

Work Health and Safety Amendment Regulation 2022 (No 2)

Subordinate law SL2022–13

made under the

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

EXPLANATORY STATEMENT

OVERVIEW OF THE REGULATION

The Work Health and Safety Amendment Regulation 2022 (No 2) (Amendment Regulation) makes a number of amendments to the *Work Health and Safety Regulation 2011* (WHS Regulation) in relation to chapter 7A (Crystalline Silica).

Respirable Crystalline Silica

Crystalline silica is a natural mineral found in construction materials such as concrete, bricks, tiles, mortar, and engineered stone. Dust containing respirable crystalline silica (silica) particles is commonly called silica dust. Activities such as cutting, grinding, sanding, drilling, loading or demolishing products that contain silica can generate respirable particles of crystalline silica dust that may not be visible and are small enough to breathe into the lungs. The dust may be harmful when inhaled into the lungs over a long period of time at low to moderate levels, or short periods at high levels.

Strengthening work safety laws to address silica dust exposure to protect workers is a national and local priority. In the ACT, Silica dust reforms are part of the legislative reform agenda outlined in the Parliamentary Agreement for the 10th Legislative Assembly of the ACT.

Since 14 July 2022, the WHS Regulation was amended to provide a dedicated chapter for crystalline silica and introduced general obligations applying to silica containing materials and specific obligations applying to silica dust work.

Specifically, the *Work Health and Safety Amendment Regulation 2022* (first amendment regulation) amended the WHS Regulation to introduce:

- an uncontrolled silica dust dry-cutting ban for certain materials containing crystalline silica (silica containing materials), including engineered stone; and
- mandate silica dust awareness training for certain occupations at higher risk of exposure to silica dust.

The uncontrolled silica dust dry-cutting ban required persons conducting a business or undertaking to have in place control measures when cutting silica containing materials of:

- a continuous flow of water over the cutting area; and
- at least one other control measure.

A temporary exemption was issued by the ACT's work safety regulator, the Work Health and Safety Commissioner, in response to issues raised by industry representatives after the first amendment regulation was made. This exemption was limited to silica containing materials other than engineered stone such that when cutting those products the requirement to use a continuous feed of water was not applied.

This Regulation is being made to address process where it is not reasonably practicable to use a continuous flow of water as a control measure.

Specifically, the *Work Health and Safety Amendment Regulation 2022 (No 2)* will amend the provisions in chapter 7A of the WHS Regulation to:

- allow the use of alternative water suppression technologies in circumstances where continuous flow of water for dust suppression is impracticable for processes used to cut crystalline silica containing materials, other than engineered stone; and
- allow for an infringement notice where cutting is not controlled; and
- clarify the meaning of what is a 'mechanical process' in line with the intention that it does not cover processes using hand held manually powered plant or tools.

CONSULTATION ON THE PROPOSED APPROACH

Industry stakeholders, unions and WorkSafe ACT have been consulted in the development of this Amendment Regulation.

CONSISTENCY WITH HUMAN RIGHTS

All amendment regulations must be compatible with the *Human Rights Act 2004* (HRA). The compatibility of this Amendment Regulation with the HRA was considered during its development.

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

Section 28(2) of the HRA contains a framework that is used to determine the acceptable limitations that may be placed on human rights.

The limitations in this Amendment Regulation on rights protected in the HRA are considered demonstrably justifiable pursuant to section 28 of the HRA.

An assessment of the Amendment Regulation against the rights protected by the HRA is provided below. It is relevant that this Amendment Regulation makes adjustments to existing sections to which strict liability has been applied to modify the required controls relating to the use of a wet dust suppression method when managing the risk of exposure to silica dust from work or near work activities being undertaken involving the mechanical cutting of crystalline silica. To this extent the assessment of human rights engaged as outlined in the Explanatory Statement for the *Work Health and Safety Amendment Regulation 2022 (No 1)* applies similarly to this Amendment Regulation as provided below.

Rights engaged

The Amendment Regulation engages and promotes the right to life under section 9 of the HRA.

The Amendment Regulation engages and promotes the right to work under section 27B of the HRA.

The Amendment Regulation also engages and may limit rights in criminal proceedings under section 22 of the HRA.

Rights Promoted

Respirable Crystalline Silica – Uncontrolled dry cutting ban

The Regulation engages and promotes the right to life (section 9) and the right to work (section 27B). The rights to life liberty and security impose duties on the ACT Government to protect life and take reasonable measures to prevent injury in workplaces, while the right to work guarantees just and favourable conditions of work, including safe and healthy working conditions.

Through the Amendment Regulation, the ACT Government is taking positive steps to satisfy its duty to protect life and prevent injury and ensure healthy working conditions

by introducing an offence for the uncontrolled dry cutting of silica containing materials at workplaces.

The offence acts as a deterrent to poor work safety practices and encourages PCBU's to dedicate resources and attention to workplace safety.

Rights Limited – Rights in criminal proceedings – strict liability and the presumption of innocence

1. Nature of the right and the limitation (s28(a) and (c))

Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The clarifying components of the Amendment Regulation are taking positive steps to protect the health and safety of workers and prevent workplace injuries, the Regulation potentially engages and limits the right to the presumption of innocence through the application of strict liability provisions as per section 12A of the *Work Health and Safety Act 2011* which apply to elements of the offence provisions in Chapter 7A Crystalline silica of the WHS Regulation, specifically Clause 6 Section 418B of the Amendment Regulation.

Strict liability provisions generally engage and limit the right to be presumed innocent as they remove the need for prosecution to prove an accused person's fault (i.e. the mental element of intent or recklessness) in relation to an offence generally or for particular elements of an offence. As a result, this reverses the onus in criminal proceedings and requires an accused to prove a defence for those elements to which strict liability applies, such as a mistake of fact under the *Criminal Code 2002*.

2. Legitimate purpose (s28(b))

The legitimate purpose of the strict liability provision is to support enforcement of the measures in the regulation to restrict/prohibit dry cutting of silica containing materials, which aims to protect the health and safety of workers. The penalty that may be imposed on commission of the offence will act as a deterrent against PCBU's providing unsafe workplaces and work cultures. The *Work Health and Safety Act 2011* (WHS Act) imposes health and safety duties on all PCBU's in the Territory, as well as duties to their officers and workers. All PCBU's are required to be aware of their health and safety duties under the WHS Act and it is reasonable for the law to assume this is the case in the context of a workplace exposure to silica containing materials.

3. Rational connection between the limitation and the purpose (s28(d))

The offence elements applying strict liability have been considered during the development of the Amendment Regulation. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. The rationale for its use in the Regulation is that people who owe work safety duties such as PCBU's, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to

workers and the wider public. In particular, where an accused can reasonably be expected, because of his or her professional involvement, to know the requirements of the law, the mental (or fault) element can justifiably be excluded. Accordingly, strict liability offences are applied so that every relevant person complies with their obligations at all times and acts appropriately to secure the health and safety of workers and others at the workplace.

4. Proportionality (s28 (e))

Given the serious health implications exposure to silica containing materials may have on workers, the application of strict liability is necessary and proportionate to ensure a culture of safe work practices. It is not considered that there are any less restrictive means reasonably available to achieve the purpose of addressing the risks that arise from uncontrolled dry cutting of silica containing materials, and encouraging proactive work health and safety compliance is far more difficult to achieve without the use of strict liability offences. Strict liability clearly identifies the essential elements that form part of the regulatory framework that encourage PCBU's to maintain a workplace that is free from harm or injury.

The application of strict liability is reasonable to protect the health and safety of workers. Strict liability is only applied to particular elements of the uncontrolled dry cutting of silica containing materials offence under Section 418B of the Regulation. This Amendment Regulation clarifies that a PCBU must not direct or allow a worker to cut material containing crystalline silica with a power tool or use another mechanical process to cut the material unless a combination of control measures are in place. It ensures those who hold responsibility for a health or safety duty uphold that responsibility and cannot escape liability by claiming ignorance of the duty or ignorance of the effect of their conduct. The defence of mistake of fact as provided by the *Criminal Code 2002* remains available to any accused for any strict liability provisions. The requirement to which the offence applies is not burdensome or out of alignment with the WHS framework and relates to ensuring the safety of workers as well as the broader ACT community.

The application of strict liability to uncontrolled dry cutting and to PCBU's who do not take all reasonably practicable measures to address exposure risks associated with silica containing materials, complements the existing scheme regulating WHS and is supported by increasing evidence of the substantial risk of inhalation of silica dust.

The application of strict liability and the penalties imposed are in line with those applied to asbestos duties under the WHS Regulation. The penalty amount applied is also consistent with penalties applied for breach of duty relating to asbestos under chapter 8 of the WHS regulation. The strict liability offence applied in the silica chapter of the regulation acts as an incentive for duty holders and officers to observe their duties under the regulation.

The Regulation places the least restrictive limitation on the right to presumption of innocence, as it does not apply strict liability to information that is known by an accused, and that may be revealed to prove or disprove the defence.

CLAUSE NOTES

Work Health and Safety Amendment Regulation 2022 (No 2)

Clause 1 Name of regulation

Clause 1 provides for the name of regulation as the Work Health and Safety Amendment Regulation 2022 (No 2).

Clause 2 Commencement

Clause 2 provides for the commencement of the Amendment Regulation.

Specifically, the Amendment Regulation (other than schedule 1) is to commence on the day after notification day.

In relation to the commencement of the Amendment Regulation under subsection (1) in clause 1, the operation of clause 4 inserting section 418BA and clause 6 implements a transitional period for silica containing materials other than engineered stone.

Schedule 1 commences immediately after the commencement of the Work Health and Safety Amendment Regulation 2022 (No 1), schedule 1.

Clause 3 Legislation amended

Clause 3 sets out the legislation amended by the Amendment Regulation.

Clause 4 Sections 418A and 418B

This clause substitutes section 418A to include new definitions for *additional crystalline silica control measure*, *mechanical process* and *wet suppression dust method*.

This clause also substitutes section 418B (Uncontrolled dry cutting of material containing crystalline silica) to allow other wet dust suppression methods to be used for silica containing materials other than engineered stone.

This clause further includes a transitional provision by inserting section 418BA to continue the arrangements for PCBUs to whom the *Work Health and Safety (Silica Dust Uncontrolled Dry-Cutting Prohibition Regulator Transition) Exemption 2022 (No 1)* (NI2022-349) applied. The transition period expires two weeks after it commences.

Clause 5 Section 418C (b) (i)

This clause substitutes section 418C (b) (i) to include alternative wet dust suppression methods as a control measure in place of a continuous feed of water if that is not reasonably practicable for silica containing materials other than engineered stone.

Clause 6 New Section 418CA

Similar to the new provision section 418BA in clause 4, this clause inserts a transitional provision to continue the arrangements for PCBUs to whom the *Work Health and Safety (Silica Dust Uncontrolled Dry-Cutting Prohibition Regulator Transition) Exemption 2022 (No 1)* (NI2022-349) applied. The transition period expires two weeks after it commences.

Clause 7 Dictionary, new definition of *additional crystalline silica control measure*

This clause inserts in the dictionary the definition of *additional crystalline silica control measure*.

Clause 8 Dictionary, definitions of *Class H vacuum cleaner* and *Class M vacuum cleaner*

This clause omits these definitions as they are now defined for the purposes of section 418A.

Clause 9 Dictionary, new definition of *engineered stone*

Clause 9 includes the definition of *engineered stone* in chapter 7A in the dictionary.

Clause 10 Dictionary, definition of *local exhaust ventilation system*

This clause omits this definition as it is now defined for the purposes of section 418A.

Clause 11 Dictionary, new definitions of *mechanical process* and *wet dust suppression method*

This clause inserts definitions for *mechanical process* and *wet dust suppression method* in the dictionary.

Schedule 1 Other amendments

Schedule 1 is consequential on and replicates the changes made to chapter 7A in clauses four to six. This clause is required due to the commencement of schedule 1 of the *Work Health and Safety Amendment Regulation 2022 (No 1)* on 1 July 2023.