



# Exemptions

## REGULATORY FUNCTION POLICY

March 2017



## INTRODUCTION

The Exemptions Policy sets out the principles that WorkSafe applies to granting exemptions from regulations under the Health and Safety at Work Act 2015 (HSWA).

## BACKGROUND

WorkSafe was established as a Crown entity under the WorkSafe New Zealand Act 2013 and is New Zealand's primary health and safety regulator. The Health and Safety at Work Act 2015 (HSWA) is New Zealand's health and safety law. It came into effect on 4 April 2016.

Section 220 of HSWA gives WorkSafe a discretionary power to grant exemptions from compliance with any provisions in regulations.

The exemptions mechanism provides WorkSafe with flexibility to respond to unforeseen circumstances when applying HSWA regulations. Exemptions are a practical intervention tool.

## POLICY PURPOSE

The purpose of the *Exemptions Policy* is to explain WorkSafe's approach to considering and granting exemptions to regulations and what it seeks to achieve from exercising this regulatory function.

This policy is for internal operational use and will guide WorkSafe's exemptions function and the development of more detailed operational documents. Other related policies include the: *Authorisations Policy*, *Reviews Policy* and the operational policies covering each regulatory regime.

The *Exemptions Policy* is not prescriptive in its application. It provides a set of principles that can be applied to exemption decisions made by WorkSafe.

## POLICY SCOPE

### RELEVANT LEGISLATION

This policy covers all exemptions made under section 220 of HSWA (see Annex 1: HSWA exemption provisions). Section 220 of HSWA gives WorkSafe the power to grant exemptions from compliance with any provision or provisions of regulations. Exemptions may be granted to a person or class of persons.

### OUT OF SCOPE

Exemptions made for the Armed Forces under section 213 of HSWA are not in scope. These exemptions are provided by way of regulation rather than being granted by WorkSafe.

This policy also does not cover the following:

- > approvals of alternative means of compliance (eg approved methods under Health and Safety at Work (Asbestos) Regulations 2016) which are addressed by WorkSafe's Authorisations Policy.
- > offences and penalties, enforcement and prosecutions related to authorisation and exemption which are addressed by WorkSafe's Enforcement Policy and related operational policies.

## PRINCIPLES THAT GUIDE EXEMPTION DECISION MAKING

### THE WORKSAFE INTERVENTION APPROACH

*WorkSafe's Intervention Approach*<sup>1</sup> describes how WorkSafe will fulfill its regulatory functions. The seven principles behind the intervention approach are highly relevant and provide the context for the principles that guide exemptions.

WorkSafe's interventions ultimately influence behaviour. Exemptions should be considered in this context and be seen as a tool within the range of regulatory interventions available.

### PRINCIPLES

The exemption decision making process should be guided by the following principles.

#### **Consistent**

A consistent approach will be used in the same or similar circumstances to achieve the same ends. This ensures a reliable and trustworthy regulator.

Common criteria will be applied for granting and refusing exemptions from health and safety regulations. This will ensure that WorkSafe's exemption decisions are consistent across the same or similar situations.

#### **Transparent and accountable**

WorkSafe will act in a visible, predictable and clear way to promote participation and accountability.

Exemptions will be used sparingly where other options have been discounted. An exemption should ensure the legislative framework is operable while still ensuring health and safety outcomes are met. Exemptions are a means to solve exceptional problems and will not be used as a business as usual tool.

WorkSafe will apply the principle of transparency so that the regulated community knows what to expect. The basis for WorkSafe's decisions and the reasons for its actions are clear, both before and after it makes them. WorkSafe is open about what it does and why. It is accountable for its actions.

Section 221(3) of HSWA requires WorkSafe to notify an exemption in the Gazette and publish an exemption on WorkSafe's Internet site. WorkSafe will publish details of exemptions granted in an accessible form. WorkSafe will also make available information on how we make exemption decisions so that exemption applicants and the public know what to expect.

#### **Proportionate**

WorkSafe will make exemption decisions that are proportionate to the situation for which an exemption is sought.

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<sup>1</sup> The approach captures WorkSafe's overall choices about how it will go about its job of influencing behaviour, and will help shape its decisions about its responses.

Application of this principle means the action chosen (for example, granting an exemption with conditions attached) is in accordance with the scope and scale of the activity for which exemption is sought, or the potential severity of the risk of the activity. WorkSafe will make decisions on granting exemptions that are proportionate to the risk associated with the activity for which exemption is sought and to the intended outcomes of HSWA.

#### **Informed decision-making**

WorkSafe's decisions will be supported by the best information available at the time.

When making exemption decisions, WorkSafe will ensure that:

- > there is an appropriate quality and quantity of information to support the decision
- > the decision can be clearly explained and justified
- > the decision is based on a balanced use of relevant precedents (if available)
- > any information that is normally regarded as relevant but which is not considered in the decision-making process must be identified and reasons provided for the exclusion.

Decisions to grant exemptions will be guided by an evidence-based analysis of the need for an exemption. This will be assessed using credible and robust evidence, as far as possible.

WorkSafe's decisions demonstrate impartiality and are applied fairly and with good reason. Decisions are aligned with WorkSafe's strategic direction. Robust decision making is essential to ensure that the best possible decision based on the information available is made, and that this decision can stand up to scrutiny. WorkSafe's exemption decisions will be informed by reliable information and operational intelligence.

#### **Responsive**

WorkSafe will be timely and responsive to the needs of an applicant in making an exemption decision.

Timeliness will be balanced with the need for suitable analysis and consultation. Exemption applicants will be advised of the expected timeframe for a decision when WorkSafe receives the application.

### **DECISION MAKING**

WorkSafe will consider all applications for exemptions from compliance with regulations in accordance with the power conferred by HSWA. WorkSafe will not grant an exemption unless it is satisfied that:

- > the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the proposed exemption or
- > the exemption is not inconsistent with the purpose of HSWA.

In addition to section 220 of HSWA, some regulations prescribe mandatory requirements or criteria for granting exemptions. Where regulations prescribe additional requirements, WorkSafe will exercise its discretion under section 220 in accordance with those requirements.

Decision making will be proportionate, consistent, robust, timely and evidence-based. Decisions made by WorkSafe must be capable of withstanding scrutiny, demonstrate accountability and transparency, and be in the public interest. WorkSafe will consider the health and safety interests of workers and other persons.

## **CONDITIONS ON EXEMPTIONS**

Imposing conditions on an exemption is authorised by section 220(3)(a) of HSWA. The ability to impose conditions on an exemption is a tool to manage any risk associated with granting the exemption and to put boundaries on the scope of an exemption.

Conditions on exemptions will be used to ensure the exemption is consistent with the purpose of HSWA. Conditions will be imposed as necessary to address health and safety issues or administrative issues that would otherwise result in the application for exemption being declined.

Conditions will be stated in a way that is clear to the exemption applicant and other interested parties.

## **CLASS EXEMPTIONS**

A class exemption applies to a class of persons rather than an individual person.

A class exemption that is of general application, as defined by section 221(6) of HSWA, is considered a legislative instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under [section 41 of that Act](#).

WorkSafe may consider a class exemption in the decision making process for individual exemptions where the issues giving rise to an individual exemption apply to a class of persons such that it is appropriate to create a class exemption.

WorkSafe will consult on class exemptions. We will ensure interested groups and individuals are aware we are consulting and will target relevant stakeholders where appropriate.

The principles that guide exemption decision making also apply to class exemptions.

## **AMENDING, REVOKING AND REPLACING AN EXEMPTION**

The principles that guide exemption decision making also apply to amending, revoking or replacing an exemption.

### **AMENDING AND REVOKING AN EXEMPTION**

WorkSafe may consider amending or revoking an exemption under section 220(3)(b) of HSWA or replacing an exemption under section 220(3)(c).

A range of factors may prompt WorkSafe to consider revoking or amending an exemption, including:

- > a breach of the terms and conditions of an exemption
- > the exemption applicant providing false or misleading information to WorkSafe in the application process.

A breach of a term or condition of an exemption is considered by section 220(5) of HSWA to be a breach of the provision to which the exemption relates (unless the terms of the exemption provide otherwise).

Analysis will support the decision to amend or revoke an exemption. WorkSafe will ensure that a decision to revoke or amend an exemption is supported by clear and justifiable reasons.

### REPLACING AN EXEMPTION

Exemptions granted by WorkSafe expire after five years. WorkSafe may replace an exemption either before or when it expires.

### GRANTING AN EXEMPTION ON WORKSAFE'S INITIATIVE

WorkSafe may consider granting an exemption on its own initiative to allow for flexibility or innovation in managing health and safety risks. The principles guiding exemption decision making also apply to exemptions granted on WorkSafe's initiative.

In considering granting an exemption on its own initiative, WorkSafe will take into account whether:

- > The regulation has unintended consequences, for example, where a person or class of persons who were not the target of a regulation have been unintentionally included in its application.
- > Significant numbers of individual exemptions have been granted in relation to similar matters to justify a class exemption.

WorkSafe's development of an exemption will be guided by its priorities and how the exemption contributes to achieving the Government's targets for health and safety. In many cases, WorkSafe will need to exercise discretion as to whether the development of an exemption is a necessary and worthwhile intervention.

In considering granting an exemption on its own initiative, WorkSafe will take into account the priorities of its work programmes and the development of other regulatory interventions such as safe work instruments. WorkSafe will seek the views of agencies designated under HSWA as sector specific workplace health and safety regulators. When appropriate, WorkSafe will also seek the views of its social partners and affected parties through consultation.

### REVIEW AND PUBLICATION OF THIS POLICY

This policy will be reviewed every two years. The policy will be reviewed to:

- > ensure the policy is still achieving its objectives
- > address any operational inefficiency within the policy and
- > recognise any relevant legislative amendments.

**Policy owner:** General Manager, Better Regulation

**Policy approved by:** WorkSafe New Zealand Board

**Policy reviewed and approved:** December 2016

**Next review date:** December 2018

**Distribution:** This policy will be published on the WorkSafe website

## ANNEX 1: HSWA EXEMPTION PROVISIONS

### 220 Regulator may grant exemption from compliance with regulations

- (1) The regulator may exempt any person or class of persons from compliance with any provision or provisions of regulations.
- (2) The regulator must not grant an exemption under subsection (1) unless it is satisfied that-
  - (a) the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the proposed exemption; and
  - (b) the exemption is not inconsistent with the purpose of this Act.
- (3) The regulator may-
  - (a) grant the exemption on any terms and conditions that the regulator thinks fit; and
  - (b) amend or revoke an exemption; and
  - (c) replace an exemption either before or when it expires.
- (4) An exemption granted under subsection (1)-
  - (a) takes effect from the date specified in the notice published in accordance with section 221 (which may not be earlier than the date of the notice); and
  - (b) expires on the close of the day that is 5 years after the date on which it took effect, unless it is sooner replaced or revoked.
- (5) The breach of a term or condition of an exemption granted under subsection (1) is a breach of the provision to which the exemption relates (unless the terms of the exemption provide otherwise).

### 221 Status and publication of exemptions granted by regulator

- (1) An exemption granted under section 220 that is a class exemption is a legislative instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.
- (2) An exemption granted under section 220 that is not a class exemption is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.
- (3) As soon as practicable after an exemption granted under section 220 is made, it must be-
  - (a) notified in the Gazette; and
  - (b) published on an Internet site maintained by or on behalf of the regulator.
- (4) The regulator's reasons for granting the exemption (including why the exemption is appropriate) must be published in accordance with subsection (3)(b) together with the exemption.
- (5) A notification in the Gazette for the purpose of subsection (3)(a) does not have to incorporate the exemption.
- (6) In this section, class exemption means an exemption granted under section 220 that is of general application and that applies to classes of persons.

## ANNEX 2: EXEMPTIONS IN HSWA REGULATIONS

REGULATIONS	REGULATION RELATED TO EXEMPTION
<b>Regulations made under HSWA</b>	
Health and Safety at Work (Major Hazard Facilities) Regulations 2016	<a href="#">25 Prescribed requirements for WorkSafe granting exemption</a>
Health and Safety at Work (Petroleum Exploration and Extraction) Regulations 2016	<a href="#">68 Criteria for granting exemption under Act from notice requirements</a>
Health and Safety at Work (Hazardous Substances) Regulations (consultation draft)	Various - regulations under development

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Published: March 2017 Current until: 2019

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