

In this issue, we cover the recent ground-breaking conviction of the former CEO of Ports of Auckland Ltd for failing to comply with his duty as an officer under the Health and Safety at Work Act (HSWA). This is the first time an officer of a large complex organisation has been prosecuted for this offence. In addition, we have articles on three recent convictions that all arose from fatalities. The first resulted after a worker was killed in the forestry sector, the second followed the death of a worker at a steel product supplier and manufacturer in Christchurch, and the last came about when a camper was killed in a caravan park by a falling tree branch in Victoria, Australia.

Former CEO of Ports of Auckland found guilty of officer health and safety offending

In a ground-breaking decision, the former CEO of Ports of Auckland Ltd (POAL), Tony Gibson, has been convicted of exposing workers to a serious risk of death or injury by failing to comply with his duty to exercise due diligence as an officer.

While there have been occasional convictions of officers for breaches of the section 44 duty of due diligence under HSWA, this prosecution was the first brought against an officer in a large complex organisation. It serves as a timely reminder that all officers, regardless of the size of their organisation, must actively and diligently turn their minds to the health and safety of their workers.

The prosecution arose after the death of a 31-year-old stevedore in the early hours of 30 August 2020. The victim was directed to re-lash shipping containers on the deck of a ship. To carry out the work, he was positioned in the walkway between two bays of containers. At the same time, containers were being unloaded from one of the adjacent bays by a gantry crane. Despite POAL having a policy that workers, including lashers, should not be located within three container widths of an operating crane, the victim was working within the exclusion zone.

The crane operator commenced a lift of two containers, unaware that the victim and his coworker were on the walkway next to the bay he was lifting from. A twist lock on the bottom of one of the containers being lifted had not been unlocked, and as the crane lifted the two containers, the container below was also lifted. The crane operator ceased lifting after realising something was wrong, but tragically, before he could lower the load, the twist lock mechanism failed, and the falling container crushed and killed the victim.

Maritime New Zealand (MNZ) investigated the death and charged POAL with two offences under HSWA. [POAL](#) subsequently pleaded guilty and was fined \$561,000 in late 2023.

MNZ also charged Mr Gibson, as an officer of POAL, with failing to comply with the duty imposed upon him to exercise due diligence. MNZ alleged that Mr Gibson failed to exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances - to take reasonable steps to ensure that POAL had available for use, and used, appropriate resources and processes to eliminate or minimise risks to health and safety from work

carried out as part of the conduct of the business. In addition, MNZ alleged that Mr Gibson failed to take reasonable steps to verify the provision and use of those resources and processes.

In finding Mr Gibson guilty of the offence, Judge Bonnar concluded that a reasonable CEO would have recognised the shortfalls in POAL's management of exclusion zones and would have ensured POAL utilised appropriate resources and processes to address those shortfalls. He found Mr Gibson did not do so.

The maximum penalty that Mr Gibson faces is a fine of \$300,000. It is not yet known if he will appeal the decision.

The Court's 146-page [decision](#) sets out a number of principles which it considered relevant to the assessment of an officer's exercise of due diligence. These provide useful guidance to all officers. The principles include that:

- The due diligence duty applies to all officers across all PCBUs, large and small, with both flat and hierarchical structures. The fact that an officer may operate at the head of a large, hierarchical organisation does not mean that the officer's obligations are diminished.
- In the case of large, hierarchical organisations, the duty to exercise due diligence is not limited to governance or directorial oversight functions.
- An officer in a large organisation does not need to be involved in day-to-day operations in a hands-on way but cannot simply rely upon others within the organisation either. The officer must personally acquire and maintain sufficient knowledge to reasonably satisfy themselves that the PCBU is complying with its duties under the Act.

In addition, the Court said that officers should:

- Ensure that people with assigned health and safety obligations or roles have the necessary skills and experience to properly execute their roles; and regularly monitor their performance to ensure that they are properly discharging their functions to ensure the PCBU's compliance with its duties.
- Acquire and maintain sufficient knowledge of the PCBU's operations and the work as done "on the shop floor" to adequately identify and address actual hazards and risks.

- Ensure entrenched and adequate systemic processes are put in place for ensuring the PCBU complies with its duties (especially in larger organisations).
- Ensure there are effective reporting lines and systems for the flow of necessary health and safety information to the officer and others with governance and supervisory functions (especially in larger organisations).
- Engage upon, or arrange, an effective process of monitoring, review and/or auditing of the PCBU's systems, processes and work practices to ensure they are achieving their purposes and being adhered to.

There are many useful articles available covering the decision, including these by [MinterEllisonRuddWatts](#), [Russell McVeagh](#), and [Bell Gully](#).

Inadequate risk management leads to reparations of \$332,187 after forestry fatality

In June 2021, a 23-year-old forestry worker was working on a harvesting site at Tangoio, north of Napier. His work involved "breaking out" - connecting felled logs to a hauling machine for extraction. Tragically, a log dislodged 325 metres above him, and hurtled down a hill, fatally striking him and narrowly missing a co-worker. The log had been put in place to act as a bridge for other logs to slide over, an uncommon work arrangement known as plugging and bridging.

WorkSafe's investigation found that the pre-harvest risk assessment only listed two hazards for the entire site, and did not properly consider the risks of the plugged log dislodging. The company was subsequently charged and convicted under HSWA, and substantial reparations of \$332,187 ordered. The company could not afford to pay a fine.

After the conviction, WorkSafe said that businesses must manage their risks and that up to date, site-specific risk assessments are a must-have in forestry. WorkSafe also noted that its new strategy zeroes in on forestry because its fatality rate is nearly 20 times higher than the average for

all industries, and that targeted frontline activities in the forestry sector will be increasing.



Racking collapse kills worker and results in combined fines and reparations of \$430,000

A Christchurch steel product manufacturer and supplier has been [fined \\$330,000 and ordered to pay reparations of \\$100,000](#) following the death of a storeman at its Christchurch depot.

In November 2020, the 33-year-old victim was sweeping underneath racking when it collapsed, and nine tonnes of badly loaded steel fell and killed him.

WorkSafe's investigation found the racking was not cross-braced or bolted to the floor for stability. The business did not conduct regular and effective safety inspections, and investigators also found the rack design had no professional engineering input.

WorkSafe recommends that a professional engineer or a similarly qualified expert is best to advise on any commercial or industrial racking bigger than that at home in the garage. Businesses should also conduct regular inspections to enable early detection of damage, missing parts, or improper installation which may help avoid a catastrophic collapse. In addition, all racking systems should have clear signage showing the maximum weight that can be safely held, and any specified load configurations to avoid overloading.

Further guidance on working safely with pallet racking systems can be found on WorkSafe's [website](#).

Victorian camping ground fined AUD\$475,000 after camper killed by falling tree branch

The death of a camper led to a [AUD\\$475,000 fine](#) for a caravan park near Melbourne. The victim died when a large tree branch fell onto his tent at night, causing fatal head injuries.

Investigators found park operators had not engaged an arborist for a general assessment of trees in the park since

2015 and did not have in place a documented system for inspecting trees or a policy on how frequently they should be inspected. An inspection of 277 trees at the park conducted after the fatal incident identified 137 trees requiring risk mitigation works, including 85 requiring works within a year. More information on managing risks from trees can be found in the [WorkSafe Victoria article](#).

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.

Vero Liability provides a full range of liability insurance products suitable for almost any business or operation in New Zealand. Our extensive range of liability products include Professional Indemnity, Directors and Officers Liability, Public and Products Liability, Statutory Liability, LegalEdge and other speciality products. We support these products with an experienced team of insurance underwriters, specialist claims lawyers and managers to ensure our policyholders get early and effective help with unexpected legal issues.

For more information on VL's specialist liability insurance products, including our statutory liability cover for non-deliberate health and safety breaches, visit our [website](#).