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Health and Safety Policy
Labour and Immigration Policy
Ministry of Business, Innovation & Employment
PO Box 1473
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Submitted by email: HSWregs@mbie.govt.nz

Tourism Industry Aotearoa Submission on Health and Safety at Work (Adventure Activities) Regulations

Purpose

To set out TIA feedback on the proposed Amendments to the Health and Safety at Work (Adventure Activities) Regulations, including the views of operators who will be impacted by the Regulations.

TIA appreciates that the consultation is on the implementation of the regulations and not on the nature of the changes. As such, we limit our comments largely to the consultation questions (attached).

Tourism Industry Aotearoa

TIA is the peak body for the tourism industry in Aotearoa New Zealand. With around 1,200 members, TIA represents a range of tourism-related activities including hospitality, accommodation, adventure and other activities, attractions, retail, airports and airlines, transport, as well as related-tourism services.

TIA is sharply focused on ensuring the sustainable future of the industry, and this is clearly articulated in our key guiding documents and programmes. These include the tourism industry's strategic framework, *Tourism 2025 & Beyond – A Sustainable Growth Framework Kaupapa Whakapakari Tāpoi* and the industry's sustainability platform *New Zealand Tourism Sustainability Commitment - He kupu taurangi kia toitū ai te tāpoianga*.

Background

TIA has been a participant in, and supported, the processes to improve the safety of the adventure tourism sector, and significant progress has been achieved.

We note the material in the Cabinet paper that over the five years to 2009 there were 29 fatalities in adventure activities whereas in the five years to 2019 following the introduction of the stronger regulatory there were 9 fatalities (excluding those from Whakaari White Island). While this is a significant reduction, there are still improvements to make.

We are also very mindful the current changes to the Regulation have been triggered by the Whakaari White Island tragedy that heightened the need for the risk of natural hazards to be better identified and managed, as reflected in the process at hand.

Again, we support the intent to further strengthen the risk management processes we have in place with regard to natural hazards. Our interest is that we get the balance right: better risk management, but without onerous workloads placed on operators.

Key points TIA would like to highlight are:

1. **Communication of Risk.** We support the concept of making all adventure activity clients aware of the risks involved with any activity they undertake. However, this can get difficult where an adventure activity product is sold by a third party as part of a travel itinerary or even online by the operator itself. TIA submits that the Regulations specifically allow for such situations given that they will be common to many visitors to and within New Zealand. Also, while the Regulations create a responsibility on the final service provider it is less clear on any obligations through the tourism supply chain.
2. **Regulatory Impost.** As with all regulatory and compliance matters, the onus is on the designer and operator of the system to ensure it is fit for purpose and minimises the impost on operators. Also, where possible, there needs to be benefits built into the system for the operators. For instance, data submitted needs to be aggregated and reported back to the sector as happens with other sectors on the WorkSafe website. If working as it should, this will provide further evidence that adventure activities are getting safer over time.
3. **Reporting Near-miss Events.** Reporting of 'near-miss natural hazard events' will likely produce many reports of non-consequential events but will likely not capture the very occasional major events that are the ones that cause the most harm. For instance, a tramping guide in places like Fiordland will regularly come across slips across the duration of a trip. Does each slip need to be reported? And this would not necessarily predict a major event. This risks much reporting for little gain, and no reporting on the major ones. Consideration on how to manage this would be appreciated, including if there are different risks identified for different sectors. Feedback reporting on the data provided will be needed to provide transparency and improve ongoing management of this system.
4. **Notifiable Incidents.** TIA member feedback was that there are serious issues with the lists as they stand due to the inherent nature of many adventure activities. For instance, rafting by nature involves hitting rocks and sometime capsizing which at the current wording would require reporting on just about each trip. More practical definitions are needed to ensure the real risks are managed for, and not a multitude of routine activities.

Further points raised by TIA members

TIA was provided other points of feedback by operators that we consider important:

- How do the regulations work for new operators or established operations starting a new activity? TIA member feedback indicates that it appears that before an operator can commence an adventure activity it needs to be audited but it can't be audited until it is operating. We would appreciate clarification on how this will work in practice.
- Regarding the definition of a near-miss natural hazard event, this needs better explanation. For instance, a tramping guide in places like Fiordland will regularly come across slips across the duration of a trip. Does each slip need to be reported? Again, clarification would be appreciated.
- It is uncertain how the regulations will play out in public conservation lands. Will these regulations make DOC (or other landowners) more risk adverse with the resultant risk that access will be decreased over time. This would be a major unintended consequence if this were to be the case. Getting feedback on this point would be good so we can understand this matter more fully.
- Another key aspect of the Regulations are the supporting guidelines, tools and any necessary training that will be put in place. These will be important for ensure we have a transparent and workable system in place that works well for all parties.
- The question was raised whether a published register of adventure activity providers will be made available.

Next Steps

TIA supports the direction and intent of the Regulations, and we are equally interested in how that work in practice.

In preparing this submission, we have communicated with a number of parties, including RealNZ and Madeleine Peacock and we support the points raised in their submissions.

Feedback provided in this submission includes as many questions as it does firm TIA positions. As such, we would appreciate the opportunity to get feedback, either in writing or in person. We look forward to hearing from you to have this conversation. Please contact Bruce Bassett to advance this – bruce.bassett@tia.org.nz, 021 609 674.

Nga mihi,

A handwritten signature in blue ink, appearing to read 'R Ingram', followed by a period.

Rebecca Ingram
Chief Executive

Submission on Amendments to the Health and Safety at Work (Adventure Activities) Regulations 2016.

Your name and organisation

Name	Bruce Bassett
Organisation (if applicable)	Tourism Industry Aotearoa

Responses

Introducing a risk communication duty	
1	<p><i>Do you consider this duty requiring operators to have processes in place to communicate risks will be effective and workable for operators? If not, please explain why.</i></p> <p>We support the concept of making all adventure activity clients aware of the risks involved with any activity they undertake.</p> <p>We also consider that at the client/operator interface, this is a practical and workable thing to do and to build into business practices.</p> <p>However, where it gets more difficult is where an adventure activity product is being sold by a third party where a particular product may be sold alongside a number of other products on a travel itinerary. For example, a travel agent in another country may be building such a package that includes a number of adventure activities and it would be difficult to meaningfully include the risk details for each.</p> <p>Also, TIA members advise that risk communication is difficult to manage from their own online sales channels. Yes, customers can click the Terms and Conditions field, but it is harder to know if people understand the risks as set out in these pages. This is compounded where language and cultural differences that come into play. In short, meaningful risk communication is difficult to do second or third hand. Members run processes at check-in to run through the risks on a one-to-one basis and to request clients sign a waiver, and they will continue to do this.</p> <p>One TIA member cited some addition situations where the risk communication duty would be difficult to achieve:</p> <ul style="list-style-type: none">• Where bookings are made directly on behalf of other people within a group. For instance, one family member purchasing for the wider family.• Where agents, such as i-Sites, assist or recommend customers to book the activity.• Where gift certificates are purchased by others who pass them onto a recipient. <p>TIA therefore submits that the Regulations need to specifically allow for such situations given that they will be common to many visitors to New Zealand, noting that WorkSafe and TIA have undertaken work to establish appropriate wording in this area.</p> <p>Another point raised is that while the Regulations create a responsibility on the final service provider, they do not appear to establish any corresponding obligation</p>

through the tourism supply chain. We would appreciate feedback on how responsibilities through the supply chain will work in practice.

New registration process

Do you consider that the new registration process will be effective and workable for operators? If not, please explain why and any potential issues you see in this new process.

The registration process needs to be as easy and seamless as possible. Ideally this would be through a website or portal that will allow the operator to complete the required fields and upload relevant documents. This will need the ability for operators to save work done and come back to later. The process also needs to be time bound to ensure the process does not drag on. This has to include defined timeline windows for both the operator and WorkSafe.

Also, it needs to be very clear what the registration relates to and what is required. For instance, a concern may occur where a single business operates in a number of areas with different natural hazard risk profiles. Does the registration apply to each particular location, or to the operator that will cover those different locations? This should be clarified as appropriate in the regulations.

2

TIA member feedback is that the process has to be easy to navigate and that the coverage questions need to be very clearly set out.

One TIA member questioned what information must be provided and who would have access to that information, with the risk being that commercially sensitive information may be required to be provided and with no indication how this sensitive information will be protected.

For non-sensitive information, particularly the ongoing reporting data, it will be important there is visibility to this. For instance, data submitted needs to be aggregated and reported back to the sector as happens with other sectors on the WorkSafe website.

Another operator commented that the amendment does not appear to require any additional improvement to WorkSafe's own processes, and this needs to be part of the overall registration process and its ongoing operation.

Do you consider the proposed rights for operators to request decisions by the Registrar be reviewed and to appeal are appropriate? If not, please explain why.

As we understand it, the right for operators to review or appeal decision seems appropriate, with the caveat around the cost and complexity of doing such a review or appeal. TIA is acutely aware that many operators are small and have limited bandwidth or resources to engage in costly processes.

3

With WorkSafe as the first stop for requesting a review, this seems like they will be reviewing their own work which isn't appropriate. TIA would consider there would only be a few operators that would have the ability or inclination to take a litigation step to the District Court. Is there a non-WorkSafe mediation option available?

TIA member feedback is that the process looks to be onerous for small operators and clear guidance and timelines need to be established in order to ensure this is a viable option for small operators.

	One operator commented that it was not appropriate for WorkSafe to be reviewing its own decisions and identified that reviews of decision should immediately default to an external party.
Powers to suspend, cancel and refuse registration	
4	<p><i>Do you consider these changes to where the Registrar can cancel, suspend and refuse registrations will be effective and workable? If not, please explain why.</i></p> <p>TIA considers that these powers need to be seen as a last resort after other more conciliatory approaches have been used first.</p> <p>TIA is mindful that the vast majority of tourism operators are committed to the places they work and operate, and so the care and protection of both their operating environment and their clients is very central to them. As such, they will always be acting in their interests.</p> <p>TIA member feedback is that mediation and the provision of assistance from WorkSafe should be the first steps, with stronger provisions used only in extreme cases. This needs to be viewed in context that those stronger provisions could involve shutting down livelihood of the business owners and their staff. The exercising of the powers needs to be commensurate with the nature of any breach.</p>
Sector-specific notifiable incidents	
5	<p><i>Do you consider the definition of near-miss natural hazards events in Regulation 3 to be sufficiently clear to require operators to notify WorkSafe only where there has been a serious risk from a natural hazard? Do you consider that this wording may cause events that are not serious to be notified?</i></p> <p>This is a difficult area in terms of what is 'normal' verses what is 'exceptional'.</p> <p>While TIA supports reporting of near-miss natural hazard events, what might happen is that many non-consequential events are reported at a cost to operators and WorkSafe, whereas the very occasional major event will likely not be reported until they actually happen. As such, the time, effort and cost for operators may be considerable for low practical benefits.</p> <p>TIA member feedback is that the definitions are problematic. What is a serious risk from a natural hazard? Is a flooded river considered a 'natural hazard' when rafting operators do not operate on flooded rivers? In this case, would an operator need to report a flooded river as a natural hazard, even though they didn't operate in accordance with their own Safety Management Plan?</p> <p>Also, the nature of the location is important. For instance, if there is a rock fall that is outside of an operators designated safe operational location, should this need to be reported? Similarly, how does this work over the course of a 24-hour day where the operators only work part of a day. For instance, if there is a rockfall that occurs overnight when the operator is not work, should this be reported?</p> <p>From a procedural perspective, why will operators need to keep a record of near-miss natural hazards event for five years when they have already been reported to WorkSafe?</p>
6	<p><i>Do you consider that the list of notifiable incidents and injuries in Regulations 19A and 19B accurately reflects the key risks in adventure activities? Are there any incidents or injuries that you consider should be removed or added to the list? If so, please explain why.</i></p>

	<p>The notifiable incidents or injuries lists, while appearing plausible, appears to be unworkable for many adventure tourism operators. This is because of the inherent feature of many adventure activities is that they are about doing things in a safety-controlled environment that would otherwise be hazardous.</p> <p>For instance, TIA member feedback is that some adventure activities by their very nature involve some ‘crashing and banging’. For instance, rafts routinely collide with rocks and roll-over – it is actually part of the adventure and is closely managed by the operator in line with their safety plans. As such, the wording around Regulation 19A d, e and f all need to be amended to take into account the rafting example cited here and to a number of other such adventure activity types.</p> <p>TIA submits that a more complete and practical set of notifiable incidents or injuries lists be established.</p> <p>Also, it is not clear how these requirements sit in relation to other safety regimes, for instance in the case of maritime or road transport incidents. It would be desirable to have this clarified.</p>
Offences and penalties	
7	<p><i>Do you agree with the proposed offences and penalties for the adventure activity regulations? If not, what would you consider the appropriate amount and why?</i></p> <p>TIA sees the penalty regime as a reserve authority to be used only once other options are exhausted. We are also interested to understand how the enforcement and monitoring provision aspects will operate in practice.</p> <p>TIA member feedback is that, as with the Powers section above, the penalties need to be applied as a last resort with wider gains to be achieved through working with operators to address any issues before they get out of hand.</p> <p>TIA members were also interested to understand how the penalties compared to other industry regulations, and if they are therefore appropriate.</p>
Implementation timing	
8	<p><i>Do you agree with the proposed three-month period before changes take effect? Are there particular requirements that may need a longer implementation time?</i></p> <p>TIA considers that there are benefits from the proposed implementation timeline so the safety gains can be accrued over the next summer season. However, it is imperative that implementation does not take place over the peak summer season (December to February) given the workload pressures on operators over this period.</p> <p>TIA member feedback raises the point that many businesses are in the rebuild phase from the COVID-19 period and flexibility will likely be needed as these operations are restored.</p> <p>Feedback also highlighted that updating of information for communicating risk to prospective customers and through the supply chain will likely require a longer timeframe to allow for creating new material, legal checks if required and updating websites and other general information with agents/suppliers. A six-month timeframe would be more appropriate to allow for the work to be completed.</p>