

# Health and Safety and Resource Management: Insurance Issues

Grant Nicholson, Partner, Kensington Swan

Greg Milner-White, Senior Associate, Kensington Swan

8 September 2009



## What will we cover today?

Practical statutory liability policy issues for you and your insureds involving:

- Health and Safety
- Resource Management



# Why should you and your insurers care about health and safety?

To avoid the obvious health and safety risks . . .

**Like this**



**Or this**



## Or maybe this



**...and to make sure they manage risk in  
the not so obvious health and safety  
issues**



## The legal framework

- Health & Safety in Employment Act 1992 (HASIE)
  - Generally non-prescriptive
  - Covers people in all places of work
  - Requires the taking of “all practicable steps”
- Health & Safety in Employment Regulations 1995
  - More prescriptive, but limited scope
- Approved Codes of Practice
- Case law from the courts
- Guidelines from the Department of Labour

NOT binding (*Department of Labour v Smithbridge Limited*)



## Why should your insureds care?

- Everyone has duties under HASIE
- HASIE imposes mandatory obligations requiring employers to:
  - Identify hazards and protect against them
  - Provide training and supervision on work and equipment
  - Record and notify accidents and serious harm
- Employees and contractors have obligations too
- If your insureds breach HASIE they could be facing substantial fines and reparation payments

## But my insureds work in an office...



- Definition of “hazard” in HASIE includes a person’s behaviour resulting from physical or mental fatigue
- Definition of “harm” in HASIE includes physical or mental harm resulting from work-related stress
- Employers are liable for workplace stress BUT NOT stress from personal life



## What does a statutory liability policy offer insureds?

- Payment for legal costs of investigation and defence after an incident
- NO indemnity for fines
- Reimbursement for reparation payments
- The selling point is alleviating risk and future costs



## What's the process?

- All serious harm incidents should be reported to the insurer immediately
- Regulators may investigate
- Regulators have powers to compel interviews and document disclosure
- Liability decisions may not be made for six months



## What do insureds need to know?

- They should notify their insurer immediately
- Getting good advice early has tangible benefits
- Being proactive is critical
- Once a prosecution is laid its almost always 'game over'



## What do the statistics tell us?

- Once a regulator prosecutes, conviction is very likely
- The financial cost of conviction can be high:
  - Highest fine \$225,000
  - Highest reparations ~ \$450,000
  - The Department of Labour wants higher penalties!



## Reparation orders are getting expensive

- The Sentencing Act 2002 makes reparations mandatory unless there are special circumstances
- Reparations can be awarded for:
  - Loss of or damage to property
  - Emotional harm
  - Any loss or damage consequential to any emotional or physical harm or loss or any damage to property
- THE SKY IS THE LIMIT... the award depends on the circumstances of the victim and how they have suffered

## Bodily injuries: What about ACC?



- In New Zealand everyone is statute-barred from suing for personal injury
- Instead, victims are entitled to payments from ACC for 80% of weekly earnings (to a capped maximum)
- Until recently Judges routinely ordered the offender responsible for causing the accident to pay the 20% shortfall....BUT...



## ***Davies v New Zealand Police***

- Mr Davies failed to properly secure a mattress on his trailer. The mattress fell off and a cyclist collided with it and was hurt
- Mr Davies was convicted of careless use causing injury
- District Court ordered Mr Davies pay \$20,500 reparations to the injured cyclist, including \$11,555 as a 20% 'top up' of lost wages
- Supreme Court held that the Sentencing Act does not permit compensation to be paid for any loss of earnings by a victim (because a victim has entitlements under the ACC legislation and the Sentencing Act has a specific prohibition on giving reparations when an ACC entitlement applies)

## Outdoor activities claims



- More and more cases are being taken against adventure tourism businesses
- 7 pupils from Elam Christian School died in a flash flood
  - Fine of \$40,000 and reparation of \$440,000 (\$60,000 for family of each victim, \$5,000 for each survivor)
- English tourist drowned in Queenstown while river boarding with Mad Dog River Boarding
  - Fine of \$60,000 and reparations of \$80,000 to the victims family



## Claims costs

- Maximum penalties \$500,000 + unlimited reparations
- Legal costs can be \$10,000 to \$100,000 or more
- Negotiating excess will help insureds



**Any questions, then please contact me:**

**Grant Nicholson**

Telephone: 09 375 1198

Email: [grant.nicholson@kensingtonswan.com](mailto:grant.nicholson@kensingtonswan.com)

## Liability under the RMA - Overview

- Three tiers of enforcement:
  - Administrative – Abatement notices, declarations, infringement offences, excessive noise directions
  - Civil - Enforcement order
  - Criminal – Prosecution
- Strict Liability - limited defences
- Penalties - \$200,000 plus up to 2 years imprisonment, \$10,000 per day for continuing offences.

## Insuring against Environmental Liabilities

- Compensation for Personal Injury or property damage arising from environmental impairment
- Clean up costs – third party and own land
- Fines and penalties
- Legal expenses
- Insurance: Statutory Liability, Public Liability, EIL?

## Resource Management (Simplifying and Streamlining) Amendment Bill

- Due to take effect on 1 October 2009
- Key changes:
  - maximum fines to \$300,00 for individuals and \$600,000 for corporates;
  - Ability to require a resource consent to be reviewed; and
  - Crown Immunity abolished

## Penalties

- Current regime has no statutory differentiation between offences committed by corporate entities and private entities.
- Fines imposed have averaged less than \$8,000 during 2001 – 2008.
- Review current levels of cover and assess any potential exposure to liability claims.

## Crown Liability

- Section 4(5) of the RMA  
*'no enforcement order, abatement notice, excessive noise direction, or information shall be issued against the Crown'*
- The Bill would allow enforcement action/infringement notices against the Crown
- Court may not sentence a Crown organisation to pay a fine
- For insurers of Crown organisations – additional liability for remedial costs resulting from enforcement action

## Recent Case Law

### *Auckland Regional Council v Gubb Motors Limited*

- 18,500 litres of diesel escaped into Mahurangi River
- Substantial containment and clean-up costs incurred by ARC and Rodney DC reimbursed by insurer
- Court found payment of remedial costs via insurance was an important mitigating factor.
- Reduction of 20% allowed as a result of insured reparation costs

*'Where businesses are struggling, but nonetheless responsibly insure against the sort of liability that arose in this case and the level of that liability, something more is in my judgment required to recognise that such insurance, whilst not compulsory, provides the only realistic prospect of prompt full payment of a large cleanup bill which the community would otherwise have to bear.'*

## Conclusions

- Consider effect of increased penalties for RMA offences on extent of cover and premiums
- Cover for Crown liability
- Insurance as a relevant factor in sentencing

**Any questions, then please contact me:**

**Greg Milner-White**

Telephone: 09 914 7277

Email: [greg.milnerwhite@kensingtonswan.com](mailto:greg.milnerwhite@kensingtonswan.com)