

Statutory Liability Insurance

Health & Safety at Work Act is Showing its Teeth

The Health & Safety at Work Act 2015 is generating a dramatically increased level of fines upon conviction for individuals and business entities. As well WorkSafe now has a 12-month window to make its decision whether to prosecute (previously 6 months). As a result, we are just now seeing how things may pan out in future.

Under the former legislation the maximum fine was \$250,000. In sentencing, the level of fines was determined within a framework established by the High Court in 2008 in the *Department of Labour v Hanham and Philip*. The court in that case established a framework of “culpability bands” as a starting point for determining fines, subject to discounts for mitigating factors. These include: early guilty plea; voluntary early reparation payments; co-operation/remorse; remedial action; safety record and the defendant’s ability to pay.

The scale was:

Low culpability	Up to \$50,000
Medium culpability	\$50,000 to \$100,000
High culpability	\$100,000 to \$175,000

With the maximum fines applying under the 2015 Act being \$300,000 for an individual and \$1.5 million for a commercial entity (double these amounts for reckless conduct), WorkSafe is submitting in the few cases prosecuted under the 2015 Act that the framework philosophy is retained but with significantly increased “culpability bands”. WorkSafe proposed a new range ten times higher and pushed for the “full quantum of fines available” under the band to be used thus:

Low culpability	Up to \$500,000
Medium culpability	\$500,000 to \$1 million
High culpability	\$1 million to \$1.5 million

The Mechanics of Sentencing

To illustrate how things may play out here is a brief summary of the sentencing determined in a recent HSW case.

WorkSafe v Budget Plastics. (August 2017)

The Judge fixed reparation for emotional harm at \$37,500 – nothing exceptional here. In relation to setting the fine, the Court specifically declined “to make sentencing guidelines”. Whereas WorkSafe had submitted that culpability was “moderate” and that the starting point for the fine should be \$900,000 the Court was of the view that the available starting point under the new Act was between \$400,000 and \$600,000 but did not fix a starting point.

Instead it reduced the fine by giving credit for mitigating factors and then said “the end sentence will therefore be between \$210,000 and \$315,000, depending on the starting point adopted”. But the end sentence was in fact determined by Budget’s submission that a fine of over \$100,000 would mean that it would be put out of business and the penalty was reduced to \$100,000.

New Exposures for Businesses

Other examples where new provisions of the 2015 Act are in play:

Prosecutions for serious harm to non-employees

A tree felling company allowed a falling tree to injure a member of the public. It was fined \$90,000 plus reparations of \$18,500. Ability pay was the determining factor in the fine which could have been up to \$1.5m.

Prosecutions for supplying dangerous products

An agricultural machinery dealer supplied a farmer with a tractor with faulty brakes. The lack of brakes caused an accident resulting in serious harm injury to the user. The dealer is being prosecuted (this case is still before the courts).

Prosecutions for “near misses”

An earthmoving machine struck overhead powerlines bringing down live wires potentially endangering two workers – no one was injured but the company was fined \$90,000.

With the inability to insure against fines for Health & Safety breaches it is almost now universally realised that business must step up their risk management in this area.

Additional Exposures for Insurers

In our [May 2017 Market Bulletin](#) we reported on the exceptional reparations award of \$336,300 in *WorkSafe NZ vs Wai Shing Ltd* which included an ACC top-up of \$226,300 which included a 50% discount on the calculated loss. Since then there have been several other significant awards.

In *WorkSafe NZ vs Ask Metro Fire* (September 2017) the final amount paid to the injured worker was \$197,415 comprising \$76,490 for the ACC shortfall, \$20,475 reparation for accommodation costs and \$100,000 for emotional harm.

WorkSafe's Costs

The 2015 Act allows WorkSafe to apply for costs recovery from the defendant – yet another adverse impact on the cost of a claim albeit relatively small thus far. The VL Statutory Liability policy makes specific provision to indemnify these.

Increasing Defence Costs

The 12 months prosecution window and the increasingly rigorous vigilance and investigations of WorkSafe inspectors means that VL's specialist lawyers are spending considerably more time defending and managing HSW claims. VL is aware that even with preferential arrangements with its panel lawyers the costs currently in a serious HSW claim is approaching twice as much as they were three years ago.

The [WorkSafe website](#) is informative.

VL's Insurance Solutions

Statutory Liability

Statutory Liability insurance will indemnify reparation costs and defence costs (which are "costs inclusive") but with all costs blowing out in all areas it may be opportune to consider limits of indemnity under Statutory Liability covers.

VL Work Accident Insurance (a unique VL offering)

Currently VL is dealing with a Health & Safety at Work claim where an employee suffered fatal injuries. The employer holds a VL Work Accident cover. The business was able to pay \$50,000 to the deceased's estate within 48 hours of the accident following VL accepting and paying the claim under Work Accident. The business owner was grateful and impressed with speed and ease of settlement.

One of the factors which a Court may consider in assessing the discount applying to the level of penalty is an early voluntary payment to an injured worker as a quasi-reparation. This discount will usually apply to reparations as well as fines.

With fines potentially increasing ten-fold it is desirable that every means should be employed to achieve maximum discounts because the business must bear the cost of fines. However, despite this potential benefit, in reality, many businesses will lack the financial capacity to make meaningful early voluntary reparations. VL Work Accident Insurance fills that gap.

VL Work Accident is a unique product with an added feature to cover funeral expenses.

Work Accident is available under VL's LegalEdge Policy as an optional addition to the package, or it can also be added by endorsement to stand-alone Statutory Liability and Combined Liability policies. [See the wording.](#)

VL Liability Consequential Loss insurance (a unique VL offering)

A workplace injury accident will inevitably have a disruptive effect on business operations. On top of that, WorkSafe has powers to cause significant interruption to a business in its investigations, particularly by ordering the closure of operations or removing or shutting down plant and machinery for indefinite periods. Either way there is potential to cause financial loss to a business. The VL Liability Consequential Loss policy is a unique product which provides a business interruption cover similar to that available in the property market but It responds to interruption following incidents which give rise to claims under a VL Public, Employers or Statutory liability policies. [See the wording.](#)

In any instance your VL underwriter will be happy to assist in any of these.

