

# New Zealand Kiwifruit Growers Incorporated

## Kiwifruit Contractor and Supply Chain: Health and Safety Obligations and Responsibilities

Prepared for New Zealand Kiwifruit Growers Incorporated (Client)

By (Beca)

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## Revision History

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## Document Acceptance

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## 1 Introduction

Beca was engaged by New Zealand Kiwifruit Growers Incorporated (NZKGI) to complete a review of the health and safety obligations and responsibilities held by the various duty holders within the New Zealand Kiwifruit production industry. The review has been completed against the requirements of the New Zealand Health and Safety at Work Act 2015 (HSWA) and associated regulations.

In this report, Beca has provided scenarios and examples of what mechanisms and processes may be put in place to ensure that various duty holders meet their obligations. We recommend that any further development and implementation of such processes is undertaken in conjunction with workers and other stakeholders to ensure that general health and safety duties to consult are met.

Specific recommendations to assist the industry to consistently meet its shared obligations have been provided in section 5 of this report.

Following initial discussions, Tim Barry (Beca) met with Nikki Johnson (NZKGI) and a group of experienced growers and representatives from across the industry supply chain, including:

- Grower and Packhouse Operators
- Post-Harvest Service Providers
- Orchard Management Service Providers
- Maturity and Residue Sampling Providers
- Zespri

The forum provided Beca with background information relating to ownership and production models in place across the industry as well as enabling Beca to ensure that the scope of the review was defined and understood. The group agreed to limit the scope of this review and report on activities up to and including the collection of harvested fruit from the producing orchard, i.e. until it leaves the farm gate.

## 2 Executive Summary

### 2.1 Orchard Ownership:

Orchard ownership varies widely across the industry, ranging from absentee, investor focused owners, to owners who undertake all activities to produce and harvest fruit. Identified types of owners include:

- Maori Trust: This type of ownership model could involve either end to end production and management or leasing of land to other producers, or a variety of arrangements involving different levels of operational control and management.
- Joint Ventures: Typically such arrangements operate as Person Conducting a Business or an Undertaking (PCBU) and often establish and operate as a syndicate model for investment purposes.
- Absentee / Investor Owners and Corporate Owners: This may involve an owner, with other areas of operations being conducted by a different party, i.e. multiple PCBUs, such as having 2 growers on the same property. Corporate Owners may include government agencies, including NZTA and Councils. This ownership model typically engages an orchard management company to run all on farm/orchard operations.
- Grower – Producer Owners: End to end producers, will typically engage a range of contractors to conduct a variety of on-farm and supply only arrangements.

The wide range of ownership models creates a complex series of interactions for the engagement and management of suppliers, contractors and other health and safety duty holders.

## 2.2 Typical Working and Orchard Management Practices

The forum highlighted that there are a wide range of orchard management practices and working arrangements across the industry, these include:

- Growers, who provide all services and undertake all activities associated with the growing and harvesting of fruit. This includes the engagement of all workers, including both direct employees and contractors.
- Some growers will pool equipment and share machinery. This is often under on-going, casual arrangements and may include the use of family as casual labour and volunteers.
- Growers may engage workers on a full and part-time basis to undertake a variety of tasks throughout the season, this would include both direct employees and contractors.
- Growers may engage orchard management companies to provide a range and scope of services.
- Additional workers may be engaged e.g. contracting labour hire companies.

All situations will, to some degree, involve the selection, engagement and management of contractors to provide both on farm and supply only arrangements.

### 2.2.1 Contractors: Standard Terminology and Definitions

For purposes of this report and to ensure the consistent understanding of responsibilities across the industry, the following definitions should be applied:

**Contractor:** The person and their employees/subcontractors, who are responsible for performing the work, and/or supplying the plant and materials associated with these works. A contractor is engaged by a principal (the other party) to perform services under a contract for services (commonly called an independent contractor agreement). Contractors are self-employed and earn income by invoicing the principal for their services. A contractor pays their own tax and ACC levies.

**On Farm Services:** Work performed by contractors at premises that is controlled by another party, such as the orchard, access routes, boundary fences, store houses etc.

## 3 Contractor Health and Safety Management

### Summary of Duties and Obligations

#### 3.1 Duty of Care

The primary duty of care means that a business has the primary responsibility for the health and safety of workers and others influenced by its work.

All businesses must ensure, as far as is reasonably practicable, the health and safety of its workers and any other workers who are influenced or directed by the business. A business must also look after other people who could be at risk by the work of the business, for example customers, visitors, children and young people, or the general public.

Persons who are self-employed, must also ensure, as far as is reasonable, their own health and safety as well as the health and safety of others who could be put at risk by their work.

## Concept of Primary Duty Holder

This report uses the term “primary duty holder” in the scenarios and examples provided in section 4.4. The term refers to the PCBU that would be expected to lead and demonstrate how it’s meeting HSWA obligations in circumstances where there are overlapping duties and multiple PCBUs working together.

The determination of which party is the primary duty holder should be made by assessing which PCBU has:

- The highest level of control and influence of the workplace.
- The greatest ability and resources to apply, to controlling health and safety risks in the workplace.

The concept of the primary duty holder should not be taken to mean that other duty holders do not have obligations that they are required to meet. These duties are summarised below.

**Table 1 Summary of Health and Safety Duty Holders**

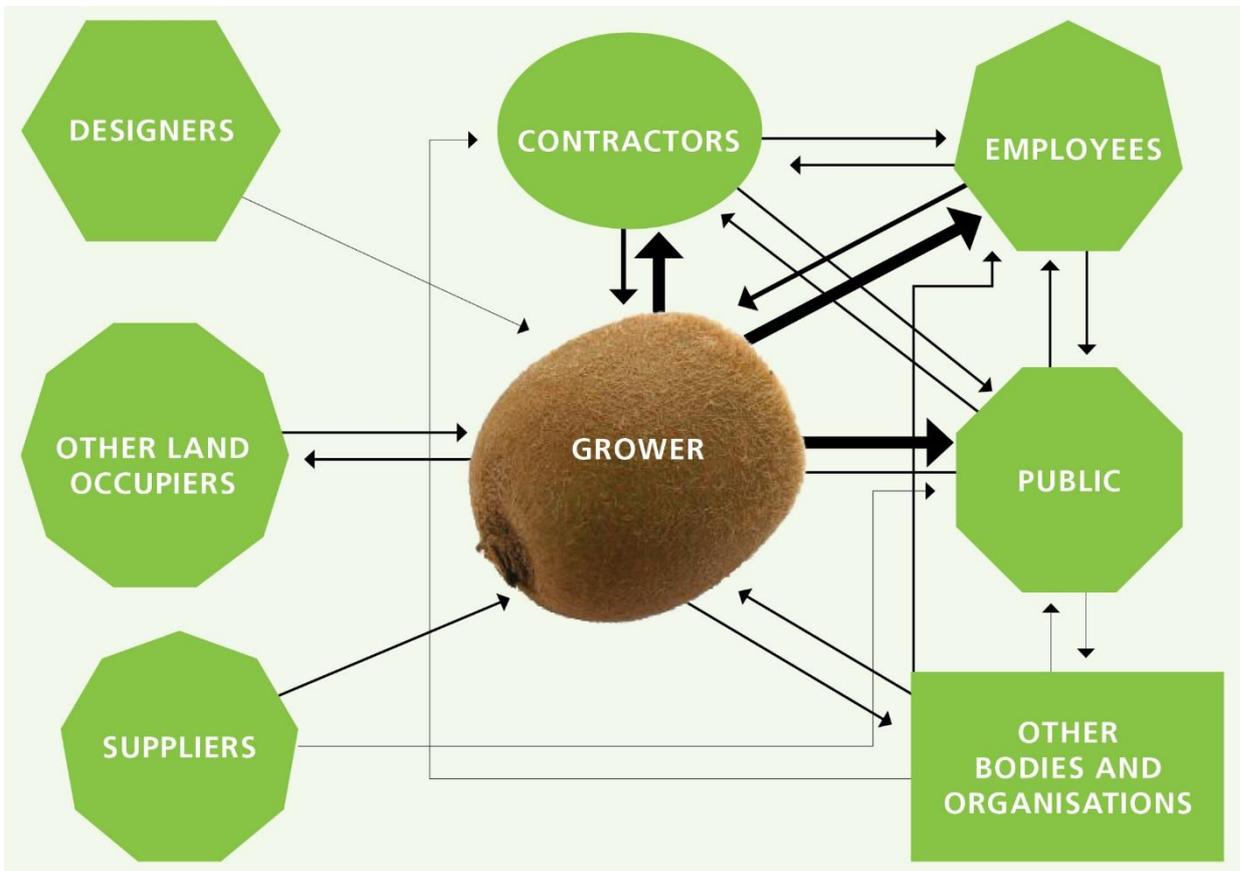
Duty Holder	Duty	Example
Person Conducting a Business or Undertaking (alone or with others).	Must ensure, so far as reasonably practicable, the health and safety of workers and other persons who could be at risk by PCBU's work.	Any organisation or entity involved in the growing, harvesting or collection of fruit from the orchard.
Upstream Duty Holders. May include designers, manufacturers, installers, constructors, importers and suppliers - who can influence the way work is carried out and the integrity of products.	Must ensure, as far as reasonably practicable, that products are made without risk to the health and safety of people who use them.	Supplier of harvesting equipment or manufacturer machinery.
Businesses that manage or control the workplace.	Under HSWA, most duties relate to the conduct of work, however certain responsibilities relate to the physical workplace.  If your business manages or controls the workplace then you must ensure, so far as is reasonably practicable, that general environment of the workplace; how people enter and exit the workplace; and anything else that may arise from the workplace are without health and safety risks to people. Required to know who is on site and	This duty could relate to orchard management companies who are engaged by absentee owners.

	transfer knowledge about on-site hazards to relevant parties.	
Workers	Must take reasonable care to ensure acts/omissions do not adversely affect the health and safety of other persons. Must comply with reasonable instruction and co-operated with reasonable policy or procedure.	Includes employees, contractors, subcontractors, on-hire workers, apprentices, trainees, work experience students and volunteers.

**Figure 1: Schematic Representation of Health and Safety Duties with the Kiwifruit Industry**

The model below has been developed for the purposes of understanding how these various duties overlap and apply between parties. The strength of the line between the parties is intended to provide a representation of where the primary duty sits. The term “Grower” refers to the PCBU who actively manages and controls on orchard operations. This may be an owner/grower or orchard management company.

Please note that this model has been developed as a schematic representation only and should not be used to assess and determine specific legal obligations.



## **4 Health and Safety Duties: Ownership and Operating Models**

### **4.1 Duties of Directors**

The HSWA 2015 introduces a positive due diligence duty for directors to proactively manage workplace health and safety. Directors must take reasonable steps to ensure that the organisation meets its health and safety obligations. Directors are personally liable under the Act, which imposes penalties for a breach of duty. All directors on the board need to understand health and safety risks and this responsibility can't be delegated.

The Act introduces the concept of a person conducting a business or undertaking (PCBU). The primary duty of care for the health and safety of workers lies with the PCBU. Officers of the PCBU must ensure that the PCBU meets its obligations.

Officers include directors and other people who exercise significant influence over the management of the business, such as the CEO. Director's due diligence duty means being proactive - actively engaged, informed and responsive about health and safety issues and holding management to account.

Directors need to take reasonable steps to:

- Know about, and keep up to date on, work health and safety matters
- Understand the nature of business operations and the associated hazards and risks
- Ensure there are appropriate resources and processes to eliminate or minimise those risks
- Ensure there are appropriate processes for receiving and considering information about incidents and responding to them
- Ensure the PCBU implements processes for complying with its duties; and
- Verify the provision and use of resources and processes.

This information was taken from guidance material developed by the Institute of Directors (IoD) further information may be obtained from the resources contained in the IoD website, link below:

<https://www.iod.org.nz/Governance-Resources/Resource-library/Risk/Health-and-safety>

### **4.2 Overlapping Duties: Consultation and Cooperation**

Wherever there are situations involving multiple PCBUs or duty holders working together, there must be some form of structured health and safety cooperation and consultation mechanisms in place.

These may be as formal, or informal as required, however it is critical to remember that the discussions, arrangements and responsibilities for risk controls, supervision and other activities must be recorded and be available. This is an explicit duty in both the Health and Safety at Work Act and Consultation and Cooperation Regulations.

### **4.3 Leasing of Bare Land**

This may be an arrangement relevant to Maori Trust, Joint Venture, Investor / Corporate Owners or absentee owners. From the forum we understand that typically such leases may run for up to 20 year duration

## **Health and Safety Duties:**

When bare leasing land to other parties, the organisation would have little control or influence over day to day activities or operations, as such there is no specific duty they would hold. However general duty of care obligations described above would apply. For example, if the organisation was conducting a review of leases, or physical inspection of its land and it became aware of health and safety hazards it should raise these with the lease holder. Similarly, if the lease arrangements required annual reporting of activities and results, then health and safety should form a component of that report, in line with the Institute of Directors model for annual health and safety reporting.

### **4.4 Engage Orchard Management Company to undertake all Operations**

This may be an arrangement relevant to Maori Trust, Joint Venture, Investor / Corporate Owners absentee owners or where annual lease arrangements are in place.

Where the organisation has engaged an orchard management company to undertake all operations on its behalf it will be required to develop processes to complete and record audits of the company's health and safety management practices. This would include:

- Receiving regular health and safety performance reports.
- Completing regular reviews that the management company was meeting all its HSWA obligations, both in terms of appropriate processes and systems, as well as physical work practices. Where non-conformances or significant failures to meet these obligations is discovered, the organisation will be required to maintain oversight and obtain evidence that corrective actions have been developed and implemented.

### **4.5 Partial or Full Management of Orchard Operations**

Where conducting any level of operational control or activity, the organisation would have specific duties as PCBU. This would include:

- Ensuring governance and oversight of health and safety risk assessment and management programs.
- Ensuring health and safety advice and expertise is available from suitably competent and experienced resources.
- Ensuring that the PCBU met its obligation to workers in relation to welfare, consultation, reporting and management of incidents.
- Ensuring that the PCBU has suitable and adequate processes and systems in place to assess and monitor the effectiveness of contractors to complete the work they have been engaged to undertake without risk to their, or others, health and safety.

### **4.6 Scenarios and Examples**

#### **4.6.1 Grower Requires On Farm Maturity Sampling**

Primary duty holder (may be grower, orchard management company) must:

- Ensure that they undertake assessment to ensure that all suppliers/contractors engaged have suitable processes and systems in place to adequately identify hazards, assess associated levels of risk and implement and monitor controls in order to reduce the levels of risk as far as is reasonably practicable. This would extend to understanding how contractors plan to control hazards associated with on-site activities.

- Provide information about hazards in work places they either directly control, or have management of, to contractors required to undertake the work. This information should be related to site specific hazards (such as access requirements, no-go zones and emergency response procedures.). Typical, or generic hazards that have been identified and addressed in the assessment process outlined above will not need to be re-communicated to contractors undertaking sampling activities.
- Ensure that there are adequate processes and practices in place to ensure consultation and cooperation between PCBUs who are working on the site.
- Conduct review and oversight of contractors' activities to ensure that controls remain in place and are effective.
- Have methods for contractors to report hazards and opportunities for improvement

Contractor completing the sampling must:

- Provide an overview of their safe system of work to the primary duty holder prior to engagement or as part of the contract procurement process.
- Work within the requirements of their safe systems of work and incorporate site specific hazards and activities into their task planning, risk assessment and control processes undertaken for onsite work.
- Facilitate, or participate in, processes and activities relating to consultation and cooperation between multiple duty holders. This would include induction to site.
- Report incidents or hazards that occur or are identified during their work activities.

#### **4.6.2 Visitors to Orchard**

Primary duty holder (may be grower, orchard management company) must ensure that visitors are provided with information relating to activities and hazards on site, control measures they may be required to engage with and any site rules and PPE requirements.

Visitors must be escorted, or supervised, by a worker familiar with the work site, its hazards and controls.

#### **4.6.3 On Farm Maintenance and Repair of Equipment**

Primary duty holder (may be grower, orchard management company) must ensure that information detailed in 4.4.1 above is transferred to the persons conducting the work. Similarly, the contractor conducting the work shall provide the information relating to their health and safety capabilities and management processes to the primary duty holder.

Given that this type of work is often conducted as part of on-going service agreements, it is usual that the transfer of information by the service provider will have been completed at the time of engagement.

The primary duty holder will be required to conduct and document periodic assessments that the service providers are conducting work in accordance with their previously supplied management plans.

Where there are requirements to engage one-off, or new providers, the primary duty holder will be required to ensure that they have evidence of the contractor's health and safety capabilities. This can be obtained at the time of engagement, the primary duty holder may ask the service provider to provide evidence of the systems of work (procedures, task analysis, training, competencies etc.) that their workers will use to identify and control the hazards associated with the work. The primary duty holder, should in this scenario, transfer information to the service provided relating to site specific activities and hazards, relevant to the area where the work will be undertaken.

#### **4.6.4 Collection of Fruit from Farm**

Primary duty holder (may be grower, orchard management company), will be required to ensure that they have requested and received information from the transportation provider on how they will control the hazards associated with the on farm activities. This would include ensuring that they have assurance that the transportation and loading equipment is maintained and that operators are trained and competent to use the equipment.

Where the grower is providing the loading area and operations they will have a requirement to ensure that they develop systems of work to prevent harm to transport provider workers. This would include ensuring that loading areas and operations are under the control of a designated worker and that briefing and coordination activities occur between transportation companies and on farm workers.

#### **4.6.5 Engaging Labour Hire**

In situations where the primary duty holder (may be grower, orchard management company), requires casual labour to be provided through a third party i.e. labour hire company, there are specific overlapping duties that exist between the PCBUs. The labour hire company should seek information from the grower as to the nature of the tasks to be undertaken, what health and safety hazards and controls are in place, with the objective of being able to obtain a level of assurance that the workplace has appropriate systems of work in place to ensure the health and safety of the worker. The labour hire company will then be able to provide a briefing to its worker prior to the engagement commencing.

The grower will be required to provide an induction/briefing to the worker prior to work commencing to ensure adequate knowledge and awareness of site hazards, controls and other health and safety requirements.

There may be instances where contractors to the primary duty holder (may be grower, orchard management company), engage a number of labour hire providers directly. In such scenarios the primary duty holder shall ensure that the contractor has provided information and evidence (at the engagement phase) of how they will manage the transfer of information, induction and briefings to the labour hire providers they have engaged, in line with the requirements outlined above. This requirement would apply to all scenarios where contractors are engaging sub-contractors, i.e. the primary duty holder will need evidence and assurance that the contractor has appropriate systems to manage their obligations when engaging sub-contractors. We understand that there are often more informal situations in place relating to on farm labour, for example other growers may assist in operations, friends and family may work on a casual basis. In such circumstances the primary duty holder should undertake the same processes to brief these workers prior to work starting as for formal labour hire arrangements detailed above.

#### **4.6.6 Engaging Employees**

Where grower, orchard management company, or other PCBU engages workers there are specific obligations that they must meet and demonstrate. The PCBU must meet its main duty of care obligations to provide and maintain a workplace that is free from risks to workers health and safety.

Practical measures to ensure that the employer can demonstrate it is meeting its obligations should include:

- Providing induction that includes specific information relating to hazards and the systems of work in place to control them. The employer should be able demonstrate that the employee has understood this information and has assessed the employees level of knowledge and understanding.

- Continuing the understanding of hazards and systems of work through on-going training and provision of information. Training may be in the form of experiential training (through supervised work) and formal training (such as use of equipment). Information may be provided through a variety of methods, such as written work instructions, briefings, meetings and workplace signage.
- Provide appropriate methods for employees to be consulted on activities and changes that may impact their health and safety. These may be as formal, or informal, as is appropriate to the scale and culture of the workplace, however it is important to remember that records must be kept of such consultation and engagement activities. This could range from a diary record, or formal minutes of health and safety meetings.
- Ensuring that employees understand emergency procedures and requirements.
- Maintaining all equipment and tools, vehicles and machinery used at work are safe to use and in good working condition.
- Providing personal protective equipment where required and ensuring that employees have training or instruction to use and maintain the equipment correctly.
- Where employees are required to have specific qualifications and competencies (for example to operate or engage with plant and equipment) employers should ensure that they have some form of process in place to assess and record the competency of employees prior to them undertaking work.
- Providing adequate supervision to employees. This is particularly important during the initial period of employees work and when they are undertaking new, or modified tasks.
- Ensuring that monitoring the health of workers and the conditions at the workplace to prevent illness or injury to workers. There are specific requirements for health monitoring, relevant examples for the Kiwifruit industry would include where employees are required to work with hazardous substances or monitoring of noise and employees hearing function.

#### **4.6.7 Undertaking Consultation and Cooperation Activities**

In smaller, more informal scenarios, such as neighbouring growers assisting each other with on farm activities, the use of daily health and safety diaries to record short term/informal cooperation arrangements, such as shared use of machinery, or equipment, would be an acceptable mechanism to capture and make information available.

Where there are larger scale and more complex interactions involving more than two PCBUs and there are formal contracts in place, we would recommend that there are more detailed, structured processes in place, such as health and safety daily briefing or work planning tools. We would recommend that there is an opportunity to develop and provide a simple, relevant and standardised tool for use across the industry. This would enable common approaches to be implemented across the supply chain.

We would suggest that the land owner, or their representative (as primary duty holder), be the responsible party for initiating the consultation and cooperation cooperation process.

#### **4.6.8 Design of Vine Trellis or other Orchard Structure**

Structures that are designed for on farm use may include:

- Trellis and fruit support structures.
- Sheds and storage facilities.
- Loading and unloading bays.

The HSWA includes specific duties for PCBUs engaged to complete the design of structures to ensure, so far as is reasonably practicable, that any structure they design is without risks to the health and safety of persons who:

- Use the structure at a workplace (end users / customers);
- Construct the structure at a workplace;
- Carry out the manufacture, assembly, use, maintenance, proper demolition and disposal of the structure at a workplace; or
- Are in the vicinity of a workplace and are exposed to the structure, or whose health and safety may be affected by an activity related to the structure.

To fulfil these responsibilities, designers must give up-to-date information to each person who is provided with their design, including:

- The purpose for which the structure was designed;
- Any risks or hazards identified in the structure, including the results of any calculations or testing; and
- The necessary steps, training, instruction or supervision needed to ensure that the structure is used without risks to health and safety.

#### **4.6.9 Fabricators and Suppliers of Equipment and Materials**

Suppliers of plant and equipment shall provide operating instructions, such as manuals and verification that the plant has been designed and manufactured in accordance with applicable standards and regulations. This may include information relating to noise, vibration controls, fixed guarding or information relating to operating parameters and limitations of equipment and materials.

Suppliers of chemicals must provide safety data sheets that include information relating to the health implications and impacts of exposure, the safe use, storage and emergency response requirements for the substance.

The PCBU (grower or orchard management company) that is responsible for requesting and specifying the design of a structure should ensure that the PCBU completing the design is able to demonstrate how it has met its obligations detailed in above. This would include requesting a health and safety in design report that would detail what hazards (associated with the construction, use and maintenance of the structure) the designer has identified and how they have either sought to eliminate or minimise their impact.

Health and Safety information supplied by the designer should be used in the development of safe systems of work related to the structure, for example work instructions, training and induction material.

## **5 Recommendations**

Following the completion of the review, Beca has provided the following recommendations to NZKGI.

### **5.1 Contractor Engagement and Management**

The Kiwifruit industry develop standardised processes and tools to enable its growers and contractors throughout the supply chain to consistently obtain, transfer and retain relevant health and safety information. This would include:

- Developing standard terms and conditions for use in contracts which detail health and safety expectations and responsibilities.
- Templates to:
  - Provide information to potential contractors relating to the health and safety hazards associated with scope of works.
  - Assess the adequacy of contractors' health and safety plans and procedures provided as part of engagement process.
  - Complete and record audit and oversight inspections of contractor activities.
  - Complete and record consultation and coordination activities completed by parties with overlapping health and safety obligations.

## **5.2 Health and Safety Consultation and Coordination**

Due to the importance and specific relevance of consultation and cooperation obligation to the kiwifruit industry we recommend the industry develop and provide information and tools to enable all duty holders undertake and demonstrate their consultation and coordination duties outlined in this report. There would be a benefit across the supply chain, as contractors and suppliers would be able to interact with standard processes and ensure their own management processes were aligned to those standard across the industry.

In some instances these obligations may be being met through informal or undocumented processes, however it is important for the industry to develop appropriate mechanisms to record such activities and interactions.

## **5.3 Standard Health and Safety Tools and Systems**

The development and implementation of standardised health and safety templates and tools would assist the industry in developing common culture and shared expectations of what health and safety management entails to all parties across the supply chain. We would suggest that there are business efficiencies available to the industry by developing and providing such standardised tools.

These tools may be provided as “stand alone” resources for the industry to uptake as required, or as a standard that individual growers must meet.

There are a wide range of proprietary systems available that may be of benefit to assist growers and orchard management companies' capture and transfer health and safety information. This information could include site hazards to contractors or visitors, standard operating procedures for specific activities, incident and near miss reports and health and safety alerts.

We would recommend that the industry complete a review to establish if a single, industry wide system would be feasible and effective. Depending on the outcome of this review we would recommend subsequent assessment of potential proprietary health and safety systems to assess capability to meet industry needs and operating requirements in a way that adds value to growers and the supply chain.

## **5.4 Industry Engagement and Input**

To enable the successful development and implementation of any standardised management processes or systems we would recommend that the industry growers association develop a health and safety strategy group to oversee the scope, development and implementation of any standardised processes or systems. The group should also be involved in developing and coordinating awareness raising and appropriate information sessions to support the consistent uptake and implementation, including involvement of the supply chain.