

18 March 2026

Education and Workforce Committee  
Parliament Buildings  
Wellington

## Outdoor Recreation Sector

### Submission on the Health and Safety at Work Amendment Bill

Tēnā koutou Katie and Committee members,

1. Thank you for the opportunity to comment on the Health and Safety at Work Amendment Bill (*Bill*). We wish to be heard in support of our submission.

#### Who are we?

2. This submission is made by the Federated Mountain Clubs of New Zealand (*FMC*) and Aotearoa Climbing Access Trust (*ACAT*) on behalf of 15 organisations<sup>1</sup> involved in the outdoor recreation sector. Our organisations represent the bulk of New Zealand's outdoor recreation communities. Our communities represent the hundreds of thousands of New Zealanders who get into the outdoors to go hunting, fishing, tramping, or climbing, or who mountain bike, kayak, raft, paraglide or hang glide. For many, enjoying these activities is viewed as a Kiwi birthright, and a key part of what makes New Zealand a great place to live.
3. We are not commercial or labour organisations, unlike most organisations you will hear from regarding this Bill. We submit fundamentally because “work” legislation has begun to adversely affect people's time away from work.
4. Our submission follows earlier work by 12 of the above 15 organisations on the MBIE review of the workplace health and safety system. We also had extensive engagement with the Minister and officials on the issues following that work, and we are grateful to the Minister and many officials for their personal interest in working with us to address our concerns.
5. A copy of our original submission dated 31 October 2024 is **attached** to this submission as **Annexure 2**. It contains detailed issues analysis and drafting suggestions for interested Committee members. We refer to this submission where we think it continues to contain valuable solutions or commentary. Otherwise we make

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<sup>1</sup> Federated Mountain Clubs of New Zealand (*FMC*), Aotearoa Climbing Access Trust (*ACAT*), New Zealand Deerstalkers Association Inc (*NZDA*), New Zealand Game Animal Council (*GAC*), New Zealand Fish & Game Council (*NZFGC*), Mountain Bike New Zealand (*MTBNZ*), New Zealand Alpine Club (*NZAC*), New Zealand Canyoning Association (*NZCA*), New Zealand Speleological Society (*NZSS*), Cave Conservation and Access Trust (*CCAT*), New Zealand Hang Gliding and Paragliding Association (*NZHGPA*), Te Araroa Trust, Whitewater NZ (*WWNZ*), Packrafting Association of NZ (*PRANZ*), New Zealand Outdoor Instructors Association (*NZOIA*).

specific drafting changes where reading the Bill has helped evolve our thinking; these suggestions are in **Annexure 1**.

6. This submission has been prepared with considerable input from:
  - a. Allan Brent – Barrister and Solicitor, FMC Executive
  - b. Edwin Sheppard – Admitted Barrister and Solicitor of the High Court, ACAT General Manager (on parental leave)
  - c. John Palmer – Barrister, former NZAC President, former ACAT Chairperson
  - d. Andrew Turner, governance professional and experienced manager with long-standing commitment to outdoor recreation, access, and community development, ACAT Interim General Manager

## Summary

7. The recreation sector supports the intent of the Bill and welcomes the introduction of provisions recognising the unique context of recreational use of land, and recognition that these pose wide ranging issues fundamental to the New Zealand identity.
8. With a small number of targeted clarifications, the Bill has the potential to provide greater certainty for landowners while maintaining appropriate protections for workplace safety. We have done our best to offer specific suggestions for these clarifications where possible. In some areas, however, we simply identify the policy problem and the direction of a possible solution.
9. The underlying difficulty is that the Health and Safety at Work Act 2015 (*HSWA*) was designed to eliminate, so far as possible, risks in workplaces. Outdoor recreation is not work and often involves voluntary exposure to natural risks. Applying workplace safety frameworks to recreational environments has therefore produced unintended consequences that are now restricting access to land across New Zealand.
10. Our key recommendations are, in order of appearance in the HSWA:
  - a. To expand the exceptions in section 19(3) to cover conservation volunteering rather than just recreation volunteering.
  - b. To make small changes to sections 37(2A) and (2B) to improve their efficacy and cut down on potential for unified consequences. These provisions relate to recreation access to land, and are set out in **Annexure 1** with full technical analysis.
  - c. To make a small change to section 38 to the same ends. This proposal relates to recreational fixtures and fittings.
  - d. Finally, to use this Bill to amend the Health and Safety at Work (Adventure Activities) Regulations 2016 or section 36 to clarify liability issues for clubs. HSWA entanglement with club-based recreation, and particularly instruction,

has long had a chilling effect on volunteer mentoring and instruction, and has complicated many clubs' insurance arrangements.

## What are our issues?

11. At a high level, we consider that in relation to outdoor recreation, which has little or nothing to do with most work, the workplace health and safety system should achieve the following:
  - a. Recreational risks – landowners and managers should have no risk of liability for accidents associated with recreational visitors and activities on their land.
  - b. Natural hazards – landowners and managers should have no risk of liability in respect of recreational access to natural features and hazards on their land.
  - c. Access fees/conditions – the existence of reasonable access conditions on private land (including a fee) should not create any risk of liability under a and b above.
  - d. Volunteers – permitting voluntary work on their land should not create any liability risk for landowners and managers.
  - e. Ensure that landowners' and managers' duties (if any) to recreational visitors in respect of work occurring on their property are minimal, practical, and supported by clear guidance.
  - f. Club liability - the position is made unambiguous and principled, replacing the current ambiguous and unprincipled position.
12. For outdoor recreationists, the workplace health and safety regulatory system has performed poorly on these issues in the years since the enactment of the HSWA. At its core, this is because the HSWA aspires to manage workplace safety risks, whereas recreation is not work, and is often accepting of safety risks. Because people work everywhere sometimes, the concept of where and when a place is a "workplace" has become blurred. Workplace health and safety issues, then, have significantly encroached and impinged on recreation despite recreation having nothing to do with work. This has been a significant unintended consequence of the HSWA, one affecting something core to the New Zealand identity.
13. One key issue is that the 2015 legislation has created a chilling effect on landowners allowing recreational access to their land. There is now a widely perceived (and sometimes even actual) risk of liability for landowners and land managers who permit recreational access. Owners and managers have responded rationally and conservatively, by restricting or closing public access to their land. Common examples occur across the nation's farms, and forests, and much of our submission is devoted to these issues, but there are also urban issues as we detail below. The authorities' approach to the Whakaari/White Island tragedy of December 2019 further exacerbated the issues, as we detail below.

14. A second key issue is that WorkSafe New Zealand (*WorkSafe*) has issued a series of guidelines relating to clubs' liability under the HSWA that have shifted, and most often adopted unpractical and unprincipled positions.
15. These issues have now reached a point of placing the ability to engage in outdoor recreation at real, and needless, risk.
16. Our submission is solely concerned with these issues, and we make no comment on health and safety for workers in workplaces. In relation to these recreational issues, the outdoor recreation sector wholly supports the intent of the Bill, and offers suggested improvements.

## **What's our view on the Bill?**

### **Volunteering issues - Sections 19, 37, and guidance**

17. Our original submission contains suggestions for guidance on, and potential amendments to, section 19. Section 19 concerns the meaning of "worker" and "volunteer worker". Volunteering is a large part of recreation today, with people "giving back" into the activities they love by fixing huts, clearing tracks, trapping and so on. These definitions delineate a key boundary for the HSWA in our sector, but are unhelpfully blurred.
18. This could be assisted by adding the conservation volunteering carve-out to section 19(3) that we have suggested in our original submission. It could also be addressed through section 37 changes, which we discuss below.
19. Beyond this obvious carve-out, creating a better-defined line that is also fixed in legislation is not necessarily practical or desirable. As such, one might turn to WorkSafe guidance. But care will be required if this path is adopted. We comment in detail on guidance issues below.

### **Warnings from landowners - section 36**

20. Section 36 contains the Act's primary duty of care. The duty is attached to PCBUs. Section 36(1) deals with duties to workers. Section 36(2) contains a duty to "other persons" including recreationists.
21. Our original submission called for a clearly marked exclusion from section 36(2) in respect of recreational access to workplaces. This suggestion has not been adopted. We urge the Committee to revisit this omission. Almost everywhere might be a workplace at times - whether it is Takapuna Beach, your local park, Lambton Quay, the Kaimanawa bush, or the summit ice of Aoraki Mount Cook. Ambiguity in the law might affect liability in, and therefore practical access to, all these places at times. We urge you to consider that this is an issue for everyone, everywhere, all the time - and not simply recreationists.

22. We understand that a broad carve-out to the primary duty would be disproportionate if it was framed and understood as a mere “recreational” issue - we have spoken from this perspective because it is our only expertise, and regret any misunderstanding on that point.
23. We return to section 36 in our discussion of WorkSafe guidance below, and offer a concrete limited amendment proposal.

### **Strong support but room for clarification in relation to Landowner / manager PCBU duty issues - section 37**

24. Section 37 contains duties attaching to PCBUs who “manage or control” workplaces. Our original submission contained a number of suggestions aimed at providing greater clarity as to when and where “work” is considered to be occurring - a matter that is often unclear.
25. It is clear that substantial thought has gone into ensuring the Bill’s ‘Exception for recreational access’ addresses the concerns our organisations raised in our original submission, and once again we are thankful for this. Now having considered the Bill we support the addition of sections 37(2A) and 37(2B) but recommend small amendments to improve their efficacy and reduce unintended consequences. These are set out in **Annexure 1** along with specific rationale intended for a technical audience.
26. These issues can be subtle and difficult to grasp, so immediately below follows commentary to help Committee members approach the issues. We give examples and comment at a high level on four distinct dimensions of our proposals.
27. To give a common example of these issues, in many rural settings small-scale work may be taking place somewhere on a property at any given time, such as repairing a fence, maintaining infrastructure, or undertaking routine farm tasks. It is not entirely clear whether such activity would mean that the recreational exception no longer applies across the whole property, even where recreational users are not exposed to any risk arising from that work. These issues are also very common in plantation forests, which cover much of the country, and often have an ambiguous relationship with access closure powers in easements (despite clarity in the formal legal position<sup>2</sup>).
28. The issues are not limited to rural settings, and an urban example may be more relatable for many. Consider Auckland Grammar School, which is host to Mount Eden Quarry. “The Quarry” is arguably the birthplace of serious rock climbing in New Zealand, and has been an incubator for national talent in the sport in the heart of our largest city. It operated for over 50 years with a safety record no better or worse than one might expect for a very difficult rock climbing wall. But after 2015, the School closed the Quarry due to perceived HSWA risks. The students are no safer and climbers worse off. While we cannot know the School Board’s motivations, this illustrates how the HSWA framework can create strong incentives for landowners to

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<sup>2</sup> *First GHas v Gibbs* [2021] NZHC 3309 at [259].

restrict recreational access, even where doing so does not materially improve safety outcomes.

### *General language*

29. Below we propose amendments to sections 37(2A) and (2B) that would closely mirror the language and structure of the “farm” exemption in section 37(3). That exemption has been a great comfort to the rural community, and has neither been challenged or raised significant concerns.

### *Open Space*

30. Second, the language of “open space” in the proposed sections 37(2A) and (2B) warrants specific comment. Our view is that there are better alternatives to this language. We suggest that these words could simply be replaced with “land or water”. An alternative would be to define “open space”, although any such definition would likely resolve back to a more general concept such as “land or water”.
31. In wide discussion of such language, people have surfaced only issues such as the potential for confusion about whether the regulatory environment for things like playgrounds may become unclear. These concerns are red-herrings. Playground construction, for example, is already extensively regulated through the Building Act and associated Orders.
32. “Open space” language has some legal provenance, for example in relation to Queen Elizabeth II Covenants, but these are not always open to public access. However, the term may also be confusing because in plain terms only grassland - but not forests, scrub or river gorges - might commonly be described as “open space”.

### *Natural features*

33. Third, outdoor recreation involves encountering natural features and environmental hazards that are inherent to the landscape. We might think of cliffs, river gorges, or even air currents created by these features. The proposed changes to section 37 appear to address natural features issues indirectly by removing duties toward recreational users in most circumstances.
34. However, additional clarity confirming that landowners are not responsible for natural features of the landscape encountered during recreation is needed. These issues have become acute after WorkSafe, in the case of the Whakaari/White Island tragedy, chose to prosecute the island’s landowner. Tragedy though it was, this was an edge-case if there ever was one: that of injury on a privately-owned and highly-active volcano. The effect of prosecuting the landowner was that all landowners were forced to chase zero risk on any and all land - to conform to that edge case. At worst, this risks a park with a steep bank being treated like an active volcano. When landowners and managers faced that impossible task, inappropriate access outcomes predictably accelerated. WorkSafe’s Whakaari prosecution eventually collapsed,<sup>3</sup> in no small part

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<sup>3</sup> See *Whakaari Management Limited v Worksafe New Zealand* [2025] NZHC 288, and ACAT commentary [here](#) and [here](#).

due to ACAT's submissions as intervener, but the institutional and cultural momentum has arguably remained.

35. What is needed is a clear exclusion for landowners and managers who permit recreational or conservation access in respect of risks associated with natural features / hazards on their land that are unrelated to their business or undertaking.
36. We have made clear suggestions for accommodating this issue in our original submission, along with potential accommodations for true edge cases like Whakaari. We have also made very specific recommendations to amend proposed sections 37(2A) and (2B) to deal with these issues.

#### *Small Access Charges*

37. Fourth, the recreation sector is subject to considerable uncertainty around situations where landowners allow access but ask visitors to contribute toward the cost of providing that access. In many locations this takes the form of modest parking fees or small access charges. There is concern that such arrangements could potentially be interpreted as the landowner operating a recreational business, which might reintroduce HSWA duties. Clarifying that reasonable access fees or voluntary donations do not in themselves constitute operating a recreational activity business would provide helpful certainty and avoid discouraging landowners from managing access in practical ways.
38. This issue calls for a standalone provision within section 37 as we detail in our original submission.

#### **Small recreational fixtures and fittings, and section 38**

39. Another issue relates to recreation infrastructure that is installed or maintained by recreation groups rather than by the landowner or manager. Probably the most ubiquitous example nationwide is the duck shooting maimai beloved of so many. Other examples include fishing stands of other kinds, climbing anchors, mountain bike track features like timber jump ramps or bermed corners, and other structures associated with recreational use. There is some uncertainty about whether the existence of such fixtures could create duties for landowners under section 38 where those fixtures are not part of the landowner's own undertaking. Clarifying that landowners are not responsible under HSWA for recreation-related fixtures that they do not provide or control as part of their business or undertaking would recognise the collaborative nature of outdoor recreation management and avoid discouraging landowners from allowing recreational use.
40. While we have had limited time to consider a specific solution, we consider that section 38 could be amended, for example by adding a section 38(4) or adding a section 38(3)(b)(iii) or 38(3)(c) to the effect that the duty in section 38(1) does not apply in respect of recreation-related fixtures or fittings that are not part of the PCBU's business or undertaking.

## Club liability issues

41. Recreation often courts risk. People need to learn how to travel rough country, cross difficult rivers, deal with bad weather, handle firearms or ice tools, and fly paragliders etc. Much in the way government circles think of public, private and civil society spheres, so people learn these things in three basic ways. One is by doing them. Another newer way with some prominence today is by commercially-arranged courses. An older way that remains vital is to learn these skills by a path in the nature of an apprenticeship - by mentoring relationships and informal teaching. Where it is not a family affair, this often happens through clubs.
42. WorkSafe has raised and amplified club liability issues through a series of official guidance documents in recent years, with the latest in March 2025. This guidance is called [\*Adventure and outdoor recreation activities – managing the risks from natural hazards\*](#) (*Guidance*).
43. The Guidance created a new set of legal issues for clubs and associations in the outdoor recreation sector, purporting to bring many of them within the scope of the HSWA and its duties.
44. The position taken by WorkSafe is perverse and leads to absurd outcomes as we demonstrate below. If not corrected, it is likely to create a severe chilling effect on many sport and recreation organisations, shutting down invaluable volunteering activities due to undue and needless liability concerns.

### *The legal position pre-Guidance*

45. Before the Guidance, there was a clear distinction between ‘adventure activities’, which are defined in the [\*Health and Safety at Work \(Adventure Activities\) Regulations 2016\*](#) (*the Regulations*) and are the subject of HSWA duties, and other recreational activities, which are not covered by the Regulations and, it was generally understood, entirely outside the scope of HSWA.
46. That understanding was based on [Cl. 4 of the Regulations](#), which takes pains to comprehensively exclude activities provided by sport or recreation clubs or associations, schools, and tertiary education providers, from the definition of an ‘adventure activity’.
47. There are obvious policy reasons for these exclusions:
  - a. First, the activities in question, namely outdoor recreation trips and instruction courses, are generally not thought of as being ‘work’ at all – they are recreation.
  - b. Second, most outdoor recreation trips and courses are run by volunteers or otherwise on a non-commercial basis.
  - c. Third, bringing these activities within the scope of HSWA would be disproportionate to the resources of the clubs and other organisations

excluded by Cl. 4, which draws a line between commercial and non-commercial activities.

- d. Finally, fear of liability among non-profit organisations is likely to have severe negative effects on the health of the New Zealand sport and recreation sector.

#### *The Guidance muddied the waters*

48. Heedless of these policy considerations and the clear intent of the Cl 4 exclusions, WorkSafe's Guidance purports to create a new, non-statutory category of HSWA duty-holders, called "outdoor recreation activity providers", which hold extensive HSWA obligations.
49. In simple terms, the Guidance appears to invent a new "adventure activity" – it's called an "outdoor recreation activity". There are no regulations directed at this latter concept and it does not appear in (and therefore seems not to be regulated by) the HSWA. Nonetheless WorkSafe's Guidance states that any school, sport or recreation organisation that qualifies as a PCBU has HSWA obligations, and suggests these are similar to those of a commercial Adventure Activities Operator (excluding audit requirements).
50. We consider this interpretation must take its slender justification from section 36(2), which provides:

*A PCBU must 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.*

51. WorksSafe must take a view that "as part of" means "from every and any part of". Though this slender basis may be available, we say it is contrary to the intent of the HSWA and the Regulations, both of which provide numerous detailed exemptions for schools, clubs and volunteer-led activities. It leads to absurd outcomes as we detail below. As a result of its adoption by WorkSafe the Guidelines render most of the benefits of these regulated exemptions null, and impose risk-management standards that many nonprofit organisations cannot meet.
52. Our contentions - that Worksafe has invented and purported to regulate a non-statutory category - are borne out by many features of the Guidance. Specific features are set out in **Annexure 1**.
53. WorkSafe's Guidance, then, creates a pathway to liability for clubs and club activities that have nothing at all to do with work, for example if a trip or course participant in an entirely voluntary situation suffers an accident. It also raises other issues. To give just one concrete example, the [New Zealand Hang Gliding and Paragliding Association \(NZHGPA\)](#) needs volunteers to do the following:
  - a. National association officials with direct responsibility for operations, including the CEO and Board of Governors, down to club-level oversight by Club Presidents and Safety Officers at local foot-launched flying sites;

- b. Club sites officers responsible for site maintenance (launch clearing, windsocks, access tracks), landowner permission and agreements;
  - c. Providing instructing, club coaching and mentoring; and
  - d. Competition and event organisation, (meet directors and launch marshals).
54. In preparing this submission, NZHGPA noted that confusion over the respective responsibilities of recreational participants and PCBUs has created a frequently distorted perception of risk, whether warranted or not, associated with current “health and safety” requirements. This significantly constrains its ability, as a recreational organisation, to attract volunteers for many of the activities described above, while its insurance position remains very challenging. These issues have also complicated, and continue to complicate, access arrangements with landowners, forestry companies, and regional and local councils for flying sites. This is particularly evident in NZHGPA’s dealings with the Department of Conservation (*DOC*), which must also navigate these complex issues as a landowner and manager.
55. The [New Zealand Alpine Club \(NZAC\)](#) encounters similar concerns to NZHGPA throughout their volunteer network. While NZAC has a small number of paid staff, its operations are undertaken by volunteers. This includes instruction, trip leading and event organisation across mountaineering and rock climbing events. Learning from skilled experienced volunteers increases safety and provides an apprenticeship scaffold for learners. The perception/reality of liability risk from mixed interpretations of the HSWA and subsequent incorrect and changing guidance from WorkSafe has driven some perverse behaviours. Alongside difficulties in recruiting and retaining skilled volunteers, there has also been a reluctance to report accidents for fear of liability. This drives the opposite of the learning culture that NZAC is trying to grow.
56. Through the [New Zealand Fish and Game Council](#) we understand that similar issues affect many fishing and gun clubs.

*What does WorkSafe want to do to fix its Guidance?*

57. WorkSafe’s 2025 Guidance has created alarm within the outdoor recreation community and is likely to produce a significant chilling effect on outdoor instruction courses and trips if not rectified. WorkSafe will say it is working to address these issues now, but as we detail below it is clinging to impractical and unprincipled positions that will continue these issues.
58. That alarm had been exacerbated given Worksafe’s long history of issuing guidance in this area and changing its position. It was wrong in its 2017 guidance, reached a correct position in 2019 guidance, then issued conflicting updated guidance in the wake of the Whakaari/White Island tragedy that year. It has been incorrect since, in various ways. In the course of engaging with officials on the Bill, we had hoped that these issues would be dealt with in the Bill but they have not been - perhaps in the hope that guidance issues might finally be corrected.

59. ACAT and FMC have been grateful to be invited into Worksafe's latest guidance revision process, but regret that we have been given limited time and real scope to engage. Worksafe has recently purported to "finalise" guidance called *Health and safety duties for recreational clubs (the Clubs guidance)*. The Club Guidance deals with similar subject matter to the earlier Guidance, and similarly wrong. Our suggestions to pause pending the Bill were not welcomed. We implore the Committee to obtain a copy of the Clubs Guidance. While there is much to like, it will remain challenging and unrealistic for many clubs on club/PCBU issues.
60. The Clubs Guidance brings forth the full absurdity of WorkSafe's legal position. It states that a tramping club that "employs a cleaner to clean its clubrooms" has health and safety duties "for the activities of its club members who are involved in running recreational activities for the club". The implications for this club would be massive; it now holds an unrelated statutory duty to ensure the health and safety of its members while on club trips or courses. An accident would bring the threat of investigation and potential prosecution. The compliance burden, for a small, volunteer-led organisation with a single "cleaner", would be unmanageable. By contrast, a similar club that does not employ a cleaner has no HSWA duties, as it does not meet the definition of a PCBU.
61. This is nonsensical and a patently absurd outcome. And it does not just concern outdoor recreation organisations; any sport club or association, such as a rugby or netball club that employs a cleaner or administrator, would be subject to the same nonsense legal test in relation to injuries from tackles or sprained ankles.

*How would we fix Worksafe's Guidance?*

62. WorkSafe is drawing the line between activities that are subject to HSWA duties, and those excluded, in the wrong place. Specifically, it treats the definition of PCBU as a gateway to all HSWA duties and potential liability for all activities run by a club or other nonprofit, regardless of whether they bear any relationship to the work of the employed person(s).
63. The absurdity of WorkSafe's own example set out above, shows that the line must be drawn in a more sensible and principled place. It simply does not make sense that employing staff in roles unrelated to the provision of trips or instruction courses should give organisations a higher level of responsibility for the health and safety of participants than they would otherwise have.
64. While WorkSafe's current position is absurd, there are important policy questions at stake in this matter, and it deserves in-depth consideration. Of course it is ridiculous that employing a cleaner imports all HSWA duties, whether practically related or not. But what about an administrator with limited involvement in instruction co-ordination? In lieu of the lost opportunity for a more comprehensive policy process in this area, we have proposed more limited solutions that can conceivably be achieved within the scope of the current Bill.

65. First, our view is that at the very least future Ministers ought to directly supervise WorkSafe's development of recreation-related guidelines in consultation with the Ministers for Sport and Conservation. Given the prominent and understandable use of guidance, but its procedural informality relative to regulations or Orders in Council, the Act itself or associated regulations might usefully erect guardrails around guideline development more generally - perhaps akin to direction in the Overseas Investment Act.
66. Second, much simpler and more decisive action is available to this Committee and Parliament, which should now take the steps to clarify the issues, for the benefit of tens of thousands of New Zealanders who learn about the outdoors through clubs.
67. We propose very simple amendments to either the Adventure Activities Regulations via this Bill, or to section 36 itself. This proposal is set out in **Annexure 1** along with specific rationale.

Ngā mihi



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on behalf of the following 15 organisations involved in the outdoor recreation sector:

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

## ANNEXURE 1 - SPECIFIC DRAFTING CHANGES AND GUIDANCE ISSUES

### *New section 37(2A)*

68. We recommend that **new section 37(2A)** should read:

(2A) Subsection (2B) applies if—

(a) the workplace includes  , or is adjacent to, land or water, open space—that can be used for recreational purposes (including the purpose of crossing the land to reach other land to be used for recreational purposes); and

(b) 1 or more persons lawfully enter and use the open space for recreational purposes, including by being expressly or impliedly permitted by the PCBU to do so.

69. Per the definition in s 20 of the Act, the nature and extent of ‘a workplace’ is highly context dependent. It does not necessarily refer to the entire legal parcel of land owned by a landowner, who may only carry out their business or undertaking on a small section of their land. It would not be sensible to define a large package of undeveloped land as a ‘workplace’ merely because work occurs in one small corner of it; and the Act does not require this.

70. Rather, the wording of s 20 provides a series of questions for a person asking “is this place a workplace?” First, is work being carried out in the place? Note this question imports a temporal component – it is a workplace if work is being carried out there at that time.

71. Second, is work customarily carried out in the place? This question introduces a test of frequency, as the word ‘customarily’ means “in a way which follows customs or usual practices”. As such, a place where work had only occurred once would not qualify as a workplace, except at the time that the work actually occurred.

72. Third, is it a place where a worker goes, or is it likely to be, while at work? Again, the answer is highly dependent on the nature of the place and of the work.

73. As such, the extent of a workplace (both geographically and temporally) is a question of fact which must be assessed by each PCBU, and by WorkSafe and the Courts in the case of an accident, in its own context.

74. This distinction between a property and a workplace is often overlooked. There is a common misconception among landowners, and even in WorkSafe guidance documents, that if work takes place on some part of their property, the entire property is automatically a ‘workplace’. This is inaccurate and unhelpful, as it means that landowners often assume they could be liable for activities occurring in the far reaches of their property, far from where work is taking place, and consequently shut down recreational access unnecessarily.

75. The current wording of the Bill unfortunately feeds into this misconception, and further, could introduce inconsistencies in the Act's own definition of workplace. This is because the phrase "workplace includes open space" implies or is likely to be read as implying that all open space land within the same parcel of land as a workplace, is legally part of the workplace. That is not correct.
76. A pertinent example of where this could be an issue is the DOC-administered estate of public conservation land (PCL). Clearly, some work does take place on PCL, most commonly around DOC huts and tracks. This does not mean that the enormous DOC estate should be regarded as a workplace at all times; it would be ridiculous to suggest that the remote ranges of Fiordland are a workplace, other than when there is actually a DOC officer undertaking work there.
77. The Bill must be careful to avoid inadvertently capturing irrelevant places in the definition of workplace, or creating additional ambiguity.
78. Adding the term "or is adjacent to" clarifies that the 'Exception for recreational access' is intended to apply to all open space that can be used for recreational purposes, including:
  - a. Places that are part of a workplace, because work occurs there on occasion; and
  - b. Places that are part of the same property as a PCBU's workplace, but is not itself part of the workplace because work rarely or never takes place there.

*New section 37(2B)*

79. We consider that the proposed s 37(2B) would better achieve its intended purpose via some small but significant tweaks to the wording, which would ensure it provides greater clarity and certainty for landowners without unduly restricting the scope of liability. We propose three small amendments.
80. **First**, we recommend adding the words "and to the extent that" after "unless", such that the **body** of section 37(2B) reads:

(2B) The duty owed by the PCBU under subsection (1) does not apply in relation to a person referred to **in subsection (2A)(b)**, unless and to the extent that—

[Emphasis added]

81. A landowner may wear several hats, and it is important to provide certainty that their actions while in one role do not unduly create liability risks while in another.
82. This is a particular concern for landowners who are also part of the outdoor recreation community. For example, consider the owner of a small forestry or farm block which contains rock climbing opportunities. The owner's primary business concerns forestry

or farming, however, they may decide to set up a small side business guiding or instructing rock climbers as paying clients. Thirdly, as a landowner they permit access to recreational climbers. Fourthly, as a keen rock climber themselves, they get involved with developing new climbing routes on the land (as part of the recreational activity).

83. We have been approached by landowners in exactly the circumstances outlined above, who are concerned that their position as a climbing guide could mean that HSWA duties could be read into their roles as landowner and recreationist. These circumstances are not uncommon.
84. There are countless examples of landowners who are keen hunters, fishers, trampers, or cavers, who are deeply involved in the outdoor recreation community and also run tours, guided activities or instruction courses on their property.
85. Our recommended addition is a small change, but it would provide reassurance to the sort of landowners outlined above that they will be covered by the 'exception for recreational access' in a similar manner to other landowners.
86. **Secondly**, we recommend replacing the words "connected to" with "part of", such that **section 37(2B)(a)** reads;
  - (a) the recreational use of the land is part of the PCBU's business or undertaking; or

[Emphasis added]]
87. We consider the term "is connected to" to be unnecessarily broad and vague in this context, and if not corrected, this wording is likely to cause undue uncertainty and liability concerns for a certain category of landowners.
88. The category in question is the set of landowners who generously provide access to their land for recreationists, and who also, separately, provide regulated "adventure activities" on their land for paying clients. The former group (recreationists) have nothing to do with the landowner's business or undertaking, and should fall outside the scope of the Act. The latter group (adventure activities clients) are part of the landowner's business or undertaking and the landowner's work in this regard is regulated by the Health and Safety at Work (Adventure Activities) Regulations 2016.
89. Our concern is that the term "is connected to" unnecessarily blurs the distinction between these two groups. One can easily imagine a situation in which recreation is 'connected to' a landowner's business or undertaking in some broad sense, but where the 'Exception for recreational access' should nonetheless apply.
90. For example, a landowner may find that they own a piece of land which contains a high-quality rock climbing area ("crag"). The landowner permits access to climbers and the crag's popularity grows until dozens of climbers are visiting on each sunny

weekend. Seeing an opportunity, the landowner establishes a campground onsite to provide accommodation options for visiting climbers.

91. The campground business is clearly 'connected to' the rock-climbing activities, however, this does not mean the landowner should be responsible for risks arising from the recreational activities themselves. Rather, the correct position is that the landowner should be responsible only for risks associated with the campground, and the visiting climbers should remain responsible for managing the risks associated with climbing (which is clearly not 'work').
92. In short, 'connected to' is too vague and unspecific a term to meaningfully define or limit duties under the Act. We note that the term "is connected to" does not appear elsewhere in the Act (and as such, it is likely to create uncertainty as to its scope).
93. By contrast, the term "part of" appears 55 times in the Act, including numerous usages of the term "part of the PCBU's business or undertaking" or equivalent phrases. For example, the primary duty of care in s 36(2) states that:

A PCBU must 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.

[Emphasis added]

94. This and other sections use the term 'part of' to circumscribe the activities and circumstances that are relevant to duties under the Act, in a focussed and precise manner. There is no reason to take a different approach in the proposed s 37(2A)(a).
95. **Third and finally**, we recommend replacing "work connected to the PCBU's business or undertaking is being carried out" with "work is being carried out as part of the PCBU's business or undertaking", such that **section 37(2B)(b)** reads:

(b) other work is being carried out as part of the PCBU's business or undertaking at the time in the open space near where the entry and use are taking place.

[Emphasis added]

96. The same rationale applies for our proposed s 37(2B)(a).

#### *Guidance issues*

97. As set out in the body of this Submission, Worksafe's Natural Hazards Guidance appears to invent a new "adventure activity" – it's called an "outdoor recreation activity". This is non-statutory and contrary to the intent of the HSWA. Specific features of the Guidance establishing this category follow.
98. The very name is "*Adventure and outdoor recreation activities – managing the risks from natural hazards*" (emphasis added). The subtitle is "*Guidance For Adventure*

*Activity Operators and Outdoor Recreation Activity Providers*" (emphasis added). These terms are used in the same breath throughout the Guidelines, which purport to apply to the two categories equally in most respects.

99. At page 3, the Guidance advances WorkSafe's position that outdoor recreation activity providers are regulated by HSWA. At pages 3 and 6 one finds:

*"Other PCBUs who provide similar outdoor recreation activities (providers) also have duties or obligations to manage risks from natural hazards."*

*"Every person conducting a business or undertaking (PCBU) must manage adventure or outdoor recreation risks, including risks from natural hazards that are a key part of the activity they provide."*

100. This text suggests that while outdoor recreation activity providers are exempt from registration and audit requirements, they have similar overall obligations to manage natural hazard risks.

101. Also at page 6:

*"These guidelines are for any PCBU who:*

*– is registered as an adventure activity operator*

*– runs similar outdoor recreation activities in areas with natural hazards. They include PCBUs who do not need WorkSafe registration as an adventure activity operator but have duties or obligations under the Health and Safety at Work Act 2015 (HSWA). These include a range of tourism and recreation activity providers such as schools, sports and recreation clubs, and tertiary education providers.*

[Emphasis added]

102. The definition of PCBU in HSWA is wide, for example it would capture a recreation club that employs a paid manager or administrator, even if its instructors and trip leaders are all volunteers. Exacerbating the issue is that the duties set out in the 'All PCBUs' sections throughout the guidance are extensive and detailed, clearly using the Adventure Activities Regulations as the starting point and then applying these stringent risk-management criteria to the newly created category of outdoor recreation activities providers.

#### *Our proposed amendment*

103. We recommend, at a minimum, adding a new section to the Bill that provides an amendment to the Adventure Activities Regulations, to the effect that the activities set out in Cl 4(3)-(5) of the Regulations are exempt from the duty in s 36(2) of the Act, where they are provided by a volunteer or volunteer worker. This amendment could also be housed in section 36 itself.

104. Creating a clear exclusion for activities provided by volunteers is a practical and relatively simple fix that will resolve most of the situations that sport and recreation clubs are concerned about. It draws the line around HSWA obligations in a more sensible location than the present reliance on the PCBU definition, and will thereby remove the most absurd outcomes of the current HSWA regime (as it is interpreted by WorkSafe).
105. In practice, outdoor recreation trips and courses, and other sports activities, can be run by three categories of persons; employees, contractors, or volunteers.
106. Where instruction is provided by a club's own employees, that must necessarily be pursuant to the organisation's own safety management plans and processes. In these cases it may be appropriate for HSWA duties to apply in respect of keeping participants safe.
107. Where instruction is provided by an external contractor, that contractor will be regulated and audited under the Regulations and must have a Safety Management Plan in place for the activity. Although there is a potential issue of overlapping duties in this case if the club is a PCBU, which our proposed solution does not address, this is a smaller category of cases and it seems reasonable for the club to largely rely on the contractor's safety systems.
108. However, most instruction courses and trips are run by volunteers, even within organisations that technically qualify as PCBUs. New Zealand Alpine Club basic snowcraft instruction courses are examples. These cases would be addressed by our proposed amendments.
109. It is intuitively correct that sport and recreational activities run on a volunteer-led basis should sit outside HSWA. This intuition rests on strong policy grounds:
  - a. Volunteer-led sport and recreation activities are not generally thought of by members of the public as being 'work' at all – they are sport and recreation.
  - b. The CI 4(3)-(5) exclusions from regulatory requirements are worth little if the organisations in question end up being investigated on a similar footing to a commercial adventure activity operator (AAO) in the case of an accident. Arguably, an 'outdoor recreation activities provider' would be at higher risk of being found in breach of HSWA duties than an AAO. AAOs are regulated and audited, with stringent requirements for their safety management systems. If an accident occurs, they can rely on their paper trail of systems to show that they did everything reasonably practicable to ensure the safety of their clients. Most clubs have no such safety net.
  - c. Fear of liability and an unmanageable compliance burden for nonprofit organisations is likely to have severe negative effects on the health of our sport and recreation sector, and this will create poorer safety outcomes overall as people head into the outdoors without the requisite knowledge to stay safe. There is already a lack of outdoor recreation skills training available

to New Zealanders and a high demand for experienced volunteers within the sector. Imposing undue liability concerns on clubs in respect of volunteer labour would further reduce opportunities for Kiwis to access structured instruction and trips led by experienced club members.

- d. Where activities are provided by volunteers, organisations do not have a sufficient level of control over what is happening on the ground to be satisfied that they could satisfy HSWA-level obligations. Volunteers simply cannot meet professional standards in most cases, and commercial, for-profit organisations that qualify as adventure activity operators should be held to higher safety standards than cash-strapped nonprofit organisations relying on volunteer effort.

110. Our proposed exclusion is relatively narrow and has minimal potential for abuse. This is because volunteers are a limited and precious resource for nonprofits. Most commercial organisations could not restructure their core operations to be carried out by “volunteers” so as to avoid HSWA duties. Above a certain (low) threshold, paid staff are always required. This kind of restructure may also be of interest to the Inland Revenue in that it may constitute an evasive tax position.

**ANNEXURE 2 - ORIGINAL OUTDOOR SECTOR SUBMISSION**

## Adverse effect of HSWA on recreation

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

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

### About the submitters

This submission is made on behalf of:

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

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

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

### Authors

John Palmer – Barrister, former NZAC President, former ACAT Chairperson

Edwin Sheppard – Admitted Barrister and Solicitor of the High Court, ACAT General Manager

Allan Brent – Barrister and Solicitor, FMC Vice President

### Foreword

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

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

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

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

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

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

### **Recommendations**

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

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

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

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

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

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

### **Structure of this submission**

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

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

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

## Signatures

### For Aotearoa Climbing Access Trust:

Name:	Position:	Signature:
Edwin Sheppard	General Manager	

### For Federated Mountain Clubs of New Zealand:

Name:	Position:	Signature:
Megan Dimozantos	President	

### For New Zealand Deerstalkers Association Inc:

Name:	Position:	Signature:
Gwyn Thurlow	CEO	

### For New Zealand Game Animal Council:

Name:	Position:	Signature:
Tim Gale	General Manager	

### For New Zealand Fish & Game Council:

Name:	Position:	Signature:
Corina Jordan	Chief Executive	

### For Mountain Bike New Zealand:

Name:	Position:	Signature:
Ryan Hunt	President	

### For New Zealand Alpine Club:

Name:	Position:	Signature:
Karen Leacock	General Manager	

### For New Zealand Canyoning Association:

Name:	Position:	Signature:
Daniel Clearwater	President	

**For New Zealand Speleological Society:**

Name:

Position:

Signature:

Kip Mandeno

President



**For Cave Conservation and Access Trust:**

Name:

Position:

Signature:

Martin Grinsted

Chairperson



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

Name:

Position:

Signature:

Peter Grieve

Landscape Officer



**For Te Araroa Trust:**

Name:

Position:

Signature:

Matt Claridge

Executive Director



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

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

<sup>1</sup> WorkSafe (Mahi Haumarua Aotearoa), *Policy Clarification: Recreational access and the Health and Safety at Work Act (2015)*, May 2019, at p1.

Provision	Issue	Comments	Possible solution(s)
<a href="#">s 37(1)</a>	WorkSafe's 2019 guidance states that: <sup>2</sup> "HSWA doesn't cover ... injuries that happen as a result of doing a recreational activity." We consider this entirely appropriate and that this should be explicit in s 37 itself.	<p>Sometimes people need to use or cross land that's a workplace to do recreational or conservation activities. In such cases, the landowner or manager should have no responsibility or risk of liability in respect of risks associated with these activities.</p> <p>This was the approach taken in WorkSafe's 2019 guidance, which states:<sup>3</sup></p> <p><i>a PCBU whose land is being accessed for recreation is:</i></p> <ul style="list-style-type: none"> <li>– <i>only responsible for risks arising from the work or workplace, and is</i></li> <li>– <i>not responsible for the risks associated with the recreational activities.</i></li> </ul> <p>However, this is not explicit in s 37 itself. The District Court's judgment in <i>WorkSafe New Zealand v Whakaari Management Ltd</i><sup>4</sup> (currently under appeal) further clouds this issue, but arguably represents an edge case.</p>	<p>Create a clear exclusion in the legislation for landowners and managers in respect of risks associated with recreation on their land, to ensure it explicitly aligns with the WorkSafe's 2019 guidance.</p> <p>For example, s 37(2) could be expanded to state that:</p> <p><i>Despite subsection (1), a PCBU who manages or controls a workplace does not owe a duty under that subsection:</i></p> <ul style="list-style-type: none"> <li>a) <i>To any person who is at the workplace for an unlawful purpose; or</i></li> <li>b) <i>For any risks associated with recreational or conservation activities on their land, unless the PCBU's business or undertaking also provides the activity.</i></li> </ul>
<a href="#">s 37(1)</a>	The current legislation may impose obligations on	WorkSafe's 2019 guidance states that landowners are <i>not</i> responsible for risks associated with natural features on their land. <sup>5</sup>	Create a clear exclusion for landowners and managers who permit recreational or

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

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

<sup>6</sup> WorkSafe (Mahi Haumarua Aotearoa), *Adventure Activities - Managing the risks from natural hazards: Guidance for Adventure Activity Operators*, Consultation draft June 2024, at p12.

<sup>7</sup> [2023] NZDC 23224, at [41].

Provision	Issue	Comments	Possible solution(s)
		<p>For the avoidance of doubt, the submitters oppose all forms of ‘exclusive capture’. Access fees or conditions may only be imposed on private land in cases where they are not contrary to any public access rights.</p> <p><b>Potential special category of landowners</b></p> <p>One of the unusual aspects of the <i>Whakaari</i> case was that the landowner, WML, was a lucrative business that was established for the sole purpose of profiting from managing tourism on the island. WML is not representative of 99% of landowners and managers, most of which have nothing to do with recreation and permit recreational access for free or for a minimal access fee, and which we consider should have no risk of liability for accidents associated with recreation on their land.</p> <p>As an unusual ‘edge case’, WML’s scenario should not provide the basis for broader development in the law around recreation-related accidents.</p> <p>It is worth considering the creation of a special category of landowning and managing PCBUs similar to WML, which would hold some s 37 duties in respect of adventure activities on their property by virtue of the fact that their business is wholly or primarily to profit from regulated adventure activities on their land.</p>	<p>37 duties in respect of the activities.</p>
<p><a href="#">s 37(3)</a></p>	<p>The carve out for farming workplaces appropriately balances flexibility and certainty. It should be retained and extended to apply to other land types where recreational access is likely.</p>	<p>We consider the exclusions in s 37(3) are an effective and appropriate measure to provide certainty around the extent of landowners’ workplace-related obligations on farms. This is helpful for recreational access on farms.</p> <p>There is no reason in principle that exclusions of this nature should be limited to farms. Extending similar exclusions to other land types would provide a sensible limitation on landowner duties and support recreational access.</p>	<p>Ensure that any replacement or amended legislation retains the existing exclusions.</p> <p>Extend the exclusions in s 37(3) to a wider range of land types where recreation is likely to occur, including at a minimum:</p> <ul style="list-style-type: none"> <li>• Public conservation land</li> <li>• Reserves</li> <li>• Whenua Māori</li> </ul>

Provision	Issue	Comments	Possible solution(s)
			<ul style="list-style-type: none"> <li>• Forestry blocks</li> <li>• School grounds</li> </ul>
<a href="#">Section 38</a>	Landowners/managers should not have duties in respect of recreation-related fixtures or fittings on their land that are unrelated to their business or undertaking. The current legislation does not provide a clear exclusion for this.	<p>The recreational community often maintains fixtures or fittings, including on farms, forestry land or other private property, reserves, and public conservation land. Common examples include mai-mais for duck shooting, structures on mountain-bike trails, motorcross jumps, and fixed anchors used by rock climbers.</p> <p>The recreational community takes responsibility for, and does not want landowners to have responsibility for, such fixtures and fittings.</p>	Create an explicit exclusion for recreation-related fixtures and fittings that are not part of the landowner/manager's business or undertaking.
<i><a href="#">Health and Safety at Work (Adventure Regulations) 2016</a></i>			
<a href="#">Cl 4</a>	The definition of "adventure activity" may capture informal clubs or recreation-related groupings	<p>Generally the "adventure activity" definition is working well, appropriately balancing flexibility and certainty.</p> <p>One small area of ambiguity is the carve out in subs (3). Increasingly, "recreation" that might otherwise fall within the "club" carve-out can be undertaken in unincorporated "clubs" or even less formal groupings of as little as two individuals. Such groups might involve people 'teaching others how' to do things and require some payment to cover shared costs like fuel, accommodation, food, and maybe even a 'koha' to the teacher. These are indistinguishable from activities "provided by clubs" but may fall outside the exclusion.</p>	Ensure that the "club" exclusion extends to informal clubs or recreation-related groupings.