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# Health and Safety Legal Update

**Electricity Engineers' Association –  
Health and Safety Workshop 2019**

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What we will  
cover today?

- Recent caselaw
- Enforcement options and trends
- WorkSafe's changing focus

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## Recent caselaw: Overlapping Duties



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- Where have we got to?
  - *Athenbury Holdings Ltd & Ors*
  - *Linfox Logistics (N.Z.) Ltd*
  - *Phil Stirling Building Ltd / Duncan Engineering Ltd*
- Need to be on top of this
  - Does your Board or Exec understand the scope of the 3Cs and what it means for your risk profile?
  - Who do you influence or have control over? How is that demonstrated or established?
  - Do you have processes in place to ensure that shared risks are being managed as agreed/appropriately?
  - Are you doing too much?

## Recent caselaw: Duty to assist (1)



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- Section 176 – PCBU must ‘give all reasonable assistance to enable an inspector to enter, inspect, examine, enquire or exercise any other power.’
- WorkSafe enforcing this section
  - D Heaps*
    - Company director misled WorkSafe investigator
    - Gave false information
    - Instructed victim (an employee) to give false information about:
      - Role in business
      - Why on site
      - Machine involved
    - Charged with perverting the course of justice
    - Starting point is imprisonment
    - Four months community detention with curfew
    - Imposed fine of \$14,000 (\$2,000 for obstruction charge)

## Recent caselaw: Duty to assist (2)

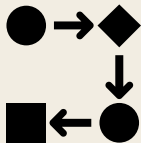


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### *Joshua Junior Nanai*

- Company director obstructed WorkSafe investigation
  - Aggressive
  - Didn't comply with document request
- Failed to attend interview under caution
- Charged with obstruction and breach of duty
- Imposed fine of \$14,000 (\$2,000 for obstruction charge)

## Recent caselaw: Supply Chain Duties



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- First prosecution for a failure to meet supply chain duties

### *Davies Tree Service Ltd and MMD Engineering Ltd*

- Worker placed hand through an unguarded opening in a wood cutting machine, severed four fingers
- Davies (employer of injured worker) and MMD (machine manufacturer) both prosecuted
  - MMD delivered and installed the machine without an instruction manual or appropriate interlock guarding in place (despite knowing this)
  - Davies removed the existing guarding
- Davies fined \$75,000 and ordered to pay reparation of \$35,000
- MMD fined \$60,000
- Both fines were reduced to take account of the companies' financial circumstances

## Recent caselaw: Electricity Act



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- WorkSafe are continuing to consider Electricity Act

### *Bradford John Dribble*

- Casual worker was injured when trimming branches of a tree. A branch fell onto a powerline and the worker sustained an electric shock, that caused him to fall from the metal ladder he was standing on.
- Dribble was prosecuted for: breaches of HSWA and Electricity Act
  - s36 HSWA for failing to ensure health and safety of a worker
  - S163c Electricity Act for taking an action know the action is reasonably likely to cause serious harm and failing to prevent it
- Dribble was fined \$65,000 and ordered to pay reparation of \$20,000
- Also sentenced to 60 hours community work under Electricity Act (maximum penalty was 2 years imprisonment, \$100,000 fine or both)

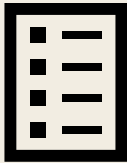
## What are the options?



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- Pre-prosecution options
  - Directions (verbal and written)
  - Infringement notices
  - Improvement notices
  - Prohibition notices
- Prosecution
  - Financial penalties (reparations and fines)
  - Court ordered enforceable undertakings
  - Adverse publicity orders
  - Project order
  - Training orders
- Enforceable undertakings

## Pre-prosecution options



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- Directive letters/verbal directions
  - A way of dealing with common breaches that don't require a formal statutory notice
- Infringement notices
  - A way of dealing with common breaches that wouldn't fall within the prosecution guidelines
  - Lead to an infringement fee
- Improvement notices
  - Intended to focus a PCBU on the tasks necessary to fix the breach
- Prohibition notices
  - Intended to stop risks that are imminent
  - Are not intended to dictate the measures to control the risk

## Prosecutions and sentencing under the Health and Safety at Work Act



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- Decision to prosecute based on WorkSafe's Enforcement Decision-making model
- Upon conviction, the sentencing process involves:
  - Assessing the reparation to be paid to the victim(s)
  - Fixing the fine
  - Considering whether other orders are appropriate
    - Costs awards
    - Court ordered enforceable undertakings
    - Adverse publicity orders
    - Project order
    - Training orders
  - Making an overall assessment of the proportionality and appropriateness of the total penalty on the defendant

## Enforcement Trends: Reparations



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- Increasing awards
- Victim only if exposed to the risk of harm that amounts to an offence  
(*Pegasus Engineering Ltd*)
- Consequential financial loss
  - Lost income is limited to the statutory shortfall between ACC compensation and financial benefit would otherwise have received  
(*Oceania Gold (New Zealand) Ltd and Croop Loggins Ltd*)
  - Property losses are reduced to like for like  
(*Agricentre South Ltd*)

## Enforcement Trends: Fines



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- Indications are that fines will increase
- Increasing claims of financial incapacity
  - Need evidence that can't afford to pay
  - Less likely that will force a business to close – only in egregious circumstances
  - Will be fined, but low level fine

## Enforcement Trends: Other orders (1)



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### WorkSafe costs

- Routinely being sought by WorkSafe
- Awards of \$5,000 - \$10,000
  - contribution of costs, not total cost

### Work health and safety project orders

- Being utilised by courts to require engagement with staff and industry

### Training orders

- Order for employees to complete specified scaffolding training (*Dong Xing Group Ltd*)

## Enforcement Trends: Other orders (2)



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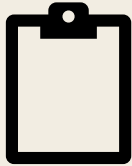
### Adverse publicity orders

- Ordered to publish details of offence, the consequences and penalty imposed
- *4 Hippos Ltd* – in newspaper
- *Quick Earth Moving* – on website

### Court Ordered Enforceable Undertaking

- Only available where low culpability and no prior health and safety convictions (*Niagara Sawmilling Ltd*)

## Enforcement Trends: Enforceable Undertakings



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- Haven't been as many this year
  - Last EU was in February
- Focus on:
  - Innovative change
  - Can't simply be 'BAU'
- Low hanging fruit is gone so the process is getting tougher and more costly

## Worksafe's changing focus (1)



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- What is WorkSafe's focus?
- Moving away from traditional focus of:
  - Working at heights
  - Moving materials
  - Vehicles and Machinery
  - Hazardous materials
- Focusing on those areas that are causing most harm
  - Mental health
  - Fatigue
  - Silicosis, asbestos exposure



## Worksafe's changing focus (2)



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- Investigation focus moving too
  - Asking questions about focus areas
    - Includes 3Cs
  - Asking for information about near misses/similar incidents
  - Seeking documents to demonstrate compliance
- Also looking at activities of directors

## Questions?

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