

Are roads subject to the Health and Safety at Work Act 2015?

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Introduction

- All main transport modes, indeed nearly all the economy, is clearly subject to HSWA
- But **not clear for the actual roads** i.e. infrastructure
- Despite being a product of work
- Different safety discipline for roads than other modes – **if subject to HSWA would be much stricter**
- HSWA purpose: to protect workers and others vs harm to health, safety, welfare by eliminating or minimising risks arising from work



Context

- Road accidents a serious problem in NZ
- But **no data on work-related vehicle casualties**
- Would include at least all truck deaths (58 in 2015)
- But also vans, taxis, buses, cars used for work – no data
- Compare rail (16); all non-transport (43).



Control

- View that road owners have no control over users
- True in part
- But **important areas where they do have substantial control** (physical condition of roads) or substantial influence (eg setting of road use rules and parameters like speed limits)
- Police record crash causes – road factors in 11% of fatal crashes (2015)
- **Loss of control (road environment important) in 34% of fatal crashes**
- Roading authority is in complete control of repair and maintenance and travellers are dependent on it for reasonable performance of the work.
Users in no position to assess the construction and maintenance work
(Canadian case *Lewis*)



Duties on roading authorities (outside HSWA)

- **Very weak for local roads** (52% of traffic)– obligation to take precautions for safety of public. Only used in context of road works
- **No formal safety obligation for State Highways** (48% traffic, 12% km)
- **Very general, soft obligations** to be “safe, efficient, effective”
- **“Target” obligations** - don’t have to be achieved if policies and budgets of authority have other priorities (UK Cases *Larner*, *Gorringer*)
- Tougher requirements in some overseas jurisdictions



Public safety legislation?

- Road safety involves general public safety
- **Some say HSWA is not a public safety act**, it is just to protect workers and others nearby.
- Where work safety ends and public safety begins is “**not easily ascertainable in a modern work context**” Johnstone and Tooma
- Key question: how close the connection with work is in time and space



Tobacco companies

- Australian commentators Johnstone and Tooma believe the H&S laws are not limited to workplaces
- **Scope so broad** as to allow actions against tobacco companies for public health consequences
- Harm arises from work in making , distributing & selling cigarettes, not a narrow factory based reading.
- **Work on road can lead to risks of safety in same way**



Reasonably practicable

- What could reasonably be done in light of **likelihood** and **consequence** of the risk
- What was or ought to have been **known** about it
- How it might be **minimised or eliminated**
- **And after these, cost.**
- Requires a “**gross disproportion**” between costs and benefits before costs outweigh safety factors.
- Not defined but does not admit of small differences
- **May have to spend \$3 or even \$10 to achieve a \$1 safety benefit**
- Road – not economic if have to spend >\$1, so not done.



Is a road a workplace: *Berryman*

- **A place where work is being carried out, or is customarily carried out.**
- In *Berryman* (1996), bridge collapsed, person not on bridge long enough – too transitory.
- But includes shearing sheds and manhole covers only used intermittently (their purpose is work)
- *DOC v Corrections* (2016): no need for close proximity or frequency – dismissed *Berryman* as the act was amended after it.
- And a **vehicle is a workplace**
- Would a “transitory” argument appeal under new “workplace” definition?



Present tense

- “Is being carried out” **very present tense** – reinforces the *Berryman* interpretation. Is work being carried out for the few seconds when the vehicle is on a defective piece of the road?
- And certainly work on the road itself is not “being carried out”
- “Being” added by the Select Committee: at pains to “make it clear that **a workplace does not remain indefinitely**, once work has been carried out there”
- “Being” not in Australian WHS Act.



Implications of a vehicle being a workplace

- A vehicle is a workplace (s 20(2)) if used for work
- If the vehicle is, then **does that make the road on which it is travelling also a workplace?**
- Clearly **the road is a place**
- And the **presence of a work vehicle** means that work “is being carried out” at that place.
 - Also, any place a vehicle is, is a place the worker “goes ... while at work”
- **So a road could be a workplace in that context**



Anything arising – from an office? Policies?

- Section 36(2) – must ensure (to extent reasonably practicable) H & S of **other persons not put at risk from work** done as part of the business
- No locational constraints – **harm caused anywhere by work**, not necessarily at the same place, is caught
- But still requires causal proximity – did the work actually put someone at risk?
- Section 37(1): must ensure (reasonably practicably) anything arising from the workplace is **without risk to H & S of any person**
- Not just physical things: decisions and policies arise from offices
- But Ministers are exempt as officers (s 18(c))



Farmers' exemption

- The Select Committee added an exemption for farmers (but only to s 37(1), and not to the similar duty under s 36(2))
- HSWA s 37(1) **does not apply to part of a farm unless work is being carried out there at the time (s 37(3))**
- So injuries to person by previous inadequate work (or omission to do any) do not make the farmer liable.
- Clearly **thought general “is being carried out” in workplace definition was not certain enough.**
- **Absence of a similar provision for roads implies that work does not have to be actually being carried out at that time for roads to be caught**



“Upstream duties” inherently prospective

- **Design**, manufacture, import, supply, **construction**, installation, others
- **Inherently prospective** – actions take place over short time and then the risks from them run
- Apply to plant, substances, **structures**, (which includes roads).
- No significant risks in the design process itself, only from when in use
- **Structure has to be used in a workplace** – might limit its use for roads.
- But work use vehicles might trigger it. Structure **doesn't have to be in the same workplace** – work vehicles use the structure, even if the road itself is not a workplace.



Reforms – (1) grossly disproportionate

- Could **remove the concept** so that benefits have to be in proportion to costs
- **Or at least define** it so there is certainty
 - Eg costs should be >2 times benefits before they can outweigh them
- And expose the definition to debate



(2) Make HSWA clearly apply to roads

- HSWA application to roads is uncertain.
- Could **revise act to make it clear that roads/bridges/tunnels are covered**
 - Whether or not there is work actually going on at the time
- Could apply to all places where work can create hazards some time after the work has taken place
 - Their users and neighbours deserve HSWA's protection
 - Wharfs, railways, runways, electricity lines, pipelines
 - Would avoid specific legislation for some sectors



(3) Extend public safety role

- **Extend the public safety role of HSWA generally**
- Include in purposes
 - As is done for rail in UK
 - Eg “Protecting the public from personal injury and other risks from construction , maintenance and operation of transport and other infrastructure activities”
- **Or could have a specific obligation in a new Roding Act**, importing the reasonably practicable standard and duties, like the Railways Act 2005. Compare the Australian Heavy Vehicle National Law.



Conclusion

- **Not clear that HSWA applies to roads**
- Could argue that purpose of act is linked to actual employment, but it also covers “others” in wide terms
- **Capable of supporting a prosecution for a work-use vehicle**
- But would Worksafe want to take that action?
 - Or would a private prosecution be taken if they don't?
- **Best action is to clarify that it does apply to roads**





Questions?