

EXPLANATORY STATEMENT

Work Health and Safety Regulations 2011

Notice of a Disallowable Instrument

Work Health and Safety Exemptions (Diving by members of the Australian Defence Force) (July 2014)

Introduction

The purpose of the instrument, to which this Explanatory Statement relates, is to grant an exemption from compliance with sub-regulations 171(a) and 174(a) of the *Work Health and Safety Regulations 2011* (the WHS Regulations) to two classes of persons, namely, members of the Australian Defence Force ('the ADF') who carry out, or supervise general diving work ('ADF divers' and 'ADF dive supervisors' respectively).

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.

In accordance with sub-regulation 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*.

Exemptions applying to ADF divers and ADF dive supervisors

This instrument exempts ADF divers and ADF dive supervisors who carry out, or supervise, general diving work from complying with sub-regulation 171(a) and (where supervision of general diving work is involved) sub-regulation 174(a).

The exemptions involving ADF divers and ADF dive supervisors are necessary because both of these classes of persons cannot comply with the competency requirements set out in sub-regulation 171(a). ADF dive supervisors cannot comply with the requirements of sub-regulation 174(a) as a result.

The exemptions apply subject to conditions.

Details of the exemptions

Sub-regulation 171(a) of the WHS Regulations provides that a person must not carry out general diving work (other than incidental diving work and limited scientific diving work) unless the person has a statement of attainment for a specified VET course; a certificate for general diving work, issued by a training organisation, that mentions the subject areas covered in AS/NZS 4005.2:2000 (*Training and certification of recreational divers—Recreational SCUBA dive supervisor*) ('AS 4005'); or both.

At present no specified VET course is prescribed for general diving work for the purposes of the WHS Regulations. Consequently, ADF divers and ADF dive supervisors who carry out general diving work cannot presently comply with sub-regulation 171(a)(i) of the WHS Regulations and must obtain, in accordance with sub-regulation 171(a)(ii), a certificate for general diving work that mentions the subject areas covered in AS 4005.

AS 4005 is directed solely towards training supervisors of recreational SCUBA divers and is inadequate in setting training requirements for general diving work carried out, or supervised, by members of the ADF.

The exemption from compliance with sub-regulation 171(a) of the WHS Regulations, has been granted on the condition that members of the ADF who carry out, or supervise, general diving work must satisfactorily complete ADF diver training to a level that is at least equivalent to that provided in AS 2815.1—2008 (*Training and certification of occupational divers, Part 1: Occupational SCUBA diver — Standard*) ('AS 2815.1') with some minor modifications. These modifications cater for ADF-specific diver training needs and will have no adverse health or safety consequences in the conduct of the ADF's general diving work activities.

AS 2815.1 is endorsed as a training standard by AS/NZS 2299.1:2007 (*Occupational diving operations—Standard operational practice*) ('AS/NZS 2299') which, itself, is prescribed by the WHS Regulations as the standard by which high risk diving work is conducted.

ADF divers and dive supervisors who train to AS 2815.1 (as modified) will be more competent to carry out general diving work than if they trained only in accordance with AS 4005 (as provided by sub-regulation 171(a)(ii)).

Insofar as ADF dive supervisor training is concerned, sub-regulation 174(a) of the WHS Regulations provides that a person appointed under regulation 177 (e.g. an ADF dive supervisor) must not perform any functions associated with that appointment unless the person has:

- the qualifications specified in sub-regulation 171(a).

For the reasons cited above, the ADF dive supervisor cannot comply with regulation 171(a) of the WHS Regulations.

An exemption from sub-regulation 174(a) has consequently been granted. To ensure work health and safety is maintained, the exemption is conditional on the ADF dive supervisor satisfactorily completing training:

- to a level at least equivalent to AS 2815.1 as modified above; and
- in accordance with specified units of competency based on those in AS/NZS 2815.5:2013 (*Training and certification of occupational divers, Part 5: Dive supervisor*) ('AS/NZS 2815.5'), with some minor modifications that reflect differences in the general diving work activities supervised by ADF Special Forces and Army Work dive supervisors.

Comcare has consulted with Defence, the ADF and the Defence dive school regarding the proposed modifications.

The exemptions will only apply to ADF divers and ADF dive supervisors (and indirectly to the ADF and Defence). As such, a Regulation Impact Statement is not required.

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 exemptions are taken to have commenced on the day after they are registered on the Federal Register of Legislative Instruments.

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 (Diving by members of the Australian Defence Force) (July 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

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supervisors who carry out general diving work cannot presently comply with sub-regulation 171(a)(i) of the WHS Regulations and must obtain, in accordance with sub-regulation 171(a)(ii), a certificate for general diving work that mentions the subject areas covered in AS 4005.

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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 provide more specific obligations, including those applying to general diving work.

This Legislative Instrument grants a conditional exemption from compliance with sub-regulations 171(a) and 174(a) where general diving work is undertaken by members of the ADF. This exemption is considered compatible with the right to safe and healthy working conditions for these 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.

Comcare considers that an exemption from complying with AS 4005 (see sub-regulation 171(a)(ii) of the WHS Regulations) on condition that members of the ADF train in accordance with AS 2815.1 and AS/NZS 2815.5 as modified will ensure that these members will continue to receive suitable and appropriate training and instruction to carry out general diving work competently and safely. The application of the training conditions will, in fact, ensure that general diving work will be carried out by ADF divers and ADF dive supervisors more competently and at a higher level of work health and safety than if they complied with AS 4005.

Second, the exemption being granted by this legislative instrument does not alter the remaining general diving work requirements 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 Defence, the ADF and members of the ADF. To the extent that it may limit rights, these limitations are reasonable, necessary and proportionate to the achievement of that legitimate objective.

Comcare

¹ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 16 (Rev.1)*, *The Committee on Economic, Social and Cultural Rights*, May 1996, No. 16 (Rev.1), available at: <http://www.refworld.org/docid/4794773cd.html> [accessed 22 May 2014]