EXPLANATORY STATEMENT

Work Health and Safety Regulations 2011

Notice of a Disallowable Instrument

Work Health and Safety Exemption to Regulation 81 (June 2014)

The purpose of the instrument, to which this Explanatory Statement relates, is to grant an exemption from compliance with regulation 81 of the Work Health and Safety Regulations 2011 (the WHS Regulations) to a broad class of persons.

Regulation 686 provides that the regulator may exempt a person or class of persons from compliance with a provision of the WHS Regulations requiring the person or class of persons to hold a high risk work licence.

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.

This instrument exempts a class of persons, being all members of the Australian Defence Force (ADF), from complying with the requirements prescribed by regulation 81 of the WHS Regulations for the period from 1 July 2014 to 31 December 2014. There are no conditions on the exemption.

Regulation 81 of the WHS Regulations provides that, subject to specific exemptions, a person must not carry out a prescribed class of high risk work unless the person holds a high risk work licence for that class of high risk work.

Pursuant to regulation 727 of the WHS Regulations, the duties imposed under regulation 81 do not apply to members of the ADF until 1 July 2014.

The ADF requires high risk work licences for a significant number of ADF members. No fee is presently prescribed by the WHS Regulations for the purposes of regulation 87(3). In the absence of a prescribed fee, a person who carries out high risk work cannot make an application for a high risk work licence in accordance with regulation 87. An exemption from complying with regulation 81 for a period of 6 months provides the ADF with an extended period of time to facilitate the required training, make licence applications for all relevant members of the Defence Force, and to meet the associated expenses.

Extensive internal and external consultation was undertaken by the ADF in relation to high risk work undertaken by ADF members to inform its application for exemption from compliance with regulation 81 of the WHS Regulations. Monthly High Risk Work Working Groups were facilitated by the ADF and attended by both ADF personnel and Comcare representatives and an online enquiries mailbox was established to facilitate consultation within the ADF.

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required for this change (OBPR ID: 17014). A Statement of Compatibility with Human Rights has been completed for the Amending Regulation, 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. The exemption will commence 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 Exemption to Regulation 81 (June 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 Bill/Legislative Instrument

Regulation 686 provides that the regulator may exempt a person or class of persons from compliance with a provision of the WHS Regulations requiring the person or class of persons to hold a high risk work licence.

The Legislative Instrument grants an exemption from compliance with regulation 81 of the Work Health and Safety Regulations 2011 (the WHS Regulations) to a broad class of persons, being members of the Australian Defence Force (ADF), for the period from 1 July 2014 to 31 December 2014.

Regulation 81 of the WHS Regulations requires (subject to specific exemptions) a person carrying out a prescribed class of high risk work to hold a licence for the class of work. The duties imposed under regulation 81 do not apply to members of the ADF until 1 July 2014 (Regulation 727).

The ADF requires high risk work licences for a significant number of ADF members. No fee is presently prescribed by the WHS Regulations for the purposes of regulation 87(3). In the absence of a prescribed fee, a person who carries out high risk work cannot make an application for a high risk work licence in accordance with regulation 87. An exemption from complying with regulation 81 for a period of 6 months provides the ADF with an extended period of time to facilitate the required training, make licence applications for all relevant members of the Defence Force, and to meet the associated expenses.

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

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 healthy 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.

This Legislative Instrument grants a temporary exemption from compliance with one of these licensing regimes (high risk work licensing) to members of the ADF for the purpose of facilitating a smooth transition to the new laws. The amendment is considered compatible with the right to safe and healthy working conditions for a number of reasons.

First, in order to grant this exemption Comcare must consider whether granting the exemption will result in a standard of health and safety at the relevant workplace, or in relation to the relevant undertaking, that is at least equivalent to the standard that would be achieved by compliance with the relevant provision. This ensures that no exemptions can be granted that would have a negative impact on the right to safe and healthy working conditions. On the basis of the information provided by ADF in support of its application, Comcare is satisfied that the ADF has implemented and maintains appropriate safety and training systems for members of the ADF undertaking high risk work. The exemption from the requirement to obtain a high risk work license will provide Defence with more time to provide the training necessary for ADF members to obtain this license and will not impact the safety arrangements that Defence has in place. Accordingly, Comcare considers that this instrument is compatible with human rights as it is a reasonable, necessary and proportionate measure.

Second, the exemption from compliance with the requirement to obtain a high risk work license does not alter the general duties that are owed by Defence to workers under the WHS Act. In particular, section 19 of the WHS Act sets out 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 exemption being granted 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 for the ADF and its members, to the extent that it may limit rights, those limitations are reasonable, necessary and proportionate to the achievement of that legitimate objective.