

To industry and beyond - the outlook for health and safety in 2016

Sherridan Cook, Hamish Kynaston, Peter Chemis, Susan Rowe

27 November 2015

November 2015 marked the fifth anniversary of the Pike River Mine disaster, and the legacy of the 29 men who died preventable deaths working in the mine will be finally realised with the start of the Health and Safety at Work Act 2015 (HSWA) on 4 April 2016. It will be interesting to see how the changes are bedded in, enforced by WorkSafe NZ and interpreted by the courts. But in the meantime, organisations will have to work out how they can best meet their new obligations.

Best practice

The HSWA may be the catalyst for changes in organisations, but it is clear that mere compliance will not be enough to meet the aim of the government's Working Safer reform package.

To improve New Zealand's health and safety record and bring down the workplace injury and death toll by at least 25 percent by 2020, organisations will need to strive for best practice, not just mere compliance. This will require a vast improvement in ownership and attitudes towards health and safety, and a shift in the mindset of the leaders of organisations.

To meet this best practice standard, they must no longer treat health and safety as an afterthought, but must incorporate it into their business strategy, risk management systems and as an aspect of all decision making. For organisations that are already exceeding expectations, the HSWA should align with their current practices and less significant changes in approach will only be required.

But for most New Zealand organisations that are merely compliant or do not meet current standards, meaningful change will be required and these changes should be initiated now. A good place to start is performing an organisation-wide health and safety review. This is a first step in bringing existing health and safety policies and practices in line with the new requirements but should also identify what aspects of health and safety systems need to be improved.

Organisations should also keep updated on the introduction of the new regulations, codes of practice and guidance as this is implemented next year and beyond.

We also recommend education and training for governance teams, as the HSWA will place a positive duty on individuals in governance to actively engage in health and safety matters, and imposes personal liability on individuals who fail to meet their due diligence obligations.

WorkSafe NZ – a change in approach?

The funding of the health and safety function of MBIE as at 1 July 2013 was \$53.7 million. This has increased, with an additional \$26.7 million funding requested for the 2017/18 years to bring funding for health and safety regulatory functions to a total of approximately \$80 million per annum.

This increase in resources is intended to allow WorkSafe NZ to expand its standard setting and educative role. The period between the HSWA being passed and implemented will be used by WorkSafe NZ to build up its internal capability and ensure the final details of the systems, processes, communications and related guidance material are aligned with the HSWA.

After April 2016, WorkSafe NZ will continue to develop and implement material to assist businesses to comply with the HSWA. It is estimated 50 Approved Codes of Practice (ACoPs) will be drafted or updated each year by WorkSafe NZ to ensure all health and safety material is up to date, reflects best practice, and is useful to duty holders. All material will be accessible online for businesses to use.

We have already seen WorkSafe NZ engage more with businesses as a result of the government's Working Safer reforms, and would expect this measured approach to continue throughout 2016.

WorkSafe NZ will also have more enforcement tools available to it under the HSWA, including non-disturbance notices and enforceable undertakings. We do not expect these tools will result in a dramatic change in approach after the HSWA comes into force. However, potential penalties for breaches will increase significantly under the HSWA, and duty holders who are found guilty of an offence will be subject to fines of up to \$3 million for a body corporate and \$600,000 for an individual.

Conclusion

Duty holders must keep updated on future changes, including regulations, ACoPs and other guidance material and should review and, where necessary, update their health and safety policies and procedures in anticipation of the HSWA to ensure they are engaging in a best practice approach to health and safety.

Key changes

Worker engagement

All PCBUs have two overarching duties in respect of worker participation – a duty to engage with workers, and a duty to have effective agreed participation practices regarding health and safety matters. All PCBUs must provide workers with reasonable and ongoing opportunities to participate effectively in improving work health and safety.

Regulation development process

Regulations are being drafted and implemented in two phases to ensure that duty holders understand and comply with the new regulatory framework. The first phase is being developed currently and will be in place when the HSWA comes into force to enable the majority of the new regulatory framework to be in place on day one. The rationale for this is partly practical – duty holders need to know how to meet their general obligations under the HSWA – and partly political – if the government's target to reduce serious work-related injury and death is to be met by 2020 swift implementation must occur.

Phase one regulations

- General risk and workplace management
- Worker participation, engagement and representation
- Work involving asbestos
- Work involving hazardous substances
- Major hazard facilities.

Phase one will also include the transfer of recently enacted health and safety regulations concerning mining, petroleum exploration and extraction, adventure activities and levy funding rates. The remainder of the existing work health and safety regulations will be transferred so they can continue in force until being more systematically reviewed during phase two.

Phase two

The second phase of regulation will be developed on an ongoing basis over a two-year period (until April 2018). Phase two involves updating and improving regulations relating to hazardous work, plant and structures, geothermal operations and quarries. The hazardous substances regulation will also be simplified to ensure it is fit-for-purpose and accessible for duty holders.

The second phase will include consideration of whether there is a need for further industry-specific regulation. For example, the Australian model regulations regulate the construction industry separately. Consultation will occur to determine if this approach is appropriate in New Zealand, or whether approved codes of practice and guidance will better achieve this.

Codes and guidance material

WorkSafe NZ is completing the regulatory framework by developing a set of Approved Codes of Practice (ACoPs), standards and guidance material to support the HSWA and regulations. This material will be published as part of the phased process, based on priority.

The guidance development process will follow shortly behind the development of the regulations, because WorkSafe NZ and the guidance group members consulting on the material need certainty about what the regulations will require prior to developing them.

Once developed, ACoPs are approved by the Minister of Labour and will outline preferred ways of working to comply with the duties of the HSWA and/or regulations. These ACoPs, standards and guidance will be admissible in court as evidence of whether or not a duty has been complied with. Where an incident has occurred, any departure from the standards set out in this material is likely to indicate a failure to meet the duties under the HSWA. Conversely, compliance with these ACoPs, standards and guidance will be key to defending against a breach of the HSWA.

Managing risks

A hazard is a situation that has the potential to harm a person. A risk is the possibility that harm might occur when a person is exposed to a hazard.

The HSWA requires PCBUs to manage health and safety risks arising from work by eliminating risks so far as is reasonably practicable. If this is not possible, then the PCBU must minimise those risks so far as is reasonably practicable. The HSWA does

not distinguish between 'isolation' and 'minimisation' of hazards or risks.

Minimisation describes anything that a duty holder does that does not completely remove (eliminate) the risk, so includes the concept of isolation. If an elimination or minimisation measure is practicable and the cost of the measure is not grossly disproportionate to the benefit gained, then the measure will be considered reasonably practicable.

In most cases, a decision on which measure to take can be made by consulting existing 'good practice' in the industry. This may not be possible in novel or complex situations and in these scenarios additional assessment will be required, such as using expert consultants.

WorkSafe NZ has suggested the following process for determining and demonstrating whether risks have been minimised so far as is reasonably practicable:

- Identify and consider a range of potential measures for risk reduction (both those adopted and those rejected)
- Systematically analyse each of the identified measures and assess the safety benefits associated with each measure
- Evaluate the reasonable practicability of the identified measures and if they should be adopted or rejected
- And record this process and the results, and summarise this in a safety case.

A decision maker may be able to rank the available control measure options to show their benefits and costs and demonstrate that the appropriate balance has been achieved, if further measures would be grossly disproportionate.

This article was published in the Industrial Safety News Yearbook 2015 - 2016.

Auckland

**188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

**P: +64 9 358 2555
F: +64 9 358 2055**

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

**P: +64 4 499 4242
F: +64 4 499 4141**

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

**P: +64 3 379 1747
F: +64 3 379 5659**