IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI 2018-404-039
[2018] NZHC 2020

BETWEEN	STUMPMASTER Appellant
AND	WORKSAFE NEW ZEALAND Respondent

WHANGANGUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI 2017-483-000016

BETWEEN	THE TASMAN TANNING COMPANY Appellant
AND	WORKSAFE NEW ZEALAND Respondent

INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CRI 2018-425-7

BETWEEN	NIAGARA SAWMILLING COMPANY LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 18 May 2018

Counsel:	T J Mackenzie for Stumpmaster Ltd G Gallaway and J Lill for Tasman Tanning Co Ltd and Niagara Sawmilling Co Ltd D La Hood, S Petricevic and T G Bain for WorkSafe NZ Ltd
Coram:	Venning and Simon France JJ
Judgment:	9 August 2018

JUDGMENT OF THE COURT

REASONS OF THE COURT

Table of Contents

Introduction

[1] In 2008 a Full Court set guideline sentencing bands for offending under the Health and Safety in Employment Act 1992 (HSEA).[1] At that time there had been an increase in the maximum available fine from $50,000 to $250,000. HSEA has now been replaced by the Health and Safety at Work Act 2015 (HASWA).[2] The equivalent maximum available fine has risen to $1.5 million under s 48. Accordingly, a Full Court has been convened to review the existing guidelines.

[2] Three appeals are being determined.[3] All are brought by companies fined under s 48 of HASWA for failing to comply with a workplace duty, such failures having exposed someone to risk of death, serious injury or serious illness. All appellants contend that the District Court has erred in the manner in which it has given effect to the statutory increase. The core proposition is that the starting point for a typical s 48 case is excessive, and misunderstands the purpose behind the statutory increase.

Executive summary

[3] The approach to sentencing under HASWA requires four steps:

(a) assess the amount of reparation;

(b) fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) determine whether further orders under ss 152–158 of HASWA are required; and

---

1 *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

2 The provisions related to offending under the Act came into force on 4 April 2016: Health and Safety at Work Act 2015 [HASWA], s 2(2).

3 Against decisions of the District Court in *Worksafe New Zealand v Tasman Tanning Co Ltd* [2017] NZDC 24398; *Worksafe New Zealand v Stumpmaster Ltd* [2018] NZDC 900; and *Worksafe New Zealand v Niagara Sawmilling Co Ltd* [2018] NZDC 3667.

(d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[4] When fixing the fine under (b), the following guideline bands should be used:

low culpability	:	Up to $250,000
medium culpability	:	$250,000 to $600,000
high culpability	:	$600,000 to $1,000,000
very high culpability	:	$1,000,000 plus

The existing position

[5] The Court in *Department of Labour v Hanham and Philp Contractors Ltd* (*Hanham*) was required to consider more than the impact of the increase in the maximum fine. Since the preceding guideline judgment, *Department of Labour v de Spa and Co Ltd* (*de Spa),* the Sentencing Act 2002 had come into force.[4] Further, sentencing methodology had undergone significant change as a consequence of *R v Taueki*.[5] That case required sentencing courts first to identify a starting point for the particular offence before considering aggravating and mitigating factors personal to the defendant.

[6] As a consequence, the Court in *Hanham* had to both identify new sentencing bands expressed as starting points, and settle how sentencings should be approached given the various rules in the Sentencing Act. The outcome was three culpability bands (recalling the maximum fine was $250,000):[6]

low culpability	:	a fine of up to $50,000
medium culpability	:	a fine of between $50,000 and $100,000
high culpability	:	a fine of between $100,000 and $175,000.

[7] In terms of how to determine where within the bands a particular offence lay, the Court identified a series of tasks and factors to which sentencing courts should

---

4 *Department of Labour v de Spa and Co Ltd* [1994] 1 ERNZ 339 (HC).
5 *R v Taueki* [2005] 3 NZLR 372 (CA).
6 *Hanham*, above n 1, at [57].

have regard. We will consider later in the judgment what adjustment is needed to these. It has not been suggested any significant change to these is required.

[8] The third key aspect of *Hanham* was to identify the order in which a sentencing court should approach the various tasks. This was:[7]

(a) assess the amount of reparation to be paid;

(b) fix the amount of the fine by reference first to the bands, and then having regard to aggravating and mitigating factors; and

(c) make an overall assessment of the proportionality and appropriateness of the combined payment required by the first two steps.

[9] Two comments are required. First, within the third step, there has often been a need to assess the level of the combined payment (reparation and fine) against the actual capacity of the company to pay. With smaller entities the level of fine, if imposed in full, would result in the company failing, and so it is not uncommon to see an otherwise appropriate fine significantly reduced. This is likely to be more common with the recent legislative change and the need to revise sentencing levels upwards.

[10] Second, HASWA has introduced a further range of orders that a sentencing court needs to consider. These include matters such as adverse publicity orders and costs of investigation orders.[8] It will be necessary to modify the *Hanham* approach to accommodate this.

[11] Finally, by way of introduction we address a terminology issue. Since the enactment of HASWA the District Court has been required to address the need to modify the *Hanham* categories. There have been two main issues – first, the revision of the dollar amounts of the bands, but secondly, whether because of the large sums involved, a greater number of bands are required. Concerning the number of bands, WorkSafe, as the common prosecuting agency, has consistently advocated for four

---

7 At [80].
8 HASWA, ss 152 and 153.

bands. This has been accepted in a number of District Court decisions.[9] The three appellants here all support a four-band approach.

[12] On analysis, we conclude there is no real difference between the existing *Hanham* classification, and the four band classification most often now used. It will be recalled that the top of the highest *Hanham* band was $175,000. This left a gap of $75,000 between the top of that band and the statutory maximum. It is this gap that has effectively become the fourth band, now routinely called "extremely high culpability"[10] but better labelled "very". To avoid confusion, we are content to adopt this terminology and will refer to the existing position as having four bands. *Hanham* restated then reads:

low culpability	:	Up to $50,000
medium culpability	:	$50,000 to $100,000
high culpability	:	$100,000 to $175,000
very high culpability	:	$175,000 up to $250,000

The new legislation

General provisions

[13] HASWA followed a series of inquiries and reports. A catalyst for the change was the disaster at the Pike River Coal Mine. The Royal Commission recommended changes be made to HSEA.[11] The Minister of Labour then established a Taskforce on Workplace Health and Safety. Following its report,[12] the Minister released a paper: *Working Safer – A blueprint for health and safety at work*.[13] In 2014 a Bill was introduced and eventually HASWA was enacted.[14]

[14] The purpose provision provides:

> **3 Purpose**

---

9 *Tasman Tanning*, above n 3, at [135]; *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd* [2017] NZDC 28091 at [48]; and *Worksafe New Zealand v Michael Vining Contracting Ltd* [2018] NZDC 6971 at [18].

10 See, for example, *Tasman Tanning*, above n 3, at [84].

11 Graham Panckhurst, Stewart Bell and David Henry *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (October 2012).

12 *The Report of the Independent Taskforce on Workplace Health and Safety* (April 2013).

13 Minister of Labour *Working Safer: A blueprint for health and safety at work* (August 2013).

14 Health and Safety Reform Bill 2014 (192–2).

(1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—

(a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and

(b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and

(d) promoting the provision of advice, information, education, and training in relation to work health and safety; and

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

(f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

(2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[15] A significant change in the Act was to introduce a classification of duty holders:[15]

(a) primary responsibility rests with "the person conducting a business or undertaking", labelled a PCBU;

(b) next are officers of the PCBU, being persons in a position to exercise significant influence over the management of the business or undertaking; and

(c) finally, workers carrying out work for a PCBU.

---

15 HASWA, ss 17–19.

[16] The primary duty of care is set out in s 36 which provides:

> **36 Primary duty of care**
>
> (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—
>
> (a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and
>
> (b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.
>
> (2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
>
> …

[17] The balance of the section identifies specific outcomes that must be ensured as far as practicable. In addition to this primary duty of care, specific duties for different classes of people are also identified.

Offence provisions

[18] The offence provisions come into play when there is a failure to comply with any of these duty provisions. The three offences, in ascending order of seriousness, are:

(a) section 49 – failing to comply with a duty;

(b) section 48 – failing to comply with a duty and thereby exposing someone to a risk of death, serious injury or illness; and

(c) section 47 – reckless conduct in respect of a duty.

[19] Section 48, with which we are concerned, provides:

> **48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness**
>
> (1) A person commits an offence against this section if—

(a) the person has a duty under subpart 2 or 3; and

(b) the person fails to comply with that duty; and

(c) that failure exposes any individual to a risk of death or serious injury or serious illness.

(2) A person who commits an offence against subsection (1) is liable on conviction,—

(a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $150,000:

(b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $300,000:

(c) for any other person, to a fine not exceeding $1.5 million.

[20] Subsection (2) requires analysis. Recalling the three levels of duty holder, a different distinction is drawn for sentencing purposes, with the jeopardy faced by a PCBU differing according to its nature. The sentencing hierarchy in ascending order is:

(a) a worker;

(b) a PCBU who is an individual, and an officer of a PCBU;

(c) a PCBU who is not an individual person but an entity, most typically a company.

It can be seen that a director, chief executive, or other officer of a PCBU is placed at the same level as a PCBU itself where that PCBU is an individual; and a person who is neither, in effect a worker, is covered by the lowest of the fine levels in subs (2)(a). The highest sanction is for a PCBU that is an entity rather than an individual person.

[21] This sentencing structure is different from that which confronted the *Hanham* Court when it fixed the current bands. Its guidelines covered all of these three groupings. By contrast the guidelines that emerge from this judgment will apply only to s 48(2)(c) – PCBUs that are not individuals. We have not heard submissions in relation to paras (a) and (b), and prefer not to comment on them. For those, it is likely sentencing patterns will emerge in the normal way through a series of District Court cases augmented by some appellate decisions. It is unlikely Full Court assistance will be required.

Other provisions

[22] Of some significance is s 151 of HASWA which is modified from its HSEA predecessor.[16] It is a provision that confirms the general applicability of Sentencing Act principles, but highlights features of that Act to which particular attention must be given. It is modified from its predecessor in that while that earlier provision highlighted considerations that were both aggravating and mitigating, the present provision places an emphasis on aggravating features as needing particular consideration. The section provides:

> **151 Sentencing criteria**
>
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and

[16] Health and Safety in Employment Act 1992 (HSEA), s 51A.

(f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[23] Two comments are required. First, courts are instructed to apply the Sentencing Act. That is what the opening words of subs (2) say. The subsequent highlighting of some particular factors does not negate the core applicability of all of the Sentencing Act. Second, too much should not be read into s 151(2)(g). The requirement there to have particular regard to a defendant's capacity to pay only "to the extent that it has the effect of increasing the amount of the fine" is not to be read as a statement that an inability to pay cannot be considered. This is where the rule that all of the Sentencing Act applies is particularly relevant. On this issue of ability or inability to pay, all the following provisions in the Sentencing Act apply to a HASWA sentencing:

(a) section 8(h) which requires a court to take into account the circumstances of an offender that might mean an otherwise appropriate sentence would be disproportionately severe;

(b) section 14(1) which says a court may decide not to impose a fine, otherwise appropriate, that an offender cannot pay;

(c) section 40(1) which directs a court, when imposing a fine, to have regard to the financial capacity of the defendant; and

(d) section 41 which empowers a court to require a declaration from the defendant as to financial capacity.

These provisions make it plain s 151(2)(g) is, like the other paragraphs, a legislative direction as to the particular importance of an already relevant factor. The final step of a sentencing will still involve assessing the ability of the company to pay the otherwise appropriate fine.

[24] We consider the financial capacity of an offender, whether it be an inquiry that might lead to an increase or decrease, should be considered at this final stage. It is only at this point that the combined financial penalty of reparation, fine and costs award will be known. Logically that provides the opportunity to measure whether the quantum needs adjusting for financial capacity reasons.

[25] Finally, we note s 152 may also be relevant to the overall assessment of the combined packet of sanctions imposed. It enables the Court, on an application by WorkSafe, to order an offender to pay to WorkSafe a just and reasonable sum towards the costs of the prosecution (including the costs of the investigation and associated costs). The provision is new and in the cases we have been referred to, WorkSafe has adopted a conservative approach to the costs it has sought, focussing on a contribution towards the direct legal costs of the prosecution. In some cases however, WorkSafe may incur substantial costs in the investigation of the offending. If it seeks and obtains an order for payment of such costs under s 152, they would need to be considered as part of the overall packet of sanctions. As the only case in which costs were raised was the Stumpmaster appeal and as we had no submissions directly on this issue we take the point no further.

Hanham **revisited**

Submissions

[26] The general thrust of the submissions for all appellants is that the level of increase in fines since the enactment of HASWA reflects an inappropriate mathematical approach. It is submitted that in effect the District Court is applying, on average, a six-fold increase across the entire range when that is not what was intended.

[27] Before outlining the particular submissions in more detail, we comment on one general aspect. It is apparent from the legislative process, and indeed the structure of the Act, that the legislation owes much to the Australian model law drafted by Safe Work Australia. Called the Model Work Health and Safety Act, it is not itself law but is available for adoption by State and Commonwealth legislatures. The offence provisions of HASWA, with minor wording changes, mirror those found in the model law.

[28] Counsel for the appellants note that fine levels in Australia are lower than the sentences being imposed under HASWA. It is accepted there is no tariff or guideline judgment, but it is submitted outcomes in specific cases on their face support levels significantly less than those likely here.[17] We have not however been persuaded that this lower level apparent in Australia can or should be transported to New Zealand. It is not apparent to us that the sentencing methodology is the same, and in the absence of a detailed understanding of both the sentencing and societal contexts from which individual decisions emerge, there are dangers in taking only isolated aspects. Accordingly, we do not address the Australian jurisprudence further.

[29] On behalf of Stumpmaster Ltd, Mr Mackenzie reviewed both the legislative history and the approach that had been taken on other occasions where there had been significant uplifts in the maximum penalties for offending. Areas where increases had occurred included the Resource Management Act 1991, the Fair Trading Act 1986, sentencing for sexual offending,[18] and under the previous health and safety legislation. Support for a progressive staggered implementation which sees the least impact visited on the majority of cases was said to be found in *R v Richardson*, a decision of the English Court of Appeal to which we shall return.[19]

[30] Mr Mackenzie submitted the following points emerge from his review of these topics:

(a) an important purpose of the increased maximum is to empower the court to better address the most serious cases. The inadequacy of the previous maximum was exposed by the events at Pike River;

(b) it is not correct to increase the existing bands by a multiplier that evenly reflects the statutory increase. Rather, a proportionate progressive response is required;

---

17 For example, *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NZWCCA 96; *Attorney-General (NSW) v Tho Services Ltd (in liq)* [2016] NSWCCA 221, (2016) 264 IR 171; and *Williamson v V H and M G Imports Pty Ltd* [2017] QDC 56, (2017) 264 IR 103.

18 *R v A* [1994] 2 NZLR 129 (CA).

19 *R v Richardson* [2006] EWCA Crim 3186, [2007] 2 All ER 601.

(c) the progressive implementation of the increase should see little change at the end of low culpability with the greatest proportionate increases found at the upper end of the scale. This approach was adopted in *Richardson*;

(d) the starting point for the majority of offending should come within the first half of the penalty range (here $750,000).

[31] A similar approach was taken by Mr Gallaway on behalf of the other two appellants. In particular, it is submitted the District Court's application of a six-fold increase to offences of average culpability or less is producing excessive outcomes. These outcomes are and will inevitably increase the number of cases where the ultimate fine is then significantly reduced to recognise financial incapacity.

[32] Taking a lead from the Australian approach, Mr Gallaway urges that the top of the middle culpability band should be around $400,000. Even after adjustments this will produce fines that are still a significant deterrent, will more often be manageable and which will still represent a significant uplift on previous sentencing levels. In that way, the legislative purpose behind the increase is respected, but implemented in a way consistent with the court's role in sentencing, namely ensuring appropriate but proportionate sentences.

[33] WorkSafe New Zealand emphasise the full legislative history in support of a submission that the purpose of the increase is to denounce and deter, and thereby effect significant improvements in worker safety. WorkSafe advocates for bands that encompass the whole of the range, and uses the guidelines advanced by the Court of Appeal in *R v AM (CA27/2009)* as a base for its proposed bands.[20] The comparability to *AM* lies in matching for each step the percentage of the maximum penalty captured by the top of the band.

---

[20] *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[34] WorkSafe New Zealand opposes the graduated approach advocated by the appellants. It submits the effect would be comparatively to lower the average fine, an outcome not consistent with the legislative intent underlying the statutory increases. It is further submitted there is little in the legislative history to support the proposition that the focus of the increases was solely on the higher culpability cases. Reference is made to the Taskforce Report,[21] and a Cabinet Paper in support of the submission that a uniform increase was the legislative aim.[22]

Approach to sentencing

[35] We first address the correct approach to sentencings under HASWA. As noted, HASWA adds a number of potential orders available to the sentencing court. The approach set out in *Hanham* must be modified to reflect that. A four step approach is now required:

(a) assess the amount of reparation;

(b) fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) determine whether further orders under ss 152–158 of HASWA are required; and

(d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

---

21 *Independent Taskforce*, above n 12.

22 Cabinet Paper "Improving Health and Safety at Work: An Effective Regulatory Framework" (15 July 2013) at [48]–[49].

Relevant considerations

[36] As noted, *Hanham* identified a list of relevant factors for sentencing:[23]

> (a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of [s 22 HASWA].
>
> (b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.
>
> (c) The degree of departure from standards prevailing in the relevant industry.
>
> (d) The obviousness of the hazard.
>
> (e) The availability, cost and effectiveness of the means necessary to avoid the hazard.
>
> (f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.
>
> (g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[37] The list in part reflects the then statutory scheme, and in particular s 51A of HSEA. To the extent that section survives, it is now s 151 of HASWA which we have already discussed. In our view all of the s 151 factors are covered by one or more of the existing *Hanham* considerations. The parties did not contend for any radical change. WorkSafe suggest a list of similar but reworded criteria. Although some of its proposed language may be better, we prefer to leave it to the sentencing courts to express the concepts as they wish. The *Hanham* factors are well known and little will be gained by rewording them.[24] There is nothing in HASWA that requires it.

[38] Referring to para (b) of the *Hanham* criteria, it can be noted that a consequence of the new structure of offences is that a risk of serious harm or death is a necessary feature of all prosecutions under s 48. The question is raised by Tasman Tanning whether this means this consideration should be changed.

---

[23] *Hanham*, above n 1, at [54].

[24] Recognising the *Hanham* reference to s 2A of HSEA should now be read as a reference to s 22 of HASWA.

[39] We see no need. Although necessarily the risk under s 48 prosecutions will always at least be of causing serious harm or illness, it is still important to have regard to exactly what the risk was. How many people did it involve, for example, and might a worker have been killed? Also, the "realised risk" component of this inquiry (i.e. the actual harm caused), similarly remains an important aspect in setting the placement within the bands.

[40] In relation to that, WorkSafe emphasises that whether actual harm eventuates is often a matter of chance, so it should not be an important feature in setting the level. It is correct the level of actual harm can be a matter of chance, but this is a statement equally true of a lot of offending. The conduct and intent will often be the same, but the consequence very different. That different consequence has always led to significant differences in sentencing jeopardy. We remain of the view that what actual harm occurred is a relevant and important feature in fixing placement within the bands. That a defendant is "lucky" no-one was hurt does not absolve it of liability under s 48, but the actual harm caused is still a relevant sentencing factor in determining how serious the offence was.[25]

Culpability bands

[41] We consider it important to recognise certain features of the *Hanham* bands. First, they already establish a graduated approach – as a percentage of the maximum penalty, the top of each band is 20, 40, 70 and 100 per cent. Further, those bands were not just a mathematical allocation of the maximum penalty. In fixing them the Court had regard to the statutory scheme, the purposes of sentencing, the principles in the Sentencing Act and the relationship between reparation and fines.

[42] The conclusion of the Court was:[26]

> [40] This review of the relevant provisions of the HSE Act and the Sentencing Act demonstrates several key propositions. First, the object of the HSE Act is the prevention of harm in the workplace. Secondly, to achieve that object, sentencing under s 50 will generally require significant weight to be given to the purposes of denunciation, deterrence and accountability of harm done to the victim in terms of s 7 Sentencing Act. Thirdly, reparation must be

---

25 This factor is also a mandatory consideration in sentencing under HASWA, s 151(2)(d).

26 *Hanham*, above n 1.

> a principal focus in sentencing. Indeed, the Sentencing Act gives primacy to reparation where the financial capacity of the offender is insufficient to pay both reparation and a fine. Finally, both the HSE Act and the Sentencing Act require the court to take account of the financial capacity of the offender.

[43] We consider that conclusion remains equally apposite today. Once it is understood that the *Hanham* bands are a well considered product of a still applicable sentencing methodology, the task of updating the bands necessarily becomes an unambitious one. Significant revision or reanalysis is not required.

[44] We were provided with all District Court decisions as at the appeal date. Three main groupings have emerged – the WorkSafe four-band proposal, a six-band model, and an approach which assessed the particular case by reference not to specific bands but to comparable decisions. Many of these latter cases have indicated that approach is being taken pending a review by the High Court of the *Hanham* categories.

[45] The parties to these appeals all suggest the four-band approach be adopted and we are satisfied that is appropriate. As with many areas of sentencing, there is no definitive answer. The six bands suggested were low, low/medium, medium, medium/high, high and extremely high.[27] The reasoning behind the six bands was a desire to avoid monetary bands that are too broad.[28]

[46] Reviewing the cases, it is apparent that assessments often seek to place the offending at some identified point within a band – "middle of band two", "towards the upper end of band two" etc. The six-band approach arguably merely consolidates that reality. However, we are more attracted to the broad generalised assessments achieved by four bands rather than creating a requirement on courts to definitively place the offending within a tighter grouping. The bands are only intended as guidelines and sentencing will always be a case specific exercise. On balance, we consider guidance will be better achieved by continuing the existing model with which the courts are familiar.

---

27 *WorkSafe New Zealand Ltd v Rangiora Carpets Ltd* [2017] NZDC 22587 at [34].
28 At [34]–[35].

[47] The task then becomes to attach values to the four bands. We first observe we are not persuaded that the primary aim of the reform was to target high-end offending. Although the Pike River events, and the need there for cumulative sentences, may have been a factor in initiating the reform, there is nothing subsequent to that which suggests the increase in maximum penalties was driven by that concern. WorkSafe point to extracts from the Taskforce Report, and Cabinet Paper that it contends point in the opposite direction. We have not found it necessary to rely on such sources, because there is nothing supporting the appellants' contention. Accordingly, we approach the increases as reflecting the standard legislative intention in such cases; namely, the existing level of sanction was seen as inadequate to achieve the statutory purposes, so the maximum sentence was increased. Here, it must be added, they were increased by a very significant amount. The revaluing of the categories must reflect that.

[48] We were referred to a passage from *R v Richardson* which we accept identifies well the task that must be undertaken:[29]

> Statutory changes in sentencing levels are constant. In recent years, maximum sentences have been increased (for example, drug related offences) or reduced (for example, theft). In general, changes like these provide clear indications to sentencing courts of the seriousness with which the criminal conduct addressed by the changes is viewed by contemporary society. In our parliamentary democracy, sentencing courts should not and do not ignore the results of the legislative process, and as a matter of constitutional principle, reflecting the careful balance between the separation of powers and judicial independence, and an appropriate interface between the judiciary and the legislature, judges are required to take such legislative changes into account when deciding the appropriate sentence in each individual case, or where guidance is being offered to sentencing courts, in the formulation of the guidance.

[49] In *Richardson*, the Court concluded that the primary statutory purpose of the increase in maximum penalty was to address a perceived inadequacy in sentencing for the worst cases.[30] Notwithstanding that, when the changes there made to the four sentencing bands are analysed, it can be seen the statutory increase led to a reasonably uniform increase other than to the low culpability band.[31] This increase to all the bands reflects the reality that proportionality across the bands must be maintained, and so

---

29 *Richardson*, above n 19, at [4].
30 At [13].
31 At [19].

some migration upwards in all levels is an inevitable consequence of increased maximum penalties.

[50] In terms of dollar values, the table below sets out first what the position would be if each *Hanham* band were just increased six-fold, and then the respective suggestions of the parties:[32]

	Hanham	WorkSafe	Tasman/Niagara	Stumpmaster
Low culpability	Up to $300,000 (20%)	Up to $400,000 (27%)	Up to $250,000 (17%)	Up to $125,000 (8%)
Medium culpability	$300,000 to $600,000 (40%)	$400,000 to $800,000 (53%)	$250,000 to $400,000 (27%)	$125,000 to $400,000 (27%)
High culpability	$600,000 to $1,050,000 (70%)	$800,000 to $1,200,000 (80%)	$400,000 to $1,000,000 (67%)	$400,000 to $800,000 (53%)
Very high culpability	$1,050,000 to $1,500,000	$1,200,000 to $1,500,000	$1,000,000 to $1,500,000	$800,000 to $1,500,000

[51] We consider the appellants' proposals would not reflect the statutory purpose. They were of course premised on the proposition that the reforms were targeted at increasing the top end. Once that is rejected, there can be no basis to so lower the range of the medium culpability band into which the 'typical' case is likely to fall.

[52] There is a case to increase the low culpability band by a lesser amount than the other bands. The pattern of decisions suggests such cases will typically involve a minor slip up from a business otherwise carrying out its duties in the correct manner.[33] It is unlikely actual harm will have occurred, or if it has it will be comparatively minor. A ceiling of $250,000 represents adequate deterrence for such offending and allows for a series of graduated steps through the remaining bands.

---

32 The percentages refer to the percentage of the statutory maximum that the figure is ($1,500,000).

33 See, for example, *WorkSafe New Zealand v Trade Depot Ltd* [2018] NZDC 372 at [35]–[40].

[53] The new guideline bands are:

low culpability	:	Up to $250,000
medium culpability	:	$250,000 to $600,000
high culpability	:	$600,000 to $1,000,000
very high culpability	:	$1,000,000 plus

[54] We are satisfied a figure of $600,000 for the top of the middle band represents a significant deterrent that reflects the statutory purposes. It is a substantial figure, and one which may well be higher depending on the degree of departure and the actual harm caused. For many businesses it will be onerous, as the legislation intends it to be. For those for whom it is not, the legislation makes clear the obligation of the court to consider uplifts to reflect the relative wealth of the offender.

Reparation orders

[55] Logically, a change in the level of fine does not necessarily require an adjustment to reparation payments. The harm to the victim is unchanged. Inevitably, however, a corollary of the larger fines is that the percentage reparation represents of the whole penalty will decrease. We have not received detailed submissions on reparation levels, nor the various factors that make up the quantum. We note the suggestion in an article by Campbell and Evans that there is scope to broaden the factors that are taken into account.[34]

[56] What can be observed at this time is that any increase in fine levels should not lower the size of reparation orders. Whether they stay the same or increase, the proportionality assessment at step four will control the overall penalty. Further, if, as seems likely, adjustment for financial incapacity increases, the approach settled in *Hanham* and continued here ensures that any such adjustment is made to the level of the fine and will not affect the reparation order.

---

[34] Mark Campbell and Charlotte Evans "Sentencing Under the Health and Safety at Work Act 2015" [2018] NZLJ 112 at 114.

Mitigating factors

[57] During the hearing, there was discussion of the size of the credit routinely given for matters such as reparation already paid, remorse, previous good record and co-operation. This discussion has led the Court to examine the issue in more depth. It is apparent to us some comment is required.

[58] We were provided with 17 decisions under HASWA.[35] We understand the approach taken in them to mitigating factors reflects that which was occurring under HSEA. In all 17 cases, there were guilty pleas which all received a standard 25 per cent credit.[36] In addition, in every case there was a further discount covering other matters of mitigation. These were remorse, co-operation, efforts made to address the underlying cause, reparation, and previous good record.

[59] Before identifying the discount given, we observe the cases presented, as one would expect, quite a variety of situations. In many it is clear the remorse was genuine, and the victims themselves spoke of it and of the efforts of the defendant to assist in every way possible.[37] In other cases, victims spoke of disappointment at the actions of the defendant subsequent to the accident. At times, there were unresolved disputes about what happened.

---

35 *Worksafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395; *Rangiora Carpets*, above n 28; *Tasman Tanning*, above n 3; *WorkSafe New Zealand v Dimac Contractors Ltd* [2017] NZDC 26648; *WorkSafe New Zealand v Atlas Concrete Ltd* [2017] NZDC 27233; *WorkSafe New Zealand v ITW New Zealand* [2017] NZDC 27830; *WorkSafe New Zealand v PG & SM Callaghan Ltd* [2017] NZDC 27814; *Lindsay Whyte*, above n 10; *Trade Depot*, above n 34; *Stumpmaster*, above n 3; *Worksafe New Zealand v Easton Agriculture Ltd* [2018] NZDC 2003; *Niagara*, above n 3; *Worksafe New Zealand v Marshall Industries Ltd* [2018] NZDC 4498; *WorkSafe New Zealand v Avon Industries Ltd* [2018] NZDC 4766; *WorkSafe New Zealand v Nutrimetrics International (New Zealand) Ltd* [2018] NZDC 4972; *Michael Vining*, above n 10; *WorkSafe New Zealand v Oceana Gold (New Zealand) Ltd* [2018] NZDC 5274.

36 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].

37 For example, *Rangiora Carpets*, above n 28, at [38]; *Dimac*, above n 36, at [57]; *Easton Agriculture*, above n 36, at [38]–[39]; and *Oceana Gold*, above n 36; at [24] and [61].

[60] In about half the cases the employer had provided monetary assistance from the outset, and had also provided what is known as "ACC top-up", a reference to the difference between existing salary and ACC payments.[38] Some had gone to other lengths to assist such as flying family from overseas.[39] At least as it appears from the record, in the other cases the defendants awaited a court reparation order, and did not assist.

[61] Several of the defendants had previous convictions for which the uplifts ranged from five to 10 per cent.[40] Most had no previous convictions.

[62] Most defendants had undertaken steps to rectify the problem. In determining whether credit should be given for this, there was little effort made to correlate what was being done to the nature and level of the underlying deficit that led to the accident. In other words, were the reformative steps going an extra mile, or at the other extreme merely correcting what were woeful deficits that should never have existed in the first place? As a potential example of the former, we note in one case the employer closed their mine for a week at the cost of over $1 million to implement immediate changes.[41]

[63] Notwithstanding this wide variety of situations, in 12 of the 17 cases the same further credit of 30 per cent was allocated, usually on an agreed basis and with little analysis.[42] In four of the other cases the size of the credit was 25 per cent,[43] and in the fifth it was 45 per cent.[44] This means the minimum reduction from the starting point in any case was 50 per cent, in the majority it was (routinely) 55 per cent and in one 70 per cent.

---

38 For example, *Tasman Tanning*, above n 3, at [166].
39 *Michael Vining*, above n 10, at [12].
40 *Tasman Tanning*, above n 3, at [164]–[165]; and *Avon Industries*, above n 36, at [29].
41 *Oceana Gold*, above n 36, at [20].
42 *Budget Plastics*, above n 36; *Rangiora Carpets*, above n 28; *Tasman Tanning*, above n 3; *Atlas*, above n 36; *ITW*, above n 36; *Callaghan*, above n 36; *Lindsay Whyte*, above n 10; *Trade Depot*, above n 34; *Stumpmaster*, above n 3; *Marshall Industries*, above n 36; *Nutrimetrics*, above n 36; and *Oceana Gold*, above n 36.
43 *Dimac*, above n 36; *Niagara*, above n 3; *Avon Industries*, above n 36 and *Michael Vining*, above n 10.
44 *Easton Agriculture*, above n 36.

[64] Such routine standard discounts give cause for concern and have distorted the sentencing process by so reducing the starting points that outcomes become too low. No doubt this was a contributor to legislative concern over sentencing levels. The difficulty now is that there has been a statutory response in the form of greatly increased sentencing levels. To undo this pattern of large discounts would be to impose a double increase.

[65] However, some correction is necessary. Proper analysis of the basis for the credit is required. First, we consider that comments made in *Hanham* about credit for a reparation order have been misunderstood. This is particularly important as the fine levels increase. In *Hanham*, under a section focusing on the amount of credit to be accorded to a defendant for the fact that a reparation order has been made, the Court observed:[45]

> [64] … Given the disparate purposes which underpin the sentences of reparation and fines, we are satisfied that a reduction in the appropriate level of fine by the total amount of the reparation ordered or monetary sum paid by way of amends is not generally appropriate unless for reasons of financial capacity. The statutory purposes of denunciation, deterrence and accountability would not be achieved if fines were reduced by the amount of the reparation on a 1:1 ratio. An assessment must be made of the whole of the circumstances including:
>
> - The desirability of encouraging the payment of reparation, or the taking of remedial measures (whether by way of a restorative justice process or otherwise).
> - The need to give significant weight to denunciation, deterrence and accountability.
> - The overall financial resources of the offender.
> - The need to impose an effective penalty which will be more than a mere licence fee.
> - The extent to which the reparation ordered will make good the harm that has occurred (including the response of the victim or the victim's family).
> - The extent to which any offer of reparation demonstrates remorse on the part of the offender.
>
> [65] Care must of course be taken to avoid double counting of mitigating factors.

---

[45] *Hanham*, above n 1, at [64]–[65].

[66] It can be seen the Court cautioned against a 1:1 credit for reparation payments, considering the credit should be lower than that. We consider it likely that under the new bands a starting point of $500,000 to $600,000 will be common. Assuming in these cases a 10 per cent credit were given for the fact of a reparation order, of the 17 decisions to which we were referred in only five was the size of reparation greater than the value of the discount. In many cases the value of the discount would be twice and sometimes three times as great as the reparation payment. This runs against the direction in *Hanham* and is incorrect. It is an example of why more analysis is required before large discounts are routinely given. They can otherwise have the effect of undermining the statutory purposes. In this area of credit for reparation, we consider the efforts of the defendant to assist a victim from the outset merit particular noting. Those are times of greater stress and uncertainty for the victim and family, and genuine efforts to assist from the outset are reflective of the matters for which this extra credit is given.

[67] Next, it is contrary to sentencing principle that those with previous convictions receive the same global discount as those without when a component of that discount is a previous good record. By way of general guidance, we consider a further discount of a size such as 30 per cent is only to be expected in cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree. That is not to place a ceiling on the amount of credit, but to observe a routine crediting of 30 per cent without regard to the particular circumstances is not consistent with the Sentencing Act. WorkSafe must take some responsibility for this. In almost all these cases we have discussed, the Court has merely been presented with an "agreed" figure of 30 per cent, a proposition that we suspect is normally accompanied by little analysis of the features of the case meriting such a credit. This must be so, since 30 per cent was standardly recommended in cases of significantly different merit.

[68] We turn now to the individual appeals.

Tasman Tanning Company Ltd

Facts

[69] Tasman is a leather tanning company. The process of tanning skins involves painting the skins with a sodium sulphide preparation to loosen the wool. The skins are then placed in a solution known as a ”pickle liquor”. That mixture, when coupled with the sulphide painted skins, produces hydrogen sulphide. This is counteracted by adding an oxidising agent to the pickle liquor.

[70] The pickle liquor is kept in what is called a mixer. The pickle liquor solution is constantly checked and monitored. The controllers of the mixture work at the upper level of the mixer on what is a mezzanine floor. They maintain a process sheet called a “recipe” which records all that is done. It also is stored on the mezzanine floor. The opening on the mixers into which the hides are placed is 2.5 m above the ground. This means a forklift is needed to place the hides into the mixer. The forklift does this from the ground floor.

[71] On the day in question, for reasons not apparent, those in charge decided to add a partially dilated pickle liquor to existing solutions. This required the pH of each to be matched. There was no set procedure for this, so they experimented. During the course of doing so, two new processing operators began their shifts. The new people were not advised what was happening, or of what exactly the mixture in the mixer was.

[72] In the late afternoon the victim, a forklift driver, was told by one of the new operators that the mixer was ready to load with skins. Normally a mixer should be empty when this happens. On this occasion, there was liquid in it, but the new operator, unaware of what had been happening, assumed the liquid was water. Accordingly, he told the forklift driver to put the skins in. As a result hydrogen sulphide was produced.

[73] The forklift driver was loading a fifth bin of skins into the mixer when he was overcome. He tried to move away from the bins but fainted and knocked himself out. He recovered and tried to get into his forklift but again lost consciousness, striking his

head as he fell. The driver suffered concussion, and experienced symptoms for five weeks. Memory loss, fatigue, dizziness and headaches continue to be experienced. They are recognised long term consequences of exposure to toxic gas. The driver had smelt rotten eggs shortly before passing out but was not aware of its significance. Unlike the workers on the mezzanine floor, the driver did not have a personal gas monitor as part of his equipment.

[74] Hydrogen sulphide is poisonous, corrosive and flammable. It is heavier than air so naturally accumulates in the lower levels of the factory floor. The smell of rotten eggs is a known warning sign, but is of limited assistance as the gas quickly deadens a person's sense of smell. The gas affects several systems in a person's body, but has most impact on the nervous system. There are many health consequences depending on the strength of the gas and the length of exposure. Any exposure is bad. Even short term exposure to high levels can be fatal.

[75] In a different facility, three years earlier the same defendant had an incident of worker exposure to hydrogen sulphide gas. At that time, no workers had personal gas monitors. Two workers lost consciousness. Two more lost consciousness when they returned into the building to try and help their workmates. Two of these four had to be placed into medically induced comas. Overall, 15 employees were affected.

Sentencing[46]

[76] There are no workplace standards or best practice guidelines for tanning. However, there is ample material about hydrogen sulphide gas and its risks. There was no dispute that the defendant company had breached several duties. These included inadequate rules to prevent departures from procedures, inadequate communication protocols, inadequate training and warning about hydrogen sulphide and failing to provide workers, including the forklift driver, with appropriate protection equipment.

---

[46] *Tasman Tanning*, above n 3.

[77] Reparation was set at $18,000, but reduced to $13,000 to reflect the fact that the defendant had already made a payment of $5,000. It is to be noted the defendant had also been providing an ACC top up.

[78] Concerning the starting point the District Court assessed the offending at the upper level of the medium band. Working on the basis of WorkSafe's categories the starting point was $700,000. An uplift of five per cent for the previous offence was imposed. There was then the routine 30 per cent discount for other factors, and a 25 per cent guilty plea discount leading to a final fine of $385,875. This was rounded to $380,000.

[79] The defendant was ordered to pay half the prosecutor's costs which meant an additional $4,000.

Submissions

[80] In addition to submissions concerning the band levels, Tasman Tanning submits the placement of the offending towards the top of the second category is too high. It is submitted that it was unexpected that skins would be added to the mixer before it was empty. Those who created the experimental mix were senior employees who knew what they were doing, and had no reason to believe skins would be added. The accident was a product of people assisting outside their designated task and a breakdown in communication. Tasman Tanning accepts responsibility but submits it was not a systemic failure.

[81] WorkSafe emphasises the failure to provide the forklift operator with a gas monitor was a significant departure from safe practice. It is further submitted the underlying cause was that employees felt able to undertake a novel process in the way they did. Better systems would have prevented this.

Assessment

[82] We agree with the placement towards the top of the second band. Tasman Tanning is correct that one would not expect protocols to be in place for what was a one-off made-up activity by senior employees. However, we agree that the communication errors which followed are indicative of poor systems. It is not so much the one-off activity, as the fact that there was a systemic lack of appreciation as to what steps were needed to ensure safety given what they were doing. The lack of awareness on the part of the forklift driver as to the significance of the smell of rotten eggs is another example of the lack of good training in the area.

[83] We also agree that given the known very serious risks of the gas, and its propensity to accumulate at lower levels, the lack of personal monitoring equipment was a significant breach of duty. The harm here is significant and we accept the District Court placement.

[84] On the bands we have identified the starting point should have been $550,000 rather than $700,000. However, that does not necessarily mean the final sentence is manifestly excessive. We consider the uplift for the previous offending was inadequate. The previous incident was only three years previously and involved the same gas. Lack of suitable equipment was also an aspect there, and reappears here. The minimum appropriate uplift was 10 per cent.

[85] We also consider 30 per cent an excessive discount in circumstances where the defendant cannot call on its good record. We do not agree with the District Court's observation that it was important that prior to 2013 Tasman Tanning had a good record. That might be so, and was certainly relevant to the 2013 exercise. Now, however, it is a repeat offender within a relatively short time in relation to the same extremely hazardous gas, and with similar failings. We consider 15 per cent to be the correct discount.

[86] We do not change the District Court's 25 per cent discount for the defendant's guilty plea.

[87] The assessment we therefore arrive at is:

(a) starting point – $550,000;

(b) uplift 10 per cent - $605,000;

(c) total discounts 40 per cent - $363,000.

[88] The appeal is allowed. The existing fine of $380,000 is quashed and in its place, we impose a fine of $363,000.

Niagara Sawmilling Co Ltd

Facts and sentencing[47]

[89] Niagara has been conducting a sawmilling business since 1954. It operates two sites. The victim worked on a grader/trimmer machine. His role was to monitor the wood on the machine, including to ensure as it reached a certain point it was travelling properly along the rollers. A piece of wood snagged. The victim put his hand in to dislodge it and his glove caught. The outcome was that two of his fingers were partially amputated.

[90] The fixed guard that was installed was not adequate protection. An external specialist had previously recommended changes but the company's health and safety adviser did not agree and considered the proposed change would create other risks. As a consequence, no change was made. The Judge assessed the offending as medium range and took a figure of $500,000.

[91] The defendant has three previous convictions – 2003, 2011 and 2015. We do not have the details. The prosecution sought a 25 per cent uplift but the Court considered 15 per cent appropriate, since 10 per cent had been applied the previous time. Twenty five per cent was allowed for the mitigating factors with an additional 25 per cent for the guilty plea. There had earlier been a reparation order of $27,000,

---

47 *Niagara*, above n 3.

which took into account a $5,000 ACC top up payment already made. The final fine was $323,437.

Submissions

[92] Niagara challenges the assessment of the offending, submitting it falls at the bottom of the middle band. It is noted Niagara had obtained, prior to the accident, the services of an expert and had implemented many changes. A recommended change to this machine was not done in the genuine belief that the recommendation was flawed. The machine was guarded, just not adequately so. The worker had been provided with intensive training that exceeded industry norms. In terms of risk, what happened is what might be expected. There was no real risk of a worse outcome such as death. Niagara also challenges the size of the uplift for previous offending, noting that credit for a good previous record is already lost.

[93] WorkSafe submits the assessment is correct. There is no evidence to say the internal health and safety adviser's contrary view was correct, and indeed the injury has occurred despite the inadequate guard he installed. Little credit can be given for a partial guard which fails to block access at one end. Significant actual harm had occurred and the District Court assessment was correct.

Assessment

[94] We are satisfied the placement in the band is correct. The breach here is a fundamental one, long recognised – the need to adequately guard machinery.[48] The external adviser had recognised the dangers and recommended a change to the machinery to increase the gap and lessen the risk that wood became entrapped. Niagara chose its own solution which proved completely inadequate, and obviously so. The guard only stopped access at one side.

---

[48] For example, *Budget Plastics*, above n 36, at [45]; *Atlas*, above n 36, at [19]–[26]; *ITW*, above n 36, at [35]; and *Easton Agriculture*, above n 36, at [22]–[23].

[95] As for the uplift, we note s 151(2)(e) of HASWA emphasises the safety record of the defendant. This is a legislative indication that a degree of deterrence is appropriate. We consider 15 per cent the least uplift available given three convictions, two of them relatively recent. More might have been appropriate depending on the detail of that past offending.

[96] We consider 25 per cent was too high a discount for other factors. Credit was certainly due given the defendant's immediate efforts to assist the defendant, but expressions of remorse, however immediately genuine, cannot receive full credit in the fact of repeated deficits. The best manifestation of remorse is taking every step available to keep the word force safe. We consider 15 per cent the most available here.

[97] Applying the new guidelines, the District Court's starting point of $500,000 is correct. On balance, the defendant has otherwise been fortunate in the sentencing exercise and the appeal is accordingly dismissed.

Stumpmaster Ltd

Facts and sentencing[49]

[98] Stumpmaster carried out residential arborist work. On this occasion, it was cutting trees at the end of a cul-de-sac. Stumpmaster put out cones to protect the danger area on the road where a tree might fall. The victim walked into that area and a tree fell on her. The victim suffered injuries requiring hospitalisation for six days.

[99] Stumpmaster had completed a hazard report when it commenced the work. However, the manner in which that part of the road was protected was inadequate. Stumpmaster had with it on the job equipment to provide a safe, obvious barrier preventing persons walking into danger, but did not use them. The District Court had in this case proposed five bands – very low, low, medium, high and very high culpability. The Judge adopted a starting point of $450,000 to $500,000.

---

[49] *Stumpmaster*, above n 3.

[100] The standard discounts of 30 per cent and 25 per cent for guilty plea were applied. It seems Stumpmaster had made real efforts to co-operate, and also alert the industry to the risks. The company had an unblemished record. Costs of $1,000 were ordered. The indicated fine was around $250,000, with reparation of $18,500.

[101] Stumpmaster was a small one-person company. There was a dispute between it and WorkSafe over its capacity to meet a fine. WorkSafe contended Stumpmaster would pay a fine of $100,000 if spread over four to five years. Stumpmaster contended $20,000 was the most it could afford. The Court identified a loan repayment obligation of $4,800 a month that was to cease in October 2018. It was considered thereafter that money could be applied to a fine. The identified fine of $250,000 was accordingly reduced to $90,000, payable at the rate of $5,000 per quarter, commencing on 25 October 2018. This will extend for a period of four and a half years.

Submissions

[102] Stumpmaster does not challenge the culpability assessment. It does, however, challenge the level of fine on the basis of inability to pay, and also challenges the costs order.

[103] WorkSafe submits the assessment is correct. The evidence as to Stumpmaster's financial capacity supported the Judge's finding, it is reasonable to assume Stumpmaster would be able to meet its liability and if it could not, it has the ability to seek remission of all or part of the fine at a later stage under HASWA.

Assessment

[104] Although the nominal appropriate fine is likely to be irrelevant to the final outcome given Stumpmaster's financial situation, we nevertheless undertake the analysis. The Judge's culpability assessment equates on our bands to towards the top of band two, medium culpability. We consider the starting point should have been around $550,000. We would be inclined to have limited the "other factor" credit to 25 per cent, this being a case of good but not exceptional response from a first time offender.

[105] Concerning ability to pay, both parties sought on the appeal to provide further evidence and commentary by way of affidavit. It has not particularly assisted us, nor shown the Judge's approach to be wrong. The identified source of funds is there. We had some hesitation over the length of time the order extends. We accept orders of this type are available but caution about extending liability too far into the future. A higher rate of repayment for a shorter time is generally preferable.

[106] The costs challenge is without merit. As noted, the Act allows for these orders[50] and the manner in which WorkSafe is presently calculating them, which is to focus only on lawyer litigation expenses, is modest. We are not to be taken to be encouraging or otherwise higher claims, but think it likely the legislation contemplates rather more cost recovery than that.

[107] Mr Mackenzie's challenge was that no features were identified that made a costs order appropriate. The defendant had been co-operative, there were no unnecessary steps taken and accordingly no reason for an order. However, we do not consider this type of order is to be reserved for cases where extra punishment is merited. There is nothing in the legislative scheme to suggest that and costs orders in the regulatory context are common place.

[108] The appeal is dismissed.

_____ _____

Venning J Simon France J

[50] HASWA, s 152.