**EXPLANATORY STATEMENT**

*Work Health and Safety Regulations 2011*

**Notice of a Disallowable Instrument**

**Work Health and Safety Exemption**

**(Construction Induction Training Card — Workers)**

**(August 2014)**

**Introduction**

The purpose of the instrument to which this Explanatory Statement relates is to grant an exemption from compliance with sub‑regulation 326(1) of the *Work Health and Safety Regulations 2011* (the WHS Regulations) to a class of persons, namely, workers who carry out construction work on sites located overseas and, in respect of whom, the Commonwealth, represented by the Department of Foreign Affairs and Trade (‘DFAT’), has jurisdiction (‘relevant workers’).

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* (‘LIA’)*.*

This instrument exempts relevant workers who carry out construction work from the requirements to keep available for inspection under the *Work Health and Safety Act 2011* (‘the Act’), their general construction induction training card (‘CITC’) or, in certain circumstances, a certificate indicating they have successfully completed general construction induction training (‘CIT’) and are waiting for the issue of a CITC.

The WHS Regulations do not place a direct obligation on workers to undertake general CIT and to obtain a CITC. Instead, regulations 316 and 317 require DFAT, as the relevant person carrying out a business or undertaking (‘PCBU’):

* to ensure that CIT is provided to the relevant workers; and
* to not direct or allow a relevant worker to undertake construction work without first sighting evidence that the worker has successfully completed CIT.

On 31 July 2014, Comcare exempted DFAT from the requirement to comply with regulations 316 and 317 of the WHS Regulations insofar as they apply to relevant workers on DFAT’s construction sites overseas. These exemptions were not class exemptions and are consequently not included in the exemption instrument to which this explanatory statement relates.

Comcare granted the exemptions from regulations 316 and 317 on the grounds that exceptional circumstances justified the grant. Similarly, Comcare has granted an exemption to the class of workers who would otherwise be required to comply with sub‑regulation 316(1) because of the following exceptional circumstances which Comcare considers justifies the grant of the exemption:

* general CIT is training delivered in Australia by a Registered Training Organisation for the specified VET course, *Work Safely in the Construction Industry*, and involves approximately six hours of face‑to‑face or online training to familiarise workers with basic work health and safety principles including requirements mandated by Australian law;
* general CIT is not available to persons geographically outside of Australia;
* DFAT generally has no or limited control over the selection of workers on its overseas construction sites;
* DFAT’s construction sites are located in myriad (low, medium and high‑risk) locations around the world;
* not all workers on DFAT’s overseas construction sites are relevant workers — some are foreign nationals who are not bound by Australian WHS legislation and are therefore not required to undertake CIT;
* if DFAT were to require relevant workers to return to Australia to undertake general CIT:
  + this could result in the intermittent suspension of work (with the associated extra costs) and, in some cases, would adversely affect the flow of work on construction sites;
  + the extra costs and work disturbances involved could result in the retraction of certain aid projects involving construction work;
  + this would not change the fact that a proportion of the workforce carrying out construction work would not have any obligation to undertake CITC; and
* it would not be practicable to require DFAT to send all workers to Australia for CIT.

**Compliance with consultation requirements of the *Legislative Instruments Act 2003***

As previously indicated, these exemptions apply in relation to present and future construction projects overseas for which DFAT has direct or indirect responsibility.

Persons affected by these exemptions are present and future workers subject to the obligations in sub‑regulation 326(1) of the WHS Regulations who work on these construction projects.

In accordance with section 18 of the LIA, Comcare is able to be satisfied that the nature of the exemption instrument is such that consultation would be unnecessary or inappropriate. In reaching this level of satisfaction, Comcare took into account the abovementioned exceptional circumstances and concluded that:

* consultation would not be reasonably practicable given the ever‑changing contingent of affected workers and contractors overseas (the administrative complexities alone in arranging for consultation on the scale required would have been untenable);
* consultation about the proposed exemption would not be likely to achieve any useful work health and safety outcome; and
* the proposed exemption was unlikely to have a direct or substantial indirect effect on business or competition.

**Details of the exemptions**

Sub‑regulation 326(1) of the WHS Regulations provides that a worker carrying out construction work must keep available for inspection under the Act:

* their general CITC (sub‑regulation 326(1)(a)); or
* where a worker has applied for but has not been issued with a CITC, a GIT certification (sub‑regulation 326(1)(b)).

The exemptions will mean that the relevant workers will not have to keep a CITC or a GIT certification as evidence that they have successfully completed general construction induction training. The effect of the exemption (in combination with the abovementioned exemptions granted to DFAT) will be to relieve the relevant workers of the requirement to successfully undertake CIT and to obtain a CITC.

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 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.

**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**

**(Construction Induction Training Card — Workers)**

**(August 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**

**Introduction**

The purpose of the instrument to which this Explanatory Statement relates is to grant an exemption from compliance with sub‑regulation 326(1) of the *Work Health and Safety Regulations 2011* (the WHS Regulations) to a class of persons, namely, workers who carry out construction work on sites located overseas and, in respect of whom, the Commonwealth, represented by the Department of Foreign Affairs and Trade (‘DFAT’), has jurisdiction (‘relevant workers’).

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.*

This instrument exempts relevant workers who carry out construction work from the requirements to keep available for inspection under the *Work Health and Safety Act 2011* (‘the Act’), their general construction induction training card (‘CITC’) or, in certain circumstances, a certificate indicating they have successfully completed general construction induction training (‘CIT’) and are waiting for the issue of a CITC.

The WHS Regulations do not place a direct obligation on workers to undertake general CIT and to obtain a CITC. Instead, regulations 316 and 317 require DFAT, as the relevant person carrying out a business or undertaking (‘PCBU’):

* to ensure that CIT is provided to the relevant workers; and
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On 31 July 2014, Comcare exempted DFAT from the requirement to comply with regulations 316 and 317 of the WHS Regulations insofar as they apply to relevant workers on DFAT’s construction sites overseas. These exemptions were not class exemptions and are consequently not included in the exemption instrument to which this explanatory statement relates.

Comcare granted the exemptions from regulations 316 and 317 on the grounds that exceptional circumstances justified the grant. Similarly, Comcare has granted an exemption to the class of workers who would otherwise be required to comply with sub‑regulation 316(1) because of the following exceptional circumstances which Comcare considers justifies the grant of the exemption:

* general CIT is training delivered in Australia by a Registered Training Organisation for the specified VET course, *Work Safely in the Construction Industry*, and involves approximately six hours of face‑to‑face or online training to familiarise workers with basic work health and safety principles including requirements mandated by Australian law;
* general CIT is not available to persons geographically outside of Australia;
* DFAT generally has no or limited control over the selection of workers on its overseas construction sites;
* DFAT’s construction sites are located in myriad (low, medium and high‑risk) locations around the world;
* not all workers on DFAT’s overseas construction sites are relevant workers — some are foreign nationals who are not bound by Australian WHS legislation and are therefore not required to undertake CIT;
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  + this would not change the fact that a proportion of the workforce carrying out construction work would not have any obligation to undertake CITC; and
* it would not be practicable to require DFAT to send all workers to Australia for CIT.

**Compliance with consultation requirements of the *Legislative Instruments Act 2003***

As previously indicated, these exemptions apply in relation to present and future construction projects overseas for which DFAT has direct or indirect responsibility.

Persons affected by these exemptions are present and future workers subject to the obligations in sub‑regulation 326(1) of the WHS Regulations who work on these construction projects.

In accordance with section 18 of the LIA, Comcare is able to be satisfied that the nature of the exemption instrument is such that consultation would be unnecessary or inappropriate. In reaching this level of satisfaction, Comcare took into account the abovementioned exceptional circumstances and concluded that:

* consultation would not be reasonably practicable given the ever‑changing contingent of affected workers and contractors overseas (the administrative complexities alone in arranging for consultation on the scale required would have been untenable);
* consultation about the proposed exemption would not be likely to achieve any useful work health and safety outcome; and
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**Details of the exemptions**

Sub‑regulation 326(1) of the WHS Regulations provides that a worker carrying out construction work must keep available for inspection under the Act:

* their general CITC (sub‑regulation 326(1)(a)); or
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The exemptions will mean that the relevant workers will not have to keep a CITC or a GIT certification as evidence that they have successfully completed general construction induction training. The effect of the exemption (in combination with the abovementioned exemptions granted to DFAT) will be to relieve the relevant workers of the requirement to successfully undertake CIT and to obtain a CITC.

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 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.

**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]](#footnote-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 exemptions from compliance with sub‑regulation 326(1) under which the relevant workers would have to keep evidence of having successfully completed construction induction training.

While it is acknowledged that CIT is intended to contribute to work health and safety, Comcare considers that the practical challenges, resultant costs, work interruptions and possible withdrawal of some construction projects are such as to qualify as exceptional circumstances that justify the exemptions granted.

Having said this, Comcare expects that other requirements in the WHS Regulations (including those relating specifically to risk management, hazardous work, hazardous manual tasks, work at heights, high risk work, electrical safety, and the maintenance and management of plant), will limit the anticipated minor risks—if any—entailed in the grant of the exemptions.

**Conclusion**

This Legislative Instrument is compatible with human rights because it seeks to balance the need for DFAT (representing the Commonwealth) to progress construction projects overseas with optimal work health and safety against some limited but very challenging practical barriers to the achievement of compliance in all instances. To the extent that it may limit rights, the exemptions 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] [↑](#footnote-ref-1)