

In the last issue of *The Safe Side* for 2022, we report on six recent sentencings – three under the Health and Safety at Work Act (HASWA) and three under the Fair Trading Act. Two of the HASWA cases involved hazardous machinery and sadly, one resulted in a fatality. The other HASWA prosecution was brought after a subcontracted painter fell 4.7m from a roof and died as a result of his injuries. The Fair Trading Act prosecutions were taken by the Commerce Commission and the convictions resulted in total combined fines of more than \$1.42 million for the three companies involved.

On a lighter note, if you would like to indulge in some Christmas-themed statutory liability insurance reading, you can revisit our “informative” articles about Santa Claus’ past Christmas struggles and successes in issues [13](#) and [30](#) of *The Safe Side*. We hope you have an enjoyable and safe holiday season and New Year.

Uncontrolled machinery hazards continue to seriously harm and kill workers

The human and economic costs of failing to adequately manage the risks of using machinery at work have been highlighted once again by two recent convictions under HASWA.

In the first case, a [Fielding company](#) was convicted and ordered to pay a total \$480,000 following the death of one of its workers in a machine at its factory in April 2021.

The 47-year-old victim was trapped and crushed while using a meal bagging machine. The machine was a replica of another the company installed on the site. But the replica machine was modified to fit into its new location and this created significant crushing hazards that were never identified by the company. The replica machine was also missing a physical barrier between the worker and exposed moving parts.

The WorkSafe investigation found that the company did not conduct an adequate risk assessment on the replica machine, failed to train its staff to use the machine properly, and did not adequately supervise them. It also found that there was no easily accessible isolating switch to stop the machine quickly in an emergency.

At sentencing, the company was fined \$350,000 and reparations of \$130,000 were ordered to be paid.

In another sentencing, a [Northland company](#) was fined \$220,000 and ordered to pay \$31,000 in reparations after a steel fabrication worker partially amputated a finger in an inadequately guarded press brake machine. The victim was off work for two months while recovering.

The accident happened when the victim was working on a steel bending and pressing machine. He became unbalanced and his left hand slipped into the pressing mechanism as it was operating.

WorkSafe said that the machine was not fitted with any observable safety devices although it was possible to have physical guards and safety sensors installed on the machine. These would have protected the workers using it.

In addition, WorkSafe’s investigation found that the victim had not been taken through a risk assessment for the machine. Instead, there was an assumption that the safe operating procedure was for the supervisor to be familiar with.

Machinery hazards are a well-known and ongoing cause of serious injuries and death at work. From September 2021 to August 2022, there were [552 incidents](#) of workers being trapped in moving machinery and equipment resulting in an injury that required more than a week away from work. This averages out as 46 incidents per month and more than one injury per day.

An important first step to managing the risks associated with machinery use is to engage a suitably competent person such as a [Chartered Professional Engineer](#) who specialises in machinery safety to carry out a risk assessment of all machinery on the site. Further advice should be sought if machinery is later modified.

Workers also need to be adequately trained in the use of the machinery and the relevant safe systems of work; and the machinery and its protective devices should be regularly inspected and maintained.

Additional information on machinery safety can be found in WorkSafe’s comprehensive [machinery safety guidelines](#).



“I did a risk assessment of the dangers of not doing a risk assessment, and decided it wasn’t worth it.”

PCBU prosecuted after subcontractor dies in a fall from a roof

In February 2021, a 56-year-old subcontractor was painting a flat, one storey roof when he fell 4.5 metres to the ground and was fatally injured. The Judge later described the death as having a “devastating and multidimensional impact...felt across generations” for the victim’s family.

The victim was engaged by a renovation company that did not have significant experience in working at heights. WorkSafe’s investigation found that there was no site-specific safety plan in place, and no edge protection (for example, scaffolding) installed around the perimeter of the building while work took place. As a result, four workers, including the victim, were exposed to the risk of injury or death.

The company was [charged and convicted](#) under HSAWA in the Christchurch District Court late last month. It was

ordered to pay reparations of \$261,695 and a fine of \$37,500.

After the sentencing, WorkSafe commented that: “Lead contractors owe all workers onsite a duty of care, whether they’re subcontractors or your own staff. Lead contractors must ensure the risks are being controlled to ensure everyone’s safety.”

Falls from height accounted for 10 [work fatalities](#) from October 2021 to September 2022 and were the second leading cause of death in New Zealand workplaces. The steps needed to manage falls from height are well known. Good practice guidance on [working on roofs](#) and working in [contracting situations](#) is available on WorkSafe’s website.

Big fines after Commerce Commission prosecutes under Fair Trading Act

Three companies were recently given substantial fines totalling \$1,427,500 following prosecutions taken by the Commerce Commission under the Fair Trading Act.

By far the most significant fine was imposed on an Australian handbag and luggage retailer. [Strandbags Pty Limited](#) was fined \$780,000 in the Auckland District Court for misleading consumers with its discounting and sales practices online and in-store.

The Commission found that between 2018 and 2020 the company routinely advertised its products as if they were significantly discounted or being sold at special prices when this was not true.

The investigation found that some products had never been sold at the higher price from which a discount was said to be made, while others were on sale for so long, that the prices could no longer be said to be “special”.

The Commission also found the prices of certain products were artificially increased prior to the sale, in order to make the discount seem more significant. Other products had been repeatedly discounted, but only ever referred to the very original ticket price as a comparison, despite being sold at different, lower, prices since.

At sentencing, the Judge concluded that the price inflation and immediate discounting was deliberate, and that extended and repeated discounting was “significantly” or “highly” careless, bordering on reckless. He also agreed with the Commission that breaching the Fair Trading Act was integral to Strandbags’ profitability.

The Commission provides guidance for retailers on discounts and pricing in its [price promotion tip sheet](#).

Two other retailers were also fined after prosecutions by the Commission for making unsubstantiated claims about their products.

Australian skincare company, [Ego Pharmaceuticals Pty Limited](#) (Ego), was fined \$280,000 in the Auckland District Court after it made unsubstantiated claims about the Sun Protection Factor (SPF) of two sunscreen products.

When the products were first released in New Zealand in 2016, the Commission said Ego had reasonable grounds to make the SPF representations. However, this stopped being the case from February 2019 due to an accumulation of adverse SPF results from various labs which tested the products (between 2017 and 2019) followed by fraud allegations in August 2019 about the testing facility it relied on.

The Commission Chair commented that: “Businesses have an obligation to ensure that representations can be substantiated, and this is an ongoing obligation. If new information comes to light which impacts on the claim being made... a business should reassess the implications of that evidence and revisit its product packaging and promotion if required.”

In the second case, [Ashley & Martin \(NZ\) Limited](#) was fined \$367,500 for making unsubstantiated marketing claims about its widely advertised hair loss treatment between November 2016 and May 2021.

The company repeatedly claimed that its programme, costing up to \$5,000, had a 98% success rate. The claims were made on its website, in radio and in television advertising and appeared to be based on a customer satisfaction survey of 109 customers and clinical trials involving 10 customers.

The Commission argued Ashley & Martin did not have a reasonable basis for its claims given the extremely small sample sizes relative to the customer base, the potential exclusion of unfavourable results and changes in the treatment formulation.

The Fair Trading Act requires businesses to have reasonable grounds for a claim about products or services when they make it. Claims must be supported with credible evidence, accurately reflect the information held and not stretch or exaggerate beyond that. Information on [unsubstantiated claims](#) is available from the Commission.