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A New Paradigm for Occupational Health and Safety: Is It Time to Abandon Experience-Rating Once and for All?

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Abstract

This article argues that both the practical consequences and the theoretical underpinning of experience rating are misaligned with the values and goals of the occupational health and safety legislative framework in New Zealand. Some perverse practical consequences of experience rating are employers discouraging employees from making claims or forcing a too-early return to work after an injury. These practical consequences are out of step with goals of the legislation. Experience rating is based on the assumption that occupational health and safety can be viewed as a commodity. Some of the underlying principles in the Health and Safety at Work Act 2015 challenge the notion that safety is merely a cost centre and places safety as a core business value or perhaps, even as a fundamental right of workers.

1. Introduction and Methodology

The introduction of the Health and Safety at Work Act (HASWA) 2015 signals a paradigm shift away from thinking of occupational health and safety (OHS) as a commodity or as a separate cost centre, to being a core organisational value. The extent to which a paradigm shift can be achieved in practice will depend on the way the HASWA 2015 is implemented (Dabee, 2016). The existing framework that currently surrounds the HASWA 2015 also needs to be examined, and commonly-held beliefs now need to be challenged.

Part of the framework surrounding the HASWA 2015 is the funding of compensation costs for workplace accidents. These costs are covered by the Accident Compensation Corporation (ACC). The ACC uses experience rating (ER) on the levies that fund its Work Account from which compensation to injured workers are paid out. Under an ER system, levies on employers are loaded or discounted depending on their past claim rates for workplace accidents.

The underlying assumption of ER is that OHS is a commodity. This view of OHS as a commodity should now be abandoned, in light the paradigm shift signalled by the HASWA 2015. The latter treats OHS as a core value of a business, which is in contradiction with ER which treats OHS as a commodity. Moreover, the practical consequences of ER do not align with the stated objectives of the legislation.

The ACC introduced ER in 2011 to "provid[e] financial incentives to prevent injuries", to "encourage appropriate return to work programmes" and, to make "levies fairer" so that lower risk employers do not subsidise higher risk employers (Accident Compensation Corporation, 2010). Experience rating means that levies imposed on employers are loaded or discounted based on the number of claims an employer has made in the past three years.

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Section 2 of this article explains how the ACC uses ER and, that the underlying premise of ER is to treat OHS as a commodity (Kankaanpaa, 2010). The section also provides other reasons to abandon the use of ER, namely that the practical effects of using ER do not align with the stated goals of the ACC. ER also does not achieve the legislative aims of the Accident Compensation Act (ACA) 2001 and of the HASWA 2015.

New research into OHS that suggest that to improve OHS, OHS should be core organisational value through management commitment and involvement of workers. The cost of OHS should also be a secondary consideration. Section 3 explains how some of the rules in the HASWA 2015 align with the findings of this new research. For example, the HASWA 2015 imposes due diligence duties on officers (S 44, HASWA 2015).

Methodology

A search for previous empirical studies (quantitative, qualitative and mixed) and, case law and legal commentary, was carried out in selected databases (EBSCOhost, HeinOnline, Jstor, PubMed, ScienceDirect, Scopus, LexisNexis NZ,Westlaw NZ and Austlii). The titles and abstracts of articles, and case summaries, were read to determine the relevance of each article, or case, to the themes examined in this article. The articles were selected on the basis of their relevance to the topic examined here.

To show that the underlying assumption of any ER scheme is that OHS is a commodity, the literature explaining the use of ER was examined.

To explain the practical effects of ER and assess the extent to which ER meets the objectives of the legislation, studies on the effects of ER were organised into the themes addressed in this article. The themes were based on ACC's stated objectives for the ER scheme (ACC, 2010). The following themes were searched for:

- Research testing the hypothesis that ER to provide financial incentives to invest in safety;
- Research examining the effect of ER on the rehabilitation of injured workers;
- Research examining the degree to which cross-subsidisation of high-risk industries by low-risk industry occurs.

The ACC has a good store of statistical data which would be impossible for a researcher to replicate. Where appropriate, the data available from the ACC were used.

Limitations of the Evidence Used

The limited availability of data is an impediment to carrying out empirical studies into OHS and ER (Brath, Klein, & Krohm, 2008). Also, a particular study can only look at a number of limited factors at a time, whereas workplace safety is affected by a multitude of factors. Finally, most of the empirical evidence comes from jurisdictions where the no-fault compensation system is limited to workers' compensation. In the United States, all States, except Texas, have opted for a no-fault compensation regime. Australia has a hybrid system where the injured employee can either sue or opt for no-fault workers' compensation. The United Kingdom has a no-fault system with most employers having to purchase compulsory insurance. This means that some of the conclusions from studies in other jurisdictions may not always be directly applicable to the New Zealand Context.

Statistics from the ACC on accident rates was also used. The ACC website explains that these data are approximate (ACC, n.d.a)

While the equivalent Australian legislation, the Model Work Health and Safety Act (Cth) 2011 is very similar to the HASWA 2015, Australian jurisprudence is not binding in New Zealand, but is merely persuasive. However, due the similarity of the two pieces of legislation, Australian jurisprudence can aid in the interpretation of the HASWA (NZ) 2015.

2. Experience Rating

2.1. Background: The ACC Compensation Scheme

The ACC pays out compensation to people who suffer injuries caused by an accident, whether at work or not, for "treatment injuries" or injuries following a medical procedure and for work-related gradual process diseases or infections (ACA 201, s 21 and Schedule 3). Mental injuries following certain criminal acts like rape are also compensated (ACA 2001, s 20).

Work-related injuries are defined in section 28 of the ACA 2001 as personal injuries suffered while at "any place for the purpose of his or her employment". Cover is available for employees on breaks or travelling to and from work if the employer provided the means of transport. Work-related mental injuries are also covered (ACA 2001, s 20).

The ACC has five different accounts that fund compensation for five different types of injuries. The ACC accounts are "fully-funded" which means that, each year, the ACC collects enough in levies to cover the costs of the full lifetime of a claim (ACA 2001, s 166A; ACC, 2015). Only the work account is experience-rated.

Account	Cover for**:**	**Levies paid by:**
Work Account	Work-related injures	Employers and the self-employed
Motor Vehicle Account	Motor vehicle injuries on public roads	Motorists through licensing fees and petrol levies
Earners' Account	Non-work injuries suffered by people in work	Through the Pay-As-You-Earn tax on salaries
Non-Earners' Account	Non-work injuries suffered by people not in work	The government
Treatment Injury Account	Injuries that occur as a result of medical treatment	Earners' and non-earners' accounts

Table 1: The Five Funding Accounts of the ACC

The ACC Experience Rating Scheme (ERS)

The ACC loads levies on employers that had a poor accident claims record in the previous three years and gives levy discounts to those with good claims records. Looking at the previous three years prevents a costly incident in any one year from distorting the claims figures (Chelius & Smith, 1993). An employer with medical claims greater than $500 per year or with a single fatal injury claim in one year faces an increase in levy of up to 75 per cent. The ACC can also require those workplaces with high claim rates to undergo prescribed safety programmes or face a 50 per cent increase in levy. The ACC also gives levy discounts to employers who have taken steps to improve workplace safety.

The ERS programme only applies to employers who pay levies beyond the "minimum liable earnings". The liable earnings refer to how much employees earn. For example, in the tax year 1 April 2014 to 31 March 2015, the minimum liable earnings were $28,600 (Accident Compensation Act (Experience Rating) Regulations 2016, Reg 6). Setting this threshold is necessary because ER can only applied to larger businesses where a large amount of data can be gathered. The data for larger organisations is more reliable and consistent than the data that can be gathered for smaller businesses (Sugarman, 1985). A couple of accidents in a small firm with few employees would change its rate more significantly than a couple of accidents in a large company with many employees. Small businesses are left out of the ERS.

For those employers that do qualify for ER, levies are adjusted not just according the number of claims and deaths, the risk management component (Accident Compensation (Experience Rating) Regulations 2015, reg 15(12)-(19)), but also according to how long the claims last – the rehabilitation component and the size of the employer (Accident Compensation (Experience Rating) Regulations 2015, reg 13, 15(4)-(11)). There is also an "off-balance" adjustment so that the "aggregate value of discounts equals the aggregate value of loadings" (Accident Compensation (Experience Rating) Regulations 2015, reg 15(2)(c)(i)). Which means that overall (across all businesses), discounts on premiums must offset loadings, so that the ACC can receive adequate funding from levies. Offsetting levy discounts with premium increases means the overall revenue of the ACC does not change (ACC, 2010).

Safety Programmes

The ACC currently has in place four programmes that tack onto of the ERS, but is planning to get rid of the two "voluntary" programmes (ACC, 2016a). That decision was made because these two voluntary programmes focus on "compliance rather than on outcomes" (ibid). There is no reason why the compulsory programmes should not be scrapped as well for similar reasons. A Research New Zealand pilot study indicates that the other programmes are also focussed on "paper compliance" (Research New Zealand, 2016).

Compulsory Programmes

For each of these programmes, an ACC inspector goes through the audit with the employer. The focus of the audit is on compliance which is determined by what is reflected on the forms provided by the ACC for the employer to fill in. Recommendations are made by the ACC inspectors.

The "No-Claims Discount" Programme

This programme applies to small businesses that have work levies of less than $10,000 in any of the three previous years. The levy discounts are based on the number of weekly

compensation days paid in the three previous years. If there were no weekly compensation days paid, the business gets a 10 per cent levy discount. If there were between one and 70 compensation weekly days paid, there is no levy adjustment, and more than 70 weekly compensation days results in the levy being loaded by 10 per cent.

The "Workplace Safety Evaluations" Programme

This is a compulsory programme for employers who have "poor injury statistics" (ACC, 2016b). Claims data is used to identify employers who have twice the number of claims as the industry average. Employers must work with the ACC to meet required safety standards and improve workplace safety. Failure to participate or to complete agreed actions the workplace will be audited. Failing the safety audit may result in a 50 per cent increase in levy.

Under the programme, the ACC inspector will help the employer discover the causes of the most common accidents, followed by a plan to implement practices that will reduce accident rates (ibid). A follow-up by the inspector is done after six months, where the inspector can order a further safety audit if the business has not been able to improve its safety practices. The focus of the audit is to make the business compliant with hazard management standards prescribed by the legislation, staff training and incident reporting under the health and safety legislation.

The ACC reported that 53 per cent of employers who were deemed to be high risk, that is, with a loading of 15 per cent or more on levies, received help to put an action plan into place to reduce workplace accidents (ACC, 2012).

Voluntary Programmes

The next two programmes are voluntary and offer the reward of a premium discount for undergoing a safety audit.

The "Workplace Safety Discounts" Programme

This is an optional programme aimed at businesses with 10 or fewer full-time employees and those who are self-employed, in the areas of agriculture, forestry, construction, motor trades, road transport, fishing and waste management industries. The employer first undergoes an ACC safety audit. An employer who passes the audit gets a 10 per cent levy discount.

The "Workplace Safety Management Practices" Programme

This voluntary programme is aimed at medium-sized businesses. Discounts on work levies are applied for 24 months and can be renewed as long as safety standards are met. There are three levels of safety performance: primary, secondary and tertiary. To get into the tertiary level requires the employer to meet the highest safety standard of all three tiers. An employer who reaches the tertiary level (highest safety level) gets a 30 per cent discount in premium. Employers who reach the secondary level get a 20 per cent discount. The discount is 10 per cent for those who reach the primary level (lowest safety level).

2.2.*The Rationale for Experience Rating*

Equity in Premiums

The levy paid by each employer is differentiated on two bases (ACA 2001, ss 167, 169; Accident Compensation Act (Experience Rating) Regulations 2015). Firstly, the risk profile of the industry the employer is in. Industries where workers statistically suffer more injuries are perceived to be higher-risk industries and so employers pay higher levies. Secondly, the premiums vary among individual employers within an industry group based on the actual number of claims, the duration of the claims, the number of fatal claims, the number of claims exceeding $500 in treatment claims (Experience Rating Regulations 2015, Reg 4), the levy-risk group and (Experience Rating Regulations 2015, Schedules 1-3), the size of the industry (ACA 2001, s 13).

Differentiating premiums creates a sense of equity. The impression is then that industries with lower claim rates do not subsidise industries with higher claim rates. (This claim is disputed later on in this article.) The accurate classification of industries into high-risk and low-risk industries is vital to calculate premiums accurately.

Safety

Part of the rhetoric on ER is that it helps promote workplace safety: the threat of a higher levy may motivate an employer to invest in workplace safety (Klein & Krohm, 2006). As explained below in section 2.3.1, this reasoning is overly simplistic.

The Underlying Assumption that OHS is a Commodity

Flemming (1967) argues that insurance premium adjustments make up a reliable "pain-and-pleasure" system that rewards employers with low claims and punishes those with high claims. The aim of this "pain-and-pleasure" system is to incentivise employers to make investments that would prevent accidents.

Underpinning this idea is the fact that employers respond rationally to incentives or disincentives (KanKaanpaa, 2010). That is, they can anticipate the increase in cost following an accident, and make a rational decision to invest in safety to prevent that accident. It follows that the investment in safety would have to be optimal, such that cost of investment in safety would not exceed the direct cost of the accident. This way of looking at OHS assumes that OHS is a "good" that requires resources to "produce" it (ibid).

A system that assumes its participants will act rationally requires employers and workers to have perfect knowledge of all the risks in the business and of all the steps required to eliminate or minimise the risks (ibid). In practice, such perfect knowledge is impossible to gain.

There is also the assumption that the cost of an accident only involves direct cost, such as paying increased levies and replacing machinery or workers. Indirect costs or externalities are often borne by victims and their families (ibid). Indirect costs can be as high as 20 times the direct costs of an accident (Mansfield et al., 2012). For example, a severely injured worker may no longer be able to work in their chosen profession and have to settle for a lower-paying job. There is also the cost of increased administration that goes into managing claims (Ison, 1986).

It is possible to require employers to assume the full cost of the accident, but that may lead to increased costs being passed on to consumers. Alternatively, employees could ask for wage premiums to compensate for the higher risk they face (KanKaanpaa, 2010). However, this is only possible when bargaining is possible between employer and employee. Employees are often economically vulnerable and unable to bargain with employers. Wage premiums will not always reflect the danger inherent in the job due to lack of knowledge about the inherent dangers of a job, inequality in bargaining and, the costs requiring the employer to set up prevention measures (Chelius, 1982). Transaction costs also exist in practice and include "ignorance, psychological factors, fundamental inequality of the employer-employee relationship, distribution of costs, and the…structure of workers' compensation system" (Speiler, 1994: 238).

All these traditional, economics-based arguments are based on the premise that OHS is a commodity and that increasing the "supply" of OHS requires increasing the "demand" by providing the right incentives. This way of thinking contradicts modern research into OHS. The modern way of looking at OHS involves looking at OHS as an organisational value that should be at the core of every business (Healy & Sugden, 2012), rather than as a cost centre or commodity.

A parallel can be drawn with the trade of "carbon credits". Splash (2010) argues that focussing on the economic aspects of reduce carbon emission reduces the incentives to change behaviour that would actually reduce carbon emission overall. Similarly, focussing on the costs of health and safety can detract from the changes in behaviour that need to occur to improve OHS.

2.3.*Workplace Safety Culture (Viewing OHS as an organisational value)*

The hypothesis that organisational structure can influence OHS is relatively recent. One of the first literature reviews in this area was done by Osborn et al., (1983), to study health and safety in nuclear plants (Osborn et al., 1983; Oien, Utne & Herrera, 2011). The authors were among the first to recognise management and other organisational factors as contributing to workplace safety.

The link between organisational structure and safety has since remained at the forefront of the safety debate. Investigations into disasters have put managerial shortcomings, poor safety culture, inadequate safety systems and, inability to take corrective measures, into focus (Kongsvik, Almklov & Fenstad, 2010). Thus, the concept of "workplace safety culture" began to emerge.

An organisation's safety culture is part of its larger culture. Fernandez-Muniz, Montes-Peon & Vazquez-Ordas, 2007) propose the following definition of "safety culture" after undertaking an extensive literature review on the link between safety culture and the reduction in workplace accidents

> A set of values, perceptions, attitudes and patterns of behavior with regard to safety shared by member of the organization; as well as a set of policies, practices and procedures relating to the reduction of employees' exposure to occupational risks, implemented at every level of the organization, and reflecting a high level of concern and commitment to the prevention of accidents and illnesses (p.628)

Workplaces that have good OHS cultures exhibit certain characteristics. Namely, that OHS is viewed as an integral part of developing work processes, equipment and plant rather than a

separate cost centre. Other characteristics of workplaces with good OHS are: management commitment to OHS, leading by example, good reporting systems from worker to management and, flat organisational hierarchies with a "no-blame" culture (Fernandez-Muniz et al., 2005).

Hudson (2001) has suggested five types of safety cultures. The worst type of safety culture is a "pathological" culture, where not being caught for violations is more important than safety. The "reactive" culture is where the organisation recognises the importance of safety, but only reacts when there is an accident. The "calculative" culture is where safety hazards are managed through the use of cost-benefit analyses of the cost of safety measures against the benefits to be gained from those safety measures. In a "proactive" culture, organisations are constantly working on solving safety problems that crop up. Finally the "generative" stage is reached. Safety then becomes part and parcel of how the organisation runs its business (ibid).

An organisation has a "generative safety culture" when management holds health and safety as sacrosanct, there is good employee participation in workplace safety, and constant improvements on existing safety protocols are being made. An example of a "generative safety" culture in practice was the way the London Olympic construction was managed. Work was stopped whenever a danger was identified, and workers told not to worry about costs and targets. There were no deaths during the construction and non-fatal injury rate below the national average and, the project was delivered on time (Healey & Sugden, 2012).

Link with the HASWA 2015

The HASWA 2015 principles reflect the actions that are needed to have a "generative" culture (see section 3 below). However, it will not be possible to effect the paradigm shift proposed by the HASWA 2015 until employers and workers shift their mind-set as well. Unfortunately, as long as employers view OHS as a cost centre and a regulatory requirement, it will be difficult for most businesses to reach a "generative" culture.

While giving premium discounts as an incentive to undergo safety audits may appear to be a positive, ER turns can inculcate the mind-set that workplace safety is a cost that needs to be managed like any other business cost. Employers usually plan along shorter time-frames and so are unlikely to be attracted to invest in safety measures that eat into short-term profits (Brath et al., 2008).

At the moment, the ERS turns the employers' minds to the costs of safety, and the accompanying safety programmes focus on compliance rather than on improving the overall safety culture. These are the characteristics of a "calculative" culture. Getting rid of the ERS could signal that thinking about OHS as a separate cost centre or as a commodity is now obsolete.

2.4. *Does the ERS Help the ACC Achieve its Stated Goals?*

As explained in section 1 above, the aims of the ERS are to "provid[e] financial incentives to prevent injuries", to "encourage appropriate return to work programmes" and, to make "levies fairer" so that lower risk employers do not subsidise higher risk employers (ACC, 2010).

2.4.1. Does the ERS Provide Financial Incentives to Prevent Injury?

If changes in levy prices are to motivate employers to invest in workplace safety, then employers need to know in advance how levy hikes and discounts will be imposed. Koning

(2005) showed that employers who were aware of how ER works were more likely to invest in workplace safety. The ACC provides extensive information on the ERS on its website. The website also has an online calculator and there are hotlines to call for employers who would like more information. So arguably, for those employers who are interested, the information is readily available.

Under ER, most of the incentives to invest in safety are *ex post*. Konig (2005) also found that the incentive to "increase … preventative activities" only eventuates after there was a "substantial" increase in levy for an employer. The ACC is decreasing levies on employers by 10 per cent for the 2017-2019 period while increasing levies on workers by three per cent (ACC, n.d.b). Employers now shoulder even less of the cost of compensation, which means reduced ability to motivate employers to invest in safety through the threat of increased costs.

Another study by Pascale Lengagne (2016) also found that an increase in premiums can lead to employers investing more in safety training and education *ex post*. She carried out an econometric study that correlates actual safety practices (rather than claim rates) with increasing or decreasing premiums; the dataset used was the manufacturing sector in France for the period 1999-2005. High premiums were a signal to employers to address OHS issues, and fewer OHS breaches were observed after a premium increase. Premium decreases did not lead to reduced efforts to maintain good OHS.

However, there are a number of confounding factors. Levy hikes may not be the direct cause of an increase in safety investment. A levy hike is usually accompanied by other events. For example, monitoring by the regulator could increase, good employees may leave, fines may be imposed and, the firm subject to negative publicity (Brath et al., 2008). Those other events may be a more significant cause of a change in attitude towards safety than a levy hike.

Increasing premiums means that employers have less to spend on improving OHS. A high claims rate could still act as a flag for an employer to improve their OHS. But a tax break could also be used as incentive, while freeing up money for employers to invest in OHS.

Smaller businesses are not experience-rated, so there is no financial incentive to invest in safety tied in with premium hikes or discounts (Boden, 1995). This is an issue because workers in smaller businesses have more hazardous work environments and smaller businesses have less money to invest in safety management systems (Sorensen, Hasle, & Bach, 2007). Small businesses (with less than 20 employees) make up 97 per cent or our economy (MBIE, 2016).

What do Decreased Claims Actually Mean?

Brath et al., (2008) found that ER is more effective at reducing the number of claims in larger employers. But they placed a *caveat* on their study and explained that the study does not "demonstrate" that experience rating creates an incentive to improve workplace safety, but only shows that claims decrease as a consequence of experience rating. The data is insufficient to suggest a causal relationship between increased premiums and an improvement in workplace safety (Brath et al., 2008).

A decrease in accident claims does not necessarily mean that fewer accidents are occurring. Instead, it could be that employers are getting their employees to make fewer claims, even if the numbers of accidents remain the same (Lengagne, 2016). It is often impossible to determine whether lower claims are due to better investment in safety or due to employers discouraging injured employees from making claims (Mansfield, 2012). The studies are

severely limited as no direct data is available to measure the effects of experience rating (Bruce & Atkins, 1993).

Indeed, one of the more severe consequences of experience rating is that some employers may discourage injured employees from filing a claim, or tell the employee to report an accident as a non-work accident (Tompa et al., 2013; Strunin & Boden, 2004). In New Zealand, this does not leave the worker with no compensation as it may in other jurisdictions (Strunin & Boden, 2004). The ACC will cover the cost of any accident, no matter the cause. Employers may discourage employees from making claims under the work account, but the cost of the claim will be picked up somewhere else. There is no evidence as to the whether this is, indeed, happening.

Injury Statistics in New Zealand

Workplace injury claim rates have declined steadily since 2002 to 2015 by 14.5 per cent. The introduction of the ERS in 2011 coincided with a drop of the incidence rate of workplace injury claims from 120 to 114 (a five per cent drop). The rate has since then been stable at 111 injury claims per 1000 full-time equivalents (FTEs) from 2012 to 2014, dropping slightly to 110 in 2015 (a 0.9 per cent drop) (Stats NZ, 2016). The introduction of the ERS also coincided with the Pike River Mine disaster in 2010 after which Parliament started the process of changing the law relating to OHS in 2011(Health and Safety Reform Bill 2011).

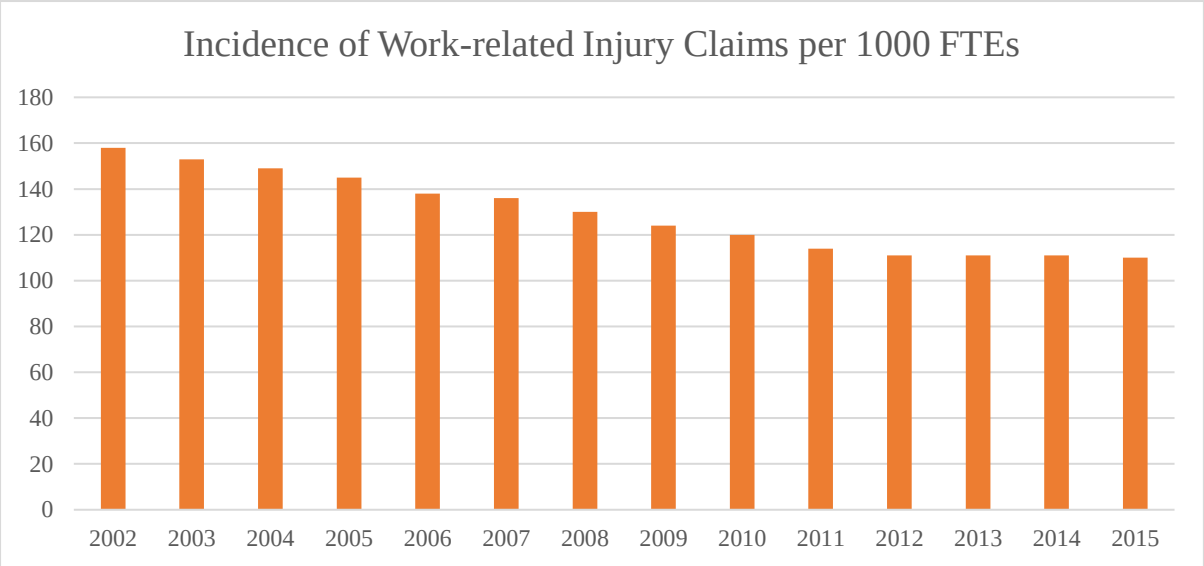

Figure 1: Rate of Work-Related Injury Claims per 1000 Full-Time Equivalents the period 2002 – 2015

The data in Figure 1 reflects the injuries that occurred in a particular year (not the date when the claim was made to the ACC).

A crude picture of what has happened since the introduction of the ERS in 2011 can be gathered by looking at the number of work-related claims against the total number of claims in the period 2011 to 2016 (ACC, n.d.a). The number of work-related claims is relatively stable, but the total number of claims across all accounts has gone up. The data on its own does not show that injured workers are moving their work-related claims to other accounts. The data indicates that more accident claims are being made to other accounts.

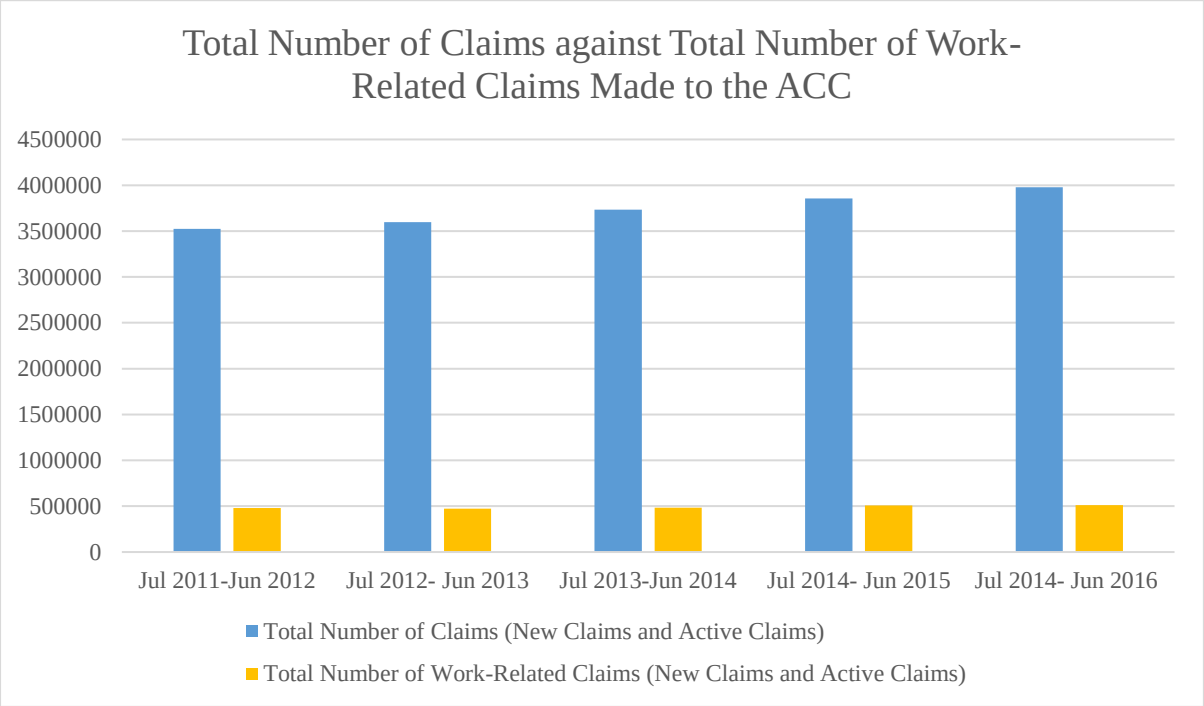

Figure 2: Total Number of Claims against the Total Number of Work-Related Made to the ACC in the Period July 2011- June 2016

The ratio of the total number of claims to the total number of work-related claims has increased since the introduction of the ERS in 2011 (ACC, n.d.a). This suggests that, relatively, more claims are being made to non-work accounts than to the work account. It could be that workplaces are becoming relatively safer when compared to other places where accidents occur (such as at home) or that work-related claims are being pushed to other accounts. It is impossible to determine what is actually going on without further research.

Year Range	Ratio of Total Number of Claims to Total Number of Work-Related Claims
Jul 2011-Jun 2012	7.4
Jul 2012- Jun 2013	7.6
Jul 2013- Jun 2014	7.7
Jul 2014- Jun 2015	7.6
Jul 2015- Jun 2016	7.8

Table 2: The Ratio of the Total Number of Claims Made to the ACC to the Total Number of Work-Related Claims Made to the ACC for the period July 2011 – June 2016.

2.4.2. Does the ERS Foster Rehabilitation?

In order to lower the number of claims being made, employees who are unfit to work may be kept on the payroll and discouraged from making a claim. (In New Zealand, workers have the option of making a claim for the injury as a non-work injury). Or, employers may ask a worker to come back on light duties so that the number of days off work can be recorded as being lower than what it ought to be (Mansfield, 2012). This then distorts the data on the number of severe injuries occurring that ought to be reported. The HASWA 2015, s 23 requires all serious

injuries to be reported to WorkSafe. Workers have sometimes been forced back to work without having fully recovered (Mansfield et al., 2012; Tompa et al., 2013).

Campolieti, Hyatt and Thomason (2006) showed a decrease in claim rates following the introduction of ER in British Columbia, Canada. The study showed that, while claims involving medical care decreased, claims that involved time off work (suggesting a serious injury) or claims for fatalities did not decrease. The reason could be because less serious injuries were not being claimed for, but claims for fatalities cannot be discouraged.

The real downside to the employer discouraging an employee from making a claim is the ensuing strain on the employer-employee relationship. Employees feel victimised, which then causes resentment and anxiety in the injured employee. These negative feelings also inhibit the employee's rehabilitation (Ison, 1986).

When an employer is worried about rising premiums, they may subject workers to unnecessary tests to prove that the injury is not work-related. To challenge claims, employers may resort to more adversarial attitudes towards their employees who make claims. Doctors may be pressurised to certify workers as fit to return to work when there is no suitable work available (Mansfield, 2012). All these factors can compound the stress on the worker, and inhibit their long-term well-being.

Dew and Taupo (2009), in a safety study of a meat processing plant in New Zealand, found that workers faced unsafe working conditions daily and felt compelled to turn up to work even while suffering from injuries. The company doctor pushed employees back into work even when they were not fit to return to their duties. Workers still turned up for work while not fully recovered from work injuries due to threats from management of lost earnings or of job losses. There was also a lack of bargaining power for employees due to production pressures and lack of opportunities to get other jobs. Moreover, workers knew their colleagues would have to pick up the slack if they were absent.

2.4.3. Does the ERS Ensure that High-Risk Employers are Not Subsidising Low-Risk Employers?

A first fallacy is to assume that ER accurately reflects a business' safety track record. The time lag between the employers making the investment in safety and the employers finally seeing a reduction in levy is long (Sugarman, 1985). An empirical study by James Chelius estimates that there is a delay of two years between the investment and a partial decrease in premium; and up to and five years to see the full reduction in premiums (Chelius & Smith, 1982).

Lamm, McDonnell & St John (2012) give an ironic example of ER in practice. Air New Zealand received a rebate in its levies in November 1980, under the then current experience rating scheme. The rebate was given to the airline after one of its planes crashed in the Antarctic in November 1989, killing 237 passengers and 20 crew members. This is an example of a company killing 257 people, but not having to immediately bear the full cost of those injuries.

A second fallacy is to assume that no cross-subsidisation occurs. There will always be a degree of cross-subsidisation as the aim of insurance is to spread out the costs of claims over all those insured. The final levy an employer has to pay always has a fixed component that covers the fixed cost of injuries across all firms and a fixed administrative cost (Lengagne, 2016).

Cheluis and Smith (1982) found that ER tends to penalise smaller firms by imposing "higher costs per dollar loss on them". That is, for every dollar lost due to a workplace accident, smaller businesses spend more on insurance premiums than larger businesses. But despite the higher costs per dollar loss for smaller businesses, it was found that larger businesses do subsidise the cost of insurance for smaller businesses. This is because insurance companies have fixed overheads that they need to spread out over all of their clients. Larger businesses tend to pick up more of the tab.

Moreover, smaller individual businesses cannot be successfully experience-rated because the fluctuations in accident rates can vary wildly due to the small sample size. The risk is then pooled across a particular sector and the premiums averaged out across all the small businesses in that sector. Therefore, "less risky" small individual businesses do end up subsidising "more risky" businesses (ibid).

2.5. *Is the ERS Consistent with the Underlying Philosophy of the ACC?*

The original aim of the ACC scheme was to provide compensation to all those who suffered injury by accidents, regardless of fault (Oliphant, 2007). In setting up the ACC scheme, the Royal Commission of Inquiry, headed by Owen Woodhouse, in 1967, proposed five guiding principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.

The value of "community responsibility" underpins the New Zealand accident compensation legislation, and entails "the community … protect[ing] all citizens … from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity" (Royal Commission on Accident Compensation, 1967).

While the ERS rhetoric of not having safer workplaces subsidising more dangerous workplaces seems appealing to the business community, it shifts the burden of the cost of accidents to those who can afford the least. Meeting the increased costs of premiums means that employers, already struggling with poor workplace safety, have even less money to spend on investing in OSH. Imposing more financial burdens on those who can least afford it goes against the fundamental philosophy of community responsibility that underpins the ACC.

The ACC wants to decrease levies on employers by 10 per cent (ACC, 2016c), but increase those on workers by three per cent (ACC, 2016a), thus, shifting more the cost of compensation onto workers, rather than spreading it out evenly across the whole community. Following from that, the rhetoric of incentivising employers to invest in safety through costs seems to make even less sense if workers are to bear more of the costs as the latter can often do very little on their own to improve workplace safety.

The Woodhouse Report stated three other goals for the ACC. Rehabilitation that enables injured workers to recover sufficiently from their injuries and allow them to start work as soon as possible. Real compensation that provides injured workers who cannot work with a decent standard of living. Finally, "administrative efficiency" to make up a speedy, consistent, economical and contention free administration (Royal Commission on Accident Compensation, 1967)

As argued above, the ERS does not foster rehabilitation. The ACC still provides compensation for all accidents, so even if accident claims are being moved to other accounts, then at least

injured workers are receiving compensation. But, if employers are urging workers to work while injured or to move their claims to other accounts, then that is hardly "contention free".

2.6. *Is the ERS Consistent with the Legislation?*

To be in line with the legislation, the ERS should also promote measures that reduce both the number and severity of personal injuries, focus on rehabilitation that "restores to the maximum extent a claimant's health" (ACA 2001, ss 3 (a),(c)). If injured workers are being forced back to work, then clearly this goal is not being met.

The ERS objectives must also be viewed in light of the overarching purpose for which the ACC was set up. The ACC's work should "enhance the public good" (ACA 2001, s 3). In addition to providing compensation for personal injury, the ACC's legislative goals are to work "to minimise the incidence of injury in the community" as well as manage "the impact of the injury on the community" (ACA 2001, s 3). The injury reduction must be done in a "supportive environment" (ACA 2001, s 263).

As shown above, the ERS leads to employers focussing on managing claims rather than on improving safety. The ERS can also create an adversarial environment, and could also be creating incentives that may push workers from claiming from other accounts would go against the legislative purpose of the ACC is to reduce personal injuries overall. Moreover, the available data show that ER does not meet the legislative purpose of restoring claimants' health and well-being to the "maximum practicable extent" (ACA 2001, s 3). Overall, it appears that ER does not promote the aims of the legislation.

If employers start questioning or legally challenging claims made by employees to avoid a levy increase, then a certain element of "fault" is being reintroduced subtly into our legal system. This goes against the ideology of the ACA 2001, which places a statutory bar on actions for personal injury (Mansfield, 2012).

There is no mention of equity in funding in ACA 2001. The Act requires that any "funding policy statements" by the Minister be consistent with section 262 of the ACA 2001 (ACA 2001, s 166B). Section 262 states that services must be "cost-effective" (ACA 2001, s 262(3)(b)). There is a lack of evidence that the ERS gives a return in terms of savings on meeting compensation costs, the programme does not meet the funding requirements in the legislation either.

Another of the legislative functions of the ACC is to collect personal injury information (ACA 2001, s 3). An integral part of running the ERS programme is the collection of and analysis of "injury-related" information (ACA 2001, s 3(b)). The data collected by the ACC is currently being used for information on levy discounts and loading. The ACA 2001 states that information collected by the ACC should be used "to facilitate the achievement of the Government's overall injury management objectives". Under the ERS, the information gathered by the ACC could be used to identify workplaces that are in need of assistance to improve their OHS systems, but without using ER.

2.7. *ACC's Suggestions to Improve the ERS*

The ACC has recently re-examined its ERS. The ACC identified three reasons for "enhancing" the ERS: improving the motivation to improve OHS performance; make the link between OHS performance and levy rates "understandable" and "improve how quickly" the levies respond to

changes put in place by the business. The ACC has suggested two new approaches: an increased "responsiveness" approach, and an increased "transparency and responsiveness" approach (ACC, 2016c).

The first approach suggests five main changes. The experience period would be shortened which would mean that the levy rates would fluctuate more rapidly. This may exacerbate problems with claims management as employers may have more incentives to manage claims to prevent fluctuations and to "ride out" shorter levy periods. More focus would be put on the number of claims than on the duration of the claims, the reasoning being that businesses have more control over preventing accidents than helping workers return to work. More severe injuries require workers to take longer periods off work; so this approach may shift the focus away from preventing more severe accidents and focus on decreasing the number of minor accidents.

Under the first approach, the ACC has also suggested only using the business' experience without reference to the industry they belong to and without reference to the size of the business. Both of these changes will make the levies more volatile for a particular business. There is also a suggestion to setting the final premium after the experience period. The employer would have paid a deposit, and a final premium is calculated at the end of experience period, based on number of accidents. The effect of these changes could be two-fold: employers would have problems with financial forecasting, which could be a problem when drawing up tenders, and it will put more pressure on employers to manage claims to avoid paying extra premiums.

The second approach suggests two main changes. One being the removal of the claim duration consideration when calculating levies, with the possible consequences just described. The premiums will be increased and decreased according to a set "sequence on a ladder" (loaded premiums at the top and discounted levies at the bottom), coupled with the application of rules that determine the movement of the ratings "up or down a number of steps on the ladder". Many rules could be applied at the same time. There is no explanation of what these rules would be except to say that they would be based on "performance" and that the rules would be known in advance to allow businesses to plan.

Neither of the suggestions cuts to the core of the issue, which is that OHS should no longer be viewed as a separate cost centre, but as a core value of the business and an integral part of the way work processes are designed.

2.8. *Retaining Equity in Funding the Work Account*

Removing the ERS would remove the perceived equity of the funding system for the ACC work account. While low-risk employers may not want to "subsidise" high risk employers, the upside is that, with reduced costs, high risks employers, for example in forestry and fishing, can be more competitive in a global market. Also, all employers would pay the same premium which would be more straightforward to administer.

Another possibility could be to retain levy differences between industries, with higher risk industries paying higher premiums but not differentiating levies within an industry. This would retain some equity at least across industries.

3. The Health and Safety at Work Act 2015: A New Concept of OHS?

Australia passed the Model Health and Safety at Work Act (Cth) 2011 as part of the process of updating its OHS legislation to be in line with the International Labour Organization's (ILO) Occupational Safety and Health Convention, of which New Zealand is also a signatory, and to be consistent with the ILO's 2003 Global Strategy on Occupational Health and Safety (National Review into Model OHS Law, 2008; ILO, 2003). The ILO's Global Strategy recognises that "new strategies and solutions need to be developed" in order to manage OHS, and that OHS needs to be given a "higher priority" and engage the whole community. The ILO advocates that workers have "the right to a safe and healthy working environment" (ILO, 2003).

Oldfield (2014) has argued that OHS should be considered as a human right. This approach would be a good strategy to fight against the abuse of workers that leads to hazardous working conditions. Human rights in the workplace is not a new concept. For example, under the Human Rights Act (HRA) 1993, employers are forbidden from discriminating against individuals on the basis of certain "prohibited grounds of discrimination", such as age and sex (HRA 1993, ss 21-22). The HRA 1993 was passed to implement New Zealand's obligations under the Universal Declaration of Human Rights. Cost is hardly ever at the forefront of any human rights debate. If OHS is to be viewed as a "right", then cost can no longer be a major consideration. Here are some provisions in the HASWA 2015 which could be interpreted to mean that OHS is a priority and cost should no longer be an overriding consideration in achieving good OHS culture.

3.1. The "reasonably practicable" test

Most of duties in the HASWA 2015 are subject to the "reasonably practicable" test (HASWA 2015, s 22). For example, a person conducting a business or undertaking (PCBU) – such as a company, a partnership or a sole proprietor – has to "so far as is reasonably practicable" ensure the health and safety of the workers who work for it (HASWA 2015, s 36). Doing what is "reasonably practicable" requires the PCBU to "weigh up all relevant matters". The PCBU must have regard to the likelihood of the hazard or risk occurring and the risk that could result. In doing so, it must consider what a reasonable person knows or ought reasonably to know about the hazard or risk, and the ways of eliminating the hazard or risk and the availability and suitability of those ways. The very last consideration is whether the "cost is grossly disproportionate to the risk". The cost of eliminating or managing hazards and risks is the very last consideration in determining what is reasonably practicable.

Cost was also the last consideration under the "all practicable steps" test in the previous legislation, the Health and Safety in Employment Act (HASEA) 1992. The test looked at "the availability and cost of those means [to eliminate or minimise harm]" (HASEA 1992, s 26A). The term "grossly disproportionate" in the HASWA 2015 suggests a much higher threshold. The case of *WorkSafe New Zealand v Ministry of Social Development* (CRI-2015-0825-002309; [2016] NZDC 12806, per Doogue J.) was decided under the HASEA 1992. The Court explained that "in order for cost to outweigh the risk of harm, the cost must be 'disproportionate to the risk.'" The court also explained that the law had evolved and the cost must be "grossly disproportionate" to the risk to justify the organisation not taking steps to eliminate/minimise the harm.

The risk in this case was the violence by clients against staff. The Ministry knew that there was a real risk that their staff could be attacked by a client armed with a firearm. The steps that would have adequately protected the staff would have involved a significant redesign of the

offices, according to current best practice, at a cost of $13.1 million - $27.3 million for all the offices. The operating budget was $400 million, so the cost of putting in place safety measures against firearm attacks would have been as much as 6.75 per cent of the operating costs. The court did not think the cost was "grossly disproportionate" to the risk faced by the employees and that the Ministry had failed in its duty to keep employees safe.

Clearly, the safety of the worker needs to come first, by eliminating or minimising risks and hazards, and the cost of protecting workers comes last. OHS can no longer be viewed as a commodity that responds to market forces (Kankaanpaa, 2010).

3.2. Duties on Officers

When the leaders of an organisation exhibit behaviours that send out messages that OHS is important, then that attitude infiltrates the rest of the organisation (Zohar, 1980). For example, in the Olympics, management gave a clear signal to stop work if it was unsafe, regardless of cost. Ironically, not worrying about cost meant that the project ended up being completed on time and within budget (Healey & Sugden, 2012).

The directors of a company have always been distinct from the company itself and, thus, traditionally not liable for any wrong-doing of the company. This changed under the HASEA 1992, directors would have only been liable if they had "directed, authorised, assented to, acquiesced in, or participated in" the breach of the company (HASEA 1992, s 56). It was very rare for a director to be found liable. In *McGall v Dominion Bookbinders Ltd* (CRI-2009-090-503893, CRI-2009-090-503896, CRI-2009-090-503291, CRI-2009-090-503297, CRI-2009-090-503894, 31/3/2010, per Blackie J), the company had failed to maintain an entrance gate and an employee's child was injured while climbing the gate. The company had breached s 50 of the HASEA 1992 by failing to provide a safe workplace for "any other person". The director, being aware that the gate was defective, had "participated" in the breach and was personally liable under s 56 of the HASEA 1992.

The HASWA 2015 puts separate duties on officers of the PCBU (such as directors and partners), (HASWA 2015, s 18) which require officers to put OHS at the centre of what they do. Officers have a duty to exercise "due diligence" to ensure that the PCBU complies with its duties. Officers must first educate themselves about OHS matters relevant to their industry, and then find out about the hazards and risks in their particular business (HASWA 2015, s 44). Businesses with good OHS tend to ensure that production pressures do not come in the way of safety (Hudson, 2001). Officers need to ensure that there are adequate resources available for OHS (HASWA 2015, s 44). Flat hierarchies are associated with good OHS (Hudson, 2001), and the officer must ensure that there are appropriate processes that work in practice for employees and contractors to provide feedback on hazards and that steps are taken to eliminate those hazards (HASWA 2015, s 44). Finally, good OHS requires constant monitoring and checking (Hudson, 2001). Officers have to ensure that there are processes to audit OHS in their business and to verify all the processes in place are viable (ibid).

Officers, thus, need to dedicate more time to OHS as they would traditionally in order to be aware of what happens on the shop floor, to keep up-to-date with OHS trends in their industries, and to carry out regular safety audits. A lack of time and other resources will no longer be an excuse for an officer to not turn their minds to OHS, even for an officer overseeing a very large company (See the Australian case of *Inspector Kumar v Ritchie* [2006] NSWIRComm 384 (6 December 2006) , per Haylen J.). Nor can the busy officer delegate this responsibility to focus mainly on the profitability of the business (HASWA 2015, s 31).

3.1.*Contractors and Sub-Contractors*

The fragmentation of the workforce means there are less stable employment contracts, and organisations increasingly rely on the work of contractors (James, Johstone, Quinlan, & Walters, 2007). This, in turn, meant more hazardous working conditions for workers in those less stable employment arrangements (Quinlan, Mayhew, & Bohle, 2001a;b)

It had been the law that contractors were responsible for their own OHS (Perritt, 1988). Thus, making use of contractors was a way for organisations to avoid the responsibility and costs of putting in place adequate safety systems. Hiring contractors is no longer an acceptable way of managing risk-liabilities and of reducing cost. The HASEA 1992 introduced changes that meant that principals had some responsibilities towards contractors and their employees.

The HASEA 1992 imposed a duty on a principal to "take all practicable steps to ensure that no employee of a contractor or subcontractor" or "no contractor or subcontractor" is harmed "while doing work… that the contractor was engaged to do" (HASEA 1992, s 18). However, the principal had less responsibilities than the contractor towards the contractor's employees (*Central Cranes v Department of Labour* [1997] 3 NZLR 694, (1997) 5 NZELC 95,733, [1997] ERNZ 520 per Blanchard, Gault, Henry, Keith and Thomas JJ). Under the HASWA 2015, the principal (a PCBU) owes the same duties to the employees of the contractor as it does to its own employees.

Under the HASWA 2015, PCBUs owe duties to keep their workers safe (HASWA 2015, s 36). The definition of "PCBU" in the HASWA 2015 is wider than the definition of "employer" in the HASEA 1992. A PCBU is a person that conducts a "business or undertaking alone or with others", whether or not for profit or gain (HASWA 2015, s 17(1)(a)), whereas an employer was a "person who employs any other person to do any work for hire or reward" (HASEA 1992, s 2).

In the HASWA 2015, the definition of "worker" includes contractors and subcontractors and their employees (HASWA 2015, s 19). Under the HASEA 1992, employees only covered those who worked directly for an employer (HASEA 1992, s 2).This change in the law is to reflect the fragmentation of employment and to impose duties on businesses that create risk and that have the ability to protect workers and other persons (Johnstone, 2015).

Also, under the HASWA 2015, main contractors and sub-contractors have a duty to "consult, co-operate… and co-ordinate activities" if they owe the same duty to the same person (HASWA 2015, s 34). Principals and contractors owe the same duties to the employees of contractors under the HASWA 2015. This duty to consult had only been part of a code of practice under the HASEA 1992 (MBIE *A Principal's Guide to Contracting to Meet the Health and Safety in Employment Act* 1992, May 2010).

The laws under the HASWA 2015 seem to suggest that PCBUs now have a higher obligation to manage the risks and hazards that contractors and their employees face than employers would under the HASEA 1992. The law recognises the fragmentation of the workforce and that all workers need protection, regardless of their employment status. While market forces may have pushed for the fragmentation of the workforce, the intent of the HASWA 2015 is to push against these forces and provide protection for all workers, regardless of their status.

4. Conclusion

From the available empirical evidence, it is possible to draw the conclusion that it is not possible to achieve the aims of the ACA 2001 and the HASWA 2015 by using ER. Tying financial incentives to preventing injuries encourages employers to focus on managing claims rather than on preventing injuries. Levies are loaded, also, according to the severity of the injuries claimed for, so the longer an employee is off work, the higher the premium becomes. This may mean some employers try to get employees back to work sooner than they are ready to do so. There is also evidence that low-risk employers do end up subsidising high-risk employers because there is a fixed cost that needs to be met that is spread out evenly over all premiums. Moreover, by increasing levies on employers with poorer OHS, the amount many of these employers have to invest on OHS is reduced, making it even less likely that they will be able to make changes to improve OHS.

With its focus on providing incentives to invest in occupational health and safety (OHS) through costs, ER is conceptually inconsistent with the fact that OHS should not be viewed as a separate cost centre but as part of the cost of properly designing work processes and plants *et caetra*… In spite of the countervailing evidence and logical inconsistencies, the ACC would still like to retain ER, albeit in a modified form (ACC, 2016d). The modifications would not remove the fundamental problems associated with ER, but more importantly, the message that safety is a cost centre would remain at the forefront.

The evidence shows that the ERS does not lead to improved workplace safety. Perverse outcomes, such as employers discouraging employees from making claims and reporting near-misses, can occur. Moreover, the "stick" approach does not sit naturally with the non-threatening, supporting role the ACC is meant to have in our community.

The HASWA 2015 represents a possible paradigm shift in the way of thinking about OHS. The "reasonably practicable" test, the due diligence duties of officers and, the emphasis on ensuring the safety of contractors and their employees signal new way of thinking about OHS. Cost can no longer be a driving factor, and, as the evidence shows, shifting the focus from costs to good practices does lead to improved profitability.

The implementation of the HASWA 2015 and the infrastructure surrounding it need to be in step with the changes represented in the HASWA 2015 if the way we think about OHS in New Zealand is to change, but that can only occur if attitudes shift. Employers need to change their mind-set, and retaining ER is a way of clinging onto a way of thinking that does not belong with the new OHS regime.

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