

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 201

Issued by the authority of the
Minister for Employment and Workplace Relations

Occupational Health and Safety Act 1991

*Occupational Health and Safety (Safety Standards) Amendment Regulations
2008 (No. 1)*

The *Occupational Health and Safety Act 1991* (the OHS Act) establishes a framework for the regulation of employers, employees and practices at workplaces covered by the OHS Act to protect the health and safety of employees at work and other persons at or near the workplace.

Section 82 of the OHS Act provides, in part, that the Governor-General may make regulations, not inconsistent with the OHS Act, prescribing all matters required or permitted by the OHS Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the OHS Act.

The purpose of the Regulations is to:

- preserve certain State and Territory occupational health and safety laws, which may currently be excluded by the OHS Act; and
- implement the National Standard for Licensing Persons Performing High Risk Work (the Licensing National Standard).

Subsection 23(1) of the OHS Act provides that regulations may make provisions relating to any matter affecting, or likely to affect the occupational health and safety of employees, contractors or other persons at or near the workplace. Paragraph 23(2)(a) of the OHS Act provides that, without limiting the generality of subsection 23(1), the regulations may make provision prohibiting the performance of all work or specified work at a workplace or by employees or contractors at work.

Subsection 4(1) of the OHS Act excludes State and Territory occupational health and safety laws in their application to employers, employees or the employment of employees covered by the OHS Act. Subsection 4(3) of the OHS Act permits regulations to be made allowing State or Territory occupational health and safety laws not dealt with under the OHS Act to apply where those State or Territory laws were not intended to be excluded by the OHS Act.

Part 2 of the *Occupational Health and Safety (Safety Standards) Regulations 1994* (the Principal Regulations) currently sets out the competency requirements and certification standards for users and operators of industrial equipment for certain high risk occupations. High risk work includes work performed in scaffolding, rigging, dogging, crane and hoist operation, and pressure equipment operation. The Principal Regulations currently recognise licences and certificates issued by State and Territory authorities to perform high risk work. However, the status of these State and Territory

laws is unclear following amendments to section 4 of the OHS Act which commenced in 2007.

The Regulations therefore clarify that certain State and Territory occupational health and safety laws relating to licensing high risk work are preserved to ensure that State and Territory licences and certificates to perform high risk work are recognised under the OHS Act and Principal Regulations.

In addition, the Australian Safety and Compensation Council declared in April 2006 the Licensing National Standard, which requires persons with a current State or Territory certificate to perform high risk work to convert to a new, nationally uniform licence. However, the Licensing National Standard is advisory and has no effect in State, Territory or Commonwealth jurisdictions until it has been implemented as legislation by that jurisdiction.

The Regulations also implement the Licensing National Standard by:

- Updating terminology to refer to licensing instead of certification;
- Updating the occupations referred to as 'high risk work'. This adds forklift operation as a high risk work occupation;
- Recognising State and Territory licences issued to perform high risk work;
- Imposing a specific duty on employers not to permit a person to undertake high risk work in the absence of appropriate qualifications;
- Imposing specific duties on employers with regard to the employees undertaking high risk work while undergoing training; and
- Enabling Comcare to make a recommendation to a State or Territory authority for the cancellation or suspension of a licence to perform high risk work.

Extensive consultation with relevant employers was undertaken prior to the Australian Safety and Compensation Council declaring the Licensing National Standard. As the Regulations simply implement the declared Licensing National Standard, no further consultations were undertaken. This was consistent with advice from the Office of Best Practice Regulation.

Details of the Regulations are set out in the [Attachment](#).

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

ATTACHMENT**Details of the Occupational Health and Safety (Safety Standards) Amendment Regulations 2008 (No. 1)****Regulation 1 – Name of Regulations**

Regulation 1 provides that the title of the Regulations is the *Occupational Health and Safety (Safety Standards) Amendment Regulations 2008 (No. 1)*.

Regulation 2 – Commencement

Regulation 2 provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 - Amendment of Occupational Health and Safety (Safety Standards) Regulations 1994

Regulation 3 provides that the *Occupational Health and Safety (Safety Standards) Regulations 1994* are to be amended as set out in Schedule 1.

Regulation 4 – Application of amendments

Subregulation 4(1) sets out the types of certificates of competency to which the Regulations apply. This includes both certificates of competency which were issued by a State or Territory licensing authority in accordance with the Licensing National Standard and those which were issued prior to the implementation of the Licensing National Standard which are in effect when the Regulations commenced.

A note following this subregulation alerts the reader that the Licensing National Standard can be found on the Internet.

Subregulations 4(2) and (3) amend the terminology of Part 2 of the Principal Regulations to make it consistent with the language of the Licensing National Standard. These subregulations recognise that all certificates of competency referred to in subregulation 4(1) are treated as a licence and that a person holding a certificate of competency is treated as if he or she were licensed to perform the class of high risk work.

Subregulation 4(4) provides that if a certificate of competency expires, or is cancelled or suspended by the State or Territory certifying authority, then the person holding the certificate is no longer able to perform the class of high risk work for an employer covered by the OHS Act.

Schedule 1 – Amendments

Item 1 – Regulation 1.03 – Definitions located in Part 20

This item makes a technical amendment to regulation 1.03 to correct an incorrect reference to the definitions which are now contained in Part 20.

A note at the foot of regulation 1.03 alerts the reader's attention to the use of definitions in the Regulations and the OHS Act.

Item 2 - Part 2 - Licensing arrangements for high risk work

Division 1 - Introduction

This item replaces the current Part 2 of the Principal Regulations to implement the Licensing National Standard. This item also amends the heading of Part 2 to reflect the terminology of the Licensing National Standard.

Regulation 2.01 – Object of Part 2

Regulation 2.01 provides that the object of Part 2 is to minimise the incidence and severity of injuries associated with performing high risk work covered by the Part by requiring that employees and contractors performing that work hold a licence issued by an authority of a State or a Territory.

A note at the foot of the regulation indicates that the Regulations in Part 2 should be read in conjunction with the Licensing National Standard.

Regulation 2.02 – Definitions for Part 2

Regulation 2.02 inserts definitions for Part 2.

Certificate of competency is defined to recognise certificates which authorise a person to perform certain classes of high risk work and that were issued by a State or Territory authority prior to the implementation of the Licensing National Standard in that State or Territory.

High risk work is defined to include the classes of work listed in the Licensing National Standard. Specifically these occupations are scaffolding work, rigging (including dogging) work, crane and hoist operation, forklift operation and pressure equipment operation.

A note following this definition alerts the reader that the classes of work listed as high risk work are those classes of work in the schedule to the Licensing National Standard as in force at the date of commencement of the Regulations.

Licence is defined as a document that authorises a person to perform one or more classes of high risk work issued by a licensing authority in accordance with the Licensing National Standard.

Licensing authority is defined to mean the government authority responsible for the administration of the licensing system set out in the Licensing National Standard. This provision maintains existing arrangements whereby Comcare and the Safety Rehabilitation and Compensation Commission continue to *not* be defined as licensing authorities.

National Standard for Licensing Persons Performing High Risk Work is defined to mean the Licensing National Standard declared by the Australian Safety and Compensation Council and as in existence immediately before the commencement of the Regulations.

A note following this definition alerts the reader that the Licensing National Standard can be found on the Internet.

Regulation 2.03 – Preservation of State and Territory laws

Subsection 4(1) of the OHS Act excludes State and Territory laws to the extent that the law of the State or Territory relates to occupational health and safety or would otherwise apply in relation to employers, employees or the employment of employees. Subsection 4(3) of the OHS Act provides for regulations to be made allowing State or Territory occupational health and safety laws not dealt with under the OHS Act to apply where those State or Territory laws were not intended to be excluded by the OHS Act.

Subregulation 2.03(1) provides that State and Territory laws (State laws) that relate to licensing for a class of high risk work (however described) are prescribed for the purposes of subsection 4(3) of the OHS Act. This makes clear that State laws relating to licensing for high risk work will not be excluded to the extent that those State laws relate to the imposition of rights or obligations on employees.

Subregulation 2.03(2) clarifies that State and Territory laws mentioned in subregulation 2.03(1) will not apply to the extent that those laws impose rights or duties on an employer.

This means that regulation 2.03 permits licences (and certificates of competency) granted by a licensing authority under State or Territory laws to be recognised as licences under the OHS Act and the Principal Regulations. This includes the existing laws and those laws once amended to implement the new Licensing National Standard.

Division 2 – Duties relating to the performance of work

Regulation 2.04 – Allowing persons to perform high risk work

Regulation 2.04 implements Clause 9.1 of the Licensing National Standard by providing that only a licensed person may perform a class of high risk work. However, some exceptions apply.

Subregulations 2.04(1) and (2) provide that an employer must not allow or direct a person to perform a class of high risk work if the person is not licensed. A civil penalty of 150 penalty units applies for contravention of these subregulations.

Subregulation 2.04(3) provides an exception to the requirement to be licensed under subregulation 2.04(1) where the employee or contractor has been exempted by a government licensing authority (for example a State or Territory authority), or is otherwise exempt, from the requirement to hold a licence to perform the class of high risk work.

Subregulation 2.04(4) provides further exceptions to the requirement under subregulation 2.04(1) where the employer is undertaking training to obtain a licence to perform high risk work and when certain conditions are met. The conditions in paragraphs 2.04(4)(a) to (d) require that:

- a person need not be licensed to perform high risk work where the employer ensures that the person is given appropriate directions and demonstrations relating to the class of high risk work;
- the employer must ensure, as far as practicable that these directions and demonstrations allow the person to perform the class of high risk work in a manner that is safe and without risk to health and safety;
- the employer must ensure that the person is directly supervised by a current licence holder unless circumstances exist so as to require a lesser level of supervision; and
- the employer must ensure that the person's performance of the task is appropriately monitored.

Regulation 2.05 – Employer to provide training

Regulation 2.05 implements Clause 9 of the Licensing National Standard by placing an obligation on the employer to provide an employee or contractor with training, instruction and information on the equipment operation, hazards, risks and control measures that is relevant to the workplace.

Subregulation 2.05(1) provides that an employer must provide training relevant to the workplace when an employer or contractor becomes a licence holder while working at the workplace or when a licence holder is new to the employer's workplace.

Subregulation 2.05(2) lists the circumstances when an employer must provide a licence holder with training relevant to the employer's workplace. This training may not be required in every circumstance listed in subregulation 2.05(2), but the employer must provide this training when it is necessary to ensure the health and safety of the employer or other persons at the workplace.

Subregulation 2.05(3) provides a civil penalty of 150 penalty units for contravention of either subregulations 2.05(1) or (2).

Regulation 2.06 – Production of a licence for inspection

Regulation 2.06 requires a licence holder to produce a licence within a reasonable period upon request by an investigator. A civil penalty of 50 penalty units applies for contravention of this regulation.

Division 3 – Suspension or cancellation of licence

Regulation 2.07 – Recommendation to licensing authority for the suspension or cancellation of a licence

Comcare does not currently issue certificates under the Principal Regulations and is therefore not a certifying authority. The Regulations maintain this arrangement in respect of licensing.

Accordingly, Comcare will not have the authority to suspend or revoke a licence issued by a State or Territory. However, Comcare could make recommendations to a State or Territory licensing authority. Regulation 2.07 replicates the current subregulation 2.09(1) in the Principal Regulations and permits Comcare to make recommendations, supported by evidence, to the relevant State or Territory licensing authority, that a licence be suspended or cancelled.