



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE  
ON  
DELEGATED LEGISLATION**

**TWENTY-SEVENTH REPORT:**

*Occupational Safety and Health Amendment Regulations (No. 2) 1997*

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

**27  
October 1997**

# Joint Standing Committee on Delegated Legislation

## Members

Hon Bob Wiese MLA (Chairman)  
Hon Nick Griffiths MLC (Deputy Chairman)  
Hon Simon O'Brien MLC  
Hon Barbara Scott MLC  
Hon Jim Scott MLC  
Mr Ted Cunningham MLA  
Mr Mark McGowan MLA  
Mr Iain MacLean MLA

## Advisory/Research Officer

Andrew Mason

## Committee Clerk

Jan Paniperis

## Terms of Reference

*It is the function of the Committee to consider and report on any regulation that:*

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament;*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

*If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.*

**ISBN No: 0 7309 8868 6**

## Report of the Joint Standing Committee on Delegated Legislation

in relation to

### Occupational Safety and Health Amendment Regulations (No. 2) 1997

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#### Introduction

In the exercise of its scrutiny function the Committee reviewed the regulations made under the *Occupational Safety and Health Act 1984*. The Committee was provided with explanatory material by Worksafe Western Australia which stated that the objective of the regulations is to protect workers from exposure to environmental tobacco smoke by restricting smoking in enclosed workplaces.

A tabled petition from members of the public has been referred to this Committee by the Constitutional Affairs and Statutes Revision Committee. The petition requests the regulations be withdrawn on the basis that they attack the rights of citizens to smoke in public places and is therefore an attack on freedoms and democratic rights. Under the Committee's Joint Rules it is the function of the Committee to consider and report on any regulations that unduly trespass upon established rights, liberties and freedoms. The Committee has considered the regulations in this context and now reports its views to Parliament.

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#### The Regulations

The *Occupational Safety and Health Amendment Regulations (No. 2) 1997* ("the Regulations") insert a new subdivision 2 into Division 3 of Part 3 of the *Occupational Safety and Health Regulations 1996* ("the Principal Regulations"). Division 3 of Part 3 of the Principal Regulations deals with air quality in workplaces. The regulations are attached and marked "Annexure A".

It is noteworthy that the Regulations only prohibit employers, employees and self-employed persons from smoking in enclosed workplaces. There is nothing prohibiting members of the public from smoking in an enclosed workplace. The other point of significance is that the Regulations make provision for areas to be set aside for smoking though an employer cannot **require** an employee to work in such an area when someone is smoking. There is nothing preventing an employee from volunteering or accepting a request to work in a smoking area.

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#### Undue Trespass on Established Rights?

In examining whether the Regulations unduly trespass on established rights the Committee

formed the view that arguably there were competing rights at issue here. The alleged right to smoke in a public place asserted by the petitioners is to be balanced against an individual's right to be protected from exposure to smoke. The Committee has already noted that people are not prevented from smoking in a public workplace altogether as provision is made for designated smoking areas to be established. An employer, employee or self-employed person may smoke in those areas. The Committee has also noted that there is nothing preventing a member of the public not being an employer, employee or self-employed person from smoking in any workplace. In this sense general members of the public are unaffected by the Regulations.

As the Regulations do not absolutely prohibit smoking the Committee is of the view that they are an attempt to strike a balance between competing rights and that in those circumstances the Regulations are not an "undue trespass" on the alleged right to smoke. The right of the individual to smoke in public places is accounted for by allowing areas to be set aside for smoking and by not prohibiting members of the general public from smoking. This is balanced against the objective intent of the Regulations to protect workers from exposure to environmental tobacco smoke. Whether that objective intent is in fact achieved by the Regulations is another question.

In the circumstances the Committee resolved to take no further action.

ANNEXURE A

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**WORKSAFE**

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WS301

OCCUPATIONAL SAFETY AND HEALTH ACT 1984  
OCCUPATIONAL SAFETY AND HEALTH AMENDMENT  
REGULATIONS (No. 2) 1997

Made by the Lieutenant-Governor and deputy of the Governor in Executive Council.

**Citation**

1. These regulations may be cited as the *Occupational Safety and Health Amendment Regulations (No. 2) 1997*.

**Commencement**

2. These regulations come into operation on 1 August 1998.

**Principal regulations**

3. In these regulations the *Occupational Safety and Health Regulations 1996\** are referred to as the principal regulations.

[\* *Published in Gazette 27 September 1996, p. 4837-5080.*  
*For amendments to 9 July 1997 see Gazette 10 June 1997, p. 2670-1.*]

**Subdivision heading inserted in Division 3 of Part 3**

4. After the heading to Division 3 of Part 3 of the principal regulations the following Subdivision heading is inserted —

“  
*Subdivision 1 — Atmosphere and respiratory protection generally*  
”

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**Regulation 3.37 amended**

5. Regulation 3.37 of the principal regulations is amended by deleting "Division" and substituting the following —

" Subdivision ".

**Subdivision 2 inserted in Division 3 of Part 3**

6. After regulation 3.44 of the principal regulations the following Subdivision is inserted —

"

*Subdivision 2 — Protection from tobacco smoke*

**Definitions**

**3.44A.** In this Subdivision —

"designated smoking area" means an area of a workplace designated under regulation 3.44C (1) to be an area in which persons may smoke;

"enclosed", in relation to a workplace, means a workplace that has a ceiling or roof and walls or other vertical covering so that when the existing closeable windows and doors and other passageways are closed, the workplace is completely or substantially enclosed; and the fact that an existing closeable window, door or passageway is open at any particular time does not determine whether or not the workplace is enclosed for the purposes of this Subdivision;

"smoke" means to smoke, hold or otherwise have control of ignited tobacco, whether by way of —

- (a) a cigarette, cigar or any other product the main, or a substantial, ingredient of which is tobacco; or
- (b) an implement containing tobacco or any other product the main, or a substantial, ingredient of which is tobacco.

**Smoking prohibited in enclosed workplaces except in designated smoking areas**

**3.44B.** (1) A person who, at an enclosed workplace, is an employer, a self-employed person or an employee must not smoke in the enclosed workplace.

Penalty: \$5 000.

(2) A person does not commit an offence under subregulation (1) if, proof of which is on the person —

- (a) the person smokes in a designated smoking area;
- (b) the person is not working at the time he or she smokes; and
- (c) in the case of an employer, no employee is working in the designated area when the employer is smoking.

**Designated smoking areas**

**3.44C.** (1) A person who, at a workplace which is enclosed, is an employer or a person having control of the workplace may, subject to subregulation (2), designate an area of the workplace to be an area in which persons may smoke.

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(2) A person who, at a workplace which is enclosed, is an employer or a person having control of the workplace must not designate an area of the workplace to be an area in which persons may smoke unless —

- (a) the area is designed or arranged so that tobacco smoke from the area does not enter any other part of the workplace; and
- (b) there is provided an exhaust system that effectively extracts tobacco smoke from the area and which is arranged so as to prevent circulation of the extracted tobacco smoke into any part of the workplace.

Penalty applicable to subregulation (2): \$25 000.

**Notice to be given as to restrictions on smoking**

**3.44D.** A person who, at a workplace which is enclosed, is an employer or a person having control of the workplace must ensure that notice is given or displayed to persons working in the enclosed workplace to the effect that smoking by those persons is prohibited in the enclosed workplace.

Penalty: \$25 000.

**Persons not to work in designated smoking areas when persons are smoking in that area**

**3.44E.** (1) A person who, at a workplace which is enclosed, is an employer must ensure that no employee is required to work in a designated smoking area when a person is smoking in that area.

Penalty: \$25 000.

(2) A person who, at a workplace which is enclosed, is a self-employed person must not work in a designated smoking area when a person is smoking in that area.

Penalty: \$25 000.

**Inspectors may require persons to stop smoking**

**3.44F.** (1) If an inspector has reasonable cause to believe that a person is smoking in contravention of regulation 3.44B the inspector may require the person to extinguish the cigarette, cigar or other tobacco product that the person is smoking.

(2) A person must comply with a requirement of an inspector made under subregulation (1).

Penalty applicable to subregulation (2): \$5 000.

By Command of the Lieutenant-Governor and deputy of the Governor,

J. PRITCHARD, Clerk of the Executive Council.