

One of the most challenging aspects of health and safety is that risk is rarely static. Like the work environment, it constantly changes in small or significant ways. In this issue, we look at some actions a business can take to manage these changes and minimise the likelihood that they will result in harm to workers. We also cover the first Court-Ordered Enforceable Undertaking, another big reparation payout to a severely injured worker, and the sentencing for the first reckless conduct charge in New Zealand. Finally, following the Beirut explosion, we talk to a chemical expert about the dangers of ammonium nitrate.

NZ's first ever Court-Ordered Enforceable Undertaking imposed

No longer is a fine the only outcome after a health and safety charge is filed in the Court. One of the novel changes in the Health and Safety at Work Act (HASWA) was the introduction of a wide range of alternative sentencing options.

Enforceable Undertakings (EUs), where WorkSafe accepts an undertaking from a PCBU and then withdraws the charge against it, have been a part of the health and safety landscape for some time. Now we have seen the first Court-Ordered Enforceable Undertaking (COEU) imposed. This means the Court, not WorkSafe, accepts the proposal for an undertaking from an offender.

The [Otago Polytechnic](#) faced a HASWA charge after a student on a carpentry course partially amputated his finger on a saw. The Polytech tried to get an EU accepted by WorkSafe, but its application was rejected.

At sentencing, the Polytechnic, represented by a VL funded lawyer, again proposed an undertaking, but this time sought agreement to it from the Court. In spite of WorkSafe opposing it, the Judge agreed that what the Polytechnic proposed would meet the principles of the Sentencing Act

and the fine the Polytech would otherwise have paid was replaced with a COEU funded by it.

The Polytech undertook to design, deliver and offer free of charge, an online training course to educate construction workers about health and safety requirements.

The estimated total cost of the COEU was \$275,000 – a little less than the fine the Court would have imposed. Reparations and Court costs still had to be paid.

Several factors weighed in the Polytech's favour. The victim was supportive of the COEU and had regained almost normal function of his finger. The Court noted that the injury had not impeded him getting a job.

In addition, as the Polytech is largely funded by Government, any fine would only have had the effect of transferring money from one crown agency to another. The Court also commented that the Polytech was particularly able to offer training given that it is their core function.

We will now have to wait to see if a non-government PCBUs can get a proposed COEU across the line.

Safely managing unplanned changes at work

Risk is rarely constant. It changes as work conditions change, sometimes within minutes, an hour or a day.

Often a business will conduct a risk assessment and say: "job done". But everyday changes in work conditions like staff absences, breakdowns in machinery or plant, extreme weather, high production pressures and even fatigue and stress, may undermine the effectiveness of controls and make work conditions more dangerous.

How can businesses manage these unplanned changes?

A first step is training workers to be alert to changes both before work begins and as it progresses. Workers can also be empowered to stop work if they find themselves in a "prickly" position. And requiring workers to check-in with a supervisor if they encounter something unexpected will add a further layer of protection.

For those in the forestry industry, Safetree has produced a useful [video](#) on unplanned change or "upset conditions".



\$400,000 payout for injured worker

A worker who fell four metres, and was paralysed as a result, has been awarded over [\\$400,000 in reparations](#). No fine was imposed due to the company's financial position.

The accident occurred after the defendant company was contracted to carry out a repair on the roof of a commercial building. To allow access, a ladder and access hatch was installed. However, they weren't inspected by an engineer and did not meet the building code. While climbing the ladder, the worker hit his head on the hatch and fell to the ground.

The defendant company was ordered to pay \$110,000 to the victim for emotional harm as well as \$294,514 in reparations for consequential losses including loss of earnings.

This case continues the pattern of large reparation awards for lifelong and severe incapacitating injuries and once again highlights the importance of having an adequate limit of indemnity to cover the costs of a fine, reparations and legal representation.

Could a Beirut type explosion happen in NZ?

The recent devastating ammonium nitrate explosion in Beirut destroyed large sections of the city and killed almost 200 people. Could something similar happen here? We talked to Matt Adams, an experienced chemical safety specialist and director of Main-NZ Ltd, to get some answers.

"Overseas, large quantities of ammonium nitrate are produced and stored for fertiliser use," Matt explained. "This is less common in NZ as we mostly use urea in nitrogen fertiliser. However, we store and use reasonable quantities of ammonium nitrate for making explosives for mining, quarrying and civil work."

"As long as ammonium nitrate is managed correctly, it is relatively stable. It has been suggested that the explosion in Beirut was caused by unsafe storage. If ammonium nitrate is allowed to settle and compact over a long period of time, and become contaminated, then at high enough temperatures it can violently decompose.

Companies that store ammonium nitrate should always follow good safety practices including regular stock rotation, segregation and avoiding high temperatures."

Sites that hold substantial quantities of ammonium nitrate in New Zealand are likely to be covered by the Health and Safety at Work (Major Hazard Facilities) Regulations. This means the site is subject to an enhanced regulatory regime involving regular inspections and scrutiny of its safety management plan or safety case by specialist WorkSafe inspectors.

"Overall, given the amount of regulatory scrutiny over large stores, I think the risk of a major explosion in New Zealand is low", says Matt. Nevertheless, given the catastrophic consequences of an explosion, VL recommends high levels of liability cover for any business that stores or uses significant quantities of ammonium nitrate.

Sentencing for the first reckless conduct charges in NZ completed

Last year, we [reported](#) on the conviction of an individual both as a worker and an officer on the most serious charges available under HASWA. The charges carry maximum penalties of five years in prison and fines of \$600,000 and \$300,000 respectively. Since then, the case has come up for [sentencing](#) and is the first sentencing of an individual on a reckless conduct charge.

Tragically, the charges arose after the man's friend and business partner died in April 2016. The helicopter the defendant was piloting to a worksite crashed in poor weather.

The judge found the culpability of the defendant was high and a starting point of around two years and six month's

imprisonment was arrived at. After giving discounts for remorse, the support he showed the victim's family and the defendant being a first time offender, the end sentence was 19 months imprisonment.

Imprisonment of less than two years means a judge must consider an electronically monitored sentence such as home detention or community detention. In this case, the offender was sentenced to community detention with a daily curfew, 350 hours of community work and a fine of \$10,000.

This sentence illustrates how high the stakes can be for individuals and businesses under HASWA. Expert legal representation, such as provided for by VL's statutory liability cover, can be crucial when facing Court proceedings.

This newsletter is published as part of Vero Liability's commitment to supporting better work health and safety outcomes for all New Zealanders. We want everyone to go home safe.

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