EXPLANATORY STATEMENT

Work Health and Safety Regulations 2011

Notice of a Disallowable Instrument

Work Health and Safety Exemptions
(‘High risk work licences - crane operation’) (November 2014)

Introduction

The purpose of the instrument to which this Explanatory Statement relates (the exemption instrument) is to grant exemptions from compliance with regulations 81 and 85 of the Work Health and Safety Regulations 2011 (WHS Regulations) to those persons who must hold a high risk work licence when carrying high risk work involving the use of certain cranes (the relevant high risk work), and those persons conducting a business or undertaking (PCBUs) at a workplace in which the abovementioned workers are carrying out the relevant high risk work.

Regulation 686 provides that the regulator may exempt a person or class of persons from compliance with the WHS Regulations requiring the person or class of persons to hold a high risk work licence. The exemptions applying to the abovementioned persons who must hold a high risk work licence (the HRW licence exemptions) will apply to them as a class.

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 other than a provision requiring a person to hold a high risk work licence (among other things). The exemptions applying to the abovementioned PCBUs (the general exemptions) will apply to them as a class.

Because the exemption instrument applies to classes of persons, it is a legislative instrument within the meaning of the Legislative Instruments Act 2003 as provided by subregulation 692(2) of the WHS Regulations.

The exemptions are granted subject to conditions. In this regard, regulation 691 provides that the regulator may impose any conditions it considers appropriate on an exemption.

The exemptions

As indicated above, the exemption instrument grants HRW licence exemptions and general exemptions.

HRW licence exemptions

Under regulation 81 of the WHS Regulations, a person must not carry out a class of high risk work unless the person holds a high risk work licence for that class of high risk work.

Among other things, the WHS Regulations require a person to hold a high risk work licence to carry out work involving the use of a vehicle loading crane, a non-slewing mobile crane, and slewing mobile cranes with various capacities ranging from 20 tonnes or less to over 100 tonnes.

Items 13 to 18 of Schedule 3 of the WHS Regulations refer to these licences and the scope of high risk work covered by each licence. Items 13 to 18 of...
Schedule 4 specify the training (‘VET course’) a person must undertake to qualify for these licences.

A much higher level of skill is required to operate a slewing mobile crane than for a vehicle loading crane and a non-slewing mobile crane. Furthermore, a person with a high risk work licence to operate a slewing mobile crane having a certain capacity has the skill to operate slewing mobile cranes with lower capacities.

Before the Work Health and Safety Act 2011 and the WHS Regulations (the WHS legislation) came into force on 1 January 2012, ‘encompassment’ arrangements were in place in all of the Australian jurisdictions including the Commonwealth. Under these arrangements, a person would not have to obtain a high risk work licence to operate a ‘lower-ranking’ crane if the person already held a high risk work licence for a ‘higher-ranking’ crane.

These encompassment arrangements are already reflected in the slewing mobile crane licence classes in items 16 and 17 of Schedule 3 of the WHS Regulations which allow persons holding high risk licences to operate slewing mobile cranes with capacities of up to 60 tonnes and 100 tonnes to operate slewing mobile cranes of less than 60 tonnes and 100 tonnes respectively.

The HRW licence exemptions in the exemption instrument exempt a person from the requirement to hold a high risk work licence to use the cranes listed in clause 3(a) of the exemption instrument on condition that the person already holds a ‘higher-ranking’ high risk work licence that encompasses the work performed. The relevant conditions are set out in the table in clause 7.1 of the exemption instrument. Paragraph (a) in each of items 1 to 3 of this table provides that the exemptions will apply so that a person:

(a) licensed to operate a slewing mobile crane of any capacity will not have to obtain a separate high risk work licence to operate a vehicle loading crane (item 1) or a non-slewing mobile crane (item 2);

(b) licensed to operate a slewing mobile crane with a capacity of over 100 tonnes will not be required to obtain a separate high risk work licence to operate a slewing mobile crane with a lesser capacity (item 3).

Paragraphs (b) and (c) in each of items 1 to 3 of the same table apply the same encompassment principles to instances where a person is in training to obtain a high risk work licence and where a person is carrying out work while awaiting a decision on a high risk work licence application. These instances reflect the exception provisions prescribed by regulation 82 of the WHS Regulations.

General exemptions

Regulation 85 of the WHS Regulations provides that a PCBU must not direct or allow a worker:

(a) to carry out high risk work for which a licence is required unless the PCBU sees written evidence that the worker has the relevant HRW licence for that work (subregulation 85(1));

(b) to carry out high risk work in relation to which the worker is not licensed but is awaiting a decision on the worker’s licence application, without seeing written evidence that the worker has applied for the relevant licence and holds the relevant certification (subregulation 85(2)); and

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(c) to supervise high risk work (being undertaken by a trainee seeking certification for that high risk work) without seeing written evidence that the worker holds the relevant high risk work licence for that high risk work (subregulation 85(3)).

Under subregulation 85(4), a PCBU must keep written evidence given to the PCBU for at least one year after the high risk work is carried out or after the last occasion on which the worker performs the supervision work (as the case may be).

The HRW licence exemptions granted in this instrument apply with regard to regulation 81. Because the obligations in regulation 85 are predicated on compliance with regulation 81, it has been necessary to grant general exemptions to adjust the regulation 85 obligations but only within the scope of the HRW licence exemptions.

Accordingly, clause 3(b) of the exemption instrument applies the general exemptions to PCBUs (the duty-holders in regulation 85) but only in relation to persons mentioned in clause 3(a).

The conditions on which the exemptions apply are set out in clause 7.2.

Grounds on which Comcare has granted the exemptions

Comcare has granted the HRW licence exemptions in accordance with subregulation 687(1) which provides that Comcare (as the regulator) must not grant a high risk work licence exemption unless 'satisfied that granting the exemption will result in a standard of health and safety that is at least equivalent to the standard that would have been achieved without that exemption'.

Comcare was able to reach the level of satisfaction required by subregulation 687(1) on the basis that the exemptions would apply only to allow persons already licensed to operate 'higher-ranking' cranes (in terms of the level of knowledge and skills required) to operate 'lower-ranking' cranes without having to separately qualify for the latter class of licence.

In this regard, Comcare notes that the Units of Competency ('VET courses') for ('higher-ranking') slewing mobile crane licences explicitly provide for encompassment of training requirements for:

(a) ('lower-ranking') non-slewing mobile crane and vehicle loading crane licences (see, for example, TLILIC3008A Licence to operate a slewing mobile crane (up to 20 tonnes)); and

(b) slewing mobile crane licences of lesser capacities (see, for example, TLILIC401A Licence to operate a slewing mobile crane (over 100 tonnes)).

Comcare also notes that the exemptions merely replicate encompassment arrangements that currently apply in most states and the ACT.

The general exemptions granted by Comcare for regulation 85 will not have any impact on work health and safety.
Compliance with consultation requirements of the Legislative Instruments Act 2003

Before the Commonwealth’s adoption of the WHS Regulations, the encompassment arrangements upon which these exemptions are based, applied nationally.

Moves are afoot to formally re-instate these arrangements in the Commonwealth jurisdiction following consultations carried out in 2013 with all of the Australian jurisdictions through processes endorsed by the 2008 Inter-Governmental Agreement (IGA) for Regulatory and Operational Reform in Occupational Health and Safety.

Until re-instatement occurs, Comcare has identified an immediate need for the exemptions following informal discussions with a number of PCBU’s about their high risk work licensing needs. Once in place, the high risk work licensing exemptions will result in greater efficiencies and lower costs for licence-holders and PCBU’s in its jurisdiction.

Comcare is satisfied that appropriate consultation has already been undertaken through IGA processes. On this basis, and in accordance with section 18 of the Legislative Instruments Act 2003, Comcare considers that further consultation would be unnecessary.

Other issues

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 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 Exemptions
(High risk work licences - crane operation) (November 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 (the exemption instrument) is to grant exemptions from compliance with regulations 81 and 85 of the Work Health and Safety Regulations 2011 (WHS Regulations) to those persons who must hold a high risk work licence when carrying out high risk work involving the use of certain cranes (the relevant high risk work), and those persons conducting a business or undertaking (PCBUs) at a workplace in which the abovementioned workers are carrying out the relevant high risk work.

Regulation 686 provides that the regulator may exempt a person or class of persons from compliance with the WHS Regulations requiring the person or class of persons to hold a high risk work licence. The exemptions applying to the abovementioned persons who must hold a high risk work licence (the HRW licence exemptions) will apply to them as a class.

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 other than a provision requiring a person to hold a high risk work licence (among other things). The exemptions applying to the abovementioned PCBUs (the general exemptions) will apply to them as a class.

Because the exemption instrument applies to classes of persons, it is a legislative instrument within the meaning of the Legislative Instruments Act 2003 as provided by subregulation 692(2) of the WHS Regulations.

The exemptions are granted subject to conditions. In this regard, regulation 691 provides that the regulator may impose any conditions it considers appropriate on an exemption.

The exemptions

As indicated above, the exemption instrument grants HRW licence exemptions and general exemptions.

HRW licence exemptions

Under regulation 81 of the WHS Regulations, a person must not carry out a class of high risk work unless the person holds a high risk work licence for that class of high risk work.

Among other things, the WHS Regulations require a person to hold a high risk work licence to carry out work involving the use of a vehicle loading crane, a
non-slewing mobile crane, and slewing mobile cranes with various capacities ranging from 20 tonnes or less to over 100 tonnes.

Items 13 to 18 of Schedule 3 of the WHS Regulations refer to these licences and the scope of high risk work covered by each licence. Items 13 to 18 of Schedule 4 specify the training (‘VET course’) a person must undertake to qualify for these licences.

A much higher level of skill is required to operate a slewing mobile crane than for a vehicle loading crane and a non-slewing mobile crane. Furthermore, a person with a high risk work licence to operate a slewing mobile crane having a certain capacity has the skill to operate slewing mobile cranes with lower capacities.

Before the Work Health and Safety Act 2011 and the WHS Regulations (the WHS legislation) came into force on 1 January 2012, ‘encompassment’ arrangements were in place in all of the Australian jurisdictions including the Commonwealth. Under these arrangements, a person would not have to obtain a high risk work licence to operate a ‘lower-ranking’ crane if the person already held a high risk work licence for a ‘higher-ranking’ crane.

These encompassment arrangements are already reflected in the slewing mobile crane licence classes in items 16 and 17 of Schedule 3 of the WHS Regulations which allow persons holding high risk licences to operate slewing mobile cranes with capacities of up to 60 tonnes and 100 tonnes to operate slewing mobile cranes of less than 60 tonnes and 100 tonnes respectively.

The HRW licence exemptions in the exemption instrument exempt a person from the requirement to hold a high risk work licence to use the cranes listed in clause 3(a) of the exemption instrument on condition that the person already holds a ‘higher-ranking’ high risk work licence that encompasses the work performed. The relevant conditions are set out in the table in clause 7.1 of the exemption instrument. Paragraph (a) in each of items 1 to 3 of this table provides that the exemptions will apply so that a person:

(c) licensed to operate a slewing mobile crane of any capacity will not have to obtain a separate high risk work licence to operate a vehicle loading crane (item 1) or a non-slewing mobile crane (item 2); and

(d) licensed to operate a slewing mobile crane with a capacity of over 100 tonnes will not be required to obtain a separate high risk work licence to operate a slewing mobile crane with a lesser capacity (item 3).

Paragraphs (b) and (c) in each of items 1 to 3 of the same table apply the same encompassment principles to instances where a person is in training to obtain a high risk work licence and where a person is carrying out work while awaiting a decision on a high risk work licence application. These instances reflect the exception provisions prescribed by regulation 82 of the WHS Regulations.

**General exemptions**

Regulation 85 of the WHS Regulations provides that a PCBU must not direct or allow a worker:

(d) to carry out high risk work for which a licence is required unless the PCBU sees written evidence that the worker has the relevant HRW licence for that work (subregulation 85(1));
(e) to carry out high risk work in relation to which the worker is not licensed but is awaiting a decision on the worker’s licence application, without seeing written evidence that the worker has applied for the relevant licence and holds the relevant certification (subregulation 85(2)); and

(f) to supervise high risk work (being undertaken by a trainee seeking certification for that high risk work) without seeing written evidence that the worker holds the relevant high risk work licence for that high risk work (subregulation 85(3)).

Under subregulation 85(4), a PCBU must keep written evidence given to the PCBU for at least one year after the high risk work is carried out or after the last occasion on which the worker performs the supervision work (as the case may be).

The HRW licence exemptions granted in this instrument apply with regard to regulation 81. Because the obligations in regulation 85 are predicated on compliance with regulation 81, it has been necessary to grant general exemptions to adjust the regulation 85 obligations but only within the scope of the HRW licence exemptions.

Accordingly, clause 3(b) of the exemption instrument applies the general exemptions to PCBUs (the duty-holders in regulation 85) but only in relation to persons mentioned in clause 3(a).

The conditions on which the exemptions apply are set out in clause 7.2.

Grounds on which Comcare has granted the exemptions

Comcare has granted the HRW licence exemptions in accordance with subregulation 687(1) which provides that Comcare (as the regulator) must not grant a high risk work licence exemption unless ‘satisfied that granting the exemption will result in a standard of health and safety that is at least equivalent to the standard that would have been achieved without that exemption’.

Comcare was able to reach the level of satisfaction required by subregulation 687(1) on the basis that the exemptions would apply only to allow persons already licensed to operate ‘higher-ranking’ cranes (in terms of the level of knowledge and skills required) to operate ‘lower-ranking’ cranes without having to separately qualify for the latter class of licence.

In this regard, Comcare notes that the Units of Competency (‘VET courses’) for (‘higher-ranking’) slewing mobile crane licences explicitly provide for encompassment of training requirements for:

(c) (‘lower-ranking’) non-slewing mobile crane and vehicle loading crane licences (see, for example, TLILIC3008A Licence to operate a slewing mobile crane (up to 20 tonnes)); and

(d) slewing mobile crane licences of lesser capacities (see, for example, TLILIC401A Licence to operate a slewing mobile crane (over 100 tonnes).

Comcare also notes that the exemptions merely replicate encompassment arrangements that currently apply in most states and the ACT.

The general exemptions granted by Comcare for regulation 85 will not have any impact on work health and safety.
Compliance with consultation requirements of the *Legislative Instruments Act 2003*

Before the Commonwealth's adoption of the WHS Regulations, the encompassment arrangements upon which these exemptions are based, applied nationally.

Moves are afoot to formally re-instate these arrangements in the Commonwealth jurisdiction following consultations carried out in 2013 with all of the Australian jurisdictions through processes endorsed by the 2008 Inter-Governmental Agreement (IGA) for Regulatory and Operational Reform in Occupational Health and Safety.

Until re-instatement occurs, Comcare has identified an immediate need for the exemptions following informal discussions with a number of PCBUs about their high risk work licensing needs. Once in place, the high risk work licensing exemptions will result in greater efficiencies and lower costs for licence-holders and PCBUs in its jurisdiction.

Comcare is satisfied that appropriate consultation has already been undertaken through IGA processes. On this basis, and in accordance with section 18 of the *Legislative Instruments Act 2003*, Comcare considers that further consultation would be unnecessary.

**Other issues**

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 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 *Work Health and Safety Act 2011* (the **WHS Act**) and the WHS Regulations. The WHS Act places

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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 under which persons must undertake the required training and obtain a high risk work licence to certain cranes at a workplace.

This Legislative Instrument duplicates high risk work licensing encompassment provisions agreed to by the Commonwealth, states and territories following consultations in 2013.

The effect of this Legislative Instrument will be that:

(a) persons holding a high risk work licence to operate a slewing mobile crane of any capacity will be able to rely on that licence to operate a vehicle loading crane or a non-slewing mobile crane, on the basis that the training for a slewing mobile crane encompasses the training required to operate the two latter-mentioned types of crane; and

(b) persons holding a high risk work licence to operate a slewing mobile crane with a capacity of over 100 tonnes will be able to rely on that licence to operate a slewing mobile crane with a lesser capacity, on the basis that the training required for a licence to operate the first-mentioned crane encompasses the training required to operate the same type of crane with lower capacities.

These exemptions will not affect work health and safety in the workplace. They merely recognise that a high risk work licence for a ‘high-ranking’ crane indicates that the holder is qualified to operate ‘lower-ranking’ cranes. As such, the person holding the high risk work licence is not required to obtain a separate licence for the ‘lower-ranking’ crane.

For the reasons presented above, the 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.