The Safe Side

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Developments in health and safety from New Zealand and around the world

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*WorkSafe has been in the news lately – and not always for good reasons. The regulator was roundly criticised by the District Court for bringing and continuing a prosecution against a small quarry in Canterbury and was ordered to pay significant costs to the company after the charge was dismissed. We cover the case in this issue. We also look at WorkSafe's recent media release about ongoing harm in the construction industry and what this may signal for the sector; as well as a rare prosecution in Victoria, Australia for discriminating against a worker who reported a health and safety concern to the health and safety regulator. Lastly, we have an article on the sentencing of a mammoth inflatable slide operator with a history of non-compliance.*

## WorkSafe issues warning to the construction industry over unsafe work

WorkSafe is warning construction company owners, directors and the wider construction supply chain that time is running out if they continue to ignore obligations to ensure work is designed and done well. "The message is clear, those who can influence how work is done must do so," said WorkSafe's Chief Executive, Phil Parkes. "Failure to meet legal requirements will result in swift enforcement."

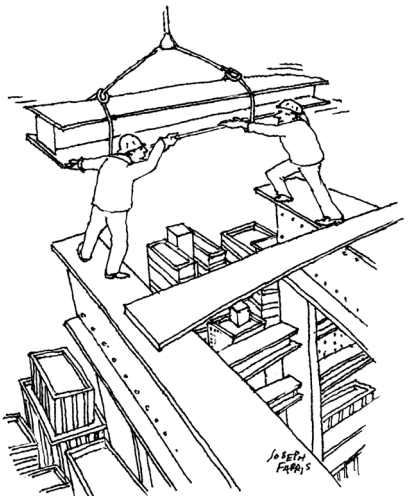
The warning was contained in a joint media release from WorkSafe NZ, Construction Health and Safety NZ (CHASNZ) and the Council of Trade Unions (CTU). All three organisations called for a renewed focus on construction health and safety after a number of serious incidents recently. The release said that since 1 January 2021, at least two workers have died in construction every month and just over one worker per day has been seriously injured.

The CHASNZ Chief Executive, Chris Alderson, noted that the construction workforce is currently under extreme pressure from internal and external factors, and this also increases the risk of a normal day's work becoming one with a tragic outcome. "It will take a concerted effort from the whole supply chain including clients, designers, contractors, government and the workforce", he said.

The Health and Safety at Work Act 2015 introduced broad overlapping duties on all PCBUs in a contracting chain. PCBUs that share duties to workers, such as those involved in a construction project, must consult, cooperate and coordinate together to manage risks that arise from the project work. PCBUs must comply to the extent to which they have, or would reasonably be expected to have, the ability to influence and control the matter to which the risk relates.

Those at the top of the contracting chain will usually have the ability to set health and safety standards for the whole project. But prosecutions of owners, directors and those at the very top of the contracting chain are complex and have been rare – except in the case of directors of small companies with hands-on involvement in work. Whether this will change remains to be seen.

More information on managing contracting chains to support health and safety is available from WorkSafe.



*"I've given up biking. Too dangerous."*

## Victorian company fined for giving a formal written warning to a worker who raised safety concerns

A Melbourne bus company has been fined $30,000 after giving a bus driver a written warning for contacting WorkSafe Victoria with safety concerns about buses.

The driver had previously informed his supervisor that a bus was unroadworthy due to a missing door safety module. He was instructed to drive it anyway but refused.

After reporting a separate safety issue on another bus a few days later, the driver was asked to attend a meeting with his manager. He was advised that he had breached company policy by contacting WorkSafe and that his reports to WorkSafe amounted to misconduct.

Health and safety legislation in both Victoria and New Zealand protects workers from discrimination for reporting or raising safety concerns. WorkSafe NZ explains that a person or a business cannot discriminate or take other negative steps against a worker because of their involvement in work health and safety.

The Safe Side
September 2022 | Issue 39

## WorkSafe ordered to pay $158,000 to a small quarry company after a failed prosecution

In a highly unusual District Court decision, WorkSafe has been ordered to pay the costs of a company it prosecuted after a Judge dismissed the charges on the basis there was no case to answer.

Mount Somers Sand Limited (MSSL) is a small three person quarrying operation that extracts high quality silica sand in its Canterbury quarry. It used a long reach excavator to collect the sand from a catch trench at the base of the 80-metre-high quarry face. The catch pit collected the sand as the face gradually collapsed.

MSSL's director, who was also an employee, had considerable experience in the extractives industry. He assessed the environment and behaviour of the face materials before deciding on the work practices and controls needed to manage the risk of the excavator being engulfed by a slope or face collapse.

On 15 February 2018, two WorkSafe inspectors made an unannounced inspection of the MSSL work site. They were at the extraction site for about 15 minutes. They formed the view that, from what they could see, with the high face at the extraction site and the practice of excavating from the toe of the face, there were risks of catastrophic failure of the face above the excavator that would exceed the ability of the catch trench to contain the material, leading to the excavator being engulfed by overburden material.

They also found that the quarry manager did not hold the required quarry manager's certificate although he had significant experience in the industry.

An inspector again visited the site briefly in July 2019 and came to the same conclusion about the risks of engulfment.

WorkSafe then charged the company with failing to engage a competent person to undertake a geological assessment, to put in place adequate excavation rules for adequate management of excavations, and to investigate previous ground failures.

An expert engaged by MSSL later provided a report saying that MSSL's method of extraction of silica sand was sufficient to meet reasonably foreseeable risks of slope failure and engulfment, and WorkSafe's assertions around the level of engulfment risk were overstated and highly unlikely. This evidence was provided to WorkSafe before the trial and WorkSafe was invited to withdraw the charge in return for no cost application. WorkSafe agreed with the expert evidence but appears to have held that this advice should have been received by MSSL before work began as MSSL could not know whether the excavation method was safe without the expert advice. WorkSafe proceeded with taking the matter to trial.

After hearing the evidence at trial, the charge was dismissed by the Court. The Judge said that the individual who conducted MSSL's hazard and risk assessment was qualified to do so and it did not matter that he was not an engineer or that he was an employee of MSSL. It was noted that the conclusions drawn by MSSL's expert were the same as those of MSSL in relation to the hazards and risks at the excavation site.

When later awarding costs against WorkSafe, the Judge observed that any prosecuting body has a duty of care to members of the public to undertake proper and careful investigations into alleged wrongdoing. She found that WorkSafe's rejection of MSSL's resolution proposal on the receipt of MSSL's expert's report was "unfortunate and negligent".

The award of costs covered the full fees of the expert, disbursements, some legal fees before the receipt of the expert's report and all legal fees following the receipt of the expert report. Duncan Cotterill, who represented MSSL, observed that the costs awarded against WorkSafe were "substantial and unprecedented."

It is difficult to see this decision as anything other than a sharp judicial rebuke for WorkSafe. It also underscores the importance of businesses being able to fund expert legal representation such as that covered by VL's Statutory Liability insurance.

## Mammoth slide operator ordered to pay more than $400,000 for safety failings

An operator of a giant inflatable slide was sentenced in the Waihi District Court after the overloaded slide collapsed at the Whangamatā Summer Festival in December 2020. A dozen people on the slide fell from heights of up to 12 metres. Most were children. One victim broke both his ankles and has required 11 surgeries.

Witnesses said there were no rules displayed for riding the mammoth slide, no instructions were given, no weight or age checks done, and there were no workers at the top of the slide at the time of its collapse. WorkSafe's investigation concluded the slide did not comply with required standards, the operators should have had safe systems in place for operating the slide and ensured its workers properly supervised and instructed slide users.

The Court imposed a sizeable fine of $350,000 and ordered emotional harm reparations of $40,000 and consequential loss reparations of $12,958. The size of the fine may have been influenced by the operator's substantial history of non-compliance. WorkSafe had 11 prior interactions with the operator. In 2015, a mammoth slide became overloaded and collapsed – injuring 6 children at the Masterton A&P show. The director of the company was fined $115,000 for obstructing WorkSafe's investigation.

In 2016, another slide collapsed at an event in Hamilton Gardens and 10 children fell about 10 metres. In response, WorkSafe issued a directive letter, and Hamilton City Council later banned the company from operating at the site.

Inflatable devices may present significant risks of injury to users if not operated safely. We reported on the tragic death of 6 children in Tasmania on a bouncy castle in December 2021. WorkSafe information on safe operating requirements for inflatable devices is available here.