



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Latest NZ Maritime Legal Developments

There have been several recent developments on health and safety in the maritime sector.

Maritime New Zealand (MNZ), which is now the health and safety regulator for New Zealand's 13 major ports as well as for ships, is developing a range of guidance on health and safety obligations.

MNZ has already published guidance on worker engagement, participation and representation. It has completed consultation on guidance on adverse, coercive or misleading conduct and on upstream duties. Guidance on these subjects will be published in due course. Upcoming consultations will be on officers' duties under the Health and Safety at Work Act (HSWA) and on overlapping duties.

The Approved Code of Practice (ACOP) for loading and unloading cargo at ports and on ships has also recently come into effect after being approved by the Minister for Workplace Relations and Safety and the Associate Minister of Transport.

The ACOP replaces all industry codes of practice related to stevedoring. It does not confer enforceable rights or obligations, but courts may rely on it when determining what is reasonably practicable or what is known about a hazard, risk, risk assessment or risk control.

MNZ director Kirstie Hewlett says that "[if] a business can show what they have done is equivalent to or better than the requirements in the ACOP, then they are likely to be meeting the test of what is reasonably practicable under HSWA".

The code focuses particularly on loading and unloading ships because that is when most incidents and injuries at ports happen.

The ACOP was developed by the Port Health and Safety Leadership Group – which includes representatives from port companies, stevedoring companies, port industry associations, maritime unions and MNZ – and was one of the key priorities in its work programme. The group will be developing further guidance, case studies, educational tools and training to help with implementation of the ACOP.

Meanwhile the former chief executive of Ports of Auckland (PoAL) Tony Gibson has been found guilty of a charge of breaching his duty as an officer to ensure that PoAL complied with its duties under HSWA, thereby exposing PoAL stevedores to a risk of death or serious injury by being struck by objects falling from cranes. The charge arose from the death of a stevedore at the port in August 2020.



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Judge Bonnar KC set out a helpful summary of the principles applying to an officer's duty of due diligence. Among the points he made were:

- assessing whether an officer has exercised due diligence must be fact and circumstance dependant;
- the duty applies to officers in all persons conducting a business or undertaking (PCBUs), whether large or small, flat or hierarchical;
- the duty is not limited to governance or directorial oversight functions;
- a failure by a PCBU to comply with its duties does not necessarily mean that its officers have not exercised due diligence and officers are not required to do everything that the PCBU is required to do to comply with its duties;
- an officer in a large PCBU doesn't need to be involved in day-to-day operations but can't simply rely on others within the organisations to exercise due diligence – "[the] officer must personally acquire and maintain sufficient knowledge to reasonably satisfy him or herself that the PCBU is complying with its duties under the Act";
- an officer must ensure that people in health and safety roles in the PCBU have the necessary skills and exercise, and regularly monitor their performance in discharging their functions;
- an officer must have sufficient knowledge of the work carried out "on the shop floor" to identify and address actual hazards and risks;
- just putting in place policies or procedures doesn't satisfy the due diligence obligation – an officer must also ensure that entrenched and adequate systemic processes are put in place to ensure that the PBCU complies with its duties;
- an officer must ensure that there are effective reporting lines and systems in place;
- an officer can't make assumptions that the PCBU is complying with its obligations;
- an officer must engage in or ensure an effective process of monitoring, review and/or auditing of the PBCU's systems, processes and working practices to ensure they are achieving their purposes and are being adhered to;
- evidence regarding industry practice is relevant but not determinative, as the reasonableness of an officer's actions or omissions must be determined objectively.

It remains to be seen whether Mr Gibson will appeal his conviction.

The full decision can be viewed [here](#).

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