

Safe work instruments

REGULATORY FUNCTION POLICY

February 2018



CONTENTS

| | |
|--|---|
| Introduction and purpose | 1 |
| Background | 1 |
| Criteria for developing safe work instruments | 1 |
| Safe work instrument work programme | 3 |
| Prioritisation of safe work instruments | 3 |
| Analysis underpinning the development of safe work instruments | 3 |
| Consultation | 4 |
| Quality standards | 5 |
| Amendments | 6 |
| Minor or technical changes | 6 |
| Implementation planning | 6 |
| Provisions for review and evaluation | 6 |
| Review and publication of this policy | 7 |

Introduction and purpose

This policy outlines at a high level how WorkSafe will develop safe work instruments (SWI) to support the achievement of improved health and safety outcomes. This includes the Government's targets of a 25 percent reduction in workplace fatalities and serious injuries by 2020; a 50 percent reduction in the incidence of pleural cancer (mesothelioma), asbestos related lung cancer and asbestosis by 2040; and zero catastrophic events.

The policy outlines the approach that WorkSafe will take in the development of SWI, including guiding decisions as to which SWI should be developed and how they should be prioritised.

Background

The WorkSafe New Zealand Act 2013 gives WorkSafe the function of developing SWI. The Health and Safety at Work Act 2015 (HSWA) allows SWI to be made for the purposes of prescribing rules, standards and methods for managing workplace risk. SWI have legal effect only where they are referred to in regulations. The HSWA defines the purposes of SWI as:

to define terms, prescribe matters, or make other provision in relation to any activity or thing, including (without limitation) listing standards, control of substances, and competency requirements.

SWI are essentially rules which are enforceable by WorkSafe. They allow for greater flexibility and timelier up-dates to the regulatory framework, reflecting changes in technology, standards and health and safety practice.

New SWI and amendments to existing SWI must be approved by the Minister for Workplace Relations and Safety (the Minister). In approving an SWI, the Minister must be satisfied that all appropriate persons and organisations have been adequately consulted in its development. Consultation is not required if the Minister is satisfied that the amendment is minor or technical.

As soon as possible after a SWI is made, the Minister must notify it in the *Gazette* and ensure it is available free of charge on the internet and for purchase in hard copy at a reasonable charge.

SWI are a disallowable instrument for the purposes of the Legislation Act 2012. This means they can be disallowed by resolution of the House of Representatives (ie Parliament). If this occurs, a SWI ceases to have any legal effect. The House of Representatives may also amend a SWI or replace it with another instrument.

Because they are a disallowable instrument, it is important that SWI be developed and made in accordance with their enabling legislation and that the SWI development process is rigorous and transparent.

Criteria for developing safe work instruments

WorkSafe will only develop SWI where they will have legal effect; that is where they are referred to in regulations. Some of the SWI referenced in regulations will need to be made for the regulatory regime to function or for the regulations to have their intended effect. For example, a SWI may be necessary for duty holders to be able to comply with the regulations or to make the regulations enforceable by WorkSafe. In many cases, however, WorkSafe will need to exercise discretion as to whether the development of a SWI is a necessary and worthwhile intervention.

Following good regulatory practice, decisions to make a SWI will be guided by an evidence-based assessment of the need for regulation and whether the proposed SWI will be effective in addressing the health and safety risk it seeks to address. This will be assessed using credible, robust evidence and/or operational intelligence, as far as possible. SWI may also be supported by additional, non-legislative interventions, such as targeted enforcement activity and educational and/or engagement interventions. We will also be satisfied that the costs for duty holders imposed by an SWI are not disproportionate to the health and safety risk it seeks to address.

WorkSafe's development of SWI will be guided by our priorities and targets, especially with respect to work related health. This focus is informed by the HSWA regulations, which reference SWI particularly where they may be developed to address work-related health risks.

WorkSafe will develop SWI to target health and safety risk and where they advance the purpose of HSWA. In doing so, we will work from the principle that 'workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work...as is reasonably practicable' (section 3 of HSWA).

SWI may be considered appropriate in situations that include the following:¹

To target risk and secure health and safety: SWI may be developed where significant risks to health and safety are identified, particularly serious harm and/or fatalities, including longer latency occupational illnesses.

A need for mandatory requirements: SWI may be developed where there is one right way of doing something, and where WorkSafe identifies the need for prescriptive and mandatory requirements.

To influence changes in behaviour: SWI may be developed where the certainty and enforceability of an SWI is required to change behaviour. This may be due to the potential or actual risk of significant non-compliance, or the failure of other interventions to change behaviour.

To allow for flexibility or innovation in risk management: SWI may be developed to allow for flexibility or innovation in managing health and safety risks where the benefits are highly significant, the need for change applies to one or more sectors, and an equivalent or greater level of health and safety to existing regulatory requirements will be ensured. This may be to:

- reflect changes in good practice health and safety management, including new or updated standards
- provide scope to adopt less costly, but equally effective, ways of meeting legal obligations set out in regulations.

To vary or set additional workplace controls for hazardous substances: SWI may be developed to vary or set additional workplace controls, so far as allowed for in the regulations, where prescriptive and mandatory requirements are necessary to ensure workers and other persons are provided the highest level of protection against health and safety harm.

In developing SWI for hazardous substances, WorkSafe will generally only develop class-wide controls. SWI for individual substances will only be developed in extraordinary circumstances. Where the need for change is individual-site or PCBU specific, an exemption under section 220 of HSWA may be more appropriate.

¹ It is recognised there are potential tensions between some of these criteria, for example prescription and certainty, and allowing for flexibility or innovation. WorkSafe will endeavor to achieve an appropriate balance between these competing objectives.

Safe work instrument work programme

The SWI work programme will be approved by the General Manager Better Regulation. This may be through an annual work programme. During the development of the work programme, the Regulatory Frameworks team will consult with WorkSafe's social partners on its content and relative priorities. WorkSafe's advisory groups² will be consulted where relevant. We will also consult with relevant government agencies. This will include the Environmental Protection Agency with respect to hazardous substances, designated agencies, the Ministry of Business, Innovation and Employment and any other agencies WorkSafe considers relevant.

The outcome of consultation will be provided to the General Manager Better Regulation, with any significant issues specified including how we have responded to, or intend to address, them.

From time to time, a SWI not listed on the work programme may be developed where needed to manage a new or emerging health and safety risk. This may include risks associated with hazardous substances. SWI developed for this purpose will be subject to the same procedural and legislative requirements as all SWI, and will only be developed with the approval of the General Manager Better Regulation.

Prioritisation of safe work instruments

The SWI work programme will be informed by a prioritisation process. SWI required for the regulations to have their intended effect or for duty holders to comply with the regulations will be prioritised. Further prioritisation will involve an assessment of the following factors:

- the SWI's contribution to achieving the Government's targets for health and safety
- the level of health and safety risk the SWI seeks to address
- the anticipated level of health and safety gain.

Analysis underpinning the development of safe work instruments

The development or amendment of SWI will be underpinned by a problem definition and impact analysis to ensure regulatory intervention is necessary, and fit-for-purpose. Consideration should also be given to the use of potentially less intrusive ways of intervening, for example through the use of exemptions, guidance or incentives. The degree or extent of this analysis may be scaled to a level that is proportionate to the anticipated impact of the proposed SWI.

To promote transparency, WorkSafe will make public the analysis behind any new or amended SWI. This will include:

- a clear, well defined definition of the problem the proposed SWI seeks to address. This will be grounded in credible evidence and operational intelligence, as far as possible. This may also include consideration of relevant international agreements or treaties
- how the SWI would contribute to the strategic goals of WorkSafe, including how they support the achievement of a step-change in health and safety performance in New Zealand

² WorkSafe's advisory groups are currently the Occupational Health Advisory Group and the Extractives Industry Advisory Group.

- impact analysis, including economic and social impacts, fiscal costs and/or savings for government, and impacts on the health and safety system to provide assurance that the case for regulatory intervention is robust
- consideration of compliance costs, and that the requirements set out in a SWI are not disproportionate to the health and safety risk it seeks to address
- consideration of alternative or accompanying interventions to decide whether regulatory intervention is warranted, and if a SWI (or amended SWI) is the best option
- evidence based analysis to ascertain if the proposed SWI would be effective in addressing the problem identified, and if other supporting interventions are needed to boost its efficacy
- outline of who was consulted, key feedback and any significant concerns
- summary of our implementation approach and any provisions for evaluation or review.

Consultation

Consultation will form a central part of the SWI development process. Effective consultation is a legislative requirement under HSWA. Under HSWA, the Minister can approve a SWI only when satisfied that all persons and organisations that the Minister thinks appropriate have been consulted, having regard to the subject matter of the proposed SWI.

WorkSafe is committed to working in partnership with our social partners, affected parties and technical experts and engaging in genuine consultation. Genuine consultation means we will engage stakeholders with honest intention and be willing to listen and be influenced by their views. This does not mean that we will always accept or incorporate our stakeholder's views, but that we will consider their views with an open mind.

Consultation on SWI will be guided by the following principles:

Integrity

- Consultation will be genuine.
- Responses will be analysed carefully and considered with an open mind.

Inclusiveness

- We will be inclusive and will seek the views of social partners, relevant industry stakeholders and interested parties.
- Where relevant we will actively seek to engage with hard to reach groups.
- We will ensure interested groups and individuals are aware we are consulting.
- Where appropriate we will target relevant stakeholders to ensure they are involved.

Transparency

- We will work closely with social partners and keep them informed about WorkSafe's SWI work programme.
- We will clearly explain what is being consulted on, in what timescale and for what purpose.
- Our SWI work programme will be publicly available so stakeholders can prepare for upcoming consultation.
- Proposed SWI for consultation will be made available on WorkSafe's website.
- We will make the results of consultation available to stakeholders and explain the reasons for final decisions.

Effectiveness and timeliness

- As far as is practicable we will engage early with our stakeholders and technical experts.
- We will work to ensure the method of consultation is appropriate to the topic and audience.
- As far as practicable, we will seek to ensure a joined up WorkSafe approach to consultation, to avoid overloading our stakeholders.

Proportionality

- Our approach to consultation on SWI will be proportionate to the scale and impact of the subject matter.

The outcome of consultation will be provided to the WorkSafe Board, with any significant issues specified including how we have responded, or intend to address, them.

Quality standards

SWI will be made to a consistent and high standard, and will take account of the needs of the regulated community. At the same time, in developing SWI, WorkSafe will retain a leadership position as the health and safety regulator and keep clear sight of our priorities and targets.

In developing SWI, WorkSafe will be guided by the principles of best practice regulation as outlined by the Treasury. In particular, SWI will be:

Growth compatible: In developing SWI, WorkSafe will seek to achieve the management of health and safety risks and secure health and safety, but not in a way that unnecessarily restricts economic growth or stifles innovation when weighed against its health and safety objective.

Proportionate: The expectations placed on duty holders by any SWI will not be disproportionate to the health and safety benefits that are expected to result.

Flexible and durable: SWI will contribute to the flexibility, efficiency and durability of the health and safety regulatory system. SWI will help support an evolving regulatory framework in response to changing circumstances, including technological and market changes, and changes to good practice.

Certain and predictable: SWI will help provide certainty and clarity for duty holders with respect to their obligations and WorkSafe's expectations of them.

Transparent and accountable: The development, implementation and enforcement of SWI will be transparent and subject to public scrutiny.

It is recognised there are potential tensions between some of these principles, for example certainty and flexibility. WorkSafe will endeavor to achieve an appropriate balance between these competing objectives.

In addition to the above principles, SWI will also:

- be tailored for the context in which the risk or hazard occurs and be consistent with the broader legislation and WorkSafe's regulatory approach
- accommodate workplace-specific factors and be both implementable and enforceable
- be based on established or accepted evidence of good practice
- following assessment and engagement with relevant stakeholders, WorkSafe will be confident that a SWI will be effective as an intervention.

Amendments

SWI may be amended from time to time to take account of new standards, changes to good practice or to improve workability. Decisions to amend SWI will be subject to the same, albeit more focused, analytical and consultation requirements as new SWI.

Minor or technical changes

The Minister may approve an amendment to a SWI (including approving incorporation of amendments to, or updates of, documents incorporated by reference) without meeting consultation requirements under section 227(3) of HSWA if the Minister is satisfied that the amendment is minor or technical. 'Minor or technical' means an amendment that is minor in effect, significance or influence especially compared with other things in the original SWI.

WorkSafe may consider it unnecessary to consult on amendments to SWI if a change is minor or technical. An amendment may be considered minor or technical if it:

- corrects drafting or typographical errors or makes consequential amendments to an existing SWI such as updates to technical or legislative references or titles
- removes inconsistencies between related things, corrects factual information or misinterpreted information made at the time the original decision was made.

An amendment will not be considered minor or technical if it:

- creates change to costs, risks, controls, approvals (unless correcting a genuine drafting or typographical error) or results in different decisions being made by the regulator or duty holder on these things, alters the substantive meaning or intent of an existing regulation or SWI
- is likely to create significant debate with stakeholders or controversy in the wider community, or has a high level of public interest.

Implementation planning

New or amended SWI will be accompanied by an implementation plan. This will include any transitional arrangements and a communication strategy to ensure the regulated community is well prepared and informed. If the SWI is supported by additional, non-regulatory interventions these will also be covered in the implementation plan. Consideration should also be given to implementation risks and how these will be mitigated.

The implementation plan will outline the enforcement approach supporting the SWI to ensure it achieves its policy objectives. This approach will be informed by the nature of the SWI, the risk of non-compliance and the level of health and safety risk the SWI is intended to mitigate.

Provisions for review and evaluation

New or amended SWI should be accompanied by a plan for monitoring and review. This will help to ensure that the intervention is effective and working as expected; there are no unintended negative consequences; and it remains fit-for-purpose and necessary. If an SWI is accompanied by other non regulatory interventions these may be reviewed together as a package. Time frames for review will be considered on a case by case basis with regard to the subject matter of the SWI.

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