

## **Regulatory Impact Statement**

**WORK HEALTH AND SAFETY AMENDMENT REGULATION 2019 (No 1)**

**Subordinate Law SL2019-3**

**Prepared in accordance with the**

***Legislation Act 2001, section 34***

## **Overview**

This regulatory impact statement relates to the *Work Health and Safety Amendment Regulation 2019 (No 1)* (the proposed law). The proposed law will amend the *Work Health and Safety Regulation 2011* (WHS Regulation) to require a person conducting a business or undertaking (PCBU) to ensure that workers engaged by the PCBU in certain occupations are trained in the course in Working Safely with Asbestos Containing Materials (ACMs).

## **Background**

A gap has been identified in training for workers who are not licenced asbestos removalists but may be required to disturb asbestos as part of minor or routine maintenance work, or other minor work. A PCBU may allow or direct them to do so under section 419(3)(k) of the WHS Regulation. Stakeholders have suggested that this gap in training may lead to workers carrying out work on ACMs using unsafe practices that put health at risk.

## **Information required by section 35 of the *Legislation Act 2001***

### **(a) The authorising law**

The WHS Act is the authorising law for the proposed law. Section 276(1) of the WHS Act enables the Executive to make regulations in relation to any matter relating to work health and safety under the Act. Furthermore, subsection 276(2) provides that a regulation may make provision in relation to matters set out in schedule 3, including: the way in which duties imposed by the Act are performed, and matters relating to the regulation of specified activities at workplaces.

The proposed law would amend the WHS Regulation.

### **(b) Policy objectives of the proposed law**

The objectives of the proposed law are:

- to provide enhanced protection for workers who may be required to carry out minor or routine maintenance work or other minor work on ACMs for a PCBU by providing mandatory training;
- to ensure workers that are likely to be required to perform this work are trained in how to do so safely;
- to ensure best practice management of asbestos in the workplace;
- to reduce workers' exposure to asbestos fibres; and
- in the longer term, to reduce incidence of asbestos related diseases.

Asbestos is an ongoing risk to the community, and in particular, the health and safety of workers. ACMs are present in a substantial proportion of buildings in the ACT due to widespread use prior to the imposition of a ban in 2003. The Asbestos Safety and

Eradication Agency estimates that approximately one third of all homes built in Australia before 1990 contain asbestos.<sup>1</sup>

If undisturbed, ACMs do not pose a significant risk to health. However, asbestos fibres may become airborne if ACMs are improperly handled, and exposure to these fibres can cause a number of serious diseases such as asbestosis and mesothelioma.

### **(c) Achieving the policy objectives**

The proposed law would require a PCBU to ensure that any of their employees engaged in occupations identified as being at heightened risk of asbestos exposure complete the Course in Working Safely with ACMs. This would be in addition to existing training requirements under the WHS Act and WHS Regulation. The training course provides attendees with the skills and knowledge to effectively identify ACMs and implement necessary controls to safely work with ACMs.

The benefits of training in achieving work health and safety are widely recognised.

Asbestos exposure presents significant proven risks to the health and safety of workers and the community.

Safe Work Australia's Asbestos Exposure and Compliance Study of Construction of Maintenance Workers, conducted in 2010, found that specific training on the safe handling of ACMs enabled and drove the implementation of safe handling precautions. Conversely, a lack of training was a barrier to safe handling precautions. Trade training was seen to be the most useful information source by the highest percentage of survey participants.

The course itself and occupations that would be required to attend the course will be declared by the Minister by notifiable instrument, and will be those occupations identified as most likely to be involved in tasks that may disturb ACMs. According to Safe Work Australia's National Data Set for Compensation-based Statistics, technicians and trade workers constituted 44 per cent of all asbestos related claims from 2010-11 to 2014-15.

### **(d) Consistency of the proposed law with the authorising law**

The objectives of the WHS Act include protecting the health and safety of workers, and improving safety outcomes in workplaces. The policy objectives of the proposed law are consistent with this.

Section 276(1) of the WHS Act enables the Executive to make regulations in relation to any matter relating to work health and safety under the Act. Furthermore, subsection 276(2) provides that a regulation may make provision in relation to matters set out in schedule 3, including the way in which duties imposed by the Act are performed, and matters relating to the regulation of specified activities at workplaces.

Section 19 of the WHS Act imposes a duty of care on PCBUs to ensure, so far as is reasonably practicable, the health and safety of their workers. Subsection 19(3)(f) of the WHS Act states that a PCBU must ensure, so far as is reasonably practicable, "the provision of any information, training, instruction or supervision that is necessary to protect all persons from

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<sup>1</sup> Asbestos Safety and Eradication Agency, National Asbestos Profile for Australia Report, November 2017

risks to their health and safety”. The proposed law will support the operation of section 19 and strengthen the WHS Act’s training requirements when it comes to asbestos. The WHS Regulation in its current form similarly places obligations on PCBUs to train their workers, in recognition that training is an important part of good work health and safety.

While the proposed law would be a deviation from the national model WHS laws, it is consistent with the principles of those laws and would improve safety standards in the territory. The Territory has previously departed from the national model WHS laws to improve the regulation of asbestos in ACT workplaces.

**(e) The proposed law is not inconsistent with the policy objectives of another Territory law**

The proposed law is not inconsistent with the policy objectives of any other Territory law.

**(f) Reasonable alternatives to the proposed law**

An alternative option is maintaining the status quo. Under this option, the Working Safely with ACMs course would not be made mandatory for certain workers.

As is, the WHS Act and WHS Regulation contain training requirements. As part of the primary duty of care established by the WHS Act, section 19(3)(f) provides that a PCBU must, as far as it is reasonably practicable, provide information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the business or undertaking. Additionally, section 39 of the WHS Regulation states that a PCBU must ensure that information, training and instruction provided to a worker is suitable and adequate having regard to the nature of the work carried out by the worker, the nature of the risks associated with the work at the time the information, training or instruction is provided and the control measures implemented. A PCBU must ensure that information, training and instruction provided under section 39 is readily understandable by any person to whom it is provided.

These requirements do not clearly require a PCBU to ensure that a worker who may be required to perform minor or maintenance work on ACMs in accordance with the WHS Regulation is formally trained in how to do so safely.

Mandatory training requirements do not currently address workers who may undertake minor or routine maintenance work on ACMs. As such, the status quo is no longer considered to support the Government’s policy objectives in relation to the management of risks associated with asbestos in these circumstances.

| <b><i>Benefits of status quo</i></b>  | <b><i>Costs of maintaining the status quo</i></b>  |
|---|--|
| <p><u>No increased costs</u></p> <ul style="list-style-type: none"> <li>- Costs associated with the training of certain workers would not be mandatory for certain industries.</li> </ul> <p><u>No additional regulation</u></p> <ul style="list-style-type: none"> <li>- There would be no increase in regulatory burden for PCBUs who engage workers in certain occupations.</li> </ul> <p><u>Training is voluntary</u></p> <ul style="list-style-type: none"> <li>- PCBUs are able to voluntarily train their workers in the Working Safety with ACMs course.</li> </ul> | <p><u>Failure to meet policy objectives</u></p> <ul style="list-style-type: none"> <li>- Minor and routine maintenance work has been identified as an area where workers who have not been trained in how to work with asbestos may be exposed to asbestos fibres during the course of such work.</li> <li>- Workers in certain industries who are more likely to carry out minor and routine maintenance work may continue to risk unnecessary exposure to asbestos fibres.</li> </ul> <p><u>Lack of effectiveness</u></p> <ul style="list-style-type: none"> <li>- Without mandatory training, PCBUs will not be required to ensure their workers are formally trained in how to safely work with ACMs.</li> <li>- Evidence of current low attendance rates demonstrates that continuing the status quo under which PCBUs may voluntarily train their workers in the Working Safety with ACMs course is not likely to have an impact on preventing unnecessary exposure to asbestos fibres associated with minor or routine maintenance work.</li> </ul> |

**(g) Brief assessment of the benefits and costs of the proposed law**

The proposed law imposes a direct economic cost on PCBUs in certain industries in ensuring that certain workers attend the required course. The indicative cost for the course at CIT, currently the only registered training organisation offering the course, is \$495.

If a course participant meets Training Fund Authority (TFA) requirements, a financial rebate of approximately \$100 would be available. A worker would be eligible if they work a minimum of 80 per cent of their time undertaking work that is liable for the training levy, as defined in the TFA training plan.

While it is not possible to obtain an exact number, according to the Australian Bureau of Statistics' 2016 Census data, approximately 6,700 people work in the relevant occupations in the ACT.

If calculated on the basis that the proposed law will cover 6,700 workers, there will be an approximate cost of \$3,316,500 (pre TFA rebate) to industry as a whole to ensure that existing workers are trained in the course. This calculation does not make an allowance for the TFA rebate of approximately \$100, which many of the workers in the relevant occupations would likely be eligible for or for workers who have completed the training previously. There will also be an ongoing cost, decreasing over time, in ensuring workers who are new to the occupations or new to working in the ACT attend the training.

An additional cost is the time a worker will spend attending the course instead of performing their usual duties. The course runs for approximately four hours. To calculate the approximate cost to PCBUs for the time workers attend the course, an additional 1 hour travel time has been included in the calculation.

Given limited availability of industry and ACT specific data for average hourly rates, the rate set by the applicable awards is used as an indication of hourly pay for workers covered by the proposed law.

Table A shows the hourly award rate range under the relevant awards, the cost range for five hours work, and shows an average rate for the highest classification averaged across each of the awards.

Table A – Estimated per worker cost to PCBUs for time required to undertake training

| Award  | Classification   | Hourly award rate range (depending on classification)* | 5 hours pay range |
|--|--|--|-------------------|
| Electrical, Electronic and Communications Contracting Award 2010 | Electrical workers (multiple grades)   | \$20.02-\$29.97  | \$100.10-\$149.85 |
| Plumbing and Fire Sprinklers Award 2010                          | Plumbing and mechanical services workers (multiple levels) and plumbing and mechanical services tradespersons (multiple levels and classes)  | \$20.91-\$27.82  | \$104.55-\$139.10 |
| Telecommunications Services Award 2010                           | Telecommunications trainees, telecommunications technical employees, telecommunications technicians (including advanced and principal classifications) and telecommunications associates | \$20.22-\$27.86  | \$101.10-\$139.30 |
|  | <b>Rate for highest classification averaged across each of the awards</b>  | <b>\$28.55</b>   | <b>\$142.75</b>   |

\*for full-time and part-time employees for standard weekday hours. Not including rates for apprentices or junior workers. All rates effective from 1 July 2018.

Using the rate for five hours work for the highest applicable classifications, averaged across each of the relevant awards (\$142.75), and the approximate number of workers covered by the proposed law (6,700), the additional cost to the industry as a whole of workers attending the training course is approximately \$956,425. This calculation does not include additional travel expenses that a PCBU might also be required to cover or any allowance for workers who are already trained.

It is noted that there are a number of limitations to this approach. Not every worker has their pay set by the award rate, and there is no data showing the proportion of workers in the relevant occupations whose pay is set by the award. Some workers will be paid higher than the award rate for their classification.

| <b><i>Benefits of the proposed law</i></b>   | <b><i>Costs of the proposed law</i></b>   |
|--|---|
| <p><u>Achieves policy objectives</u></p> <ul style="list-style-type: none"> <li>- The proposed law provides a means to achieve policy objectives as outlined above.</li> <li>- An expected outcome is improved health and safety practices when working with ACMs.</li> <li>- Reduces the risk of minor or routine maintenance work resulting in exposure to asbestos fibres.</li> <li>- In the longer term, potentially reduce the incidence of asbestos-related disease.</li> </ul> <p><u>Positive flow on effects</u></p> <ul style="list-style-type: none"> <li>- Increasing the level of training of workers in certain occupations will raise their work health and safety competency, and that of the industries they work in generally.</li> </ul> | <p><u>Increased costs for businesses</u></p> <ul style="list-style-type: none"> <li>- PCBU's covered by the proposed law face the costs outlined above.</li> <li>- The costs include the price of the course itself. The Course in Working Safely with ACMs is currently \$495 with the sole training provider at this time, CIT. Based on the information above this is estimated to be approximately \$3,316,500. This estimate does not include a deduction for the TFA rebate.</li> <li>- There is an additional cost of workers taking time off work to attend the course. Based on the information above this is estimated to be approximately \$956,425.</li> <li>- There will also be an ongoing cost of ensuring that workers who are new to the industry or the ACT attend the training.</li> </ul> <p><u>Costs may be passed on to consumers</u></p> <ul style="list-style-type: none"> <li>- Increased business costs may be passed on to consumers resulting in higher cost services.</li> </ul> <p><u>Increased costs for Government</u></p> <ul style="list-style-type: none"> <li>- The proposed law may have a small effect on regulatory costs for Government.</li> <li>- There is likely to be an increase in Training Fund Authority (TFA) expenditure due to the increased number of workers attending the mandated training, some of whom would be eligible for a TFA rebate of approximately \$100.</li> </ul> |

**(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bill Committee principles**

The Standing Committee on Justice and Community Safety's (Legislative Scrutiny Role) Terms of Reference require the Committee to consider whether (among other things) a regulation:

- 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 matters which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

An analysis of the proposed law against each of these items follows.

*i. Accordance with the general objects of the Act under which it is made*

See above.

*ii. Rights previously established by law*

Section 22(1) of the *Human Rights Act 2004* (HR Act), provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

*The nature of the right affected*

The proposed law will create a strict liability offence for a PCBU that fails to ensure that a worker they engage in one of the required occupations is trained in the Course in Working Safely with ACMs. Strict liability offences engage the right to be presumed innocent under section 22(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;
- 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 where offences are minor with no custodial penalty.

*The importance of the purpose of the limitation*

The purpose of the WHS Act is to ensure the health and safety of workers while at work. A necessary role of the WHS Act and supporting legislation is to ensure the effective deterrence of behaviour, and minimisation of risks, that increase the likelihood of workplace injuries or deaths, or work-related diseases.

Exposure to asbestos is a concern for workers in the ACT, particularly those in occupations more likely to come across asbestos as a result of the nature of their work. The proposed law will amend the WHS Regulation to require a PCBU to ensure that workers they engage that are in occupations likely to perform routine or minor maintenance work, or other minor work, on ACMs, are trained in how to do so safely. This will facilitate a consistent approach to asbestos safety in the workplace.

This strict liability offence arises in the 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 can be reasonably expected, because of their professional involvement, to know the requirements of the law. As such, the mental or fault element can justifiably be excluded.

*The nature and extent of the limitation*

The offences in this Bill are consistent with the existing application of the work health and safety legislation, specifically in applying strict liability to the physical elements of offences created under the work health and safety legislation. Both the WHS Act (under section 12A) and WHS Regulation (under section 6A) expressly state that under the WHS Act and WHS Regulation strict liability applies to each physical element of an offence.

Strict liability will apply under the proposed law where a PCBU fails to ensure that a relevant worker they engage is trained in the Course in Working Safely with ACMs.

The new offence does not impose a custodial penalty.

*Any less restricted means available to achieve the purpose the limitation seeks to achieve*

The limitation under the proposed law is considered to be the least restrictive means of ensuring that relevant workers are trained in how to work safely with ACMs.

*iii.*     *Non-reviewable decisions*

The proposed law does not create any non-reviewable decisions.

*iv.*     *Matters properly dealt with in an Act of the Legislative Assembly*

As outlined above, the authorising law, the WHS Act, provides the Executive with the power to make this Regulation. As such, the proposed law is within an express power granted to the Executive by an Act of the Legislative Assembly.