

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Subject – *Work Health and Safety Act 2011*

Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016

The *Work Health and Safety Act 2011* (the Act) and accompanying *Work Health and Safety Regulations 2011* (the WHS Regulations) provide the primary work health and safety legislation for the Commonwealth jurisdiction. They are based on model laws developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

Subsection 276(1) of the Act provides the Governor-General may make regulations in relation to any matter relating to work health and safety and any matter or thing required or permitted by the Act to be prescribed or that is necessary or convenient to be prescribed to give effect to the Act.

Subsection 276(2) prescribes additional things the regulations may make provision for, without limiting the regulation making power. This includes matters relating to authorisations, including licences, registrations and permits (see item 7, Schedule 3 to the Act).

Licensing asbestos removal work

Chapter 8 of the WHS Regulations deals with asbestos. Unlike the model laws, however, the Commonwealth's Regulations do not have a licensing scheme for asbestos removal work. That is because under current arrangements states and territories—but not the Commonwealth—administer licensing schemes for asbestos removal.

These arrangements worked well until some private businesses covered by the Comcare scheme sought to carry out this work. The *Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016* (the Amendment Regulation) includes the model licensing provisions for asbestos removal work in the WHS Regulations. The amendments enable the Commonwealth's regulator, Comcare, to administer an asbestos removal licensing scheme for the Commonwealth jurisdiction.

Reach stacker licences

Operating a reach stacker—a vehicle used to handle cargo containers at ports—is a class of high risk work under the WHS laws: see section 43 of the Act and Part 4.5 of the WHS Regulations.

Most, but not all, state and territory jurisdictions require reach stacker operators to hold a reach stacker licence under their WHS laws, subject to any transitional arrangements. Victoria and Western Australia require persons operating a reach stacker to hold a different class of licence.

Employees in the Comcare scheme mostly obtain their high risk licences from the state or territory in which those employees reside. This presents difficulties for employees operating reach stackers in Victoria or Western Australia, who are required under the Commonwealth WHS Regulations to hold a reach stacker licence but cannot obtain one from their state WHS regulator.

Transitional arrangements for reach stacker licences expire on 1 January 2017: reg 727 of the WHS Regulations. From then, all reach stacker operators covered by the Comcare scheme will be required to hold a reach stacker licence, no matter where they are based across Australia.

The Amendment Regulation accommodates state-based differences in the licensing scheme. It means that reach stacker operators in the Comcare scheme will be required to hold the licence required to operate a reach stacker under the corresponding WHS laws and regulations in the state or territory in which they are working.

Spent transitional provisions

Chapter 12 of the WHS Regulations contains a range of transitional provisions that facilitated the implementation of the model WHS laws. The Amendment Regulation repeals transitional provisions that have ceased to have effect due to the passage of time.

Details of the Amendment Regulation are set out in Attachment A.

Consultation

Comcare has consulted with private-sector employers within its scheme over the proposal to insert licensing provisions for asbestos removal into the Regulations. No objections were raised.

The Department of Employment has consulted Comcare and the Commonwealth agency, Safe Work Australia, about the proposal to accommodate state-based differences in licensing arrangements for reach stacker operators. Safe Work Australia is responsible for developing and maintaining the model WHS laws, which have been implemented in most jurisdictions. Safe Work Australia is a representative body, made up of representatives from all jurisdictions, as well as employer organisations and unions.

Comcare has also consulted with employers whose workers operate reach stackers about the proposal. Employers strongly supported addressing this potential difficulty. No objections were raised.

As the instrument is of a minor nature, and does not substantially alter existing arrangements, broader consultation was considered unnecessary.

Regulation Impact Statement

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (OBPR ID: 17832).

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for the Amendment Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Regulation does not engage, and is therefore compatible with human rights. A copy of the Statement is attached (Attachment B).

The Amendment Regulation is a legislative instrument for purposes of the *Legislation Act 2003*.

The Act does not impose any conditions that need to be satisfied before the power to make the Amendment Regulation may be exercised.

The Amendment Regulation commences on the day after it is registered.

Details of the Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016

Section 1 – Name of Regulation

This section sets out the name of the regulation as the *Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016* (the Amendment Regulation).

Section 2 – Commencement

This section provides details about when the Amendment Regulation commences.

Section 3 – Authority

This section provides that the Amendment Regulation is made under the *Work Health and Safety Act* (WHS Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Part 1—Amendments relating to licensing of asbestos removalists

Work Health and Safety Regulations 2011

Item [1] – Subregulation 488(1)

This item amends the definition of ‘asbestos removal licence’ so it covers an asbestos removal licence issued under the new provisions, as well as an equivalent licence granted under a corresponding WHS law.

Item [2] – After Division 2 of Part 8.10

This item inserts new ‘Division 3—Licensing process’ that establishes an asbestos licensing regime and deals with related matters. This division is based on the model laws developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. Minor technical and drafting amendments have been made to reflect the Commonwealth’s unique requirements.

Division 3—Licensing process

Regulation 491 Who may apply for a licence

Regulation 491 prescribes who may apply for an asbestos removal licence.

Regulation 492 Application for asbestos removal licence

Regulation 492 sets out the application process for obtaining an asbestos removal licence.

Subregulation(1) requires the application to be made in the matter and form required by the regulator.

Subregulation 492(2) specifies the information that the application must include, for either a Class A or Class B asbestos removal licence.

Subregulation 492(3) provides that the application must be accompanied by the relevant fee (if any), as prescribed in Schedule 2 of the WHS Regulations (see item 4).

Regulation 493 Content of application—Class A asbestos removal licence

Regulation 493 prescribes the additional information that must be included in an application for a Class A asbestos removal licence.

Regulation 494 Content of application—Class B asbestos removal licence

Regulation 494 prescribes the additional information that must be included in an application for a Class B asbestos removal licence.

Regulation 495 of the model provisions is deliberately omitted. In the model provisions, regulation 495 covers content requirements for asbestos assessor licence applications. No provision is made for the Commonwealth regulator to issue these kinds of licences.

Regulation 496 Additional information

Regulation 496 enables the regulator (Comcare) to ask an applicant for more information to support their application. The request must be made in writing and give the applicant at least 28 days to provide the required information.

Subregulation 496(2) deems the application to be withdrawn if the additional information is not provided within the time allowed.

Regulation 497 Decision on application

Regulation 497 requires Comcare to issue an asbestos removal licence if it is satisfied the requirements in subregulation 497(2) are met. If not satisfied, the application must be refused.

Subregulation 497(3) sets out additional grounds for refusing an application.

Subregulation 497(4) requires Comcare to notify the applicant of its decision within 14 days of the decision being made.

If Comcare does not make a decision within 120 days after receiving the application or additional information requested under new regulation 496, Comcare is taken to have refused the application.

A decision to refuse an application under regulation 497 is a reviewable decision (regulation 676).

Regulation 498 Class A asbestos removal licence—regulator to be satisfied about additional matters

Regulation 498 sets out the additional matters Comcare must be satisfied about before a Class A asbestos removal licence may be granted.

Paragraph 498(a) sets out age, qualification and experience requirements for supervisors named in relation to a Class A asbestos removal licence.

Paragraph 498(b) sets out requirements for a ‘certified safety management system’, which is defined by regulation 4.

Regulation 499 Class B asbestos removal licence—regulator to be satisfied about additional matters

Regulation 499 sets out the additional matters Comcare must be satisfied about before a Class B asbestos removal licence may be granted. It sets out age, qualification and experience requirements for supervisors named in relation to a Class B asbestos removal licence.

Regulation 500 Matters to be taken into account

Regulation 500 requires Comcare to take the applicant’s prior history into account in determining a licence application, as specified in the section. The legislative note makes it clear the provision is subject to the Commonwealth’s spent convictions scheme.

Regulation 501 Refusal to grant licence—process

Regulation 501 sets out the process for refusing a licence application. A decision to refuse a licence application is a reviewable decision (regulation 676).

Regulation 502 Conditions of licence

Regulation 502 empowers Comcare to impose any condition on a licence, including those listed in subregulation 502(2).

The legislative note refers to section 45 of the Act, which establishes the duty to meet licensing requirements, including any conditions attaching to the licence.

A decision to impose a condition on a licence is a reviewable decision (regulation 676).

Regulation 503 Duration of licence

Regulation 503 provides that an asbestos removal licence takes effect on the day it is granted and, unless cancelled earlier, expires five years after that day.

Regulation 504 Licence document

Regulation 504 requires Comcare to issue a licence document in accordance with the section, if it grants a licence application.

Regulation 505 Licence document available

Regulation 505 requires a licence holder to keep the licence document available for inspection under the WHS Act. Subregulation 505(2) excuses the licence holder from complying with this requirement in the prescribed circumstances.

Failure to comply with this provision can result in a maximum penalty of \$1,250 for an individual or \$6,000 for a body corporate.

Division 4—Amendment of licence and licence document

Regulation 506 Changes to information

Regulation 506 requires licence holders to notify Comcare in writing about any change to any material particular in any information given to Comcare within 14 days of becoming aware of the change.

Failure to comply with this provision can result in a maximum penalty of \$1,250 for an individual or \$6,000 for a body corporate.

Regulation 507 Change to nominated supervisor

Regulation 507 sets out the process for nominating a new supervisor, or removing a nominated supervisor, for purposes of an asbestos removal licence.

Subregulation 507(2) provides that the nomination of a new supervisor does not take effect until approved by Comcare.

Failure to comply with this provision can result in a maximum penalty of \$1,250 for an individual or \$6,000 for a body corporate.

Regulation 508 Amendment imposed by regulator

Regulation 508 enables Comcare to amend an asbestos removal licence on its own initiative, for example by varying or deleting a licence condition or imposing a new condition.

Subregulations 508(2) and (3) set out the pre-requisites to exercising this power.

A decision to amend a licence is a reviewable decision (regulation 676).

Regulation 509 Amendment on application by licence holder

Regulation 509 enables Comcare to amend an asbestos removal licence on request of the licence holder. Subregulations 509(2) to (5) set out the process for refusing or granting a request.

A decision to refuse an application to amend a licence is a reviewable decision (regulation 676).

Regulation 510 Minor corrections to licence

Regulation 510 allows Comcare to make minor amendments to an asbestos removal licence, like correcting an obvious error or updating an address.

Regulation 511 Regulator to give amended licence to the holder

Regulation 511 applies if Comcare amends a licence and considers the licence document should be up-dated to reflect the change. In these circumstances Comcare must provide the updated licence document to the licence holder within 14 days of deciding to make the change.

Regulation 512 Licence holder to return licence

Regulation 512 enables Comcare to recall a licence document in order to make changes to the document, following an amendment.

Failure to comply with a request to return the licence document within the time specified can result in a maximum penalty of \$1,250 for an individual or \$6,000 for a body corporate.

Regulation 513 Replacement licence document

Regulation 513 requires the licence holder to notify Comcare as soon as practicable if the licence document is lost, stolen or destroyed. It also sets out the process for replacing the licence document.

A refusal to issue a replacement licence document is a reviewable decision (regulation 676).

Regulation 514 Voluntary surrender of licence

Regulation 514 provides that a licence holder may voluntarily surrender the licence document to Comcare. Subregulation 514(2) stipulates that the licence expires on the surrender of the licence document.

Division 5—Renewal of licence

Regulation 515 Regulator may renew licence

Regulation 515 enables Comcare to renew an asbestos removal licence on application by the licence holder. The application must be made before the licence expires (subregulation 516(4)).

Regulation 516 Application for renewal

Regulation 516 sets out the requirements for renewing an asbestos removal licence.

Regulation 517 Provisions relating to renewal of licence

Regulation 517 extends the rules for applying for an asbestos removal licence to renewing a licence, with appropriate modifications. The rules prevent an asbestos removal licence holder from holding more than one licence (i.e. by obtaining another one from another jurisdiction).

Subregulation 517(4) ensures the old licence does not expire while a decision on the application is being made.

A refusal to renew a licence is a reviewable decision (regulation 676).

Regulation 518 Renewal of asbestos removal licence—regulator to be satisfied about certain matters

Regulation 518 requires Comcare to be satisfied about additional matters before an asbestos removal licence may be renewed, relating to supervisors' qualifications and experience. Comcare must also be satisfied that the applicant carried out the relevant licensed asbestos removal work during the term of the licence.

Regulation 519 Status of licence during review

Regulation 519 applies if Comcare gives the licence holder notice of its decision to refuse to renew the licence. It allows for internal review to run its course, by keeping the licence on foot (even if it notionally expires) until the matter is finally resolved, as set out in the section.

Regulation 520 Suspension or cancellation of licence

Regulation 520 sets out the grounds on which Comcare may suspend or cancel an asbestos removal licence.

Subregulation 520(2) clarifies that a licence may be suspended or cancelled if the licence holder does not have a qualified nominated asbestos removal supervisor.

Subregulation 520(4) applies if Comcare suspends or cancels a licence. It allows Comcare to disqualify the licence holder from applying for another licence of the same or similar type.

A decision to suspend or cancel a licence or disqualify the licence holder from applying for a further licence is a reviewable decision (regulation 676).

Regulation 521 Matters taken into account

Regulation 521 specifies the matters that Comcare must take into account in making a decision under regulation 520, including any submissions made by the licence holder and any advice received from a corresponding regulator.

Subregulations 521(2) and (3) require Comcare to take the applicant's prior history into account in making the decision. The legislative note makes it clear the provision is subject to the Commonwealth's spent convictions scheme.

Regulation 522 Notice to and submissions by licence holder

Regulation 522 requires Comcare to give written notice to the licence holder before suspending or cancelling an asbestos removal licence, or disqualifying the licence holder from re-applying.

Paragraph 522(b) requires the regulator to give the licence holder at least 28 days to respond in writing.

Regulation 523 Notice of decision

Regulation 523 sets out the process for suspending or cancelling an asbestos removal licence after the decision has been made, including notice requirements.

Regulation 524 Immediate suspension

Regulation 524 empowers Comcare to suspend an asbestos removal licence immediately and without notice if any of the serious circumstances described in the section exist. This is an important power, designed to ensure work health and safety where concerns about immediate risks to health or safety have been raised. Procedural safeguards are provided for in subregulations 524(2) to (5).

Regulation 525 Licence holder to return licence document

Regulation 525 applies if an asbestos removal licence has been cancelled or suspended. It requires the licence holder to return the licence document to Comcare in accordance with the notice of the decision.

Failure to comply with this provision can result in a maximum penalty of \$1,250 for an individual or \$6,000 for a body corporate.

Regulation 526 Regulator to return licence document after suspension

Regulation 526 requires Comcare to return the licence document to the licence holder within 14 days after the suspension of a licence ends.

Item [3] – Before regulation 529

Regulation 527 Asbestos removal licence register

Regulation 527 requires Comcare to keep a register of asbestos removal licence holders, including details of nominated supervisors for each licence.

Regulation 428 of the model regulations is deliberately omitted. In the model provisions, regulation 428 requires the regulator to keep a publicly available register of asbestos assessor licence holders. No provision is made for the Commonwealth regulator to issue these kinds of licences.

Item [4] – Clause 1 of Schedule 2 (at the end of the table)

This item inserts new provisions in the table of prescribed fees to allow Comcare to charge a fee for the purposes of:

- subregulation 492(3) (application for asbestos removal licence);
- paragraph 513(4)(b) (application for replacement licence document); and
- subregulation 516(3) (application for renewal of asbestos removal licence).

Part 2—Amendments relating to reach stacker licensing

Work Health and Safety Regulations 2011

Item [1] – After subregulation 83(1)

This item extends mutual recognition arrangements for reach stacker licences in certain circumstances. It replaces transitional arrangements in regulation 727 which expire on 1 January 2017 with permanent arrangements.

New subregulation 83(1A) means that a non-slewing crane licence is acceptable for high risk work involving a reach stacker for purposes of the Commonwealth laws—but only if the relevant state or territory authorises this, and the licence is being used in accordance with the terms and conditions under which it was granted.

Item [2] – Subregulation 83(2)

This item is consequential upon the inclusion of new subregulation 83(1A).

Item [3] – Division 4.5 of Part 4 of Chapter 12

This item repeals the existing transitional arrangements relating to reach stacker licences on 1 January 2017, which coincides with the expiry of the transitional arrangements.

Part 3—Other amendments

Work Health and Safety Regulations 2011

Item [1] Amendments of listed provisions—repeals

This item repeals spent transitional provisions. These amendments no longer operate and their repeal does not alter the operation of the WHS Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016

This Disallowable 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 Disallowable Legislative Instrument

The *Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016* (the Amendment Regulation) empowers the Commonwealth WHS regulator, Comcare, to administer asbestos removal licences within the Comcare scheme and recognise appropriate state and territory high risk work licenses for reach stacker operators. The Amendment Regulation also repeals spent transitional provisions.

Licensing asbestos removal work

Chapter 8 of the Work Health and Safety Regulations (WHS Regulations) deals with asbestos. Unlike the model laws, however, the Commonwealth's Regulations do not have a licensing scheme for asbestos removal work. That is because under current arrangements states and territories—but not the Commonwealth—administer licensing schemes for asbestos removal.

These arrangements worked well until some private businesses covered by the Comcare scheme sought to carry out this work. The Amendment Regulation includes the model licensing provisions for asbestos removal work in the WHS Regulations. The amendments enable the Commonwealth's regulator, Comcare, to administer an asbestos removal licensing scheme for the Commonwealth jurisdiction.

Reach stacker licences

Operating a reach stacker—a vehicle used to handle cargo containers at ports—is a class of high risk work under the WHS laws: see section 43 of the Act and Part 4.5 of the WHS Regulations.

Most, but not all, state and territory jurisdictions require reach stacker operators to hold a reach stacker licence under their WHS laws, subject to any transitional arrangements. Victoria and Western Australia require persons operating a reach stacker to hold a different class of licence.

Employees in the Comcare scheme mostly obtain their high risk licences from the state or territory in which those employees reside. This presents difficulties for employees operating reach stackers in Victoria or Western Australia, who are required under the Commonwealth WHS Regulations to hold a reach stacker licence but cannot obtain one from their state WHS regulator.

Transitional arrangements for reach stacker licences expire on 1 January 2017: reg 727 of the WHS Regulations. From then, all reach stacker operators covered by the Comcare scheme will be required to hold a reach stacker licence, no matter where they are based across Australia.

The Amendment Regulation accommodates state-based differences in the licensing scheme. It means that reach stacker operators in the Comcare scheme will be required to hold the licence required to operate a reach stacker under the corresponding WHS laws and regulations in the state or territory in which they are working.

Spent transitional provisions

Chapter 12 of the WHS Regulations contains a range of transitional provisions that facilitated the implementation of the model WHS laws. The Amendment Regulation repeals transitional provisions that have ceased to have effect due to the passage of time.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

The amendments to insert licensing provisions for asbestos removal do not affect any pre-existing licensing requirements around the country. They enable Comcare to issue asbestos removal licences to businesses within its scheme, which are currently unable to obtain licences that would enable them to perform asbestos removal work from Comcare or elsewhere.

The amendments for reach stacker licences are administrative in nature. They accommodate differences in reach stacker licensing arrangements in Victoria and Western Australia, enabling reach stacker operators in the Comcare scheme to operate reach stackers in all states and territories with an appropriate high risk work licence.

The amendments to remove spent transitional regulations are administrative in nature.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.