

KensingtonSwan*

Health and Safety Legal Update

Electricity Engineers Association

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11 October 2018



What will we cover today?



- Recent case law
 - Electricity Act
 - Health and Safety at Work Act
- Trends from WorkSafe and the courts
- Enforceable undertakings
- Incident investigation
- Your questions

Electricity Act



- Prosecutions are rare
 - *WorkSafe New Zealand v Broadspectrum (New Zealand) Limited*
 - Victim suffered electric shock while holding testing leads in place on top of a transformer
 - Breach of section 163D Electricity Act – intentionally or negligently causing or permitting work in a manner dangerous to life
 - Fine of \$42,000
 - Reparations of \$17,000
- Time limits are different to HSWA
 - 12 month time limit for prosecution under the Health and Safety at Work Act
 - 5 year time limit for prosecution under the Electricity Act

Health and Safety at Work Act



- A person can have more than one duty (s 32 HSWA)
 - Different duties may cover similar conduct
- More than one person can have the same duty (s 33 HSWA)
- *WorkSafe New Zealand v Linfox Logistics (N.Z.) Limited*
 - Truck driver struck by forklift at distribution centre
 - Two defendants charged under section 36 and another under section 34
 - Can a practicable step under section 36 relate to consultation, cooperation and coordination of activities?
 - Court said yes, as section 36 is “apex” of HSWA

Health and Safety at Work Act (2)



- *WorkSafe New Zealand v Athenberry Holdings Limited and Hume Pack-N-Cool Limited*
 - Employee of contractor used quad bike to travel around orchard while conducting independent kiwifruit testing
 - Quad bike rolled on hill, causing fatal injuries
 - Both defendants were acquitted
 - What did the Court say?
 - What is reasonably foreseeable or reasonably practicable involves 'an assessment of proportionality and rationality'
 - Reasonableness between multiple PCBU's requires a 'nuanced and flexible approach'

Health and Safety at Work Act (3)



- The Court also said:
 - Influence or direction by a PCBU requires at least one of:
 - Control over the practical carrying out of the work
 - Provision of advice
 - Specification of matters affecting the conduct or methods of work
 - Reporting requirements
 - Oversight or supervision
 - *‘The legislature in using the words ‘so far as is reasonably practicable’ in ss 36 and 37, cannot have intended farmers and orchardists to identify farm or orchard features which can only become a hazard in circumstances of contractor incompetence, carelessness, or non-compliance with instructions in the operations of the contractor’s vehicles or machinery’*

Sentencing under the Health and Safety at Work Act



- Upon conviction, the sentencing process now involves:
 - Assessing the reparation to be paid to the victim(s)
 - Fixing the fine
 - Considering whether other orders are appropriate
 - Making an overall assessment of the proportionality and appropriateness of the total penalty on the defendant

Sentencing under the Health and Safety at Work Act (2)



Stumpmaster Limited v WorkSafe New Zealand

- First sentencing appeal in High Court
- Sentencing bands based on culpability:
 - Low culpability: Up to \$250,000
 - Medium culpability: \$250,000 to \$600,000
 - High culpability: \$600,000 to \$1,000,000
 - Very high culpability: \$1,000,000 or higher

Trends from prosecutions



- Overseas experience indicate fines are likely to get higher over time
 - Australia now has fines of \$1m+ in serious cases
 - United Kingdom seeing fines of £1m+ and imprisonment becoming common
- Very little use of new 'creative' sentencing powers so far
 - Awards of Court costs are low
 - No adverse publicity, training or project orders
- Court is being asked to consider the financial means of defendants more often
 - In *WorkSafe New Zealand v The Tasman Tanning Company Limited* the Court held it would only impose a fine forcing a business to close in exceptional cases involving:
 - Repeat offending
 - Most egregious breaches

Trends from WorkSafe investigations



- Narrow view of who is a PCBU
- Focus on:
 - Consultation (s 34 HSWA)
 - Checking the checker – interest in supervisor and trainer competency
- Starting to ask questions about officers and due diligence (s 44 HSWA)
- Regularly now seeking information about other incidents and near misses
- Seeking documents to demonstrate all aspects of compliance

Enforceable Undertakings



- Agreement by a duty holder to take certain action to atone for its alleged breach(es)
 - Alternative to prosecution
- Apply to WorkSafe
- Process involves:
 - Initial suitability assessment by WorkSafe
 - Submission of application including:
 - Amends to victim
 - Improvements for workers
 - Benefit to industry
 - Benefit to NZ society
 - Burden of enforceable undertakings must “bite” to be accepted
- Failure to comply with undertaking is an offence (s126 HSWA)
- Can also seek court mandated enforceable undertaking (s156 HSWA)

Issues after incidents:

Working with others



- Duty of consultation, co-operation and co-ordination of activities when multiple PCBUs have duty in relation to same matter (s 34 HSWA)
 - Joint incident investigations?
 - What do your contracts require?
- Consider common interest privilege before sharing information

Issues after incidents (2):

Be careful what you write down



- WorkSafe can now compel disclosure of almost all business records (s168 HSWA)
- Internal reports often contain incriminating admissions
- Be mindful of email correspondence and texts too
- Develop a communication strategy (internal and external) from the beginning

When the inspector calls...



- Engage with the inspector try to agree a process
 - Consider what limitations there might be around re-starting business operations
 - Investigation can take 6-9 months
 - Create an agreed communication channel
- Co-operate
 - Duty to give reasonable assistance to inspector
 - Offence to hinder or obstruct inspector
- Look at documents before giving them to the inspector
- Don't speculate or guess when providing information

Support your workers



- Consider counselling or time off if workers witness distressing events
- No legal obligation on workers to answer inspector's questions
 - Any statements are voluntary
- Sit in on interviews (if possible)
 - WorkSafe may allege conflict of interest for employer to attend worker interviews
 - Consider support by health and safety representative or union

Interviews under caution



- An inspector can require a PCBU to provide statements in any form and manner that the inspector specifies (s 168(1)(f) HSWA)
 - PCBU is usually represented by a senior manager
 - Questions about
 - The work, the workplace and workers who work there
 - Compliance with the law
- PCBU cannot refuse to answer questions on the basis of privilege against self-incrimination ... BUT individuals can
- Smart to have a lawyer present during the interview

How can you influence the investigation process?



- Disclose all helpful relevant material
 - Provide a report emphasising positive aspects
 - Explain systems used to manage and identify hazards and risks
 - Volunteer information to put bad documents in a better context
- Offer innovative solutions to ensure (and persuade WorkSafe of) future compliance
- Negotiate over any potential enforcement outcomes

Any questions?

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