

# The HSW Act from a legal perspective

## NZISM Branch CPD Day

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# Overview

- Enforceable undertaking regime
- What are 'plant and structures'?
- Hierarchy of controls – what is required?
- Health and Safety consultants' liability
- Recent sentencing decisions in the UK and Australia

# Enforceable Undertakings

# Enforceable Undertaking

- Legally binding agreement
- Alternative to prosecution
- Monitoring
- Penalties for contravention:
  - \$50,000 (individual liability)
  - \$100,000 ('any other person')

# Accepting an enforceable undertaking

- WorkSafe's policy states that it will consider:
  - Nature of alleged misconduct and how serious it was
  - Injuries arising and prevalence of risks
  - Submissions from interested parties
  - Remedial action and mitigation
  - Past performance and history of compliance
  - Commitment to health and safety policies



# Examples

- St Kentigern Trust Board
- Amcor Flexibles

# ‘Plant and Structures’

# Duties involving 'plant and structures'

- Primary duty:
  - Provision and maintenance of safe plant and structures.
  - Safe use, handling and storage of plant, substances and structures.
- Duty of PCBUs who manage or control fixtures, fittings or plant at workplaces.
- Duties of 'upstream' PCBUs.



# Definitions

## ‘Plant’

- Any machinery, vehicle, vessel, aircraft, equipment (including PPE), appliance, container, implement or tool; and
- Any *component* of those things; and
- Anything *fitted or connected* to any of those things.

## ‘Structure’

- Anything that is constructed, whether fixed, moveable, temporary or permanent.
- Includes any *component or part* of a structure.

# Hierarchy of controls

# Management of risks

- HSE Act:
  1. Eliminate
  2. Isolate
  3. Minimise
- Section 30 HSW Act - Removed second step

# Hierarchy of controls

- Health and Safety at Work (General Risk and Workplace Management) Regulations 2016
- Control measures:
  1. Substituting the hazard
  2. Isolating the hazard
  3. Implementing engineering controls
  4. Implementing administrative controls
  5. Provision and use of suitable PPE

## Hierarchy of Controls

### Group controls

### Individual controls

#### Eliminate

- > Design or modify machine to eliminate the hazard
- > Eliminate by substitution
- > Eliminate human interaction (eg automate handling)
- > Eliminate pinch points
- > Increase clearances or remove forces

#### Isolate

- > Fixed guard
- > Interlock guard
- > Interlock distance bars
- > Failsafe interlocking
- > Safe by position

#### Minimise

- > Presence sensing devices
- > Light curtains
- > Computer warnings
- > Light beacons and strobe lights
- > Lock-out systems
- > Two-hand controls
- > Emergency stop

#### Minimise

- > Safe system of work
- > Signage
- > Training
- > Supervision
- > Safe operating procedures and instructions
- > Administrative controls (eg safety inspections)
- > Personal protective equipment



# Liability of H&S consultants

# Liability of H&S Consultants

- UK prosecutions
- Could New Zealand consultants be liable under the HSW Act?

- H&S consultants as workers – s 45(b)

*While at work, a worker must –*

*Take reasonable care that his or her actions do not adversely affect the health and safety of other persons*

- H&S consultant as PCBU - duty under s 36(2)

*A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking*

- Can H&S consultants be officers?

# Recent sentencing decisions

# Maximum sentences by jurisdiction

- New Zealand
  - Imprisonment not exceeding 5 years
  - Fines capped at \$600,000 for individuals
  - Fines capped at \$3 million for companies
- United Kingdom
  - Imprisonment not exceeding 2 years
  - Fines capped at £10 million for companies
- Australia
  - Imprisonment not exceeding 5 years
  - Fines capped at \$600,000 for individuals
  - Fines capped at \$3 million for companies

# UK Sentencing Decisions

- Sentencing Guidelines
- Examples
  - *Merlin Attractions v HSE*
    - £5 million
  - *Wilko v Leicester City Council Public Safety Team*
    - £2.2 million
  - *C Smith and Sons and Building Dismantling Contractors v HSE*
    - owner jailed for 8 months, company fined £90,000



# Australia Sentencing Decisions

- New South Wales
  - *Essential Energy v Safe Work NSW*
    - \$300,000
  - *Romanous Contractors v Safe Work NSW*
    - \$425,000
  - *Visy Paper v WorkCover*
    - \$412,500
- Queensland
  - 12 months' imprisonment (suspended for three years)
  - \$200,000

# Any questions?

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