

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2020-004-009514
[2023] NZDC 19521**

WORKSAFE NEW ZEALAND
Prosecutor

v

**ID TOURS NEW ZEALAND LIMITED
TAURANGA TOURISM SERVICES LIMITED**
Defendants

Hearing: 6 and 7 September 2023

Appearances: K McDonald KC, S Symon and D Dow for the Prosecutor
D Neutze, P Couldwell and P Hawkins for ID Tours New Zealand
Limited
P David KC and S Wroe for Tauranga Tourism Services Limited

Judgment: 12 September 2023

**ORAL TRIAL RULING 6 OF JUDGE E M THOMAS
[ON S 147 APPLICATIONS]**

**The charges against ID Tours NZ Ltd and Tauranga Tourism Services Ltd are
dismissed.**

REASONS

Introduction

[1] White Island Tours Limited conducted tours to Whakaari. It had an exclusive agreement with Tauranga Tourism Services Limited. Tauranga Tourism's business under that agreement was essentially limited to:

- (a) managing bookings on behalf of White Island Tours,
- (b) co-ordinating with the relevant parties to ensure the logistics of getting paying tourists to the start of the tour were taken care of, and
- (c) in the case of Royal Caribbean tourists, arranging the necessary transport from the Port of Tauranga.

[2] Tauranga Tourism did not deal directly with Royal Caribbean. For tours to Whakaari, Royal Caribbean had an exclusive agreement with ID Tours New Zealand Limited. Under that agreement, ID Tours:

- (a) offered tours to Royal Caribbean for Royal Caribbean to sell to its passengers,
- (b) communicated the bookings to Tauranga Tourism for tours to Whakaari purchased by Royal Caribbean passengers,
- (c) liaised with Tauranga Tourism regarding logistics, and
- (d) acted as ground handler to get the paying Royal Caribbean tourists on the necessary transport to Whakatāne when Royal Caribbean cruise ships docked at Tauranga.

[3] Both ID Tours and Tauranga Tourism formed part of the necessary supply chain between the tour operator White Island Tours and Royal Caribbean passengers buying tours to Whakaari. Tauranga Tourism and ID Tours communicated with each other as

a necessary part of that supply chain. Tauranga Tourism communicated as required with White Island Tours and ID Tours. ID Tours communicated as required with Royal Caribbean and Tauranga Tourism.

[4] WorkSafe alleges that both Tauranga Tourism and ID Tours breached a duty to tourists visiting Whakaari under s 36(2) of the Health and Safety at Work Act 2015:

- (a) Specifically, that each failed to properly consult, co-ordinate and co-operate with others in the supply chain to obtain necessary safety information and ensure this reached Royal Caribbean passengers, and
- (b) in relation to ID Tours that it did not implement a process for providing Royal Caribbean with that information.

These applications

[5] WorkSafe has now closed its case. Both ID Tours and Tauranga Tourism apply under s 147 of the Criminal Procedure Act 2011 to dismiss the charge they each face. WorkSafe opposes both applications. ID Tours and Tauranga Tourism advance various grounds in support of those applications.

[6] There is a preliminary fundamental issue common to both whether they had the necessary duty under Act to begin with.

Did either ID Tours or Tauranga Tourism owe a duty to tourists on Whakaari under s 36(2)?

[7] No.

[8] WorkSafe argues that the reference to “other persons” in s 36(2) means that Tauranga Tourism and ID Tours owed a duty to tourists by virtue of their respective business operations as part of the supply chain.

[9] The starting point is the decision concerning NEMA. There, I held s 36(2) must be read with reference to s 36(1). Despite the term no longer being used, it still

applies to the concept of occupational health and safety.¹ I do not repeat again here the full analysis I undertook in *NEMA*. The key points from that decision are:

- (a) section 36(2) is not a standalone provision,
- (b) it must be read together with s 36(1), and
- (c) any duty a PCBU has under s 36(2) must arise from its work activity as opposed to its work product.

[10] That is supported by:

- (a) the language and structure of s 36 and the Act as a whole,
- (b) the indicators of purpose within the Act, and
- (c) the legislative history both in Australia and New Zealand.

[11] Neither Tauranga Tourism nor ID Tours had workers on Whakaari. It was never their workplace. They did not influence or direct the workers of the tour operators in the carrying out of their work.

[12] WorkSafe argues that the work of each included facilitating tours. But at no point did their work take it to the level that would have engaged any duty under s 36(1). Applying *NEMA*, finding a s 36(2) duty where there is none owed under s 36(1) offends against language of the provisions, the purpose of the Act and Parliament's clear intention in passing it.

[13] I must also, however, consider context.² WorkSafe fairly points to the context in which we are applying the Act in relation to Tauranga Tourism and ID Tours. Their situation is rather different from *NEMA*'s. Tauranga Tourism and ID Tours are elements of a commercial supply chain facilitating a specific and risky product with clearly identifiable consumers. That is a very different context.

¹ *WorkSafe v National Emergency Management Agency* [2022] NZDC 8020.

² Legislation Act 2019 s 10.

[14] Had the operation not been so large as to require a supply chain, had it been a single entity dealing directly with consumers and providing the tour, that entity would owe duties including the provision of safety information to consumers at point of sale. Dr Deuchar explained that the development of the supply chain in the tourism industry was a response to demand and scale. I accept all her evidence here, as I must take the prosecution case at its highest. If elements of the supply chain do not work proactively together, consumers are at risk of not receiving critical information. WorkSafe's case, at its highest, shows that failure happened here. Had it been a single entity model, that entity would have breached the Act. Parliament could not have intended that a PCBU avoid liability because there is a supply chain instead. Indeed, that is a large part of why ID Tours' previous application under s 147 was unsuccessful.³

[15] Dr Deuchar has now testified, as have all WorkSafe's witnesses. She is, appropriately, critical of how the supply chain failed to properly transmit the necessary information. Importantly, however, she did demonstrate how the Act does operate as intended even in a supply chain context. It is uncontroversial that White Island Tours owed a duty under s 36(2) to tourists on Whakaari. It is also uncontroversial that this would include getting adequate information to consumers at or prior to point of sale. Its duty in that respect would be defined by what was reasonably practicable for White Island Tours to do, given their influence and control and other factors.

[16] Dr Deuchar testified that supply chains, including this one, could readily accommodate the need to coordinate and consult on safety information and ensure the necessary information got to the right people at the right time.⁴ This includes:

- (a) a tour operator requiring safety information be provided to passengers prior to booking or at other points,
- (b) a tour operator requiring confirmation that had been done,
- (c) each participant in a supply chain requiring that information to be passed up to the passengers, and

³ *WorkSafe New Zealand v ID Tours Limited* [2023] NZDC 4627.

⁴ Trial transcript from p1116, line 1 (T1116:1).

- (d) each participant in a supply chain being able to pass confirmation that it had been done down to a tour operator.

[17] The evidence also established that Royal Caribbean would have been able to provide:

- (a) White Island Tours safety information in prebooking material provided to passengers; and
- (b) confirmation to ID Tours that information had been provided to passengers.

[18] Witnesses were sceptical that Royal Caribbean would have agreed to do that. But that is not material to these applications. What is material, based on WorkSafe's case at its highest, is that the supply chain structure would not prevent White Island Tours meeting its obligation to provide safety information; that is the effect of Dr Deuchar's evidence.

[19] It is uncontroversial that the supply chain operated largely capably, although informally, with other types of information, for example regarding logistics.⁵ Just because the supply chain could operate successfully in that way does not mean ID Tours and Tauranga Tourism have no duty under the Act. They do, but only in relation to their own workers, workplaces and other persons associated with their own work activity.

[20] WorkSafe has often referred to the work activity of both Tauranga Tourism and ID Tours as including "the facilitation of tours" to Whakaari. It has said that every entity's role in the supply chain was important. That without the work activity of ID Tours and Tauranga Tourism the tours could not have happened.

[21] Arguably and at its highest, Tauranga Tourism and ID Tours may have caused the workers of White Island Tours to be engaged in the work of taking Royal Caribbean passengers to Whakaari. Under the Australian legislation, that would have engaged a

⁵ Dr Deuchar's formal written statement, paras 3.6, 3.7 and 3.18.

primary duty of care with a consequent to duty to other persons. Our law is based on that Australian legislation. However, that duty was expressly omitted by Parliament from the New Zealand provision. That does not determine these applications, but it is relevant to both Parliament's intention regarding the Act's purpose and provisions and the Act's context.

[22] As I held in *NEMA*, the wording is clear, Parliament's intention is clear. There is nothing about the context of any part of this case or the context of the tourism industry in general that demands a different interpretation.

Should I amend or substitute either charge?

[23] No party suggested I should amend. Given there is no duty under s 32(2), no other charge appears available. However, I record here that there was no formal argument on this point.

Result

[24] I grant both applications. The charges against each of Tauranga Tourism and ID Tours are dismissed.

Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 13/09/2023