

BETTER REGULATION STATEMENT

Work Health and Safety Amendment (Miscellaneous) Regulation 2020

Statement of Compliance with Schedule 1 of the Subordinate Legislation Act 1989 and the Better Regulation Principles for the Work Health and Safety Amendment (Miscellaneous) Regulation 2020 ('Amendment Regulation')

Background

The *Subordinate Legislation Act 1989* provides that, before a statutory rule may be made, the responsible Minister must ensure, as far as is practicable, that the guidelines set out in Schedule 1 of that Act are complied with.

The guidelines essentially entail a delineation of objectives; a consideration of the suitability of the objectives; an assessment of alternative options for achieving the objectives; an evaluation of the costs and benefits expected to arise from each option, including the "do nothing" option; and consultation with any other affected authority. Where costs and benefits are involved, economic and social costs and benefits are to be taken into account and given due consideration.

The responsible Minister must ensure that implementation by means of a statutory rule occurs only when anticipated community benefits outweigh anticipated community costs. The Minister must also ensure that only the option involving the greatest net benefit or least net cost is chosen, bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected.

In addition, all new and amending regulatory proposals are required to comply with the requirements outlined in the *Guide to Better Regulation*. The objectives of the *Subordinate Legislation Act 1989* and the seven better regulation principles have guided the preparation of the attached regulation.

Requirements of Schedule 1 of the Subordinate Legislation Act 1989 and the Better Regulation Principles

Principle 1: *The need for government action should be established. government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs*

The *Work Health and Safety Act 2011* (NSW) ('**WHS Act**') provides a framework for a nationally consistent framework to secure the health and safety of workers and workplaces. Among other objects, the Act aims to: protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant; secure compliance with the Act through effective and appropriate compliance and enforcement measures, and; establish a principle that workers and other persons be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably necessary.

- The proposed *Amendment Regulation* will help ensure the objectives of the Act are met by:
 - Addressing the lapsing of transitional arrangements related to the registration of items of plant and introduce an ongoing regulatory scheme that maintains an effective flow of information to the regulator and subsequent awareness of emerging health and safety issues, allowing safeguards to be pre-emptively implemented.

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- Provide consistency across Work Health and Safety legislation through the conversion of monetary amounts in penalty provisions to penalty units – allowing for the annual indexing of penalty amounts, as delivered within the *Work Health and Safety Amendment Act 2020*.
- Provide a consistent enforcement tool and be an immediate deterrent for those who may be putting workers at significant risk in the construction industry, with regard to scaffolding and minimising risk associated with falling objects.
- Refine the definition of *Traffic Control Work* to better reflect the scope of traffic control devices/instruments that traffic controllers use currently and may use in the future as technology continues to evolve.

Principle 2: *The objective of government action should be clear*

The proposed *Amendment Regulation* aligns with the objectives, principles and intent of the *Subordinate Legislation Act 1989* and the *WHS Act*. It is not inconsistent with the objectives of other Acts or statutory rules.

- The objective of the amending regulation is to:
 - Address the lapsing of transitional arrangements related to the registration of items of plant and introduce an ongoing regulatory scheme.
 - Provide consistency in penalty amounts to allow for annual indexation.
 - Improve the functionality of the *Work Health and Safety Amendment (Traffic Control Work Training) Regulation 2019*.
 - Introduce penalty notices related to existing offences under the *Work Health and Safety Regulation 2017*

Principle 3: *The impact of government action should be properly understood, by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options*

- In NSW, there are currently over 62,000 items of plant which are registered. Annual registration of certain items of plant has been in effect in NSW since prior to the commencement of the model WHS legislation on 1 January 2012 (and subsequently extended through transitional arrangements). By allowing the transitional arrangements to lapse without amendment, the model WHS legislation would come into effect on 1 January 2021. This would provide a 5-year annual registration cycle.
- Maintaining annual arrangements with regards to plant item registrations limit the disruption to both industry and the regulator as existing processes already exist. Additionally, by allowing the model WHS provisions to be implemented in full, the Regulator's ability to notify and respond to such instances would be significantly impacted.
- The annual registration process carries a requirement that a statement be provided evidencing that the item of plant has been inspected by a competent person and assessed by that person as being safe to operate. This is a core safety outcome of the annual registration process.

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- Serious incidents involving high risk plant in other jurisdictions have highlighted the importance of having strong regulatory systems in place to ensure that high risk plant is regularly assessed as the consequences can result in serious incidents that impact workers and the public.
- It is for this reasoning that fixed concrete placing units are intended to be registered for the first time in NSW. These are complex items of plant and given their method of operation, high pressure fluid systems, and proximity to workers, should be considered inherently high risk, and therefore suitable for registration.
- Under the Amendment Regulation, these items will require registration from 1 July 2021. This transitional period has been established in order to allow for the Regulator to effectively consult with industry on the new requirements and to determine the scope of concrete placing booms within NSW.
- It is considered that the additional regulatory burden is offset by the net safety benefits of ensuring that concrete placing booms are appropriately and safely maintained, inspected and registered. Similarly, this new requirement establishes consistency with similarly hazardous items of plant that have been subject to annual notification for an extended period of time.
- Through the conversion of all penalty amounts to penalty units, annual indexation of penalties under the WHS legislation will be able to more efficiently be updated – reducing the regulatory expense required. Further, this will aid in the deterrence factor of penalties, with an aim to reduce the number of infractions or legislative breaches as a result.
- By introducing the penalty notice offences, there will be reduced regulatory expense when pursuing offences against clauses 55 and 225 of the WHS Regulation 2017, which currently require prosecution to enforce a penalty and has generally resulted in only the most serious breaches, rather than all breaches, being pursued.

Principle 4: government action should be effective and proportional

- The amendments related to plant item registration ensure that items posing a significant risk to safety, are annually registered and inspected by a competent person. As they are considered to be complex items of plant and given their method of operation, and proximity to workers, are therefore suitable for annual registration.
- Through the conversion of all penalty amounts within the WHS regulation to penalty units, the NSW Government will be able to annually index the penalty amounts. This will allow for the effective deterrence of all penalties to be maintained.
- Amendments to the Traffic Control Training Scheme remove prescriptive terminology within existing definitions to better capture and define traffic control work that is being conducted.
- The proposed penalty notices relate to existing offences within the WHS legislation, which currently require prosecution in order to achieve a penalty. The new amendment will allow inspectors to issue on-the-spot penalties for lower-risk offences to prevent and deter unsafe activity.

Principle 5: Consultation with business, and the community, should inform regulatory development

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- SafeWork NSW was consulted and endorsed the proposed amendments.
- The NSW Resources Regulator was consulted to confirm that the plant item registration amendment does not affect plant items to be used at mines and petroleum sites (winding systems, diesel engine systems (UG coal) or booster fans (UG coal)) which are required to be registered by the Resources Regulator pursuant to clause 177 of the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014*.
- The Government agencies that administer and are affected by the Traffic Control Training Scheme have been consulted and support the proposed amendment.

Principle 6: *The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered*

- The proposed amendments will provide clarity, simplification and long-term resolution to owners of items of plant. This is achieved by the consolidation of requirements into a single piece of legislation rather than maintain the effect of elements of the *Occupational Health and Safety Regulation 2001*, and previous WHS Regulations.
- The consolidation of penalty amounts within the Regulation will allow for penalties to be annually indexed, modernising the WHS regulatory framework and simplifying changes to future penalty amounts.
- Amendments to the Traffic Control Training Scheme provide a more robust, future-proof definition of *Traffic Control Work* – this is achieved through the simplification of the definition and the removal of prescriptive terms.

Principle 7: *Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness*

- The proposed Regulation amends the WHS Regulation 2017, which is subject to the sunset provisions of the *Subordinate Legislation Act 1989*. It is due to be automatically repealed in 2022 and a Regulatory Impact Statement and public consultation is required under the Act in order to make a new Regulation.