

The anniversary of the HSWA: Panic, progress but no prosecutions

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The Health and Safety at Work Act 2015 (HSWA) has now been in force for one year. Workplace Relations and Safety Minister Michael Woodhouse considers the response to this reform as the beginning of a shift of "both attitudes and behaviours towards health and safety", with New Zealand "on track to meet the Government's target of a 25% reduction in workplace deaths and injuries by 2020". We agree with the Minister that the implementation of the HSWA has created a catalyst for change in the health and safety space, but consider the Government should be setting more challenging targets if it is wants to motivate significant changes.

In our view, the effectiveness of the HSWA to date has been the result of the increased attention and media coverage of health and safety in the workplace, as well as fear of prosecution given the fines under the HSWA are roughly six times that of the preceding Act.

The indications of progress are encouraging, but the goal of a 25% reduction in workplace deaths and injuries by 2020 championed by the Government is not lofty. The reduction rate is determined against a baseline of 2.97 deaths per 100,000 workers, being the average rate of deaths in 2008-2010. The goal equates to 2.2 deaths per 100,000 workers and is met simply by removing the spikes in fatality rates from Pike River and the Canterbury earthquakes. In addition, if you exclude Pike River, work-related fatality rates were already falling prior to the HSWA's implementation. Most importantly, even if this 25% reduction rate is met, this still results in the same number of workers being killed at work each year. In 2016, 49 workers were killed in workplace accidents, which is also the mean number of fatalities for the 2011 to 2016 years. There were 10 fatalities from the start of this year to 21 March 2017, which would amount to approximately 50 fatalities if this rate continued for the remainder of 2017. This equates to a worker being killed at work almost every week.

Therefore, the goal of 2.2 deaths is hardly lofty. In our view, it is unacceptably high, particularly when considered against Australia's current rate of only 1.78 deaths per 100,000 workers.

Despite our view that the 2020 target is insufficient, the implementation of the HSWA has been, overall, a success for New Zealand businesses. In Safeguard magazine's second annual State of the Nation survey, 78% of respondents believe health and safety is taken seriously, a double-digit increase from the 67% who felt the same way in 2016. In the same survey, 72% of respondents agree that in their workplace, risks are discussed with other businesses which share the same site, up from 63%.

WorkSafe's policy of proactive engagement has meant that businesses are generally feeling confident and able to respond to the health and safety risks in their industry. Despite the sharp criticism from some industry sectors, who feared over prescriptive legislation would hurt their bottom line, this does not seem to have eventuated. Instead, it appears businesses have been taking a measured and appropriate response to the changes. The initial panic over the increased fine levels and liability of directors and other officers also appears to have subsided, in part because of the predominantly educational and collaborative approach to industry by WorkSafe. Businesses seem to be engaging in the new mechanisms under the HSWA, and are completing duty holder reviews and proactively suggesting compliance measures, as we have seen in the recent enforceable undertaking imposed on St Kentigern Trust Board following its Sweeney Todd production health and safety incident. Whether this will be more effective than prosecution at improving New Zealand's statistics remains to be seen, but it certainly encourages proactive and forward looking measures when dealing with incidents, which is a welcome change from the defensive and legalistic approach that was common under the previous Act, when denying any failings was viewed as imperative.

The success of the bedding in period of the HSWA can also be attributed to WorkSafe's expenditure budget, which is almost \$100 million for the current year. Given the Government estimates the social and economic cost of deaths, injuries, and ill-health arising from work is \$3.5 billion a year, this is likely to continue to be seen as a worthwhile level of investment. WorkSafe's partnership with ACC and implementation of the Safety Star Rating initiative should also begin to create change, and we expect the replacement of the 15-year-old Workplace Safety Management Practices discounts to create a set of economic incentives better aligned with today's health and safety environment and incorporating aspects of behavioural economics will go some way to cementing the current successes.

The effect of the HSWA on CEO and director behaviour

Given the intense scrutiny on the directors of Pike River, and the creation of due diligence obligations on 'officers', it is unsurprising that CEO's and directors are taking extensive advice on what the HSWA means for their business and their role. The extent to which officers must perform due diligence, which is intended to be a governance obligation at high level, is creating confusion, particularly for directors and CEOs of large businesses, or businesses operating over a number of locations.

In our view, fulfilling these due diligence obligations means acting as a check and balance, rather than becoming involved in the mechanics of day-to-day operations. Officers should understand the risks that are inherent in their business, and use health and safety as a criterion when making decisions about business initiatives. They should also personally ensure information is being shared about health and safety, and that the structure of the business means the right people are in place, properly authorised and accountable, to enable adherence to the HSWA.

As WorkSafe recognises, a key requirement for its own success is industry leaders championing health and safety within their own organisations. Time will tell whether this attitude change, or the HSWA itself will be a much-needed catalyst for change for the health and safety practices of New Zealand businesses. We encourage all leaders to be proactive about health and safety in their organisations, to ensure its workforce is healthy and safe.

This article was written by [Sherridan Cook](#) and [Lucy Carruthers](#) for the May 2017 edition of [NZBusiness Magazine](#).

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