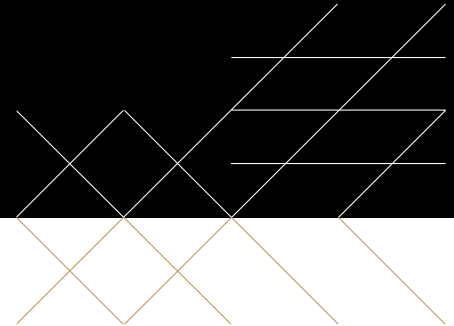


# LawNews

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## HEALTH & SAFETY LAW

# Is our workplace safety law still fit for purpose?

By Rod Vaughan

Despite tragedies such as Pike River and the Whakaari/White Island eruption, when it comes to workplace safety, New Zealand's track record still isn't too flash.

We have twice as many workplace deaths per capita as Australia where there has been a substantial 30% reduction in worker fatalities in recent years compared to a more modest 20% on this side of the ditch.

On average, between 50 to 60 New Zealanders die each year from work-related injuries and between 600 and 900 from work-related illnesses. And in the wake of the Whakaari/White Island eruption and the subsequent prosecution and court appearances of 13 entities and individuals, the blow-torch has once again been turned on New Zealand's workplace safety law.

Is the legislation still fit for purpose? Or is our high workplace death and injury rate rooted in the complacent Kiwi 'she'll be right' culture?

Among lawyers and those who operate at the sharp end of workplace safety, opinion is divided. The unions, for example, have long been calling for more safety inspectors.

But some of the country's top health and safety experts are adamant that WorkSafe's prosecution of the Whakaari/White Island defendants is not indicative of flawed legislation that needs an overhaul.

They believe the issues have their genesis in more deep-seated problems that New Zealand has failed to address. Put simply, our high rate of workplace death and injury is the result of poor worker behaviour and risk management, along with the condition and suitability of work equipment.

Bell Gully partner Tim Clarke is in this camp, saying the White Island prosecutions do not mean our current legislation is deficient.



*A failure of attitude or the law?*

Photo by Ferting/Getty Images

## It isn't the law that is broken – it is our health and safety culture

"Rather, the case highlights the interpretation, application and enforcement of the law, and that New Zealand continues to suffer from a poor health and safety workplace culture in some areas."

The Health and Safety at Work Act (HSWA) was introduced after a "perfect storm" of events, Clarke says.

These included the Independent Taskforce on workplace health and safety which reviewed its predecessor legislation, the Royal Commission on the Pike River Coal Mine tragedy and the Royal Commission of Inquiry into Building Failure after the Canterbury Earthquakes.

"It also reflected the fact that New Zealand had an appalling workplace health and safety record, with an injury rate twice as high as Australia, and six times higher than the United Kingdom."

Clarke says the HSWA is based on Australian health and safety legislation, and there is nothing to suggest that the Australian law is deficient.

"As for the United Kingdom, the primary legislation governing occupational health and safety is now over 40 years old and yet their injury rate is a fraction of New Zealand's rate. In other words, it isn't the law that is broken – it is our health and safety culture."

Clarke isn't sure why New Zealand has such a poor workplace health and safety record in comparison to Australia and the UK.

"Some people have surmised that it's to do with our 'number 8 wire' and 'she'll be right' mentality while others suggest that ACC legislation prohibiting claims for personal injury since the 1970s has meant that we are lax in our approach because of the absence of civil claims."

Clarke says the HSWA has tried to address these issues by introducing an officer's 'due diligence' duties, and introducing a new, tiered liability regime which increases the penalty levels six-fold.

**Continued on page 2**

# Is our workplace safety law still fit for purpose?

*Continued from page 1*

"The onus is on officers to provide necessary safety leadership because they are responsible for major decisions that influence health and safety outcomes, the allocation of resources and strategic direction.

"So, there is now some real skin in the game for directors and officers because of their exposure to personal liability through duties that cannot be transferred, delegated or modified, and exposure to fines that cannot be insured or indemnified."

Clarke says the first two sentencing decisions of officers (*CAA v Sarginson*, and *Maritime NZ v Nino's Ltd & Basile*) have involved officers of small businesses who were directly involved in the respective breaches and who were prosecuted by transport regulators under the HSWA.

"[But] because these decisions do not engage in a discussion about due diligence duties, they are no more insightful than those decided under the former health and safety legislation.

"To date we have not seen a significant WorkSafe prosecution of directors or officers highlighting the safety governance of leaders."

Clarke says it remains to be seen whether the White Island prosecution will improve our understanding of the current health and safety law.

"The case does highlight the tensions that exist between WorkSafe's role as the health and safety regulator in taking enforcement action, and its obligations to engage with duty holders and educate them about their health and safety responsibilities.

"But while opinions may be swayed by the number of charges, it's too soon to put a label on WorkSafe's approach."

Barrister Catherine Stewart, convenor of the ADLS Employment Law committee, is another health and safety expert who believes the HSWA is a step in the right direction in terms of addressing New Zealand's poor workplace safety record.

It represents a significant step forward in workplace health and safety law, introducing new responsibilities and massive potential penalties as well as possible imprisonment for breaches of those responsibilities, she says.

"One of the key features of the Act is a new



*Tim Clarke*



*Catherine Stewart*

stand-alone duty of due diligence on officers of an organisation, and WorkSafe's White Island prosecution is the first WorkSafe prosecution for breach of this important duty.

"There is a lot that officers can do towards meeting that duty and much of it involves taking a proactive, rather than reactive, stance in asking questions, checking systems, and ensuring understanding of the risks and hazards in the workplace.

"WorkSafe's prosecution for White Island is likely to be a wake-up call for many officers to consider whether they are really doing enough."

Stewart believes the Act takes a modern approach to legislation because it focuses on the outcome rather than the prescriptive checklists that can leave gaps.

However, she questions the extent to which the Act is actually being implemented in workplaces around New Zealand.

"For example, one of the themes of the Act is training and worker involvement in workplace health and safety. How seriously is this obligation being taken by New Zealand businesses?"

"The majority of New Zealand businesses are small to medium sized, which tend not to have strongly-documented systems. Is this having an effect on their obligations? We also have a diverse

population of workers, for many of whom English is not their first language. What steps are being taken to filter training through to these workers?"

"And most poignantly, are the obligations being taken seriously in all workplaces including less conventional ones like the adventure tourism industry?"

Like Clarke, Stewart has concerns about New Zealanders' rather casual attitude to workplace safety.

"New Zealanders are sometimes known as having a 'she'll be right' attitude and I question the extent to which this cultural attitude might be embedded in our workplaces, leaving us wide open to the risk of accidents and injury."

On a more positive note she welcomes the government's independent review of the adventure activity regulations.

"I hope this will present an opportunity for learnings that might prevent a tragedy like White Island ever happening again. I would also welcome a greater number of inspectors being trained to monitor levels of risk in the adventure tourism sector."

These sentiments are shared by Lane Neave managing partner Andrew Shaw who, among other things, specialises in workplace safety issues.

*Continued on page 4*

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*Andrew Shaw*



*Melissa Ansell-Bridges*



*Michael Wood*

**Continued from page 2**

Shaw believes there is no need to overhaul the HSWA but is concerned about the resources provided to WorkSafe and whether they are enough to achieve the objectives of the legislation.

In 2019 the government invested \$57 million in WorkSafe over four years, raising questions in some quarters about how effectively it will be spent.

“Specifically, does this funding allow for enough education and training as a first step in creating an appropriate health and safety culture in this country, which may go some way to prevent tragedies like the Whakaari/White Island eruption occurring again?” Shaw asks.

“The then Minister for Workplace Relations and Safety, Iain Lees-Galloway, said this funding would help WorkSafe be able ‘to plan for the future using data, intelligence and insights to do predictive modelling and ensure that regulations and actions are targeted, aligned and flexible.’

“So, it appears some of this funding may have gone into research which, if properly targeted, should benefit health and safety into the future. Overall, however, I believe the funding is being effectively spent in terms of preventing workplace deaths, but is this funding enough?”

Shaw says there is not only a need for more health and safety inspectors but there should also be better training so “we have the right people on the job”.

“This training must be not just about investigating an accident in the workplace after it occurs, but also aimed at being preventative, by way of education.”

Shaw says significant amounts of money are needed to educate and train employers and employees about health and safety in the workplace.

“This includes media coverage (think Meerkats in the workplace on TV ads), but also more WorkSafe-based regular and bespoke industry-based workshops.

“I believe we do need a change in mindset where health and safety practices are embedded in the culture of a business. Ultimately, it is better that

the implementation of our health and safety laws provide a fence at the top of the cliff and not an ambulance at the bottom.”

That said, there is a limit to the extent of protection offered by health and safety legislation. “An area of concern here is the inherent dangers in the natural world.

“As we have just commemorated the 10-year anniversary of the Christchurch earthquakes, the question has been asked about how far can we expect our health and safety laws to go to protect us in such unique and unpredictable circumstances?”

“The Whakaari/White Island eruption is a similar example of nature at its most dangerous with the consequential tragic loss of life and injuries to the survivors.

“It is clear that our current health and safety laws are designed to eliminate, or at least mitigate, risk to people in these circumstances, but this legislative regime has to be considered in line with events arising out of nature.”

Shaw’s call for more health and safety inspectors is echoed by the New Zealand Council of Trade Unions.

NZCTU Secretary Melissa Ansell-Bridges told *LawNews*, “we absolutely need more health and safety inspectors. They have a crucial role in making workplaces safe.

“Employers need to see that having good health and safety is simply core business. This includes having effective, meaningful and consistent engagement with working people and their unions. It’s essential that this is embedded. We know that these things work and make a real difference.”

Ansell-Bridges says everyone who goes to work should be confident that they can return home healthy and safe at the end of their working day.

“This should be the case regardless of the industry or the work that is being done. The fact that anyone is being killed at work is completely unacceptable.

“Certainly more work needs to be done, and urgently. Everyone needs to do more, especially employers.

“There is a power imbalance in the workplace where all too often the concerns and issues of working people are not heard or taken seriously enough. We want there to be greater consequences for employers who do not ensure everyone is healthy and safe at work.”

Workplace Relations and Safety Minister Michael Wood says since the introduction of the HSWA and the creation of WorkSafe, “New Zealand has achieved the target of reducing our fatality rate.”

Our December 2020 results are 30% lower than the 2012 baseline of 2.3 fatal acute injuries per 100,000 fulltime employees, but the rate has flat-lined since 2014-2016, he says.

“There is still a lot more work to do and we’re committed to strengthening regulations to keep people safe at work.”

Wood says to date WorkSafe has received almost \$19 million of the \$57 million promised in 2019 over the next four years. The money will be used to address several issues.

“These include addressing shortfalls in frontline inspector numbers, including hazardous substances inspectors, training to increase inspector capability in asbestos and regulations, ICT modernisation, staff insurances and new expertise to get traction on mental health harm at work.

“This year I intend to progress work to roll out Workplace Health & Safety representatives to smaller workplaces where no legal obligation to have reps currently applies.”

Wood says he’s also working closely with WorkSafe to make sure it has modern, fit-for-purpose regulatory tools to keep workers safe.

“This is an important next step in the full implementation of the Health and Safety at Work Act and my intention is to make progress in progressing the regulatory programme this year. We’re committed to keep working to improve New Zealand’s record on workplace safety.

“I do stress that while WorkSafe has a critical role to play, we will only reduce deaths, injuries, and harm in New Zealand workplaces if everyone plays their part at workplaces up and down our country.” ❖