

7 September 2000

## **MINISTER OF LABOUR**

### **REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: AMENDMENT TO SECTION 16**

#### **Executive Summary**

The amendment to section 16 means that no longer are all persons in a place of work covered by the Health and Safety in Employment Act 1992 (HSE Act).

The purpose of the amendment to section 16 was to clarify for farmers and recreational groups that there was no liability under section 16 for recreational people entering farmland.

The amendment to section 16 changed its focus from a hazard-based liability to a focus on the relationship between the person in the place of work and the person who controlled the place of work. The amended section 16 lists various classes of relationships and liability varies depending on those relationships.

Because of the complex nature of work environments and the variety of business relationships able to be entered into, it has transpired that not all possible relationships have been legislated for under the relationship-based liability regime of the HSE Act.

This problem was identified when the HSE Act was drafted. One of the express purposes of the original section 16 was to ensure that where a work relationship was not captured, the HSE Act would still cover those at work via section 16. It was envisaged that the original section 16 would resolve any gaps created by a relationship model. This safety net was removed by the amendment to section 16.

The clarity provided for farmers and recreational groups has been at the cost of excluding from the HSE Act some workers and public originally intended to be included. If the focus of the amendment to section 16 was narrowed it would reduce the gaps created for workers and members of the public while allowing recreational users of rural land to continue to have access to recreational areas of New Zealand that are potential workplaces. This is also likely to be an acceptable outcome for farmers and recreational groups.

## **Purpose**

1. The purpose of this paper is to make recommendations regarding the unintended consequences of the 1998 amendment to section 16 of the HSE Act. This project is being undertaken as part of the Health and Safety in Employment Act Review Project (refer 99/004522).
2. Section 16 of the HSE Act was amended in April 1998. The purpose of the amendment was to clarify to farmers and recreational groups that there was no liability under section 16 for recreational people entering their land. The method chosen to achieve this was to recast section 16 from a hazard-based liability to a relationship-based<sup>1</sup> liability. The amended section 16 lists various classes of relationships and liability varies depending on those relationships.
3. Farmers have found the amendment has clarified their liability under the HSE Act towards recreational users of their land. This has been at the cost of excluding from the HSE Act some workers and public originally intended to be included. This paper discusses the unintended consequences of the amendment.

## **Background to the Amendment to Section 16**

4. The amendment to section 16 means that no longer are all persons in a place of work covered by the HSE Act. Prior to the 1998 amendment, the original section 16 focused on the hazards in the place of work. The amendment to section 16 focused on the relationship between the person in the place of work and the person who controlled the place of work. Under the amendment to section 16 a duty is owed only to those persons who have a particular relationship to the controller. The safety net of a hazard-based duty focused on the safety of a particular place of work has been removed with the amendment to section 16.
5. The translation of workplace health and safety into a single piece of legislation required a change of focus from a hazard-based or work-based model of legislation to a relationship-based model to cover all workers in all work places. This model had inherent problems in that describing every possible work relationship would always have the potential to create a gap where a relationship wasn't described in the legislation but was operating in the workplace.
6. This potential gap was the reason for including in the HSE Act the original section 16 that centred on hazards in the workplace and those who could control those hazards. This was not a new concept from a workplace health and safety perspective but because the HSE Act replaced a number of more prescriptive acts relating to particular work situations, the effect was a much wider coverage than with previous legislation.
7. Because of the complex nature of work environments and the variety of business relationships able to be entered into, it has transpired that not all possible relationships have been legislated for in the HSE Act.

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<sup>1</sup> This reflected the general liability regime of the HSE Act.

8. This problem was identified when the HSE Act was drafted. One of the express purposes of the original section 16 was to ensure that where a work relationship was not captured, the HSE Act would still cover those at work via section 16. It was envisaged that the original section 16 would resolve any gaps created by a relationship model.<sup>2</sup>
9. The original section 16 in its entirety reads:  
**16. Duties of persons with control of places of work -**  
to the extent that a person is -  
(a) The owner, lessee, sublessee, occupier, or person in possession of a place of work or any part of a place of work (not being a home occupied by the person); or  
(b) The owner, lessee, sublessee, or bailee, of any plant in a place of work (not being a home occupied by the person), -the person shall take all practical steps to ensure that people in the place of work, and people in the vicinity of the place of work, are not harmed by any hazard that is or arises in the place of work.
10. The reason for the amendment to the original section 16 was to address the concern of farmers and recreational users of rural land that liabilities under the HSE Act existed that had not under previous legislation. Analysis of previous legislation suggests this was an accurate perception [please refer to appendix 1 for a full explanation of the history to the amendment to section 16 in 1998]
11. The effect of the introduction of a single Act for health and safety (the HSE Act) was to widen the coverage of health and safety legislation. The objective of the HSE Act was to apply the principles of workplace safety (and some aspects of public safety that overlapped with workplace safety) consistently across a wider range of workplaces, including farms. Farmers and recreational groups perceived this as having gone too far for the reason stated above.
12. This raised for farmers and other landowners concerns about their liability for visitors, including recreational visitors such as hunters, trampers and fishermen under section 16 of the Act. Two prosecutions of farmers under the Act (the so-called Bendigo and Berryman cases) exacerbated concern. OSH published administrative guidelines clarifying that farmers would not be liable for non-work related injuries to recreational users, however, these did not provide farmers with sufficient assurance.
13. This was the issue that both farmers and recreational groups brought to the Government in 1995, and requested an amendment to section 16 of the HSE Act to remove any liability farmers may have to recreational users of their land.
14. The result was an amendment to Section 16. The Department of Labour (the Department) understands that the groups involved in lobbying for the amendment are satisfied with the outcome.

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<sup>2</sup> Another express purpose of the original section 16 was to capture the public safety elements of workplace health and safety.

## **The Effect of the Section 16 Amendment**

15. The unintended consequence of the amendment to section 16 has been that gaps in the coverage of health and safety in the workplace have been created. There is a growing concern within the Department that organising work relationships effectively can circumvent the HSE Act. The follow on for workers is that work providers will exploit these gaps and this will become accepted practice as a way to cut costs and avoid responsibility for health and safety in their business.
16. The reality of the work environment is that it is competitive, dynamic and workers are required to fit the needs of those who are offering the work. It was recognised that to try and capture all future types of work relationships in the HSE Act was impossible. Accordingly, the HSE Act included some flexibility to take this into account. Unfortunately, this flexibility has been lost with the amendment to section 16.
17. The effect of the section 16 amendment is that section 16 now requires a relationship listed in the section to be established before a duty is owed. The result is the HSE Act no longer covers some workers and gives a lesser protection of "warning" to some workers as well as removing some of the public safety aspects of the HSE Act. The analysis of the amendment to section 16 follows.
  - Two duties are owed under section 16
    - 1) a full duty of all practicable steps; and
    - 2) a warning duty.
  - A person in control of a place of work owes;
    1. a) Full duties to people who are;
      - employees or contractors working for the person;
      - in the vicinity of the workplace; and
    - b) Full duties to people who have consent to be there who are;
      - paying the person to do an activity in that place; or
      - buying or inspecting goods offered for sale.
    2. a) A duty to warn about known significant hazards to people who are;
      - given express consent to be there; or
      - authorised by legislation to be there.
    - b) A duty to warn about known significant hazards arises when;
      - a significant hazard is in, or likely to arise in, that workplace;
      - arises from work activity; and
      - is unusual for that workplace.

## **Examples of exclusions created by the Amendment to Section 16**

18. Examples of some complex work environments where the HSE Act may no longer cover some workers are:
  - principals who contract with multiple contractors who in turn contract with subcontractors and cascading down several levels, any of who may have employees, hire staff from agencies or staff on "loan", where there is no contractual relationship between the parties a duty under the HSE Act may not be owed to workers in the workplace
  - contractors and employers who "lend" subcontractors or employees to other contractors or employers

- property or plant owners and their relationship with leaseholders, sublessee, their employees, other contractors, other employers other plant owners and others working on the same project
- agencies who hire staff to contractors or subcontractors, or an employer, on a short term basis
- employers who "trial" a potential employee for no gain or reward on a promise of possible of work in the future

19. All the above examples may mean that a duty may not be established because the work relationship is not described in the HSE Act.

### **Construction Industry Example<sup>3</sup>**

20. Work relationships respond and restructure according to the economic and regulatory environment. The Employment Contracts Act saw an increase in individual contracts between employers and employees. Competitive tendering has meant that companies must survive in an environment that requires constant shifts in work capacity. The construction industry is a pointed example of this. The change from companies who have any number of permanent employees available for work at any given time to the introduction of contractors, subcontractors, hire labour, self employed persons and labour on loan who fulfil the same work requirements on a need basis.

21. The following is an example of a worker killed at work in the construction industry since the amendment to section 16 came into force. OSH had no ability to prosecute in this situation.

#### *The Facts*

Two legally separate companies were involved in work on a construction site. Demolition Ltd was a demolition company and Salvage Ltd was a salvage company. These companies worked closely together.

About four years ago Salvage Ltd was started to do only salvage work. Salvage Ltd has an informal agreement to do salvage work on sites that Demolition Ltd is demolishing sharing equipment and persons if needed.

OSH visited the site where Demolition Ltd and Salvage Ltd were working two weeks prior to the death. An Improvement Notice was issued to Demolition Ltd and Salvage Ltd requiring them to:

- cover over some openings;
- staff to wear fall arrest equipment; and
- staff to work away from areas as cladding removed.

The notice required compliance on that day. Both companies had their respective employees working on the site.

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<sup>3</sup> A further example is found in Appendix 2.

While carrying out work for Salvage Ltd an employee of Demolition Ltd died when he fell 5.3 metres onto a concrete floor during demolition of a warehouse on the site. He was not wearing a safety harness, although one was available. He was removing purlins<sup>4</sup> from a roof (for later resale) when he fell.

On the day of the employee's death he was employed by the demolition contractor Demolition Ltd but as they had no available work for him on that day he was instructed by Demolition Ltd to work under the control of Salvage Ltd the salvage company.

The investigation by an HSE inspector revealed the following:

- The employee was known not to wear harnesses when carrying out work at heights and had not done so while carrying out work earlier that day.
- The employee had worn a harness after the OSH visit two weeks prior that had resulted in an Improvement Notice being issued.
- The director of Salvage Ltd saw the employee (who subsequently fell and died) not wearing a harness that morning and took no action.
- The employer Demolition Ltd had provided to the employee the means to prevent a fall.

#### *Application of the HSE Act*

At least three people would appear to have duties to take all practicable steps under the HSE Act in respect of this accident.

The employee who died had a duty under section 19 to use the safety gear provided. He did not and paid the ultimate penalty for not complying.

The employer Demolition Ltd had specific duties under Regulation 21 of the Health and Safety in Employment Regulations 1995 (HSE Regulations) and all the general duties an employer has to an employee under the HSE Act. It made available suitable means to prevent the fall when working above three metres (Regulation 21, HSE Regulations). After the previous visit by OSH it took steps to ensure that the employee used the equipment as required under section 10 of the HSE Act.

The other company Salvage Ltd was a person who controlled the place of work that the employee was in. They instructed the employee what purlins were to be removed. They had the same duty to the employee under Regulation 21 of the HSE Regulations as the employer (because of the extended definition of employer and employee in Regulation 12 of the HSE Regulations). Suitable means to prevent the fall were provided.

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<sup>4</sup> Purlins are pieces of timber or steel laid horizontally across rafters. The purlins support the roofing iron etc which is laid from ridge to gutter. They are sometimes timber but may also be steel. In this example the purlins were timber laid across steel portals which were fulfilling the function of rafters.

Salvage Ltd was in control of the work of the employee. The director of Salvage Ltd saw the employee carrying out the work he was instructed to do without using the harness. Salvage Ltd took no steps to ensure that the harness was used. It could have:

- instructed the employee to fit the harness;
- refused to have the employee working under its control if he did not wear the harness; or
- required the employee's employer to instruct the employee to wear the harness.

### *Liability of the Person in Control of a Place of Work*

Salvage Ltd was the person in control of the place of work. Even though its director saw the victim not wearing a harness, it does not have any duty under the HSE Act to carry out the steps set out above. Prior to the amendment to section 16 these would have been practicable steps required to be taken under section 16(a).<sup>5</sup> Under the amended section 16:

- the employee who died was not the employee of the person in control of the place of work;
- nor a contractor nor contractor's employee.

In fact the only duty the Director of Salvage Ltd owed the employee was to warn him of significant hazards not likely to be found on a construction site.

22. The circumstances of the work situation in this example are not unusual. It is clear to OSH on an operational level that some workers who were protected by the HSE Act are now no longer protected.<sup>6</sup>

### **Owners etc of Plant in a Place of Work**

23. Under the original section 16(b) an owner, lessee, sublessee or bailee of plant owed duties to people in a place of work. These duties were removed by the amendment. The reason for this was that at the time it was thought that the provisions of section 16(b) did not fit with the new format of the amendment. This omission creates a gap.

24. An owner of plant previously had to ensure that plant<sup>7</sup> in a place of work did not cause harm to other people. With that duty removed safe plant is now dealt with through the other sections of the HSE Act that establish duties on a relationship basis.<sup>8</sup> Gaps are created because the other sections do not always capture a relationship that exists in the workplace.

25. Again clear examples of this are highlighted by the construction industry because of the multiple contractor and subcontractor work arrangements that exist

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<sup>5</sup> Refer to original section 16 quoted in paragraph 12 above

<sup>6</sup> Refer to the list in paragraph 20 under the heading "Examples of Exclusions Created by the Amendment to Section 16"

<sup>7</sup> Section 2(1) of the HSE Act defines plant as including '(a) Appliance, equipment, fitting, furniture, implement, machine, machinery, tool, and vehicle.'

<sup>8</sup> Sections 6, 15, 17, 18 and 19

although the gaps are not limited to this industry. If a construction site is large with many contractors (a commercial building site for example), and a contractor uses a truck that has faulty brakes, which cause the driver to run over another contractor's employee. There is no duty under the HSE Act in respect to the unsafe vehicle (the plant).

### **Public Safety interface with Section 16**

26. The principal focus of the HSE Act is health and safety in the workplace. The HSE Act was not intended to cover public safety in public places. The public safety interface with the HSE Act is discussed in this section of the paper because the original section 16 recognised the public safety elements of workplace health and safety. The amendment to section 16 has fundamentally changed public safety in the workplace.
27. When the HSE Act was drafted it was recognised that some aspects of public safety and workplace health and safety were inseparable. The legislation preceding the HSE Act also reflected an interface with public safety. The reference to "people in the vicinity of the place of work" comes from the Construction Act 1959.<sup>9</sup> Continued protection of the public from harmful work situations was intended but that protection is now flawed.
28. The amendment to section 16 removed full duties under the HSE Act being owed to members of the public if a relationship as described by the amendment to section 16 does not exist.<sup>10</sup> A lesser duty of warning exists in circumstances where a member of the public enters the workplace with consent. This duty to warn about known significant unusual hazards arises when:
  - a significant hazard is in, or likely to arise in, that workplace;
  - arises from work activity; and
  - is unusual for that workplace.
29. The amendment to section 16 was intended to narrow the public safety interface of the HSE Act by removing from coverage recreational users of rural land. The gap created by the amendment is far wider in its reach than was intended. The gap in protection for the public from workplace hazards occurs in the same areas as for workers. If a member of the public has no relationship with the person who controls the place of work as described in the amended section 16, and consent to be there has not been given, there is no duty under the HSE Act to prevent harm occurring to them. For example, a person visiting a hospital patient, (unless express consent is given for the visit) or children playing in school grounds at the weekend are not covered under the HSE Act.
30. If a member of the public has sought consent to be in a particular workplace they would then be owed a duty of warning of known, significant, unusual hazards for that workplace.

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<sup>9</sup> Refer to footnote 12 in appendix 1

<sup>10</sup> Refer to paragraph 19 for full analysis of the amended section 16

31. The reach of the amendment to section 16 should be narrowed to exclude only recreational users of rural land from the HSE Act. This was the approach of the Labour Party members on the Social Services Select Committee during deliberation on the amendment in 1997.
32. If the focus of the amendment to section 16 was narrowed it would reduce the gaps created for members of the public while allowing recreational users of rural land to continue to have access to recreational areas of New Zealand that are potential workplaces.

### **Resource issues**

33. OSH has in place operational policy to focus its resources on prevention of injury to employees and workers. This is consistent with OSH's Mission statement "Together to zero; elimination of workplace deaths" and section 5 of the HSE Act which states:  
**5. Objects** - (1) This Act's principal object is to provide for the prevention of harm to employees at work.
34. Currently OSH is able to cover approximately 15% of New Zealand's workplaces each year (through a combination of proactive and reactive work). To use the resources allocated to OSH in the most effective way it requires a focus of activity on identified high risk areas with allocation of resources cascading down to a limited focus on areas that are not central to workplace health and safety. Public safety and its interface with workplace health and safety fall into the limited resource category.
35. OSH is the only enforcement agency who can prosecute under the HSE Act. This may change if the removal of OSH's monopoly on prosecutions under the HSE Act (part of the HSE Act review project<sup>11</sup>) is agreed to. The impact of private prosecutions may be to increase prosecution activity in areas of low priority for OSH. This would be a positive outcome for workplace health and safety in general.
36. If it is accepted that a further amendment to section 16 is an appropriate mechanism to resolve the gaps in the HSE Act created by the 1998 amendment, resources to properly inform affected groups should be considered.
37. Current tools available to all organisations and the public on the amended section 16 are:
  - OSH website with a dedicated page for section 16;
  - media resources for rural news agencies and Federated Farmers;
  - guidelines for agriculture;
  - OSH agricultural strategy including information on section 16; and
  - relationship between OSH and key organisations in the agricultural and recreational industries.

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<sup>11</sup> Refer to briefing paper "Health and Safety in Employment Act Review Project" number 99/004522 and the briefing paper currently being prepared on "Removal of Prosecution Monopoly"

38. The above resources would be updated to account for any change and a renewed information and communication strategy would be included into the agricultural strategy. This would involve inspectors' time to give seminars to key groups and visit agricultural workplaces with information, working alongside information and communication programmes undertaken at the corporate level.

### **Compliance Costs to Business**

39. To the extent that the proposal would extend the current HSE Act obligations of business to certain individuals this may lead to increased costs to businesses. The extent of these costs are not clear, however officials consider they are not likely to be significant because they are only likely to require marginal changes (if any) to preventative measures given the current duties under the HSE Act on employers.

### **Options for Resolving the Gaps Created by the Amendment to Section 16**

#### *Option One*

40. The current section 16 could be redrafted to take account of unintended consequences such as those described in this paper. The concern with this option is the likelihood of new gaps appearing due to the changing nature of the work environment and work relationships. The outcome may be a redrafted amendment that has its own unintended consequences.
41. This option would be acceptable to the farmers and recreational groups who initiated the amendment to section 16.

#### *Option Two*

42. An option to address the gaps created is a return to the previous section 16 as drafted with no exceptions included in the HSE Act, and OSH would administer the wider coverage by administrative policy. The gaps created by the amendment to section 16 would be resolved.
43. However this would not resolve the concerns of the farmers or recreational groups.

#### *Option Three*

44. A third option to address the gaps would be to refocus section 16 on a hazard-based liability and include in that section an exclusion for rural landowners and recreational users of rural land. The Social Services Select Committee attempted to achieve this option during their deliberations on the amendment. Several possible exclusions were drafted at the time. This was the preferred solution of the Labour Party members on the Social Services Select Committee.
45. Including exceptions risks excluding those who ought to be covered by the HSE Act, although the potential gaps would be narrower and could be interpreted by a Court with the intent of the HSE Act in mind.

46. This option is likely to be acceptable to farmers and recreational groups, if it addresses the issues placed before the Government in 1995, while closing the gaps identified in this paper. This option would require resources such as information and communication strategies for farmer and recreational groups, on changes to section 16.

#### *Option Four*

47. The "place of work" definition in section 2 could be amended to exclude rural landowners and recreational users from the HSE Act and return to the previous section 16. This option is similar to option two.
48. An exclusion in the definition section of the HSE Act (section 2) will apply to the whole of the Act. This is in contrast to option 2 where the exclusion will apply only to section 16. A possible consequence of this is the exclusion may be read wider than intended and create unforeseen gaps. This option is likely to be acceptable to farmers and recreational groups, if a comprehensive information and communication strategy is undertaken.

#### *Option Five*

49. Section 16 could be completely redrafted with specific work places described. This would be a return to pre-HSE Act prescriptive legislation where workplaces and hazards specific to that work place were described.
50. The prescriptive nature of this option would not sit easily with the enabling framework of the HSE Act. It would be necessary to describe not only types of work places but also the kinds of work that occurred in the workplace. This is again open to gaps being created, as was recognised when the policy for the HSE Act was being formulated.
51. This would be an acceptable option for farmers, as the reach of the HSE Act would be returned to pre-HSE Act legislation. The principal of "comprehensive coverage of all work situations" would not be given effect and potential for gaps under this option are high.

#### *Option Six*

52. Section 16 could be completely redrafted and split into two sections. The sections would address the duties of a person in control of a place of work but deal with workplace safety and public safety in separate sections.
53. The sections would capture the duties of a person in control of a place of work towards;
- a) people at work in the place of work, including workers other than their own employees or contractors; and
  - b) people not at work in the place of work, and people in the vicinity of the place of work.

54. The disadvantage of this option is differentiating between when a person is and is not at work at any time while in the place of work. Further definitions surrounding reasons for being in a workplace may be required to ensure the farmers and recreational users of rural land concerns are addressed, and to clarify when a person is "at work" and not "at work".
55. This option may create unintended gaps in the HSE Act if prescriptive definitions surrounding the "at work" or not "at work" issue and the mechanism used to account for the concerns of farmers and recreational users of rural land are necessary to achieve clarity. It is likely to address the concerns of farmers and recreational groups, and may provide a clearer path for excluding them from the HSE Act.

#### *Option Seven*

56. Do nothing.
57. Section 16 currently leaves workers and some members of the public unprotected by the HSE Act as discussed in this paper.

#### **Conclusion**

58. This paper discusses the unintended consequences of the 1998 amendment to section 16. The effect of the amendment has been that some workers and members of the public are no longer covered under the HSE Act.
59. It is clear that the problems created by the amendment to section 16 need to be addressed by legislative change. This paper identifies seven options. There is a range of possible changes from minimal change as outlined in option 1, through to a complete rethink of the intention of section 16 (considering the original intent along with the amendment's intent) in option 6.
60. Minimal change as suggested in option 1 will not achieve clear closing of the gaps that have been created, and may create its own gaps that will require further amendment later.
61. Option 2, returning to the previous section 16 will not maintain the clarity that has been achieved for farmers and recreational groups by the amendment. The risk is that they may return to pre-1998 amendment behaviours, resulting in farmers closing their gates to recreational users of rural land. This option will not achieve the aim of closing the gaps and maintaining the confidence of farmers and recreational groups.
62. Option 3 is a good balance between the first two options. While closing the gaps created by the amendment, this option ensures the concerns of the farmers and recreational groups are legislated for. It is likely that farm and recreational groups will accept this change but require significant support in informing members of their respective groups.

63. Option 4 is another mechanism for balancing the gaps created and concerns of the farmers and recreational groups. It differs from option 3 in that it will apply to the whole HSE Act and therefore may be interpreted more widely than anticipated. It is likely to address the concerns of farmers and recreational groups but may create its own unknown consequences.
64. Options 5 and 6 will require complete restructuring of section 16 by returning to first principles and including in the analysis the concerns of farmers and recreational groups. This will require breaking section 16 down into its essential elements, reformatting and expanding it and using a different criterion for drafting. This could be successful in achieving the aim of closing gaps and but both these options result in new sections with untried interpretation and may take time to gain the confidence of farmers and recreational groups.
65. Finally, option 7 will not address the gaps that have been created by the amendment to section 16.
66. In conclusion, option 3 is the most likely to achieve the aim of closing the gaps created by the amendment to section 16 and maintaining the support and confidence of the farmers and recreational groups.

### **Recommendations**

I recommend that you:

- a) **note** that the amendment to section 16 of the HSE Act has created unintended gaps in the Act for some workers and some members of the public.
- b) **agree** to amend section 16 of the HSE Act.
- c) **agree** to refocus section 16 on a hazard based liability and include in that section an exclusion for rural landowners and recreational users of rural land. Supported by a comprehensive information and communication strategy for farmers and recreational groups (option 3 paragraphs 44 - 46).
- d) **note** that we would welcome an opportunity to discuss this issue with you.

RJM Hill  
for Secretary of Labour

**Background to the Amendment to Section 16 in 1998**

1. Prior to the enactment of the HSE Act, employee and workplace safety was covered in a myriad of different pieces of legislation. Key pieces of legislation also protected legitimate visitors or members of the public who happened to be on site or in the vicinity of various workplaces.<sup>12</sup>
2. Legislation covering the farming sector related to general responsibilities for workers and the safety of some machinery. Visitor safety was not covered specifically, although the Occupiers' Liability Act 1962 imposed a general duty of care for visitors on occupiers of premises including land.<sup>13</sup> This Act is still in force, although the introduction of no-fault accident compensation has lessened its impact.
3. The HSE Act replaced the mix of industrial health and safety legislation with performance-based requirements covering all workplaces, including farms. In particular, section 16 (prior to the 1998 amendment) imposed a duty on every '...owner, lessee, sublessee and person in possession of a place of work to take all practicable steps to ensure that people in the place of work, and people in the vicinity of the place of work, are not harmed by any hazard that is or arises in the place of work.'
4. This raised for farmers and other landowners concerns about their liability for visitors, including recreational visitors such as hunters, trampers and fishermen under section 16 of the Act. Two prosecutions of farmers under the Act (the so-called Bendigo and Berryman cases) exacerbated concern. OSH published administrative guidelines clarifying that farmers would not be liable for non-work related injuries to recreational users, however, these did not provide farmers with sufficient assurance.
5. In August 1995, Federated Farmers raised the issue in a submission to the Labour Select Committee Inquiry into the Administration of Occupational Health and

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<sup>12</sup> For example:

- a) The Construction Act 1959 imposed responsibilities on employers and employees for the safety of workplaces. Section 3 (2) specified inter alia that provisions '...relating to the safety of workmen in construction work shall apply also to the safety of persons lawfully in the vicinity of the work, whether or not they are employed in the work.' This Act followed a Royal Commission of Inquiry into a 1957 accident, in which the collapse of scaffolding around the DIC building in Wellington killed two pedestrians.
- b) Section 18 of The Factories and Commercial Premises Act 1981 imposed duties on occupiers to '...take all reasonable precautions for the safety and health of workers, and persons lawfully on the premises of the undertaking'.
- c) Clause 10 of the Quarries Regulations 1983 imposed a similar responsibility on quarry managers.

<sup>13</sup> The duty under the Occupiers' Liability Act 1962 '...is a duty to take such care as...reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there'.

Safety. Later that year, farmers and recreational groups brought their concerns to the then Minister of Labour, the Hon. Doug Kidd. It was argued that uncertainty about liabilities was leading farmers and other landowners to refuse access to recreational users. A working group was set up at the request of the Minister comprising representatives of Federated Farmers, New Zealand Sports Assembly, New Zealand Fish and Game Council, Adventure Tourism Council and the Federated Mountain Clubs.

6. The working group canvassed a range of options and agreed on the preferred option that '(t)he HSE Act should be amended to ensure that landowners have no duties towards people using their land for non-work related purposes.' Wide consultation followed and there was widespread support for the proposal. About 50 of the 200 respondents also sought continued liability of landowners for, for example, warning visitors of hazards.
7. The Report of the Labour Select Committee endorsed the proposal to address uncertainties over access to land for recreational purposes through amendment.<sup>14</sup>
8. The Hon. Doug Kidd tabled the Amendment Bill in Parliament on 17 July 1996 and it was referred to the Social Services Select Committee for consideration. The Select Committee received twenty written submissions on the Bill. The analysis of submissions showed:
  - seven supported the Bill as worded;
  - eight supported the Bill, and sought further amendments to resolve inconsistencies or uncertainties arising from the submission;
  - one submission supported the general thrust of the Bill, but sought modifications to ensure some responsibilities remained on landowners;
  - three submissions opposed the amendment to Section 16 because of its likely impact on the safety of visiting workers and other legitimate visitors to all workplaces; and
  - one submission did not address the amendment.
9. After hearing oral submissions, the Select Committee debated the Bill. It should be noted Ms Laila Harré was a member of this committee and took an active role in the debate. It was agreed that the amendment as tabled was broad in scope and would remove HSE Act cover for all visitors present for purposes unrelated to the work purpose from all work sites. This was not an acceptable outcome for the Committee.
10. The Select Committee sought to refine the amendment by limiting its scope to "rural land owners" and "recreational users". This did not meet with the approval of the then Minister of Labour, the Hon. Max Bradford, who argued that the amendment should apply to all work places across New Zealand not just "rural land owners".

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<sup>14</sup> Inquiry into the Administration of Occupational Safety and Health Policy

11. The Select Committee considered many options to clarify farmers' liabilities under the HSE Act.<sup>15</sup> These included:
- amend section 16 duties to 'people in the place of work who are there for some purpose connected with work activities of the person who owes the duty';<sup>16</sup>
  - amend the "place of work" definition to exclude recreational users and landowners;
  - amend section 16 by adding a subsection removing duties on a person who controls a place of work that is "open rural land" for a person who is there for enjoyment, exercise, leisure, recreation or sport and a person crossing the land to begin activity elsewhere for hire or reward. This required amendments to section 2 to include a definition of "open rural land";
  - amend section 16 to exclude a person who controls a place of work that is "open rural land" to owe any duty to a "recreational or casual user" harmed by an "inherent hazard" with corresponding definitions;
  - provide a defence for landowners against prosecution under section 16 for harm to recreational users (Ms Harré's suggestion); and
  - the burden of proof on the prosecution to show that under section 16 the defendant did not take all practicable steps to avoid harm to recreational users of land, the qualification to be restricted to section 16 (Ms Harré's suggestion).
12. The Select Committee had a tied vote and was unable to recommend that the Bill proceed. During deliberation the clauses and the Long Title were recommended to be struck out. The members voted the Bill be sent back to the House for debate. This meant that the original Amendment Bill was reprinted showing all the clauses struck out and was considered by the House with the Select Committee Report on the amendment.
13. The Select Committee unanimously struck out the clauses relating to section 16, which meant they were not retrievable. The Hon. Max Bradford lodged a Supplementary Order Paper (SOP) to amend the Bill (as it contained at that stage the short title and clause 4 relating to codes of practice) to be considered by the House in committee. The SOP was debated and voted on successfully in favour of the Government's view. The Amendment to Section 16 was passed.

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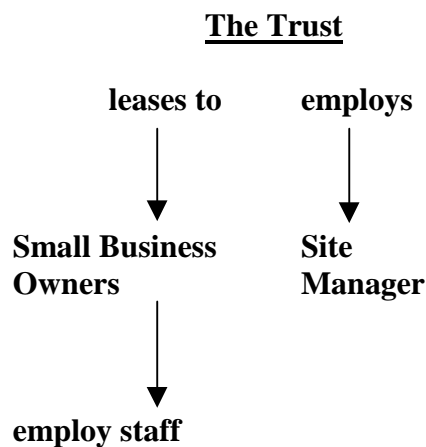
<sup>15</sup> Parliamentary Counsel drafted 15 main versions of possible amendments, drafted variations on all versions and discussed many possible drafting options. The final version enacted was numbered 15 E/4.

<sup>16</sup> Refer explanatory note of the Amendment Bill proposed by Doug Kidd.

**Retail Complex Example**

1. This is an actual example that occurred where a person in control of a place of work owed a duty prior to the amendment but no longer owes a duty under the amended section 16:

A Trust leases a retail complex from the Crown. In turn, the Trust leases retail space to several different small retail business owners, who employ people to work in their shops selling goods to the public. The Trust employs an onsite manager. The lease requires the Trust to maintain the retail complex. The relationships are therefore as follows:



The complex has an outside stairwell used for:

- emergency access and exit
- customer access to and from the retail outlets
- a place for employees of the retail outlets to get fresh air and have meal breaks

The stairwell is not maintained and the disrepair makes it dangerous to use. An employee of one of the retail outlets falls in the stairwell due to its disrepair. Who owes a duty of all practicable steps to that employee?

The Trust owes a duty to the shop owner under section 16(2)(b)(i);

(2) A person who controls a place of work ... must take all practicable steps to ensure that no hazard that is or arises in the place harms people - harms people -

(b) Who -

(i) Have paid the person (directly or indirectly) to be there or to undertake activities there

The duty is owed by the Trust to the shop owners because the shop owners have paid the Trust to be there.

The employer shop owner owes a duty to the employee under section 6:

(6) **Employers to ensure safety of employees** - Every employer shall take all practical steps to ensure the safety of employees while at work

However, there is no practicable step, in respect of the actual maintenance of the stairwell, that the shop owner could take to protect the employee. The shop owner has no control over the stairwell, it being the responsibility of the Trust. The shop owner may bring the state of the stairwell to the attention of the Trust and request repairs to be carried out, and/or the shop owner may advise the employee not to use the stairwell.

The Trust does not owe a duty to the employee under the amendment to section 16 because no category of relationship fits. There are no other applicable sections of the HSE Act.

2. As stated the range of relationships that operate in the work environment are diverse and complex. The above example illustrates a situation where an employee should have been owed a duty of all practicable steps to ensure a safe work place but was not due to the amendment to section 16. Prior to the amendment the Trust in the example would have been a person in control of the place of work who had a duty to ensure that;  
...people in the place of work ... are not harmed by any hazard that is or arises in the place of work.