

Summary of submissions

*HAZARDOUS SUBSTANCES
SAFE WORK INSTRUMENTS*

November 2017



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Purpose

This document summarises key submitter feedback received on proposed hazardous substances safe work instruments (SWIs), WorkSafe's responses to that feedback, and the resulting changes made to the SWIs.

Executive summary

WorkSafe recently consulted on two proposed SWIs developed under the Health and Safety at Work Act 2015 (HSWA) that set out detailed requirements concerning the use of hazardous substances at work.

One of the proposed SWIs will continue work-related requirements currently imposed under the Hazardous Substances and New Organisms Act 1996 (HSNO) and by the Environmental Protection Authority (EPA) in its approval of individual fumigants for importation and manufacture in New Zealand. The other proposed SWI will continue an arrangement under which individuals may be authorised by the Liquefied Petroleum Gas Association (LPGA) to charge LPG cylinders of a certain size as an alternative to becoming an Approved Filler under the new Health and Safety at Work (Hazardous Substances) Regulations 2017 (the HS Regulations).

The SWIs are part of the hazardous substances reforms to 'lift and shift' the regulation of the work-related use of hazardous substances from the HSNO regime to the HSWA regime.

The consultation did not seek views on whether the SWIs should make substantive changes to existing requirements under HSNO. The scope of the proposed SWIs is to ensure PCBUs that are currently compliant under the HSNO regime remain compliant under the HSWA regime.

The SWIs are in addition to the 12 SWIs already approved by the Minister for Workplace Relations and Safety (listed in Annex 1) and are due to commence alongside the HS Regulations on 1 December 2017.

Background

Safe work instruments

SWIs are a new tool provided for by section 227 of HSWA. They are a type of subordinate instrument (sometimes called tertiary legislation) used to support or complement regulations. SWIs are developed by WorkSafe, and approved by the Minister for Workplace Relations and Safety.

An SWI has legal effect only to the extent it is referred to in regulations made under relevant health and safety legislation, such as the HSWA. SWIs can be made for the purposes of defining terms, prescribing matters, or making other provisions in relation to any activity or thing, including (without limitation) listing standards, substance controls, and competency requirements.

Hazardous substances safe work instruments

The following two types of SWIs applying to work-related use of hazardous substances were consulted on between 16 October 2017 and 27 October 2017:

- an SWI to continue additional or modified requirements already imposed on individual substances approved by the Environmental Protection Authority (EPA), and
- an SWI to prescribe alternative requirements to those set out in the Regulations for individuals working in a specific industry.

WorkSafe notified business and social partners (the Council of Trade Unions and Business New Zealand), targeted stakeholders with a particular interest in the subject matter, and 11,000 stakeholders via the hazardous substances e-newsletter. The draft SWIs were also available to the general public on WorkSafe's website.

One of these SWIs, *Requirements for Specified Fumigants*, was consulted on in both September and October. During the initial consultation, WorkSafe was advised that the EPA was about to approve a new fumigant, which subsequently required an additional round of consultation in October on requirements for that fumigant.

WorkSafe notes that all SWIs should be read in conjunction with the HS Regulations and do not stand alone or independently of the HS Regulations. SWIs complement the HS Regulations by providing more detailed compliance requirements or, in some cases, by setting modified or additional requirements.

Submissions received on hazardous substances safe work instruments

A total of 8 submissions were received on the proposed SWIs. Submitters included industry representatives, government agencies, businesses and social partners.

The submissions helped inform further amendments to the proposed SWIs. These submissions and the consequential changes to the SWIs are recorded in this summary.

Some submitters suggested improvements to existing requirements. This feedback has been recorded to inform future work, however such changes are not in scope for these SWIs, which are aimed at ensuring PCBUs currently compliant under the HSNO regime will remain compliant under the HSWA regime.

CHARGING LPG CYLINDERS OF LESS THAN 110 kg WATER CAPACITY

The proposed *Health and Safety at Work (Hazardous Substances – Charging LPG Cylinders of Less than 110 kg Water Capacity) Safe Work Instrument 2017* prescribes requirements to be met by a person who is not an ‘approved filler’¹ before they can charge an LPG cylinder of less than 110 kg water capacity. The SWI draws on an existing delegation from the EPA to the LPGA under which the LPGA has been authorising its own test certifiers to issue approved filler certificates to workers filling gas cylinders of less than 110 kg water capacity and to carry out related training.

The SWI required the person (called an ‘LPGA filler’) to be trained in accordance with an LPGA training and competence scheme and certified by an LPGA-approved site trainer to ensure that the person’s work is compliant with the HS regulations.

The SWI provided for individuals currently charging LPG cylinders in accordance with the EPA delegation to the LPGA to continue to do so in compliance with the HS Regulations for a transitional period.

Submissions summary

Four submissions were received on this SWI by one individual and three industry groups, including the LPGA.

Submitters requested that the SWI further clarify that an LPGA appointed trainer can certify LPGA fillers directly if a site trainer has not been appointed at a workplace. It was also recommended that an LPGA filler should hold a certificate of training for a specified timeframe before they can become a site trainer. This feedback has informed an amendment to the SWI as outlined in the following section.

One submitter queried the capacity limitation on the cylinders that LPGA fillers can charge. WorkSafe notes that this limit is informed by the referring provision for this SWI, regulation 15.64(2) (b), which refers specifically to LPG cylinders of ‘less than 110 kg water capacity’.

One submitter queried whether the fines under regulations 15.56 (1) and 15.65 of the HS Regulations applied to an LPGA filler. WorkSafe notes that regulation 15.56 applies to periodic testers at testing stations only and not LPGA fillers, while regulation 15.65 applies to approved fillers and not LPGA fillers. However, WorkSafe did share this observation with the Ministry of Business, Innovation and Employment (which is responsible for administering the HS Regulations) for consideration.

WorkSafe received a number of helpful comments on what competencies LPGA fillers should be required to demonstrate, as well as suggested topics for inclusion in course training materials. As noted in the *Changes to SWI* section below, the SWI will now require the LPGA cylinder charging training, which LPGA fillers need to undergo, to address how to respond to adverse effects. Detailed course material requirements will be provided to the LPGA to inform the development of the LPGA training and competence scheme.

All submitters answered WorkSafe’s question on whether they supported the introduction of the new terms ‘LPGA appointed trainer’ and ‘LPGA filler’. All submitters supported these new terms, except for one who considered that there should be a sole ‘approved filler’ descriptor. Given that the majority of submitters supported its use, and given also the need to distinguish individuals certified in accordance with the SWI from those authorised as approved fillers under the HS Regulations, WorkSafe will retain the new term ‘LPGA filler’.

One submitter recommended that the SWI not be limited to an LPGA training and competence scheme, but instead provide that a number of organisations could offer alternative training and competence schemes. WorkSafe notes that this SWI is focussed on ‘lifting and shifting’ an existing arrangement in place for the LPGA under HSNO. However, it does not preclude the development of further SWIs to allow individuals to comply with LPG training and competence schemes by other organisations.

WorkSafe queried whether individuals operating in accordance with the SWI should be required to be employed or engaged by PCBUs who are members of the LPGA. Feedback to this question was mixed, with two submitters supportive of this requirement and two opposed. Following public consultation, the LPGA confirmed with WorkSafe that it would continue auditing LPGA fillers and site trainers who

¹ An Approved Filler is an individual who holds a compliance certificate issued under the HS Regulations to charge gas containers in a workplace.

operate in accordance with its scheme, irrespective of their membership status. This confirmation has satisfied WorkSafe that the scheme will have the required quality assurance oversight and removes the need to require LPGA membership in order to use the LPGA training and competence scheme.

One submitter suggested that the title of this SWI could be improved to clarify its application. This feedback has informed a title change from 'Health and Safety at Work (Requirements for Charging LPG Cylinders Other than by Approved Fillers) Safe Work Instrument 2017' to 'Health and Safety at Work (Charging LPG Cylinders of Less than 110 kg Water Capacity) Safe Work Instrument 2017'.

All submitters supported the proposed transitional timeframe of six months to allow individuals currently certified in accordance with the existing delegation from the EPA to the LPGA, to continue to operate under that certificate until 1 July 2018. On reflection, WorkSafe considers that a one year transitional timeframe is more realistic. This will provide sufficient time for both WorkSafe and the LPGA to finalise an operational agreement being developed alongside the LPGA's training and competence scheme and for the LPGA to update its existing course materials. Subsequently, the transitional timeframe will be extended to 1 December 2018.

WorkSafe asked submitters to confirm whether the certificate of training issued to an LPGA filler should record the physical location/s where the LPGA filler will be charging cylinders.

One submitter incorrectly assumed that the SWI would apply to all motor vehicle garages that have LPG filling facilities and recommended the physical locations should not be recorded on the certificate. WorkSafe advises that the SWI relates to only those workers who undertake LPGA training to charge cylinders at their particular workplaces, as was the intention with the current arrangement under the HSNO Act. Accordingly, the certificate needs to specify the relevant workplace or workplaces. Any workers operating in accordance with the existing delegation from the EPA to the LPGA may continue to do so on the basis of their current certificate until the transitional timeframe expires. Anyone else charging LPG cylinders will need to be an approved filler authorised under the HS Regulations.

Other submitters noted that an LPGA filler might operate at a number of physical locations. WorkSafe does not consider this sufficient reason not to require the workplaces to be specified on an LPGA filler certificate of training. As noted above, the SWI is intended to provide an alternative to the HS Regulations that is limited to the charging of cylinders by workers at their particular workplaces. WorkSafe notes that some workplaces will have different charging equipment at different locations, as well as site specific emergency procedures. This requires individuals operating at those sites to be aware of these differences and competent to operate and respond appropriately. WorkSafe believes this supports the need to state the workplaces where the LPGA filler is certified to charge LPG cylinders on the certificate of training. For the above reasons, WorkSafe has decided to retain this requirement in the SWI.

Changes to SWI

Following consultation, the following changes will be made to the SWI:

1. The title of the SWI will be amended to 'Health and Safety at Work (Charging LPG Cylinders of Less than 110 kg Water Capacity) Safe Work Instrument 2017'.
2. The definition of 'LPGA filler' will be amended to refer to a certificate of training issued by an LPGA appointed trainer, as well as one issued by a site trainer.
3. The definition of 'site trainer' will be amended to refer to a person who has been an LPGA filler for at least six months.
4. The definition of 'LPGA training and competency scheme' will be amended to require the LPGA training to include actions that should be taken to manage the potential adverse effects of an LPGA cylinder leaking or failing.
5. The transitional timeframe during which existing site trainers and approved fillers authorised in accordance with the existing delegation from the EPA to the LPGA may continue to operate will be increased from six months to one year, until 1 December 2018.

REQUIREMENTS FOR SPECIFIED FUMIGANTS

The proposed *Health and Safety at Work (Hazardous Substances – Requirements for Specified Fumigants) Safe Work Instrument 2017* transfers certain controls set by the EPA on specific fumigant substances as requirements under HSWA. Two rounds of consultation occurred for this SWI: one to consult on requirements for Tri-Form 60, Ripper Range and Methyl Bromide, and another to consult on requirements set for a newly approved fumigant, AFE-HFP.

Submissions summary

WorkSafe received four submissions on this SWI.

One submitter recommended that the SWI be amended to reduce the buffer zone from 400m to 100m when using a highly retentive film for Tri-form 60 or any other fumigant required by a relevant SWI. The SWI has been amended to provide for this.

Fire and Emergency New Zealand (FENZ) advised that the additional notification information it was required to receive from a PCBU when using AFE-HFP was not useful for its operational emergency response purposes and recommended that the default notification regulations apply instead.

WorkSafe notes that the requirements on AFE-HFP are consistent with requirements for Tri-Form 60, including the additional notification requirements. In consultation with the EPA, WorkSafe determined that the requirements for these substances should continue to be consistent. Subsequently when using Tri-Form 60 or AFE-HFP, a PCBU will not be required to notifying FENZ of the proposed additional information. WorkSafe decided that it was unhelpful to require the provision of specific information to an agency if it was not going to be used.

Two submitters recommended improvements or additional requirements when using methyl bromide. These included requiring a PCBU to monitor adjacent and downwind of a fumigated log pile or container and recapture or ventilation until methyl bromide levels have dropped below that allowed in the HS Regulations. It was also recommended that a PCBU of fumigation be required to only use methyl bromide monitoring equipment calibrated either in a factory or in situ, and that this calibration be audited by an external audit agency or expert in such work and approved by WorkSafe.

WorkSafe notes that the purpose of the SWI is to transfer requirements currently provided under HSNO into the HSWA framework. WorkSafe also determined that if it modified the requirements for using methyl bromide, more extensive consultation

than the timeframe for the reforms allowed would be necessary. These proposals would also potentially impose additional compliance obligations on businesses using methyl bromide, which is not the intent of this phase of reforms.

Consequently, the recommendations are outside that scope and will not be reflected in the final version of the SWI. However, improvements to existing requirements may be explored following commencement of the HS Regulations or as part of the phase 2 reforms to the regulation of hazardous substances.

One submitter recommended the SWI require air monitoring at multiple sites. WorkSafe notes that the *Health and Safety at Work (General Risk and Workplace Management) Regulations 2016* sets out monitoring requirements in relation to prescribed exposure standards. These are recorded in the methyl bromide approval and must be complied with under HSWA.

Concern was raised with clause 8(5) *Notification of intended fumigation – quarantine or pre-shipment fumigation using methyl bromide* and the ability of a PCBU who intends to carry out quarantine or pre-shipment fumigation using methyl bromide to notify relevant persons annually. WorkSafe notes that this clause only applies if there are to be regular fumigations (clause 8(5)(a) provides for a weekly frequency) and that if the PCBU has notified all relevant persons of all required matters before the intended initial fumigation, then the PCBU may subsequently notify these persons annually. However, if a person who should have been notified of fumigation has not received a notification that meets the requirements of this clause, then this is necessary before annual notification can commence.

One submitter recommended that the SWI prescribe how notification of intended fumigation should be provided. WorkSafe notes that the HS Regulations require PCBUs provide 24 hour notice prior to fumigation occurring. How this notification is made is not prescribed in the regulations to allow for flexibility and to reflect the various ways people conduct their work, for example, by email, telephone or in-person discussions.

One submitter recommended that signage be required at intervals that allow it to be seen regardless of where someone may enter the buffer zone. However, WorkSafe is satisfied that the requirement to place signage at every point of access to a buffer zone in order to keep members of the public out of the buffer zone area is sufficient.

Changes to SWI

Following consultation, the following changes will be made to the SWI:

1. The SWI will not include the requirement to notify additional information to FENZ when using AFE-HFP or Tri-Form 60, and the default requirements in regulations 14.7 and 14.8 will apply instead.
2. The SWI will provide that a buffer zone for Tri-form 60 or any other fumigant required by a relevant safe work instrument can be reduced from 400 m to 100 m when using a highly retentive film.

Implementation

WorkSafe is now finalising the SWIs and they will be provided to the Minister for Workplace Relations and Safety for the Minister's consideration in November 2017.

Once approved, the SWIs will be published on WorkSafe's website.

The requirements provided in the SWIs will come into effect, if approved, alongside the HS Regulations on 1 December 2017.

Annex 1: Approved hazardous substances safe work instruments

Health and Safety at Work (Hazardous Substances – Polyethylene Above Ground Stationary Tanks for Diesel Fuel) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Management of Pre-2006 Stationary Container Systems up to 60,000 L) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Filling of Below Ground Stationary Tanks by Pumping) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Design and Construction of Above Ground Stationary Tank to ULC-ORD-C80.1-2000) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Disused Below Ground Tanks on Farms) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Markings for Pipework Connected to Above Ground Stationary Tanks) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Reduced Secondary Containment for Certain Above Ground Stationary Tanks) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Specification of Standard Relating to Non-refillable Gas Containers) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Thermoplastic Stationary Tanks) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Above Ground Stationary Tanks Connected to a Generator Set) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Above Ground Rotationally-Moulded Polyethylene Stationary Tanks) Safe Work Instrument 2017

Health and Safety at Work (Hazardous Substances – Additional and Modified Requirements for Specified Class 6 and 8 Substances) Safe Work Instrument 2017

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