31 October 2024

Adverse effect of HSWA on recreation

For: Health and Safety Policy, Ministry of Business, Innovation and Employment.

Tēnā koe. Thank you for the opportunity to submit on this review of the workplace health and safety system.

About the submitters

This submission is made on behalf of:

1. Federated Mountain Clubs of New Zealand (*FMC*)
2. Aotearoa Climbing Access Trust (*ACAT*)
3. New Zealand Deerstalkers Association Inc *(NZDA)*
4. New Zealand Game Animal Council *(GAC)*
5. New Zealand Fish & Game Council *(NZFGC)*
6. Mountain Bike New Zealand *(MTBNZ)*
7. New Zealand Alpine Club *(NZAC)*
8. New Zealand Canyoning Association *(NZCA)*
9. New Zealand Speleological Society *(NZSS)*
10. Cave Conservation and Access Trust *(CCAT)*
11. New Zealand Hang Gliding and Paragliding Association *(NZHGPA)*
12. Te Araroa Trust

Together, these organisations represent the bulk of the New Zealand outdoor recreation community.

We hope to be able to work with and assist MBIE to gain clarity on the issues covered by this submission, and that staff will email Edwin Sheppard of ACAT to initiate such discussions.

Authors

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Foreword

Together the above recreational groups represent hundreds of thousands of New Zealanders who enjoy getting into the country's outdoors to hunt, fish, tramp, climb, mountain bike, kayak, and more. For many, the ability to enjoy these activities is viewed as a birthright, and a part of what makes New Zealand a great place to live.

But for outdoor recreationists, the workplace health and safety regulatory system has performed poorly in the years since 2015. Workplace health and safety issues have significantly encroached and impinged on recreation, yet recreation itself has nothing to do with work. This is an unintended consequence of the 2015 legislation.

The 2015 legislation has created a perceived or actual risk of liability for landowners and land managers that permit recreational access, prompting them to respond conservatively by restricting or closing public access to their land.

These issues have now reached a point of placing the ability to engage in outdoor recreation at real, and needless, risk. Such an outcome was not within the purpose of the 2015 legislation and

results in undesirable health, wellbeing and social impacts. This threat is so significant that recreationists have intervened in aspects of the WorkSafe prosecutions over the Whakaari White Island tragedy of 2019 to protect recreation interests.

Recreation is never a zero-risk activity, and in fact, assuming and managing some risk is an inherent part of such activities. As a matter of public policy, recreationists (not PCBUs) should have the responsibility of managing these risks themselves and should be free to do so, without undue, paternalistic restrictions imposed through workplace health and safety laws, and without creating liability risks for the landowners and land managers whose goodwill we rely on for recreational access.

Recommendations

The Health and Safety at Work Act 2015 (*HSWA*) cast the net of potential duties and duty-holders so wide that it has become almost impossible for landowners and managers to ever rule out liability risks, creating a chilling effect on recreational access. We consider that greater certainty is needed, and this can be achieved by providing some clear exclusions in respect of recreational visitors and activities.

At a high level, we consider that, whatever legislative changes are undertaken after this review process, they should achieve the following:

1. Recreational risks – landowners and managers should have no risk of liability for accidents associated with recreational visitors and activities on their land.
2. Natural hazards – landowners and managers should have no risk of liability in respect of recreational access to natural features and hazards on their land.
3. Access fees/conditions – the existence of reasonable access conditions on private land (including a fee) should not create any risk of liability under 1. and 2. above.
4. Volunteers – permitting voluntary work on their land should not create any liability risk for landowners and managers.
5. Ensure that landowners' and managers' duties (if any) to recreational visitors in respect of work occurring on their property are minimal, practical, and supported by clear guidance.

We note that the most significant issues in respect of recreational access (including points 1-3 above) relate to s 37 HSWA.

We also consider that a key feature of any future regime should be strong efforts to promote clarity through appropriate guidance that is effectively promoted to ensure widespread information uptake by landowners and managers.

The purpose of these recommendations is to protect our national heritage – access to the outdoors and recreation; and to enable landowners and managers to exercise their goodwill and permit recreational access without undue fear of liability.

Structure of this submission

Our submission is structured by key provisions in the HSWA. It is relevant to questions 12 and 13 of MBIE's discussion document.

References to specific duties and provisions in HSWA should be taken to apply to any similar provisions in replacement legislation.

Throughout this submission we use the term ‘landowners and managers’ to refer to landowning and land-managing PCBUs that are subject to HSWA provisions. However, we note that not all landowners are PCBUs, only those which operate a business or undertaking on their property. There is a common misperception that all landowners are PCBUs, which exacerbates undue liability concerns.

Signatures

For **Aotearoa Climbing Access Trust:**

Name:	Position:	Signature:
Edwin Sheppard	General Manager	

For **Federated Mountain Clubs of New Zealand:**

Name:	Position:	Signature:
Megan Dimozantos	President	

For **New Zealand Deerstalkers Association Inc:**

Name:	Position:	Signature:
Gwyn Thurlow	CEO	

For **New Zealand Game Animal Council:**

Name:	Position:	Signature:
Tim Gale	General Manager	

For **New Zealand Fish & Game Council:**

Name:	Position:	Signature:
Corina Jordan	Chief Executive	

For **Mountain Bike New Zealand:**

Name:	Position:	Signature:
Ryan Hunt	President	

For **New Zealand Alpine Club:**

Name:	Position:	Signature:
Karen Leacock	General Manager	

For **New Zealand Canyoning Association:**

Name:	Position:	Signature:
Daniel Clearwater	President	

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For **New Zealand Speleological Society:**

Name:	Position:	Signature:
Kip Mandeno	President	

For **Cave Conservation and Access Trust:**

Name:	Position:	Signature:
Martin Grinsted	Chairperson	

For **New Zealand Hang Gliding and Paragliding Association:**

Name:	Position:	Signature:
Peter Grieve	Landspace Officer	

For **Te Araroa Trust:**

Name:	Position:	Signature:
Matt Claridge	Executive Director	

Provision	Issue	Comments	Possible solution(s)
		Health and Safety at Work Act 2015	
Ss 19(3) & 36(1)	Boundary of HSWA regime is not always clear for volunteers, landowners and managers.	New Zealand outdoor recreation is critically supported by volunteering, without which many activities would not remain possible. Volunteering ranges in formality, regularity and the like. At the more informal end, groups of friends might engage in irregular track maintenance or weeding on local reserves or similar. Section 19 does not treat such volunteering as "volunteer work" and such volunteering is therefore outside the HSWA regime entirely. While safety is always important to these groups, treating such volunteering as if it was "work" is and would be inappropriate both given the nature of the volunteering, and because other treatment would cause a chilling effect on critical informal outdoor recreation volunteering. At the more formal end, groups like Backcountry Trust operate significant and regular outdoor recreation volunteering, often with formal government budgetary support etc. Section 19 treats volunteering for groups like this more clearly as "volunteer work" falling within the HSWA regime. This treatment is appropriate for converse reasons. While the application of section 19 to volunteers is clear at the far ends of the spectrum outlined above, it is often unclear in practice - for example for groups of mixed club members and friends whose work may be repeated but not regular, or may not be "critical" for landowners. This creates uncertainty both for the volunteers and organisations involved in the work, and for landowners and managers who cannot be certain whether they hold s 36 duties in respect of the volunteers. Landowners in this position have been known to prohibit volunteering on their land, stifling valuable contributions by the community.	Careful thought has clearly gone into section 19, so better clarity might be achieved through wide distribution of guidance to groups that are intended to more commonly fall on the "volunteer work" side of the line. Use of the incorporated societies register database could be used for this purpose.
Ss 19(3) & 36(1)	Lack of exclusion for conservation volunteering in s 19(3).	Section 19(3) provides a carve out for recreational volunteering but not for conservation volunteering. Often for outdoor recreation volunteers,	Add a ‘conservation’ volunteering carve out to section 19(3) and including comment on

Provision	Issue	Comments	Possible solution(s)
		the two go hand-in-hand, but the treatment of a pure conservation volunteer trip by a recreational club, for example, is not clear.	this in relevant guidance. We suggest that MBIE liaise with the Department of Conservation on this issue.
s 36(2)	The extent of landowning PCBUs' obligations to warn visitors of work-related hazards (including temporary hazards) is unclear.	Throughout New Zealand / Aotearoa, many large land areas including forestry blocks, farms, whenua Māori, and public conservation land, hold significant recreational opportunities. In many cases, public access is freely provided by landowners with no sign in requirements, and may even be legally required, as with public conservation land, reserves, paper roads and easements. Work, including temporary work, sometimes occurs in proximity to recreational activities on such land. S 36(2) is sufficiently strong and vague that landowners do not understand the extent of their obligations and respond conservatively, for example by closing or restricting access. WorkSafe's 2019 guidance states:[1] *PCBUs can usually meet their duties to recreational visitors in simple ways (eg using signs, emails, or verbal warnings to let people know about work hazards).* However, it is unclear when a landowner can be satisfied that they have taken sufficient action to warn visitors of potential work-related hazards. In general, recreational activities and conservation volunteering activities take place in remote locations away from work-related hazards, and recreationists take responsibility for managing their own safety. As such, an explicit exclusion to the s 36(2) duty in respect of recreational access and conservation volunteering access may be appropriate, to provide certainty for landowners and managers.	Clarify landowners' responsibility to recreational and conservation visitors in respect of work occurring on site. Legal obligations (if any) need to be minimal, practical, and supported by clear guidance. Consider an explicit exclusion to the s 36(2) duty in respect of recreational access.

[1] WorkSafe (Mahi Haumaru Aotearoa), *Policy Clarification: Recreational access and the Health and Safety at Work Act (2015)*, May 2019, at p1.

Provision	Issue	Comments	Possible solution(s)
s 37(1)	WorkSafe's 2019 guidance states that:[2] "HSWA doesn't cover … injuries that happen as a result of doing a recreational activity." We consider this entirely appropriate and that this should be explicit in s 37 itself.	Sometimes people need to use or cross land that's a workplace to do recreational or conservation activities. In such cases, the landowner or manager should have no responsibility or risk of liability in respect of risks associated with these activities. This was the approach taken in WorkSafe's 2019 guidance, which states:[3] *a PCBU whose land is being accessed for recreation is:* *– only responsible for risks arising from the work or workplace, and is* *– not responsible for the risks associated with the recreational activities.* However, this is not explicit in s 37 itself. The District Court's judgment in *WorkSafe New Zealand v Whakaari Management Ltd*[4] (currently under appeal) further clouds this issue, but arguably represents an edge case.	Create a clear exclusion in the legislation for landowners and managers in respect of risks associated with recreation on their land, to ensure it explicitly aligns with the WorkSafe's 2019 guidance. For example, s 37(2) could be expanded to state that: *Despite subsection (1), a PCBU who manages or controls a workplace does not owe a duty under that subsection:* *a) To any person who is at the workplace for an unlawful purpose; or* *b) For any risks associated with recreational or conservation activities on their land, unless the PCBU's business or undertaking also provides the activity.*
s 37(1)	The current legislation may impose obligations on	WorkSafe's 2019 guidance states that landowners are *not* responsible for risks associated with natural features on their land.[5]	Create a clear exclusion for landowners and managers who permit recreational or

[2] Ibid.
[3] Ibid.
[4] [2023] NZDC 23224.
[5] WorkSafe (Mahi Haumaru Aotearoa), *Frequently Asked Questions: Recreational access and the Health and Safety at Work Act (2015)*, May 2019, at p2.

Provision	Issue	Comments	Possible solution(s)
	landowners and managers to recreational visitors in respect of natural hazards on their land, creating a chilling effect on recreational access.	However, draft guidance produced in 2024 (currently under development) states the opposite: that landowners or land managers have a duty to tell adventure activities operators about all hazards on the land, including natural hazards, and may need to take additional steps to manage the risks in respect of a natural hazard.[6] These purported duties may apply even if the natural hazards have nothing to do with the landowners' business or undertaking. This is a clear example of workplace H&S rules encroaching on recreation and, if included in the final guidance, will produce a significant chilling effect on recreational access.	conservation access in respect of risks associated with natural features / hazards on their land that are unrelated to their business or undertaking.
s 37(1)	Whether a landowner or manager that sets reasonable conditions of access for recreational visitors (including a reasonable access fee) "manages or controls" a workplace. Whether a special category is needed for PCBUs whose business is wholly or mostly to profit from adventure activities on their land.	**Access conditions and fees** In *WorkSafe New Zealand v Whakaari Management Ltd* (under appeal), the District Court distinguished between landowners that merely have a right to exercise management or control over access to their land, and those that actually do, stating that the s 37(1) duty only applies in the latter case.[7] With respect, this creates perverse incentives for landowners to refrain from setting reasonable access conditions for visitors (whether directed at health and safety or other purposes), or from charging a reasonable access fee to compensate for any potential inconvenience caused by visitors. This issue could be addressed through an explicit carve-out in s 37(4) for landowners and managers that set reasonable conditions for recreational access and/or charge a reasonable access fee.	Clarify that a landowner or manager that sets reasonable conditions of access for visitors (including a reasonable access fee) does not "manage or control" a workplace as a result. For example, an exclusion could be added to s 37(4). Consider the creation of a special category of landowning and managing PCBUs whose business is wholly or primarily concerned with profiting from adventure activities on their land, and that (unlike most landowners) would hold some s

[6] WorkSafe (Mahi Haumaru Aotearoa), *Adventure Activities - Managing the risks from natural hazards: Guidance for Adventure Activity Operators,* Consultation draft June 2024, at p12.
[7] [2023] NZDC 23224, at [41].

Provision	Issue	Comments	Possible solution(s)
		For the avoidance of doubt, the submitters oppose all forms of 'exclusive capture'. Access fees or conditions may only be imposed on private land in cases where they are not contrary to any public access rights. **Potential special category of landowners** One of the unusual aspects of the *Whakaari* case was that the landowner, WML, was a lucrative business that was established for the sole purpose of profiting from managing tourism on the island. WML is not representative of 99% of landowners and managers, most of which have nothing to do with recreation and permit recreational access for free or for a minimal access fee, and which we consider should have no risk of liability for accidents associated with recreation on their land. As an unusual 'edge case', WML's scenario should not provide the basis for broader development in the law around recreation-related accidents. It is worth considering the creation of a special category of landowning and managing PCBUs similar to WML, which would hold some s 37 duties in respect of adventure activities on their property by virtue of the fact that their business is wholly or primarily to profit from regulated adventure activities on their land.	37 duties in respect of the activities.
s 37(3)	The carve out for farming workplaces appropriately balances flexibility and certainty. It should be retained and extended to apply to other land types where recreational access is likely.	We consider the exclusions in s 37(3) are an effective and appropriate measure to provide certainty around the extent of landowners' workplace-related obligations on farms. This is helpful for recreational access on farms. There is no reason in principle that exclusions of this nature should be limited to farms. Extending similar exclusions to other land types would provide a sensible limitation on landowner duties and support recreational access.	Ensure that any replacement or amended legislation retains the existing exclusions. Extend the exclusions in s 37(3) to a wider range of land types where recreation is likely to occur, including at a minimum: • Public conservation land • Reserves • Whenua Māori

Provision	Issue	Comments	Possible solution(s)
			• Forestry blocks • School grounds
Section 38	Landowners/managers should not have duties in respect of recreation-related fixtures or fittings on their land that are unrelated to their business or undertaking. The current legislation does not provide a clear exclusion for this.	The recreational community often maintains fixtures or fittings, including on farms, forestry land or other private property, reserves, and public conservation land. Common examples include mai-mais for duck shooting, structures on mountain-bike trails, motorcross jumps, and fixed anchors used by rock climbers. The recreational community takes responsibility for, and does not want landowners to have responsibility for, such fixtures and fittings.	Create an explicit exclusion for recreation-related fixtures and fittings that are not part of the landowner/manager's business or undertaking.
Health and Safety at Work (Adventure Regulations) 2016			
Cl 4	The definition of "adventure activity" may capture informal clubs or recreation-related groupings	Generally the "adventure activity" definition is working well, appropriately balancing flexibility and certainty. One small area of ambiguity is the carve out in subs (3). Increasingly, "recreation" that might otherwise fall within the "club" carve-out can be undertaken in unincorporated "clubs" or even less formal groupings of as little as two individuals. Such groups might involve people 'teaching others how' to do things and require some payment to cover shared costs like fuel, accommodation, food, and maybe even a 'koha' to the teacher. These are indistinguishable from activities "provided by clubs" but may fall outside the exclusion.	Ensure that the "club" exclusion extends to informal clubs or recreation-related groupings.