragraphs 28(a) and (b): duties of workers
- paragraphs 29(a) and (b): duties of other persons at the workplace
- section 39: incident site preservation

Paragraphs 28(a) and (b) of the Act provide that while at work, a worker must take reasonable care for his or her own health and safety; and take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, respectively. Similarly, paragraphs 29(a) and (b) of the Act provide that a person at a workplace (whether or not the person has another duty under Part 2 of the Act) must take reasonable care for his or her own health and safety; and take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, respectively. Finally, section 39 of the Act establishes the duty of a person with management or control of a workplace at which a notifiable incident has occurred to ensure, as far as is reasonably practicable, that the site where the incident occurred is not disturbed until an inspector arrives at the site or any earlier time that an inspector directs.

Human rights implications

This Disallowable Legislative Instrument engages the right to just and favourable conditions of work, and in particular safe and healthy working conditions, as expressed in article 7(b) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Under international human rights law, any limitation on rights and freedoms must be reasonable, necessary and proportionate for the pursuit of a legitimate objective. For an objective to be legitimate, it must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

The legitimate objective of the Disallowable Legislative Instrument is to ensure Australia's defence and security through the control of Australia's maritime borders as part of Operation Sovereign Borders.

The right to safe and healthy working conditions is given effect in Australia by work health and safety legislation at the Commonwealth, state and territory levels. Workers owe duties under the WHS Act and have a responsibility to ensure that their actions do not adversely affect the health and safety of other workers and persons at the workplace.

The instrument establishes exemptions from certain provisions of the WHS Act in relation to the duties of workers, the duties of other persons at the workplace and the duty to preserve incident sites. Exemptions from these requirements of the WHS Act are provided for a limited subset of activities undertaken by operational personnel as part of OSB. Accordingly, the instrument limits the rights expressed in article 7(b) of the ICESCR by modifying the application of certain health and safety duties that operational personnel, as workers under the WHS Act, hold under that legislation.

However, this limitation expressed within the instrument is considered necessary to give effect to a legitimate objective. As part of OSB, operational personnel are required to operate in a hazardous, uncertain and high-tempo operational environment, having to potentially board and control vessels, and control and transfer uncooperative persons. In the absence of the instrument, the perceived risk of liability being imposed on individual personnel could undermine their ability for those personnel to confidently discharge their duties to the best of their ability. It is also considered that the uncertainty created by the absence of an exemption from these duties could give rise to perceptions of apparent conflicting obligations, leading to misjudgement in high-pressure situations and consequential adverse outcomes. Accordingly, the measures contained within the instrument are necessary in order to provide sufficient clarity for personnel and achieve the legitimate objective.

This does not mean that the right to safe workplaces is abandoned in OSB. Operational personnel engaged in the specified activities as part of OSB are highly trained and equipped to intercept, board and control vessels in a safe and secure manner. However, throughout this process, there are numerous potential mishaps that may eventuate. Operational personnel can neither foresee nor prepare for all eventualities, particularly in circumstances where illegal maritime arrivals may react in an unsafe way, as has happened in the past. Senior officials and the Commonwealth as an entity will remain responsible for providing safe workplace conditions for OSB personnel and anyone else present at the workplace.

The scope of the measures in the instrument are also reasonable and proportionate. The instrument is intended to continue to apply to the narrow range of specified activities, only undertaken by highly trained operational personnel. Other activities undertaken in connection with OSB (for example, movement and transfer of persons to offshore regional processing centres) are not included as part of the exempted activities set out in this instrument, and will accordingly remain subject to the WHS Act requirements.

Exclusion of paragraphs 28(a) and (b) and paragraphs 29(a) and (b)

OSB operations typically involve highly unusual workplace circumstances. Accordingly, it is not reasonable or appropriate to apply WHS health and safety duties to operational personnel in this context. If these duties are not excluded, there is a concern that personnel will not be confident in applying their training and this could adversely affect safety. Operational personnel will still have ongoing duties to comply with organisational WHS policies and training requirements. This is complemented by effective supervision through the chain of command providing necessary oversight.

Exclusion of section 39

Similarly, site-preservation requirements established by section 39 of the WHS Act are highly impracticable in a maritime operations context such as OSB. For the most part, activities under OSB will take place at sea, which makes it particularly challenging, if not impossible, to preserve an incident site. This is due to a variety of factors that could fundamentally impede the ability of a person with management or control to safely preserve the incident site for an inspector. These include hazardous sea and weather conditions, uncooperative or agitated unauthorised maritime arrivals and potentially unseaworthy vessels upon which the notifiable incident has occurred.

The instrument notwithstanding, all notifiable incidents will continue to be reported within the Government departments and agencies contributing personnel and assets to OSB. Records of these reports and investigations will be made available to Comcare as required.

Conclusion

The making of the instrument will not substantively alter the safety of the workplace, which is a consideration of the highest priority as part of OSB and for the Government more broadly. Accordingly, the Disallowable Legislative Instrument is compatible with human rights because, to the extent that it may limit article 7(b) of the ICESCR, that limitation is reasonable, necessary and proportionate to achieving the legitimate objective.