

IMPACT OF HEALTH AND SAFETY REFORMS ON JOCKEYS AND DRIVERS

The Health and Safety at Work Act 2015 (the **HSW Act**), which has replaced the Health and Safety in Employment Act 1992 (the **HSE Act**), was passed into law on 4 September 2015. Parts of the HSW Act relating to regulations came into force on that day; however the majority of the HSW Act will come into force on 4 April 2016.

The key aspects of the HSW Act for jockeys/drivers are set out below.

Status of jockeys/drivers under the HSW Act

The HSW Act creates the concept of a “Person conducting a business or undertaking” (**PCBU**). This includes all businesses or undertakings regardless of whether a person conducts a business alone or with others, or whether or not it is for profit or gain.

A jockey or a driver who are self-employed are therefore a PCBU. A self-employed jockey/driver is also a worker for the purposes of the HSW Act.

On the assumption that apprentice jockeys/drivers are not self-employed, they are not PCBUs but, rather, are only workers for the purposes of the HSW Act.

Duties on PCBUs

The HSW Act sets out a number of duties for PCBUs.

The relevant duties for jockeys/drivers who are PCBUs include:

- a duty to ensure, so far as is reasonably practicable, his or her own health and safety while at work;
- if the jockey/driver manages or controls a workplace, a duty to ensure, so far as is reasonably practicable, that:
 - the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person; and
 - the fixtures, fittings or plant are without risks to the health and safety of any person.

“Workplace” is widely defined to include any place where a worker goes, or is likely to be, while at work;

- a duty while at a workplace to take reasonable care that his or her own acts or omissions do not adversely affect the health and safety of other people;
- a duty to comply, as far as the person is reasonably able, with any reasonable instruction that is given to him or her by another PCBU (such as NZTR or the racing club) to allow that PCBU to comply with the HSW Act or regulations; and
- a duty to co-operate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

A jockey/driver who are a PCBU must also ensure, so far as is reasonably practicable:

- the provision and maintenance of a workplace that is without risks to health and safety;
- the provision and maintenance of safe plant and structures;
- the provision and maintenance of safe systems of work;

- the safe use, handling, and storage of plant, substances and structures;
- the provision of adequate facilities for the welfare at work of workers in carrying out work for the business, including ensuring access to those facilities;
- the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business; and
- that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business.

The HSW Act also provides that there is a duty, so far as is reasonably practicable, for PCBUs to consult, co-operate with, and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter. This means that jockeys/drivers who are PCBUs must work with racing clubs and NZTR/HRNZ, together with other relevant people to ensure that risks to health and safety in the thoroughbred racing industry are eliminated or minimised. A failure to work together in this way is an offence and can result in a fine of up to \$20,000 for an individual and up to \$100,000 for an organisation.

Duties on workers

The duties under the HSW Act for those jockeys/drivers who are not PCBUs are:

- a duty to take reasonable care for his or her own health and safety;
- a duty to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons;
- a duty to comply, as far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the HSW Act or regulations; and
- a duty to co-operate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

The standard of care

Where a duty is imposed on a person under the HSW Act, a person is required to:

- eliminate risks to health and safety, so far as is reasonably practicable; and
- if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks as far as is reasonably practicable.

What is “reasonably practicable” is determined by taking into account and weighing up all relevant matters including:

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

Relationship with other parties

Under the HSW Act, more than one person can have the same duty. The HSW Act provides that if more than one person has a duty for the same matter, each person:

- (a) retains responsibility for that person's duty in relation to the matter; and
- (b) must discharge that person's duty to the extent to which the person has the ability to influence or control the matter or would have had that ability but for an agreement or arrangement purporting to limit or remove that ability.

In all other situations, duties cannot be excluded, limited, modified or transferred by contract.

Higher penalties for offences

The proposed new penalties for offences under the HSW Act are considerably higher than under the HSE Act.

There are three categories of offences:

- reckless conduct in respect of a health and safety duty for which the maximum penalties range from a fine of up to \$300,000 or a term of imprisonment of up to five years, or both for an individual who is not a PCBU or an officer of a PCBU; to a fine of up to \$600,000 or a term of imprisonment of up to five years or both for an individual who is a PCBU or an officer of a PCBU; and for any other person, a fine of up to \$3 million;
- failing to comply with a health and safety duty that exposes an individual to risk of death or serious illness for which the maximum penalties range from a fine of up to \$150,000 for an individual who is not a PCBU or an officer of a PCBU; to a fine of up to \$300,000 for an individual who is a PCBU or an officer of a PCBU; and for any other person, a fine of up to \$1.5 million; and
- failing to comply with a health and safety duty for which the maximum penalties range from a fine of up to \$50,000 for an individual who is not a PCBU or an officer of a PCBU; to a fine of up to \$100,000 for an individual who is a PCBU or an officer of a PCBU; and for any other person, a fine of up to \$500,000.

The HSW Act provides that it is not possible to take out insurance against fines or infringement fees under the HSW Act and to do so is a criminal offence. It is, however, possible to take out an insurance policy to indemnify against the costs of defending a prosecution under the HSW Act and for any liability to pay reparation to victims in a notifiable event.

Summary

The legislation is intended to make a significant difference to the way in which health and safety issues are dealt with in New Zealand. In particular, health and safety issues are expected to be elevated so that anyone who is in a position of responsibility or able to have any influence over health and safety issues is expected to take steps to ensure that risks to health and safety are eliminated or minimised. A failure to meet these obligations could result in imprisonment or a substantial fine.

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