IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-009514
[2022] NZDC 8020

WORKSAFE NEW ZEALAND
Prosecutor

v

NATIONAL EMERGENCY MANAGEMENT AGENCY
Defendant

Date of Hearing:	28-29 April 2022
Appearances:	K McDonald QC, M Hodge, S Symon and T Williams-McIlroy for the Prosecutor V Casey QC and C White for the Defendant
Judgment:	4 May 2022

ORAL JUDGMENT OF JUDGE E M THOMAS
[S147 application]

The application to dismiss the charge is granted.

REASONS

Introduction

[1] Many people would agree that if a person or organisation has failed in its job and that has placed people seriously at risk, there should be a way to investigate and

if necessary, hold that person or organisation accountable. There are different laws that allow you to do that depending on what the allegations are. One is s 36(2) of the Health and Safety at Work Act 2015. WorkSafe has chosen that law to prosecute NEMA.

[2] NEMA did not carry out any work physically on Whakaari. It did not send any workers to Whakaari. It never placed any person on Whakaari. Today's hearing is not about whether NEMA did its job properly. It may have, it may not have. It is only about whether WorkSafe can use this law to prosecute NEMA. NEMA argues that it cannot and that therefore the charge should be dismissed. WorkSafe argues that it can.

NEMA's civil defence duties

[3] I heard submissions on what NEMA's duties are under the Civil Defence Emergency Management Act 2002 and related laws and documents. WorkSafe and NEMA took different positions. I make no decision on that. I do not need to. Whatever position applies, today's outcome remains the same.

The allegations

[4] WorkSafe's allegations are that between 4 April 2016 and 10 December 2019 NEMA had a duty under the Health and Safety at Work Act, to ensure that the health and safety of tourists and tour operators to Whakaari was not put at risk from work it carried out as part of its business or undertaking. That this duty extended to identifying and analysing the risk to life from volcanic hazards at Whakaari and taking steps to eliminate or reduce the magnitude or likelihood of that risk. That NEMA failed to do that and that this failure exposed people to the risk of death or serious injury from volcanic activity.

[5] Specifically, WorkSafe alleges that NEMA failed to:

(a) consult, co-operate, and coordinate with GNS and Whakaari management regarding the implications of volcanic activity, and

(b) communicate the risk posed by volcanic activity to the public.

Do these allegations against NEMA engage s 36(2)?

[6] No.

[7] WorkSafe argues that they do. That the s 36(2) reference to "other persons not being put at risk from work being carried out as part of the business and undertaking," means exactly that. That on a plain reading, other persons must include Whakaari visitors and tour operators. That work means work, without differentiating between the process of carrying out that work (work activity) and the result of that work (work product).

[8] It argues that s 36(2) is separate from the provision relating to workers. That the use in section 36(2) of "not put at risk from work" is substantially different drafting and that therefore s 36(2) is intended as a stand-alone provision and should be read in that way. However, that ignores the effect of the word "other" in s 36(2). Plainly, s 36(2) was intended to be read alongside s 36(1).

[9] What s 36(2) ultimately means is a question of statutory interpretation. I must interpret what the provision means. The meaning of a section comes from the words that are used but also from the purpose of the Act itself.[1] Even if a meaning may appear clear from the words that are used, I must still be satisfied that this meaning is consistent with Parliament's intention.[2]

[10] WorkSafe argues that its interpretation is consistent with purpose. However, what follows suggests otherwise.

Indicators within the Health and Safety at Work Act

[11] We have the title of the Act, the Health and Safety at Work Act. We have the name of the regulatory agency, WorkSafe.

[12] The purpose of the Act is important. Its main purpose is to "provide for a balanced framework to secure the health and safety of workers and workplaces by…"

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[1] Section 5(1) Interpretation Act 1999.
[2] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC).

and then sets out a series of steps. One of those is by "protecting workers and other persons and against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant" etc.

[13] WorkSafe argues that this reference to other persons supports its argument. However, how Parliament has structured that purpose suggests otherwise. Yes, there is reference to other persons being safe from harm at work, but that reference is secondary to the opening statement of purpose. In other words, protecting "other persons" is part of the overall aim of securing "the health and safety of workers and workplaces". The Act's purpose would have been drafted much differently if workers and workplaces had not been the main aim.

[14] Section 36 itself contains six subsections. Every other subsection almost exclusively refers to worker or workplace safety. The duty that WorkSafe supports goes far beyond worker and workplace safety. It would create significant additional obligations on businesses. There are countless ways that such a duty could be breached. At the very least, such a duty would require significant regulation or at least significant statutory guidance. It would require and impose a very wide-ranging monitoring regime. It is unlikely that the only reference to such a duty then would be a single subsection in s 36. If Parliament had intended a wider duty, there would have been much more reference to it in the Act.

[15] The Act would have made it clear. By way of example, Parliament has made it clear in one location in the Act. In relation to high-risk plant, the Act says a reference to work health and safety includes a reference to public health and safety.[3] Parliament clearly understood the need to use very clear language if it was to extend the duty. This is the only place in the Act where it has expressly extended it.

[16] It is illegal to insure against fines under the Act.[4] It is unlikely that parliament's purpose in enacting that provision was to prevent suppliers from insuring themselves against the consequences of faulty work product. If it was, much of the marketplace today is committing an offence for which they are not being prosecuted.

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[3] Section 12(2)(c).
[4] Section 29.

[17] WorkSafe argues that its interpretation does not result in a wide-open definition creating unrealistic duties. It says that this would not result in a broad public safety duty at all because any duty would be limited or contained by influence and control, reasonable steps, and foreseeability. These concepts do contain any duty under the Act. However, these are all enquiries that are undertaken once s 36(2) is engaged. The section is not engaged merely by an organisation having reasonably practicable foreseeable steps within its influence and control to protect a certain category of people. It must first owe that duty to that category of people. WorkSafe argues that NEMA does have such a duty under the Civil Defence Emergency Management Act and related instruments. But critically NEMA needs to have that duty also under the Health and Safety at Work Act.

Legislative background

[18] WorkSafe argues that its interpretation is supported by the legislative background. It relies on the Health and Safety Reform Bill. In respect of what was to become s 36(2), the bill states: "The PCBU's duty of care extends to all other persons affected by the carrying out of the work." However, while this does extend a duty to other persons, it also demonstrates an intention that this duty is in respect of work activity as opposed to work product - the carrying out of the work.

[19] Furthermore, the explanatory note to the bill states that the Act's "main purpose is to provide for a balanced framework to secure the health and safety of workers and workplaces." It does not refer to anything beyond that. [5]

[20] The Health and Safety at Work Act was introduced to replace the Health and Safety in Employment Act 1992. It was enacted following recommendations made by the Independent Taskforce on Workplace Health and Safety following recommendations made by the Royal Commission on the Pike River Coal Mine Tragedy. The recommendation was that New Zealand enact a new workplace health and safety act based on the Australian Model Work Health and Safety Act. Parliament acted on that recommendation.

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[5] General Policy Statement, page 1 of the Explanatory Note.

[21] WorkSafe argues that if Parliament intended s 36(2) to be limited in the way that NEMA says it is, that you would have expected it to have said so. However, it is much more likely that if Parliament intended WorkSafe's interpretation to be preferred there would have been clear signs of that. Expanding the duty beyond what used to be called occupational safety and health would be significant and controversial. The Act creates a strict liability offence. It imposes a higher standard of care. Insurance is unlawful. WorkSafe's own obligations to monitor and improve safety conditions would be potentially vast. Had Parliament intended this, any of this, it would have been referred to somewhere, anywhere.

[22] Reports informing the Australian proposed legislation refer to care being taken in drafting a bill to ensure that a duty is limited to occupational health and safety.[6] This concern, this caution, is echoed in the Australian bill. [7] On this question, there was no further debate, no further explanatory material, no further discussion prior to the introduction of the Australian legislation. WorkSafe argues that I cannot infer that Parliament intended to exclude public safety in passing that legislation. However, the report urged caution in clear terms to ensure that an already onerous duty was not extended. Extending it would have been controversial for the reasons I have already spoken about. You would have expected plenty of further debate had Parliament decided to extend it regardless.

[23] Significantly, our s 36(2) is almost identical to the equivalent Australian provision. Our parliament appears to have done exactly what it intended, which was to adopt the Australian model. Again, there should have been plenty of debate had it intended to extend the duty beyond what was contained in the Australian Act. There was none.

Authority

[24] WorkSafe refers to several authorities that it says supports its interpretation. However, in none of the cases did the Court look at Parliament's intention in respect

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[6] National Review into Model Occupational Health and Safety Laws, Second Report to the Workplace Relations Minister's Council, Commonwealth of Australia, January 2019; Workplace Relations Minister's Council Response to Recommendations of the National Review.

[7] Explanatory Memorandum Model Work Health and Safety Bill, August 2016.

of s 36(2) in anything like the way we have in this case. Many cases involve the defendant pleading guilty so there was no discussion about this issue at all.[8]

[25] The remaining cases can be distinguished as either involving work and workplaces,[9] people being placed for work,[10] or the nature of the employment relationship.[11]

[26] There has been some limited discussion in Australia about the interpretation of its provision. However, those cases do not assist us here given the far more purposive statutory interpretation rules that apply in New Zealand.[12]

An additional observation

[27] This is not a point that is featured in my arriving at my decision, but I do observe that WorkSafe's main objective under the Worksafe New Zealand Act 2013 is to promote and contribute to securing the health and safety of workers and workplaces.[13] Additionally, when performing its various functions under health and safety legislation, to act in a way that furthers relevant objectives or purposes of that legislation.[14]

[28] The reference only to workers and workplaces in s 9(a) perhaps tells its own story. But if WorkSafe is right about how s 36(2) should be interpreted, how far that duty extends, s 9 means that Worksafe, as its primary aim, must promote and contribute to the safety of those impacted by a breach of that duty. Part of that role would be to issue guidance to the marketplace. WorkSafe does not advance any evidence of any guidance it has issued to anyone based on a duty to people beyond workplaces, workers, or work activity other than in one instance. However, that

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[8] *WorkSafe v YSB Group Limited* [2018] NZDC 26771; *WorkSafe v Hastings District Council* [2015] NZDC 7574; *WorkSafe v Agricentre South Limited* [2018] NZDC 7756; *WorkSafe v Richies Transport Holdings Limited* [2019] NZDC 18495; *B v Corona Electrical Limited* (DC Manukau CRI-2013-092-6296).
[9] *CAA v Sarginson* [2020] NZHC 319; *WorkSafe v Dong SH Auckland Limited* [2020] NZHC 3368.
[10] *WorkSafe v Department of Corrections* [2017] NZDC 24865.
[11] *Bellett v Cave and Haddow* (DC Greymouth CRI-2006-018-689, 30 Nov 2007).
[12] *Boland v Safe is Safe Pty Limited* [2017] SAIRC 17; *WorkSafe New South Wales v Wagga Motors Pty Limited* [2018] NSWDC 242.
[13] Section 9(a).
[14] Section 9(b).

guideline only appears to contemplate that other persons such as visitors need to be protected from harm arising from work activity as opposed to work product.[15]

Result

[29] We have not yet reached the point where Parliament or higher courts have extended the duty under s 36(2) beyond what Parliament intended.

[30] That means I must grant NEMA's application. The charge against it is dismissed.

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Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/05/2022

[15] WorkSafe New Zealand: *WorkSafe Position: Visitors at Work* (February 2019) at page 1.