

**IN THE DISTRICT COURT
AT WHAKATANE**

**I TE KŌTI-Ā-ROHE
KI WHAKATĀNE**

**CRI-2020-004-009514
[2023] NZDC 4627**

WORKSAFE NEW ZEALAND
Prosecutor

v

I D TOURS NEW ZEALAND LIMITED
Defendant

Hearing: 13 March 2023
Appearances: K McDonald KC, M Hodge and S Symon for the Prosecutor
D Neutze and P Couldwell for the Defendant
Judgment: 14 March 2023

**ORAL RULING OF JUDGE E M THOMAS
[ON S 147 APPLICATION]**

A. The defendant's application to dismiss the charge is refused.

REASONS

Introduction

[1] When a tour operator deals directly with customers it has all the health and safety duties under the Health and Safety at Work Act 2015. It must keep workers and other people safe at the activity. It must ensure that all the right information gets to customers when they are buying a tour. It must make sure that everything is safe for them while they are transporting them to their activity site; and so on.

[2] The cruise and adventure tourism industries have grown significantly over the years. It is now often no longer practical for tour operators to do all the selling, ticketing and transport as well as run the tours. It has become standard industry practice to use a supply chain model. That is, the tour provider might use another entity or entities to perform some of those other functions. ID Tours New Zealand Limited is one of those other entities.

[3] Royal Caribbean Cruise Lines (RCCL) would sell the tours to its passengers. ID Tours would then liaise between RCCL and Tauranga Tourism Services Limited, the local agent for the tour provider, White Island Tours Limited. Each of those is a separate legal entity which together form a supply chain from tour provider to customer.

This application

[4] ID Tours accepts it has a duty under s 36(1) of the Act in relation to its own workers and workplaces.¹ It accepts it has a duty to other persons related to its own work activity and workplaces. It has been charged with breaching a duty under s 36(2) owed to tourists who made it on to the Whakaari. It argues that its duty does not extend that far. It applies to dismiss the charge against it. WorkSafe opposes.

[5] I must be satisfied that there is no case for ID Tours to answer. That is a different test from a trial. It is not about whether ID Tours is guilty or not guilty of the charge that it faces. If ID Tours gets to a trial, that is what the trial is for. That is when the evidence gets tested. For this application I must take the prosecution evidence at its highest, even if ID Tours disputes that evidence.

Did ID Tours New Zealand Limited owe a duty to tourists on Whakaari?

[6] Yes.

[7] For this application, ID Tours accepts WorkSafe's characterisation of its operations set out in the amended summary of facts:

¹ Which does not include Whakaari.

- (a) it acted as a conduit between overseas entities and local tour operators to facilitate the tour booking process,
- (b) it sent booking details to Tauranga Tourism Services Limited for it to advise White Island Tours Limited, and
- (c) it remained in constant contact about passenger numbers, cancellations and any other relevant information for the timely provision of Whakaari excursions.²

[8] It says its business or undertaking was limited to just that. It argues that its work or work activity did not put tourists at risk on Whakaari. In simple terms, its workers did not go to Whakaari and Whakaari was never its own workplace. Its work activity was complete before any tourist landed on Whakaari. ID Tours relies upon my decision dismissing the charge against NEMA.³

[9] As a limited liability company, ID Tours Limited is a separate legal entity. It argues then that it is a separate PCBU. That it is not part of a single entity as WorkSafe has described this supply chain. No such concept appears to be specifically covered in the Act, nor has it been discussed in any previous cases.

[10] WorkSafe alleges that ID Tours was required to have processes in place to ensure:

- (a) it obtained appropriate and up-to-date health and safety information about tours on Whakaari from Tauranga Tourism Services Ltd,
- (b) it provided that information to RCCL, and
- (c) customers received that information to make informed decisions about whether to participate in the tour.

² ID Tours itself did not communicate directly with White Island Tours Limited.

³ *WorkSafe v National Emergency Management Agency* [2022] NZDC 8020.

[11] Outside of the Act, what ID Tours was required to do is likely to depend upon what it was contractually bound to do or what other PCBUs may have understood it would do. Both aspects of that are in dispute.

[12] The prosecution evidence at its highest, however, is that it did have obligations in transmitting health and safety information up the chain and/or held itself out as doing so.⁴ For example, in a bid document to RCCL it represented that it operates adventurous tours and “we live and breath [sic] our Safety Management System...this covers...all risk assessments...sightseeing venues...emergency procedures and safety procedures.”⁵

[13] ID Tours disputes the effect of these sorts of documents but accepts they are part of the prosecution case at its highest. It argues that even if it had contractual obligations around health and safety those alone do not bring it within the Act. I accept that submission. A duty must exist under the Act, whether there are contractual or other obligations or not.

[14] However, one potentially available interpretation is that it did have those contractual obligations or held itself out as performing those tasks. By assuming those or signalling that to other PCBUs it acts in a way that might affect what is a reasonable, practicable step for another PCBU to take. It bears some sort of responsibility or agency in respect of that PCBU’s duty.⁶ That would have the effect of potentially watering down the very safeguards the Act was passed to create. It is unlikely that Parliament would have intended that.

[15] The Act is silent on what duties exist in a supply chain scenario. However, the Act’s purpose is to protect workers and workplaces. That includes the principle that this should be the highest level of protection that is reasonably practicable. Statutes should be interpreted against current values and conditions and in light of the Act’s context.⁷

⁴ Refer evidence summary at paragraph [2.7] WorkSafe submissions.

⁵ *Why ID Tours New Zealand Limited? A company profile prepared for Royal Caribbean Cruises Limited.*

⁶ Albeit the PCBU still retains its own responsibility as the Act prohibits contracting out.

⁷ Sections 10 and 11 Legislation Act 2019.

[16] The evidence provided by WorkSafe is that it has become common in the tourism industry to have single entities operating as part of a single chain from point of sale to delivery of adventure activities.⁸ Although that is likely due to practical operational reasons, it runs counter to the Act's purpose that a consequence would be less protection. I doubt that would have been Parliament's intention.

[17] Interpreting PCBU to include a supply chain is consonant with the Act's purpose, Parliament's intention in passing it, the current conditions of the adventure tourism industry and the current context in which the Act sits within that industry. It is not inconsistent with any of the authorities relied upon by either side.

[18] It does not offend against the decision in *WorkSafe v NEMA*. That situation dealt with obligations to the wider public, not to customers as part of a commercial supply chain in a situation where had it been a single entity rather than a supply chain it would have been caught by s 36(2).

[19] That does not mean everyone in a supply chain has a duty under the Act. Each situation would be fact specific. Here, however, ID Tours is caught for the reasons I have described.

Result

[20] I must refuse the application.

Judge EM Thomas

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 16/03/2023

⁸ Formal Statement of Carolyn Deuchar dated 1 March 2022.