

# **Health and Safety at Work Act 2015: Intention, Implementation and Outcomes in the Hill Country Livestock Farming Industry**

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## **Abstract**

The recently enacted Health and Safety at Work Act 2015 applies across all New Zealand industries. The unique workplace environment and industry culture of the hill country livestock farming sector makes application, implementation and enforcement of the Act in this context uniquely challenging. In contrast to other industries, hill country livestock farming has an uncontained workplace complicated by family and public involvement. WorkSafe, as a “fair, consistent and engaged” regulator, seeks to establish health and safety as one of the industry’s key cornerstones, alongside lifestyle, profit and sustainability. Results to date have been undermined by WorkSafe’s conflicting enforcement, engagement and education functions. There is a perceived misplaced focus on enforcement of low probability, peripheral hazards rather than the key risks that cause accidents. This paper explains the implications of significant changes under the Act for the industry. It also recommends legislative adaptations to address the inadequacies of the farming exception in s 37. An alternative WorkSafe strategy that focuses on effecting compliance through supply chain demand and economic drivers rather than enforcement is outlined.

**Key words:** Health and Safety at Work Act 2015, hill country livestock farming, health and safety, WorkSafe, workplace

## **Introduction**

This paper is a case study on the impact of the Health and Safety at Work Act 2015 (HSWA) within the hill country livestock farming industry. This industry warrants specific consideration because the unique culture and workplace environment makes application and enforcement of the Act within this context distinctly difficult. As the industry is strongly represented in New Zealand’s workplace injury and fatality rates, WorkSafe will not achieve key performance indicators without addressing health and safety deficiencies within this sector. As a result, the industry is currently subject to intense enforcement and regulatory attention. The object of this article is to assess the application, enforcement and current effectiveness of the Act within this industry and determine necessary modifications to the current regime. This paper highlights relevant changes under the new Act. The

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imbalance between enforcement and encouragement with a particular focus on WorkSafe's current implementation strategy is addressed. Difficulties inherent in the legislation when applied to the industry are identified and legislative and strategic changes recommended.

## **I Background to the HSWA and WorkSafe**

The loss of 29 miners in the Pike River mine tragedy on 19 November 2010 highlighted multiple workplace health and safety issues in New Zealand (Royal Commission on the Pike River Coal Mine Tragedy, 2012). The ensuing comprehensive response included enacting the HSWA and forming WorkSafe New Zealand.

WorkSafe is a New Zealand Crown entity, established in 2013, to replace its predecessor the Occupational Safety and Health Service (WorkSafe New Zealand Act 2013). WorkSafe has a tripartite function to safeguard health and safety in New Zealand workplaces through education, engagement and enforcement (WorkSafe New Zealand, 2016a)

## **II The Industry Requires a Degree of Separate Treatment**

Hill country livestock farming is an industry sector of New Zealand agriculture. Agriculture accounts for 38 per cent of workplace fatalities since 2011 and seven per cent of workplace serious harm notifications (WorkSafe New Zealand, 2016b). Research suggests disparity between the fatality rate and serious harm notifications is the result of under-reporting rather than the nature of agricultural accidents (Lovelock & Cryer, 2009). Under-reporting is likely driven by both "negation and denial of ill-health" and minimal compensatory benefits for minor injuries (ibid: 23).

Hill country livestock farming is a unique industry with a clearly distinguishable culture of stoicism, pragmatism and self-sufficiency. Family and work are entwined and members of the public are frequently permitted gratuitous, often unsupervised, access to the workplace. The work is intensely physical and highly varied, requiring skilled use of various machinery and an acute awareness of the risks involved in unpredictable elements of the industry, such as climate and stock handling. The whole farm is a potentially active workplace, with some parts worked only occasionally, often in remote and isolated conditions. This strongly contrasts to other relatively contained workplaces, such as factories and mines, in which the traditional health and safety model is designed to operate.

Family members are often intimately involved in farm work and thereby exposed to the same risks as workers. This complicates the formulation and implementation of workplace health and safety initiatives because industry receptiveness is not solely determined by the effects proposed changes have on their businesses, the impact on family lifestyle is equally relevant. A pertinent example is WorkSafe guidance which prohibits carrying passengers on quad bikes (WorkSafe New Zealand, 2014a). This and similar rules not only affect workers, but also significantly constrain the traditional family-work integration.

The HSWA is drafted to apply universally across all industries and, consequently, it inadequately addresses the specific industry culture and interaction between the workplace,

family and public associated with hill country livestock farming. These unique features justify industry specific regulation and legislative adaptations.

### **III Key Features of the HSWA**

Multiple individuals within a workplace have the capacity to influence health and safety risks. The HSWA capitalises on this by converting potential into a positive obligation to control and eliminate health and safety risks within the workplace as far as is “reasonably practicable”. The “reasonably practicable” threshold is a known concept in New Zealand health and safety law because it was used to define “all practicable steps” in s 2A of the Health and Safety in Employment Act 1992 (HSEA). While not immediately apparent from the s 22 definition, unlike the HSEA, the focus of the HSWA is on risks rather than hazards (McKenzie, 2016; Schmidt-McCleave & Shortall, 2016). The initially suggested definition of “risk” was “the possibility that death, injury, or illness might occur when a person is exposed to a hazard” (Health and Safety Reform Bill (192-2): 30). However, the Select Committee decided against including any definition “to encourage people to consider what risk means to them, in their particular circumstances” (Health and Safety Reform Bill (192-2): 5).

#### ***A Duty Holders and Their Obligations***

The three main duty holders under the Act are persons conducting a business or undertaking (PCBUs), workers, and others present on the workplace. This is a change in terminology from the “employer” and “employee” categories of the HSEA (s 6). This change will affect particular industry business structures as discussed in part three/this section.

The primary duty of care is the most onerous duty, requiring a PCBU to “ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU while the workers are at work in the business or undertaking” (HSWA: s 36). A PCBU breaches this duty by failing to ensure health and safety, irrespective of whether this failure results in an injury or fatality (*Haynes v CI & D Manufacturing Pty Ltd*, 1994). The change in terminology from “employee” under the HSEA to “worker” is intended to make it clear that people who are workers, though they may not be strictly classed as employees, are owed a primary duty of care (Health and Safety Reform Bill (192-2)). Federated Farmers notes that this resolves the status of contractors (Federated Farmers as cited in Neal, 2016).

A PCBU also owes a duty to people who are not workers to “ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking” (HSWA: s 36(2)). This is marginally more onerous than the corresponding duty under s 15 of the HSEA.

Workers and other persons at the workplace are under correlative duties to take reasonable care concerning health and safety towards themselves, others and to comply with policies and instructions of PCBUs.

The addition of a duty on others at the workplace ensures that everyone is compelled to partake in workplace health and safety (McKenzie, 2016). As a result, multiple individuals

often owe duties in relation to the same risk. In this situation, all duty holders are required to discharge their duties (HSWA: s 33).

### ***B Changes Under The HSWA***

The class of people obliged to discharge a duty of care has widened, penalties increased and PCBUs are required to undertake more worker involvement. Notwithstanding these changes the overall intention, enforcement potential and the nature of the duties are not materially different under the HSWA when compared with the HSEA. As discussed below, the noticeable increase in health and safety inspections and enforcement actions pre-dated the HSWA coming into force and are instead the result of WorkSafe's conception rather than legislative reform.

#### *1 Enforcement of the HSWA*

The duties and obligations under the HSWA when compared with the HSEA are a variation on an existing theme rather than a revolution of health and safety law. While Pike River was the tipping point that spurred the creation of WorkSafe and an overhaul of the HSEA, concern for New Zealand's workplace health and safety and corresponding initiatives predated the mining disaster (Dyson, 2005). Recent prosecutions brought under the enforcement provisions of the HSEA, such as *Jones v WorkSafe New Zealand*, suggest that the HSEA can be an effective enforcement instrument. Therefore, asserting that the HSWA has caused increased enforcement and scrutiny of workplace health and safety confuses correlation in timing with causation. The real cause was the establishment and funding of WorkSafe in 2013, an organisation tasked with enforcing health and safety law which merely coincided with the formulation of the HSWA.

#### *2 Penalties*

Depending on the gravity of the offending, fines under the HSWA can be issued for up to \$3,000,000 for companies, \$600,000 for PCBUs and \$300,000 for individuals (HSWA: s 47(3)). This is a significant increase from the maximum \$500,000 penalty under the HSEA (s 49(3)(b)). The purpose of significant penalties is to ensure that foregoing health and safety compliance expenditure is not a feasible competitive advantage strategy (Independent Taskforce on Workplace Health and Safety, 2013a). While the potential fines are significant, to put the prospect of enforcement action in perspective, "in the past two years, on average only one in 600 visits by an inspector resulted in a fine, and just one in every 5,000 businesses in New Zealand is prosecuted" (WorkSafe New Zealand, 2016c).

All of WorkSafe's enforcement tools under the HSWA are discretionary, including any action taken and penalty imposed. WorkSafe's guiding principles in the use of this discretion are "proportionality", "transparency", "consistency" and "accountability" (WorkSafe New Zealand, 2017). A significant change from the HSEA is that enforcement action need not be preceded by a warning (HSEA: s 56B(1)(b)).

Minor infringements of the HSWA are likely to result in a verbal warning from WorkSafe. More serious infringements may be addressed with either an improvement, prohibition,

non-disturbance or suspension notice (HSWA: s 100). WorkSafe may agree to an enforceable undertaking which advantageously for the duty holder “does not constitute an admission of guilt” (HSWA: s 123). If the notices or undertakings are not complied with, WorkSafe is empowered to enforce them (HSWA: ss 119, 122, 126 and 127). People who contravene the HSWA may be prosecuted by WorkSafe within 12 months of the offence occurring (HSWA: ss 137, 146(1)(a)).

The HSWA also introduces the ability for private prosecutions to be brought by workers or unions provided that WorkSafe does not intend to take enforcement action and the plaintiff has obtained leave from the District Court (s 144). Private prosecutions are likely to be more common in other industries where workers are assisted by union funding and practical support (Dabee, 2015).

WorkSafe’s enforcement actions are difficult to predict because policy does not define the types of conduct that amount to minor as opposed to serious infringements (WorkSafe New Zealand, 2016d). To resolve this uncertainty, a clear explanation by WorkSafe of the conduct that will result in specific enforcement measures is required. The current reports that outline WorkSafe’s Enforcement Decision Making Model and the principles applied are too generally written to provide specific guidelines for the industry (WorkSafe New Zealand, 2016e).

#### **IV HSWA In The Context of Hill Country Livestock Farming**

The following section addresses changes under the HSWA that are particularly relevant to the hill country livestock farming industry, including the enlarged definition of the primary duty holder, creation of the role of “officer” and application of the farming exception.

##### ***A PCBUs***

Hill country livestock farms are most commonly structured as partnerships or sole trader operations. Companies are usually the product of intergenerational succession or arise when outside equity has been introduced.

The HSWA changes the primary duty holder from the “employer” to a PCBU and also creates a new role of “officer” under s 18. Sole traders are relatively unaffected by this change because they are both employers and PCBUs (HSEA: s 2(1)). In contrast, the changes have significant implications for farming partnerships and companies because, applying the s 16 definition of “person”, a PCBU includes “any body of persons whether corporate or unincorporate” so where companies or partnerships are engaged in a business or undertaking they are now under a primary duty of care.

##### ***B Officers***

Where a PCBU is a partnership or a company, directors and partners are deemed “officers” under s 18. On well-reasoned grounds, Campbell and McVeagh (2016) maintains that “director” under this section is restricted to a person actually occupying the position of director of a company and does not include people encompassed by the extended class of directors captured by s 126 of the Companies Act 1993.

Under s 44 officers must “exercise due diligence to ensure that the PCBU complies with [their duties and obligations under the Act]”. This is an objective standard, “taking into account (without limitation) the nature of the business or undertaking; and the position of the officer and the nature of the responsibilities undertaken by the officer”. Specific steps an officer must take to discharge their due diligence obligations are set out under s 44(4). As this is a duty of due diligence, officers are required to take an active interest in the health and safety of the business, ignorance is no excuse (*Mason v Lewis*, 2006; *FXHT Fund Managers Ltd (in liquidation) v Oberholster*, 2010; *Blanchett v Keshvara*, 2011).

### *1 Trustees*

An area of uncertainty is the obligations of trustees. A common industry business structure involves leasing the family farm from a trust as part of a succession arrangement. Trustees under this arrangement may or may not be classified as a PCBU. Campbell and McVeagh (2016: 219) argues that the role of “officer” is limited to people who are PCBUs because the definition of “officer” requires that the person “occupy a position in relation to the business”.

However, Campbell and McVeagh (2016: 220) also acknowledges “the contrary argument is that s 18(b) refers to a position *in relation* to the business or undertaking, not a position *in* the business itself”. On the plain wording of the section, this argument is more persuasive. The overall theme of the Act is to extend duties to people who are able to influence health and safety at work (McKenzie, 2016). This purpose would be frustrated if “officer” were restricted to people who occupy a formal position in relation to a business.

Whether or not the section requires a trustee be a PCBU, they will not be classified as an “officer” unless they are “occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking” (HSWA: s 18(b)). Where trustees are intimately involved in the farming business they are more likely to meet this criteria than if they are acting in a strictly advisory capacity. Campbell and McVeagh (2016) expects that “where the line of significant influence will be drawn is likely to remain uncertain for a considerable period” (p.220). Case law clarification of this issue will be well received by the industry.

### *C Farming Exception*

Under s 37 a “PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person”. Nearly the entire farm, through fencing, mustering, tractor work or other activities, with the exclusion of unproductive zones such as fenced off bush, is a “place where work is being 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” (HSWA: s 20(1)). This means that “workplace” under s 20 encapsulates practically the entire farm.

During the select committee stage, farmers expressed concern about their potential liability under this section when hosting community events, such as dog trials and school fundraisers and when allowing recreationalists, such as hunters and walkers gratuitous access (Federated Farmers). In response, the select committee inserted s 37(3) (Health and Safety Reform Bill (192-2)). Under s 37(3) where a PCBU is conducting a farming business or undertaking the s 37 duty:

- (a) applies only in relation to the farm buildings and any structure or part of the farm immediately surrounding the farm buildings that are necessary for the operation of the business or undertaking;
- (b) does not apply in relation to –
  - (i) the main dwelling house on the farm (if any); or
  - (ii) any other part of the farm, unless work is being carried out in that part at the time.

When advising PCBUs on their s 37 duty, WorkSafe’s information sheet states that (WorkSafe New Zealand, 2016f):

Farmers are not responsible for the safety of people crossing a farm in non-work areas and away from farm buildings. However, they must ensure that work carried out as part of the business (at any location on the farm), doesn’t put others at risk.

This advice credits s 37 with giving farmers a blanket protection against liability for health and safety of others on the farm unless they are in a location encompassed by narrow definition of a farming “workplace” under s 37 (WorkSafe New Zealand, 2014b).

This is incorrect. The narrow definition of “workplace”, known as ‘the farming exception’, only applies to s 37. Every other reference to “workplace” in the Act invokes the s 20 definition which effectively encompasses the entire farm. WorkSafe advice regarding farmers’ duties to others at the workplace only takes s 37 into account. When s 37 is read in light of a PCBU’s obligations under ss 36 (primary duty of care), 38 (duty of PCBU who manages or controls fixtures, fittings, or plant at workplaces) and 39 (duty of PCBU who designs plant, substances, or structures) it is evident that farmers are under duties in respect of multiple areas and structures on the farm that are not encompassed by the narrow s 37(3) definition.

In light of ss 36, 38 and 39, a PCBU essentially owes a duty to others in respect of the entire farm. The issue would be partially resolved if the s 37(3) restricted definition of a farming workplace were removed from the s 37 duty provision and inserted in the s 20 definition of “workplace”. There would also need to be a reference to this definition in the s 36 primary duty of care. However, this will not resolve the inherent flaws in the s 37(3) definition. It is evident from the wording of the provision that the exception intends to limit workplace to the immediate vicinity of the farm buildings. The issue is that this intention is executed on the assumption that farms consist of a single set of buildings in close proximity. The definition does not allow for farms that have woolsheds and covered yards in multiple locations around the farm. It is, therefore, unclear whether satellite buildings

and their immediate surroundings are also classified as part of the “workplace” under s 37(3)(a).

A superior resolution is to repeal the restricted definition of “workplace” and insert a new provision in s 20, cross referenced to s 36, which defines a farming workplace in terms of commercial activities. This would more accurately address the concern that prompted the initial insertion of s 37(3) because “workplace” would include places where farm work occurs and areas accessed by paying public, such as walkers and hunters, but not apply to places where people are gratuitously granted access. This would “encourage farmers to allow walkers on their land without being unduly concerned about their liability” which is the purpose the farming exception initially intended to fulfil (Health and Safety Reform Bill (192-2): 8).

## ***V Encouragement and Enforcement***

WorkSafe repeatedly states in reports the importance of appearing to be a regulator who is “fair, consistent and engaged” (WorkSafe New Zealand, 2016a: 2). There is a distinct and clearly evident disjunction between how WorkSafe aspires to be perceived and how it is currently viewed by the industry (Brown, 2015). This derives from flaws in the structure of WorkSafe itself and general industry attitudes that oppose external regulation of health and safety (Lovelock & Cryer, 2009).

### ***A WorkSafe’s Dual Roles as Enforcer and Educator***

The Independent Taskforce advised that culture change campaigns face less resistance when they are run independently of enforcement organisations (Martin Jenkins, 2013). WorkSafe’s conflicting roles as enforcer, educator and engager are inconsistent with this recommendation and, as a result, stakeholders struggle to delineate when inspectors are visiting to educate or inspecting to enforce. While recognising that “businesses value the regulator itself providing education because it helps them to understand when and why that same body may take enforcement action”, the negative consequences of the conflicting roles significantly outweigh this limited benefit (MBIE, 2016: 8).

The negative externalities of WorkSafe’s dual roles have caused counter-productive industry reactions. For example, rather than approaching WorkSafe for health and safety advice farmers are employing ‘independent’ consultants (Wairarapa Times-Ages, 2016). Consultants have an interest in promoting negative aspects of the HSWA which, if done, perpetuates inaccurate understandings of health and safety reform (Farmers Weekly NZ, 2016)

Another issue with perceiving WorkSafe as an enforcer rather than an educator is that farmers have developed a culture of liability avoidance rather than taking ownership of their business’ health and safety as the reforms intended. This is best illustrated by the now common practice of farmers requiring visitors to sign waivers of liability for their health and safety. Brown (2015) noted one farmer he interviewed who “felt certain that as long as they had a health and safety declaration signed that they would be absolved from any



responsibility” (p.24). This is incorrect because provisions that “exclude, limit, or modify” the PCBU’s duties under the HSWA are expressly prohibited by s 28 so persons cannot contract out of the HSWA.

Further evidence of a compliance driven approach is the proliferation of detailed, written health and safety policies. Few farmers are aware that written policies alone are insufficient to discharge their obligations (Farmers Weekly NZ, 2015). If the policy is not enforced or does not provide for contingencies, the PCBU has not done all that is reasonably practicable to ensure health and safety (*Inspector Beacham v BOC Ltd*, 2007).

The most effective solution is to separate WorkSafe’s enforcement and education functions so that WorkSafe advisors are both ostensibly and actually independent. Practical implications may mean that a total severance between the two functions is unrealistic but at a minimum clear separation may assist industry perception.

### ***B Enforcement – Prosecution and Fines***

Limited enforcement of the HSEA led to low levels of compliance, illustrating that enforcement is a necessary part of ensuring health and safety changes under the HSWA occur (Independent Taskforce on Workplace Health and Safety, 2013). Where enforcement action is pursued it is essential to garnering support from the industry that it is perceived as proportionate and reasonable. As the Taskforce for health and safety culture change explained (Martin Jenkins, 2013: 30):

There is a need to create positive motivations to focus on health and safety in the workplace, rather than presenting as (burdensome) compliance. A campaign must work from where people are currently in their views and behaviours, and address the choices and decisions which need to change – it is not simply about making people feel bad about their actions, and should not be perceived as telling them what to do. Using messages that focus on the possibility of positive change as opposed to using shock value to highlight the consequences of non-compliance may assist this.

WorkSafe’s actions in enforcing the HSWA can serve to establish their credibility as a fair, consistent and engaged regulator. The opportunity to cultivate industry acceptance of increased health and safety regulation through cultural change may be irrevocably harmed if WorkSafe takes a hard line towards enforcement at the expense of education initiatives during the early stages of implementation of the HSWA. Caution is required to ensure that pursuing a small percentage of change resisters does not alienate the target group.

Where prosecution is commenced, it is essential that WorkSafe publicise reasons for pursuing enforcement in the relevant situation. This can add weight to evidencing WorkSafe’s stated aspirations as a fair, consistent and engaged regulator. Published court summaries on WorkSafe’s website set out the fines, reasons for pursuing the case and safety lessons learned. The clarity of this message would be improved if the summaries were more widely publicised.

Clarity of reasons for pursuing enforcement action is particularly important when controversial cases attract widespread media attention. This was an issue in *Jones v WorkSafe New Zealand*. The message in the rural community was that the farmers had been fined an excessive amount for not wearing helmets on farm quad bikes (Brown, 2015). It was not widely known that the defendants had been issued multiple warnings before WorkSafe decided to prosecute (*Jones v WorkSafe New Zealand*, 2015).

Proportionality of penalties is equally essential in garnering industry support for increased health and safety regulation. In *Jones v WorkSafe New Zealand* the District Court fined Holmes \$15,000 and Carlson and Jones \$20,000 each. Although on appeal the fines were reduced to \$12,000 each, the fines were manifestly excessive. A motorcyclist who fails to securely fasten or wear a helmet on the road and is liable for a maximum \$1000 if the fine is challenged and upheld (Land Transport (Offences and Penalties) Regulations 1999, sch 1 cl 7.12(1)). In principle, this fine may represent multiple breaches but it is 12 per cent of the fines for not wearing helmets on a farm quad bike. The magnitude of the fine may be considered especially disproportionate given that the requirement to wear a helmet is not expressly legislated.

### ***C Encouragement - Economic and Social Motivators***

The Independent Taskforce on Health and Safety was critical of New Zealanders' "high level of tolerance for risk, and negative perceptions of health and safety" which is the result of "kiwi stoicism, deference to authority, laid-back complacency and suspicion of red tape" (Independent Taskforce on Workplace Health & Safety, 2013b: 12). This is particularly reflective of hill country livestock farming.

Though no farmer intentionally seeks to get injured at work, health and safety is not seen as a key cornerstone of the industry. The industry has been generally resistant to health and safety reform (Mazengarb's Employment Law (NZ), 2016). Brown (2014) concluded from interviews that the industry "demonstrated almost a failure to understand the need for change", noting a "strong feeling for the use of common sense, and many times the question was raised as to why there couldn't be an expectation on others to use it" (p.26). There is a lack of acknowledgement that "common sense" is gained through experience by those who are brought up in the industry.

Despite resistance to health and safety regulation, strict implementation and enforcement of the HSWA is neither the most efficient nor the most effective approach to achieve health and safety aspirations. The three key drivers of family farming operations are lifestyle, profit and sustainability. The challenge for reform initiatives is to establish health and safety as the fourth driver.

The Taskforce on Culture Change explained that "a positive business case needs to be developed for good health and safety, breaking the perception that there is a trade-off between health and safety and productivity and profit" (Martin Jenkins, 2013: 31). This is

particularly important in an industry where farmers are generally too pragmatic to see the purpose compliance for compliance's sake.

Marketing health and safety as a growth and income assistor will help to counter the perception that compliance is a costly hindrance. Rather than encouraging compliance with health and safety to avoid negative enforcement consequences, emphasis should be placed on how reduced risks will lead to higher productivity and profits. For example, adopting technology such as dagging machines reduces strain, chance of injury, increases efficiency and minimises stress on sheep. An increased focus on highlighting these positive effects of health and safety compliance will improve industry response to proposed changes.

Where media campaigns are used to promote health and safety, use of defensibly accurate information is essential. The Advertising Standards Authority (ASA) recently requested that WorkSafe remove television advertisements which were found to be misleading and incorrect (Advertising Standards Authority Appeal Board, 2016). The ASA held that "taking into account the important safety message in the advertisement, it did not reach the threshold to, unjustifiably, play on fear" (ibid: 1). This is inconsistent with being a fair, consistent and engaged regulator.

Economic motivators can also be implemented within the supply chain. ACC are offering reduced premiums in exchange for evidence of sound health and safety systems. WorkSafe is encouraging meat processors to undertake health and safety audits of suppliers similar to the chemical, animal welfare and environmental quality assurance requirements already put in place by industry meat processors (for example: Silver Fern Farms, 2013; AFFCO New Zealand, 2015; ANZCO Foods).

Supply chain demand will necessitate compliance. The effectiveness of meat processor health and safety audits cannot be understated. Market access is essential to farming business, if that access is restricted by health and safety requirements the set standards will be met.

Social pressure is another effective and efficient means of implementing a culture change. WorkSafe is currently "leveraging off roadshows, field days, industry forums, presentations and assessments" (MBIE, 2016: 9). They are also cultivating social pressure through partnerships with key industry stakeholders such as Agriculture Women's Development Trust and Taratahi. Targeted farmers are being educated through these initiatives and it is anticipated that by being industry insiders they will have a strong influence on the rest of the maturing workforce.

## **VI Difficulties Inherent in the Legislation and Its Interpretation When Applied To the Hill Country Livestock Farming Industry**

### ***A Approved Codes of Practice and WorkSafe Guidance***

The content of WorkSafe guidance is a key reason for farmer disillusionment with the HSWA. The HSWA sets out general duties and guidance and approved codes of practice then detail how those duties apply to different types of workplaces and activities. The Ministry of Business Innovation and Employment is responsible for drafting codes and WorkSafe for guides of practice

### ***B Approved Codes of Practice***

A Minister may approve a code of practice prepared by WorkSafe provided they are satisfied the code was developed “by a process of consultation” between unions, employer organisations and other persons likely to be affected (HSWA: s 222). The Act makes it clear that, though an “approved code of practice is admissible in civil or criminal proceedings as evidence of whether or not a duty or obligation under [the HSWA] has been complied with”, the code is not capable of being enforced (HSWA: s 226).

### ***C Guidance***

WorkSafe guides have been admissible under the 1992 Act and are likely to remain so under the HSWA (*Jones v WorkSafe New Zealand*, 2015). Under the 1992 Act, the High Court recently held that WorkSafe guides are “aspirational” and indicate “best practice” so are persuasive rather than determinative in the particular circumstances (*ibid*, 2015). It is, therefore, unclear why the Safer Farms website, run by WorkSafe, states that guides are “current industry best practice and they represent a minimum standard you are expected to meet” (WorkSafe New Zealand, 2016g). “Best” is “of the most excellent or desirable type or quality; most appropriate, advantageous or well advised” (Soanes & Stevenson, 2006: 127). It is an inexplicable contradiction of terms to say the guides represent best practice and also a minimum standard. As the Court suggests, guides portray ideal health and safety systems in an ideal environment, they do not take specific circumstances into account.

The content of WorkSafe guidance is a controversial matter in the industry. Disagreement with specific guidelines is generally either because they are unrealistic in the industry environment or because the industry and WorkSafe do not agree that the targeted issue is a risk. An Otago University study found that, in general, from a farmer’s perspective “a serious injury was one that killed you or seriously disabled you so you were unable to work again [...] anything less than this was minor or at least considered fairly insignificant” (Lovell & Cryer, 2009: 20). It is necessary to find a middle-ground. Unrealistic guidelines require amending, but where the issue is disagreement over the riskiness of the conduct, discussion between industry and WorkSafe is required. In some situations, imposing guidelines which are realistic but the industry disagrees upon may be warranted.

WorkSafe's legislative mandate is to "promote and contribute to a balanced framework for securing the health and safety of workers and workplaces" (WorkSafe New Zealand Act 2013, s 9(1)). Some unsafe practices such as young children driving quad bikes and workers not wearing chainsaw chaps are an appropriate target for guidance. General areas that warrant particular focus are safe use of quad bikes, tractors and vehicles, given that 29 per cent of agricultural deaths from 2013 to 26 June 2016 involved quad bikes, 21 per cent tractors and 17 per cent vehicles (WorkSafe New Zealand, 2016b). However, WorkSafe from the outset has tackled controversial activities that are not reasonably practicable to avoid such as transporting passengers on quads.

On the matter of carrying passengers on quad bikes, WorkSafe guidance is unequivocal and justified by manufacturers' guidelines. These state that quad bikes are not designed to carry passengers so allowing passengers to be carried is not ensuring health and safety as far as is reasonably practicable (WorkSafe New Zealand, 2014a). Manufacturers' guidelines are written conservatively to avoid liability in jurisdictions where they may be liable for personal injury. Furthermore, justifying rigid standards in relation to passengers on the basis of manufacturers' guidelines directly contradicts WorkSafe's current guidelines on roll bars which state that affixing roll bars to quad bikes is a reasonably practicable step, despite quad bike manufacturers explicitly stating that roll bars should not be fitted to quad bikes (WorkSafe New Zealand, 2014a; Fox, 2016).

Such rigid guidelines ignore the reality of hill country farming. A complete prohibition on carrying passengers on quad bikes is unequivocally impractical and maintaining this rigid guideline suggests a lack of understanding of the hill country livestock farming environment. As Grieve (as cited in Fox, 2016) explains, it is not reasonably practicable to allow an inexperienced driver to take themselves to the back of a farm for work where an experienced driver can, while accommodating the extra weight and reducing speed, safely take them as a passenger. WorkSafe agricultural manager, Al McCone, acknowledges that sometimes it may not be reasonably practicable to comply with manufacturers' and WorkSafe's guidelines but he says this will only be the case in very limited circumstances (*ibid*).

Unrealistic suggestions, such as never carrying a passenger on a quad bike, risk detracting from WorkSafe's future initiatives. Guidelines would be more effective if they recognised that some work tasks make carrying passengers on quad bikes an unideal necessity and instead focused on how to safely accommodate a passenger when driving.

## **VII Summary**

In summary, the HSWA replicates the essential duties and intentions of the HSEA. Recasting of duty holders as PCBUs and workers clarifies previous uncertainty under the "employer" and "employee" categories of the HSEA. The addition of a duty on others on the workplace, and due diligence obligations on officers ensures that the HSWA completely captures all people who have an influence on health and safety.

Amendment to the farming exception under s 37(3) is required. The most effective resolution is removing the s 37(3) definition and inserting a new provision under the s 20 definition of workplace that confines the farming workplace to areas where commercial activity is being undertaken. This will include areas accessed by paying public but not areas accessed gratuitously. The expanse and variation of the hill country workplace and common desire to preserve public access justifies inserting an industry specific provision.

WorkSafe was established in 2013 following the Pike River Taskforce's finding that OSH "lacks the capacity and capability to regulate efficiently and fairly [...] this has led to a serious neglect of occupational health issues and high-hazard workplaces" (Independent Taskforce on Workplace Health and Safety, 2013a: 28). It was the establishment of WorkSafe as a well-resourced regulator in 2013, rather than the introduction of the HSWA that caused the visible enforcement of health and safety in New Zealand. Lack of enforcement of the 1992 Act meant that health and safety was not an industry focus.

WorkSafe is in a challenging position. They are seeking to implement health and safety initiatives in an industry with an entrenched culture of stoicism and dismissal of outside interventions. Furthermore, changes to the workplace directly affect family lifestyle. Education initiatives by WorkSafe have been undermined by an unclear external delineation between the regulator's education, engagement and enforcement branches. To reduce this unnecessary resistance, following the Taskforce's recommendation, a clear separation between these three branches is required.

WorkSafe strategy requires a refocusing on high probability risks and the factors that actually cause those risks rather than peripheral hazards. There is currently an undue focus on enforcement rather than positive, proactive change drivers such as supply chain demand and social and economic motivators.

## **VIII Conclusion**

In many respects, the HSWA is a re-phrasing of the HSEA, nevertheless its introduction has generated an industry wide awareness of health and safety duties and potential liabilities. During the initial stages of implementation, emphasis on positive motivations for change rather than promoting the negative consequences of non-compliance is essential. As outlined amendments to ss 20, 36 and 37 are required to address the ineffective restriction of the farming workplace under s 37(3). Negative industry perception of WorkSafe will be reduced when there is an actual and ostensible severance between WorkSafe's conflicting tripartite functions. Focusing on the primary causes of accidents and high probability risks through education rather than enforcement will establish WorkSafe as a credible and effective educator, engager and enforcer.

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