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Comparing health and safety sentencing in NZ to abroad

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Abstract

High-profile health and safety cases in New Zealand, such as the Whakaari prosecutions and the Pike River Coal Limited (In Rec) case, indicate a significant disparity in sentencing outcomes when compared to the United Kingdom and Australia. While fines imposed in New Zealand may appear substantial, they can fall short of those imposed in these overseas jurisdictions. This article focuses on two aspects of New Zealand's sentencing regime: consideration of a defendant's financial capacity to pay fines and the utilization of alternative orders. By examining these issues areas to improve the effectiveness of the health and safety sentencing in New Zealand are identified.

Keywords

legislation; sentencing; work health and safety; Health and Safety at Work Act;

Introduction

Sentencing is a necessary feature of health and safety enforcement. The Health and Safety at Work Act 2015 (*HSWA*) modernised New Zealand's original 1992 Robens style legislation. Increased penalties were one feature of the updated legislation alongside a new suite of alternative orders.

Following the Whakaari prosecutions, the District Court imposed fines ranging from $54,000 through to just over $1 million dollars on the guilty defendants (*WorkSafe New Zealand v Whakaari Management Ltd & Ors* [2024] NZDC 4119; *WorkSafe New Zealand v Institute of Geological and Nuclear Sciences Ltd* [2024] NZDC 4149). For its role in Pike River, Pike River Coal Limited (In Rec) was fined a total of $760,000 across nine charges (*Ministry of Business Innovation and Employment v Pike River Coal Ltd (In Rec)*, DC Greymouth, 5 July 2013).

Last year in New South Wales, Australia, A1 Arbor Tree Service Pty Ltd was sentenced to a fine of $2,025,000 (*SafeWork NSW v A1 Arbor Tree Service Pty Ltd*, DC New South Wales, 14 July 2023). That fine set a new record for the highest fine for health and safety offending. Earlier in 2023, in England, Kier Infrastructure and Overseas Limited was fined a total of £4,415,000 and ordered to pay £87,759.60 in costs following two separate non-harm accidents (*Health and Safety Executive v Kier Infrastructure and Overseas Limited,* Manchester Crown Court, cases 4635938 & 4635925, 12 January 2023).

The two highest fines in New Zealand were arrived at following catastrophic events. They were also imposed following defended or formal proof hearings further accentuating the contrast with the overseas cases (both of which involved discounts for early guilty pleas). This indicates that penalties for health and safety offending in at least two comparable overseas jurisdictions are significantly higher than what could be expected in New Zealand.

Beyond lower maximum penalties the sentencing regime in New Zealand has another feature which distinguishes it from the approach in England and Wales. Namely, the ability for Judges to impose alternative orders as part of the sentencing process.

Given the range of tools open to Judges in New Zealand there is scope for the development of a more sophisticated and refined sentencing approach. That type of regime would better align with and help to advance the objectives of the HSWA. This is through identifying and facilitating more health and safety benefits than the current financially focused approach provides for.

Criminal sentencing

At the outset some underlying premises of criminal sentencing are worth touching on. The purposes of sentencing set out in the Sentencing Act 2002 include, holding the offender to account, deterring other potential law breakers and compensating victims. It should of course, protect the community

from future offending. Sentencing also takes into account features particular to the defendant such as their financial capacity and should impose the least restrictive level that is appropriate.

These purposes and principles inform the approach of a Judge in any sentencing hearing in New Zealand including regulatory offending such as health and safety cases.

Financial capacity

New Zealand

Following the enactment of the HSWA the maximum penalties for health and safety offending increased significantly. The previous regime contained two offences with maximum penalties for corporates of $250,000 and $500,000. The HSWA has a three-tier offence regime with maximum penalties for corporates of $500,000, $1.5 million and $3 million.

The lift in penalty was intended to improve compliance and, in turn, health and safety outcomes for New Zealand workers. The adjustment has resulted in an increase in starting points and larger end fines for health and safety offending. We have not seen, however, the intended reductions in fatal or serious acute injuries the government intended when changes were being made (WorkSafe, October 2021).

Within New Zealand health and safety cases the prominence of a defendant's financial circumstance has become a virtually determinative factor in sentencing outcomes. A review of WorkSafe sentencing decisions between 2019 and 2023 indicates that between 33% to 37% of cases involve a reduction for financial capacity. There were six cases in 2023 where no fine at all was imposed. Two of these cases involved Councils, two companies that were in liquidation and two others that had their financial position advanced as being such that they could not afford a fine (they are both still registered companies). This is a significant proportion of cases to have the penalty that would otherwise be ordered, adjusted downward.

At the same time, another factor that is readily apparent from the review is that fines are not adjusted up for large corporates. Section 151(2)(g) of the HSWA expressly provides for consideration of a defendant's financial capacity "to the extent that it has the effect of increasing the amount of the fine*".* This provision has not, however, to the author's knowledge been utilised under the HSWA. Under the previous legislation some rare examples of these uplifts exist (for example, *Ministry of Business, Innovation and Employment v Briscoes Group Limited,* DC Manukau, 24 October 2013, where a 20% uplift was imposed). The position remains that, even where they are penalising a large corporate, the regulators rarely seek, and the Courts do not consider, an uplift.

Across the sentencing decisions in the 2019 to 2023 period reviewed for this article some of the defendants were the largest companies in New Zealand. For example, Ports of Auckland Limited, First Gas Limited, Affco New Zealand Limited, Silver Fern Farms Limited, Hellers Limited and Heinz Wattie's Limited are just a few examples of large corporate entities that were sentenced during that five-year period. There is nothing to suggest the prosecutor or Court considered an uplift based on their scale or size.

So, despite the clear legislative intent in section 151(2)(g) of the HSWA it appears, the sole trader or small business owner has his fine adjusted down to a level they are able to afford, but the large corporate does not face an increase to ensure the penalty bites. The current approach indicates large corporates can treat the penalty as a cost of doing business, smaller businesses have it adjusted down to something they can manage and the deterrent effect of the larger maximum penalties for health and safety offending is not realised.

United Kingdom

In the UK the sentencing regime for comparative offending is quite different. In an endeavour to provide some parity of pain a company's turn over dictates what level a business enters their sentencing framework and prescriptive steps guide the Judge up or down when arriving at an end sentence. The framework reaches its highest point at £10 million which again is considerably higher than our maximum penalty of $1.5 million for 'standard' health and safety offences.

To guide Judges in the UK the Sentencing Council has issued the *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline* (effective from 1 February 2016). Like New Zealand, an assessment of culpability is made on a four-point scale from low to medium through to high and very high. Then an assessment of the harm is required before consideration of the businesses turn-over is made.

There are four categories of turnover:

Large - £50 million and over;

Medium - £10 million to £50 million;

Small - £2 million to £10 million; and

Micro - Up to £2 million.

The combination of turnover categorisation, culpability and harm dictate a starting point as well as a potential range that utilises the full £10 million maximum for large companies but caps it closer to £450,000 for micro businesses. The ranges are still wide to ensure the sentencing Judge retains discretion but the identification of turnover early in this process should reduce the need for further adjustments at the end and, in the case of large corporates, creates results that are more likely to achieve a level of deterrence.

In 2023, Kier Infrastructure and Overseas Limited was sentenced following two seperate incidents where work being carried out on the M6 motorway brought down live overhead lines. While no one was injured as Kier Infrastructure has over £50 million in turnover it entered the sentencing regime at the highest level part of the guideline. End fines of £1,205,000 and £3,165,000 were ordered along with £87,759.60 in costs.

Another case from 2023 involved Valencia Waste Management Limited. It was sentenced following two separate fatal accidents at its waste collection and processing plants. Following guilty pleas, it was ordered to pay fines of £1,000,000 and £2,000,000 respectively (*Health and Safety Executive v Valencia Waste Management Limited,* Loughborough Magistrates' Court, 6 September 2023).

Both of these defendants faced penalties that are far greater than what they would expect in New Zealand. For example, in *WorkSafe New Zealand v Affco New Zealand Limited* [2023] NZDC 12484 the defendant was fined a total of $502,500 following a fatal accident. In the New Zealand context this is a very stiff penalty and involved a starting point at half of the maximum available along with a 9% uplift for previous convictions. On the other hand, when compared to the level of fine imposed in England & Wales this seems like a light outcome for a large corporate defendant especially in circumstances where the Judge described the defendant's failure to identify the risk as "grossly careless" (at [64]).

Summary

The maximum penalty for health and safety offending and level of fines imposed in the UK is much greater than what would be expected in New Zealand. That is especially so for large corporate offenders for whom the risk of an upwards adjustment is very unlikely to be realised as part of the current sentencing approach. A large maximum penalty would require a more sophisticated approach to sentencing but it would not be unprecedented.

Regulatory offending with a maximum penalty of $10 million dollars was contained in the National and Built Environments Act 2023 (*NBEA*). Had the NBEA survived the election a more sophisticated approach to sentencing for resource management offending would have needed to evolve. The one size fits all approach that is currently undertaken with a final step down for financial position would not be workable.

Further, with such a large increase in maximum penalty in the environmental space you would expect some pressure on Parliament to reconsider the level of penalty for health and safety offending. The previous Parliament was clearly open to a maximum penalty for regulatory offending at a much higher level than is currently contained in the HSWA. If penalties are intended to bite, then an increase in penalty at the top end is required otherwise, for large corporates, these penalties are simply the price of doing business.

Alternative orders

While the previous discussion has focussed on financial penalties the efficacy of achieving improved health and safety outcomes through criminal sanctions has been questioned (Dabee, 2016). While denunciation and deterrence through fines is an intended outcome from the criminal sentencing process, most businesses want to keep their workers safe and are extremely disappointed when their systems fail to achieve that outcome. With the questionable efficacy of purely financial penalties in mind, the HSWA does provide Judges with a range of sentencing options not available to Judges in England and Wales and which, in some cases, have been used instead of or in conjunction with

financial penalties. These penalties are common with the Model Law in Australia on which the HSWA is based.

The alternative or non-monetary orders provided for within the HSWA include adverse publicity orders (section 153), training orders (section 158), work project orders (section 155) and Court Ordered Enforceable Undertakings (section 156). These alternative orders are rarely used with a handful of cases involving adverse publicity orders, training orders, work project orders and court ordered enforceable undertakings over the past seven years.

Cases

Recently, when Ports of Auckland Limited was being sentenced following its guilty plea to an offence involving the death of a lasher, Mr Kalati, it was ordered to publish an adverse publicity notice (*Maritime New Zealand v Ports of Auckland Limited*, DC Auckland, 1 December 2023). This notice is still available on Ports of Auckland Limited's website and will be through until December 2024.

There have also been three court ordered enforceable undertakings in the past four years. The defendants in those cases were Otago Polytechnic (ordered 18 June 2020), ISO Limited (ordered 29 July 2021) and Icepak New Zealand Limited (ordered 29 January 2023). These stand in lieu of any other penalty and require the defendant to undertake various work projects to advance safety within their industry, business and/or community.

Maritime New Zealand v Fullers Group Limited [2020] NZDC 10157 was the first successful application to the Court for a project work order. The detailed proposal for a learning teams initiative that would be shared with industry participants was proposed. This was supported by Maritime New Zealand and the Judge who said at [19] this was "for the general improvement of work health and safety" and ultimately granted the application. Her Honour went onto say at [22] "project orders should be encouraged by prosecutorial authorities". In completing sentencing, a deduction of $200,000 off the fine that otherwise would have been ordered was made to recognise the estimated cost of the work project order of $300,750. A dollar-for-dollar discount was not made as there would be a benefit to the workplace as a result of the works project order.

A common theme in the few decisions we have seen is that defendants are the ones applying for these orders against the opposition of the regulator. The Fullers Group case where Maritime New Zealand supported the order is the exception that proves this rule. Further, the Courts have been slow to give reductions to penalties when making these orders making the option even less appealing to defendants.

In *WorkSafe New Zealand v Nicks Components & Accessories Limited* (DC North Shore, 13 December 2018) the Judge adjusted the fine for financial circumstances but also imposed the training order that had been proposed by the defendant. This type of outcome essentially penalised the defendant by making them subject to the maximum fine they could pay and another training order which, had they not applied for it, would not have been made. This acts as a strong disincentive for defendants to seek these orders. Rather, they focus on the financial evidence required to reduce the fine as low as possible without going beyond that type of penalty.

Summary

In June 2020 the New South Wales government published a *Guide for regulators in the use of non-monetary orders*. The Guide covered the equivalent non-monetary orders in the Australian health and safety legislation which was the model for HSWA. The guidance identifies a range of considerations for regulators as well as case law examples of where the orders have been used in Australia.

The creation of the Guide was prompted by the following concern:

> *The use of these orders offers a range of benefits including increased awareness of WHS requirements, skill building, and repair of inflicted harms. Despite these benefits, orders were being used infrequently in WHS sentencing.*

The intention was to try and encourage regulators to seek to engage in promoting the use of these orders and was underpinned by research that established "the unique role held by WHS Regulators". The Guide went on to encourage regulators "to advocate for these orders in providing advice to courts on sentencing and the likely effects they might have on WHS outcomes."

These concerns and the issues that prompted that guide are present in New Zealand. Engagement by the regulators and Court with these non-monetary orders is critical to promote their use and for the benefits of these alternatives sentences to be achieved.

Alternative orders provide New Zealand Courts with a direct way of influencing health and safety outcomes. If used appropriately, and with guidance from the regulator, these tools could have a far more lasting effect in terms of impacting a defendant's health and safety system or educating workers or an industry. Leaving these for defendants to raise and in the absence of any incentive for them to do so seems doomed to fail.

Summary

Regulators could consider what changes are required or could be made as part of their investigation and then, where a guilty plea is entered, a review is undertaken to confirm any areas that could still be improved using an alternative order. Equally, consideration of the industry at a regional level and what training programs could be funded is something the regulator should be able to work through as part of the sentencing process. There is also scope to engage with victims and perhaps enable them to have some engagement with the sentencing process beyond highlighting the impacting of the event on them through their victim impact statements.

The suggested approach will undoubtedly require more work in preparing for sentencing hearings. With, however, the end fine in just under 40% of cases dictated by financial circumstances looking beyond the starting point is sensible. Regulators could use these options to achieve greater protection for the community and seek to achieve broader health and safety improvements.

Finally, s8(g) of the Sentencing Act 2002 obliges the Court to impose the less restrictive outcome that is appropriate. Alternative orders do not require a financial penalty and presumably would be considered less restrictive in the hierarchy of sentences. Considering these orders should be a normal step in the sentencing process and, while they may technically be less restrictive than a fine, they do require an ongoing commitment from the defendant to a health and safety initiative or training program. Arguably, these forms of sanction would be a more effective deterrent for the defendant than merely paying a fine.

Conclusion

The HSWA was intended to build upon the Robens model approach introduced in 1974 in the UK, and 1992 in New Zealand. The laws and penalties are intended to drive change and improve health and safety outcomes for New Zealand workers. It is well known our statistics still fall behind similar countries such as the UK and Australia. While penalties have increased, they also appear to lag penalties in those jurisdictions especially with regard to large corporates.

Increasing the maximum available penalty is one option but, setting aside larger corporates, any penalty imposed on a small business will limit cashflow and restrict the ability of a small business to fund health and safety improvements. This may explain why around 35% of cases involve a downwards adjustment to end fines. In some cases, the offending warrants a purely punitive approach, however, strict liability offending by its nature lacks malice and looking to use the more constructive sentencing options provided for in the HSWA could lead to better health and safety outcomes.

The HSWA provides Judges in New Zealand tools to better tailor sentences for both larger and smaller defendants through ensuring accountability by increasing fines for well-off corporates, and better integrating the use of alternative orders within the sentencing process. These tools need to be utilised to help achieve the gains HSWA was intended to make for worker safety.

Disclaimer

This article was self-funded by the author.

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The views expressed in this article are the author's own and do not reflect the views of his employer or any other organisation he is affiliated with.

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