

Health and Safety Legal Update

Grow | Protect | Operate | Finance

Agenda

Cases

WorkSafe v NEMA

WorkSafe v ID Tours NZ and Tauranga Tourism

WorkSafe v Waste Management

Southern Pallett Recycling v WorkSafe

Officer duties

WorkSafe v Andrew, James and Peter Buttle

Agenda (cont.)

Recent & Upcoming Changes

- Adventure activities
- Increased health and safety representation
- Plant and structure regulations

Enforcement trends

- Construction sector focus
- Targeted Complex Interventions



Recent cases

WorkSafe New Zealand v NEMA

Scope of section 36(2)

Prosecution of NEMA in relation to Whakaari / White Island

- Failure to consult, co-operate and coordinate
- Failure to communicate risk posed by volcanic activity to public

Brought under Section 36(2) HSWA

(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.

11 October 2023

5

WorkSafe New Zealand v NEMA

Scope of section 36(2)

- Court focused on the purpose of the HSWA
 - “...to provide for a balanced framework to secure the health and safety of workers and workplaces...”
- WorkSafe’s interpretation of this duty went too far
 - Duty did not cover NEMA’s ‘work product’ and did not extend to visitors to Whakaari

11 October 2023

6

WorkSafe New Zealand v ID Tours NZ and Tauranga Tourism Services Ltd

Scope of section 36(2)

Prosecution of ID Tours and Tauranga Tourism in relation to the Whakaari / White

ID Tours and Tauranga Tourism were part of a supply chain

WorkSafe argued both parties breached a duty to tourists visiting Whakaari under s 36(2) of the HSWA by:

- Failure to consult, co-ordinate and co-operate with others in the supply chain; and
- Failing to implement a process for communicating that information

11 October 2023

7

WorkSafe New Zealand v ID Tours NZ and Tauranga Tourism Services Ltd

Scope of section 36(2)

The preliminary issue was whether the parties had a necessary duty under the Act to begin with.

- Applied the reasoning in *WorkSafe NZ v NEMA*

Court held:

- Section 36(2) is not a standalone provision
- It must be read together with s 36(1)
- Any duty a PCBU has under s 36(2) must arise from its work activity, NOT work product

11 October 2023

8

Scope of section 36(2)

Where does this leave section 36(2)?

Distinction is clear on the edges

- *Wealleans Bay of Plenty Ltd*
- *JTK Trustee*

Less clear in the 'grey area'

- *Inflite Charters*

11 October 2023

9

WorkSafe New Zealand v Waste Management Recklessness

Prosecution of Waste Management following death of an employee

- Section 48 HSWA – guilty plea
- Section 47 (recklessness) – failed to prove at District Court

Recklessness under section 47 requires:

- Knowledge that an action or activity carries a 'real possibility' of serious injury or death; and
- Unreasonably carrying on and doing it anyway

WorkSafe sought leave to appeal on section 47 – High Court rejected

11 October 2023

10

WorkSafe New Zealand v Waste Management

Difficulty proving recklessness

The reckless action or activity must be more specific than just the business' operation being risky

- This would remove distinction between sections 47 and 48

Defendant must understand that there remains "a real possibility" of the prohibited harm

- Mitigation doesn't require elimination

11 October 2023

11

Southern Pallett Recycling v WorkSafe (HC)

Reliance on WorkSafe's advice

Worker injured by a saw with inadequate guarding and controls

- WorkSafe inspected Southern Pallett's workshop in 2017
- Sought to rely on inspector's statement that their "machinery was well guarded"

Officially induced error of law argument failed

- No evidence the saw was actually inspected
- Primary duty was ultimately the PCBU's responsibility

Limited scope within the HSWA

- "difficult, if not impossible, to establish that reliance on official advice was reasonable"
- Enforcement and education functions overlap

11 October 2023

12

Officer duties

WorkSafe v Smoke Control NZ (Brendan Kennedy)

- Sole director and shareholder of Smoke Control
- Worker killed while using unsuitable tools
- Smoke Control also convicted

WorkSafe v Hong Sang Cheuk

- Sole director of DMJ painters.
- A contractor died after falling from the roof of a property at which he was working
- DMJ Painters Limited entered liquidation 49 days after the incident
- “Liquidation no escape from health and safety accountability”

Officer prosecutions in the boardroom?

11 October 2023

13

WorkSafe New Zealand v Andrew, James & Peter Buttle

Officer duties

- Andrew Buttle, James Buttle and Peter Buttle were the directors of Whakaari Management Limited (WML)
- Charged separately as individuals with failing to exercise the necessary due diligence as directors of WML

WorkSafe alleged the Buttles failed to exercise necessary due diligence, exhibited by WML failing to obtain expert advice

Section 44 of the Health and Safety at Work Act:

(1) If a PCBU has a duty or an obligation under this Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.

(2) For the purposes of subsection (1), an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation)—

(a) the nature of the business or undertaking; and

(b) the position of the officer and the nature of the responsibilities undertaken by the officer.

11 October 2023

14

WorkSafe New Zealand v Andrew, James & Peter Buttle

Officer duties

- Court found there was insufficient evidence to charge the Buttles as individuals
- All the evidence pointed to the Buttles as a group / board of directors

- Court dismissed the charges against the Buttles as individuals

11 October 2023

15



Recent changes

Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act

- Came into force in June 2023
- Removes ability for small and low-risk businesses to refuse health and safety representatives
- Does not mandate health and safety representatives

11 October 2023

Upcoming changes

Adventure activities overhaul

Post-Whakaari review showed gaps in current regulations

Range of changes to regulatory regime announced.

Amended regulations will come into force on 1 April 2024.

What to expect:

- Specific requirements for assessing and managing natural hazard risks
- Strengthening requirements for operators to communicate risks to activity participants
- Stronger operator registration and notification requirements
- Reviewing and updating adventure activity safety guidance



11 October 2023

18

Upcoming changes

Plant and structure regulations

Changes necessary in this space:

- Responsible for large proportion of workplace injury
- Current regulations complex, outdated, and unclear

Key concepts to look for:

- Controls will be in addition to section 36 and 37 duties
- Requirements of high-risk plant will be consolidated to one set
- Obligations on 'upstream' businesses
- Changes to working at height



11 October 2023

19

Upcoming changes

High Risk Work License Regulations

- WorkSafe propose new licensing system for commercial and industrial refrigeration, heat pump and air conditioning technicians
- Technicians that use flammable, toxic, or very high operating pressure will need to be licensed

11 October 2023

20



Enforcement trends

WorkSafe’s current focus

Construction

- Construction continues to be a leader in workplace injuries
- Joint effort of WorkSafe / Construction and Health and Safety NZ / Council of Trade unions
- Focus on all levels of the supply chain

Mentally healthy work

- Mental ill-health accounts for 17% of all work-related harm
- Notification center for mentally unhealthy work

Accelerated silicosis

- Workers in stone benchtop / stone engineering industry
- Over-exposure to respirable crystalline silica
- Introduce regulations and review workplace exposure standard

WorkSafe's enforcement

Targeted complex interventions

What's involved:

- Wānanga series with staff and management
 - Meeting with the Talley's Group board of directors
 - Site inspections
 - Improvement notices and sustained compliance letters
 - SafePlus self-assessment
-
- Not an easy alternative to prosecution or 'WorkSafe gone soft'
-
- TCI underway at Aramex, who might be next?

11 October 2023

23

DENTONS

Thank you



Ruvin Pattiaratchi
Senior Associate
D +64 4 915 0814
M +64 21 029 28042
ruvin.pattiaratchi@dentons.com

Dentons is designed to be different. As the world's largest global law firm with 21,000 professionals in over 200 locations in more than 80 countries, we can help you grow, protect, operate and finance your business. Our polycentric and purpose-driven approach, together with our commitment to inclusion, diversity, equity and ESG, ensures we challenge the status quo to stay focused on what matters most to you. www.dentons.com.

© 2023 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal advice and you should not take, or refrain from taking, action based on its content. Please see dentons.com for Legal Notices.