

# BuildLaw: In Brief

## Company fined heavily following elderly man's death

Following the death of an elderly man, Shannon Thompson Concrete Pumps Limited has been fined \$500,000 for breaching the Health and Safety Work Act 2015.

The man was riding his mobility scooter and fell from it when it hit a damaged section of footpath. The incident occurred in March 2017, outside a housing development site to which the company provided the concrete pump.

In May 2018, the company was first charged with obstructing WorkSafe's investigation into the death. Now, two years on, they have been sentenced under sections 36(2), and 48(1) and (2) (c) regarding their responsibility in the death.

WorkSafe's investigation into the matter found Shannon Thompson Concrete Pumps Limited had "failed to work with other companies on site to identify the damaged footpath as a risk." Hayden Mander, chief investigator for WorkSafe, said "No site-specific risk assessment was undertaken and the company failed to identify and put in place controls to manage the risks related to the entry and exit of heavy vehicles onto the worksite."

This "entirely avoidable" death highlights the importance of a company's duty of care under s 36 (2) of the Act to ensure the health and safety of other persons is not put at risk from work carried out as part of business conduct.

Mr Mander reports that "there was no deduction from the starting point of \$500,000 as the judge did not find that there were any applicable mitigating factors." The massive fine reflects the company's "total lack of regard for the family and the company's role in the man's death," he says.

"We hope today's sentencing can provide the family some closure following this tragic accident."

More information regarding a company's primary duties of care can be found [here](#).



## Commerce Commission to appeal Steel & Tube sentence

On 20 September, the Commerce Commission announced their application for permission to appeal the High Court's decision *Commerce Commission v Steel & Tube Holdings Ltd* [2019] NZHC 2098.

### Background

In 2018, Steel & Tube Holdings plead guilty to 24 charges of breaching the Fair Trading Act by making false and misleading representations. The breach related to a product known as SE62, which is used in construction to provide strength and stability in the event of an earthquake. In October 2018, the District Court imposed a \$1.885 million fine on Steel & Tube Holdings.

Both Steel & Tube Holdings and the Commerce Commission appealed the decision; Steel & Tube Holdings on the grounds the fine was manifestly excessive, and the Commerce Commission on the grounds it was manifestly inadequate.



The High Court heard the appeal and in August this year delivered its judgment. The fine on Steel & Tube Holdings was increased to \$2.009 million.

Steel & Tube Holdings is "disappointed by the decision and continues to stand by its products". The company's view is that "the differences in testing would not have a material impact on the performance of the steel mesh".

Judge Duffy classed the breach of trust as significant.

"It is unusual for a company of Steel & Tube's size to fail so completely to have systems and procedures in place that would alert it to deviance, but that is what has happened here."

The High Court Judgment, delivered by Judge Duffy, can be found [here](#).

## Appeal

The Commerce Commission now seeks leave to appeal to the Court of Appeal on the grounds that the Judge erred when sentencing the company by:

1. failing to properly attribute the knowledge of a Steel & Tube manager to the company;
2. applying an excessive totality discount to the penalty; and
3. failing to adequately take into account the size of Steel & Tube and the potential for it to gain from the conduct.

This differs from the grounds on which they appealed to the High Court only in the addition of the second ground.

## Reforms to Security of Payments Act (NSW)

The Building and Construction Industry Security of Payment Regulation 2008 (NSW) was updated on the 21 October, following a period of public consultation.

To avoid breaching the amended Security of

Payment Act 1999 (NSW) (the Act), it is important for parties in the construction industry to ensure they understand these recent changes. This will be particularly important for directors, as new liabilities have been introduced relating to supporting statements. The amendments also tighten payment time frames. Accordingly, parties will need to review internal processes to meet new time frames.

Following are the most important changes affecting parties in the industry:

### 1. *Relating to section 8 of the original Act*

- a. A change to the conditions for progressing a payment claim means that a claim can now be made to a person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services. This new structure removes the requirement of a reference date to initiate payment claims.



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## 2. *Relating to section 13(2)(c) of the original Act*

a. Payment claims must include an endorsement stating that they are made under the Act. This amendment restores the requirement that was removed in April 2014.

## 3. *Insertion of section 32B*

a. Corporations in liquidation are now prohibited from serving or taking action to enforce a payment claim or an adjudication determination.

b. Further, if an adjudication application is made prior to the day of liquidation and is not then determined, said application is assumed to have been withdrawn upon liquidation.

## 4. *Relating to section 11(1B)(a) of the original Act*

a. The head contractor must now make progress payments to subcontractors within 20 business days after the payment claim is received. This shortens the timeframe from the original 30 business days.

## 5. *Insertion of Part 3A*

a. Part 3A gives new powers to authorised officers to investigate, monitor and enforce compliance with the Act. Authorised officers may now enter onto premises and make examinations and inquiries.

## 6. *Increasing penalty units*

a. Penalty units have been increased for some offences, including that for a corporation that fails to provide a supporting statement when serving a payment claim, and that for a corporation failing to give notice to the claimant within the required time after a payment withholding request.



## England looks to tighten energy efficiency in buildings

The English Government has launched a consultation period on a new Future Homes Standard. The standard looks to be operable from 2025, with a goal of reducing greenhouse gas emissions. Energy use by homes accounts for approximately 20% of greenhouse gas emissions in the UK. This initiative therefore will be a key step in reducing greenhouse emissions to their legally binding national target of net zero emissions by 2050.

This consultation regards new homes. Shortly a second consultation regarding (a) existing domestic buildings and (b) new and existing non-domestic buildings is likely to occur. Both consultations look to shape new requirements in order to reduce carbon heating and increase energy efficiency in buildings.

In the meantime, the Government looks to impose interim measures which are to commence in 2020. This includes a proposal of implementing new performance metrics for buildings to be measured

The Review of Security of Payment Laws, by J Murray AM, gives interesting insight into the motive behind the changes; you can read that [here](#).



against. It is hoped these transitional standards will encourage home builders to start implementing higher standards in advance of the changed requirements. The four performance metrics are as follows:

1. primary energy target;
2. CO<sub>2</sub> emission target;
3. householder affordability rating; and
4. minimum standards for fabric and fixed building services.

Evidently, the performance metrics are closely linked. Energy efficiency, for instance, lowers CO<sub>2</sub> emissions, while increased fabric standards reduces the amount of energy required to keep homes warm.

Importantly, however, the energy target is distinct from the CO<sub>2</sub> emissions target. This distinction was included to acknowledge that CO<sub>2</sub> and energy efficiency are not the same thing, despite being related. This will be particularly evident going forward; overtime CO<sub>2</sub> emissions will become less relevant as the UK moves towards decarbonisation.

Two options of target CO<sub>2</sub> emissions reduction are being considered going forward. The government looks at setting the standard at either (a) 20% reduction in emissions, or (b) 31% reduction in emissions. The latter option, which is preferable, could be achieved by installing carbon-saving technology and improving fabric standards.

It is stated, in fact, that the Standard will set very high fabric standards. This will involve:

1. triple glazing; and
2. standards which significantly reduce heat loss for:
  - a. walls,
  - b. floors, and
  - c. roofs.

One criticism of the consultation is that it does not propose to stop the use of gas, LPG, oil or solid mineral fuels in building new homes. This

contradicts an announcement in March this year by the Chancellor: that the Standard would be introduced “mandating the end of fossil-fuel heating systems in all new houses.”

There will be significant costs for home builders in complying with the transitional standards. To minimise the increase in these costs, there is a proposal to prevent local planning authorities from setting higher energy efficiency standards than the Building Regulations set out.

The Standard, despite being potentially costly, looks to be very effective in reducing greenhouse emissions — at least those produced by homes. Homes built to the Standard should become net zero as the UK moves to a decarbonised grid.

The consultation accepts submissions online and will close on the 10 January 2020. More information can be found [here](#).

