

# Update on Court Decisions

Harvey O'Sullivan

## Cases

- Talleys
- Essential Energy
- Budget
- Northpower & Wellington Electricity

## General

- Judicial decisions
  - Most decisions still relating to HSE Act
  - One prosecution so far under HSW Act
- Australian decisions may be relevant where they relate to the equivalent requirement of NZ legislation

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## Talleys

- Bins fell from a stack being created using a forklift, seriously injuring an employee adjacent to the stack.
- DC Judge dismissed the charges on the basis of a number of non-compliances with process by WorkSafe.
- WorkSafe appealed to High Court
- HC disagreed with DC and upheld WorkSafe position in all but one process element

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## Talleys ctd

- Section 17(4) of HSE Act requires that:
  - *A charge must include sufficient particulars to fully and fairly inform the defendant of the substance of the offence that it is alleged that the defendant has committed.*
- The HC decision notes at para 45 *'The charge ... contained sufficient specifics to identify the date and the place of the alleged offence, and that it related to a Yale forklift, but provided no details of the offence itself beyond merely restating the statutory offence of failing to take all reasonable steps.'*

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## Talleys ctd

- HC Judge concluded *'Accordingly I agree with the (DC) Judge's conclusions that s17(4) requires each practicable step relied upon by the prosecution to be set out in the charging document.'*
- HC Judge further notes *'the prosecution is limited to the particulars set out in the summary of facts disclosed to the defendants at the time of that charging document as if they were particulars in a charging document'*
  - WorkSafe can apply to change charges

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## Essential Energy

- Essential Energy (EE) is a major Distribution Co in NSW
- EE prosecuted under NSW *Work Health and Safety Act*
  - Derived from same Model Act as NZ HSW Act
- EE employee electrocuted while part of crew removing a surplus 11 kV line 1.2 m below an in-service 11 kV line.

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## Essential Energy ctd

- Applicable controls applied included;
  - MAD (700 mm)
  - Safety observer
  - Access Permit
- Electrocuted employee was a safety observer and a ground based assistant when not observing.

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## Essential Energy ctd

- Incident occurred when a worker lowered a removed conductor to ground assistant (who was also safety observer) who received the conductor but at same time conductor came into contact with a live conductor 2 spans away due to reduced sag in that span
- EE prohibited overhead restringing, re-tensioning etc unless all conductors de-energised.

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## Essential Energy ctd

- EE also reviewed live line work and reduced the number of tasks which could be undertaken live.
- Judge noted that after the incident EE decided that the work should be done only if the top conductors were de-energised.

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## Essential Energy ctd

- The Judge further noted that *By reason of its plea of guilty the offender recognises that it was reasonably practicable to conduct the work in this way ...*
- Judge also noted that there was nothing in the way the workers performed the work that contributed to the fatality and the failure occurred at a higher level in EE.

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## Budget Plastics

- Budget Plastics was the first business in NZ to be prosecuted under the HSW Act.
- A Budget employee suffered serious hand injuries in a plastic extrusion machine.
- The Judge advised that the sentencing principles under the HSE Act continue to apply to HSWA

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## Budget Plastics ctd

- WorkSafe argued for increased penalties but Judge noted that it is not for the DC to make sentencing guidelines and the DC can only adapt available authorities.
- With respect to consistency with Australian cases, the Judge advised that they may inform an appellate court but there are issues with that approach.

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## Northpower & WE

- Injury to Northpower employee working on WE ground mounted sub
- Charges laid under Electricity Act s163D(1)(a)
- Arc flash occurred during decommissioning of equipment when a bracket fell onto live terminals.
- 92 previous similar jobs had been completed

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## Northpower & WE ctd

- Work methodology had been approved whereby the removal of decommissioned equipment could be carried out with the transformer in service but the area of work de-energised.
  - Some had been worked on de-energised because of their configuration
  - Sub where arc flash occurred was different to others and live parts were below the work area.

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## Northpower & WE ctd

- Both parties acknowledged breaches of the Electricity Act, including not de-energising the sub in this instance
- This was the first prosecution under s163D of the EA.
- Judge accepted use of sentencing principles established under HSE Act.

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## Northpower & WE ctd

- Judge also had to apportion culpability of each party
  - Assessed Northpower at 60% and WE at 40%, mostly because Northpower was in control of the site.

## Thank You