

**IN THE DISTRICT COURT  
AT WHAKATANE**

**I TE KŌTI-Ā-ROHE  
KI WHAKATĀNE**

**CRI-2020-004-009514**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**WHAKAARI MANAGEMENT LIMITED  
INSTITUTE OF GEOLOGICAL AND NUCLEAR SCIENCES LIMITED  
WHITE ISLAND TOURS LIMITED  
VOLCANIC AIR SAFARIS LIMITED  
AERIUS LIMITED  
KAHU NZ LIMITED**  
Defendants

Date: 19 October 2023

Appearances: K McDonald KC, S Symon and D Dow for the Prosecutor  
P Brash for Whakaari Management Limited  
G Gallaway for Institute of Geological and Nuclear Sciences  
Limited  
R Raymond KC and G Nicholson for White Island Tours Limited  
F Pilditch KC and I Rosic for Volcanic Air Safaris Limited, Aerius  
Limited and Kahu NZ Limited  
R Gowing as counsel to assist

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**MINUTE OF JUDGE E M THOMAS**

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**Sentencing Date**

[1] The sentencing hearing is set for two weeks commencing on 26 February 2024.

### **Preliminary hearing**

[2] Counsel have raised several issues which ideally should be resolved ahead of sentencing to enable it to proceed as appropriately and as efficiently as possible. There will be a preliminary hearing then on 13 and 14 December 2023. At this stage, there are some suggested issues but I encourage all parties to continue discussions to see whether there can be some more resolution of these issues or if they can be further refined.

[3] In respect of anything that is needs consideration on 13 December, submissions should be filed in advance. WorkSafe is to file its submission by 29 November and all defendants by 6 December.

### **Participation at the preliminary hearing**

[4] The preliminary hearing may be covering issues that are not pertinent to all defendants. Additionally, there may be defendants who do not wish to participate for strategic or financial reasons. I leave it to counsel and their clients to decide how little or how much they wish to participate in that hearing.

[5] Can I simply ask that each of them files a memorandum ahead of time if they do not wish to participate that states that and also reflects that they understand they will have to abide any decisions that the Court makes at that hearing in relation to issues raised by others even if those issues may relate to their own clients.

[6] Counsel may participate remotely at the preliminary hearing. I invite them to make the necessary arrangements directly with our registrar

### **Sentencing submissions**

[7] At this stage, WorkSafe is to file and serve its substantive sentencing submissions by 7 February 2024 and the defendants must do the same by 19 February.

## **Financial information**

[8] To the extent that any defendant wishes to rely upon limited financial resources being available to meet fines and/or reparation, it must file and serve the evidence it intends by 12 January 2024. That will give WorkSafe sufficient time to consider the material and work on a response, if any.

## **WorkSafe reliance upon mens rea**

[9] If WorkSafe intends to rely upon mens rea as an aggravating feature of the offending in respect of any defendant, the tour operator defendants have indicated that they would oppose that being an available aggravating feature. In that instance, we would require a s 24 hearing.

[10] At this stage, we will not schedule that hearing. We do not know its extent or likelihood. WorkSafe is still taking further instructions which may remove this agenda item. It will file and serve a memorandum stating its position by 27 October 2023. In the event that a hearing is required, I ask the registrar please to liaise with counsel concerned to set up another case management hearing for us to discuss how we would deal with that. For today, it requires not further attention.

## **Venue**

[11] Initially there were multiple venue options being Whakatāne or Auckland for both the preliminary hearing and the sentencing hearing. However, after discussing this with victims, both WorkSafe and Mr Gowing on their behalf have come to a firm view that both hearings should occur in Auckland for the sake of all but one of the victims. The one victim who expresses a preference for a Whakatāne hearing, would not appear to be prejudiced beyond the need to travel if they wish to attend if the hearing were held in Auckland. I would like to accommodate everyone including that victim but we cannot do so. The interests of justice require me to consider not just the majority but the rather more significant consequences such as triggering adverse mental health reactions if we were to ask victims to return to what many perceive as the scene of their trauma.

[12] All parties agree, given the information that Mr Gowing and WorkSafe has provided this morning, that Auckland is the only available option. No parties suggest a hearing in Whakatāne. Both hearings will, therefore, occur in Auckland. Exactly where is still the subject of some discussion and may require head of bench intervention. We will begin that process. Madame registrar will advise counsel in due course where physically we will hold each of those hearings.

### **Funding for victim participation at sentencing**

[13] Funding has not yet been secured. Various parties are working hard to secure it including the Ministry. Those discussions are ongoing. For now, they do not require us to consider that issue further. However, I would ask Mr Gowing to keep the Court advised of any developments he becomes aware of which might suggest that there is an issue about that at any stage.

### **Restorative justice**

[14] Under the Sentencing Act 2002 I must consider ordering restorative justice in respect of victims and defendants who have pleaded guilty. However, WorkSafe and Mr Gowing, again, have been active with victims in determining whether they wish to participate in that process. The overwhelming response has been that they do not. All parties are agreed that this leaves me with only one option. I take it. I do not direct restorative justice.

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Judge EM Thomas

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 27/10/2023