

Enforcement

REGULATORY FUNCTION POLICY

August 2017

The Enforcement Policy describes the high level approach WorkSafe uses regarding enforcement.

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1.0

Introduction

IN THIS SECTION:

- 1.1** The Intervention Approach
- 1.2** The principles of the enforcement regime

WorkSafe New Zealand (WorkSafe) was established as a Crown entity under the WorkSafe New Zealand Act 2013 and is New Zealand's primary health and safety regulator.

WorkSafe's primary objective is to promote and contribute to a balanced framework for securing the health and safety of workers and workplaces. WorkSafe is also the regulator for the safe supply and use of electricity and gas.

New Zealand has high rates of workplace fatalities, serious harm injuries, and work-related illness compared to other OECD countries. WorkSafe is aiming to achieve at least a 25 percent reduction in workplace fatalities and serious injuries by 2020; and a 50 percent reduction in the incidence of pleural cancer (mesothelioma) asbestos-related lung cancer and asbestosis by 2040.

WorkSafe provides enforcement activities to improve the health and safety of New Zealand's workplaces.

We undertake assessments, inspections and investigations at workplaces to monitor and enforce compliance with the law.

Purpose

This operational policy sets out a high level approach to enforcement and how it supports WorkSafe to achieve its targets. The Enforcement Policy seeks to guide inspectors and their managers in their decision-making and choice in the range of enforcement tools available to WorkSafe.

Policy scope

WorkSafe enforces under the following legislation and their associated regulations:

- WorkSafe New Zealand Act 2013
- Health and Safety at Work Act 2015 (HSWA)
- Hazardous Substances and New Organisms Act 1996 (HSNO)
- Electricity Act 1992
- Gas Act 1992
- Crown Minerals Act 1991
- Mines Rescue Act 2013.

OUT OF SCOPE

- Establishing the factors WorkSafe takes into account when considering whether to intervene. This is covered in *WorkSafe Position - When will WorkSafe intervene?*
- WorkSafe’s approach to prosecution. This is covered in the *Prosecution Policy*.
- WorkSafe’s approach to investigations. This is covered in the *Investigations Policy*.
- WorkSafe’s approach to inspections. This is covered in the *Inspections Policy*.

Objectives of enforcement policy

Enforcement is one of a range of tools used by WorkSafe to ensure good health and safety practices are well understood and implemented in every New Zealand workplace, including the safe supply and use of electricity and gas. WorkSafe engages, informs and educates duty holders¹ so that there is a clear understanding of workplace compliance², and how to best identify and manage risks.

Core Functions



FIGURE 1:
Core functions

WorkSafe has a specific focus on workers most at risk, with duty holders and workers being held accountable for specific breaches of health and safety legislation. There is also an expectation of self-management of health and safety issues by duty holders, in collaboration with workers. Core concepts from HSWA are reflected in WorkSafe’s regulatory practice and need to be factored in to any enforcement response:

¹ Defined in the Definition of terms section.

² Defined in the Definition of terms section.

- people at work and the public should be protected from risks to their health and safety
- people who create the risks are in the best position to eliminate or minimise those risks
- duty holders need to be proactive in ensuring health and safety in the workplace
- duty holders must communicate, share responsibility and collaborate with workers and representatives, to manage health and safety risks
- all duty holders need to work together, and with WorkSafe, to exchange ideas and information about reducing or eliminating risks in their workplaces.

1.1 The Intervention Approach

The *Intervention Approach* describes the approach that WorkSafe will take in fulfilling its regulatory functions. It is made up of five key features:

1. Targeting regulatory activity through intelligence-led analysis of risk of serious harm and/or fatalities .
2. Adopting a high engagement approach involving key agencies, stakeholders and workplaces.
3. Practicing credible and proportionate enforcement.
4. Expanding the focus from hazards and incidents to incorporate underlying causes (of health and safety problems) and patterns of *non-compliance*³ (including ineffective engagement or participation of workers in health and safety issues).
5. Focusing on sustainable improvements in health and safety performance such as finding effective solutions for risk based issues.

1.2 The principles of the enforcement regime

The principles of natural justice are incorporated in WorkSafe's decision making about enforcement. This means that the decision maker (such as the inspector) should consider WorkSafe's views, those of the duty holder and any potential victim, fairly with due regard to all applicable circumstances, and decide an enforcement matter impartially.

The duty holder, worker, and the wider public (including potential victims and their families) need to be confident that all decisions to exercise regulatory powers are lawful and follow a fair process.

These principles will apply to specific cases of enforcement and to WorkSafe's management of enforcement activities as a whole.

Proportionality

WorkSafe's enforcement responses are proportionate to the context, the problem they seek to address, and take into account duty holder responsibility.

WorkSafe also expects duty holders to be proportionate in the way they manage health and safety. For example: the greater the harm that could result the more that may need to be done to manage the risk.

Transparency

Transparency assists duty holders to understand what is expected of them in specific situations, and what they can expect from WorkSafe. Transparency also extends to keeping affected parties (including victims) informed where required (subject to any privacy or legal constraints).

³ As defined in the Definition of terms section.

⁴ WorkSafe Position on: [Risk Management at Work](#)

WorkSafe enforces all of the legislation for which it is responsible transparently. Enforcement approaches, methodologies and rules development are publicly available to demonstrate WorkSafe's credibility.

Duty holders can expect transparency in relation to actions on the part of the inspector.

Consistency

Outcomes from WorkSafe's enforcement activities are predictable and consistent. This means that similar incidents of non-compliance should lead to similar enforcement outcomes.

This approach does not necessarily mean uniformity⁵ WorkSafe responds consistently when dealing with similar cases, but is flexible enough to take into account the specific circumstances of each case. Consistency of approach provides certainty in the workplace about the types of enforcement responses WorkSafe takes, why, and in what circumstances.

Accountability

WorkSafe carefully considers the action it takes around enforcement and has a sound legal basis for its enforcement decision making. Both WorkSafe staff and the relevant duty holders are accountable for their actions.

WorkSafe is judged against certain standards by the public (such as the principles contained in this policy), and enforcement and practices are open for public scrutiny.

Where our enforcement decisions are amenable to internal or external review or appeal, we will communicate this to affected parties.

WorkSafe has effective and easily accessible mechanisms for dealing with complaints, or reviews of its processes or actions.

⁵ Health and Safety Executive (UK): *Enforcement Policy Statement: (Principles of enforcement and consistency)*

2.0 Enforcement approach

IN THIS SECTION:

- 2.1 Enforcement Decision-making Model (EDM)
- 2.2 WorkSafe's enforcement approach

WorkSafe applies its enforcement approach across all of its legislative obligations to encourage duty holders to take their health and safety responsibilities seriously.

2.1 WorkSafe's enforcement approach

Enforcement responses are specific and proportionate to the situation they address, and the seriousness of the workplace behaviour.

Enforcement decisions may not necessarily be progressive in response (moving from a low level enforcement response to the use of a stronger enforcement response later). Enforcement decisions will differ depending on the situation. For example: a duty holder may experience a series of escalating enforcement responses or an immediate prosecution decision. The high level parameters for decision making are outlined in this document.

WorkSafe expects duty holders to self-manage work-related health and safety issues. WorkSafe has a specific focus on workers most at risk, and enforcement is the tool it uses to hold duty holders to account for specific breaches of health and safety legislation. Where duties are compliance-based, and where WorkSafe identifies a clear legislative breach, we may not always enforce based on risk.

Appropriate tools will be used, depending on the circumstances, including the level of risk, the clarity of guidance available, the willingness of Persons Conducting a Business or Undertaking (PCBU) to comply with the law, and any harm.

The regulator has a range of tools (described on pages 11-15) to:

- promote and achieve compliance with the law
- make sure duty holders take appropriate action to manage risk
- make sure duty holders who breach health and safety requirements are held to account.

Enforcement contributes to a system working effectively to manage risks. WorkSafe uses its Enforcement Decision-making Model (described below) as a risk-based approach to guide the choice of enforcement tools.

2.2 Enforcement Decision-making Model (EDM)

EDM is an enforcement decision making model that puts the enforcement policy into practice. It guides WorkSafe's enforcement decision-makers (in the first instance inspectors) through a guided decision making process to determine what enforcement response is appropriate in the particular circumstances.

EDM supports inspectors to reach decisions that are consistent, proportionate, transparent and accountable.⁶ In any given situation, inspectors must use their own judgement. EDM expects inspectors to carefully consider the overall level, appropriate focus, and impact of their enforcement decision. EDM ensures that their judgement is guided by WorkSafe's enforcement aims. It also provides a clear basis for management and peer review of all enforcement decisions.

EDM focusses decision-makers on situations where significant risks are not being managed well.

We will determine whether the duty holder is effectively and proportionality managing risks to workers and other people. Where risk is not being managed effectively, WorkSafe requires its decision makers to apply enforcement responses that are proportionate to the risk involved.

When addressing matters where a risk of harm is present, WorkSafe requires its decision makers to assess the degree of risk as a fundamental premise of its enforcement decision, and to consider whether the risk has been eliminated or minimised so far as is reasonably practicable.

Targeted activity

WorkSafe targets its enforcement activities to prevent the most serious risks of harm, focusing on activities and workplaces that give rise to the most serious risks. Information about WorkSafe's current focus areas can be found on our website: www.worksafe.govt.nz/worksafe

WorkSafe works with other regulatory agencies to improve collaboration and co-ordination of its activities. It will gather intelligence (subject to legal and/or privacy constraints) and share information in order to target particular high risk industries. WorkSafe will use that information and intelligence to assist it in informing where enforcement resources and activities need to be focused.

Status of standards

WorkSafe will incorporate the status of any relevant standards when making enforcement decisions. The EDM incorporates WorkSafe's expectation that a higher level of enforcement will be appropriate when there has been a failure to meet standards that are well known and readily available (especially in an Act, Regulations, Approved Code of Practice or WorkSafe Good Practice Guides), compared to situations where there is very little information or specific guidance available to assist the duty holder to comply with or manage risks effectively.

Duty holder factors

WorkSafe will consider duty holder factors when determining the enforcement response. The EDM incorporates thresholds that WorkSafe considers to be usually appropriate for each enforcement response. It also requires the decision maker to consider a range of aggravating or mitigating factors ('duty holder factors') that may be specific to the situation.

WorkSafe will take these factors into account in certain circumstances and where appropriate, to determine whether the enforcement response is the same as, higher or lower than, the initial enforcement expectation in the EDM.

The overall impact of decision making

WorkSafe's enforcement responses demonstrate impartiality and integrity, and enforcement decisions are applied fairly and with good reason. Decisions are aligned with WorkSafe's strategic direction, and its current priority campaigns.

⁶ Refer to WorkSafe's Enforcement Decision-making Model (EDM).

3.0

Enforcement tools and application

IN THIS SECTION:

- 3.1 WorkSafe's enforcement tools
- 3.2 Review and publication
of this policy

WorkSafe has a number of enforcement tools that can work both as an effective incentive to change behaviour and as a deterrent to non-compliant behaviour.

3.1 WorkSafe's enforcement tools

Some enforcement tools (such as improvement notices) are aimed at the management and control of risks by ensuring compliance with health and safety legislation. Punitive tools (such as infringement notices and prosecution) additionally penalise non-compliance and act as a further incentive to comply with the law. A breach of the law may be enforced through WorkSafe's various Acts, associated regulations, or both.

Directive letter and verbal direction

Directive letters and verbal direction are used when an inspector identifies a breach of one of WorkSafe's Acts or regulations and makes a decision that the non-compliance does not require a statutory notice. Inspectors are able to provide the duty holder with directive advice, either in writing or verbally. A directive letter may also be issued as part of an inspection report recommendation. WorkSafe will keep a record of that advice.

These types of enforcement tools are not prescribed in WorkSafe's Acts or regulations and may be used in some situations in which there is:

- a moderate or nominal risk of harm (for risk based matters)
- a minor or short term lapse or occasional non-compliance (for administrative matters)
- where the standard being applied by the duty holder is not set out in an Act, and Approved Code of Practice, or the WorkSafe Good Practice Guide.

WorkSafe considers this to be an effective way of dealing with minor issues or risks where simple, immediate or short-term action can be taken by the duty-holder to comply. A directive letter or verbal direction provides a formal record that WorkSafe has required a duty holder to manage a risk or prevent future harm. The instruction would need to be clear enough so that the duty holder understands the breach, and what action needs to be taken and by when.

The letter or verbal direction will be recorded by WorkSafe, and may be referred to in the future. For example: if a similar breach occurs in the future (and the duty holder has previously received a directive letter or verbal direction relating to a similar breach) then the duty holder may expect a stronger enforcement response for subsequent incidents.

Directive letter and Recommendations (Petroleum, Mining Operations and Quarrying Operations and Major High Hazard Regulations)

Under the Health and Safety at Work (Petroleum Exploration and Extraction) Regulations 2016, the Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 and the Health and Safety at Work (Major High Facilities) Regulations 2016, WorkSafe issues formal Inspection Reports to ensure duty holders are in compliance with the specific requirements in each of these regulations. Generally, the regulations require WorkSafe to be satisfied that all parts of the installation or equipment are fit for purpose. Following an inspection, WorkSafe may issue a report specifying the steps the duty holder is required to take to ensure compliance.

Written Notice (Gas Act, Electricity Act)

Section 9 of the Gas Act and section 8 of the Electricity Act permit WorkSafe to issue a Written Notice. A Written Notice can require any person to do or refrain from doing all such things as WorkSafe considers necessary to remove or minimise the danger or potential danger.

Non-Disturbance Notice (HSWA)

Under HSWA, an inspector may issue a non-disturbance notice (to a person with management or control of a workplace) if they reasonably believe that it is necessary to do so to facilitate the exercise of their compliance powers. A non-disturbance notice might be issued in order to preserve the site at which a notifiable event⁷ has occurred, or to stop any disturbance of a particular site (including the operation of a plant), for a specified time, that is reasonable in the circumstances.

A non-disturbance notice does not affect a PCBU's compliance history. A non-disturbance notice is used by an inspector so they may exercise their compliance powers (eg for an examination, a test, an inquiry or inspection) to ascertain whether there has been a contravention with HSWA or the regulations. The inspector may determine there has been no contravention.

Improvement Notice (HSWA)

Under HSWA or its regulations, an improvement notice is issued by an inspector in order to rectify a breach or prevent non-compliance, within a set timeframe.

The purpose of an improvement notice is to focus the duty holder on the tasks to be carried out in order to fix a breach. An improvement notice will generally be issued where a type of non-compliance is detected that does not involve an immediate risk to health and safety and/or a risk gap that is extreme or substantial. Improvements are therefore not necessarily required or able to be corrected immediately.

The notice may be issued to a duty holder when an inspector reasonably believes that a duty holder is, or is likely to, breach HSWA or regulations.

The notice must stipulate the breach (or likely breach), the provision that is being breached (or is likely to be breached), and provide a time period (a compliance period) by which the duty holder must comply with the notice. The notice may also contain advice such as measures that may be taken to rectify the breach.

⁷ Defined in the Definition of terms section.

Prohibition Notice (HSWA)

Under HSWA, Prohibition Notices may be issued by an inspector to stop an activity that is occurring or may occur at a workplace. A prohibition notice may be issued in cases where the risk gap⁸ is extreme or substantial, the risk is imminent or there may be a serious risk to the health and safety of a person due to failure to comply with the HSWA or regulations. Inspectors may also issue an oral direction to the person that has control over the activity prohibiting continuation of the activity. Oral directions will be confirmed by a written notice (the prohibition notice) as soon as practicable.

The circumstances in which an inspector may issue a prohibition notice are set out in HSWA.⁹

Where a prohibition notice is issued, the activity would not only involve a serious risk to the health and safety of a person(s) but is likely to fall significantly below the standard of compliance set down in specific guidance.

The notice will stipulate the matter that gives rise to the risk (or is likely to give rise to the risk) and, where relevant, the provision that is, or is likely to be breached. The prohibition notice may also contain other recommendations such as measures that could be taken to remedy the risk.

Sustained Compliance Letter (HSWA)

A Sustained Compliance Letter is issued by an inspector in a situation where they would have issued a Prohibition Notice, but the duty holder rectifies the issue while the inspector is still on site. A Sustained Compliance Letter is issued by an inspector to create a written record and allow the duty holder to address the underlying issue(s) that led to the immediate risk of harm.

Like a directive letter, a Sustained Compliance Letter will be recorded by WorkSafe, and may be referred to in the future.

Compliance Orders (HSNO)

Compliance Orders currently exist under the Hazardous Substances and New Organisms Act 1996 (HSNO) and WorkSafe's HSNO Enforcement Officers (its inspectors) use them when they are enforcing under this Act.

Under section 97(1)(a) and (b) of HSNO, WorkSafe enforcement officers can enforce HSNO in any workplace or distribution system, gas installation or gas appliance.

Enforcement officers can serve a compliance order on any person, requiring them to:

- cease an activity that contravenes the provisions of HSNO, or relates to a hazardous substance or new organism that poses a danger to health and safety of people or the environment
- do something as required by the enforcement officer to ensure the person complies with the Act.

A compliance order may be made subject to such conditions as are reasonable in the circumstances.

⁸ Defined in the Definition of terms section.

⁹ The activity would involve a serious risk to the health and safety of anyone arising from an immediate or imminent exposure to a hazard or, in relation to authorised workplaces and mining operations, there is a serious risk to the health and safety of a person because of a failure (or likely failure) to comply with HSWA or associated regulations.

The person being served with a compliance order must comply in the period specified and pay all the costs and expenses of compliance.

Depending on how it is written, a compliance order can function like a prohibition notice (for example, require an activity to cease immediately) or an improvement notice (give a time period for an improvement to be made).

Regulatory Permissions

WorkSafe issues a range of regulatory permissions, such as licences and certificates in workplaces using hazardous substances and safety cases in high hazard industries.

The terms and conditions of granting permission are set out in the permissioning documents. If a duty holder fails to adhere to the conditions set out in the permissioning documents, an analysis of the risk gap will be used when considering a possible enforcement response.

Infringement Notice

Infringement notices may be used for breaches of specified health and safety obligations under HSWA, the Gas and Electricity Acts, or associated regulations. The amount for each infringement fee is set out in the applicable regulations.

WorkSafe can issue an infringement notice¹⁰ to a duty holder if it believes on reasonable grounds, that a person is committing or has committed an infringement offence.

Infringement notices are a way of dealing with common breaches of the law where the impact of the duty holder's action is not considered serious enough to warrant prosecution.

The infringement notice may be issued without a prior warning to the duty holder. There needs to be a clear breach of HSWA, the Gas and Electricity Acts or associated regulations so that the set of facts around the infringement offence can be verified.

The recipient of an infringement notice may choose to opt for a hearing in the District Court, instead of paying the fine.

WorkSafe is not able to prosecute regarding an offence for which an infringement notice has already been issued as a means of enforcement.

Prosecution

WorkSafe's objective in prosecuting is to deter non-compliance with the laws it is responsible for enforcing. Prosecution is a deterrent and ensures that those who breach the law are held to account. Prosecution action may be taken whether or not a breach has resulted in death, injury, illness or disease actually occurring. Prosecution also assists to promote good health and safety values and practices. WorkSafe's prosecution decisions are made in accordance with the WorkSafe's *Prosecution Policy* and the Solicitor General's *Prosecution Guidelines*.

¹⁰ Under HSWA the 'regulator' issues infringement notices. In reference to improvement, prohibition and non-disturbance notices, HSWA specifically refers to an 'inspector' issuing those notices.

Enforceable Undertakings (HSWA)

An enforceable undertaking is an enforcement pathway that is permitted under Part 4 of HSWA. It can be taken following a contravention of the Act.

Generally used as an alternative to prosecution, it allows a duty holder to voluntarily enter in to a binding agreement with WorkSafe. The agreement outlines actions the duty holder will undertake to address the contravention and remedy the harm caused to any victim(s), workers, the wider industry or sector and community.

An enforceable undertaking is not imposed on a duty holder. A duty holder must apply to WorkSafe who considers the application and makes a decision about whether or not to accept it. Once WorkSafe accepts an enforceable undertaking, it is legally binding.

WorkSafe's decisions about enforceable undertakings are made in accordance with its *Enforceable Undertakings Operational Policy*.

Review of decisions

A person that has been affected by a decision made by an inspector may apply to WorkSafe for an internal review of that decision. The inspector that made the original decision is not able to review his or her own decision.

WorkSafe may stay the action required by the original enforcement decision, until an internal reviewer has made a decision.

A review of decisions applies to people affected by an enforcement notice or a compliance order. If the review relates to a prohibition notice which is based on an assertion of 'immediate risk', it is extremely unlikely that the stay of action will be granted.

The Internal Review Policy clarifies that all internal review decisions made by WorkSafe can be appealed to the District Court.

3.2 Review and publication of this policy

This policy is owned by the WorkSafe Operational Policy team and will be reviewed every five years. The purpose of the review is to:

- address any operational inefficiency with the policy
- ensure the policy is achieving its objectives, and
- recognise any relevant legislative amendments.

The policy is included in WorkSafe's practice framework and will be available externally.

Appendix

IN THIS SECTION:

Appendix 1: Glossary

Appendix 1: Glossary

TERM	DEFINITION
Compliance	The continuous process of acting in accordance with any of the legislation and/or regulations administered by WorkSafe.
Duty holder	The principal duty holder is the person conducting a business or undertaking (PCBU) as described under section 17 of HSWA. Other persons also have duties under HSWA.
Enforcement response	A WorkSafe action that aims at reducing or stopping workplace related death, injuries and disease by deterring non-compliance with HSWA.
HSNO	The Hazardous Substances and New Organisms Act 1996.
HSWA	The Health and Safety at Work Act 2015.
Inspector	An inspector appointed under section 163 of HSWA. The role of inspector also includes technical officers who operate under the Gas Act, the Electricity Act, and associated regulations.
Non-compliance	Failure to comply with any of the legislation and/or regulations administered by WorkSafe.
Notifiable event	Any of the following events that arise from work: the death of a person; or a notifiable injury or illness, or a notifiable incident (as prescribed under section 24 of HSWA).
Risk gap	The 'risk gap' is determined by comparing the duty holder's breach of the legislation against where they should be if they were taking reasonably practicable steps to be compliant.
Workplace	Places where work is carried out, or is customarily carried out, for a business or undertaking, and includes any place where a worker goes or is likely to be while at work (as defined in section 20 of HSWA).

Disclaimer

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This document is a guideline only. It should not be used as a substitute for legislation or legal advice. WorkSafe is not responsible for the results of any action taken on the basis of information in this document, or for any errors or omissions.

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PO Box 165, Wellington 6140, New Zealand

www.worksafe.govt.nz



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