



GUIDE FOR APPLICANTS FOR EXEMPTIONS

SAFEWORK NSW

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Disclaimer

This publication may contain information about the regulation and enforcement of work health and safety in NSW. It may include some of your obligations under some of the legislation that SafeWork NSW administers. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website www.legislation.gov.au

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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INTRODUCTION

The Work Health and Safety Regulation 2017 (WHS Regulation) has a general power that provides for SafeWork NSW (the Regulator) to grant an exemption from compliance with any of the WHS Regulations.

The issuing of an exemption is based on the understanding that the alternative agreed course of action will provide at least an equivalent level of health and safety to that achieved by complying with the WHS Regulation.

EXEMPTION TYPES

General exemption

SafeWork NSW may grant a general exemption from compliance with any of the WHS Regulations (Clause 684 (1) of the WHS Regulation).

Hazard specific exemptions

Hazard specific provisions in the WHS Regulations apply to the granting of an exemption:

- from holding a high risk work (HRW) licence (Clause 686 of the WHS Regulation), or
- for a major hazard facility (MHF) (Clause 688 of the WHS Regulation).

SCOPE

General exemption provisions are set out in Clauses 684 – 685 of the WHS Regulation and exclude exemptions requiring a person to hold a HRW licence that are set out in Clauses 686 – 687 of the WHS Regulation or relating to a MHF or a proposed MHF, that are set out in clauses 688 – 689 of the WHS Regulation.

WHO MAY APPLY FOR AN EXEMPTION

GENERAL EXEMPTION

Any person or class of persons may apply to SafeWork NSW in writing for a general exemption (Clause 684 (1) of the WHS Regulation).

A person may be an individual, a body corporate, a government agency, a partnership or an unincorporated association.

A class of persons means a number of persons who have a common characteristic for example: operators of a specific tool or machinery.

SafeWork NSW may on its own initiative grant a general exemption (Clause 684 (2) of the WHS Regulation).

HIGH RISK WORK LICENCE EXEMPTION

Any person or class of persons may apply to SafeWork NSW in writing for an exemption from the requirement to hold a HRW licence (Clause 686 of the WHS Regulation).

MAJOR HAZARD FACILITY EXEMPTION

The operator of a MHF or proposed MHF may apply to SafeWork NSW for an exemption from compliance with any provision in the WHS Regulations relating to that facility (Clause 688 of the WHS Regulation).

Clause 533 (1) of the WHS Regulation defines the operator of a MHF to be a person conducting the business or undertaking of operating the facility and who has:

- management or control of the facility
- the power to direct that the whole facility be shut down.

Regulation 533 (2) of the WHS Regulation defines the operator of a proposed MHF to be:

- the operator of a proposed facility that is an existing workplace, or
- the person who is to be the operator of a proposed facility that is being designed or constructed.

DURATION OF AN EXEMPTION

The exemption will last the length of time stipulated by SafeWork NSW (Clause 692 (h) of the WHS Regulation) or until the regulation is amended and is no longer applicable, unless SafeWork NSW amends or cancels the exemption earlier (Clause 697 of the WHS Regulation).

RECOGNITION OF INTERSTATE AUTHORISATIONS

An exemption issued by SafeWork NSW is valid in NSW only.

HOW TO APPLY

To apply for an exemption, complete the *Application for an exemption under the Work Health and Safety Regulation 2017* form (catalogue no. SW08450) available on the SafeWork NSW website. Lodgement instructions are on the form.

FEES

There is no fee for an exemption.

GRANTING/AMENDING OR REFUSING AN EXEMPTION

WHAT DOES SAFEWORK NSW TAKE INTO ACCOUNT WHEN DECIDING WHETHER TO GRANT AN EXEMPTION?

General exemption

SafeWork NSW may deem any matter relevant when making its decision to grant a general exemption but must consider the following:

- Whether granting the exemption will result in a standard of health and safety at the relevant workplace or in relation to the relevant undertaking, that is at least equivalent to the standard that would be achieved by compliance with the provision(s).
- Whether at least an equivalent standard of health and safety can be achieved by granting a conditional exemption.
- Whether exceptional circumstances justify the granting of the exemption. Exceptional circumstances may include emergency situations, practicality of applying a regulatory provision and technological change.
- If the proposed exemption relates to a particular thing, whether the risk associated with that thing is not significant if the exemption is granted.
- Whether the applicant has carried out consultation in relation to the proposed exemption in accordance with Divisions 1 and 2 of Part 5 of the WHS Act.

(Clause 685 of the WHS Regulation).

Exemption from holding a high risk work licence

SafeWork NSW may deem any matter relevant when making its decision to grant an exemption from holding a HRW licence but must be satisfied that granting the exemption will result in a standard of health and safety that is at least equivalent to the standard that would be achieved without the exemption. In making a decision SafeWork NSW will consider the following:

- The impracticability of obtaining a HRW licence.
- Whether the person's competencies exceed those required for the grant of a HRW licence.
- Whether any plant used can be modified to reduce the risk associated with its operation.

(Clause 687 of the WHS Regulation).

Exemption for a major hazard facility

SafeWork NSW must be satisfied about the following before granting an exemption:

- Whether one or more Schedule 15 chemicals are present or likely to be present at the facility.
- Whether the quantity of the Schedule 15 chemical(s) exceeds the threshold quantity of the chemical(s) periodically because:
 - the Schedule 15 chemical(s) are solely the subject of intermediate temporary storage
 - the Schedule 15 chemical(s) are in one or more containers with the capacity of each container to contain no more than a total of 500 kilograms of the Schedule 15 chemical.

- Whether granting the exemption will result in a standard of health and safety in relation to the operation of the facility that is at least equivalent to the standard that would be achieved by compliance with the relevant provision(s). In making its decision SafeWork NSW will consider the following:
 - Whether the applicant (operator of the facility) is complying with the WHS Act and the Regulations.
 - Whether the applicant has processes and procedures in place which will keep the quantity of the Schedule 15 chemical(s) present or likely to be present at or below the threshold quantity for the Schedule 15 chemical(s) as often as practicable.
 - Whether the applicant has implemented adequate control measures to minimise the risk of a major incident occurring.

(Clause 689 of the WHS Regulation).

GRANTING OF A CONDITIONAL EXEMPTION

SafeWork NSW may impose any conditions it considers appropriate on an exemption. Conditions that may be imposed include:

- monitoring risks
- monitoring the health of persons at the workplace who may be affected by the exemption
- keeping certain records
- using a stated system of work
- reporting certain matters to SafeWork NSW
- giving notice of the exemption to person(s) that may be affected by the exemption.

A decision to impose condition(s) on an exemption is a reviewable decision (Clause 691 of the WHS Regulation).

AMENDMENT OR CANCELLATION OF AN EXEMPTION

SafeWork NSW may amend or cancel an exemption at any time. A decision to amend or cancel an exemption is a reviewable decision (Clause 697 of the WHS Regulation).

If SafeWork NSW decides to amend or cancel an exemption, it must give written notice within 14 days after making its decision to:

- where a person applied, the applicant, or
- if SafeWork NSW granted the exemption on its own initiative each person to whom the exemption applies unless it affects a class of persons, in which case the notice must be published in the NSW Government Gazette.

The notice must state the reasons for the amendment or cancellation (Clause 698 of the WHS Regulation).

The amendment or cancellation takes effect on the publication of the notice in the NSW Government Gazette or on a later date specified in the notice or if a notice is not required to be published in the NSW Government Gazette, on the giving of the notice to the applicant or on a later date specified in the notice (Clause 698 (4) of the WHS Regulation).

REFUSING TO GRANT AN EXEMPTION

SafeWork NSW must refuse to grant an exemption where it is not satisfied that the exemption will result in a standard of health and safety that is at least equivalent to the standard that would have been achieved without the exemption (Mandatory refusal) (Clauses 685, 687 and 689 of the WHS Regulation).

If SafeWork NSW refuses to grant an exemption, it must give the applicant written notice of the refusal within 14 days after making that decision and the notice must state the reasons for the refusal (Clause 696 of the WHS Regulation).

A decision to refuse to grant an exemption is a reviewable decision (Clauses 684, 686 and 688 of the WHS Regulation).

OBLIGATIONS

A person to whom an exemption is granted must comply with the conditions of the exemption and ensure any person under their management or control complies with the conditions of the exemption (Clause 693 of the WHS Regulation).

APPLICATION FOR REVIEW OF DECISION

The table in Regulation 676 sets out decisions that are reviewable (reviewable decisions) and who is eligible (eligible person) to apply for the review of a reviewable decision.

The applicant is the eligible person to request a review of the following decisions:

- to refuse to grant an exemption (Clauses 684, 686 and 688 of the WHS Regulation), or
- to impose a condition on an exemption (Clause 691 of the WHS Regulation), or
- to refuse to grant an exemption (Clause 696 of the WHS Regulation), or
- to amend an exemption (Clause 697 of the WHS Regulation), or
- to cancel an exemption (Clause 697 of the WHS Regulation).

INTERNAL REVIEW

An application for internal review allows SafeWork NSW decision to be reviewed and possibly changed by a person who was not involved in the original decision. A written application for the internal review of a reviewable decision is made using the application form provided by SafeWork NSW. The application must be lodged within 28 days of the day on which the decision first came to the eligible person's notice or such longer period as SafeWork NSW allows (Clause 678 (1) of the WHS Regulation).

The internal reviewer may:

- confirm or vary the reviewable decision, or
- set aside the reviewable decision and substitute another decision that the internal reviewer considers appropriate.

(Clause 680 (2) of the WHS Regulation).

If the reviewable decision is not varied or set aside within the 21 day period, the internal decision is taken to have been confirmed (Clause 680 (6) of the WHS Regulation).

SafeWork NSW will give the applicant written notice of the decision on the internal review and reasons for the decision within 21 days of making the decision (Clause 681 of the WHS Regulation).

An application for an internal review does not affect the operation of the original decision or prevent the taking of any lawful action to implement or enforce the decision, though once the decision on internal review is made if a new decision is substituted then that new decision takes effect (Clause 682 of the WHS Regulation).

EXTERNAL REVIEW

If the applicant or licence holder is not satisfied with the decision on internal review, they can apply to the NSW Civil and Administrative Tribunal (NCAT). (Clause 683 of the WHS Regulation).

FURTHER INFORMATION

For further information, phone Customer Experience on 13 10 50 or visit www.safework.nsw.gov.au.

LEGISLATION

The WHS Regulation is located on the SafeWork NSW website www.safework.nsw.gov.au.

LIST OF JURISDICTION CONTACTS

Jurisdiction	Name of regulator	Telephone	Website
New South Wales	SafeWork NSW	13 10 50	www.safework.nsw.gov.au
Victoria	WorkSafe Victoria	1800 136 089	www.worksafe.vic.gov.au
Queensland	Workplace Health and Safety Qld	1300 369 915	www.justice.qld.gov.au
South Australia	SafeWork SA	1300 365 255	www.safework.sa.gov.au
Western Australia	WorkSafe WA	1300 307 877	www.worksafe.wa.gov.au
Australian Capital Territory	WorkSafe ACT	02 6207 3000	www.worksafety.act.gov.au
Tasmania	Workplace Standards TAS	1300 366 322 (Inside Tasmania) 03 62337657 (Outside Tasmania)	www.wst.tas.gov.au
Northern Territory	NT WorkSafe	1800 019 115	www.nt.gov.au/justice/worksafe
Commonwealth	Comcare	1300 366 979	www.comcare.gov.au

CHECKLISTS

CHECKLIST FOR GENERAL EXEMPTION

General exemption

- ☐ Application form is complete, including a signature in the declaration.
- ☐ If the proposed exemption relates to a thing, evidence that the risk associated with the thing is not significant if the exemption is granted has been submitted.
- ☐ Evidence that consultation in relation to the proposed exemption has been undertaken in accordance with Divisions 1 and 2 of Part 5 of the WHS Act has been submitted.

CHECKLIST FOR EXEMPTION FROM HIGH RISK WORK LICENCE

Exemption from high risk work licence

- ☐ Application form is complete, including a signature in the declaration.
- ☐ Copies of documents showing successful completion of competencies exceeding those required for the grant of the high risk work licence has been submitted.
- ☐ Documents that demonstrate that the plant used by the person or class of persons can be modified to reduce the risk associated with its operation has been submitted.

CHECKLIST FOR EXEMPTION FOR A MAJOR HAZARD FACILITY

Exemption for a major hazard facility

- ☐ Application form is complete, including a signature in the declaration.
- ☐ Documents that demonstrate that the Schedule 15 chemical(s) present or likely to be present will periodically exceed the threshold quantity because they are in intermediate temporary storage and in containers with a capacity to contain no more than 500 kg of the chemical have been submitted.
- ☐ Documents that the operator of the facility is complying with the WHS Act and Regulations, including Part 7.1 have been submitted.
- ☐ Documents that evidence processes and procedures are in place which will keep the quantity of the Schedule 15 chemical(s) present or likely to be present at or below the threshold quantity as often as practicable have been submitted.
- ☐ Documents that evidence that the operator of the facility has implemented control measures to minimise the risk of a major incident occurring have been submitted.

