

Australian Capital Territory

Work Health and Safety Amendment Regulation 2020 (No 1)

Subordinate law SL2020–27

made under the

Work Health and Safety Act 2011, section 276 (Regulation-making powers)

EXPLANATORY STATEMENT

PURPOSE AND OUTLINE

The purpose of this Regulation is to amend the *Work Health Safety Regulation 2011* (WHS Regulation) to adopt recent amendments made to the national model WHS regulations and make other amendments.

The WHS Regulation adopts the nationally agreed model WHS laws and sets out the framework for securing the health and safety of workers and workplaces in the Territory.

This Amendment Regulation makes amendments to the WHS Regulation to:

- facilitate the adoption of the recent republication of exposure limits published by Safe Work Australia in the *Workplace Exposure Standard for Airborne Contaminants* as agreed by jurisdictions under the model WHS framework;
- align the WHS Regulation with recent amendments to the blood lead level thresholds adopted in the nationally agreed model WHS laws;
- align the WHS Regulation with technical amendments to diving provisions to correct outdated references to training courses as adopted in the nationally agreed model WHS laws; and
- establish a public register of infringement notices issued on WHS licence holders under the WHS laws.

The objectives of the above amendments are to ensure the health and safety standards adopted in the Territory maintain alignment with the nationally agreed model WHS laws and current evidence and information on health risks.

CONSISTENCY WITH HUMAN RIGHTS

This section provides an overview of the human rights which may be engaged by the Regulation Amendment, together with a discussion of the reasonableness of any possible limitations.

Rights engaged

Broadly, the Amendment Regulation may engage and *limit* the following *Human Rights Act 2004* (HR Act) rights:

- section 12 – right to privacy; and
- section 22 – rights in criminal proceedings.

Section 28 (1) of the HR Act provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28 (2) provides that, in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purposes; and
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The limits that are placed on human rights by the Amendment Regulation are reasonable and justifiable in a free and democratic society. An assessment of the Regulation's impact on relevant provisions of the HR Act, against all factors in section 28 (2), is provided below.

Detailed human rights discussion

Section 22 – rights in criminal proceedings – strict liability offences

Section 22 (1) of the HR Act states that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

The nature of the right affected and the limitation (s28 (2) (a) and (c))

The Amendment Regulation introduces a new licence condition. Namely, clauses 5, 27 and 28, apply a new licence condition on those who hold a licence under the WHS Regulation for:

- high risk work;
- class B asbestos removal; and
- a major hazard facility.

Specifically, the new licence condition will make it a condition on the above licence holders that should the licensee be issued with an infringement notice under the

Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011 for an offence under the WHS laws, information about the infringement notice must be included in a public register in accordance with section 698A.

Like any other licence condition imposed under the WHS Regulations, non-compliance is an offence on a PCBU under section 45 of the WHS Act. As with all offences under the WHS Act, section 12A applies strict liability to each physical element of an offence.

Strict liability offences engage the right to be presumed innocent under section 21(1) of the HR Act by removing the fault elements of an offence which, in turn, requires the defendant to prove mistake of fact, (a defence to all ACT offences under the Criminal Code 2002 (the Code)), or other defences available under the Code for strict liability offences.

Strict liability can be reasonably justified in certain circumstances:

- strict liability offences should only be used where a person knows, or ought to know, their legal obligations;
- strict liability offences must be relevant, rational and proportionate to their objective; and
- examples of where strict liability offences are considered to be appropriate include regulatory regimes such as work health and safety, to support the integrity of the legislation and regulations, and where offences are minor with no custodial penalty.

The importance of the purpose of the limitation (s28 (2) (b))

The purpose of the limitation is to support compliance with WHS obligations and duties by PCBUs and act as a better deterrence tool.

The strict liability offence attaching to the new licence condition arises in a regulatory context where, for reasons such as worker and public safety, and in the interest of ensuring that regulatory schemes are observed, the sanction of a criminal penalty is justified. The offence also arises in a context where a PCBU (licence holder) can be reasonably expected, because of the regulatory scheme they participate in, to know the requirements of the law. As such, the mental or fault element can justifiably be excluded.

Legitimate purpose (s28 (2) (b)), rational connection (s28 (2) (d)) and proportionality (s28 (2) (e))

The application of a licence condition is a necessary regulatory tool to support compliance with the WHS laws by allowing the publication of infringement notices issued for non-compliance with WHS laws. The publication of information about a licence holder's non-compliance with their WHS obligations and duties as part of a condition of their licence will act as an important deterrence to systemic and repeat non-compliance.

Given the importance of ensuring compliance with WHS laws that protect the health and safety of workers and the community, and that there are unlikely to be circumstances in which the PCBU would breach the new licence conditions, the limitation is considered to be reasonable and proportionate in a regulatory scheme to support the health and safety of workers and the public.

Section 12 (Privacy and reputation) – establishing a licence register

Section 12 of the HR Act protects the right of individuals not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily. It further provides to protect the right of individuals not to have their reputation unlawfully attacked.

The nature of the right affected and the limitation (s28 (2) (a) and (c))

The right to privacy may be engaged by the Amendment Regulation in some instances where the PCBU is an individual.

Specifically, clause 29 of the Amendment Regulation establishes a licence register for the purpose of allowing the publication of information about an infringement notice issued to a PCBU under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011* for non-compliance with WHS laws. In some instances the PCBU may be an individual, which may limit the individual's right to privacy.

The public licence register will only apply to licensees under the WHS Regulation, specifically, the holder of a:

- high risk work licence;
- asbestos assessor licence; and
- major hazard facility licence.

The information that is included on the register is limited to the business details of the licensee, namely:

- the licensee's registered business name;
- the trading name – if different from the business name;
- the licensee's ABN or ACN; and
- the expiry date for the licence.

Importantly, the licence register will include information about an infringement notice given to a licensee for a WHS non-compliance. This information is publishable in accordance with guidelines to be determined via notifiable instrument by the Minister.

The importance of the purpose of the limitation (s28 (2) (b))

The purpose of the WHS Act is to protect the health and safety of workers and the community.

To achieve this, it is necessary to establish effective compliance and enforcement mechanisms. Licence holders under the WHS laws, in addition to the general duties and obligations on PCBUs, participate in a regulatory scheme that is responsive to the higher risks associated with those activities. In this way, by virtue of them holding a licence, they are expected to know their WHS obligations and duties.

Legitimate purpose (s28 (2) (b)) and rational connection (s28 (2) (d)) and proportionality (s28 (2) (e))

The purpose of establishing a licence register for the publication of information about WHS infringement notices issued to PCBUs (licence holders) is to better support compliance with the PCBUs health and safety duties to workers and the community. It serves as an important and public deterrent to PCBUs for non-compliance with WHS laws. Specifically, it would deter systemic and repeat non-compliance by licence holders.

The objective of better WHS compliance is to create safer workplaces and thereby reduce the number of workplace injuries in the ACT.

The limitation is reasonable and justified in so far as it would:

- establish a public facing deterrence tool for non-compliance with WHS laws applying to the PCBU, in particular, it would deter systemic and repeat non-compliance with WHS laws;
- promote a behaviour of compliance with work health and safety duties; and
- allow the publication of information about an infringement notice in accordance with guidelines determined by the Minister which would set out when offences would be published (ie after an appeal period ends); the type of offences that may be published, the length of time they are to remain on the register and provisions for their removal.

Work Health and Safety Amendment Regulation 2020 (No. 1)

CLAUSE NOTES

Clause 1 Name of Regulation

This clause provides that the name of the regulation is the *Work Health and Safety Amendment Regulation 2020 (No 1)*.

Clause 2 Commencement

This clause provides for the commencement of this regulation, specifically:

- the exposure standard amendments in clauses 4 and 30 will commence on 1 July 2020;
- the technical amendments to the blood level thresholds and diving provision corrections in clauses 6 to 26 and 31 will commence on 3 August 2020; and
- the establishment of the public register for infringement notices issued to licence holders in clauses 5 and 27 to 29 will commence on 1 February 2021.

Clause 3 Legislation amended

This clause provides that the regulation amends the *Work Health and Safety Regulation 2011*.

Clause 4 New section 48A

This clause amends the *Work Health and Safety Regulation 2011* by inserting a new section 48A to allow the Minister to declare, via notifiable instrument, exposure standards in the *Workplace Exposure Standard for Airborne Contaminants* for this regulation (other than part 4.1 (Noise)). The *Workplace Exposure Standard for Airborne Contaminants* (workplace exposure standards) is published by Safe Work Australia on its website.

This change will allow the publication of the workplace exposure standards as updated by Safe Work Australia to be adopted in the ACT by declaration of the Minister. In this way, the ACT can apply a transition period to changes in the workplace exposure standards as and when they are adopted in the ACT.

Clause 5 New section 91A (2A)

This clause amends the *Work Health and Safety Regulation 2011* by inserting a new section 91A (2A) to provide that a licence under this division includes a condition that the if the licensee is issued with an infringement notice under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011*, information

about the infringement notice be included in a public in accordance with section 698A.

Clause 6 Section 171 heading

This clause amends the title of section 171 to “Competence of worker – general diving work – qualifications –Act, s 44”.

Clause 7 Section 171 (2)

This clause amends section 171(2) by omitting “limited diving work” and substituting “limited scientific diving work”. This amendment corrects an accidental omission of the word “scientific”.

Clause 8 Section 171 (3)

This clause omits “AS/NZ 4005.2:2000 (Training and certification of recreational divers) or” from section 171 (3). Recreational diving standard AS/NZ 4005.2 has been withdrawn by Standards Australia. In the absence of a clear equivalent, the relevant competencies for general diving work are specified in the AS/NZS 2815 (Training and certification of occupational divers).

Clause 9 Section 171 (3), note

This clause substitutes the note after subsection (3) and is consequential on the amendment in clause 8.

Clause 10 Section 171A heading

This clause amends section 171A heading by substituting “Competence of worker – general diving work – knowledge and skill –Act, s 44”, to reflect that section 171A requires that all persons carrying out general diving work must have acquired certain knowledge and skill.

Clause 11 Section 171A (1)

This clause amends subsection 171A(1) by replacing the words “In addition to regulation 171, a person”, with the words “A person”. Subsection 171A(1) requires that all persons carrying out general diving work must have acquired certain knowledge and skill. This amendment clarifies that the knowledge and skill is not always additional to the qualification requirement for general diving work in section 171(1).

Clause 12 Section 171A (2)

This clause omits existing subsection 171A(2). The wording of existing section 171A(2) exempted incidental diving work and limited scientific diving work

from the knowledge and skill requirement in section 171A(1). This was an error and inconsistent with sections 172 and 173, which specifically apply the requirements in section 171A to incidental diving work and limited scientific diving work.

Clause 13 Section 173 (1) and note

This clause provides that a person must not carry out limited scientific diving work unless they have the training, qualification or experience referred to in section 171A, and if the person is not permanently resident in Australia – relevant diving experience, including relevant diving experience obtained outside Australia.

Clause 14 Sections 183 and 184

This clause updates diving standards for high risk diving work by replacing references to “AS/NZS 2299.1:2007” with the most up-to-date standard “AS/NZS 2299.1:2015”.

Clause 15 Section 319 (4)

This clause omits subsection (2) (b) (ii) and substitutes it with subsection (3) (b) (ii).

Clause 16 Section 394 (a)

This clause provides for amendments to replace the blood lead levels expressed in sub-regulation 394(1) by omitting “10µg/dL (0.48µmol/L)” and substituting “5µg/dL (0.24µmol/L)”. These new values represent safer blood lead levels identified by current toxicological and epidemiological evidence. The general effect of this regulation is to lower the threshold at which PCBUs have additional duties toward workers undertaking ‘lead risk work’.

Clause 17 Section 394 (b)

This clause provides for amendments to replace the blood lead levels expressed in sub-regulation 394(1) by omitting “30µg/dL (1.45µmol/L)” and substituting “20µg/dL (0.97µmol/L)”. These new values represent safer blood lead levels identified by current toxicological and epidemiological evidence. The general effect of this regulation is to lower the threshold at which PCBUs have additional duties toward workers undertaking ‘lead risk work’.

Clause 18 Section 407 (1) (a) (i)

This clause provides for amendments to replace the blood lead levels that determine the required frequency of biological monitoring of workers by omitting “30µg/dL (1.45µmol/L)” and substituting “10µg/dL (0.48µmol/L)”. The effect of this amendment is to lower the threshold which activates a PCBUs obligation to conduct biological monitoring.

Clause 19 Section 407 (1) (a) (ii)

This clause provides for amendments to replace the blood lead levels that determine the required frequency of biological monitoring of workers by omitting “30µg/dL (1.45µmol/L) or more but less than 40µg/dL (1.93µmol/L)” and substituting with “10µg/dL (0.48µmol/L) or more but less than 20µg/dL (0.97µmol/L)”. The effect of this amendment is to lower the threshold which activates a PCBUs obligation to conduct biological monitoring.

Clause 20 Section 407 (1) (a) (iii)

This clause provides for amendments to replace the blood lead levels that determine the required frequency of biological monitoring of workers by omitting “40µg/dL (1.93µmol/L)” and substituting with “20µg/dL (0.97µmol/L)”. The effect of this amendment is to lower the threshold which activates a PCBUs obligation to conduct biological monitoring.

Clause 21 Section 407 (1) (b) (i)

This clause provides for amendments to replace the blood lead levels that determine the required frequency of biological monitoring of workers by omitting “10µg/dL (0.48µmol/L)” and substituting with “5µg/dL (0.24µmol/L)”. The effect of this amendment is to lower the threshold which activates a PCBUs obligation to conduct biological monitoring.

Clause 22 Section 407 (1) (b) (ii)

This clause provides for amendments to replace the blood lead levels that determine the required frequency of biological monitoring of workers by omitting “10µg/dL (0.48µmol/L)” and substituting “5µg/dL (0.24µmol/L)”. The effect of this amendment is to lower the threshold which activates a PCBUs obligation to conduct biological monitoring.

Clause 23 Section 415 (1) (a) (i)

This clause provides for amendments to replace the blood lead levels by omitting “50µg/dL (2.42µmol/L)” and substituting with “30µg/dL (1.45µmol/L)”. The effect of this amendment is to lower the threshold at which a PCBU must remove a worker from undertaking lead risk work.

Clause 24 Section 415 (1) (a) (ii) and (iii)

This clause provides for amendments to replace the blood lead levels by substituting “(ii) for females not of reproductive capacity – 10µg/dL (0.48µmol/L)”. The effect of this amendment is to lower the threshold at which a PCBU must remove a worker from undertaking lead risk work. The amended blood lead levels also apply to

females who are pregnant or breastfeeding. This clause provides to omit paragraph 415(1)(a)(iii).

Clause 25 Section 417 (3) (a) (i)

This clause provides for amendments to replace the blood lead levels by omitting “40µg/dL (1.93µmol/L)” and substituting with “20µg/dL (0.97µmol/L)”. The amendment has the effect of lowering the threshold at which workers may return to carrying out lead risk work after being removed under Regulation 415.

Clause 26 Section 417 (3) (a) (ii)

This clause provides for amendments to replace the blood lead levels by omitting “10µg/dL (0.48µmol/L)” and substituting with “5µg/dL (0.24µmol/L)”. The amendment has the effect of lowering the threshold at which workers may return to carrying out lead risk work after being removed under Regulation 415.

Clause 27 New section 502 (3)

This clause inserts a new section at 502(3). A licence under this part includes a condition that the licensee agree that information about an infringement notice issued against the licensee under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011* be included on a public register in accordance section 698A.

Clause 28 New section 584 (3)

This clause inserts a new section at 584 (3). A licence under this part includes a condition that the licensee agree that information about an infringement notice issued against the licensee under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011* be included on a public register in accordance section 698A.

Clause 29 New part 11.2A

This clause inserts a new part 11.2A to establish a public register of licence holders that will include information about an infringement notice issued to a licensee under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011*, in accordance with a guideline determined by the Minister.

Clause 30 Dictionary, definition of *exposure standard*

This clause provides for the definition of “exposure standard” as “except in part 4.1 (Noise), means an exposure standard declared by the Minister under section 48A.” and is consequential on the new section in clause 4.

Clause 31 Dictionary, definition of *fitness criteria* and note

This clause provides for the definition of “fitness criteria” to omit “AS/NZS 2299.1:2007” and substitute with “AS/NZS 2299.1:2015”.