

The Courts continue to clarify the “edges” of HASWA liability. In this issue, we look at a recent High Court decision on contracts and PCBU duties. We also briefly cover some recent convictions from New Zealand and overseas, the obligation to prepare for emergencies and the fall in the number of EUs being accepted by WorkSafe. Finally, we update you on the findings from the independent review of health and safety at Ports of Auckland.

High Court Judgement clarifies the role of contracts and liability cover under HASWA

One of the recurring themes of *The Safe Side* is that HASWA’s coverage is wide. A recent High Court [decision](#) further confirms this – and it is not necessarily good news for businesses that are concerned about their legal liability.

The case arose after the demolition of a house went badly wrong. During the work, a wall fell onto a neighbouring house, damaging it and rupturing a gas line. In addition, samples revealed that asbestos was on the site.

The company that carried out the demolition was charged over the incident and pleaded guilty. A second company that was expecting to later project manage the work was also charged. This company had no contractual ties to the first company when the offending occurred. However, it had fenced the site and arranged for the services to be cut off.

The second company successfully defended the charges against it in the District Court. It argued the actions it took were acts of friendship to the property owner’s director and

it was not, therefore a PCBU in relation to the work. The District Court Judge found that without evidence of a contractual relationship that tied the two companies together, the “... charges must fail.” The charges were dismissed.

WorkSafe appealed this decision in the High Court. The High Court overturned the District Court decision and found that the broad way in which a PCBU and related terms are defined in HASWA means that a business does not need to be contractually tied to an activity to be a PCBU in relation to it. The question was more if the second company was actually managing or supervising the work even in the absence of a contract. The Judge ordered a retrial.

This decision again emphasises the need for businesses to have generous statutory liability cover for unexpected health and safety investigations and prosecutions. Even if a business is only peripherally involved in work in which someone is seriously injured or killed, they might still get caught in the wider HASWA net.

Preparing for emergencies under HASWA

Almost any workplace can have a medical event or a fire. Last month, the earthquake off the East Coast led to a widespread tsunami alert. Preparing for these types of emergencies is not only a good idea but something that all PCBUs must do under the Health and Safety at Work (General Risk and Workplace Management) Regulations.

The Regulations say that a PCBU must prepare, maintain and implement an emergency plan for the workplace. This includes providing procedures for: evacuation; notifying emergency services at the earliest opportunity; medical treatment and assistance; as well as procedures to ensure effective communication with all persons in the workplace. The emergency plan must also set out the frequency of testing of the plan and provide information, training and instruction to workers who may have a role in implementing the plan.

What needs to go into the plan will depend on the circumstances of the workplace including its size and location, and the nature of the work carried out. It will almost always cover fire and natural disasters; and may also cover anything from gas leaks to robbery or bomb threats.

General guidance on developing an emergency plan is available from [WorkSafe](#). Some types of workplaces also have additional duties around managing emergencies. These include those holding certain types and quantities of [hazardous substances](#), [major hazard facilities](#) and [underground tunnels and mines](#).



“At this time, I’d like to point out some of the safety features and emergency exits that our craft is equipped with...”

Numbers of enforceable undertaking accepted by WorkSafe declines sharply

An [Enforceable Undertaking](#) (EU) is a formal agreement between WorkSafe and a duty holder made under HASWA. It is entered into voluntarily by the duty holder following a breach (including an alleged breach) of HASWA and, once in place, is legally binding. It is generally used as an alternative to prosecution and after charges have been filed. A PCBU will usually agree to carry out actions to improve the health and safety of workers and the industry instead of being convicted and paying a fine. An EU will also usually compensate a victim if this has not been done already.

Overall trends show that WorkSafe is accepting far fewer EUs than it did when they first became available and the number of accepted EUs has fallen sharply since a peak in 2018. From April 2017 (when the first EU was accepted) to March 2018, WorkSafe accepted 11 EUs. From April 2018 to

March 2019, this rose to 13. From April 2019 to March 2020, this fell to four. From April 2020 until now, the number is five.

It is unclear why this fall in numbers has occurred. The experiences of some of VL's clients suggest that it is now much harder to get an EU over the WorkSafe line. Part of the reason for this may be that past enforceable undertakings have already resulted in the most obvious industry safety initiatives being implemented and it is now more difficult to present novel proposals to persuade WorkSafe's EU panel. It may also be that WorkSafe itself has lost some of its early enthusiasm for EUs.

All accepted EUs must be published and you can find a record of them [here](#). WorkSafe also explains its approach to EUs in its [Operational Policy](#) and this is used to guide WorkSafe's decisions.

Falls from height remain an ongoing risk that needs to be managed by PCBUs

A fall from height remains a significant cause of death and injury at work, and a recent prosecution demonstrates that this risk needs to be actively and diligently managed.

A car transporter company has been [sentenced](#) after it failed to maintain an edge protection system around a car trailer. A worker leant against the wire ropes while securing a car on the trailer. The wire snapped and he fell three metres to the ground. Sadly, he later died in hospital of a brain injury.

WorkSafe's investigation found that the wire ropes were severely corroded despite the fact the company had highlighted the need to maintain them and had recorded four falls from height on trailers in the two years before the incident. At sentencing, a fine of \$279,000 was imposed on the company and reparations of \$90,000 were paid to the victim's family.

The UK HSE has produced extensive [guidance](#) on managing [falls from vehicles](#).

£1M fine for UK theme park after the death of a child on a water ride

A [UK company](#) has been fined a staggering £1M after the death of an 11-year-old girl on a water ride.

The child was visiting the theme park as part of a school trip when she fell out of the raft and into the ride's water trough. She managed to wade to the conveyor at the end of the ride and climb onto it – but then fell into a section of deeper water and drowned.

Despite similar incidents, the investigation found that there were inadequate control measures to detect when a person was in the water as CCTV only covered half the ride. In

addition, there was no system to rescue anyone who fell into the water.

The HSE commented: "The risks from ejection from the raft had been evident ... for some time, yet they still failed to take the action that could have prevented ... death."

Independent review of Ports of Auckland identifies needs for significant improvements

Auckland Council has released its independent review into health and safety at Ports of Auckland. The review was commissioned following three work deaths at the Port. You can read about the most recent conviction for one of these deaths in our January 2021 issue of [The Safe Side](#).

Mayor Phil Goff said the [review](#) found systemic problems at the Ports in relation to critical health and safety risk management and organisational culture relating to health and safety. "Health and safety rules that keep people safe are not 'a nice to have'. They are a vital component of

good management in any workplace," he said. "When someone goes to work, they should go back home to their families and loved ones."

Significantly, Mr Goff also said that he had made it very clear to the Chair of the Ports that changes needed to be made to the way the Ports run and it was his expectation that he and the board would hold management accountable for these changes. Council in turn will hold the board accountable. A full copy of the report is available [here](#).