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## **Occupational Health & Safety: introduction to the collection**

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At 3.44 in the afternoon of Friday November 19, 2010, an explosion in the Pike River Mine on the West Coast of Aotearoa New Zealand’s South Island trapped 29 men underground. Following three additional explosions over the next 10 days, police accepted that the men could not be alive and attention turned from rescue to an unsuccessful effort at recovery. The disaster remains on the public consciousness seven years later, as families of the victims continue to press authorities for the mine to be entered and the bodies of their lost men finally recovered.

The Pike River disaster has also affected the public consciousness in another way as well. In terms of the loss of human life, it was amongst the most costly workplace episodes in New Zealand history. In looking for explanations, attention quickly turned to weak mine safety regulations and inadequate mine safety inspections, which in turn led to a wider concern with the general inadequacy of New Zealand’s Occupational Health and Safety (OHS) regime. These inadequacies were reinforced when an earthquake hit Christchurch for the second time in February 2011, resulting in further loss of life, including many people at work. The urgency to do something increased.

New Zealand is not alone in experiencing recent workplace tragedies, and OHS is increasingly recognised as an important Employment Relations (ER) issue, with inherent obligations on employers and the State to keep workers safe. In developed countries, a key contributory element for the escalation of occupational illness, injuries and death has been the diminishing role of unions as workers’ advocates, with neither government regulation nor employer ER initiatives moving sufficiently or sufficiently quick to fill the void. The Pike River disaster and its aftermath served to highlight two important realities: by comparison with others, New Zealand’s occupational accident and injury rates were high; and employers were not sufficiently attentive to or held accountable for the welfare of their workers.

Impelled by a ground swell of public opinion, change was deemed urgently necessary and employer groups in conjunction with the State belatedly swung into action. This was evidenced by the commissioning and development of a series of working papers and reports (e.g. *The Report of the Independent Taskforce on Workplace Health and Safety*, April 2013; *Wellness in the Workplace*, 2013; and *Workplace Health and Safety*, 2012), with this work subsequently informing a revamping of OHS legislation. In April of 2016, the Health and Safety at Work Act (HSWA, 2015), which is explicitly aimed at securing “the health and safety” of workplaces and their employees came into force. A new regulatory agency, WorkSafe New Zealand, was established by the HSWA.

This Act has raised a lot of questions about employers’ obligations and liabilities in the OHS arena, and it is against this backdrop that we were delighted to be invited by the Editors of the NZJER to convene this collection of papers on aspects of the broad and multi-faceted field of workplace health and safety. We see this collection as a beginning that urgently invites further research attention to this vital area of study.

Primary industries remain key drivers of the New Zealand economy and to some extent lifestyle as well, and the first paper in our collection illustrates the difficulties of adequately regulating for worker safety in this arena, and the complexities of regulating for worker safety across a diverse economy. Bronwyn Neal highlights peculiarities of hill country farming as an industry from an OHS perspective, including the uncontained nature of the workplace, the involvement of family labour and the integration of workplace with lifestyle, and the long tradition of public access to the privately-held terrain of the high country. Neal contends that, in the hill country farming sector, the Act has prompted peripheral issues to become the main focus, thus detracting attention away from the more serious risks experienced in this sector. She points to a contradiction of enforcement, engagement, and education functions of the newly-established State regulatory agency, WorkSafe, as undermining its effectiveness in this iconic New Zealand industry.

Construction is another vital and high profile industry in New Zealand, both because of a general shortage of housing stock, particularly in Auckland, the country's largest market, and due to the reconstruction continuing in Christchurch and the wider Canterbury area following the earthquakes of 2010, 2011 and subsequently. The HSWA places a lot of emphasis on managerial commitment and worker involvement as key pillars of a rejuvenated drive for occupational safety, and the second paper by Taylor Sizemore examines this focus in the construction industry. Sizemore finds commitment to improving workplace health and safety is being addressed largely through enhanced employee involvement; however, the efficacy of these initiatives may be thwarted by the complacent attitudes of workers. Nonetheless, his interviews with construction industry managers responsible for OHS within their organisations revealed some positive changes in the safety culture of firms in the industry and provided reasons for optimism.

We stay in the construction industry for our third paper, but with a wholly different focus. A special issue on OHS would not be complete without a review of worker vulnerability and this article takes up this important issue. Using the catalyst of the Christchurch earthquakes and their subsequent impact on the construction industry, Felicity Lamm, Dave Moore, Swati Nagar, Erling Rasmussen, and Malcolm Sargeant apply Quinlan and Bohle's 'Pressures, Disorganization and Regulatory Failure' model to probe issues pertaining to the OHS and sub-contracted workers in this industry. They propose a model which recognises the interests of multiple stakeholders, combined with the fostering of intra-industry collaboration, as potential mechanisms for enhancing the outcomes of this vulnerable worker group.

A cornerstone of past and current OHS legislation in New Zealand, as in a number of other jurisdictions, is and has been the obligation on employers to take 'reasonably practicable steps' to ensure the safety of workers (and others). This involves the interpretation of those terms and the application of that principle to the facts and circumstances of particular situations. As such, the obligation has been at the contentious centre of academic discourse and, of course, of many adjudicated cases as well. Continuing with the legislative theme, our fourth paper by Christopher Peace explores the origins of the 'reasonably practicable test' both in common law and in New Zealand's and Australia's health and safety legislation and asks what a risk assessment under these current legislative frameworks might look like.

For our final paper, we take a different approach and consider New Zealand's problematic drinking culture and its confounding impact on the workplace, examined in an exploratory study by Ian McAndrew, Fiona Edgar and Trudy Sullivan. It is accepted that alcohol serves a sometimes functional purpose as a social lubricant in many work-related and workplace

situations. However, research has also established the harmful effects of workers intoxication on the job, reporting for work 'hungover,' or workers otherwise impacted by inappropriate alcohol consumption by themselves, their employers, their co-workers, or others with whom they interact in their employment. Drug and alcohol consumption are now recognised as modern day threats to workplace health and safety. Our final paper examines one aspect of alcohol in the workplace as an OHS danger, invoking the same employer and worker obligations that attach to any threat to workplace safety. The focus is workplace social events, including after-work drinks and the iconic 'work Christmas party'; a source of so-much pleasure and pain in so many workplaces. McAndrew et al examine a number of significant behavioural issues that can occur at these events, including acts of physical aggression and sexual harassment, and highlight the lessons to be gleaned from this study.

In concluding this introduction, we wish to redraw attention to the broad range of issues which fall within the gamut of OHS, noting that the breadth of topics addressed within this special issue afford testament to this. We thank the authors for their valuable contributions, and encourage others to contribute to this vital area of regulatory and ER policy and practice.

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

BRONWYN NEAL \*

### **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 PCBU's 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 PCBU's 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 PCBU's 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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# Managerial attitudes toward the Health and Safety at Work Act (2015): An exploratory study of the Construction Sector

TAYLOR SIZEMORE\*

## Abstract

The purpose of this research is to conduct an exploratory, qualitative study to examine the attitudes that managers in New Zealand's construction industry have towards occupational health and safety and the Health and Safety at Work Act (2015). Additionally, this study aims to assess whether managers believe that the increases in managerial commitment and worker involvement required by the new legislation will improve the safety culture and performance within the construction industry. *Method:* Eight semi-structured interviews were conducted with senior or frontline managers of construction companies that were responsible for overseeing the health and safety function within their organisations. *Results:* This study suggests that the Health and Safety at Work Act (2015) has forced managers within the construction industry to increase their commitment and employee involvement in occupational health and safety. Additionally it seems that the new legislation is beginning to create positive changes to the safety culture within the industry. *Conclusion:* The study has helped verify the government's goal to utilise the new legislation to drive positive changes to New Zealand's occupational safety culture to increase national safety performance. However managers highlight a number of barriers that may inhibit their ability to improve the safety performance within their organisations.

**Keywords:** construction; safety climate; managerial commitment; employee involvement; safety performance

## Introduction

While the majority of workers in developed countries take for granted that going to work on a daily basis does not compromise their safety (Barling, Kelloway & Loughlin, 2002), New Zealand's poor occupational safety statistics suggests that they should think otherwise. Every year, thousands of New Zealanders are killed or injured at work, and between 600 and 900 people die from work-related illnesses. The financial impact of these accidents is estimated to cost the New Zealand government on average \$3.5 billion per year (MBIE, 2012). The immense human costs of these tragedies offer an equally disheartening perspective. On average, one person per week dies from a work-related accident and 15 people die prematurely due to occupational ill health (WorkSafe, 2016). The New Zealand government has responded to these statistics by announcing major changes to the national occupational health and safety legislation.

The Health and Safety at Work Act (HSWA) (2015) is part of the government's "Working Safer" reforms that aim to create a 25 per cent reduction in workplace deaths and injuries by 2025. The government has acknowledged that changing the occupational health and safety legislation is only the first step towards achieving this goal. A significant factor affecting its

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success lies in changing the safety culture within New Zealand workplaces. Results from a national survey commissioned by WorkSafe, New Zealand's health and safety regulator, suggests that high-risk industries house cultural characteristics that negatively affect health and safety performance (Nielsen, 2014). Of these high-risk industries, construction has been highlighted as being particularly complacent about health and safety, despite its high accident and injury rates. Between 2011 and February 2016, the construction sector contributed the second highest national workplace fatalities by industry (Statistics New Zealand, 2016). The industry accounted for a total of 68 fatal accidents between 2008 and 2014, averaging at almost 10 per year. Nielsen's (2014) study suggested that there was a general disbelief of the high accident rates reported in construction and there was a lack of urgency to address the issue of health and safety.

The purpose of this investigation is to examine the attitudes that managers in New Zealand's construction industry have towards occupational health and safety and the HSWA (2015). The government aims to create positive shifts in New Zealand's safety culture and performance by making greater levels of managerial commitment and employee involvement mandatory under the new legislation. It is designed so that these requirements will eventually lead New Zealanders to change their attitudes towards occupational health and safety, resulting in the practice of safer behaviours at work. This research assesses whether the government's desired changes have begun to take effect within the construction sector, and whether managers within the industry believe that increases in managerial commitment and worker involvement required by the new legislation will improve the safety culture and performance.

## **Safety Climate and Safety Performance**

Following from Schneider's (1975) work on organisational climates, Zohar (1980) introduced the concept of safety climate as, "a summary of molar perceptions that employees share about their work environment," (p.96). Typically, the term safety climate is used within the literature to describe employees' perceptions of the significance of safety in their work environment (Neal, Hart & Griffin, 2000; Choudhry, Fang & Mohamed, 2007). Safety climate research has become increasingly popularised over the last three decades as an observable manifestation of safety culture (Mearns, Whitaker & Flin, 2003). Given that safety climate acts as a frame of reference for the behaviours and attitudes of both groups of and individual employees, there is an argument that this will influence their accident involvement (Clarke, 2006). The assumption is that workers in organisations that have a positive safety climate (where employees perceive workplace safety favourably) will be less likely to participate in unsafe acts (Hofmann & Stetzer, 1996), which are precursors to workplace accidents and injuries (Reason, 1990). This is because climate provides guidance on suitable organisational behaviour. Therefore, organisations with a positive safety climate will encourage behaviours that positively relate to workplace safety, such as wearing the appropriate safety equipment. In contrast, organisations with a more negative safety climate reinforce unsafe work behaviours (e.g. ignoring safety procedures to increase productivity), which are related to occupational accidents and injury (Clarke, 2006). Previous studies have highlighted the connection between positive safety climate and lower accident rates (Siu, Phillips & Leung, 2004; Clarke, 2006; Donald & Canter, 1994).

## **Dimensions of Safety Climate**

Zohar (1980) attempted to introduce organisational characteristics that could distinguish between companies with high and low accident rates. The eight dimensions of safety climate he proposed were: successful safety training, management commitment to safety, status of safety officer, status of the safety committee, level of risk in the workplace, effects of safe conduct on promotion, effect of safe conduct on social status, and effects of required work pace on safety. Later, Brown and Holmes (1986) attempted to validate Zohar's (1980) eight safety climate dimensions model by testing it on 10 manufacturing and production companies in the US. The results of the questionnaires enabled them to narrow down the eight original dimensions to just three factors: management actions, management attitudes, and employee level of risk. DeDobbeleer and Béland (1991) provided further analysis by testing Brown and Holmes' (1986) three-factor model of safety climate. They found strong correlations between managerial concerns and reduced the model to just two factors: managerial commitment and worker's involvement.

Many scholars have conducted safety climate research within the construction sector because of its notorious international safety record (Mohamed, 2002; Glendon & Litherland, 2001; Choudhry, Fang, & Lingard, 2009). One study of the Hong Kong construction industry suggested that managerial commitment and employee involvement were found to be the most significant factors positively affecting safety climate and perceptual safety performance on construction sites (Choudhry et al., 2009). Additionally, research involving 44 Australian construction companies suggested that the major factors influencing safety performance were management and employee commitment to occupational health and safety. (Lin & Mills, 2001).

## **The Health and Safety at Work Act (2015)**

The HSWA (2015) is New Zealand's key piece of occupational health and safety legislation. An important feature of the HSWA (2015) is that the number of duty holders and their respective responsibilities has increased from previous legislative requirements. These duties and the penalties associated with their breach are designed to force New Zealand workplaces to increase their safety performance by improving their safety culture (Worksafe, 2016). The HSWA (2015) aims to drive these cultural changes by making greater levels of managerial commitment and employee involvement mandatory under the new legislation. The duties of a 'person conducting business of undertaking' (PCBU) and officers aim to increase managerial commitment to occupational health and safety.

A PCBU may be a sole trader, a limited partnership, a business in the form of a limited liability company, a partner in a partnership (if the partnership is not a limited partnership), or an entity created by legislation, such as a university (Worksafe, 2016). Under section 36 of the HSWA (2015) a PCBU's primary duty of care is to ensure, so far as reasonably practical, the health and safety of workers, and that other people are not put at risk by its work. This duty promotes greater managerial commitment, as the PCBU and the officers in positions of authority within them are legally required to effectively manage health and safety within the workplaces they control. If a PCBU breaches its primary duty of care they can face penalties of up to five years imprisonment and a \$600,000 fine (Worksafe, 2016).



Under the HSWA (2015) any person that holds a position in a company that allows them to exercise significant influence of the business or undertaking is deemed an officer; therefore, examples may include company directors, partners in a partnership, board members, or CEOs. Section 44 of the HSWA (2015) requires officers to exercise 'due diligence' to make sure the PCBU complies with all its health and safety duties (Worksafe, 2016). This keeps officers proactive and involved in the health and safety practices within their organisation. An officer cannot claim ignorance in regard to health and safety failures within the firm and avoid accountability. If officers breach their duty of due diligence they may face five years imprisonment and a \$300,000 fine (Worksafe, 2016). The duties of the PCBU and officers are designed to make managerial commitment to occupational health and safety a legal requirement under the HSWA (2015).

## **Managerial Commitment to Health and Safety**

Many studies have emphasised the role that managers play in promoting safety in the workplace (Mohamed, 2002; Jaselski, Anderson & Russell, 1996; Zohar, 1980). Heinrich (1931) was the first to state that occupational accidents are symptoms of a lack of managerial commitment to workplace safety; he stated that 98 per cent of accidents were preventable by management. Additionally, Niskanen's (1994) findings from interviews with construction managers and workers suggested that 'humanware' accounted for much of the underlying causes of occupational accidents. 'Humanware' was defined as a function comprised of leadership, fellowship, and the interaction between them. The results indicated that management commitment is responsible for the majority of the humanware problem. Another study conducted within the construction industry suggested that managerial inaction was the leading cause of construction accidents (Abdelhamid & Everett, 2000). Despite the importance placed in literature on managerial commitment to achieving greater safety performance and a more positive safety climate, there is often no agreement on safety roles among owner managers, contractors, and subcontractors on a construction site (Toole, 2002).

## **Worker's Duties and Involvement**

The HSWA (2015) also identifies roles that workers must play in occupational health and safety. The term 'workers' in the HSWA (2015) is defined as any individual who carries out work in any capacity for a PCBU (Worksafe, 2016). In the workplace, workers have duties to take reasonable care for their own health and safety and that of others. Additionally, workers are required by their duty to follow any reasonable health and safety instructions given to them by the PCBU (Worksafe, 2016). If a worker fails to cooperate with any reasonable business health and safety policy or procedure, they could face fines of up to \$150,000. It is hoped that this significant potential fine for breaching their duty will encourage employees to comply with new health and safety practices as they are brought in to reflect the new law changes. The HSWA (2015) also includes a legal requirement on PCBUs to ensure that workers are engaged with health and safety issues that may affect them and are given the opportunity to participate in the continuous improvement of health and safety in their workplace (Worksafe, 2016). This requires the PCBU to have effective and continuous processes for workers to suggest improvements or to raise concerns around health and safety, typically through health and safety representatives or a health and safety committee.

Workers are in direct contact with the hazardous conditions of work and, therefore, have insights of how management's safety policies function in practice (Simard & Marchand, 1997). Consequently, workers can make valuable contributions and improve the organisation's health and safety processes. Holding site or "tool-box" meetings is a common method of involving workers in workplace safety management (Hinze & Raboud, 1988; Harper & Koehn, 1998). Additionally, organisations may wish to increase worker involvement by establishing a safety committee. Safety committees often have members consisting of representatives of the employer, workers, and subcontractors. These committees encourage interaction between the parties and have proven effective in discovering unsafe practices and problems (Lin & Mills, 2001). Discouraging workers from practising unsafe behaviours is a significant factor to decreasing workplace accidents, as unsafe acts of workers and co-workers are the second leading cause of construction accidents (Abdelhamid & Everett, 2000). Despite the benefits to safety performance that employee involvement brings, it is often overlooked or ignored by management (Dawson, Clinton, Bamford & Willman, 1985).

The duties assigned to PCBUs, officers, workers and others in the workplace and the penalties associated with their breach are designed to increase managerial commitment and employee involvement in occupational health and safety. These two factors are targeted by the HSWA (2015) to drive the improvements in national safety culture and safety performance. However, it is important, before proceeding, to acknowledge several other factors identified as possibly contributing to an organisation's safety performance. Older workers are generally cited as having more positive safety attitudes and habits (Siu, Phillips, & Leong, 2003; Gyekye & Salminen, 2009). Smaller firms are generally reported as more at risk of unsafe behaviour than larger firms with access to more sophisticated health and safety advice (Lin & Mills, 2001; Hinze & Raboud, 1988; Holmes, Lingard, Yesilyurt & De Munk, 2000; Wilson & Koehn, 2000). This is necessarily of concern in construction, being an industry largely populated by small firms. Effective training for both safe performance of tasks (Clarke, 2006; Eklöf, 2002; Prussia, Brown & Willis, 2003), as well as training in safety topics and first aid (Stokols, McMahan, Clitheroe & Wells, 2001), is also reported as a factor indicative of better safety performance.

## **Research Purpose and Method**

To reiterate, the purpose of this research is to conduct an exploratory study to examine the attitudes that managers in New Zealand's construction industry have towards occupational health and safety and the Health and Safety at Work Act (2015). Additionally, this paper aims to assess whether managers believe that the increases in managerial commitment and worker involvement required by the new legislation will improve the safety culture and performance within the construction industry. Eight semi-structured interviews were conducted with the purpose of gaining a deeper understanding of the research questions:

1. How has the safety culture within the construction industry changed since the introduction of the HSWA (2015)?
2. How has the level of managerial commitment changed since the introduction of the HSWA (2015)?
3. How has the level of employee involvement changed since the introduction of the HSWA (2015)?
4. What are the barriers that inhibit safe work practices within the construction sector?

The qualitative method of interviewing was chosen in order to address the research questions. Participants involved in this study engaged in formal semi-structured interviews. These interviews were guided by the themes within the research questions, however, there was room for deviation if the conversation provided unique perspectives not outlined by the set questions. The rationale behind using semi-structured interviews lies in the fact that they are particularly useful for exploring the participants' attitudes (Richardson, Dohrenwend & Klein, 1965) and it can facilitate comparability by ensuring that all the questions are answered by each respondent (Bailey, 1987). Interviews were arranged at a time and location that suited the participants to accommodate their busy work schedules. The interviews were conducted in a quiet environment, audio taped and later transcribed.

## Sample

The eight participants in this study were selected through a purposive sampling method (Silverman, 2013). Participants were either senior or frontline managers that were responsible for overseeing the health and safety functions within their organisations. To be eligible to participate in this study, the managers had to be currently operating and have had at least five years of experience working within the construction sector to ensure they have enough knowledge to accurately account for the differences in the occupational health and safety environment within their organisations and industry pre and post the Health and Safety at Work Act (2015). A mix of managers from differently sized construction companies was desired for comparison in the results of the study. The company size categories were determined by the number of managers and employees working within the organisation at the time of the interviews. Small companies were classified as having between one and nine people, medium companies having between 10 and 50, and large companies having over 100. Managers are given a corresponding letter and number, representing their participant number and company size. This is designed to differentiate the participant's responses within the results section (See Table 1).

**Table 1:**

	Small Company	Medium Company	Large Company
Participant 1	S1	M1	L1
Participant 2	S2	M2	L2
Participant 3	N / A	M3	L3

## Data Analysis

The data for this study were collected from the audio taped interviews and transcribed for analysis. Data analysis was carried out by hand, as there were only a small number of participants within the study. The transcripts were coded by identifying emerging themes within the data relating to the research questions guiding the study.

## Results

### 1. How has the safety culture within the construction industry changed since the introduction of the HSWA (2015)?

Every respondent emphasised that they had felt that the HSWA (2015) had brought changes to the construction industry. Many highlighted that there was a greater awareness surrounding the issue of occupational health and safety.

*“There have been a lot of changes. Health and safety is a lot more prevalent, five years ago it wasn’t even thought of,” – Manager S1.*

*“The industry has changed a lot. Ever since I’ve been here there is a massive push for zero harm,” – Manager L2.*

One manager noted that the new legislation was a motivator to think more positively about occupational health and safety.

*“I personally thought health and safety was a pain in the arse, as it took too much time, but at the start of this year I had to change my attitude and say come on, this is the way it is and I need to push it to the guys down the line,” – Manager M2.*

There was a unanimously positive response to the questions asking whether the new legislation will create safer workplaces and whether individual attitudes around safety affect the practice of safe work behaviour.

*“Absolutely will make them safer,” – Manager M2.*

*“They definitely will. Wearing the proper safety gear, earmuffs, knee pads, it’ll definitely create safer workplaces,” – Manager S1.*

Participants within the study highlighted that the new legislation was improving the safety culture within the industry.

*“It’s becoming more accepted because it’s here to stay, people’s attitudes toward it are gradually getting better,” – Manager S1.*

*“Year by year it is getting better and better and the trend will get better due to the increased pressure with legislation,” – Manager M2.*

One participant added that cultural change would increase with health and safety enforcement.

*“Worksafe have increased their staff here and around the country so I would expect that they will be visiting the sites more regularly... Until it is enforced it will always be a battle with people,” – Manager M2.*

## **2. How has the level of managerial commitment changed since the introduction of the HSWA (2015)?**

Responses from managers during the interview process suggested that the HSWA (2015) has forced managers to drive the required health and safety changes in their organisations.

*“For me in the office there’s a lot of difference in the management, control and monitoring bits and pieces,” – Manager M1.*

*“Senior management have been pushing down through all the management staff the health and safety message,” – Manager M2.*

*“A lot of guys do it (health and safety procedures) for a couple of weeks then it stops, so it’s more management driven as much as self driven by the employees,” – Manager M3.*

Additionally managers felt pressured by the threat of fines to increase their commitment to occupational health and safety.

*“From an employer’s perspective there is a lot more responsibility when you can be charged within the Act. We probably could have gotten away with it in the past and blamed the employee, but now everybody’s in line,” – Manager M1.*

*“They’re (the government) implementing it by threatening people, if they didn’t have this threat of fines people wouldn’t be doing any of the new health and safety stuff,” – Manager S1.*

However, other responses during the interview process suggested that some managers might be more committed to workplace health and safety than others. All of the small and medium company managers reported that they were not confident in knowing their legal requirements under the HSWA (2015). Those working in larger companies stated that the company had provided them with all the information within the new legislation that related to their job.

*“Not confident at all. I don’t think many people are. In fact I don’t know anyone that is confident that they know all their legal obligations. That’s one of the problems,” – Manager S1.*

*“I would say I was 95 per cent sure. The Act’s wording changes all the time. So I am reasonably familiar with it, at least what is relevant to us,” – Manager L3.*

*“I’m fairly confident (knowing the health and safety requirements) in what I do. The company provide all the information for us that we need to know of in terms of what the legislation is and what not,” – Manager L1.*

Additionally, the managers of the large companies indicated that they spent the most time on health and safety per week compared to the managers of the small and medium sized construction companies. Managers S1 and S2 indicated that they would spend one hour per week on occupational health and safety, while managers L1, L2 and L3 indicated that they spent over three hours on occupational health and safety.

### **3. How has the level of employee involvement changed since the introduction of the HSWA (2015)?**

Every manager interviewed indicated that employee involvement was very important to occupational health and safety.

*“I think the objective is to make the employee more aware of health and safety,” – Manager L3.*

All but one participant stated that the HSWA (2015) required them to increase the level of employee involvement in their workplace health and safety processes.

*“Employees are more committed now than before. We’re doing it all the time now, it’s not like something we do once a week, we do it all the time now,” – Manager L1.*

*“Definitely more now after the law change, as they’ve had to be more involved,” – Manager L2.*

Managers S1 and S2 struggled to identify forms of employee involvement in their health and safety systems.

*“On every job site now there is a hazard board where people can write up hazards. There are meeting points in case of emergencies, fire extinguishers etc. These things are all new now because of the changes in legislation,” – Manager S1.*

The managers of medium and larger companies could identify a greater range of formal methods of involving employees in their health and safety systems.

*“We have a task analysis that we use so we identify the areas of risk before we start work. The actual guys doing the job fill it in and work out the best way to do the job safely,” – Manager M2.*

*“Employees now identify hazards daily with site checks, and a hazard identification register completed on site daily,” – Manager L3.*

*“We do a toolbox meeting every Monday with our crews on any big issues, so employees can bring up issues with health and safety,” – Manager L1.*

*“There is a health and safety committee with representatives from management and employees,” – Manager L3.*

Many managers related employee involvement to their level of commitment to occupational health and safety.

*“It’s got to be driven by the guys, if they don’t want to do it then it is going to be them that is affected by it. I think it is very important for them to get it as if they don’t understand they won’t do it,” – Manager M3.*

*“It’s really important, if they’re not involved there’s no point in doing it. I could give them all the earmuffs and protective boots, but if they turn up to work and don’t use it it’s pointless,” – Manager S1.*

Managers M3 and L1 identified that employee involvement was increasing because of the HSWA (2015) and the increased duties and penalties placed on PCBU’s, officers and the workers themselves. Manager M3 states that employees are more involved because they have a duty to comply with their company’s health and safety.

*“... The responsibility has moved down the chain to individuals. They are more liable for their part. It was always up to the boss to make sure it was done, but now there is more responsibility*

*on the individual as well so the more the individual is aware of that, the more it affects the change,” – Manager M3.*

*“Companies are making sure that these things (employee involvement) are happening because they (managers) are liable now,” - Manager L1.*

#### **4. What are the barriers that inhibit safe work practices within the construction sector?**

A lack of safety knowledge was a prominent barrier identified by managers that inhibited safe work practices.

*“The way to reduce the risks is by education. I guess this is our roles as managers,” – Manager M1.*

*“I think education is a big thing, they just think if they fall down they’ll be fine,” – Manager M3.*

In contrast, both managers of the small construction companies identified that their own safety knowledge, rather than the safety knowledge of their employees, was a barrier to safer work practices within their company.

*“They say you have to fill out these hazard forms and don’t tell you what’s right and what’s wrong, how much you’ve got to do. There’s no specific guideline of what you’ve got to do. There are a lot of grey areas,” – Manager S1.*

*“They (the government) should sit down and say come here and I’ll explain it to you. There’s nothing like that. They say go look it up on the net and read it, who’s going to read a five thousand page thing?” – Manager S2.*

The managers of the small construction companies within this study both felt that there were not any suitable avenues for them to obtain the relevant information they needed to comply with the new legislation. Manager M3 supports the statements of both small construction company managers, as M3 criticises the way that the government has rolled out the legislation and the lack of quality education available.

*“It is the way they have brought out this legislation and they haven’t really educated us well. I went to one seminar workshop through Worksafe, but it was the only one worth going to. The rest lack substance and are 50 per cent education. Too much focus on selling a product than that of education,” - Manager M3.*

Small and medium sized companies often emphasised the significance of the financial costs involved in complying with the new legislation.

*“You’ve got to be price competitive to do the work, if I add on \$500 to do a job because of health and safety I won’t get the job,” - Manager S1.*

*“Cost is especially significant... Our wages haven’t gone up to reflect all this health and safety that we have to supply,” - Manager S2.*

*“The money that we have tied up in scaffolding is ridiculous... We pay \$4000 a year for tool tagging alone, as well as other associated costs for health and safety so it is built into our prices,” – Manager M3.*

It is interesting to note that manager M3 acknowledges the greater costs involved with complying with the new health and safety legislation and states that their prices for jobs have



increased to reflect this. However both manager S1 and S2 are reluctant to increase their prices to remain competitive in the market.

Aside from the direct financial costs, many managers also explained that complying with the new health and safety requirements also cost them in time.

*“Cost is a massive one, as you’ve got guys not out there working and attending training courses. They’re in classes learning stuff as opposed to out there earning money for the company,”* – Manager L2.

In addition to competing on cost, the participants in this study noted that the competitive nature of the market also forced them to keep to strict time schedules to complete jobs. Many managers in larger companies identified that these tight timeframes were a barrier to safety performance and safe work behaviours.

*“When I first started, you’d go to a job site and just start doing the job straight away. Now there’s a lot of paperwork involved in a lot of the work now, before you even start. That’s the major difference. It’s a time consuming thing,”* – Manager L1.

*“The main problem is keeping the work up to the same speed while implementing the safety requirements of the company,”* – Manager L2.

However Manager M2 offered a differing opinion.

*“I think a lot of people think they haven’t got time to do health and safety. If you keep things tidy and do the checks at the start of the day it will keep it safer and actually speed up the job in the end,”* – Manager M2.

Every manager that mentioned age as a barrier to workplace health and safety performance identified that it is predominantly the older workers within their organisation that hold negative attitudes towards the new safety reforms.

*“There is a greater awareness that things have changed, but a lot of older people especially think it’s a load of rubbish,”* – Manager L3.

*“The older guys don’t want anything to do with it,”* – Manager M3.

Additionally, two managers highlighted the direct link between the negative attitudes held by the older workforce and their occupational ill health and accident rates.

*“It’s the older generation who have that mindset of, “she’ll be right, let’s just do it, it’s only gonna take us ten minutes.” We have found that these are the guys that are getting injured and hurt,”* – Manager L1.

*“The older guys have got through the years without injury, in saying that... That one [pointing to a workmate] has industrial deafness and the other has a stuffed back,”* – Manager M3.

The respondents emphasised that the younger workers within their organisation have been quick to adapt to the new ways of working under the HSWA (2015).

*“The younger guys have picked it up and run with it there is a couple there that are smart enough to see what it can do, but the others are doing it because we are telling them to do it,”*  
– Manager M3.

*“It’s the newer breed of guys who are buying into health and safety,”* – Manager L1.

One respondent highlighted that the older members of the workforce had a lot of power within their organisation over younger workers. Therefore, their negative attitudes towards health and safety was identified as a barrier to greater safety performance, as they had greater potential to influence younger workers to adopt their way of thinking.

*“The tough man attitude is definitely a barrier. A lot of the guys are intimidated by the older guys. The younger guys who start working with you they will do what an authority figure will say to you. You know, an older guy says to you, “Pick up the asphalt, naah don’t worry about your gloves,” that tends to happen,”* – Manager L1.

## **Discussion and Concluding Remarks**

The results from this study suggest that the HSWA (2015) has forced managers in the construction sector to be more proactive and drive the required health and safety changes within their organisation. Respondents often emphasised that the threat of fines due to duty breaches were a key motivator in increasing their commitment to occupational health and safety. Additionally, the findings also suggest that the HSWA (2015) has encouraged managers to increase the level of employee involvement in occupational health and safety practices within their organisations. Every participant indicated that employee involvement is a key driver of safety performance. Seven of the eight participants in this study recognised that the HSWA (2015) required them to increase the level of employee involvement in their workplace health and safety processes.

Every participant identified barriers that inhibit safe work practices within the construction sector and their own organisations. The results from this study dispute the literature’s claim that older workers exhibit more positive attitudes towards occupational health and safety than their younger counterparts. Five of the eight participants identified that older workers and their negative attitudes towards health and safety was a significant barrier to positive safety performance within their organisation. In contrast, these same managers reported it has been the younger members of their workforce that have been quick to adapt to the changes under the HSWA (2015).

The findings of this study parallel previous literature, in that participants indicated that a lack of safety knowledge and education was a barrier to achieving greater safety performance within the construction industry. Managers identified that increasing the level of safety knowledge throughout the industry would contribute to improving occupational health and safety statistics. However, some managers have identified that it is currently difficult to access the relevant information they needed to comply with the new legislation.

Participants often mentioned that the HSWA (2015) has increased the financial costs to the business, as it requires them to have more advanced health and safety systems and provide their employees with greater safety equipment and training. These costs may be a significant barrier to many managers, as every participant in the study stated that they are operating in highly

competitive, price sensitive markets. Therefore, the added costs that the HSWA (2015) demands from managers may affect their motivation to comply, as they are currently reluctant to increase their job prices in what is a competitive industry. Many managers stated that complying with the HSWA (2015) also cost them in time, in a market where keeping to strict time schedules to complete jobs was paramount. Managers in larger companies, in particular, identified these tight timeframes as a barrier to safety performance and safety work behaviours, as it motivated workers to cut corners on health and safety to speed up the completion of jobs.

Lastly, this study supports findings from previous literature suggesting that company size may be a factor affecting health and safety performance and motivation. The managers of the small and medium sized companies reported that they were not confident in knowing their legal requirements under the HSWA (2015). This is contrasted with the responses from the managers from the large construction companies, all of whom reported that they were confident in knowing their legal requirements. Additionally, large company managers stated that ensuring their employees had adequate safety knowledge was one of their biggest barriers preventing greater health and safety performance. Managers from the small companies mentioned that safety knowledge was a barrier, but they emphasised that it was their lack of knowledge that was the greatest barrier. These results suggest that larger company managers have been more motivated to gain a better understanding of the HSWA (2015). This increased motivation from managers of the larger construction companies was shown in other aspects than safety knowledge. For instance, the large company managers indicated that they spent more time per week on health and safety than their small manager counterparts. Moreover, they could also identify a greater range of formal methods of involving employees in their health and safety systems.

This study aimed to contribute to the existing occupational health and safety literature by examining the attitudes of managers within New Zealand's construction industry towards workplace health and safety and the Health and Safety at Work Act (2015). Due to time restraints and word limits, this study has been restricted to eight interview participants. Therefore, this small sample size is not reflective of the entire industry. However this exploratory study may provide insights for future quantitative studies and other occupational health and safety research.

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## Under Pressure: OHS of Vulnerable Workers in the Construction Industry

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### Abstract

The New Zealand construction industry provides a good illustration of the changing nature of work and the impact this has had on the occupational health and safety (OHS) of sub-contracted construction workers. In particular, we examine the vulnerability of workers in the context of the construction industry post-2010 Canterbury earthquakes. In doing so, we apply Quinlan and Bohle's (2004; 2009) 'Pressures, Disorganization and Regulatory Failure' (PDR) model to frame the changing nature and organisation of work and the impact this has had on the OHS of sub-contracted construction workers. Finally, we discuss what can be done going forward in terms of creating a more effective regulatory regime and a safer and healthier industry.

**Key words:** occupational health and safety, vulnerable workers, construction industry, the changing nature of work.

### Introduction

In the past four decades, there have been profound global changes to the organisation of work (James, 2006; Standing, 2009; Quinlan, 2014). Large organisations in particular have pursued more flexible employment and working arrangements as a way of either shedding their employment obligations by outsourcing work to small, often less regulated companies or by having a largely precariously employed workforce who compete for fewer and fewer jobs (Quinlan & Wright, 2008; Weil, 2014). Outsourcing has also created complex chains of suppliers, distributors and contractors, and has shifted the risk onto a burgeoning casualised workforce who are forever chasing diminishing employment opportunities (Weil, 2014; Lamare, Lamm, McDonnell, & White, 2015). The cumulative result has been declining wages, eroding benefits, inadequate health and safety conditions, and an ever widening income inequality (Wilkinson & Pickett, 2009). The construction industry, with its increasing use of contracted labour, epitomises the changes to working arrangements that we see across many other industries. The construction industry is notorious for its short-term contracts, complex sub-contracting chains and informal employment practices; all of which leave workers open to exploitation (Lingard, Cooke & Blismas, 2009). Moreover, over half of all construction businesses in OECD (Organisation for Economic Co-operation and Development) countries are small firms employing fewer than 10 employees, (OECD, 2008) in which a large percentage of the employees are contingent, migrant workers (OECD, 2009). Compared to other

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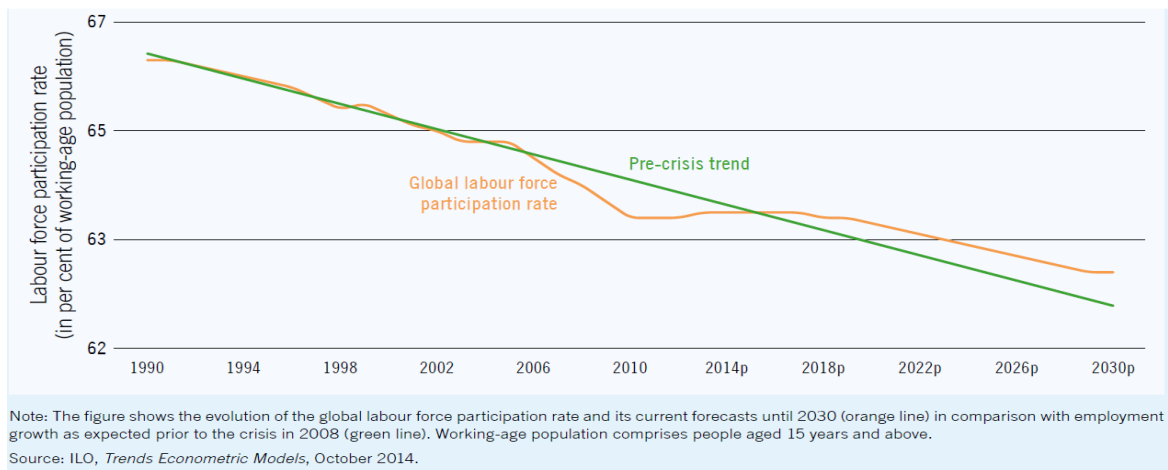
occupational groups, the injury, illness, and fatality rates amongst construction workers are some of the highest in New Zealand (Workplace Safety & Health Institute, 2014; Statistics New Zealand, 2015a).

Using Quinlan and Bohle's (2004; 2009) 'Pressures, Disorganization and Regulatory Failure' (PDR) model and the construction industry to frame the changing nature and organisation of work and the impact this has had on the OHS of sub-contracted construction workers, we consider the issues in the wider context of the vulnerability of workers. By focusing on the construction industry in New Zealand, post-2010 Canterbury earthquake, we hope to shed light on why the rates of injuries, illness and fatalities among vulnerable construction workers remain stubbornly high. To support our arguments, we draw on government data and secondary data located in scientist reports, and the like. Finally, we discuss what can be done going forward in terms of creating a more effective regulatory regime and a safer and healthier industry. In so doing, we consider (albeit briefly) recent developments in vulnerability theory (e.g. Fineman, 2008) in order to assess their applicability. However, it is necessary to first define what we mean by "vulnerable workers" as well as commenting on the increase in the number of vulnerable workers and under what circumstances workers become "vulnerable".

## **Rise of the Vulnerable Workers**

The post-war standard form of employment began to deteriorate in many of the OECD countries from the late 1980s onwards for a number of reasons (Quinlan, Mayhew, & Bohle, 2001; Auer, 2006; Burgess, Campbell, & May, 2008; Connelly & Gallagher, 2004; MacEachen, Polzer, & Clarke, 2008; Kalleberg, 2009; Quinlan, 2012). Increasing globalisation, mounting competitive pressures, and an expanded labour market created the need for greater labour flexibility, further threatening standard employment and traditional tripartite employment relationships (ILO, 2015). Moreover, labour force participation rates have been falling over recent decades, reflecting a loss of more than 37 million potential workers from the global labour force (ibid). It should be noted, however, that in the construction industry, labour participation fluctuates dramatically as a result of the 'boom and bust' nature of the industry (Ministry of Business, Innovation and Employment, 2016a). Nonetheless, long-run trends point to further declines, with participation rates predicted to fall significantly below 63 per cent of the global working-age population by 2030 (ILO, 2014; see Figure 1). In New Zealand, the unemployment rate, particularly among young workers and ethnic minorities, has crept upwards, and the participation rate has begun to slide downwards (Ministry of Business, Innovation and Employment, 2016b). More specifically, there are pockets of structural unemployment, a widening income and wage inequality, the rise in insecure work and the reliance on migrant labour to plug skill shortages in industries, such as construction, tourism and hospitality (Rasmussen, Lamm, & Ravenswood, 2016). Another related trend is the prevalence of reclassifying a 'full-time, permanent employee' to 'an independent contractor' or 'casualised employee' which has significantly altered the employment relationship as the former status is often linked to employment benefits and entitlements not afforded to the latter (refer to Donahue, Lamare, Kotler, & Fred, 2007; Nuttall, 2011; Lamare et al., 2015).



**Figure 1: Global labour force participation rate: Projections vs trends, 1990-2030**

Structural phenomena, such as a downturn in the economy and resultant unemployment, weakened trade union presence and shifts in industry, and occupational employment patterns have also created an underclass of vulnerable workers who are powerless “...to maintain desired continuity in a threatened job situation” (Greenhalgh & Rosenblatt, 1984: 438). However, Quinlan, et al. (2001), Evans and Gibb (2009) and Croucher, Stumbitz, Quinlan, & Vickers (2013) note that deteriorating employment conditions and wages are not new issues. What is new is the ‘great risk shift’ that has occurred in recent years, whereby key social risks are increasingly transferred away from governments and employers onto the individual. This, together with corporate and public policies giving “...a greater role to market forces within the workplace, have been key determinants in the erosion of the standard employment relationship” (Evans & Gibb, 2009: 5).

With unemployment and underemployment, there are degrees of vulnerability whereby some individuals and groups are more exposed to exploitation than others (Sargeant & Tucker, 2009:1). Highlighting the factors that contribute to the vulnerability of workers has also been part of a wider discussion that includes the ILO’s Decent Work Agenda and the Living Wage Campaigns (Anker, 2011). As noted in the ILO’s ‘Decent Work Agenda’:

People throughout the world face deficits, gaps and exclusions in the form of unemployment and underemployment, poor quality and unproductive jobs, unsafe work and insecure income, rights which are denied, gender inequality, migrant workers who are exploited, lack of representation and voice, and inadequate protection and solidarity in the face of disease, disability and old age (ILO, 2006:1)

Not only have there been attempts to expose the working conditions of vulnerable workers, but there have also been attempts to identify particular groups of vulnerable workers, as outlined below in Table 1 (see the British Trades Union Congress’ (TUC) Commission on Vulnerable Workers, (2007) and ILO (2012) – From Precarious Work to Decent Work).

**Table 1: Groups of vulnerable workers**

<ul style="list-style-type: none"> <li>Agency workers and other ‘atypical workers’ (for example, casual workers and some freelancers)</li> </ul>	<ul style="list-style-type: none"> <li>Young workers: who are not entitled to the same rates of the minimum wage as others and are more likely to face exploitation</li> </ul>
<ul style="list-style-type: none"> <li>Industrial home-workers: who are often denied even the most basic employment rights</li> </ul>	<ul style="list-style-type: none"> <li>Unpaid family workers: employed across a range of businesses with no legal protection at work</li> </ul>
<ul style="list-style-type: none"> <li>Recent migrants: who are more likely to face extreme discrimination, dangerous working conditions, and a range of other abuses – including forced labour</li> </ul>	<ul style="list-style-type: none"> <li>Informal workers: working across many industries, with those already facing disadvantage the most likely to be exploited</li> </ul>

A great deal of the empirical work and conceptualisation on the vulnerability of workers starts with the premise that precarious employment is at the heart of the problem (see Quinlan & Mayhew, 2001; Tucker, 2002; Fineman, 2008; Sargeant & Tucker, 2009; Standing, 2011). For most workers, the precarious nature of their pay and conditions have eroded minimum standards set out in collective agreements and employment law, thus creating a situation where workers have become increasingly vulnerable. The PDR model attempts to explain the poor OHS outcomes of precariously employed, vulnerable workers (Quinlan & Bohle, 2004: 2009). The model, outlined in Table 2, is useful in that it organises a number of factors that have a negative impact on the OHS of precarious workers into three categories: economic and reward pressures; disorganisation at the workplace; and regulatory failure (ibid). The first category entails employment and income insecurity as well as intense competition for work, which in turn can contribute to a range of hazardous practices, including work intensification, working when injured, and holding down multiple jobs (ibid).

The second category, disorganisation, concerns the lack of commitment by businesses to invest in a stable workforce. Here, disorganisation is not simply a result of employer oversight, it is “...a characteristic feature of the relationship between contingent workers and their employers” (Quinlan & Bohle, 2004: 93). Using the PDR model to explain the how precarious employment affects the health and safety at work, Underhill and Quinlan (2011: 399) note that:

Where workforce instability prevents the sustaining of established rules, procedures and roles, then OHS knowledge and management systems become fractured, whilst inter-worker communication, task co-ordination, and lines of management control are weakened. Under-qualified, under-trained and inexperienced workers become more commonplace. In this setting, contingent workers are less able to collectively organize or be heard at the workplace. Use of temporary workers affects employer attitudes to induction, training, participation in workplace committees, and other activities with implications for safety.

Regulatory failure is the third and critical category and refers to the extent to which OHS and employment legislation is weakened by precarious employment arrangements (Underhill & Quinlan, 2011). Quinlan and Bohle (2004) argue that employment protection and minimum entitlements become ineffectual when vulnerable workers are less cognisant of their entitlements and their employers are less inclined to comply. OHS regulatory inspectors also encounter difficulties, such as identifying those with legal responsibility in multiple-employer worksites (Quinlan and Bohle, 2004; Underhill & Quinlan, 2011).

**Table 2: Risk Categories Associated with the PDR Model**

<b>Economic &amp; Employment Pressures</b>	<b>Disorganisation at the Industry &amp; Workplace</b>	<b>Regulatory Failure</b>
Insecure jobs (fear of losing job)	Short tenure, inexperience	Poor knowledge of legal rights, obligations
Contingent, irregular payment	Poor induction, training, and supervision	Limited access to OHS, workers' compensation rights
Long or irregular work hours	Ineffective procedures and communication	Fractured or disputed legal obligations
Multiple jobholding	Ineffective OHSMS/ inability to organize	Non-compliance and regulatory oversight (stretched resources)

**Source:** Underhill, E. & Quinlan, M. (2011) How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers, *Industrial Relations Quarterly Review*, 66(3): 397-421.

Underhill and Quinlan (2011) argue that many of the risks associated with economic pressures and disorganisation are based upon and compounded by regulatory failure. Indeed, limited resources allocated to OHS regulatory agencies result in a preference for 'demonstration effect' prosecutions of large stable companies. That is, larger employers are more readily identifiable by regulators, have more capital and reputation to protect, and are unable to 'disappear' when threatened with prosecution. Conversely, smaller businesses often operate without fear of prosecution in the knowledge they can 'disappear' should an employee be sufficiently severely injured to warrant prosecution (also see Lamm, 2002). Moreover, the OHS legislation in New Zealand, as in many other countries, exempts small businesses from having to provide formalised employee participation systems (e.g. have elected worker representatives and establish health and safety committees). These regulator features, together with other factors, such as the difficulties many vulnerable workers face when raising health and safety issues within small businesses, can compromise the OHS outcomes of these workers.

In the next two sections, we endeavour to apply Quinlan and Bohle's (2004; 2009) PDR Model to help understand the interrelated factors that characterise the New Zealand construction industry. In doing so, we hope to explore why traditional approaches to OHS are no longer viable in protecting vulnerable workers and that new solutions and theories are necessary.

## **Economic and Employment Pressures in the Construction Industry**

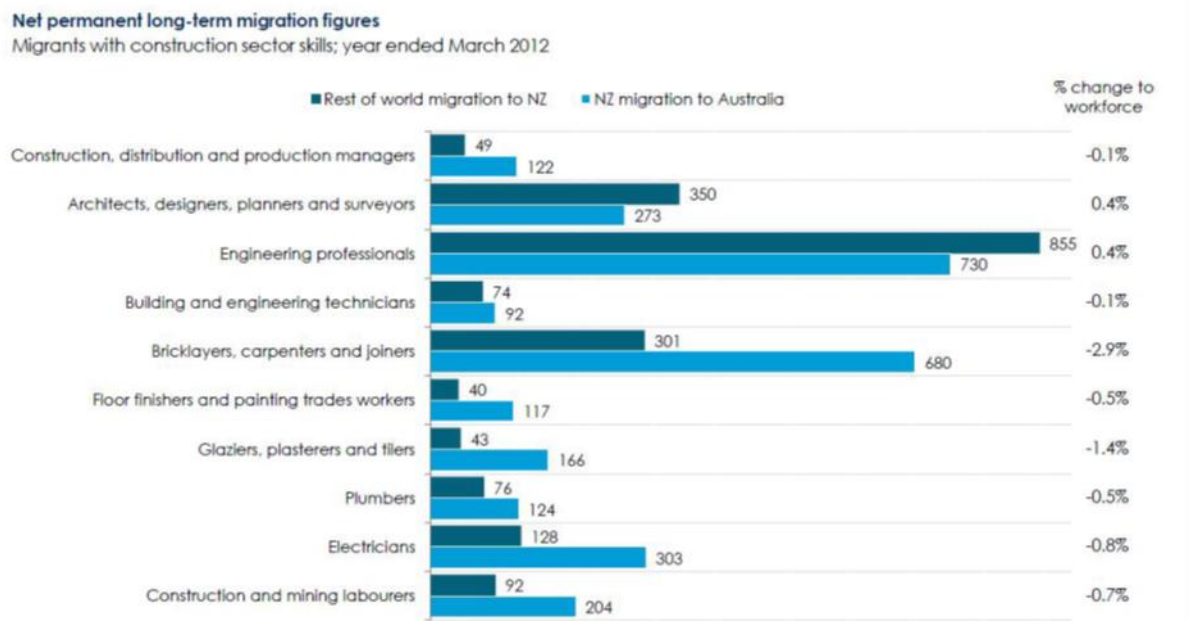
The construction industry is the fifth largest in the New Zealand economy and represents 12 per cent of the total workforce (Ministry of Business, Innovation and Employment, 2016b). The New Zealand construction workforce itself covers a wide range of skill levels, from labourers and tradespeople to project managers and engineers (Ministry of Business, Innovation and Employment, 2016c). Moreover, 97 per cent of businesses in the construction industry are small, employing 20 or fewer workers, with many operating as self-employed contractors (Statistics New Zealand, 2016a). These small businesses also operate within complex sub-contracting environments across multiple sites (Ministry of Business, Innovation and Employment, 2016a). These facts have two important implications. First, a higher proportion of businesses relative to employment indicates that the average business size for

this industry is smaller than that of other industries in the economy. In addition, as the average size of businesses in this industry is small, it is likely that most firms lack the breadth and depth of finances and/or business acumen to invest and implement, human resource policies and practices, such as training and development and OHS (Lamm & Walters, 2004; Lamm, 2014, Nagar, 2015). Second, the productivity rate for the New Zealand construction industry is 30 per cent below that of Australia (Ministry of Business, Innovation and Employment, 2014; 2016c; also see Kane, (2012)). Some have argued that the significant proportion of small construction businesses, which typically suffer from short life-cycles and are likely to be under-resourced, may help to explain the industry's relatively low productivity (New Zealand Building and Construction Sector Productivity Taskforce 2009). Tran and Tookey (2011: 58) in their study into labour productivity in the New Zealand construction sector noted that:

Between 1997 and 2007, the basic construction costs (material and labour) remained stable while values of works grew at significantly higher rates. This result suggests that, in theory, NZ construction should have performed exceptionally well in terms of labour productivity. However, productivity statistics showed that overall the performance of NZ construction was actually decreasing. This contradiction suggests that when extraneous factors are taken into consideration, labour productivity might have performed much worse than we had expected.

Not only does the New Zealand construction industry have stubbornly low levels of productivity but, as stated earlier, the industry is also susceptible to boom and bust cycles (Chang-Richards, Wilkinson, Seville, & Brunsdon, 2012; 2013; Ministry of Business, Innovation and Employment, 2014). It should also be noted that construction workers are the fourth lowest paid in New Zealand (Statistics New Zealand, 2015b). The industry also employs a relatively young workforce with high concentrations of Maori and Pasifika workers (ibid). These attributes tend to increase the industry's vulnerabilities to disturbances in social and economic climates (Chang-Richards, et al, 2012, 2013). As the graph below shows, there was a dramatic downturn in employment in the construction industry prior to the Canterbury earthquakes which lead to the shrinking number of skilled labour (Figure 2). The subsequent labour shortage of skilled construction workers at a time of high demand post-2010 earthquakes and the expansion of Auckland, (New Zealand's largest city), meant that skilled labour has had to be largely imported. This was predictable as the cyclical construction industry has always relied on migrant labour when there has been upturn in the industry (McLeod & Maré, 2013; Rotherham, 2016). Moreover, because the New Zealand construction industry has traditionally lost workers to Australia in search of better prospects, it has become highly dependent on migrant workers during so-called 'building booms' (Ministry of Business, Innovation and Employment, 2016b).

Figure 2: Employee Migration in the Construction Industry to and from New Zealand



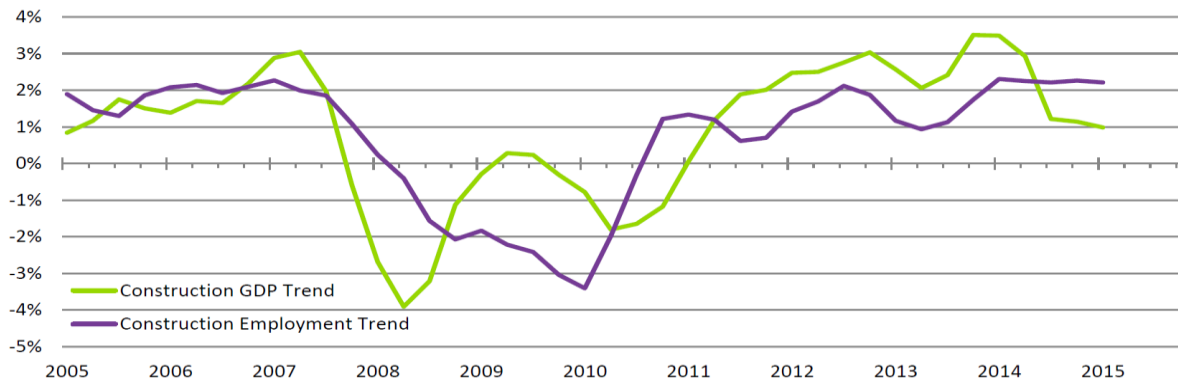
(Source: Ministry of Business, Innovation and Employment, 2016b)

While the number of temporary migrants decreased across New Zealand in the 2010 and 2011 following the global economic crisis (see Figure 3), the numbers rebounded from the 2012 onwards with the beginning of the Canterbury rebuild and the economic recovery (ibid). Many of the jobs, however, are temporary and the scale of precarious employment in the construction industry was highlighted in a recent article by Rotherham (2016: 1):

On a typical day, the country's largest recruiter and temporary labour provider, AWF Madison Group, has 3500 blue-collar workers out on the job. Most are Kiwis, though the company hired 350 Filipinos for the Christchurch rebuild. Now chief executive Simon Bennett wants to hire a further 1000 migrants by the end of 2017 to fill a shortage of skilled construction workers in Auckland. A road map of the unprecedented levels of forecast growth in the Auckland construction industry through to 2018, when it's expected to peak, shows a "wall of work" that will create 32,000 extra jobs.

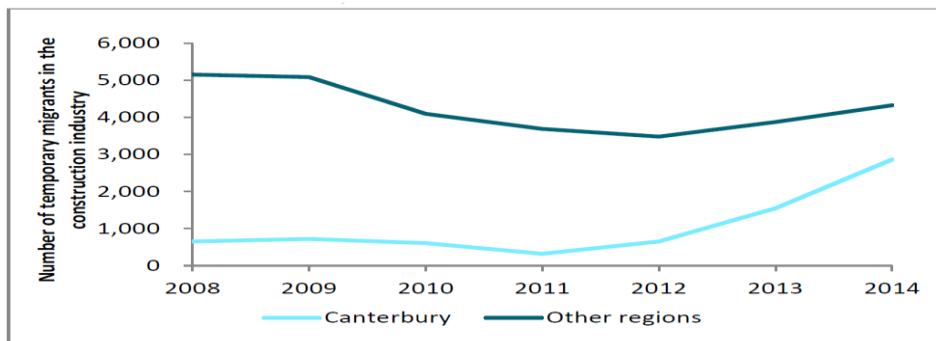
As stated, the number of temporary migrants working in construction in Canterbury has accelerated and now accounts for 40 per cent of all temporary migrant construction workers in New Zealand (Ministry of Business Innovation and Employment, 2015a). While New Zealand data is fairly crude, it does show that the largest increase in immigrant workers has been from the Philippines, with almost half of the work visas granted for the Canterbury rebuild were allocated to Filipinos, working as carpenters and joiners and painting trades workers (see Figure 4 and 5).

Figure 3: Quarterly employment and real GDP growth to March 2015



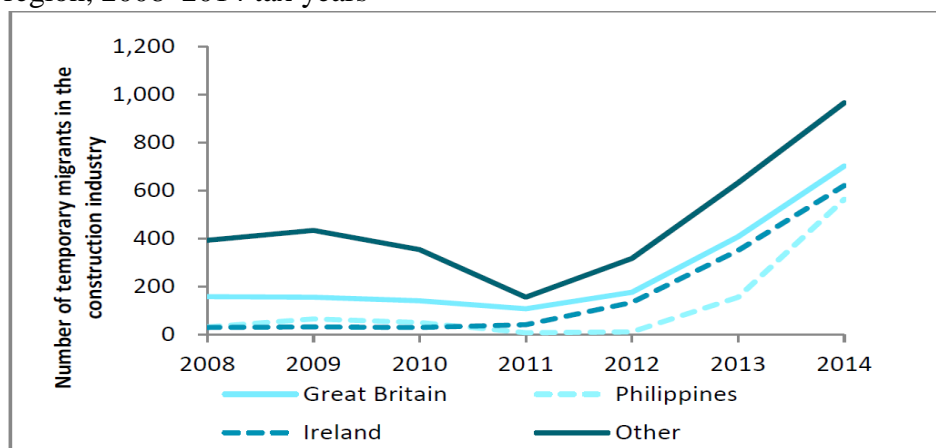
Source: Ministry of Business Innovation and Employment, (2015b)

Figure 4. Temporary migrant trends in the construction industry, Canterbury and other regions, 2008–2014 tax years



Source: Ministry of Business Innovation and Employment, (2015b)

Figure 5: Migrants in the construction industry by country of origin and tax year, Canterbury region, 2008–2014 tax years



Source: Ministry of Business Innovation and Employment, (2015b)

Growing anecdotal evidence and media attention over the exploitation of migrant workers not only by their employers but also by the recruitment agents and landlords, prompted the Ministry of Business, Innovation and Employment to commission a study – *Vulnerable Temporary Migrant Workers: Canterbury Construction Industry* (see Searle, McLeod & Ellen-Eliza,

2015). The study concluded that migrants in the Canterbury construction industry were affected by a variety of exploitative practices. Most commonly mentioned were:

- excessive amounts of money charged by recruitment agencies in the migrant worker's country of origin - migrant workers hired by labour hire companies or small businesses were also considered particularly vulnerable to exploitative practices;
- contract substitution or situations where terms and conditions of a migrant's contract were not met;
- situations where migrants were subjected to practices that were not in breach of minimum standards but were considered poor employment practices;
- situations where employers were not meeting minimum employment standards; and
- concern about the use of the 90-day trial when recruiting from overseas.

In another report on vulnerable workers in New Zealand, Lambert (2014: 36) uses the following extract to illustrate how New Zealand-based recruitment and building companies operating in rebuild of Christchurch are exploiting migrant workers:

Major Holdings Limited was registered in October 2013 and went insolvent in June 2014. During its operational months, it recruited about 7 carpenters from the Philippines and offered them a "package deal" to come to New Zealand to work. Each man paid about \$4,000 for airfares, visas, orientation and the contract with Major Holdings (and most are in debt to Filipino lenders). Major Holdings provided overcrowded accommodation (3 men to a single room with cooking facilities), and witnesses told of having eight (8) men staying in a converted garage. Despite these conditions, each man paid rent of \$150 per week. After the company liquidated, the men were left stranded at the mercy of Immigration New Zealand to decide whether they would be deported as they were in breach of their visa conditions (for not working for Major Holdings), or if another visa would be issued to them to allow them to obtain alternative employment.

In another similar study on the exploitation of migrant construction workers in Canterbury, it was found that there was evidence of racism (Searle et al., 2015). The most frequently reported instances were:

- in public places, where hostile or aversive racism commonly takes the form of verbal denigration by a stranger; and
- in the workplace, where subtle, or symbolic racism in job seeking and career advancement leads Asian migrants to have on average the lowest wages of any cultural grouping in New Zealand according to the 2006 census.

As we have seen, the New Zealand construction industry, particularly in Canterbury, typifies the primary elements of Quinlan and Bohle's (2004; 2009) model. That is, it is characterised by employment and income insecurity as well as intense competition for work, and a heavy reliance on cheap vulnerable migrant labour – all of which constitute a high degree of complexity. In the next section we will see how these features have contributed to a range of hazardous practices, including work intensification, working when injured, and multiple job holding, resulting in the construction industry having one of the highest rates of injuries and fatalities. Moreover, we assert that it is no coincidence that there is a relationship between high rates of work-related injuries and fatalities and a prevalence of exploitation of vulnerable groups of workers.

## Disorganisation in the Industry

New Zealand's injury and fatality rates are high compared to other similar countries. In a recently published comparison of fatal occupational injury rates by Workplace Safety and Health Institute (2014), New Zealand's construction industry ranked ninth out of 9 countries, with a fatal occupational injury rate of 15.3 per 100,000 person years. Australia (4.4 fatalities) and Norway (4.4 fatalities) had the lowest rates in the construction industry. Unlike some other countries included in the study, official ILO data for New Zealand included self-employed workers. Given that this industry contains a high proportion of self-employed workers (over 35 per cent), Lilley, Samaranayaka, & Weiss (2013: 23) argued that, when compared with countries that exclude self-employed workers in construction, it is likely that the magnitude of New Zealand's fatal occupational injury rates could be over-estimated.

Notwithstanding Lilley's comments, the New Zealand construction industry, particularly residential construction, still has one of the highest injury, illness and fatality rates in the country (Statistics New Zealand, 2016b). Between 2011 and 2015 the construction industry had the second highest number of work-related deaths (33) and recorded the second highest number of work-related claims lodged by workers (21,300 claims) (WorkSafe Annual Report, 2016). The total number of reportable injuries in building and allied trades in New Zealand was some 25,557. By 2013, the occupation groups with the most work-related injury claims were trades workers (35,500 claims), compared to agriculture and fishery workers (31,200 claims) plant and machine operators and assemblers (25,200 claims) (Statistics New Zealand, 2014). While these statistics might be high, the real figures could be higher. A recent survey of workers and employers suggests that a serious level of under-reporting of accidents (see Nielson, 2015). When asked how often hazards, near misses and accidents were reported to bosses/supervisors, only two out of 10 workers and around three out of 10 employers in the construction industry said they believed this happened "all the time". More disturbingly only 28 per cent of employers said that serious harm incidents in their businesses had been reported to WorkSafe (Nielson, 2015:11). One explanation for the rise in the number of injuries and fatalities in the New Zealand construction industry is that workloads have risen exponentially, driven by the Canterbury rebuild, along with the demand for housing and infrastructure in Auckland and remedial work relating to the weather-tightness issue (Ministry of Business, Innovation and Employment, 2014: 24). These pressures potentially increase the risks to health and safety.

What was missing from the discourse around the OHS of Canterbury construction workers, however, was the exposure levels to hazardous dust particles. Pressure from health officials and the general public experiencing clouds of dust containing large quantities of silica and asbestos from fallen masonry and the liquefaction, however, resulted in WorkSafe New Zealand commissioning a pilot study – *Exposure to silica dust in the construction industry in the Canterbury rebuild: A pilot study* (Douwes, Glass, McLean, 't Mannetje, 2015). The main findings of the study show a lack of knowledge of the risk of silica dust, a lack of efficient dust suppression methods, a large number of construction workers not using respiratory protection, and sampling results of silica exposure exceeded national and international workplace exposure standards. The authors concluded that workers performing selected 'at risk' tasks in the New Zealand construction industry are being exposed to levels of respirable dust and respirable crystalline silica (RCS) exceeding national and international standards. Preliminary data suggest that control measures currently applied may not be adequate to protect workers from adverse respiratory effects. The authors argue that urgent action is required to reduce silica



exposure in the New Zealand construction industry given the results of their study and other international research (ibid).

As outlined above, the context in which Canterbury construction workers are exposed to occupational injury and disease is complex in that the workforce is diverse and comprises a network of supply chains across four construction areas (commercial, housing, civil and specialist trades), including a prevalence of small and medium-size (SMEs) subcontracting firms operating within multiple-site configurations (Ng, Cheng, & Skitmore, 2005; James, Johnstone, Quinlan, & Walters, 2007; PricewaterhouseCoopers 2011). Managing OHS among subcontractors can be difficult, because they are at risk of slipping through safety checks and often fail to adopt adequate health and safety practices, or may be shielded by contracting firms who compromise health and safety in return for completing work more quickly and profitably (Ng et. al, 2005). Further, as stated earlier, the business cycle is experienced more acutely in the construction industry when compared to other industries and has a significant impact on firms' employment and OHS (Lin & Mills, 2001; Allan, Yin & Scheepbouwer, 2008). That is, when the industry experiences a boom, the industry suffers from capacity constraints, while in the case of a bust, many workers tend to lose their jobs as firms try to cut costs, especially in areas deemed to be inconsequential (such as OHS). Also when the industry experiences a downturn, there is a tendency to price at or below cost in order to win the contract which has consequences for the quality of work, employment and training and viability of businesses (Ruddock & Lopes, 2006).

The industry is also divided, with underlying tensions coalescing around the lucrative safety training space (Sherratt; Farrell; & Noble, 2013; Bahn & Lamm, 2014). Riding on the back of the previous and current legislation, numerous industry training providers, most of which are small businesses, have been launched over the past decade. Typically these organisations offer safety training (the emphasis is on safety with little mention of health) and provide a system of identity cards showing the level and type of training the card holder has gained. As a result, there is a proliferation of OHS training providers and registration schemes. Each of the large players in the construction industry has a particular preference as to which scheme they require all their workers and their main subcontractors to subscribe to (Bahn & Lamm, 2014). Quinlan and Bohle (2004) argue, however, that workers in precarious employment are rarely afforded the same benefits, such as training, compared to those workers in more stable employment relationships. As outlined above, the construction industry and central government have failed over the years to invest in a stable workforce and instead have contributed to the fluctuations in the labour market by taking a just-in-time approach (see Rasmussen, 2010) which has implications for health and safety training for *all* its workers. As we will see in the next section, the employment relations and health and safety legislation has also done little to moderate the excessive use and abuse of casual labour.

## **OHS Regulatory Failure and Vulnerable Workers**

As with other similar commonwealth countries, New Zealand adopted a generalist approach to managing OHS. During the 1970s, a number of jurisdictions acknowledged regulatory deficiencies in the area of OHS and in response conducted their own reviews, notably the UK with Lord Robens' Report, Safety and Health at Work (1972). Two main features outlined in the Robens' Report were seen by New Zealand and other Commonwealth governments as essential to effective administration of, and long-term compliance with, OHS legislation:

- A single Act covering all workers, administered by a single unified inspectorate; and
- The creation of a joint, self-regulatory approach where the responsibility for health and safety is placed firmly back into the workplace, that is, the ownership of ‘duty of care for workers’ is no longer solely with the State but instead with employers and employees. The participation of employees is formalised via the mechanism of representation on workplace health and safety committees.

The New Zealand Health and Safety in Employment Act, 1992, however, deviated from the Robens’ model in that it did not stipulate the participation of employees in the decisions affecting their health and safety; the Act made only vague reference to the involvement of employees in health and safety issues. This was not surprising, given that the employment legislation introduced by the right-wing National Government failed to recognise trade unions as legitimate representative of the workers or countenance worker participation and instead promoted the unitarist approach to work (Quinlan, Bohle & Lamm, 2010). Moreover, since the mid-1980s, successive governments have, to a greater or lesser degree, “rolled back the state” and directed the Department of Labour (now defunct) to focus exclusively on core labour market functions while taking a “side-line” position to most aspects of employment, including industrial disputes and frontline enforcement. As a result, the Department’s role shifted from one that was primarily concerned with enforcing the regulations to a more passive, consultant-like role, dispensing advice via a centralised call centre and often without the necessary expertise or staff to effectively undertake their statutory duties of enforcement.

Although the Labour Coalition Government of 2000-2008 endeavoured to remedy a number of weaknesses inherent the Health and Safety in Employment Act, 1992, including introducing worker participation, enforcement deficits were not addressed until the tragic mining accident in November, 2010. The year 2010-2011 will be known in New Zealand as *annus horribilis*. Within a period of five months, New Zealand had not only experienced a major mining disaster, killing 29 workers, 13 of whom were construction workers, but also two major earthquakes which killed 185 people. It was the disaster at the Pike River Coal Mine that finally bought action to address the failings of the OHS enforcement and compliance. The role that the OHS inspectors played in the lead up to the Pike River Coal Mine disaster was seen as a pivotal cause of the failings at the mine. Internal investigations as well as submissions made to the Royal Commission of Inquiry and the later Independent Taskforce all highlighted the fact that the enforcement role of the inspectorate had been considerably reduced and that there was a general lack of mine safety expertise among the senior public servants as well as inadequate legislation (Macfie, 2013).

The subsequent statute, the Health and Safety at Work Act, 2015, is designed to make senior managers more responsible for OHS, particularly those operating in hazardous industries. However, the final version of the OHS legislation was a pale shade of its earlier, more robust version. It was entirely predictable that the legislative process was captured by powerful lobby groups, most notably from the agricultural and small business sector who successfully argued that their sectors were not hazardous, in spite of all the evidence to the contrary (Rasmussen et al., 2016). In short, the campaign was very effective in that the problems and issues of the OHS law were redefined and then dismissed as unimportant. For example, the worker representative provisions in the new Act have been considerably diluted and now exempt non-hazardous, small businesses from any formal worker representation process. As an editorial (New Zealand Herald, 2015) succinctly notes:

The bill should not exempt small workplaces from the obligation to have a work and safety representative if their staff request one. In its original form, it did not contain an exemption but the National Party clearly came under intense lobbying from small business interests while the bill was before a select committee. It emerged with an exemption for workplaces with fewer than 20 employees, unless the industry was on its schedule of high risk. This would be a marginal improvement on the present law, which exempts employers of up to 30 people, but there is no good case for any exemptions. If there was, the Government would be making it. In the absence of a compelling reason, it can perhaps be assumed National MPs were persuaded the bill as originally drafted would have exposed small employers to external unions, giving them a foot in their door as health and safety representatives.

The question is: What does this mean for workers in the construction industry? Here Quinlan and Bohle (2004) and Underhill and Quinlan (2011) argue that OHS and employment legislation is weakened by precarious employment arrangements prevalent in the construction industry. They also argue that employment protection and minimum entitlements become ineffectual when workers are less cognisant of their entitlements and their employers are less inclined to comply. In spite of recent regulatory reforms in both Australia and New Zealand, OHS regulatory inspectors still encounter difficulties, such as identifying those with legal responsibility in multiple-employer worksites in the industry (Underhill & Quinlan, 2011; Lamm et al., 2013). Moreover, the weak regulatory oversight, together with poor levels of compliance, undermine accessibility of workers' compensation by vulnerable workers (Quinlan et al., 2010). There is a substantial evidence to show that, for a number of reasons, there is a significant under-reporting of workers' compensation claims among vulnerable workers in precarious employment (Lamm, 2014).

In summary, while Quinlan and Bohle's (2004; 2009) PDR model and other similar models, such as Sargeant and Tucker (2009), are useful as "...a means of explaining the poor OHS outcomes experienced by precariously employed, vulnerable workers", there is still a great deal to be learnt regarding the context and different forms vulnerability and more importantly, what can be done to reduce the level of vulnerability. It is argued, therefore, that it is necessary to build on the PDR and other models, in order to elevate current theorising to the next level.

## **Conclusions and a way forward**

Using the Canterbury rebuild as an example of how and under what circumstances workers can be exploited in a so-called "civilized country", we can see that customary labour practices, underpinned by minima standards together with traditional methods of regulatory enforcement are ill-equipped to protect the OHS of vulnerable workers. Moreover, while the extant models are sufficiently robust and adroit to explain the levels of complexity in an industry, like construction, and to expose the hidden practices of extortion, blackmail and exploitation that pervades the world of the vulnerable worker, we are still no closer in determining why existing labour standards and state intervention have done little to stem the deteriorating employment conditions and pay. More importantly, how do we advance the conceptualisation of vulnerability? In this regard, Fineman (2008) offers a possible solution. In her essay, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', Fineman (2008: 19) argues that:

...we must think beyond current ideological constraints and consider the possibility of an active state in non-authoritarian terms. This theoretical task—reconceptualising the role of the state—requires that we imagine responsive structures whereby state involvement actually empowers a vulnerable subject.

There has been an expectation shared by unions, employers, and the general community that, in matters concerning the health and safety of workers, some state intervention through legislation is necessary, if only to set minimum standards and punish gross violators. The justification for such legislation and its enforcement can be seen in several ways. First, management may consider the safety and health of the labour it employs to be unimportant and/or, in the face of competitive pressures, fail to provide sufficient protection for workers. Second, workers in such circumstances are relatively powerless to protect themselves, particularly when there is a large pool of unemployed labour and unions are weak. Third, enforcement is the mechanism by which people or organisations are held to account for their actions or inactions (Lamm, Rasmussen & Anderson, 2013). As Fineman (2008:19) notes the state is required to ensure that institutions and structures within its control do not inappropriately benefit or disadvantage certain members of society. She adds that:

The legislature and its actions would become the primary institutional manifestation of the state. Its mandate would be to be responsive to vulnerability, which would result in a more nuanced sense of what constitutes equal opportunity than currently theorized—one that is more sensitive to existing inequalities and more demanding of the state. This imperative would be placed on the legislature and executive in the first instance: the mandate to be more responsive to and reflective of vulnerability. The legislative and executive fulfilment of that imperative ultimately would be monitored or supervised by the courts, looking to see if the state fulfilled its responsibility in assessing individual equality claims.

The question is, then, what can be done going forward in terms creating a safer and healthier industry for all workers, including vulnerable workers? Simply being able to explain the challenges and linking them to the underperformance in OHS in the New Zealand construction industry does not remove the problem. Although challenging, it is imperative to consider possible solutions that could assist the New Zealand construction industry in developing the appropriate OHS mechanisms to protect its most vulnerable workers. Whilst there is minimal definitive research, it is not unreasonable to conclude that the New Zealand construction industry is inefficient and ineffective because of two reasons (see Statistics New Zealand, 2016b). First, the firms and the industry as a whole operate in an environment of conflict rather than collaboration (PriceWaterhouseCoopers, 2011; Bahn & Lamm, 2014). Second, the industry is structured such that the traditional divide of design and construction firms, together with the hierarchy of sub-contractors and suppliers means that much of the knowledge on how to manage OHS strategies more efficiently is fragmented and often not shared (Bahn & Lamm, 2014).

Given that construction projects are technologically and organisationally complex, there is a need to manage the interests and influences of multiple project contributors, workers

and stakeholders on OHS practices (Lingard, 2013). As a suggestion, an industry OHS network similar to the Canterbury Safety Charter would provide a useful mechanism to manage the interests of multiple stakeholders' whilst ensuring the provision of adequate OHS measures at firm level. The proposed industry network could facilitate greater interaction amongst the government, industry, and the firms on the protection of marginalised, vulnerable workers. This intra-industry collaboration could foster more collaboration and greater sharing of knowledge and resources on OHS practices aimed at reaching vulnerable workers. Collaboration at an industry level could also assist in creating an operative network at a firm level. Such an operative network would allow the firms (both contractors and sub-contractors) to gather necessary resources and knowledge, critical to maintaining appropriate OHS standards and ensuring the safety of the workers. Such a network may also encourage the development of strong integrating mechanisms, as in the absence of such measures, discrepancies can produce deep fractures, conflicting interests, communication failures and a lack of clarity concerning responsibility for OHS both for the workers and the firms (Lingard, 2013).

Furthermore, competitive tendering practices which result in most contracts being awarded to the lowest bidder often compel businesses to drive their prices low, in an effort to cut costs, which in turn, affects health and safety considerations (Nagar, 2015). Cost pressures are then usually passed down to the smaller subcontractors (Weil, 2014), causing recurrent health and safety problems (Lingard, 2013). Recognising this gap, the New Zealand government and local industry bodies (such as construction strategy group and Building Research Association of New Zealand (BRANZ)) could work together in the industry to establish funding schemes to ease the financial burden of small construction firms. In doing so, the financial support would perhaps help these firms in establishing a variety of initiatives in the form of safety promotion, and training, which can be implemented to promote safety and health in the workplace. Findings outlined in Bahn and Lamm's (2014) report show that investment is needed at the firm level to ensure that adequate OHS training is provided to *all workers*, irrespective of their employment status, at the onset of every project. It is noted that training and induction procedures are often poorly structured in industries such as construction (Wilkins, 2011). An appropriate level of training, therefore, can result in a greater level of safety awareness and better OHS performance (Pearce, et al., 2007).

The highly transient and often vulnerable nature of the subcontracting workforce and deficit of resources so characteristic of small businesses in the construction industry, tends to complicate employment relationships which in turn causes ambiguity regarding the responsibility for OHS (James et al., 2007; Lingard, 2013; Nagar, 2015). Added to this is the declining trade union density, a political and legal environment that favours individual and decentralised bargaining – all of which have contributed to the lack of employee voice over employment matters, including OHS. Within this challenging working environment, Holland, Pyman, Cooper and Teicher (2009) and others argue that creating alternative, wide-ranging worker participation mechanisms is critical in OHS. They note, however, that alternative worker participation mechanisms on individual and organisational-levels is achievable only if joint consultation is embedded in organisational processes and that there is managerial motivation for joint consultation and alternative voice channels when dealing with OHS matters.

Finally, there is clearly a need for the industry to focus on making significant improvements to the way workers are employed and the conditions they are employed under. The industry, supported by evidence, has identified the OHS issues but not necessarily the solutions. Moreover, as noted in the Royal Commission on the Pike River Coal Mine Tragedy (2012), the prevailing ethos was profit over safety. Given the points discussed in this paper, it is, therefore, suggested that improving the OHS standards and practices within the New Zealand construction industry that takes account of the vulnerability of workers will require deliberate, sustained attention and action from those working in government, related industry agencies and the industry as a whole.

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# The reasonably practicable test and work health and safety-related risk assessments

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## Abstract

The test of “so far as is reasonably practicable” (SFAIRP) arose from the mid-1800s in English common law to determine if a duty of care for work health and safety had been met. It was arguably most famously summarised in the case of *Edwards v National Coal Board* 1949, but has since been used in the UK Health and Safety at Work Act that has, in turn, given rise to similar legislation in other jurisdictions. Internationally, the SFAIRP test has been the subject of many common law and criminal law cases to determine if all that could reasonably be done had, in fact, been done. However, a literature search carried out as part of wider research found no discussion of the implied requirement in the test that a risk assessment be carried out as part of demonstrating that SFAIRP requirements had been met. This has become of some significance in New Zealand and Australia due to the passage of recent legislation founded on SFAIRP.

This article addresses this gap and then reviews what a risk assessment might include. Risk assessment processes and techniques (derived from international standards) that might satisfy a regulatory agency or the courts are then outlined and their use in practice is indicated from the findings of an online survey and related field work. These findings suggest a knowledge or practice gap that may reduce the effectiveness and acceptability of risk assessments. Some options for closing that gap are described.

The paper concludes with a discussion of some of the implications of ineffective risk assessments for the courts, directors, employers and workers.

**Keywords:** risk assessment, international standards, work health and safety legislation, the reasonably practicable principle

## Background

Exploration of the effectiveness of risk assessments in informing decision makers identified implied legal requirements for risk assessments that might satisfy judicial and statutory interpretations of the “so far as is reasonably practicable” (SFAIRP) test in the common law duty of care and Robens-style work health and safety legislation. This research also found that company legislation in New Zealand and other jurisdictions allows directors to rely on

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professional or expert advice under specified circumstances, and (following recent legislation on work health and safety (WH&S) in Australia and New Zealand) that company officers and employers will need to consider whether they can rely on a risk assessment (Peace, Mabin, & Cordery, 2017).

Decisions from leading WH&S cases in three jurisdictions were reviewed and found to strongly imply the requirement for a risk assessment. However, no articles discussing such implied requirements were found in a literature search.

This paper responds to these issues as follows. It first briefly discusses the origins of the reasonably practicable test in the common law and recent New Zealand and Australian WH&S legislation. A selection of reported cases where the reasonably practicable test has been considered are then discussed, leading, it is argued, to the implied requirement for a risk assessment. The possible structure of such a risk assessment is then outlined before discussing how the best available information might be gathered, in theory and in practice, to demonstrate that a duty has been complied with *so far as is reasonably practicable*. The development and effectiveness of a novel tool for stakeholder engagement during risk assessments is described before concluding with implications for future research.

## **Origins of reasonably practicable and legislation**

In the early 1970s, the UK government recognised the need to rationalise work health and safety and related legislation, and regulatory agencies, and appointed a committee chaired by Lord Robens to review the law and make recommendations. The committee reported in 1972 and suggested that new legislation be based on the English common law duty of care (Lord Robens et al., 1972). That duty requires a duty-holder to discharge their duty “so far as is reasonably practicable”. The UK Health and Safety at Work Act (UK HSWA) became law in 1974 with cross-party support and has remained in place without any substantial amendment (Ford, 2002).

Since 1974, other countries have adopted the basic structure and duties of care in the UK legislation, including the SFAIRP test for compliance. In Australia, the government has sought to put in place a single, federal health and safety framework by developing a Model Bill (“Model Work Health and Safety Bill,” 2009) to replace sometimes conflicting Acts in each State.

After the New Zealand Pike River disaster (Macfie, 2013) the New Zealand government appointed a Royal Commission to enquire into the causes of the explosions and make recommendations (Royal Commission on the Pike River Coal Mine Tragedy, 2012). The Ministry of Business Innovation and Employment (MBIE) subsequently absorbed the regulatory functions of the Department of Labour (including the Mines Inspectorate). MBIE commissioned a report that determined regulatory work at the mine had fallen short of a good standard, so contributing to the disaster (Shanks & Meares, 2013).

The government also appointed a taskforce to investigate and report on improvements in the regulatory framework (Independent Taskforce on Workplace Health and Safety, 2013). The report recommended adoption of the Australian Model Bill, subsequently adapted to give a better fit with New Zealand law and practice (published as the “Health and Safety Reform Bill,” 2014). That Bill became law in April 2016 (renamed the “Health and Safety at Work

Act,” 2015 (NZ HSWA)) and sets out a series of duties of care modified by the SFAIRP test owed to workers and “other persons” who might be affected by workplace activities.

## **Reasonably practicable**

English common law decisions relating to workplace injuries and cases under the UK HSWA have often been cited in court in Australia and New Zealand. Some are outlined below before discussing relevant Australian and New Zealand cases.

### ***UK case law***

In some cases, the meaning of the reasonably practicable test has been decided to imply a requirement for a risk assessment to be carried out before any harm occurred. The most significant and commonly cited case is *Edwards v National Coal Board (NCB)* (1949), and is reviewed first.

The facts of the case were that Mr Edwards (a colliery timberman) was going to his workplace along an underground travelling road in Marine Colliery, South Wales, a coal mine owned by the defendants, when he was killed by a fall of material from the side of the road. Although some propping and lining of the road had been carried out at places where weaknesses appeared, the point at which the accident occurred had no artificial support. The defendants contended that it was not reasonably practicable for them to have avoided or prevented the insecurity of the road at the point in question, there being nothing to indicate the existence of the latent defect, and that to require them to support all roads in the mine would be to impose on them an impossible financial burden.

Evidence from the original trial suggested that propping and lining the whole mine might be unreasonable in terms of cost but that it would be reasonable to either prop or prop and line the travelling roads and so make them safer. The court heard that “this particular travelling road which was only 400 yards long ... had, in fact, been timbered for about half its length and up to within 15 to 30 yards of the spot where this accident occurred.” Evidence was also heard that the necessary timbers were available at the surface of the mine. However, the mine officials seem never to have proactively considered the options of propping or propping and lining, although they did rely on a system of inspections and the “ordinary and usual precautions”.

Damages of £948 were awarded to Mr Edwards’ widow in the original trial and confirmed in the House of Lords appeal. “Reasonably practicable” was discussed in that appeal by Lord Asquith thus:

The onus was on the defendants to establish that it was not reasonably practicable for them to have prevented a breach ... “Reasonably practicable” is a narrower term than physically possible and it seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions [the



employer] has to answer are: (a) What measures are necessary and sufficient to prevent any breach ...? (b) Are these measures reasonably practicable? [Emphasis added.]

(Asquith LJ., in *Edwards -v- NCB* (1949))

The measures to prevent any breach suggest the need to assess the effectiveness of current controls and of options that might eliminate or minimise risk. The absence of evidence on which a conscious decision had been based was of importance to Lord Asquith who wrote:

I do not think any, or any sufficient, evidence was adduced as to the relative quantum of risk and sacrifice involved on the basis either that the mines as a whole (or that this particular roadway) should be taken as the unit – a necessary prerequisite to any decision that the defendants have proved the necessary measures impracticable.

In the same case Lord Tucker argued that:

This shows that in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost (Tucker LJ., in *Edwards -v- NCB* (1949)).

Arguing that “a computation must be made” ... “at a point of time anterior to the accident” and “weighed” implies the need for a risk assessment that informs decisions about risk before harm has occurred. The “quantum of risk” relates to the harm that might be caused (death, injury or ill-health) and suggests the scale of the necessary risk assessment, perhaps including the questions suggested by Lord Asquith ((a) What measures are necessary and sufficient to prevent any breach ...? (b) Are these measures reasonably practicable?).

In a 1990 appeal under the UK HSWA, the need to take into account the likelihood of consequences was emphasised.

For the purpose of considering whether the defendant has discharged the onus which rests upon him to establish that it was not reasonably practicable for him, in the circumstances, to eliminate the relevant risk, there has to be taken into account (inter alia) the likelihood of that risk eventuating. The degree of likelihood is an important element in the equation. It follows that the effect is to bring into play foreseeability in the sense of likelihood of the incidence of the relevant risk, and that the likelihood of such risk eventuating has to be weighed against the means, including cost, necessary to eliminate it. [Emphasis added.]

(Goff LJ., in *Austin Rover Company v HM Inspector of Factories* (1990))

An earlier common law case distinguished between what is practicable and what is reasonably practicable thus:

The test of what is [reasonably practicable] is not simply what is practicable as a matter of engineering, but it depends on the consideration, in the light of the whole circumstances at the time of the accident and, whether the time, trouble and expense of the precautions suggested are or are not disproportionate to the risk involved, and also an assessment of the degree of security which of the measures suggested



may be expected to afford. [Emphasis added.]  
(Reid LJ., in Marshall vs Gotham (1954))

The phrase “in the light of the whole circumstances” again implies the need for a risk assessment while “an assessment ... of the measures” again pointed to the need to consider controls currently in place.

In a subsequent appeal, under UK HSWA, it was decided that “reasonably practicable” required a defendant to prove that:

... it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty ... or that there was no better practicable means than was in fact used to satisfy the duty or requirement.  
 (“R v British Steel plc,” 1994)

Reaching the conclusion that “there was no better practicable means” again requires some form of enquiry into current controls or options to eliminate or minimise risk – here, it is argued, a risk assessment.

#### *Australian case law*

The meaning of “reasonably practicable” in earlier Australian legislation was considered in a Supreme Court of Victoria case where it was determined that:

The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment.  
(Harper J., in Holmes v RE Spence & Co Pty Ltd (1992) at line 123)

Harper J considered this might done:

... by taking an active, imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever-present reality ... [so] ... preventing the human factor from resulting in injury.

This might require “no more than the making of a value judgement in the light of all the facts” based on “what was known at the relevant time” (Gaudron J., p. 53 in Slivak v Lurgi (Australia) Pty Ltd (2001) at page 53). This comment aligns with comments made by Tucker LJ in Edwards v NCB quoted above.

A grossly inadequate risk assessment carried out by an employer was found to have led to the death of a worker (Greenwood J., in Comcare v John Holland Pty Ltd (2016) at para 96). The court found that “no employee or agent of John Holland Pty Ltd undertook a formal risk assessment in relation” (emphasis added) to the planned work activity and that such a risk assessment ought to have addressed at least 20 practical questions about the conduct of the activity. The judgement again followed Edwards v NCB 1949 in that a risk assessment should have preceded the fatality.

In a 2016 case involving high-risk movement of vehicles in confined spaces the judge held that: ... so far as is reasonably practicable must involve the creation of strict, rigorous and comprehensive standards which are the religiously maintained.

(Cannon J, in *Director of Public Prosecutions V Toll Transport Pty Ltd* (2016))

Flores-Walsh, Costa, & Lo (2017) commented that this required:

... employers and other persons who conduct businesses and undertakings [to] ... identify ... the competence of their risk assessment processes and the persons who conduct assessments ...

### *New Zealand case law*

The reasonably practicable test formed part of the definition of “all practicable steps” in section 2A of the Health and Safety in Employment Act 1992, now repealed by NZ HSWA. In an appeal by the employer against conviction, the High Court seems to have followed the UK case *R v British Steel plc* (ibid), and found that the appellant had done what was practicable by carrying out an informal risk assessment (Hansen J, in *Buchanan’s Foundry Ltd v Department of Labour* (1996)). That enquiry should be “judged on the basis of what had been known at the relevant time”.

In a more recent case, the High Court found that use of a cherry picker was a practicable step and that the cost of hire (\$480) was reasonable when the lives of workers working at heights were at risk (Venning J, in *Martin Simmons Air Conditioning Services Ltd v Department of Labour* (2008)). However, use of a cherry picker had not been considered as part of any risk assessment.

The Australian case *Director of Public Prosecutions V Toll Transport Pty* (ibid) was echoed in a 2016 New Zealand case which found that policies and procedures identified as necessary as a result of a risk assessment should be maintained and subject to review (Rowe, J in *WorkSafe NZ v Rentokil Initial Ltd* (2016)).

### *Summary*

In summary, these cases from the UK, Australia and New Zealand strongly suggest that a decision about a WH&S-related risk must be preceded by a risk assessment that provides the best available information for that decision. This will enable a duty-holder to demonstrate it had done what was reasonably practicable and was using that information to enable monitoring of the risk for any changes in the work environment, work or workers.

## **Reasonably practicable in the NZ HSWA and the Model Bill**

Whereas judges have previously interpreted reasonably practicable in either the common law or statute law, the Model Bill and NZ HSWA set out the following definition.

### **22. Reasonably practicable**

In this Act, unless the context otherwise requires, reasonably practicable, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including:

(a) the likelihood of the hazard or the risk concerned occurring; and

- (b) the degree of harm that might result from the hazard or risk; and
- (c) what the person concerned knows, or ought reasonably to know, about:
  - (i) the hazard or risk; and
  - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

The legislation introduced the term “person having control of a business or undertaking”, abbreviated in the Act as PCBU, defined as a natural person or other entity having control of a workplace.

Specific mention of “or ought reasonably to know” in clause (c) raises the question: “What does a duty-holder have to do to discover what they ought reasonably to know?”, an issue addressed later.

Guidance on reasonably practicable published by WorkSafe NZ (2016), the New Zealand regulator, states that many risks might be eliminated or minimised by the use of common controls, perhaps without the need for a full risk assessment. The guidance suggests that “if there isn’t a common control for a risk then you first need to evaluate the risk and the ways to control it. Then, lastly, you would consider the costs and if they are proportionate to the risk”. WorkSafe suggests such an evaluation – a risk assessment – might include:

- how likely is the risk to occur
- how severe is the harm that might result from the risk
- what you know or ought reasonably to know about the risk and the ways of eliminating or minimising it
- the availability of the control measures, and how suitable they are for the specific risk.

The guidance then suggests “as a final step, consider if the cost of setting up control measures is grossly disproportionate to the risk” and that “cost is rarely an excuse for not setting up a necessary control for a risk”. Although this guidance is for small to medium businesses, it makes no reference to how a risk assessment might be carried out (eg, a suitable process or suitable techniques) or form part of related workplace activities (eg, quality improvement), and how a simple cost benefit analysis might be conducted.

The factors to be considered when assessing if a WH&S-related risk has been minimised, SFAIRP have also been described by WorkSafe NZ (2016) and the UK regulator, the Health and Safety Executive (HSE, 2001), and are summarised in Table 1, structured to match the requirements of section 22 NZ HSWA (clause 18 of the Model Bill), and section 137 of the NZ Companies Act 1993.

**Table 1. Summary of factors affecting demonstration of SFAIRP**

Sources: WorkSafe NZ (2016); HSE (1992; 2001); section 22 NZ HSWA; Lowrance (1976)

Factor	Issues to consider
(a) likelihood of the hazard (cause) or risk occurring	<p>What is the current state of knowledge about the likelihood of harm?</p> <p>Is the likelihood continuous (chronic) or sudden (acute)?</p> <p>Are there uncertainties about the likelihood of the harm?</p>
(b) the degree of harm (the consequences) that might result from the hazard or risk	<p>What would be the nature and severity of the potential harm?</p> <p>What is known about harm of that nature and severity?</p> <p>Will harm be immediate or delayed?</p> <p>Is there a possibility of harm to future generations?</p> <p>Is the harm reversible?</p> <p>Are there uncertainties about the magnitude of the harm?</p> <p>What are the expected number and range of harms arising from the hazard?</p> <p>Is the harm common or dread (ie, deeply feared by some people)?</p> <p>Would there be no detectable adverse effect?</p> <p>Are vulnerable groups of the public exposed?</p>
<p>(c) What is known about:</p> <p>(i) the hazard or risk</p> <p>(ii) ways of eliminating or minimising the hazard or risk</p>	<p>What is the current state of knowledge about the means available to eliminate or minimise the risk?</p> <p>Are guidance documents on the hazard and associated risks freely available or of restricted-access?</p> <p>Is the hazard natural or man-made?</p> <p>What is the exposure relative to natural background?</p> <p>Is the hazard occupational or non-occupational or both?</p> <p>Are the people exposed to the hazard aware of it and any potential harm it might cause (ie, voluntary or involuntary)?</p> <p>Is the hazard familiar or novel?</p> <p>What could reasonably be done to discover new means to eliminate or minimise the risk?</p> <p>Can the hazard (causes of risk) or potential harm (consequences) be eliminated?</p> <p>Can a lesser hazard be substituted for the current hazard, so reducing the risk?</p> <p>Can the hazard be isolated from people?</p> <p>Can people be isolated from the hazard?</p> <p>Can an engineering control be used to minimise the hazard?</p> <p>Can administrative controls be implemented to minimise the risk?</p> <p>If there is still a risk, would personal protective equipment be of any benefit?</p>
(d) the availability and suitability of ways to eliminate or minimise the risk	<p>Arising from (c)(ii):</p> <p>What are the current controls over the risk?</p> <p>What is the effectiveness of those controls?</p> <p>Who manages the controls?</p> <p>Do workers and/or the public have confidence in the quality of that management?</p> <p>Could emergency services cope with any incidents?</p>
(e) the cost, including whether the cost is grossly disproportionate	<p>Could relatively cheap expenditure or modifications significantly reduce risk?</p>

to the risk	See further discussion on “grossly disproportionate” below
NZ Companies Act 1993, section 138 and NZ HSWA, section 44	Do workers and/or the public have confidence in the independence and quality of expert advice? How is the risk viewed in light of prevailing professional practice?

### Risk assessments

The meaning of risk ought to be the starting point for discussion of how a risk assessment might be conducted or how that a risk assessment might be a driver for change in a process or business activity. Conversely, the “grossly disproportionate” part of reasonably practicable has often been discussed (including Ale, Hartford, & Slater, 2015; Aven & Abrahamsen, 2007; Fischhoff, Lichtenstein, Slovic, Derby, & Keeny, 1981; Jones-Lee & Aven, 2011; Lowrance, 1976; Thomas & Vaughan), but mostly as a standalone topic, unrelated to the meaning of risk or the outcome of a risk assessment. Some authors draw on the “value of a prevented fatality” (VPF) or “value of a statistical life” (VOSL) as a source of data for the application of techniques such as cost benefit analysis, cost effectiveness analysis or multi-attribute utility theory.

The Model Bill and NZ HSWA do not define “risk” and so, for the purposes of this paper, the definition in the international standard, ISO31000: 2009 *Risk management: principles and guidelines*<sup>1</sup>, is used. This standard (and most other management standards published by the International Standards Organization) define risk as the “effect of uncertainty on objectives”, suggesting that any risk assessment must start with an understanding of organisational objectives, including those for work health and safety, and then analyse the effects of uncertainty on those objectives.

A range of standards and documents gives guidance on risk assessments but may be sector- or activity-specific, whereas ISO31000 states it can be applied to any risk in any organisation. Managers and others can, therefore, use this generic standard and its definitions to help manage risk, regardless of the consequences. This view was confirmed by Safe Work Australia (a Federal agency established to coordinate and develop national policy and strategies) in a guide that suggests the process for deciding what is reasonably practicable “is consistent with guidance on risk management” (Safe Work Australia, 2011).

The causes and effects of uncertainty can then be assessed, leading to an understanding of the risk, how effectively it is currently managed, whether it is currently acceptable and, if not acceptable, identification of options for elimination or minimisation of the risk.

Risk assessment is defined in ISO31000 as the “overall process of risk identification, risk analysis and risk evaluation” and risk assessment is part of the overall risk management process – how an organisation increases the certainty that its objectives will be achieved. To provide the best available information for a decision about risk (ISO, 2009, p. 7, principle f) a risk assessment should follow a structured process to identify and analyse possible causes of events, their consequences, the likelihood of those consequences and the effectiveness of current controls.

Once in possession of the best available information, a decision maker must then address the “acceptable risk problem” (Fischhoff et al., 1981) to decide if a WH&S-related risk is

<sup>1</sup> (published in Australia and New Zealand as AS/NZS ISO31000: 2009

acceptable, tolerable or intolerable. That is: “Has this risk been minimised so far as is reasonably practicable?” as per *Edwards v NCB* 1949 and section 22, HSWA (section 18, Model Bill).

Based on this ISO31000 definition and approach, risk assessments can be seen as a “pre-cautionary” management activity that should be “game-changing” information technology (Goble & Bier, 2013), capable of informing decisions, engendering stakeholder trust in decisions, and facilitating adaptation and experimentation by decision makers and risk managers. Risk assessments should contribute to management as a technology and help discover and contextualise knowledge in an understandable representation, communicated by a credible person, that aids rational decisions (Bloom, Raffaella, & Van Reenen, 2016). Issues associated with whether the cost of a possible control is “grossly disproportionate” may then be of less significance.

The statutory definition of reasonably practicable and WorkSafe NZ guidance includes “what the person concerned knows, or ought reasonably to know ...”. It is argued that following the above approach will help respond to this requirement, but without a formal process and use of relevant risk techniques may miss key aspects of uncertainty.

### ***What might be included in a “reasonably practicable” risk assessment?***

If a risk has both low uncertainty and low complexity, a simple screening risk assessment may be sufficient to show that relevant codes of practice or other well-established and applicable guidance will either eliminate or minimise the risk (HSE, 2001; WorkSafe NZ, 2016). However, in assessments of more complex risks with WH&S-related consequences, a more detailed risk assessment may be necessary to help answer the “acceptable risk problem”.

Fischhoff et al. (1981) concluded the “acceptable risk problem” was hard to resolve due to difficulties in agreeing on terms of reference for risk assessments, distinguishing facts and values, and difficulties with professional judgement. Such difficulties have been partly addressed by ISO31000 (ibid), supported by IEC/ISO31010 (2009) *Risk assessment techniques*<sup>2</sup> and a range of technique-specific International Electrotechnical Commission (IEC) standards. Several authors have also addressed the conduct of risk assessments, and how to avoid failures of risk assessments (Busby & Hughes, 2006; Haas, 2016; Wiedemann et al., 2013).

## **Techniques for use in the risk assessment process**

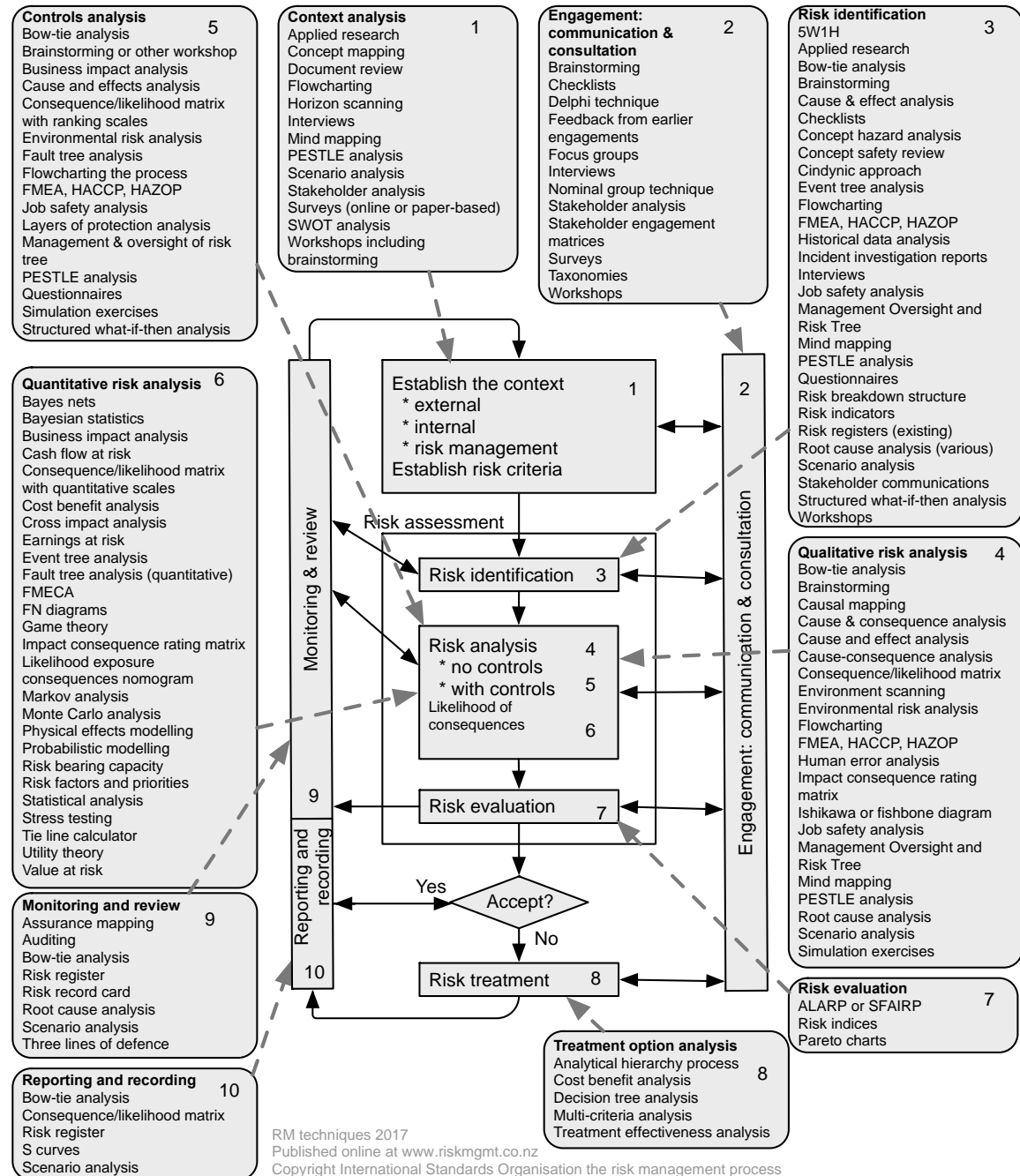
Research into the effectiveness of risk assessments is continuing, including examination of which risk assessment techniques might be used to help identify and analyse uncertainty, its effect on objectives and to enable evaluation of analysed risks against the reasonably practicable test. The techniques thought to be most commonly used were mapped against an amended version of the risk management process in ISO31000 (see Figure 1) and their use tested in an online survey.

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<sup>2</sup> Published in Australia and New Zealand as SA/NZS HB89:2013 Risk management – Guidelines on risk assessment techniques

**Figure 1. Risk assessment techniques in the selected process**

This graphic is based on the ISO 31000 risk management process diagram. Possible risk techniques are shown in boxes with solid lines and curved corners to indicate where they might be used. Note that some techniques can be used in several stages of the process.



RM techniques 2017  
Published online at [www.riskmgmt.co.nz](http://www.riskmgmt.co.nz)  
Copyright International Standards Organisation the risk management process  
Copyright Risk Management Ltd 207-2017 for mapping techniques against the process

The numbered boxes in the diagram represent the sequence in which each stage might be carried out. Note that box 7 (bottom right corner) includes “so far as is reasonably practicable” and the abbreviation ALARP (“as low as is reasonably practicable”) to help ensure that UK respondents recognised it.

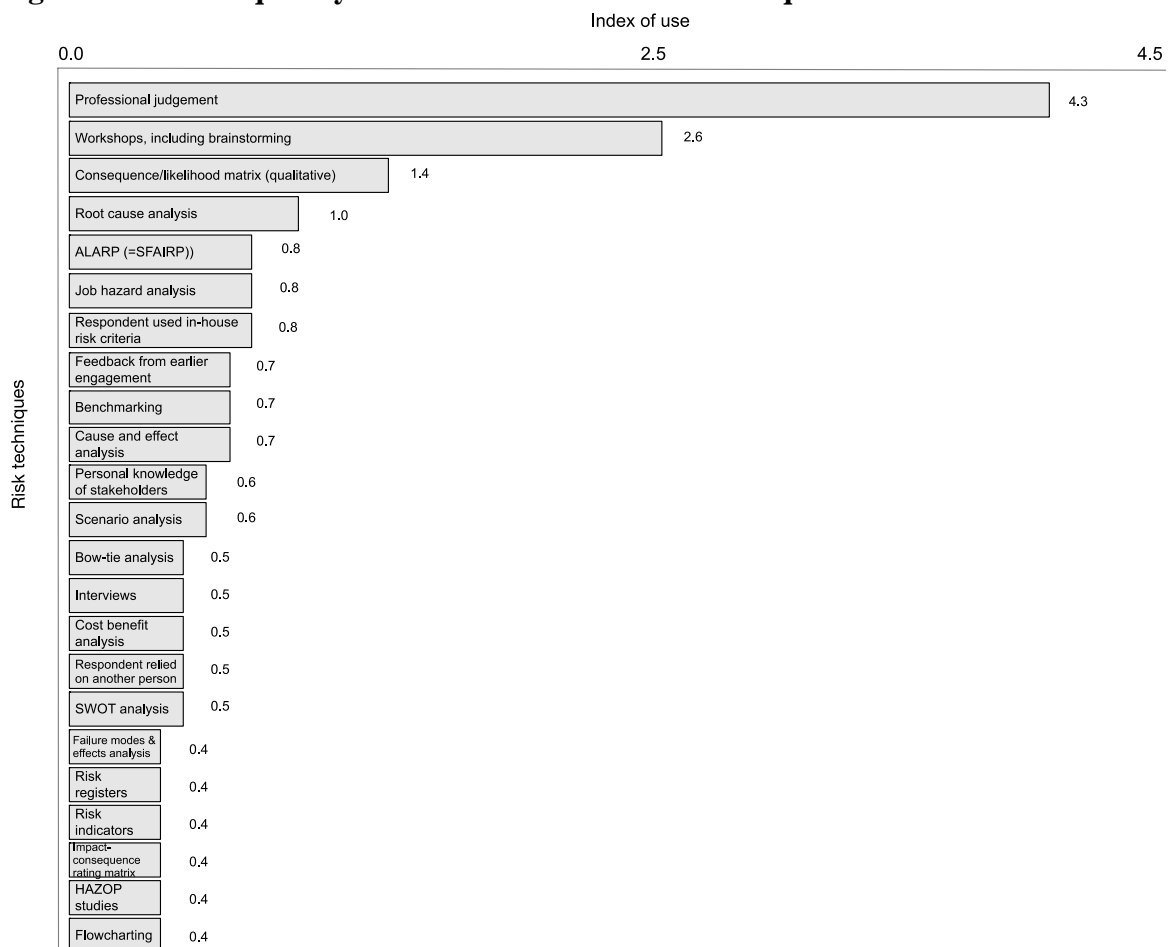
Before release of the survey, it was pre-tested with focus groups of risk practitioners and amended to include techniques that had been overlooked, resulting in inclusion of “professional judgement” in the survey (but not in Figure 1).

### *Survey results*

To summarise the range of techniques used by respondents, an index for each technique was calculated by dividing the number of selections for each risk technique by the total number of respondents to each question. The 23 highest-ranked techniques are listed in descending order in Figure 2, showing that the techniques most frequently selected were:

- professional judgement
- workshops, including brainstorming
- consequence/likelihood matrix with ranking scales.

**Figure 2. Most frequently selected risk assessment techniques**





More structured techniques had low scores, suggesting that many risk and safety practitioners preferred to use their professional judgement or, perhaps, were not aware of those techniques. If the same is true for managers, this may be an explanation for the failure of risk assessments that might have been intended to demonstrate that WH&S-risk had been minimised “so far as is reasonably practicable” (Gadd, Keeley, & Balmforth, 2003; Stulz, 2009). The survey results (and the preceding focus groups) showed that cost benefit analysis and multi-attribute utility theory were rarely or never mentioned by respondents as techniques to aid decisions about the cost of risk treatment and whether it might be “grossly disproportionate to the risk”.

Many of the techniques are at least superficially the same or closely related. For example, bow-tie analysis is based on fault tree analysis and event tree analysis and strongly resembles cause and effect analysis (which does not identify an event), while root cause analysis (IEC, 2015) is a collection of techniques that can include fault tree analysis.

The research, therefore, suggests that risk assessors most often use their professional judgement, regardless of any apparent need for a structured approach to demonstrate that reasonably practicable steps have been taken to assess and then manage risk. This may be because they are not aware of generally accepted processes or relevant techniques that can help provide the best available information about uncertainty in risk. Risk assessments using professional judgement therefore may suffer from bias (Kahneman, Rosenfield, Gandhi, & Blaser, 2016; Montibeller & von Winterfeldt, 2015).

## Can risk assessments be improved?

In research to date, two options for improving risk assessments have been considered.

### *Graphically relating techniques to process*

Some practitioners may be aware of IEC/ISO31010 but not relate the techniques it describes to the different stages in the risk management process. **Error! Reference source not found.** was initially developed to aid development of the online survey but may also help practitioners to select techniques that are relevant to their risk assessment needs and practice.

### *Graphical elicitation methods – flipcharts, Post-it notes and the risk canvas*

Graphical methods including flowcharts, maps, charts, diagrams and visual metaphors can be used to help elicit risk information (Bagnoli, 2009; Crilly, Blackwell, & Clarkson, 2006; Eppler & Aeschmann, 2009). Training courses for managers and risk and safety practitioners by the author had used flipcharts and Post-it notes as a way of using some risk techniques, but failed to deliver consistent or reproducible results. When a series of one-day training courses was run in 2015, contacts in the organisation suggested (M.Ward & G.Burnett, personal communication, 27 July 2015) that a large sheet of paper be used, pre-printed with the risk techniques being taught, instead of “free-form” flipcharts and Post-it notes. This was named the “Risk Canvas” and has since been developed to aid the application of selected risk techniques from IEC/ISO31010, within the ISO31000 risk management process. These include stakeholder analysis, document review, PESTLE

analysis, SWOT analysis, bow-tie analysis, and rating scales for risk velocity, controls effectiveness and probability.

Anecdotal evidence suggested the first versions worked well and it has been developed to version 2.3 (available at <http://www.riskmgmt.co.nz/publications/>), setting out information to further aid engagement with stakeholders and application of techniques. Victoria University Human Ethics Committee approval, therefore, was sought and granted to seek anonymous feedback on the risk canvas in training courses and other settings. Use of the risk canvas will be reported when more data has been gathered but, to date, the overwhelming response has been in favour of its use during training courses and, potentially, in real-world risk assessment workshops.

In three training courses, attendees were also asked to estimate the level of risk (extreme, high, medium, low or negligible) in a case study before and after using the risk canvas. Preliminary analysis of the limited data suggests that use of the risk canvas may result in about a 25 per cent reduction in variability of the estimated level of risk; this will be further investigated.

The risk canvas also enables linking with other techniques (including flowcharting, HAZOP, FMEA and HACCP) in workshops and will be developed to enable use of these and other techniques. The risk canvas is, therefore, a means to aid discovery of “what the person concerned knows, or ought reasonably to know” about a WH&S-related risk and so discharge the implied “reasonably practicable” requirement for a risk assessment

## **Implications for practice**

If managers and safety or risk practitioners prefer to use professional judgement rather than structured techniques they may be in breach of the implied requirement of “reasonably practicable” to carry out a risk assessment before a worker or other person has been harmed. Further, a short, recent article (Lloyd & Healy, 2017) indicates that safety and risk practitioners who fail to conduct an effective risk assessment could be in breach of the NZ HSWA (or, in Australia, the Model Bill). This corroborates the earlier comments by Costa, & Lo (2017) about risk assessments and risk assessors.

As noted, the implied requirement for a risk assessment, supported by guidance from regulators, necessitates understanding the level of uncertainty about achieving organisational, statutory and common law WH&S objectives, and should include the:

- degree of harm that might be caused (death, injury or ill health)
- likelihood of that harm
- controls already in place
- further options to eliminate or minimise the risk
- costs of the options to eliminate or minimise the risk and whether those costs are grossly disproportionate.

The lack of structure inherent in professional judgement may also result in failure to gather the best available information to help decide if a WH&S-related risk has been eliminated or minimised, so far as is reasonably practicable. Use of the risk canvas has been found to

provide a structured approach that engages workshop participants and helps overcome biases.

Management training courses may not always include how to carry out a risk assessment. In New Zealand, some 98 per cent of businesses are small or medium sized enterprises (SMEs) whose managers may not have undergone formal safety training, an issue complicating risk management that has been identified internationally by many authors including:

- Bluff (2005), who discussed at length the need for specialist support for small- or medium-sized businesses in Australia if they were to achieve compliance with occupational health and safety legislation
- Champoux and Brun (2015), who found that occupational health and safety in SMEs was not well managed in Quebec
- Deighan, Lansdown, & Brotherton (2009), who found a low level of occupational health and safety activity in a sample of UK SMEs
- Legg et al. (2010), who found a low level of integration of occupational health and safety in business systems in New Zealand SMEs.

This issue may also extend to safety and risk practitioners; an unpublished online survey of 1,438 safety practitioners in early 2016 had a 27 per cent response rate and suggested a general lack of training in risk assessment practice in New Zealand safety practitioners (Peace, 2016).

## **Implications for future research**

This paper suggests the following areas for future research.

- Analysis of court cases under the now-repealed NZ Health and Safety in Employment Act 1992 and the HSWA to try to identify the quality and frequency of risk assessments before the harm that led to a prosecution.
- In-depth analysis of the effectiveness and benefits of the risk canvas other than during training courses. This might be done by the researcher observing, but not intervening in, use of the risk canvas.
- Investigation into professional judgement in risk assessments, as applied by line managers and safety practitioners in New Zealand, to help identify knowledge and practice gaps.

## **Contributions of this research**

This research made the following contributions.

- The requirement for a risk assessment, implied in section 22 NZ HSWA, the Model Bill and leading cases, has been identified, explored and made explicit for use of other researchers and for practitioners.
- The content of a risk assessment has been explored using relevant NZ and UK guidance.
- The high level of use of professional judgement by safety and risk practitioners in risk assessments has been quantified.
- Two options to help improve the practice of risk assessments have been developed and one has been tested in the field, showing it may be worth pursuing.

### Acknowledgement

The helpful comments of an anonymous reviewer are gratefully acknowledged.

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# Discipline, Dismissal, and the Demon Drink: An Explosive Social Cocktail

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## Abstract

Social drinking in the workplace forms an important part of our organisational identity. Considered a social lubricant, alcohol has become part of New Zealand's social fabric. In the workplace, however, alcohol can often become the demon, responsible for behavioural impropriety. This over-indulgence often leads to embarrassment, but sometimes it extends to the more severe outcomes of discipline and even dismissal. It is also increasingly a focus of occupational health and safety regulation. Adopting a conversational yet serious stance, our paper explores the views and experiences of employers and employees as they relate to workplace social occasions. By cataloguing contemporary attitudes and profiling the pitfalls and the problems that arise when things go wrong, our paper concludes by proposing some sage advice for both parties.

**Keywords:** alcohol, employee behaviour, social norms, drinking culture, workplace policy

## Introduction

What constitutes acceptable behaviour in and around the workplace is, to some considerable extent, subject to the proverbial 'moving goal posts,' a set of sometimes oblique standards that move with changing societal mores. In the workplaces of Australia and New Zealand, that could not be more true than it is in relation to the consumption and influence of alcohol. By comparison, the regulations and expectations in relation to illicit drugs in the workplace are relatively straightforward. But alcohol consumption is legal, and enjoyed moderately and reasonably by most adults in many circumstances, including often times at or around the workplace. However, from both disciplinary and safety perspectives, there is increasing recognition of the dangers of alcohol consumption at work or at work-related social functions. Testament of the occupation health and safety dimension to this are the numerous comprehensive regulatory and advisory government and extra-government outputs at international (cf. *Management of alcohol and drug-related issues in the workplace: an ILO code of practice* (International Labour Organization, 1996)), state and national (cf. *Guidance note: alcohol and other drugs at the workplace* (Western Australia Commission for Occupational Safety and Health, 2008)), and industry levels (cf. *Guidance for managing drug and alcohol-related risks in adventure activities* (New Zealand Ministry of Business, Innovation & Employment, 2013)).

First, let's set the scene – and we do so with a person we shall refer to as Ms C. At 24, she was a top salesperson at the most profitable outlet of a major appliance retailer, regularly pulling

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the highest commissions and monthly bonuses. She lived at home with her parents and was building a good financial basis for the future. She was good at sales and she enjoyed her work and, her workplace. Until the Christmas party!

To celebrate the holiday season and a good year at the store, staff organised drinks at a city pub followed by dinner at a nearby restaurant. Management contributed \$25 per head. Everyone from the store manager to the cleaner was there. A couple of the women booked a room at a city hotel to avoid driving home to the suburbs at the end of the evening, and invited others to join them for “pre-drinks drinks” and Ms C went along. Later at the pub, already slipping under the influence, Ms C patted the store manager’s behind, drawing a rebuke from the manager’s wife. Alcohol continued to flow freely at dinner, for those who wanted it.

After dinner, Ms C and two men from the store went on to a nightclub, and eventually around midnight presented themselves, now conspicuously drunk, at the hotel room where their colleagues were preparing to sleep. Over the next couple of hours, Ms C had sex in the bathtub with the assistant store manager and, on the floor beside the bed in which her colleagues were trying to sleep, with the other man, a salesman from the store. Despite the protests of the women who rented the room, all three eventually passed out and spent the night. Ms C’s recollection of events was hazy and incomplete at best.

The next day, the women who had rented the room filed complaints with store management and an investigation was initiated. The two men resigned. Ms C was interviewed and was sufficiently vague in her answers that she was accused of not being honest, and she was eventually fired for sexual harassment of the colleagues who rented the room and for lying during the investigation. She filed a grievance and won on some points, but she didn’t get her job back or any substantial remedies, and that career path was pretty well shut down.

Ms C’s story is a true one, drawn from the annals of employment case law. Social occasions where management and staff mix are a feature of many workplaces, and alcohol often serves as a “social lubricant” at such events. Friday night drinks after work or even every night drinks after work, special occasion celebrations of retirements, births, engagements, and marriages, dinner and drinks with colleagues while away on business, socialising with prospective customers or suppliers, and of course the long and widespread tradition of end-of-year or holiday celebrations. It is widely believed that the guiding mechanism for employees’ drinking behaviour (for good or for bad) at these social events are the social norms which usually become embedded within the stories, rituals and rights of the organisation (Trice & Sonnenstuhl, 1988). As the case of Ms C demonstrates, social drinking occasions can, however, give rise to some serious safety and health issues.

In our study, we take a look at some of the prevailing social norms surrounding alcohol consumption within New Zealand workplaces, with a view to highlighting the nature and extent to which behavioural impropriety occurs at work-related social events. Based on this information, we are then able to develop some guidelines for promoting best behaviour and practice for both parties and, in so doing, we are hopeful that these occasions will be memorable for all the right reasons. We see this endeavour as both timely and worthy given the recently introduced Health and Safety at Work Act (HSWA, 2015) explicitly requires New Zealand employers to secure “the health and safety” of their workplaces and their employees.



### *Alcohol as a “social lubricant”*

Drinking alcohol can be a source of both enjoyment and relaxation (Nesvåg & Duckert, 2017) and there is evidence that, at the workplace level, it has some utility influencing the formation of our organisational identity (Walker & Bridgman, 2013) and as a social lubricant – alleviating stress, enhancing relationships, and improving solidarity amongst group members (Bennett & Lehman, 1998; Trice & Sonnenstuhl, 1988; Walker & Bridgman, 2013). Social controls for employees’ drinking behaviours are developed and transmitted via social cultural/subcultural norms (Ames, Delaney & Janes, 1992) established at the level of the workplace, the workgroup and/or the occupation. These norms act as the guide to proper and functional drinking behaviours (Nesvåg & Duckert, 2017).

However, if these norms are violated, dysfunctionality problems which compromise occupational safety and health can arise. Along with workplace social drinking norms, although not a focus in our study, for individuals, characteristics associated with the work itself are also thought to influence drinking behaviours. Jobs which are demanding, stressful or alienating, jobs which involve shift work, jobs which have low job performance visibility or abusive supervision are all characteristics which have been linked to problematic employee drinking behaviours (Trice & Sonnenstuhl, 1988).

Most New Zealand adults drink alcohol; alcohol is prominent in the New Zealand lifestyle (Walker & Bridgman, 2013). It sponsors our national game and it lubricates our social occasions. Most drink in moderation and appropriately to the occasions, but some don’t. The *New Zealand Health Survey 2012-2013* reported that 79 per cent of New Zealanders aged 15 and over had drunk alcohol in the past year. Of these drinkers, one third drank alcohol at least three or four times per week, half had been intoxicated at least once in the previous 12 months, including eight per cent who reported being intoxicated at least once a week (Ministry of Health, 2013). There are some positives here, if moderation is valued. For instance, two thirds of drinkers drink less than weekly; half had not drunk to the point of intoxication in the past 12 months. So, many New Zealand adults are enjoying drinking alcohol appropriately and in moderation. However, self-harm and harm caused by the drinking of others is sufficiently widespread in New Zealand that abuse of alcohol is considered a significant social problem. The social lubricant is too often an anti-social enabler.

A New Zealand Law Commission report issued in 2010 after an extensive inquiry identified the following “serious harms” caused by New Zealanders’ “excessive consumption of alcohol”: “an array of criminal offences,” up to and including homicides, but prominently including sexual assaults and domestic violence against women and children, a particular New Zealand scourge; “alcohol poisoning and accidental injury due to intoxication” sometimes causing death; “the harmful effects on educational outcomes, workplace productivity, friendships, social life, and the financial position of households”; and “public nuisance” including litter, noise, and damage to property (New Zealand Law Commission, 2010).

The workplace is a central institution of society, in New Zealand as elsewhere, so it is to be expected that the workplace will reflect social norms about alcohol consumption, although tempered somewhat to the purpose and disciplines of the place, and will also experience some of the “serious harms” attributed to alcohol consumption. Our study was designed to broadly document the impacts of alcohol on New Zealand workplaces and the workers who populate them. In this paper, we report on one important aspect of that broader subject, namely the impacts of alcohol consumption in “workplace-related” social settings of the types listed in the

introduction above: after work drinks, celebrations of special events, dinner and drinks with colleagues “on the road” or as a part of business dealings with customers or suppliers, and holiday social functions.

## **The research method**

### ***Data collection***

The research design saw data collected from both primary and secondary sources. Primary data were collected via an online questionnaire, administered by a data collection agency (ResearchNow), to a randomised sample of 230 employers, of which 218 were usable, and 850 employees, of which 813 were usable. This online questionnaire sought information about the policies and prevalent attitudes towards alcohol consumption at social events in respondents’ workplaces, as well as any incidences and/or examples of inappropriate behaviours observed at these occasions. In addition, respondents were asked to share, should they wish, any relevant workplace stories pertinent to a study of this nature – these could be good, bad, funny or sad. With regards to the latter, while no employers elected to share any workplace stories, some 187 employees did comment. It is these anecdotal data, which we believe, that affords our research both depth and insight into the role played by alcohol at contemporary workplace social occasions.

In addition to the survey data, we examined the decisions of the adjudicatory bodies under New Zealand labour market legislation – the Employment Tribunal under the Employment Contracts Act 1991 and the Employment Relations Authority under the current Employment Relations Act 2000. We identified from available adjudication decisions 199 cases in which the misuse of alcohol was in some causative way involved in the case; most cases were grievances alleging unjustified dismissal from employment. Of these cases, 21 cases involved consumption of alcohol in a “workplace-related” social setting. It is to be expected that many more cases arising out of similar circumstances were resolved in mediation or direct exit negotiations with offending employees, or resulted in voluntary quits, while no doubt others would have been let go without formal adverse consequences for employees involved. Where appropriate, these stories have been woven into our narrative.

## **Results**

### ***The legal framework***

Employment lawyers, mediators, and adjudicators will all tell you that holiday work functions and other “work-related” social occasions are a rich source of “business” for them. Under New Zealand employment law, even conduct that occurs outside of normal hours and off site can be actionable by the employer, if there is a sufficient nexus to the employment.

Misconduct occurring at work sponsored social functions, whether on or off premises, will almost always be within the jurisdiction of the employer much like any other misconduct at work. New Zealand law also extends the employer’s jurisdiction to adverse events occurring outside work hours and away from the workplace where the employee is involved in workplace-related activities, for example while travelling for the employer, where there is

damage to the employer's reputation, some other material harm to the employer, or significant damage to fellow employees or the workplace environment (*Smith v Christchurch Press Company Ltd, Hallwright v Forsyth Barr*). These general principles cover all manner of after-hours and off-premises mischief that does damage to the employer's interests, including misconduct powered by alcohol.

The other relevant legal concept in New Zealand, as in many countries, is the employer's obligation under occupational health and safety laws. In New Zealand, that obligation is to take all practicable steps to provide employees with a safe workplace, and that obligation extends to workplace-related social functions and occasions. It could be said that, to the extent that the employer's disciplinary reach extends to cover employees' use of alcohol on and off the premises, in and out of normal hours, the employer has obligations to take all practicable steps to ensure that employee safety is not jeopardised by the availability and use of alcohol. In essence, "good host" obligations apply to employers where alcohol is made available to employees in their capacity as employees under the auspices of the employer.

### ***Availability of alcohol at workplace social occasions***

Seventy per cent of our 813 employee survey respondents reported that alcohol was available at their work social functions, both on site and off site, and in most instances this was wholly or partially paid for by the employer. It is worth noting that most reported having experienced no significant problems from the availability of alcohol at work functions. While there is some evidence that alcohol is less accepted in the workplace today than it might have been in the past, many people still enjoy a drink in moderation and control as a part of work social events. However, 20 per cent of our employee respondents had seen trouble, sometimes big trouble, when staff over-indulged at work events, while 25 per cent of employer respondents also reported having had to deal with inappropriate behaviour at work social occasions.

The data from our 218 employer respondents give an indication of the employer-endorsed availability of alcohol at work-related social occasions. While only a minority of employers reported having alcohol available at "working sessions", such as staff seminars and team building exercises, 70 per cent reported providing alcohol at work social functions, and a similar percentage said this was true as well for work-related social events held away from the work premises. This did not, however, extend to travelling for work purposes, with only 21 per cent of respondent employers allowing employees to claim for alcoholic drinks while "on the road." Two-thirds of employer respondents reported that at least some of their employees liked to drink together "after work," although the frequency varied a great deal and this habit wasn't necessarily supported or endorsed by the employer. The most common frequencies cited were "less than once a month" and "once a week," 22 per cent and 16 per cent, respectively. While 36 per cent of employers reported their organisation's unofficial attitude towards alcohol consumption at work was one of zero tolerance, a similar number (37 per cent) reported this to be one of tolerance, with 22 per cent indicating a relaxed stance was adopted, with a couldn't care less stance adopted by the remaining five per cent.

### ***Behavioural manifestations***

The extant research suggests organisational drinking subcultures play a hugely influential role in work group drinking behaviours (Bennet & Lehman, 1999). Specifically, research has found that drinking behaviour in organisations is often regulated by "informal social controls", with these having a pressurising effect, especially on new employees (Ames & Janes, 1992: 113).

In our study, we found some evidence of this with one employee feeling immense pressure to drink at social events, with the consequences for non-conformance being severe. Here is their story:

I left a job in local government 2 years ago ... The pressure to conform through social club events, Friday drinks, and other “special” events was immense. And because I did not feel comfortable as a manager drinking with staff who were my direct reports, I rarely participated. The drinking culture contributed directly to a culture of bullying and harassment, where ultimately a few staff got together to fabricate stories against me. I held out all the way through a personal grievance because the organisation handled the “investigation” so badly. It turned out that senior managers had helped orchestrate the entire situation. It took me almost a year to recover from the stress and my earning capacity has been greatly downsized. But on the positive side, I am in a much better place for health – both physical and mental. I think the use of alcohol is viewed in many NZ organisations as the norm. And it creates unhealthy work relationships.

Fortunately this case was not representative of all employees however, with many making a conscious and independently motivated decision about whether they would or would not participate and/or drink at work social occasions. In these cases, it was encouraging to see that, where these choices seemingly differed from those of the majority, the individuals concerned were not sanctioned or subject to ridicule or alienation from the rest of the group. We wonder if this tolerance is attributable to life cycle changes, as our data also showed a number of employees had observed within themselves a change in drinking behaviour and attitudes towards alcohol, with these being attributed to increases in their age and responsibilities. Some even observed these behavioural and attitudinal changes to be more widespread, with one employee commenting:

I have been in the same job for 38 years and it was a “live hard” “play hard” situation which promoted alcohol use/abuse. It is different today without the same emphasis on alcohol with a lot of younger co-workers seemingly more responsible in their drinking habits.

Consistent with prior research (Walker & Bridgman, 2013), some also suggested alcohol has a positive role to play in facilitating organisational bonding, with one employee suggesting:

... companies should make more effort to encourage team building and socialising amongst employees with controlled alcohol as it builds strong relationships and teaches people about each other by changing the environment and situations we relate to each other in; learning about each other away from the strict confines of the stressful workplace.

So what could go wrong at the workplace social party – well quite a lot so it happens! As we noted above, some 20 per cent of our employee respondents and 25 per cent of our employer respondents did report having experienced inappropriate behaviour on the part of employees or managers as a consequence of intoxication at work-related social functions or occasions. We catalogued and categorised the regrettable behaviours and consequences reported to us, some more prevalent and troubling than others (see Appendix 1), and it is to this end that our discussion now turns.

At the lower end of the impropriety scale, respondents reported just foolish, sometimes annoying behaviour. Lots of loud and unruly conduct, “getting a little crazy” and “falling down drunk,” but sometimes going too far – doing wheelies around the work’s yard and pushing a fellow employee into the swimming pool. While most of this sort of embarrassing behaviour is at the least harmful end of the scale, it does run the risk of leaving an employee with a damaged reputation; losing control is not the ideal way to make an impression. And sometimes it can turn dangerous. One respondent reported a young intern “becoming paralytic” at an offsite Christmas function and collapsing in a toilet cubicle, not found until the following morning, probably lucky not to have choked to death.

Sometimes general drunken rowdiness can degenerate into more offensive incivility and rudeness. So, loudness becomes swearing and unacceptable language; falling down drunk becomes breaking glassware, furniture, and office or restaurant fittings; loss of physical control becomes vomiting in restaurants, offices, lifts, or over one’s colleagues; and alcohol-fuelled recklessness can lead to everything from smoking in non-smoking facilities to driving home drunk.

The two most damaging kinds of behaviours that surface at work functions, often putting employment at risk, are *aggression* directed at fellow employees and *sexual behaviour* or *harassment*. We received many reports of drunk party-goers directing verbal abuse at co-workers, or sometimes clients or co-workers’ family members, where those folks were invited to the function, as they often are. But there were also a number of reports of physical assaults occurring at work functions, usually between co-workers and usually over some work-related matter, although there were also reports of altercations between domestic partners and occasionally between workers and clients. One detailed story reported by a respondent involved an altercation between a married couple at the company function that resulted in an arrest for domestic violence. In many of the assault and verbal abuse cases reported to us, there appeared to be a history of employment relationship problems that came to the surface in a social situation when under the influence of too much alcohol.

In a recent New Zealand example from adjudication case files, Ms L was a manager in an early childhood facility, until she resigned in the face of disciplinary action and filed a constructive dismissal grievance. There was a history of employment performance difficulties that the employer was attempting to work through with Ms L, providing extensive counselling and training opportunities. But the employment relationship was also being compromised by Ms L’s drunken behaviour, and that of her invited family and friends, at several staff social functions held by the employer at his rural property. Eventually she abused a fellow employee, whom she happened to encounter on the street on a Saturday night, leading to an intervention by the employer to address her alcohol issues. Unsurprisingly however, other difficulties overtook matters and the employment relationship ended.

Verbal and physical aggression directed by an employee towards management is a special category of abusive behaviour that sometimes emerges at work social functions, and these cases too, almost always have a back story. There were several such instances reported by respondents in our study, with reports of an employee “dissing management in front of everyone,” getting into an argument with a manager, or shouting and swearing at a manager.

In one example from New Zealand case law, Ms S had been a sales consultant for a year or so before she was dismissed for her behaviour at a work function. There was a history of unhappiness in her employment, Ms S claiming that she had been deprived of some

entitlements, and generally discriminated against and bullied. Presumably, this felt discontent contributed to her venting under the influence of too much alcohol at a staff social club function that began at a leisure centre on a Saturday afternoon and moved on to a BBQ at the employer's home. For whatever reason, she called a fellow employee "a f--- dickhead," commented indelicately on the similarity between a sausage and a penis, and told the employer that she was "a f--- bitch," and "I hate you." Predictably, that was pretty much the end of that relationship.

Of course things can go in the other direction as well, with managers under the influence abusing staff at works functions. In another New Zealand reported case, Mr C was a welder who was assaulted by an intoxicated workshop manager at the work Christmas party, resulting in him being off work for over a month while his injuries healed. Before returning to work he asked that he not be assigned to work under the manager who had assaulted him. He was found unjustifiably constructively dismissed when the company denied the request and he understandably elected to not return to work.

The other particularly damaging type of behaviour that often surfaces at the annual Christmas party or other work social occasion, and that featured in our respondents' accounts, is sexual harassment or other forms of sexual behaviour. The offenders are reported as both fellow employees and managers, but also sometimes clients of the organisation, or spouses, other family members, or friends of employees invited to the function. The behaviours reported in our study included a male employee being found drunk and naked in the work bathroom, a staff member "flopping his wang out," a female employee "dancing on a senior manager's knee as she was too drunk," various male and female employees stripping to their underwear, "dirty dancing," "inappropriate hook-ups," and "employees raunchy on the dance floor" and "people making out."

Mostly, however, when inhibitions were relaxed by too much alcohol, sexual harassment at work functions was reported as inappropriate comments and unwanted attention – inappropriate jokes, unwelcome flirting, uncomfortable leering at another employee, particularly men at women, and commenting on breast size or other body features or appearance, and groping or "cuddling" or hanging over other staff; all of which can ruin the occasion for the person on the receiving end of the unwelcome behaviour, and can indeed have lingering after-effects for the victim and for the environment of the workplace, and perhaps marginalisation for the protagonist (Nesvåg & Duckert, 2017).

Consistent with these data, this was also a recurrent theme evidenced in case files. Typically where an employee is being subjected to intensive and usually public sexual harassment at a work social function, it often appears to be the "beginning of the end" of the employment relationship for the harassed employee. As the former Chief Judge of the New Zealand Employment Court said some years ago, "sexual harassment poisons the atmosphere of the workplace" and the work function is one workplace setting that often fosters harassment by some when the alcohol takes hold. Another noteworthy point to be gleaned from the case data is that the largest number of cases in the New Zealand database involving sexual harassment of colleagues under the influence of too much alcohol in work-related settings occurred when employees were away together on business overnight (e.g., airline workers). That perhaps represents a relaxed setting where even the limited restraints offered by a wider audience at staff functions are not present to inhibit inappropriate behaviour under the influence.

These sorts of improprieties can and often do lead to dismissal – a fact attested to by many cases in the files of employment adjudicators. In a recent Australian case, Mr K was a team leader in a road construction company who was dismissed for his behaviour at a work Christmas party held off site. Over a period of about six hours, Mr K consumed 13 alcoholic drinks on top of two drinks he had before arriving at the function. The employer relied on eight alleged incidents of poor behaviour from Mr K on the night, including swearing at a director, sexual harassment of a female colleague (asking about her personal life and for her phone number), and bullying and swearing at two different female colleagues. After the formal function had finished, some of the party-goers continued at the venue's public bar. Mr K's poor behaviour continued. He kissed another female colleague and told another he would like to know the colour of her underwear.

## **Concluding remarks**

Alcohol is renowned for being used as a crutch at social occasions. While the popular press (see Fitzgerald, 2016) and some researchers (Friedman & Klatsky, 1993) have recognised the problems resultant from this relationship, few have done so within the context of the workplace (exceptions include the work of Nesvåg & Duckert, 2017). Indeed, in the New Zealand context, a review of the Alcohol Advisory Council of New Zealand's publications, over a 10 year period, revealed there to be "no mention of a work-alcohol link" (Walker, 2012: 26). This is somewhat surprising given many New Zealanders share a love affair with both socialising and with the drink. A study which intertwines these themes within the context of the workplace is long overdue. However, for such a study to be a worthwhile endeavour, it needs to be able to afford practitioners some pragmatic beneficial advice guiding them in how to best meet the needs of the parties involved in the social occasion. These are now highlighted in the concluding sections of our paper.

### ***Who is responsible?***

We think both parties need to assume some responsibility. The responsibility for employee welfare resides with employer, while the responsibility for behavioural impropriety lies with the employee. In the case of Mr K (discussed above), the dismissal was appealed and he subsequently won his case. This was in part on the grounds that the employer had provided unlimited alcohol and, in doing so, had breached its health and safety responsibilities to employees, and in part on the grounds that some of the behaviour complained of occurred after the official function, deemed to be one step removed from the employer's reach. However, while there are lessons there for employers, the sort of behaviour documented in the cases presented in our paper will more often than not get an employee fired – and this is exactly what happened in the Australian case of *McDaid v Future Engineering and Construction*. In this instance, the counter view was taken by the presiding Court Judge resulting in the employee's dismissal being upheld.

### ***Lessons for us all***

So what lessons are to be gleaned from these experiences? For employees, the answers are pretty clear. Know your limits and stay well within them. Even if nothing worse happens, falling down drunk is not a good look and will generally lessen most colleagues' and managers' impressions of you. Workplace social occasions are not the time to liquor up and take up

grudges with management or that annoying colleague, or to try to impress a colleague with how sexy you are when plastered. It can be very confounding, as one employee pointed out:

As a teenager working part time reception I found the idea of grown men drinking alcohol at Christmas parties extremely uncomfortable and would go out of my way to avoid them if I could. Their attitudes and speech scared me.

It can also lead to credibility issues: “I don’t respect people who get very drunk at work functions, especially my seniors.”

For employers, the lessons begin with understanding your obligations under Health and Safety regulations. Employers who provide or permit alcohol at work functions could be held liable if employees or others are harmed as a result. The obligation to proactively take all practicable steps to manage and minimise hazards and risks at the workplace extends to all relevant alcohol-related risks and hazards. The employer’s policies in relation to alcohol should be audited with their employment advisers or employment lawyers to ensure that they are in line with the employer’s legal obligations and liabilities. When hosting work-endorsed social functions, always adopt “good host” practices. Indeed, the research shows that where employers develop responsible attitudes towards alcohol consumption, these are likely to be well received and supported by their employees. For some employers, this is nothing new with an employee from the education sector making the following observation:

The understanding is the food is always provided, someone remains the safe host and taxis are provided if necessary for transport post drinking. It is a known rule that one alcoholic drink can be purchased with an evening meal when away on work trips but not alcohol during the standard school day of 9-3 when travelling.

And seemingly, some had modified their behaviour as a consequence of things going awry. In responding to the exhibition of poor behaviour, one employee reported that after a workplace event in which “inappropriate comments” were made, the next event was deemed “alcohol free to show that it’s not necessary.”

Not all employers are so enlightened, with one employee contrastingly lamenting:

Personally I used to drink too much at home and at work parties, do something embarrassing or just suffer a hangover the next day. Now that I don’t drink and I reflect back I am a little disappointed that my work supervisors, colleagues [sic] showed no concern that I may have had a drinking problem. This relates to a previous employer not my current employer but during that time I was aware that a younger male colleague was offered help with his excessive drinking and no help was ever offered to me. But also since then I have been told by people I worked with that they were concerned I may have been drinking too much but no one ever brought the subject up with me and when I tried to [do] it was basically joked away and I was told I didn’t have a problem; I was just having a good time.

In addition, employers need to be cognisant of the drinking culture which is being promoted within their workplace. As noted at the outset of our paper, the cultural norms surrounding alcohol consumption can have a pervasive effect on employees’ drinking behaviours (Trice & Sunnestuhl, 1988). Moreover, where these norms are permissive they can promulgate drinking subcultures within the organisation (Ames & Janes, 1992). Where drinks are provided and paid



for or at least subsidised by employers then, anecdotally, our evidence would suggest that this serves to encourage excessive drinking and, moreover, can lead to competitive drinking behaviours amongst groups of employees. Although this outcome is probably unintentional; it occurs nonetheless.

So here is our concluding sage advice to employers. Although not legally obliged to do so, the first piece of advice is to always lead by example. Think about how your own drinking behaviour might impact on your employees and what messages you are conveying. Second, while an organisation's cultural norms are often informal and unwritten, acceptable drinking norms need to be formalised and explicitly communicated. It would be nice to think we can all self-regulate our drinking behaviour, but the reality is this does not always happen. Workplace drinking norms can be modified by putting in place restrictions and/or limits on alcohol availability and consumption and, moreover, strictly adhering to these. This will send a clear message to employees about what is and what is not acceptable behaviour at the social event. This is particularly important in organisations where a large percentage of the workforce is employed on a contingent basis as research suggests these workers might offer more resistance to adhering to cultural norms (Lauver, Lester, & Lentz, 2009). Finally, research finds that where organisations strictly enforce their alcohol policies, their employees are more receptive to them (ibid), thus conformance should be engendered through enforcement. So, prior to the scheduling of a social event, employers should take the time to remind their workforce that this is a work event and, thence, the usual standards of workplace behaviour apply.

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*Keenan v Leighton, Boral Amey NSW Pty Ltd* [2015] FWC 3156, Australia

## Appendix 1. Classifications and incident of behavioural impropriety

<i>Classification</i>	<i>Exhibited behavioural impropriety</i>
Foolish behaviour	<ul style="list-style-type: none"> <li>➤ Acting silly. Making a fool of themselves</li> <li>➤ Silly and embarrassing behaviour</li> <li>➤ Just being idiots and childish at a work function</li> <li>➤ Doing “wheelies” in cars around the work’s yard</li> <li>➤ A person pushing a wheel chaired employee too fast and flipping the wheelchair</li> <li>➤ Pushing a fellow employee into a swimming pool</li> <li>➤ People over drinking and getting a little crazy</li> <li>➤ Too inebriated and making a fool of oneself</li> <li>➤ Just general drunkenness, it’s out of worktime but it’s during a work function with members of the team higher than your position so it’s not a good look</li> <li>➤ People behaving embarrassingly and loud and unruly</li> <li>➤ Some people getting too drunk and making fools of themselves, by falling over or saying things they shouldn’t</li> <li>➤ I went to a Xmas work do for a building company we work for (just my boss and I) and I got very drunk and fell over...not a good look!</li> <li>➤ Loud obnoxious behaviour</li> <li>➤ Rowdy folks have fallen and created some ruckus</li> <li>➤ Inappropriate rowdiness, sexual stuff, silliness</li> <li>➤ Heavy intoxication leading to rowdy behaviour</li> <li>➤ Getting very loud</li> <li>➤ Falling about the place</li> </ul>
Incivility and rudeness	<ul style="list-style-type: none"> <li>➤ Speaking loudly</li> <li>➤ Loud and raucous overt behaviour</li> <li>➤ Loud mouths, swearing, silliness</li> <li>➤ Inappropriate language, etc.</li> <li>➤ People speaking out of turn, being too drunk and getting together with other workmates</li> <li>➤ People being rude, making silly comments without thinking</li> <li>➤ General drunkenness, loud talk, verbal abuse etc.</li> <li>➤ Drinking too much and behaving poorly</li> <li>➤ Some drunks who become quite loud</li> <li>➤ Getting too drunk and not being able to physically function properly</li> <li>➤ Slurring of words</li> <li>➤ Drunkenness, falling down, breaking things</li> <li>➤ Falling, swearing</li> <li>➤ Vomiting and breaking of glass</li> <li>➤ Vomiting everywhere</li> <li>➤ Being sick</li> <li>➤ Public vomiting</li> <li>➤ Over consumption and being sick at restaurants</li> <li>➤ Drinking too much and throwing up</li> <li>➤ Employee vomiting in public due to drunkenness</li> <li>➤ Vomiting in lifts</li> <li>➤ Driving drunk and getting arrested</li> <li>➤ Driving whilst under the influence</li> </ul>

- Driving home after drinking
- Drunk driving
- People drinking more than allowed and being loud and obnoxious
- Smoking on site when a smoke free zone
- Empty bottles left everywhere are a H&S hazard

#### Aggression

- Bad mood
- Verbal abuse of co-workers
- Verbal abuse to other co-workers
- Verbal abuse
- Abusing fellow peers
- Abusive behaviour towards other staff members
- Jumping, arguing, aggressive behaviour
- Being rude and saying rude things
- Men getting loud and obnoxious
- Fights and arguments
- Arguments, loudness, disruptive, aggression
- Verbal abuse and physical assault
- Rudeness towards staff, visitors and clients
- Rowdiness and some unpleasant stuff
- Fights between co-workers
- Physical assault
- Disagreements resulting in physical injury
- Use of abusive words
- People getting too drunk and insulting others that results in fights
- Destroying furniture, being rude to work colleagues, getting into a fight
- Arguments over work related issues between individuals
- Employees arguing over things that happened at work
- Arguments over sporting incidents
- Fights between partners....husband/wife, boy/girlfriend, either workmates or partners invited to the work function
- A colleague's spouse drank too much at a work function and was obnoxious
- Anger, fighting, inappropriate remarks
- Some inappropriate comments leading to fights
- A couple of people had a fight after drinking
- Fighting
- Intimidating and threatening behaviour
- Drunken aggression and fights
- People getting too drunk and causing scenes
- Some damage within a pub
- Broken table after being danced on
- Damage to equipment
- Destruction of property
- Damaging office furniture
- Property damage
- Drunk people stealing drinks
- Staff got so drunk at a Christmas function, the dinner was cancelled

- Inciting violence in a public place – not between fellow workers
- One guy got very loud and abusive at a work function and was asked to leave
- A brawl broke out at the event; since then the official stance has been “NO ALCOHOL”
- Impropropriety directed towards Management
- Dissing management in front of everyone
- An employee got into a verbal fight with a manager
- Shouting, swearing at manager

Sexual harassment

- Sexual innuendoes
  - Rude comments to female staff
  - Sexual matters
  - Inappropriate comments and gestures
  - People getting drunk and saying inappropriate things
  - Inappropriate interactions with other staff
  - Inappropriate jokes, people being asked to leave functions
  - Inappropriate comments from a male worker to several female workers – not overtly sexual but uncomfortable
  - Dirty dancing and flirting
  - Flirting with fellow staff members that didn't like it
  - Being drunk, stripping down to their bras and panties at a restaurant
  - Someone stripped down to their underwear at a Xmas party
  - Senior staff leering over girls shoulders looking down tops, commenting on breast size
  - Groping of females by senior male staff members
  - “Cuddling” of other staff members when intoxicated
  - One of the ladies lap-danced on a senior manager's knee as she was too drunk
  - Crude & unwelcomed comments about appearance or sexual innuendos
  - Affairs start or come out in the open
  - Hooking up
  - Liaisons between colleagues where one is married
  - Colleagues end up going out with each other
  - Inappropriate hook-ups
  - Inappropriate sexual conduct
  - Employees raunchy on the dancefloor and people making out
  - A male staff member found naked in bathroom “playing” with himself
  - Flopping his wang out at a staff member
  - Inappropriate behaviour towards a staff member's husband
  - Inappropriate behaviour and relations
  - Inappropriate relationships
  - Sexual harassment ... male employee saying inappropriate sexual jokes and references to female employee
  - The function escalated a little bit due to inappropriate remarks made by employee towards female employees
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## **Employment relations and the 2017 general election.**

It has been a long tradition that this Journal presents an overview of the political parties' employment relations policies when there is a general election. This issue contains two articles where the first article discusses the employment relations policies of the National Party and the Labour Party and the second article overviews the minor parties' policies participating in this election: ACT Party, Green Party, Maori, NZ First, Mana Party, The Opportunities Party (TOP). Both articles highlight that this has been a rather unusual election campaign with a new Prime Minister (after PM John Key's resignation in December 2016), and, over the last month, a new leader of the Labour Party, a leadership change in the Green Party and United Future not contesting the election.

At the time of writing (end of August), it also promises to be an interesting campaign where the final shape of the government will probably be decided by post-election negotiations. This implies that the future employment relations policies can be influenced by the minor parties and there are clearly considerable policy differences amongst those parties. As Skilling and Molineaux highlights, the influence of minor parties will also be determined by outcomes in the Maori seats, the relative size of NZ First and the Green Party and whether any of the minor parties has a 'king-maker' role. Similarly, the public policy gap between the major parties is obvious with the National-led governments having made many legislative changes and with the Labour Party promoting stronger, industry-based collective bargaining. However, as Foster and Rasmussen show, the policy gap has been narrowed by the recent reactive interventions of the National-led government in areas, such as occupational health and safety, 'zero hours' agreements, enhanced parental leave entitlements and pay equity and low pay in the aged-care sector.

Finally, all parties will have to address the entrenched labour market and employment issues, such as immigration, skill shortages, low pay and 'living wages', youth unemployment, pay equity and diversity. Again, there are, as the articles show, stark public policy differences between the parties contesting this election and this makes it a fascinating election with major future employment relations decisions in store.

Erling Rasmussen, 22 August 2017

## The major parties: National's and Labour's employment relations policies

BARRY FOSTER\* and ERLING RASMUSSEN\*\*

### Abstract

This has already been an unusual election campaign with the two major parties sporting new leaders and a growing diversity in the two parties' employment relations policies. There seems to be no major employment relations changes planned by the National Party and instead the National-led government's recent *reactive* legislative interventions are overviewed. The Labour Party will support collective bargaining but its approach is short on practical details. It also plans more interventions and funding to support low paid workers and combat youth unemployment. An apparently dysfunctional labour market has highlighted immigration dependency, skill shortages, limited wage movements and youth unemployment and these issues will be confronting any new government after this general election.

### Introduction

This is an election campaign where a rather dull prospect has been set alight by leadership changes and where the electorate will be faced with some clear choices in respect of employment relations. Leadership changes have influenced the election campaign with Prime Minister John Key suddenly standing down in December 2016 and with Jacinda Ardern, surprisingly, becoming the Labour Party leader in August 2017. There has been a major shift in economic and political context since the 2014 General Election and this shift has influenced the policy agenda and the major parties' policy differences. Furthermore, recent public policy announcements by the Labour Party have highlighted the public policy differences between the two parties. In particular, the Labour Party's support of collective bargaining and industry-based collective agreements constitute a major difference though it is unclear how these agreements will be implemented. Another difference is the Labour Party's stronger focus on low paid workers though the government's recent reactive interventions, such as the tripartite agreement on low paid work in age-care sector and abolishing 'zero-hour agreements', have reduced the public policy difference.

Both parties are faced with a dysfunctional labour market where employers have come to rely on immigration and short-term visa holders to plug skill and staff shortages, where wages are not responding to a tight labour market, where youth unemployment is stubbornly high, and where income inequality and low productivity growth cloud the economic growth story. Stronger government intervention is on the agenda as the National-led government has become more reactive to public debates and the Labour Party has announced a number of interventions to enhance labour market 'inclusiveness' (see Tables 1 and 3).

While there are significant public policy differences, there has also been a contest for winning the mainstream public policy debate, including debates on economic, welfare and employment reforms. This will cloud the policy debate as will the probable 'kingmaker' role of New Zealand

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First. Thus, the electoral and political volatility of the current election campaign could continue for some time.

### **Context and history: employment relations 2008-2017**

There has been a considerable shift in the employment relations context since the 2014 General Election. The Global Financial Crisis is now a distant memory and a construction sector boom on the back of the Christchurch earthquakes has morphed into a more widespread economic upswing. This has created many new jobs, skill shortages are embedded in several occupations, and employers are supporting high levels of net migration. Unemployment has dropped below five per cent and the focus has now shifted towards 300,000 jobless and how to overcome, what employers and commentators have called, a skill and attitudinal mismatch. This mismatch already appeared before the last general election: “The usual inverse relationship, where rising unemployment makes it easier for employers to find skilled labour, has broken down because the skills of the unemployed no longer match the skills that employers need” (Collins, 2015: p. A14).

As the economic upswing has continued and unemployment has fallen the skill mismatch and the labour market’s ability to balance effectively workforce demand and supply has gained notoriety. There is now an emphasis on how to accommodate higher economic activity levels and, especially, dealing with social and structural issues. As detailed below, this image of an ‘inefficient’ labour market has directed attention to systematic problems: slowly rising wage levels – including the ‘living wage’ debate – skill shortages, the lop-sidedness of the Auckland housing and labour markets, the embeddedness of youth and NEET (Not in Employment, Education or Training) unemployment and several sectors’ reliance of short-term overseas labour. There is also the perennial problem of low productivity growth. Regardless of who forms the next government, these labour market problems are major obstacles to be tackled and are bound to highlight crucial public policy differences between the major parties.

The employment relations context has also witnessed considerable public policy changes and there are now many differences between the two major parties (see Table 1 below). These differences include several major election issues in this general election, such as immigration, low paid work, employee participation in occupational health and safety, youth unemployment and equality and pay equity (see below).



<b>Table 1. Employment Relations context: policy positions</b>		
<b>Policy</b>	<b>National (Policies for 2017)</b>	<b>Labour</b>
<b>Social welfare benefits, employment assistance and assistance for Youth (including Youth NEET – Not in Employment, Education and training)</b>	Nothing on their website	Boosting its dole for apprenticeship scheme by extending eligibility to all 18 to 24 years not earning or learning Give unemployed young people a job for six months doing work of public value, so they can gain work experience and avoid long-term unemployment.
<b>Family assistance, child poverty</b>	More funding for insulation of rental homes for low income families Families on benefits receive an extra \$25 per week in 2016 The Family Incomes Package will increase the \$14,000 income tax threshold to \$22,000, and the \$48,000 tax threshold to \$52,000	Boost Working for Families in addition to the 2017 Budget. Introduce Best Start payment to assist in a child's early years. Introduce a Winter Energy Payment for people receiving superannuation or a main benefit. Reinstate the Independent Earners Tax Credit
<b>Vocational education and training</b>	Established three primary industry trades academies to train more young people with the skills they need to succeed in the rural sector, with 850 places available each year, and increased tuition subsidies for agriculture-related tertiary qualifications	Labour's Working Futures Plan provides three years of free post-school education over a person's lifetime. It can be used for any training,
<b>Education &amp; teachers</b>	Investing a record \$10.8 billion a year into early childhood, primary, and secondary school education. Investing \$359 million to keep the best teachers in classrooms and share leadership and expertise across schools.	Invest an extra \$4b over 4 years to deliver a modern education system Reinstate extra funding for ECE centres who the majority of the teachers are fully registered. Ensuring every student has a personalised career development plan
<b>Immigration</b>	Introduced a 3-year cap on migrant workers for anyone earning over \$41,898 a year or \$20 per hour.	Introduce the KiwiBuild Visa to help address the growing shortages in skilled tradespeople and facilitate Labour's KiwiBuild housing programme.

<b>Research &amp; development (R&amp;D)</b>	Will invest \$372.8 million of new operating funding in the second round of the government's Innovative New Zealand programme	Reintroduce R&D tax credits
<b>Taxation</b>	While possible future tax cuts are still emphasised the 2017 Budget increased tax thresholds for low incomes, Working for Families benefits and accommodation benefits.	Abolish secondary tax as it denies many New Zealanders access to wages they need to make ends meet. Will ensure a progressive taxation system that is fair, balanced, and promotes the long-term sustainability and productivity of the economy.
<b>Housing</b>	Create special housing areas across NZ. A \$1b housing infrastructure to accelerate new housing. Setting up Independent Urban Development Authorities to speed up housing. Low and middle-income couples can now apply for government grants of up to \$20,000 to put towards a deposit for their first home.	Build more affordable houses. Crack down on speculators. Support those in need.
<b>Transport</b>	\$267 million investment for commuter rail in Auckland and Wellington. \$2.6 billion election transport package for Auckland would include a new highway alongside the Southern Motorway.	Build light rail from the CBD to Auckland Airport. This will be part of a new light rail network that will be built over the next decade with routes to the central suburbs, the airport, and West Auckland, and will later be extended to the North Shore. Allow Auckland Council to collect a regional fuel tax to fund these investments
<b>Regional Development</b>	Regional Growth programme, working with local communities to develop and implement economic growth Action Plans	New Zealand's regions have a chance to thrive, beginning with the establishment of a new Centre of Digital Excellence to be based in Dunedin

Sources: Labour Party and National Party web sites.

Besides the changing economic and employment relations contexts, there appears to have been a shift in the National Party's willingness to address employment relations issues. While the National Party has kept a low profile in previous general elections, it is noticeable how little the party has addressed employment relations issues in the run up to this general election<sup>1</sup>.

<sup>1</sup> After this article was finished, the National Party published its policy platform on employment relations and health and safety. See: [https://www.national.org.nz/workplace\\_relations\\_safety](https://www.national.org.nz/workplace_relations_safety)

Since the National Party decided to continue with the Employment Relations Act prior to the 2008 election, it has normally suggested very specific changes to improve the ‘flexibility’ of employment processes (see Rasmussen, 2010; Rasmussen, Fletcher, & Hannam, 2014). Besides the rather low public profile of the suggested changes to the employment protection of high wage earners (see below), there is, at the time of writing, nearly a total dearth of any specific public policy initiatives in employment relations coming from the National Party. Instead it appears, as argued below, that either the National Party is relying on very general suggestions or, in practice, it has implemented a *reactive* public policy approach to neutralise any politically controversial employment relations topics.

The National Party’s website talks about a clear plan to make New Zealand stronger but its four major goals are very general and their aspirational tone makes it difficult for many voters to disagree with them.

- 1) Responsibly managing the Government’s finances by maintaining operating surpluses, reducing crown debt, tackling welfare dependency and delivering better results for families and better values for taxpayers.
- 2) Building a more competitive and productive economy through their Business Growth Agenda with six critical areas; export markets, infrastructure, capital markets, innovation, skilled and safe workplaces and natural resources.
- 3) Delivering better public services with specific targets, lifting student achievement across our education system, reducing crime, delivering a better, sooner and convenient health care, ensure welfare is there for those who need it, while helping people back into work.
- 4) Continuing to support the rebuilding of Christchurch.

These aspirational goals will probably prompt a detailed public policy discussion if the National Party does not secure a firm majority. This will then open for more debate about, for example, the appropriate size of operating surpluses or whether the focus on operation surpluses is preventing an efficient tackling of ‘welfare dependency’. As discussed below, there are also concerns whether the National-led government has done enough to secure “skilled and safe workplaces” or has done enough to “helping people back into work” during this election cycle.

Besides these aspirational goals, a *reactive* approach of the National-led government has become more pronounced. This reactive approach has characterised the recent major public policy changes in employment relations. As detailed below, there have been three significant examples of such a reactive approach – the changes to occupational health and safety, the intervention against so-called ‘zero hours agreements’, and the approach to pay equity and low wage labour in the age-care sector.

The Pike River disaster in 2010 was a driving force behind rethinking the approach to occupational health and safety (OHS). The Pike River explosion, together with a dismal accident record in other sectors, put the spotlight firmly on the ineffectiveness and chronic underfunding of OHS regulation (Lamm, Rasmussen, & Anderson, 2013; Lamm, Moore, Nagar, Rasmussen, & Sargeant, 2017). It prompted the resignation of Kate Wilkinson as the Minister in charge, and the establishment of a Royal Commission into the Pike River disaster. All the recommendations from the Commission appeared accepted by the National Government when they presented the Health and Safety Reform Bill. In particular, a new independent regulator for OHS would be separated from the Ministry of Business, Innovation and Employment.

The new Health and Safety in Work Act 2015 constituted a major divergence from the National Party's low level of regulation preference. It has increased employer responsibilities and potential penalties and this has propelled OHS to become a major executive responsibility. However, it has also attracted a fair amount of criticism for not going far enough (see Sissons, 2016; Pashorina-Nichols, 2016; Tipples, 2015). A major issue is how effective the 'worker engagement' would be (even though the Act reduced the threshold to 20 employees or more) and another issue is the lack of focus on dangerous sectors. If a small employer is not listed on the so-called 'high risk' list then they are exempt from the legislative duty of having OHS representatives. In particular, the many small employers in agriculture is not on the 'high risk list', although many fatalities have occurred in the agriculture sector (Tipples, 2015). It is also problematic that there is no requirement to provide training for OHS committee representatives.

The changes surrounding the so-called 'zero hours agreements' was another demonstration that the National Government is reacting to public opinion. The Unite Union and the Labour Party ran a high profile campaign to eliminate these types of agreements during 2014-2015. In late 2014, the Labour MP for Palmerston North, Iain Lees-Galloway, announced the tabling of a private members bill to make 'zero hour agreements' unlawful. Media reports suggested that the Government were slow in reacting to this practice but the Minister of Workplace Relations, Michael Woodhouse, defended the government position by saying: "the government had to examine the issue carefully before making any decisions" (Radio New Zealand, 2015). In September 2015, the Government tabled the Employment Standards Bill, which sought, amongst other changes, to prohibit 'zero hours agreements' though it did not stipulate any minimum guaranteed hours of work. However, when the Bill was finally enacted in April 2016, employees were to be given guaranteed hours and stronger enforcement efforts were also included (see Table 2).

Finally, the National-led government decided to revive a tripartite approach to employment relations as it reacted to the likelihood of a string of pay equity court cases following a Court of Appeal decision in December 2014. The Court of Appeal decided in the so-called Terranova case to uphold the Employment Court decision that favoured the pay equity claim of Kristine Bartlett and the Service and Food Workers Union. Besides opening for other pay equity cases, it also put the spotlight firmly on low pay issues in the aged-care sector; a sector where many employers were reliant on government contracts and subsidies. In October 2015, a Joint Working Group on Pay Equity was tasked with recommending principles for dealing with pay equity claims under the Equal Pay Act. The Joint Working Group included employers, unions and government representatives who presented a set of recommendations in May 2016. The recommendations included:

- A set of principles to provide guidance to employers and employees in implementing pay equity, including criteria for considering whether a claim has merit as a pay equity claim and high-level guidance on how pay equity rates are established.
- A process for employers and employees to follow to address pay equity, which sets out a bargaining process based on the Employment Relations Act framework.

In April 2017, the National Government announced a \$2 billion pay equity settlement for 55,000 health care workers in the aged-care sector, effective from 1 July 2017. In announcing the deal, the Minister of Health, Jonathan Coleman, thanked the unions and the industry sector for their constructive and positive approach throughout the negotiations over the last 12 months (Coleman, 2017). Interestingly, several representatives of employers' associations, who have previously opposed union claims for pay equity, applauded the settlement and its recognition of the contributions of low paid workers.

Likewise, many major aged-care sector employers highlighted the positive staff implications of increased government funding in terms of recruitment, turnover and staff morale.

As a result, the National-led government tabled the Employment (Pay Equity and Equal Pay) Bill in July 2017. While the Bill was heralded a major step forward for low paid workers, it has also been criticised by several unions and the Labour Party. According to CTU Vice-President Rachel Mackintosh: “It seems that, at the very least, it would have been much more difficult for Kristine Bartlett and the 55,000 other care workers to have achieved their recently won equal pay settlement had this Bill been the law” (NZCTU, 2017).

The big question is whether this settlement will have flow-on effects. Is it likely to see claims from other employee groups, particular public sector groups, such as nurses, mental health workers and teacher aides? Business New Zealand’s Chief Executive, Kirk Hope (2017), has suggested that this settlement could affect businesses in two ways:

- First, it could affect the normal process of wage bargaining, making it more complicated because of the requirement to bargain over job comparisons, and thus lead to more regulation and compliance for businesses.
- Second, pay increases in the public sector gained through pay equity bargaining could have a knock-on effect on wages in the private sector more generally and thereby fuel wage inflation in related sectors.

Interestingly, Hope also said: “as a result of this court decision and ensuing legislation we will certainly have a changed industrial relations environment” (Hope 2017).

Finally, one of the few new National Party public policy initiatives has been an interesting new employment relations Bill on employment-at-will for high wage earners in March 2017 (Jones, 2017). Initially, the Private Members Bill was under the name of Paul Goldsmith (now a Minister for Science and Innovation and Tertiary Education, Skills and Employment) and subsequently promoted by Coromandel MP Scott Simpson (2017) (recently appointed to Minister of Statistics and Associate Minister of Immigration and for the Environment). The Private Members Bill – Freedom of Contract for Higher Earners Amendment Bill – has been through the first reading stage. Whether the Bill will reappear after the election is unclear; it has been opposed by the Labour Party, the Green Party and New Zealand First.

**Table 2: Major employment relations policy changes 2008-2017**

<b>Legislation</b>	<b>Legislative purpose and details</b>
ER Amendment Act 2008	Introduce 90-day probation/trial period for small businesses (one-19 employees)
ER Amendment Act 2010	Extend 90-day trial period to all organisations, reduced union access rights, reinstatement is no longer primary remedy in dismissal cases, change dismissal test from what a reasonable employer 'would' instead of 'could' have done
Holidays Amendment Act 2010	Employers can require proof of sickness from the first day, allow employees to trade for cash their fourth week of annual leave
ER (Film Production Work) Amendment Act 2010	'Hobbit' legislation prescribes 'contracting' for film production workers
ER (Secret Ballots for Strikes) Amendment Act 2012	Before taking strike action, unions need to conduct secret ballots of members
ER Amendment Bill 2013 (implemented after the 2014 General Election)	Changes good faith duty to conclude collective bargaining, allow opting out of multi-employer agreement bargaining, meal and refreshment breaks can be removed, allow pay reduction for partial strikes, changes transfer regulation (Part 6A), strike notice requirements changed
Minimum Wage (Starting-out Wage) Amendment Act 2013	Reduce starting-out wages for 16-19 years employees to 80 per cent of adult statutory minimum wage (applies only to 18-19 years olds if they have been on benefit prior to starting job)
Health and Safety legislation	The Health and Safety Reform Bill in March 2014 extends the duty of care to all persons in control of a business or undertaking, worker participation is strengthened. New enforcement agency Worksafe NZ. The Accident Compensation Act underwent two amendments in 2008 and 2010. The amendments were primarily concerned with reducing the number of claims and associated costs.
ER Amendment Act 2016 (Employment Standards)	Increased Parental Leave to 18 weeks. 'Zero hours' abolished by preventing employers altering shifts at short notice and guaranteeing minimum number of hours. Increasing recording obligations (wage and hours) for employers and more regulatory powers of Labour Inspectors.

**Source:** Rasmussen et al., 2014: 24 and government websites.

## Current public policy position and election promises

At the time of writing (with one month to Election Day), The National Party has yet to publish a detailed employment relations policy platform. As mentioned, there is not anything unusual in this approach since the National Party has downplayed its employment relations changes in the last three general elections (see Rasmussen, 2010; Rasmussen et al., 2014). It also fits with the intention of the National Party to ‘run on its record’, emphasising a growing economy with many job opportunities, low unemployment and interventions in low paid sectors. After nearly a decade in power, the National Party has a well-established approach to employment relations as can be seen from the many changes in Table 2.

However, as discussed in the previous section, the low profile of employment relations policies can arguably be said to hide some differences compared to previous general elections. Although employment relations changes were downplayed in previous general elections there were significant changes proposed and subsequently implemented by the National Party. This does not appear to be the case in this general election and, importantly, recent public policy changes appear to have been more *reactive* – mediating public concerns – and less in line with the party’s mantra of ‘flexible labour markets’ and reducing restrictive legislation.

While the National Party appears reactive and devoid of new major policy reforms, this cannot be said of the Labour Party that has announced a number of new policies over the last months, including public policy changes influencing the wider employment relations context (see Table 1). The key policy positions can be found in Table 3 though we will focus our detailed policy discussion on three areas: supporting collective bargaining, supporting employment relations fairness (including a lift in the income of low paid workers), and extending information and participation rights in occupational health and safety.

The Labour Party seeks to support collective bargaining in several ways. Bargaining rights will be extended to all workers, including dependent contracts. Fair Pay Agreements (FPAs) are promoted as industry-based agreements that will cover all workers in a particular industry. While the actual implementation of the FPAs would be developed subsequently by a Labour-led Government the recent tripartite aged-care settlement was heralded a possible scenario. Thus, it is unclear when negotiations can start – whether negotiations could only start if a certain number/percentage of employees already covered, whether it would involve employers or employer associations, whether it would involve a particular range of conditions or whether the content of FPAs would be negotiable, and whether the government could implement FPAs which had not been settled in employer-union negotiations.

The ‘90-day trial period’ has been controversial in previous general elections (see Rasmussen 2010; Rasmussen et al., 2014). The trial periods were promoted as having a positive employment impact by making hiring less risky for employers. This claim was disputed in a 2016 report commissioned by the Treasury (2016) that found “no evidence that the ability to use trial periods significantly increases firms’ overall hiring; or assisted in firms hiring disadvantaged job seekers” (Chappell & Sin, 2016). The report concluded the main benefit was “a decrease in dismissal costs for firms”. While the Government has been firm in its support of the ‘90-day trial period’, the Labour Party has moved from its outright opposition in previous elections. The Labour Party position is now that ‘90-day trial period’ will no longer be abolished; instead it will be subject to prescriptive employer performance feedback and any worker who is dismissed will have access to a free mediation service to test whether they have been unjustifiably dismissed.

While there will be further workplace information and participation rights in respect of occupational health and safety under a Labour-led government, it has not been announced whether such a government will pursue other information and participation rights through mechanisms such as workplace councils or employee directors.

<b>Table 3. Employment relations policy positions, August 2017</b>		
<b>Policies</b>	<b>National Party</b>	<b>Labour Party</b>
<b>Collective bargaining</b>	Collective bargaining is not discussed on their website	Introduce Fair Pay Agreements that are industry based. Restore and improve bargaining rights for all workers. Extend bargaining rights to dependent contractors.
<b>90 Day-Trial Periods</b>	Continue 90 trial period	Retain trial periods but remove the fire-at-will provision with referee system that is fair and simple.
<b>Enforcement of legislation</b>	Increased powers for Labour Inspectors.	Double the number of Labour Inspectors from 55 to 110.
<b>Statutory Minimum Wage</b>	Continue 'responsible' rises in statutory minimum wage.	Increase minimum wage to \$16.50. Work toward a minimum wage of two thirds of average wage. Abolish youth rates.
<b>Occupational Health &amp; Safety</b>	In the 2017 Budget, \$36.3m extra funding for Worksafe was allocated over the next four years	Extending worker representation to all workplaces regardless of size or industry
<b>Equity</b>	Rest home workers receive increases as stipulated by Joint Working Group on Pay Equity. Extended Parental Leave to 18 Weeks	26 weeks paid parental leave. Ensure NZ employment laws extend to everyone working in NZ. Restore protections for vulnerable workers in cases of sale or transfer of business or proposed outsourcing.
<b>Living Wage</b>		Ensure all workers in the core public service are paid at least the Living Wage.
<b>Dismissal</b>	No change	Restore reinstatement as primary remedy
<b>Best practice</b>		Implement HPES by encouraging employer/union participation and engagement. Expand and enhance skill and industry training

Source: Labour Party and National Party web sites.



## The labour market is not working?

Several of the recent public policy issues mentioned above – zero hours agreements, the ‘living wage’ campaign, high net migration levels, widespread skill shortages, persistent high youth unemployment – have often been portrayed as being part of a *dysfunctional labour market*. It has become a frequent media theme that the *current* New Zealand labour market is behaving in a rather unusual fashion.

New Zealand’s economy has thrown up an apparently bizarre mix of very strong jobs growth with virtually no fall in the various unemployment rates and fall in wage inflation. It seems to make no sense. How can an economy be growing strongly at 3.5 per cent plus and not be heating up wage inflation or lowering unemployment? The simple answer is that almost all that jobs growth over the past two years was soaked up by net migration of 131,188 and an increase of 28,200 in the number of people over the age of 65 who are working (Hickey, 2016: 28).

The current labour market is clearly influenced by a very high economic activity level, with the creation of over 200,000 new jobs in this election cycle. There has also been a significant rise in employment participation with the current 76.1 per cent of the workforce in paid employment being over eight per cent higher than when the Global Financial Crisis struck in 2008-2009. As discussed below, immigration is bound to one of the major policy issues in this general election. The dependency on high levels of net migration, (including short-term visa holders), is seen as a major indication of the labour market’s inability to deal with the current level of economic activity. With skill shortages being manifest in several sectors, this has also highlighted the importance of having a more active labour market policy and considerable stronger investment in vocational education and training (Trevett, 2016). It has also raised the issue of wage increases which have been rather low during the current upswing (Dann, 2017a & 2017b). Besides pointing to the negative impact on wages of high levels of net migration, the low wage rises have been seen as another indicator of a dysfunctional labour market.

The ‘future of work’ concept has caught the imagination of many commentators and the Labour Party’s Future of Work Commission had a long-running investigation that produced a major report (Future of Work Commission, 2016). A core idea is that the ‘future of work’ will produce a more fluent labour market with many non-standard/atypical employment situations and with fluent employment patterns becoming the norm for many workers (being an employee may become less prevalent). This has prompted calls for changes to the tax system, having more flexible welfare provisions (Fletcher, 2015) and allowing more intermittent and individualised participation in education and vocational training (see Table 1). While there has clearly been a move towards a ‘post-industrial’ labour market, where service jobs dominate new jobs creation, it is unclear (to us) how well this covers recent employment changes in New Zealand. It appears there has been a very strong growth in workforce participation rates and in full-time employment during the current economic upswing. “The New Zealand economy created 181,000 additional jobs over the past two years, with 93 per cent of these being full-time employment and the remaining 7 per cent part-time” (Gaynor, 2017: C4). This is very different from many other OECD countries where, for example, a recent UK labour market analysis found that most new jobs were in part-time work or self-employment (Sentence, 2017).

A particular issue is the low productivity growth – real GDP per hour worked – associated with the current economic upswing (Fallow, 2017). Productivity growth has been a long-term problem and it has become a well-established fact that New Zealand has experienced a relative, long-term decline since the 1960s. This has prompted many different ‘recipes’ or interventions

and employment relations changes have often been highlighted as a core part of any solutions to the productivity ‘problem’ (Haworth, 2010). As a result, the National-led government established the New Zealand Productivity Commission in April 2011 in order to provide analyses and advice on ways to improve productivity growth.

While the Productivity Commission seems vetted to a market-orientated approach – making markets, sectors, industries and occupations more efficient – it appears that this is going against the grain of the current public policy debates. This is highlighted by the reluctance of the National-led government to implement many of the suggestions in various Productivity Commission reports. The Productivity Commission’s inability to influence the productivity debate can also be associated with this article’s discussion of concerns about a dysfunctional labour market. Recent regulatory employment relations interventions and the opposition parties’ suggestions of new regulatory interventions indicate a broader acceptance that new interventions are necessary in combating skill shortages, youth unemployment, and low paid work. This is a long way from the 1980s public policy beliefs of ‘trickle down’ effects of market liberalisation. Still, it is also unclear whether this amounts to a fundamental change in public policy, as suggested in media reports: “After decades moving away from Government intervention, times have changed. National and Labour have different approaches but their policies suggest a grudging consensus the market is failing for many people and exacerbating inequality” (Dann, 2017c: 17).

## **The BIG policy issues in this election campaign**

Immigration is clearly going to be a major issue in this election. This is mainly associated with a fundamental shift in the level of net migration during this electoral cycle. Prior to 2013, it was common for net migration to oscillate in a band between plus and minus 20,000 net migrants. In the last couple of years, net migration has been two to three times this level. While the Labour Party has clearly stipulated that they want to reduce annual immigration by something like 30,000 it is probably more interesting to look at the position of New Zealand First (the likely ‘kingmaker’ after this election) and the changing policy position of the National Party. New Zealand First has called on their website for a “strictly applied immigration policy” that does not “undermine New Zealanders’ pay and conditions”. Thus, New Zealand First is aligned with the Labour Party and the Green Party on the immigration issue.

The National-led government has overseen a major influx of migrants in this election cycle and, reacted to public concerns about the high net migration level by announcing several interventions to curb low skilled and short-term immigration in April 2017. In particular, the government introduced a three year cap on immigrant workers unless they were paid more than \$48,839 a year or \$23.50 per hour. However, the Government is currently ‘fine-tuning’ this policy position following major pressure from business and industry groups as well as individual employers and employees. In July, it was announced that the threshold would be reduced to \$41,859 or \$20.00 per hour. While the government would like to neutralise the immigration issue this would impact on business interests. As succinctly put by commentator Brian Gaynor (2017: C4):

Most New Zealand business owners and managers, particularly those in the building, information technology, hospitality and horticulture sectors support the current immigration policies. This is because they face serious labour market shortages that can only be resolved by attracting foreign workers.

Thus, immigration will be a current and future public policy focus and the debate has also highlighted major issues surrounding vocational training and education and youth unemployment.

The Auckland housing and labour markets have become the stuff of media and folklore speculations, and there is no doubt that there are shortages and supply issues in public services, such as nursing and teaching. The so-called Auckland exodus of skilled labour has been highlighted in several articles but it is often disputed or downplayed by various government spokespeople (for example, see Persico, 2017: A4). Likewise, calls for an 'Auckland allowance' has also been stymied by ministers and government spokespeople (Editorial, 2015). While the two major parties are taking a different approach – the National Party is keen to downplay the labour market issues and the Labour Party is highlighting the labour market issues – this is something that will influence the national debate beyond this general election.

Wage levels have become a continuous media story and there seems to be at least four recurrent focal points or policy concerns: how to deal with low paid labour – including the statutory minimum wage and the 'living wage' – sectoral recruitment and retention problems (with the construction sector hocking the headlines), the tripartite agreement on low wages and pay equity has set a new precedence, and the 'exodus' from the Auckland labour market. As discussed above, the underlying theme of these media reports is a call for more government intervention. The tripartite agreement in the aged-care sector shows that government intervention can be a circuit breaker and deliver significant wage rises. The Labour Party's support of the 'living wage' as well as its plan for sectoral collective bargaining indicate how this party will address some of the wage issues. However, the entrenched wage issues will probably need wider, more complex public policy changes as indicated by the persistent debates about immigration, the Auckland housing and labour markets, skill shortages and youth unemployment.

## Conclusion

In a very unusual election campaign, there are many and stark policy differences between the two major political parties. The National Party has implemented many changes to the Employment Relations Act that seemed to undermine the Act's emphasis on collectivism, power balance and mutual employer-employee trust. The National Party's emphasis on legislative changes to enhance labour market flexibility appears to have ended and instead there has been several reactive interventions to overcome major employment relations issues. These reactive interventions have had major impacts since the 2014 general election.

The election campaign has highlighted that there are many embedded employment relations problems. The concerns about income inequality, low productivity growth and a reliance on immigrant labour will probably last much longer than the current electoral cycle. These concerns are associated with systematic imbalances in the labour market and it appears that enhanced government interventions have become part of the two major parties' public policy positions.

There are many general statements on the political parties' websites and their policy announcements are also very elastic, and often relies on future announcements. Furthermore, at the time of writing, it is unlikely that the major parties will be able to govern without the support of New Zealand First. This opens for negotiations and 'horse trading' following the general election. Thus, the spectacular political volatility could continue for a while, thus

making it unclear whether the significant public policy differences in employment relations will be part of major public policy changes.

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## New Zealand's minor parties and ER policy after 2017

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### Abstract

Since New Zealand adopted a proportional representation electoral system in 1996, neither of the major parties have been able to form a government without the support of one or more of the minor parties. As such, understanding the likely trajectory of employment relations (ER) policy after this year's election requires an understanding of the policy positions, the political priorities, and the potential power of the minor parties. In this article, we provide an overview of the positions of six minor parties contesting this year's election who have a realistic chance of achieving seats in parliament. September 23 is shaping up to be the most interesting and unpredictable election night for many years. Leading the polls since 2006, and comfortably ahead of Labour just two months out from the election, many expected the National Party to be the largest party after the 2017 election. The question, at that stage, was whether National could form a government with their existing minor party partners, or whether they would need to rely on New Zealand First to gain a majority. Instead, Labour has been resurgent following a change of leader on August 1, just seven weeks from election day. Labour's resurgence has closed the gap with National – some polls putting Labour ahead – and led to a corresponding drop in poll ratings for the two largest minor parties, the Greens and New Zealand First. We explore the opportunities and challenges that this uncertain and dynamic environment generates for the minor parties.

### Introduction

In our earlier review of minor parties' employment relations positions (Skilling & Molineaux, 2011; Molineaux & Skilling, 2014), we noted that predictions of policy change tend (understandably) to focus on the positions of the major parties. In practice, however, the Mixed Member Proportional (MMP) electoral system constrains major parties to work together with a range of partners, and legislation is not crafted at the sole discretion of the largest party, even when one party holds a substantial lead over all others. In 2017, it remains the case that no party has been able to govern alone since New Zealand began using a proportional representation electoral system in 1996. This article, then, proceeds from the contention that a proper analysis of the prospects for ER policy after this year's election needs to take seriously the policy positions, power and priorities of the minor parties. Taking minor parties seriously, of course, does not imply that any particular minor party holds unlimited influence. Governing parties have proved adept at crafting flexible arrangements with multiple partners to advance different parts of their agenda. Further, smaller parties – sensitive to the accusation that they are the tail wagging the dog – have tended to use their influence sparingly, focusing on their areas of priority (Skilling & Molineaux, 2011).

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The 2017 election (scheduled for September 23) may well prove a particularly interesting one for the minor parties. After dominating the polls for over a decade, the incumbent National Party has been falling in the polls since the start of the year, has lost one of its support partners (United Future's Peter Dunne), and could not form a government with its remaining support partners ACT and the Māori Party.<sup>1</sup> On the other side of the aisle, Labour's dismal ratings through July led to a change of leader on the August 1, with Jacinda Ardern replacing Andrew Little. The change had an immediate effect, as Labour's popularity increased from 24 per cent to just over 40 per cent. While much of this increase appeared to come at the expense of the Green Party, whose support fell from 13.4 per cent to around five per cent, the gap between National and the Labour-Green bloc reversed, with the Labour-Green bloc ahead in early September (James, 2017a). But the Māori Party and (more especially) the Greens are in a precarious position: polling around the five per cent threshold, the Greens have historically fared worse on election night than their pre-election polling numbers and run the risk of not returning to parliament. New Zealand First's poll support has also dropped since Ardern became Labour leader but, along with the Māori Party – should they return to Parliament – New Zealand First are still in a potential king-maker role for after the election. While nothing is certain in politics, it appears almost certain that some of New Zealand's minor parties will play an important policy-making role after this year's election, just as they have since 1996.

In this article, we analyse the ER positions of those minor parties contesting this year's election that have a realistic chance of gaining representation in parliament. We conduct this exploration by analysing their ER-relevant public statements and (where possible) their voting records during the last parliamentary term. Beyond summarising policy positions, we discuss the relative power that each party might yield after the election, we assess the extent to which ER policy is likely to be a high priority for them, and we note – where appropriate – any issues of personality or history that might be relevant as they attempt to exercise influence over the policy-making process.

## Political Context

The 2017 election takes place in the shadow of surprising results in elections in other English-speaking democracies. Donald Trump's populist nationalism, built around promises to put America first, won the 2016 presidential election in the United States, against the predictions of most pundits. Earlier in that election cycle, Bernie Sanders, self-identifying as a democratic socialist, performed much better than expected in the Democratic primary race eventually won by Hilary Clinton. In the United Kingdom, the historic Brexit vote in 2016 was followed by a snap election in June 2017 intended to strengthen the majority and the mandate of Theresa May's Conservative Party. As events transpired, however, the Conservatives lost both their substantial lead in the polls and their outright majority in the House of Commons. While this poor result can be attributed in part to May's own performance, it was also a result of a surge in support for Labour leader Jeremy Corbyn, who many (including many within his own party) had believed unelectable for his socialist commitments.

There is no necessary reason to expect major upheavals of this sort in New Zealand in 2017. Many of the underlying performance measures of the New Zealand economy (such as unemployment and job growth) appear positive (Statistics New Zealand, 2017). Opinion polls

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<sup>1</sup> We discuss the fate of 2008-2017 support partner United Future later in the article.

from mid-August (see James, 2017b; c) suggest that more New Zealanders believe the country to be ‘on the right track’ (59 per cent) than believe it to be on the ‘wrong track’ (33 per cent). Significantly, however, this 59-33 result represents a *less* positive outlook than in December 2016 (65-24). In terms of galvanising political figures, while the country has no obvious analogue on a policy level for Trump, Sanders or Corbyn, Labour’s remarkable resurgence in the polls is clearly associated with the ‘Jacinda effect’ (James, 2017b). Further, New Zealand’s proportional representation MMP electoral system provides a ready mechanism through which voters can express dissatisfaction with the status quo. A combination of New Zealand’s electoral system, extreme volatility in recent polls, and overseas examples of surprising “change elections”, may offer minor parties a degree of optimism.

The 2017 election sees National attempting to secure a fourth term that would be unprecedented in the MMP-era. They are contesting the election, however, without former leader John Key, who is considered by many to have been the party’s most potent electoral weapon, but who resigned unexpectedly in late 2016. National’s remarkable (and remarkably consistent) popularity since gaining office in 2008 has rested, in, part on its ability to position itself as moderate and centrist. Indeed, some have argued that National’s (and Key’s) consistently high popularity was achieved by the simple expedient of refusing to do anything potentially unpopular (No Right Turn, 2016; Godfrey, 2017): that is to say, National’s policy agenda may have been shaped more by a keen sense of what is politically acceptable in key constituencies than by any rigorous vision of what is right or necessary. In a 2015 speech, Bill English (then Finance Minister, now leader) indicated that National has, since 2008, deliberately adopted a moderate approach (which he dubs “incremental radicalism”) in response to lessons learnt from the “crash or crash through” approach of the 1990-1999 National Government, which “failed to build broader constituencies for [extensive and sometimes unexpected] changes”. The party’s preferred *modus operandi* since 2008 has been to build “popular support for our changes so they will stick” (English, 2015).

In the field of ER regulation, National has, thus, not overseen rapid or radical regulatory reform. At the policy level, there has been no full-blown return to the Employment Contracts Act era. Indeed, National has introduced certain provisions (extensions to paid parental leave, continued increases to the statutory minimum wage) that have favoured (some) workers. Opinions differ, however, as to whether National’s ER record can accurately be portrayed as centrist and moderate, or whether they have simply sought to construct a centrist-moderate image to deflect attention and criticism away from a continued, gradual erosion of workers’ rights and union power. On this latter view, National’s self-presentation as moderate and incrementalist is nothing more than a cynical attempt to obscure the significant changes they have overseen. Certainly, both interpretations could be given to English’s words above. It is beyond the scope of this paper to engage in this debate, let alone to adjudicate between the two positions; the salient point here is that all parties contesting this year’s election need to contend with the *fact* of National’s high approval rating, and with the *perception* that National has remained moderate and centrist.

## **The minor party landscape**

The 51<sup>st</sup> Parliament, elected in September 2014, has had 121 seats – 120 plus a one seat overhang as a result of Peter Dunne winning the Ōhāriu electorate but not being entitled to any seats under the party vote. National was, by some distance, the largest party after the 2014



election. Its party vote of 47 per cent translated into 60 seats in the 121-seat parliament (Electoral Commission, 2014). With 61 votes required to pass legislation, National's support deals with ACT (1 MP), the Māori Party (2 MPs) and United Future (1 MP) provided several possible combinations of votes to pass legislation (see Harman, 2017, for an example of how that flexibility has been used.) This was similar to its governing arrangements in the 2008-2014 period, although the number of ACT and Māori Party MPs has decreased throughout this period (Electoral Commission, 2008; 2011; 2014; Skilling & Molineaux, 2011). In 2015, however, the resignation of National MP, Mike Sabin, led to a by-election in the safe National seat of Northland. This by-election was won by New Zealand First leader, Winston Peters, changing the make-up of parliament. National was left with only 59 seats, and needing either the Māori Party or both ACT and United Future to pass legislation.

Two parties discussed in our 2014 survey, the Conservative Party and the Internet/MANA grouping, failed to win seats in 2014. One new party (The Opportunities Party) has been added to our survey this year. As expected, the Conservative Party did not win an electorate in 2014 and, despite being well-funded, it gained only 3.97 per cent of the party vote, below the five per cent threshold for representation in parliament. The Internet/MANA umbrella party, also well-funded, fared worse on 1.42 per cent of the party vote. With Mana leader, Hone Harawira, failing to retain the Te Tai Tokerau seat – lost to Labour's Kelvin Davis – neither party (Internet or Mana) made it to Parliament. Since 2014, both the Conservative Party and the Internet Party have struggled to attract public attention or poll ratings. In the expectation that they will not be influential during or after the election campaign, they are not covered in this survey.

Also not covered in this survey is the United Future party, following the abrupt resignation from parliament in late August of its leader and sole MP Peter Dunne. For a short period of time United Future was a significant minor party – winning eight seats in 2002 off the back of a collapsed vote for National – but by 2008 it reverted to its historic norm of one seat. At each of the previous three elections, United Future has received less than one per cent of the party vote; in 2014, its share was 0.22 per cent. Dunne was, therefore, an overhang MP, creating an extra seat in Parliament and a reliable vote for National's ER programme. Following polling that indicated he was likely to lose his Ōhāriu seat to Labour's Greg O'Connor (Radio New Zealand, 2017a), Dunne announced his retirement on August 21.

Disruption to the balance of power may come from the seven Māori electorates, where the Māori and Mana parties have formed an alliance to take on Labour. While the party vote is usually the most important vote in that it determines the overall balance of seats in parliament, for small parties that hold electorates, the outcomes in their electorate seats are vital to their survival. The Mana Party is running under its own branding, free from the Internet Party, with Hone Harawira once again contesting the Te Tai Tokerau electorate. He has formed an electoral accommodation with the Māori Party, who will not contest the seat. In turn, Mana will not stand candidates in the other Māori electorates (Fisher, 2017). With one exception, Labour's candidates for the Māori seats, meanwhile, will not be standing on the party list – they have to win electorates to get back into parliament.<sup>2</sup> This raises the stakes for voters on the Māori roll: you will either get a Labour MP or a Mana/Māori MP, not both. Previously, it was possible to

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<sup>2</sup> The exception to this rule is the late inclusion of Kelvin Davis at number two on the list after he was named Deputy Leader on 1 August 2017. We consider the implications of this move for Hone Harawira and the Mana Party later.

gain a Mana or Māori Party MP for the electorate, while the Labour candidate for the same electorate was returned via the party list.

## ER policy change since 2014

Before turning to each of the minor parties in turn, we present a schematic overview of their basic orientations towards ER policy. Table 1 shows the position of each party on the major pieces of ER legislation introduced since 2014. In some cases, there are nuances that the table glosses over. Some pieces of legislation were omnibus bills, and many parties supported some aspects of the bill while opposing others.

**Table One: Summary of ER Positions of the Minor Parties**

	ER policy closest to which major party*	Current Number of MPs	ERA Amendment Act 2014	Health and Safety at Work Act 2015	Employment Standards Legislation Act 2016
<b>ACT Party</b>	National	1	Support	Support	Support
<b>Green Party</b>	Labour	14	Oppose	Oppose	Oppose
<b>Maori</b>	Labour	2	Oppose	Support	Oppose
<b>NZ First</b>	Labour	12	Oppose	Oppose	Oppose
<b>United Future</b>	National	1	Support	Support	Support
<b>Mana Party**</b>	Labour	-	Oppose	Oppose	Oppose
<b>TOP</b>	unclear	-			

\* See also additional comments and caveats in the text.

\*\* The Mana Party did not exist in parliament at the time of these bills. Its position is presumed on the basis its voting record and public statements.

National was unable to garner enough votes to pass the 2014 Employment Relations Amendment Bill into law before the 2014 election, due to Māori Party opposition and the forced resignation of ACT leader, John Banks, just prior to the election (see Molineaux & Skilling, 2014). The centre-right majority, re-established at the 2014 election, passed the Bill, which was opposed by all parties except for National, ACT and United Future. It contained a series of measures designed to enhance employer flexibility. Among other provisions, the Bill removed the good-faith duty to conclude collective bargaining, allowed employers to opt out of multi-employer agreement bargaining, and changed the requirements around meal and refreshment breaks, strike notices, and pay reduction for partial strikes. While National presented the Bill as offering “a flexible and fair employment relations framework”, the response of the various parties, and the language of Government Minister Sam Lotu-I’iga (“this bill is about ensuring employers have the confidence to compete and expand” ... [the] bill increases choice and flexibility ... reduces ineffective bargaining, and ... prevent[s]

unnecessary and protracted collective bargaining”) indicate that it was weighted towards the interests of employers (Lotu-I’iga as cited in NZPD, 2014).

The 2015 Health and Safety at Work Act (HSWA) was the government’s response to the widespread acceptance that New Zealand’s workplace safety regime needed significant strengthening in the wake of the deadly explosion at the Pike River coal mine. The Pike River disaster led to its own Royal Commission, and the Health and Safety at Work Bill was also informed by the recommendations of the Independent Task Force on Workplace Health and Safety that reported in 2013. Beginning with cross-party and widespread industry support, the Bill ended up heavily opposed by Labour, the Greens, and New Zealand First, who criticised it for weakening safety provisions (Sissons, 2016). Major points of contention included the restricted provisions for worker participation, and controversial definitions of high-risk and low-risk industries. Critics held that the original focus on worker safety had been replaced by National MP’s desire to placate certain industries (ibid.). The HSWB was an omnibus Bill, resulting in dozens of votes on various clauses and SOPs. While Labour and the Greens voted against the government on almost all occasions, the opposition of New Zealand First and the Māori Party, while substantial, was not as total, and all parties voted with the government on some occasions (see NZPD, 2015).

The Employment Standards Legislation Bill (ESLB) was another omnibus bill that introduced a range of changes that included extension to paid parental leave (PPL), and clarification around the requirements surrounding so-called “zero-hour contracts.” There was general enthusiasm around provisions for an increase in PPL to 18 weeks in Part One of the Bill: New Zealand First’s Clayton Mitchell noted “the solidarity that I thought that all parties had with regard to ... paid parental leave”; Denise Roche described this as “a step in the right direction” towards the Green’s policy of 18 months PPL (see NZPD, 2016a). There was far less agreement, as we shall see, on Part Two’s response to the practice of zero hour contracts: National presented the Bill as one that “eliminates zero-hour contracts”; Labour and the Greens held, on the other hand, that the Bill actually ‘entrenches’ such contracts in law (Lees-Galloway as cited in NZPD, 2016a).

## The ACT Party

ACT’s policy positions (including its position on ER) are informed by its classical liberal position, expressed in a commitment to ‘personal responsibility’ (ACT, n.d.a) and to “removing petty regulation, reducing tax burdens, fostering entrepreneurship and a culture of aspiration” (ibid.) The party posits a “trickle-down” economics, where “less tax leads to a more productive economy with high growth and low unemployment” (ACT, n.d.b). Support for “more jobs and higher incomes” (ACT, n.d.a) is secured in this vision not through regulation and government *diktat* but through “more efficient government spending with lower flatter taxes and no new taxes” (ACT, n.d.b). On almost every occasion since 2008, ACT has voted in support of National’s ER agenda. It has, at times, expressed frustration that National has not moved further and faster towards a deregulated labour market: witness ACT’s argument that “National and Labour’s overly cautious economic tinkering has delivered very modest economic performance. National, in particular, campaigns from the right just as surely as it governs from the left” (ACT, n.d.b). Acknowledging its limited influence, the Party has consistently voted in support of what it sees as National’s tentative moves in the right direction.

In terms of policy priorities, ACT's influence and resources are limited by having only one MP, and it has needed to make strategic decisions on where to devote its energy and attention. Since 2014, ACT has focused on partnership (or 'charter') schools and 'regulatory reform', with Seymour being Under-Secretary to Ministers in both areas. Seymour has framed ACT's charter school initiative – in part – as an ER issue, by presenting teacher unions as a sectoral interest group seeking to preserve their own interests rather than as a professional body committed to improving outcomes for students (Sunday Star Times, 2016). Beyond this, ER policy is not prominent on ACT's website or in its press releases. While it is not dealt with explicitly, it is easy enough to infer the sort of ER settings that ACT would endorse from its stated values.

ACT's position does not always lead to less support for workers. During the changes to PPL provisions in the ELSB (2016), Seymour supported additional entitlement for parents of babies "born earlier than the expected 36 weeks". While Seymour opposed the "relentless extension of paid parental leave, which amounts to a massive wealth transfer" on the grounds that "for the overwhelming majority of us, having children is not an unexpected outcome", he also argued that "having a baby born pre-term... is an unexpected outcome" and that the state has an "extremely important" role in "offering insurance against unexpected outcomes" (NZPD, 2016b). Regardless of one's opinion on Seymour's position, it is refreshing to see a philosophical principle (that the distinction between chosen and unchosen disadvantage is relevant in determining where compensation should be provided) coherently expressed in the debating chamber.

Given past polling in Epsom and Prime Minister Bill English's explicit endorsement of David Seymour's electorate campaign in 2017 (Patterson, 2017), Seymour is likely to hold his Epsom seat. But polling stubbornly around or below one per cent since 2014, ACT's party vote may not be enough to bring additional MPs into parliament. As such, ACT matters in two ways. It offers National, firstly and most obviously, (at least) one additional, reliable vote in parliament. Secondly, the party's influence derives from its ability to persuade the public and other parties of the desirability of its position. ACT works to encourage National further towards the right, and to extend the spectrum of perspectives articulated in the political sphere. From National's perspective, there is arguably a further contribution that ACT makes, where its criticisms of National serve – paradoxically – a useful purpose, reassuring more centrist voters that National is a moderate party, far from the extremes.

## **The Green Party**

Besides its emphasis on environmental issues, the Green Party in New Zealand has always had a social justice focus. Its critique of the existing labour market is predicated on its understanding of the social world as marked by conflict, exploitation and power inequalities. This understanding continues to be expressed in the Party's policy documents and parliamentary speeches, which insist that the role of government is to protect workers left vulnerable within inherently unequal employment relationships. It was also expressed, as will be discussed below, in decisions in 2017 that led to the resignation of three Green MPs – including that of co-leader Metiria Turei – and a collapse in public support. ER-relevant statements continue to express commitment to "full employment with dignity and a living income", to significant increases to wages at the bottom of the distribution (Green Party, 2011; 2017a) and to improving "workplace democracy and ... working peoples' union representation and participation in the future of their work" (ibid).

In the parliamentary debate around zero hour contracts, meanwhile, Denise Roche (as cited in NZPD, 2016, 3 March) stated that:

Our caucus maintains a strong and unwavering opposition to legislation that enables the exploitation of ordinary working New Zealanders ... The Greens believe that we should be making laws that support the most vulnerable in our society. In this case, those who are vulnerable are those with no guarantee of basic working hours, who are desperate for paid work, and who are on the losing side of the power imbalance inherent in the employment relationship.

Roche insists on the point that workers' possession of legal rights is different, in reality, from their ability to exercise those rights: "an individual, waiting at the end of the phone for a call for some hours of work – it is not likely you are going to stand up for [your rights]". Returning to the underlying theme of the power inequalities, Catherine Delahunty (as cited in NZPD, 2015) notes the aversion in parliament to the very words 'worker' and 'power'. 'Power', she said, is "the word that no one wants to talk about", even though "you cannot achieve [mutual responsibility] with power inequality". Speaking on the issue of health and safety at work, Delahunty states that "safety comes from making sure that power is balanced ... This is about balancing power, and then we will get safety".

In important ways, then, the Greens' stance on ER remains unchanged from previous elections. At the same time, ER policy has not been given a particularly high priority in high-level messaging. At the time of writing (mid-July 2017, two months out from the election), the 'Policy' section of the Party's website featured 30 priorities: the only policy that was explicitly concerned with ER ('Equal Pay Amendment Bill') was near the bottom, at number 28 (Green Party, 2017b). On the website's homepage, moreover, emphasis was placed not on a standard leftist critique of capitalism but on an aspirational vision of a flourishing future: "great water... great families ... trustworthy and inclusive government" (Green Party, 2017c). In a key environmental policy document, the Party stressed the long-term economic opportunities of a future that is "cleaner, fairer, and more prosperous" (Green Party, 2015: 4, 7, 26). Social and economic objectives, on this logic, are not necessarily opposed to the logic of capitalism. Rather, an inclusive society and a sustainable economy can work for the benefit of people, planet and profit, in a "win-win for people and the planet, now and into the future" (ibid: 28).

Such statements, and the Greens' acceptance (with Labour) of 'Budget Responsibility Rules' (BRR) that would constrain the two parties' capacity for public spending were interpreted as the Party is seeking to present itself, for the purposes of electoral success, as "pragmatic" and "realistic", rather than as "dogmatic", and "out of touch with reality". The most biting criticism came from former Green MP, Sue Bradford, who argued that the BRR showed the Party "nailing their colours to the mast of neoliberal capitalism" before concluding: "this is the death knell for the Greens as a left party in any way, shape or form. They are a party of capitalism. They're a party that Business New Zealand now loves" (Manhire, 2017; see also Mitchell, 2017).

Criticism that the Greens were becoming a centrist, business-friendly party would not have predicted the events of July and August 2017. Co-leader Metiria Turei made a speech on July 16 stating that she had committed welfare fraud in the early 1990s. Pointedly, she refused to apologise for the acknowledged fraud, insisting that she wanted to use her experience to start a conversation about poverty in New Zealand, and the challenges and stigma faced by welfare recipients (Hickey, 2017; New Zealand Herald, 2017). In the face of public criticism, two

senior MPs resigned from the Party list and – on August 9 – Turei herself resigned, saying that she could not subject her family to continued public scrutiny (Hurley, 2017). The Greens' poll ratings essentially halved over the course of a month (James, 2017a; b) and one poll placed their support at 4.3 per cent (TVNZ, 2017). Subsequently polling uncomfortably close to the five per cent threshold, there is the danger of voters electing not to cast their vote for a party who may not return to parliament.

If the Greens are returned to parliament, their influence in a Labour-led government will be much less than if their vote share had been much closer to Labour's. Their close accommodation with Labour (which included a memorandum of understanding signed in late 2016 formalising their intention to work together to change the government (Labour and Green Parties, 2016) and a shared State of the Nation event in January 2017 (see Small, 2017) will look very different if the Greens are a minor partner in a coalition that includes a more dominant Labour Party and New Zealand First. The Greens and New Zealand First have historically had a testy public relationship: in 2005, New Zealand First leader Winston Peters only agreed to a coalition deal with Labour on condition that the Greens did not have any Cabinet posts. In 2017, despite trading insults, both parties say they remain open to working with each other (Heron, 2017).

## **The Māori Party**

The Māori Party was formed as a breakaway from the Labour Party in 2004, in protest at the Foreshore and Seabed Act (also 2004). It has competed with some success in the Māori electorates, although Labour has gradually won back all but one seat. The Party has not cracked five per cent in the party vote; party vote totals have ranged from a high of 2.4 per cent in 2008 to a low of 1.3 per cent in 2014. Founding leaders Tariana Turia and Pita Sharples resigned at the 2014 election; new co-leaders Te Ururoa Flavell and Marama Fox were elected to Parliament as the party's only MPs, representing the Waiariki electorate, and from the party list, respectively.

The Māori Party has been in a confidence and supply agreement with the National-led government since 2008 but other than confidence and supply matters, has voted against much government legislation, including some ER initiatives. The Māori Party has been described as delivering Labour votes to National (James, 2015) and Labour Māori campaign manager, Willie Jackson, is running the line that a vote for the Māori Party in the Māori electorates is a vote for National (Newshub, 2017a). In contrast, leader Te Ururoa Flavell defends their arrangement, saying you have to be at the top table to advance your agenda (Flavell, 2015), suggesting they would also be open to working with a government led by the Labour Party. Māori Party President Tukuroirangi Morgan has revealed that party members prefer an alliance with Labour over National (Radio New Zealand, 2017b)

The Party has not used its leverage to advance ER policies, focusing its attention on other areas. It does not have an MP on the Transport and Industrial Relations Select Committee. Generally, the Māori Party's ER stance is closer to Labour than National. On the Employment Relations Amendment Bill, co-leader Marama Fox (as cited in NZPD, 2014) outlined the Party's principles:

The concept that we in the Māori Party have always believed in is that innovation in the economy should be built upon a foundation of workers' rights and terms. It should not be a case of either/or ... We can create future prospects of economic growth, while at the same time adhering to conditions of employment that are socially and economically fair.

The Party, therefore, does not seek an overthrow of the established order so much as a fairer balancing of power within the existing system. As Fox (*ibid.*) continues, "our greatest capacity for influence is not only through speaking out and against; it can come even more persuasively when we work together, speaking up to unite". Still, Fox's description of the labour market is similar to the Greens' in its emphasis on power inequalities and systematic vulnerability. Speaking against Section 6A of the ERAB (concerning workers' rights when their employer "loses a contract to a rival bidder"), Fox notes that "it is women, Māori, and ethnic minorities who make up the majority of those [vulnerable] workers" who, having "limited bargaining strength in the labour market ... are most likely to be disadvantaged by these changes that strengthen employers' rights and power". Fox concludes that "greater protection is needed for these workers, not less" (*ibid.*).

Despite low polling and its small caucus, the Māori Party may be important to the National Party's chances of forming a new government after September 23. If National is able to increase its vote into the high 40 per cent range, and if the Māori Party has 2 or 3 MPs, National may be able to form a government with its existing support partners. Under this scenario, the Māori Party would continue to exercise some influence over policy-making. This scenario, however, seems increasingly unlikely. If National does not achieve a vote share in the high 40s (i.e. materially above its current polling level), National will need New Zealand First to form a government, and the Māori Party's influence will diminish.

The Māori Party co-leader Te Ururoa Flavell is facing high profile Labour candidate Tamati Coffey in his Waiariki seat; and the most recent polls place Flavell comfortably ahead (Newshub, 2017b). If Flavell retains the seat, any party votes above (approximately) 1.2 per cent will contribute towards extra MPs. The Māori Party is heading into the 2017 election with the goals of winning six Māori electorate seats and seven per cent of the party vote, and to hold the balance of power after the election (Māori Party, 2017). The head-on battle with Labour in the Māori electorates is yet to play out. While both parties will fight for votes in these electorates, the relationship between them has thawed following the Labour Party leadership change with Māori Party President Tuku Morgan describing Labour deputy leader Kelvin Davis as, "someone who we can talk to, who we have some trust and confidence, that in the end whakapapa/genealogical ties, kinship ties mean something" (Morgan, 2017).

## **The MANA Movement**

The Mana Movement was formed in 2011 as a breakaway from the Māori Party, over the latter's support for the National-led government's Marine and Coastal Area (Takutai Moana) Act 2011, and conflicts over the Party's insider-outsider status more generally (Flavell, 2015). Its sole MP, Hone Harawira, lost his Te Tai Tokerau seat to Labour's Kelvin Davies in the 2014 general election, following a coordinated campaign by opponents to unseat him, and Mana's doomed deal with the Internet Party.

Harawira has announced that he will stand again in 2017 and has an accord with the Māori Party, which will see the two Parties team up to defeat Labour in the Māori electorates: The Māori Party will not stand a candidate in Te Tai Tokerau; Mana will not stand candidates in the other Māori electorates. With no Māori Party candidate to lose votes to, Harawira has a better chance of regaining the electorate. The initial decision of Labour's Māori electorate MPs to not stand on the Party list gave Te Tai Tokerau electors a stark choice: Hone Harawira or Kelvin Davis but not both. As noted above, however, Davis' ascendancy to the Deputy Leadership meant – under Labour Party rules – that he takes the second place on the list. As such, Harawira immediately began arguing that by voting for him in the electorate, Te Tai Tokerau voters could “get two MPs for the price of one”. As Harawira said, “it's an opportunity to ensure that we don't just have two Tai Tokerau MPs in the House, but two Tai Tokerau MPs on the front bench... It's a win-win for Tai Tokerau” (Radio New Zealand, 2017c). Both candidates are likely to have appeal within the electorate: Harawira has deep ties in the North, and is present at events and on marae. Davis, meanwhile, has been a high profile MP for the Labour Party.

Mana barely registers on party vote polls, and they rely on Harawira winning Te Tai Tokerau to re-renter parliament. Even if he does, the party is unlikely to win extra seats via the party vote. Potentially, then, the best prospect for Mana will be a one-MP party. Mana's deal with the Māori Party ends at the election, and if the Māori Party, again, go into coalition with National, Mana will stay outside it. Harawira's influence will be one of ideas, and of encouraging the Māori Party to represent the interests of working people, both Māori and non-Māori. Mana was founded as a movement to, “bring the voice of the poor, the powerless and the dispossessed into Parliament” (Mana Movement, n.d.a.). The Party has policies designed to reduce the power of corporations and increase taxes on the rich. It supports full employment, “so that everyone can give back to their communities in a meaningful way with dignity” (ibid). On ER policy, Mana says the party wants to:

...ensure that all workers are well supported at work with good conditions and that all are paid at least a living wage. For the last 30 years, workers' real wages have gone down while the cost of living has gone up, making many people much worse off than ever before and requiring workers to work many additional hours to make up the difference.

It is important that all workers are able to join and participate in unions to represent their collective interests and negotiate for decent wages and conditions of work (Mana Movement, n.d.b.).

If elected, Harawira can be expected to be vocal in support of the poor, including the working poor, standing against inequality, promoting higher wages and better working conditions. He will represent one vote in the House and is unlikely to go into any formal governing arrangement.

## **New Zealand First**

Formed in 1993, New Zealand First's electoral fortunes have fluctuated throughout the MMP-era. Led by former National MP, Winston Peters, the Party has been in parliament since 1993, except for the 2008-2011 period. In 2014, New Zealand First gained 8.7 per cent of the party



vote, giving the Party 11 MPs. Subsequently, Winston Peters contested and won the 2015 Northland by-election, winning the seat off National. This increased the Party's total MP count to 12 and reduced National's by a crucial one vote. In both 2011 and 2014, New Zealand First's election night results were a significant improvement on poll results from earlier in those years. In both instances, the Party had been polling under the five per cent threshold before the election campaign started. It is significant, then, that polls in early September put the party on eight per cent, although even this figure represents a decline from 13 per cent support in July (Electoral Commission, 2011; Skilling & Molineaux, 2011; James, 2017a). As noted above, the Party has a very real chance of holding the balance of power: it may well find itself in a position where it can decide which major party is able to form a workable government. Labour's recent leadership change may smooth relationships between the two parties, with new Labour deputy leader Kelvin Davis related to, and on good terms with, New Zealand First's Winston Peters and Shane Jones (Moir, 2017).

We reported in 2014 that ER policy was not a top priority for New Zealand First. Since 2014, however, the Party's increased representation in parliament has allowed it to have a voice in parliament on ER issues: Clayton Mitchell has been a member of the Transport and Industrial Relations Select Committee, and the Party has had the right to speak on ER legislation as it is debated in the house. Expressing this heightened emphasis, 'Labour and Employment' is the second-listed policy area on the 'Policies' section of the party's website (for comparison, 'Immigration' is listed much further down the page) (New Zealand First, 2017a). Other explicitly stated policies include raising "the minimum wage to \$20 per hour" (New Zealand First, 2017b); changing "laws that allow individuals to be employed on a permanent 'casual' basis"; and abolishing "the 'starting out wage' for young people" (New Zealand First, 2017c). Peters has been a vocal champion of the Pike River families, advocating an exemption to health and safety laws to enable the coal mine to be re-entered in a bid to recover bodies and look for evidence for a prosecution against the mine owners (New Zealand Herald, 2016). Mine re-entry is a bottom line of confidence and supply or coalition deal (Satherley, 2017).

New Zealand First's promise to put New Zealand interests first is expressed in a stated commitment to protect New Zealand workers and for there to be a dramatic drop in immigration. It promises to "train New Zealanders in areas of skill shortages, instead of actively recruiting offshore", to "ensure that hiring New Zealanders is a priority" and to "incentivise skilled New Zealanders to stay and work in New Zealand". More generally, New Zealand First rejects a hands-off approach to the labour market, favouring instead a planned management of the national economy and society. For example, New Zealand First (2017c) would "ensure enough workers are being trained in the area of aged care to cope with New Zealand's ageing population".

New Zealand First's immigration policy intersects with their employment relations and training policies: funding the tertiary sector better so there is less reliance on international students; ending student work visa rorts; ensure priority is given to upskilling and hiring New Zealanders for jobs; and encourage skilled New Zealanders to remain in New Zealand, partly by offering a bonding system for new graduates, which include student loan debt write-offs.

The Party has consistently voted against government moves to reduce employee and union power (e.g. ERAA 2014), and supported higher minimum wages and longer paid parental leave. They have argued for a 19 per cent pay loading for casual workers, a return to pre-ECA situation whereby casual workers are compensated for lost sick leave, public holidays, bereavement leave, health and safety representative training, jury duty, and so forth. Speaking

in parliament, MP Darroch Ball (as cited in NZPD, 2016b) noted that, “casual workers also have no access to personal grievance protections for unfair dismissal, and, effectively, these are cost transfers from the employer to the worker”. The purpose of the loading was to incentivise “the employer to move the employee on to a part-time or full-time contract”, correcting what Ball sees as an existing “systemic bias towards the employment of casual workers”.

Peters has consistently refused to indicate whether he is more likely to support National or Labour after the election. Commentators have listed reasons why he might prefer to go with one party or the other, but it is unwise to offer firm predictions. New Zealand First’s ER statements and policies align more logically with Labour and the Green Party than with National and ACT. Indeed, since 2011 (including since 2014, as seen in Table 1), New Zealand First has consistently voted against National’s proposed ER amendments. It is unclear however, how important the Party’s ER position will be in coalition negotiations: disagreement with National’s ER position, in other words, may not be a “deal-breaker”.

Further, New Zealand First’s apparent convergence with a left bloc is not straightforward. As well as clear differences in other policy areas, there remains a degree of distrust and personal antipathy between Peters and the Green Party. In July, the Greens embarked on a deliberate strategy of criticising New Zealand First, with Metiria Turei repeatedly describing some of their policies as ‘racist’ (Trevett, 2017). Such criticisms appeared intended to stake out a distinct position for the Green Party as a way of maximising their vote. The antagonising effect of such statements may, however, have lessened with Turei’s resignation.

## **The Opportunities Party**

The Opportunities Party, or TOP, was founded by millionaire businessman, philanthropist and public commentator Gareth Morgan. The Party promotes a number of policies previously advocated by The Morgan Foundation, a charitable trust that furthers policies and actions that reduce “the wealth disparities between people” (Morgan Foundation, 2016) and is concerned with conservation and environmental enhancement. The Party gained registration in March 2017 and will stand list and electorate candidates in the 2017 general election. Chief of Staff and former Morgan Foundation economist Geoff Simmons ran for TOP in the Mt Albert by-election (a safe Labour seat) in February 2017, where he gained 4.56 per cent of the vote (Electoral Commission, 2017). He is standing as the Wellington Central candidate in the general election.

TOP’s purpose is to promote a radical shake-up of policies and Morgan has stated the party would be happy operating from the cross-benches, or outside Parliament. The key aim is to influence policy (The Opportunities Party, n.d.a.). The Party says it is neither left nor right, and is interested in evaluating evidence before coming to a policy position.

TOP policy is framed with the concept of fairness. It believes that government needs to ensure people have opportunities and that, at present, too many do not because New Zealand society has become increasingly unequal. The Party has no specific ER policies, but a number of its policies would impact on the standards of living of working people. Their policy shake-ups include tax reform that shifts the burden of tax away from labour and onto capital, and a staged introduction of an unconditional basic income (UBI), which would give low income workers

more bargaining power with employers. TOP's immigration policy is to encourage more New Zealanders to be trained and hired for jobs, reduce low skilled immigration which is enabling the suppression of wages and conditions, and cracking down on the exploitation of migrant workers, including providing the exploited migrant an opportunity to remain in New Zealand whilst securing other work (The Opportunities Party, n.d.b.). The Party supports the current minimum wage regime rather than the living wage concept, with an underlying UBI and tax reform providing the further assistance the lowest paid need to thrive (personal communication). In education, TOP advocates following more of a Finnish model than a US or UK one; this includes no performance pay for teachers, and a more trust-based model than at present (The Opportunities Party).

On the training front, the Party's UBI forms part of a lifelong learning strategy, along with support for more innovation in the occupational skills and training space. There is an acceptance that new technology will disrupt existing work patterns and the best response is not to fight these changes but to ensure people are well-placed to adapt (personal communication). TOP has not followed ER legislation debates closely and would use the concept of fairness and a level playing field for bargaining when deciding how to vote on issues such as zero hours contracts, rights of workers to organise, union access to workplaces and so forth. For example, on zero hours contracts, they see the issue as one whereby employers have an obligation to guarantee work if they expect workers to make themselves available. The Party accepts that employment relationships are not equal, with employers usually having more power (personal communication).

Since the introduction of MMP, no new party that has not been a breakaway from an existing party has been able to breach the five per cent threshold. TOP has policy depth in a number of areas (The Opportunities Party, n.d.b.), funding for policy development and dissemination, key people who regularly front the mainstream media and social media, and attracts crowds to community events. But it faces a tough challenge to achieve its aim of policy disruption. They are currently polling below the margin of error – but above the other minnows of ACT, the Māori Party, Mana and United Future. Without the lifeline of an electorate seat, though, TOP may head the way of other recent new political parties founded by millionaires intent on policy influence: the Internet Party and the Conservative Party.

## **Conclusion**

The fate of the different minor parties will be important in determining the makeup of the next government. If ACT continues polling close to zero but David Seymour wins Epsom, his seat will be an overhang, meaning the winning coalition needs to find an extra seat to reach a majority for any legislative support. Polls in August and September have been marked by extreme volatility, and government formation may depend on whether the Green Party and the Māori Party make it back into Parliament. The other potentially influential minor party result is whether election 2017 will see New Zealand First as 'kingmaker' (Young, 2017). The Party refuses to state, pre-election, a preferred major party partner. While New Zealand First has ER policy similarities with Labour, it is questionable how central policies in this field will be in coalition negotiations or in government. In this scenario, the policy position of the major party – National or Labour – leading the next government will be the main determinant of ER changes or status quo.

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