Occupational Health and Safety (General) Regulation 2007

SL 2007-36

Regulatory Impact Statement

Prepared in accordance with the
***Legislation Act 2001* s 34**

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1. Introduction

Section 229 of the *Occupational Health and Safety Act 1989* (the OHS Act) vests power in the Executive to make regulations in relation to any matter affecting, or likely to affect, the occupational health and safety of employees. The Executive made the Occupational Health and Safety (General) Regulation 2007 (the Regulation) on **dd** October 2007.

Section 34 of the *Legislation Act 2001* provides that the Minister must arrange for a regulatory impact statement (RIS) to be prepared for a subordinate law if it is likely to impose appreciable costs on the community, or part of the community. This RIS is prepared for the Regulation. A copy of the Regulation is in Appendix 2.

Section 35 of the *Legislation Act 2001* sets out the requirements for the content of a RIS prepared to meet the requirement under section 34 of that Act. A copy of these content requirements is in Appendix 2. A brief assessment of the consistency of the Regulation with the scrutiny principles (required by the Legislation Act paragraph 35(h)) is in Appendix 3.

2. The current regulatory environment

The ACT regulatory environment

The purpose of the OHS Act is to promote and improve standards of occupational health, safety and welfare, and to provide for related purposes.

The regulation-making power in section 229 of the Act has resulted in the following regulations made under the OHS Act applying to workplaces in the ACT–

- Occupational Health and Safety Regulation 1991 which includes provisions requiring the reporting of dangerous occurrences, the keeping of records, and training for workplace health and safety representatives;
- Occupational Health and Safety (Manual Handling) Regulation 1997 which requires employers and people in control of a working environment to take all reasonably practicable steps to ensure that activities requiring a person to lift or shift an object are safe; and
- Occupational Health and Safety (Certification of Plant Users and Operators) Regulation 2000 which establishes a system of certification of competency and licensing for people operating plant and machinery.

The Regulation reflects the general safety duties imposed under section 37 of the Act, replicates the content of the Occupational Health and Safety Regulation 1991 (and repeals it), and will require that facilities necessary to health and safety are made available at the workplace and that particular safety measures are undertaken in relation to certain workplace processes and situations.

The national regulatory environment

The International Labour Oganisation's Protocol C155 of 2002 provides for the adoption of a coherent national occupational safety and health policy, as well as action to be taken by governments and within enterprises to promote occupational safety and health and to improve working conditions. The Protocol calls for the establishment and periodic review of requirements and procedures for the recording and notification of occupational accidents and diseases, and for the publication of related annual statistics. Protocol C155 of 2002 was ratified by Australia on 23 March 2004.

The ACT is signatory to the *National Occupational Health and Safety Strategy 2002 – 2012* (the National Strategy). This is a framework developed by the National Occupational Health and Safety Commission (the predecessor of the Australian Safety and Compensation Council) for sustained and substantial improvement in Australia's occupational health and safety performance. The National Strategy was developed in a collaboration of the Federal Government, all State and Territory Governments, and the Australian Council of Trades Union and the Australian Chamber of Commerce and Industry. It sets a ten-year target for improvement in occupational health and safety standards, identifies five national priority areas and focuses assistance within six high-risk industry sectors.

Under the National Strategy Australian Governments have agreed to develop and implement more effective OHS interventions. It is agreed that the best results are achieved by identifying and applying best practice interventions that include the best mix of information, assistance, regulation, compliance, enforcement and incentives.

National standards relating to confined spaces and noise and hearing protection developed by the National Occupational Health and Safety Commission
have been adopted under section 206 of the OHS Act as approved Codes of Practice. Codes of Practice are not enforceable; they provide guidance as to the means of compliance with statutory obligations. The national scheme is for agreed standards to be incorporated into the statutory regime of each Australian jurisdiction. The Regulation implements this part of the national scheme in respect of the confined spaces and noise and hearing protection standards and provides a vehicle for the incorporation of model regulations and other agreed standards and codes.

3. Policy objectives of the Regulation and reasons for them

Relevance and coverage of the existing regulation

The body of regulations currently supporting the OHS Act are underdeveloped and technically outdated. They do not apply to all ACT workplaces. The principal occupational health and safety laws of all other Australian jurisdictions are supported by well-developed bodies of regulations covering a range of general workplace and hazard-specific controls and processes.

Further, New South Wales, Queensland, South Australia and Western Australia have developed consolidated health and safety regulations. Victoria is currently seeking comment on a proposed Occupational Health and Safety Regulations 2007 intended to consolidate the existing occupational health and safety regulations of that jurisdiction.

The Regulation will provide the first step in consolidating the ACT occupational health and safety regulations and is intended to be the instrument for the future incorporation of national codes and standards into the ACT statutory scheme.

In most Australian jurisdictions, early laws regulating the safe use of boilers, pressure vessels, scaffolding, lifts and cranes and other plant and machinery have been repealed and provision made for their regulation under occupational health and safety laws. In the ACT important aspects of work and plant safety continue to be regulated under the *Scaffolding and Lifts Act 1912* and *Machinery Act 1949*. The Acts and the regulations made under them are technically outdated, prescriptive, and do not conform to the performance-based standards considered to be best practice in occupational health and safety law.

The Regulation is the first stage of a plan to consolidate the occupational health and safety regulations into a 'general' regulation that, in due course, will provide for the safe use of machinery, plant and construction safety matters and the regulation of hazardous workplace situations and processes, and allow for the statutory regulation of other workplace safety matters as they arise.

The Regulation will provide for workplace amenities and the management of hazards in certain processes and situations, and for the matters provided for in the Occupational Health and Safety Regulation 1991.

National consistency and the national reform agenda

The signatories to the National Strategy undertook to share a responsibility for ensuring that Australia's performance in work-related health and safety is continuously improved. In that it implements a comprehensive and systematic approach to occupational health and safety risk management, the Regulation is a major step in the improvement of the occupational health and safety laws of the Australian Capital Territory.

The ACT is a signatory also to the Council of Australian Governments' (COAG) undertaking to reduce regulatory barriers to the efficient operation of multi-jurisdictional enterprises.

Achieving national consistency in occupational health and safety laws, an important part of the reduction of regulatory inefficiencies, is a federally agreed policy. The Regulation gives effect to the reduction of inefficiencies in that it aligns the ACT occupational health and safety scheme with the statutory regimes of other Australian jurisdictions and will provide the vehicle for future agreed industry safety standards and codes to be provided for within a statutory regime.

4. Summary of the Regulation

The Regulation requires that amenities such as personal hygiene facilities be provided at workplaces and covers particular safety areas and duties in relation to the workplace management of –

- the safe entry and exit from the workplace;
- the use of personal protective and safety equipment;
- the prevention of falls;
- measures relating to the atmosphere and ventilation;
- protection against extremes of heat and cold;
- safe surfaces and floors;
- the safe use electricity;
- protective measures for work in confined spaces;
- lighting;
- noise and the risk of hearing impairment;
- protective measures for employees working in isolation;
- the risk of fire and explosion; and
- emergency procedures in the workplace.

The Regulation also includes the substance of the Occupational Health and Safety Regulation 1991 in updated provisions dealing with dangerous occurrences and the reporting and recording of injuries and dangerous occurrences, the approval and management of training programs and the timing of the making of a decision on an application for an internal review of an inspector's decision.

The Occupational Health and Safety Regulation 1991 is repealed by the Regulation.

While the Regulation adds to the occupational health and safety regulatory regime, in effect it would not introduce new practices to responsible employers. The amenities requirements in the Regulation catalogue the facilities (safe and hygienic places to wash and change clothes, and the provision of clean drinking water, for instance) that could be expected to be provided in a workplace where the protection of the health of employees while at the workplace has been considered and addressed.

The particular safety management provisions are risk-focused and impose obligations that are no more than the sensible safety precautions that would already have been put into practice by a responsible enterprise. They bring the ACT occupational health and safety regime more closely into line with those of the other Australian jurisdictions.

It should also be noted that, where possible, in accordance with regulatory best practice, the requirements are outcomes-based and not prescriptive in their particulars. It is envisaged that codes of practice will be developed to provide guidance as to the regulatory requirements and their implementation, to assist employers, employees and other duty-holders to comply with the requirements and to ensure consistent enforcement of the requirements of the Regulation.

5. The consultation process

The ACT Government is committed to the provision of safe and healthy workplaces and to assisting employers and other duty holders to comply with occupational health and safety requirements. The Occupational Health and Safety Council is established under the OHS Act to advise the Minister of Industrial Relations on occupational health and safety, workers' compensation and the rehabilitation of injured workers.

The Council is made up of twelve members (appointed by the Minister on a part-time basis for terms of up to three years): four members representing employees, four members representing employers, three members appointed by the Minister, and the ACT Occupational Health and Safety Commissioner.

The Occupational Health and Safety Council discussed the need for a framework within which a full body of occupational health and safety regulations could be developed, and referred this issue to the Council's Legislation Review Advisory Committee. That Committee supported a three-staged approach to the development of regulations to provide for matters that include –

Stage 1. workplace amenities and the management of hazards in certain processes and situations;
Stage 2. plant and construction safety and working at heights; and
Stage 3. workplace consultation; training; manual handling; and hazardous work situations and processes.

The Regulation gives effect to Stage 1 of this plan and provides a framework for the consolidation of the occupational health and safety regulatory regime and a vehicle for the future replacement or addition of regulatory provisions.

6. Options

A Maintain the status quo

As noted above safety laws and the regulations made under the OHS Act are various, contain duplications and overlapping duties, are technically outdated, and limited in their application.

These features do not aid a clear understanding of occupational health and safety duties, can produce uncertainty as to what is acceptable compliance with the duties imposed and may produce inconsistency of enforcement. Such uncertainties impose an unacceptable burden on the individuals and enterprises required to comply with and enforce an occupational health and safety regulatory scheme.

Option A is not feasible because -

- uncertainty as to the application of, and compliance with the requirements undermines the integrity of the occupational health and safety scheme of the Australian Capital Territory;

- the existing statutory regime, unsatisfactory now, offers an inadequate platform for necessary future development; and

- undertakings made under the National Strategy will not be met, and the policy agreed at COAG will not be implemented under Option A.

B Make no further regulation

Some of the matters dealt with in the Regulation might seem more suited to be recommended for action in a code of practice. An approved code of practice provides guidance to persons with duties of care under the *Occupational Health and Safety Act 1989* and related regulations; it explains the processes that will enable the outcomes required by the relevant legislation to be achieved, gives practical examples and provides references to the relevant Australian Standards. In defending a charge of failing to carry out a safety duty, that a code of practice was followed can be evidence of compliance with the relevant statutory scheme unless the legislative requirement is achieved, or bettered, in other more practicable ways.

Compliance with a code of practice, however, is not mandatory and is not enforceable. The outcome of using codes of practice rather than enforceable regulations would be a scheme of self-regulation. Such a scheme does not meet the commitment the ACT has made to implement the nationally agreed OHS scheme.

If a self-regulatory approach to the management of the workplace health and safety matters covered in the Regulation were to be taken, there would be further inconsistency of regulatory outcomes across workplaces in the ACT and increased and increasing national inconsistency.

A well-developed body of consolidated performance-based, risk-focused regulations covering a range of general workplace and hazard-specific controls and processes will properly provide for the protection of the Territory's workers, and will support the principal occupational health and safety laws in all other Australian jurisdictions.

Option B is not feasible because taking no further *regulatory* action would mean that the ACT occupational health and safety regime –

- would slip further behind the standards of other Australian jurisdictions, most importantly NSW and Victoria;

- fail to implement undertakings made to meet current and future national and international regulatory standards; and

- fail to meet commitments made to achieve consistency in national occupational health and safety regulation.

C The statutory option

This option, the making of the Regulation, will provide for certain safety duties to be part of the statutory regime for industry safety in the Australian Capital Territory, consolidate existing OHS Regulations, address duplications, standardise the application of the regulatory regime and provide greater certainty for duty holders and regulators.

A 'general' regulation will establish the foundation for further necessary consolidation of the Territory's occupational health and safety compliance statutory regime and provide the framework for future changes in occupational health and safety standards, both national and international, to be incorporated into the regime.

In summary, the Australian Capital Territory has undertaken to –

- continue to provide for regulatory (statutory) consistency in standards of health, safety and welfare at workplaces;
- bring the regulation of occupational health and safety in the ACT up to the best Australian standards;
- further national consistency in regulatory provisions to assist in the mobility of labour and reduce the 'red tape' barrier to efficient commercial operations; and
- achieve these undertakings according to a timeframe agreed in the National Strategy.

Option C, the making of this Regulation, and future regulations, as part of a statutory OHS regime, will advance the meeting of these undertakings.

7. Costs and benefits

Workplace injury and illness impose significant social and economic costs on injured workers and their families, employers, and are detrimental to the wider community and to the economy.

The NOHSC Report *The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community* (Canberra, May 2000) estimated that the total cost of workplace injury and illness to the Australian community from direct and indirect costs for the 2000-01 reference year was $34.3 billion. This was equivalent to 5% of GDP for that year. The NOHSC Report indicates (in Appendix 2) that the cost to the ACT of work-related injury and illness for the 2000-01 year was $M1 240.

These dollar figures do not include costs that are not specifically related to injury to or the illness of employees, such as damage to property and loss of company image. The varying degrees of pain, suffering and changed life circumstances of workers and their families are immeasurable costs.

The matters provided for in the Regulation establish benchmarks and describe basic conditions: they do not create new conditions, and are unlikely to require new work. The

Regulation facilitates improved regulation; compliance with its provisions will cause costs to be incurred only by those enterprises that are not currently meeting the general safety duties imposed by the OHS Act.

Sector	**Costs**	**Benefits**
Government	The costs of the development of the Regulation are met under the budget of the Office of Industrial Relations. The ACT WorkCover budget includes the costs of education and publicity about OHS matters and the development of codes of practice.	Improved robustness of the OHS regime. Clearer standards and more certain requirements. Will give effect to- • the meeting of obligations of duty of care owed to the community; • undertakings made as to the closing of inconsistencies between ACT OHS regulation and other jurisdictions; • undertakings made to reduce the regulatory burden on businesses.
Individuals/employees		Improved safety, health and welfare for employees while at work.
Business and Industry	May need to obtain advice on the requirements. Compliance with standards if not already compliant. Possible expenditure on facilities and personal protective equipment.	Certainty and clearer obligations. Reduced costs of – • lost work days due to injury; • absenteeism; • rehabilitation; • insurance premiums. • the overall costs of doing business (see Appendix 1).
Environment		Compliance with risk management duties should reduce polluting accidents.

8. Summary

While the Regulations may require some workplaces to improve the facilities available they –

- implement the objects of the *Occupational Health and Safety Act 1989*;
- provide clear standards for the management of workplace health and safety in respect of the areas covered;
- go towards providing the ACT with a more robust, certain but flexible occupational health and safety regulatory framework;
- are in line with undertakings made under the *National Occupational Health and Safety Strategy 2002 – 2012*;

  and

- will further the achievement of national regulatory consistency of occupational health and safety laws.

The implementation of a performance-based, risk-focused approach to workplace safety will improve the capacity of employers and employees to more effectively manage occupational health and safety outcomes.

It should be noted that, as is indicated in the National Strategy, a nationally consistent approach to occupational health and safety regulation is essential for employers, employees and other duty holders to play their part in the reduction of workplace injury and disease. Regulatory requirements will be relevant, effective, clear and practicable and not unnecessarily prescriptive with a balance between allowing for flexibility in achieving the required outcomes and prescribing certain actions or processes where necessary. (*National Occupational Health and Safety Strategy 2002 – 2012*, page 10).

The Regulation will enhance the ability of the ACT to meet its commitment to the National Strategy.

Appendix 1

The Agenda Item of the ILO International Labour Office Governing Body: *Occupational safety and health: Synergies between security and productivity* (Geneva, March 2006) (page 4) gives the following list of direct and indirect costs attributable to workplace injury and illnesses at enterprise level.

"Direct costs

- Disruption to business and ongoing lost production from worker absence.
- Worker's lost wages and possible costs of retraining.
- First aid, medical and rehabilitation costs.
- Insurance costs and possibly higher future premiums.
- Costs of compensation.
- Any fines or legal proceedings following the accident/case of ill health.
- Replacing or repairing any damaged equipment.

"Indirect costs

- Management time in subsequent investigation, perhaps jointly with the enforcing authority (e.g. labour inspectorate) and other administrations.
- Costs of retraining someone else for the job, and possible recruitment of replacement worker.
- Poorer long-term worker employability because of injury.
- "Human costs" – loss of quality of life and general welfare.
- Lower motivation to work and workforce morale, increased absenteeism.
- Poorer enterprise reputation and client and public relations."

At page 14 the Report quoted *"The business of health and safety – Case studies*, Health and Safety Commission, United Kingdom: Summary of benefits:

"By taking positive steps to preventing accidents and ill health, several business benefits were gained over periods of one or more years, including:

- Absenteeism rates were very greatly reduced.
- Productivity was clearly improved.
- Very significant sums of money were saved through better plant maintenance.
- Compensation claims and insurance costs were considerably reduced.
- Client and supplier relationships were improved and company "image" and reputation were enhanced.
- Contract pre-qualification scores were increased.
- Employees were happier, with higher levels of morale, motivation and concentration at work.
- Employee retention was improved."

Appendix 2

Section 35 of the *Legislation Act 1991*

35 Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the ***proposed law***) must include the following information about the proposed law in clear and precise language:

(a) the authorising law;

(b) a brief statement of the policy objectives of the proposed law and the reasons for them;

(c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;

(d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;

(e) if the proposed law is inconsistent with the policy objectives of another territory law—

(i) a brief explanation of the relationship with the other law; and

(ii) a brief explanation for the inconsistency;

(f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;

(g) a brief assessment of the benefits and costs of implementing the proposed law that—

(i) if practicable and appropriate, quantifies the benefits and costs;
and

(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

Appendix 3

The scrutiny principles

Section 35(h) of the *Legislation Act 2001* requires that this RIS contain a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

As set out in the terms of reference of the Assembly's Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) the relevant scrutiny principles are:

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

(i) is in accord with the general objects of the Act under which it is made;

(ii) unduly trespasses on rights previously established by law;

(iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

To briefly answer these (using the same numbering system):

(i) the Regulation accords with the objects of the Act;

(ii) the Regulation does not trespass on rights previously established by law;

(iii) there are no non-reviewable decisions made under the Regulation; and

(iv) the Act ss229(2) contemplates that the matters dealt with by the Regulation may be provided for by regulation, so it would not sensibly be said that they were matters properly to be dealt with in an Act of the Legislative Assembly.