

The Safe Side



Developments in Health and Safety from New Zealand and around the world

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It is now three years since the Health and Safety at Work Act 2015 (HASWA) came into effect on 4 April 2016. Over the next few months, we'll briefly cover some of the most significant prosecutions under the new Act. We begin in this issue by looking at the conviction that resulted in the highest fine to date. In addition, we touch on the rising interest in industrial manslaughter laws and provide a brief update on the first HASWA conviction for reckless conduct. As always, we hope you find the articles useful.

- Jane Birdsall, Health & Safety and Statutory Risk Consultant

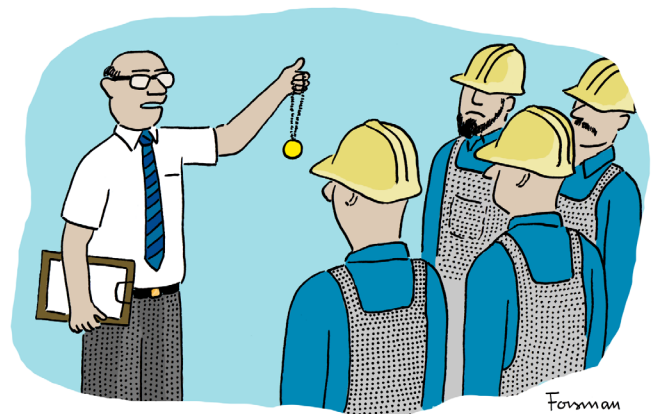
Investing in health, safety and wellbeing

Focussing on the long-term horizon helps businesses to create a virtuous circle that supports growth, profit and community wellbeing, according to the Governor of the Reserve Bank of New Zealand, Adrian Orr.

In a conversation with the Chief Executive of WorkSafe, Nicole Rosie, Mr Orr explains that health, safety and wellbeing should be seen as an “enabler of business” - not a cost. He discusses the productivity benefits of committing to a trained labour force and investing in safer machinery and equipment.

Mr Orr also covers the role of a fund manager which he says includes insisting on responsible investment decisions.

[Watch the full WorkSafe video of the conversation here.](#)



“As a part of a cost-cutting experiment all of our safety measures will be replaced with these good luck charms.”

The importance of managing vehicle and pedestrian interactions in the workplace

One of New Zealand's largest freight-forwarding and logistics companies was ordered to pay a fine of over half a million dollars following a conviction under HASWA in May 2018. The fine remains the highest imposed under the Act to date.

Toll Networks (NZ) Ltd (Toll) was prosecuted after its Onehunga site caretaker was killed at work in September 2016. The deceased was fatally struck when three pallets of oats, each weighing 400 kg, tipped from the tines of an operational forklift.

The investigation revealed systematic failures including the absence of specific procedures to barricade off the unloading area and erect temporary warning signage. In addition, the procedural controls in place were contradictory and insufficient to ensure worker safety.

[The Court found that Toll's offending fell within the “high culpability” band](#) and fixed a starting point of \$900,000. With discounts for the reparations to be paid, cooperation with the investigation, Toll's good safety record and an early guilty plea,

the final fine was \$506,300. The Court also ordered that Toll pay reparations to the victim's family of \$110,000 for emotional harm and \$8,020.10 for consequential loss as well as \$6,030 towards WorkSafe's costs. In addition, although unknown, the final financial costs to Toll from the prosecution would almost certainly have included substantial legal costs – possibly well into six figures.

What lessons can businesses learn from this incident?

Inadequate segregation of pedestrians and plant is a leading cause of deaths at work. Businesses should assess how the risks arising from the interactions between people and plant can be eliminated or minimised. [WorkSafe has produced guidance](#) on traffic management and provides links to further Australian and UK guidance.

In addition, there is specific and useful [Australian guidance](#) on establishing loading and unloading exclusion zones to ensure pedestrians stay isolated from plant.

Industrial manslaughter – the next significant development in health and safety legislation?

The creation of a nationally consistent offence of industrial manslaughter has been recommended by two recent Government reports in Australia and may soon be back on the table in New Zealand.

Potential offending under industrial manslaughter laws will only occur if a death arises from work. This differs from current offences under HASWA which relate to the risk of injury or death only. Industrial manslaughter also generally requires that the offender engages in criminally negligent or reckless conduct in relation to the death.

[Safe Work Australia's just completed review](#) of Australia's model Work Health and Safety (WHS) law recommends that a new offence of industrial manslaughter be added.

[The Australian Senate Committee review](#) on the framework surrounding industrial deaths made a very similar recommendation. New Zealand's HASWA is largely based on the Australian model WHS law.

Queensland and ACT already have industrial manslaughter offences in place. The more recent Queensland Amendment Act came into effect on 23 October 2017 and provides for a maximum penalty of 20 years imprisonment for an individual who is an officer or a PCBU, and up to a \$10 million fine for a PCBU that is a corporation.

[The Victorian State Government has also committed to introducing industrial manslaughter laws.](#) The proposed penalty is for a fine of up to \$16 million for employers and 20 years in jail for individuals negligently causing death.

In New Zealand, the Hon. Andrew Little has been a long-time advocate for industrial manslaughter offences – especially for corporations. In 2012 he sponsored a private member's Bill to introduce the offence into the Crimes Act. After the Police decision to file no charges over the CTV building collapse in the 2011 Canterbury earthquake, he explained that the Government was looking at introducing a corporate manslaughter law.

What are the implications for insurance if an offence of industrial manslaughter becomes law in New Zealand?

Insurers, brokers and business will need to consider how and to what extent insurance will apply in this area – especially if the offence is included under the Crimes Act. Statutory liability insurance might cover defence costs but it is unlikely the law will allow insurers to pay for fines or any sort of punitive award.

Policies will also need to provide sufficient cover for high quality and independent legal representation for each potential defendant (as well as the PCBU) during what could be an extensive and expensive investigation and prosecution process.

First conviction for a charge of reckless conduct under HASWA

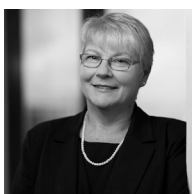
An earthworks contractor has been convicted of reckless conduct in respect of a duty after a lengthy trial in the District Court. The conviction is the first under section 47 of HASWA and carries with it the highest potential penalties available – for an individual who is an officer, up to five years imprisonment and a \$600,000 fine. Sentencing is set down for the end of April.

The Civil Aviation Authority prosecuted the defendant after the helicopter he was piloting crashed in the Canterbury High Country killing his business partner. The charges filed included one each for reckless conduct as a worker and as an officer.

The defendant used the helicopter to fly himself and the victim to a remote work site at Mt Algidus Station. On 30 April 2016, while flying up to the site, the helicopter encountered diminished visibility from a cloud layer below it. The defendant

decided to make a descending spiral manoeuvre through a hole in the cloud. During the descent, visibility worsened. The defendant then chose to bring the helicopter to a hover but lost spatial awareness. The overloaded helicopter sunk downwards, struck the hillside and crashed. The victim died at the scene.

Many businesses will have employees who travel to off-site locations to do work. During the trial, the Court considered whether the men in the helicopter were "at work", and therefore covered by HASWA, while flying up to the work site. The Court found the helicopter journey was not an ordinary "commute" (which would not generally be covered by HASWA) because the men were travelling from their usual work base in Athol to the work site with the primary purpose of undertaking work.



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Jane has over 12 years experience as a health, safety and environmental regulator. She has led many significant investigations into workplace accidents as both a manager and health and safety inspector with WorkSafe New Zealand. Jane is thoroughly familiar with current health and safety practice and works with colleagues, customers and others to assist with risk analysis and reduction of risk factors in this area.

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