IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2024-404-132
[2025] NZHC 288

BETWEEN	WHAKAARI MANAGEMENT LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing:	29-31 October 2024
Appearances:	R S Reed KC, J D Cairney and P H Brash for Appellant K P McDonald KC, D B Dow and STA Forrest for Respondent J Dixon KC and C Cox for Aotearoa Climbing Access Trust as Intervener
Judgment:	27 February 2025

JUDGMENT OF MOORE J
[Appeal against conviction]

This judgment was delivered by me on 27 February 2025 at 10:00 am.

Registrar/Deputy Registrar

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Introduction

[1] Whakaari White Island is an active volcano that lies off the coast of the Bay of Plenty.[1] At 2:11 pm on Monday 9 December 2019 it erupted. Ash, volcanic gas, steam, and rocks suddenly rose several hundred metres into the air. In less than a minute, that eruptive mixture then collapsed and spread across the crater floor.

[2] There were 47 people on the Island at the time. 42 were paying tourists; five were tour guides. In total, 22 people died as a result of the eruption. The remaining 25 were all seriously injured, some severely so. Most, if not all survivors, still bear the physical and emotional scars of that horrific day.

[3] Whakaari is – and was at the time of the eruption – owned by Whakaari Trustee Ltd ("WTL"). It leased Whakaari to the appellant, Whakaari Management Ltd ("WML"). WML, in turn, granted licences to commercial tour operators ("walking tour operators") who conducted guided walking tours for tourists on the crater floor of the Island ("the walking tour workplace"). WTL and WML were incorporated by their directors, Andrew, James and Peter Buttle, in 2008. They were the third generation of the Buttle family to own the Island after their grandfather, George Raymond Buttle, purchased it in 1935.

[4] Following the 2019 eruption, the respondent, WorkSafe New Zealand ("WorkSafe"), commenced an extensive and wide-ranging investigation. This led to 13 defendants, including WML and the Buttle brothers, being prosecuted under the Health and Safety at Work Act 2015 ("HSWA").

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[1] I refer to Whakaari White Island alternatively as "Whakaari" or "the Island" throughout this judgment.

[5] Six defendants, including the Buttle brothers, had their charges dismissed before or during the trial.[2] Six – including all walking tour operators – pleaded guilty.[3] Only WML remained. WML was charged with an offence under s 48 of HSWA for failing to comply with an alleged duty to ensure that the walking tour workplace, the means of entering or exiting it, or anything arising from it were without risks to the health and safety of any person under s 37(1). It was also alternatively charged for failing to comply with an alleged duty under s 36(2) to ensure that the health and safety of others was not put at risk because of the conduct of its own business or undertaking. The charging period was for between 4 April 2016 – the date HSWA came into force – and 10 December 2019 – the day after Whakaari erupted.

[6] On 31 October 2023, following a ten-week judge-alone trial, Judge E M Thomas in the District Court at Auckland found WML guilty in respect of the charge of breaching its duty under s 37(1). The Judge found that WML managed or controlled the walking tour workplace, and that it breached its duty to ensure that workplace was without risks to the health and safety of any person. The Judge acquitted WML on the alternative charge of breaching its duty under s 36(2).[4]

[7] On 1 March 2024, the Judge sentenced WML together with the other defendants who had earlier pleaded guilty. WML was fined $1,045,000 and ordered to pay reparation of $4,880,000.[5]

[8] WML now appeals its conviction. It says that it did not owe a duty under s 37 of HSWA and that even if it did, it was not in breach of that duty. It further says that even if it was in breach, compliance with any such duty would not have prevented any

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2 These were the National Emergency Management Agency; ID Tours New Zealand Ltd; Tauranga Tourism Services Ltd; and, as noted, Andrew Buttle, James Buttle and Peter Buttle. See *WorkSafe New Zealand v National Emergency Management Agency* [2022] NZDC 8020; *WorkSafe New Zealand v ID Tours New Zealand Ltd* [2023] NZDC 19521 and *WorkSafe New Zealand v Buttle* [2023] NZDC 18939. The Institute of Geological and Nuclear Sciences Ltd ("GNS") also had a charge for a breach of s 36(2) of HSWA successfully dismissed but pleaded guilty to a charge under s 36(1)(a) in respect of its own workers. See *WorkSafe New Zealand v Institute of Geological and Nuclear Sciences Ltd* [2022] NZDC 21610 and *WorkSafe New Zealand v Institute of Geological and Nuclear Sciences Ltd* [2024] NZDC 4149, (2024) 20 NZELR 380.

3 These were Inflight Charters Ltd, White Island Tours Ltd, Volcanic Air Safaris Ltd, Aerius Ltd, Kahu NZ Ltd and, as noted, the Institute of Geological and Nuclear Sciences Ltd in respect of its charge for breach of s 36(1) of HSWA.

4 *WorkSafe New Zealand v Whakaari Management Ltd* [2023] NZDC 23224, (2023) 20 NZELR 138 [District Court decision].

5 *WorkSafe New Zealand v Whakaari Management Ltd* [2024] NZDC 4119, (2024) 20 NZELR 399.

individual from being exposed to a risk of death or serious injury. WorkSafe opposes the appeal.

[9] On 22 July 2024, the Aotearoa Climbing Access Trust ("ACAT") sought leave to intervene in this proceeding. It did so on the grounds that this appeal involves questions about when landowners/controllers will be exposed to liability under HSWA by permitting others to access their land.

[10] Downs J granted ACAT's application to intervene with written submissions.[6] ACAT did not make oral submissions at the hearing before me.

What happened?

[11] In order to understand WorkSafe's prosecution of WML – and WML's appeal in turn – it is necessary to first discuss the nature of Whakaari and its eruptive history; its ownership and management through WML; the way in which tourism was conducted on the Island and the various Government agencies concerned with monitoring the risks associated with allowing the public to visit it.

[12] This is because that context informs the events both before and during the charging period that help to explain how it tragically came to be that 47 people were on the Island at the time it erupted.

The nature of Whakaari

[13] Whakaari lies 48 kilometres off the coast of Whakatāne. It is an active volcano with a long eruptive history. Indeed, it is commonly referred to as New Zealand's most active volcano.

[14] Significantly, Whakaari is a mostly submerged volcano. The vast majority of its mass its beneath sea level. Only the volcano's summit and crater area emerge above the water. The shape of the crater, which opens to the sea on the south-eastern side,

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6 *Whakaari Management Ltd v WorkSafe New Zealand* HC Auckland CRI-2024-404-132, 31 July 2024 (Minute (No 2) of Downs J).

permits ready access on foot, via a wharf. Situated within the crater area sits the crater lake.

[15] Whakaari's volcanic history shows that it is prone to what are known as "phreatic explosions". These explosions occur when water is heated by magma or volcanic gas. The nature of these explosions is that they "impulsively" and "violently" eject ash, steam, volcanic gas and rocks into the atmosphere.[7] Usually, but not always, some of this eruptive mixture then collapses back onto the ground and then, very rapidly, spreads out across the surface. This is what is known as a "pyroclastic density current" ("PDC") or "base surge". The temperature of these surges varies but can reach over a few hundred degrees Celsius.

[16] Because of this, PDCs are regarded as the most significant hazard on many active volcanos. They account for almost 40 per cent of volcanic fatalities worldwide. Their high speed and commonly high temperatures make them lethal, such that most who are caught in one will be killed. Indeed, for that reason, the Institute of Geological and Nuclear Sciences Ltd ("GNS") attributed a 95 per cent fatality rate in the event of being caught in a PDC.

[17] The eruption which occurred on 9 December 2019 was a phreatic explosion. The PDC that formed afterwards covered the crater floor in less than a minute.

Ownership and management of Whakaari

[18] The Buttle family have had a long connection to Whakaari. As mentioned, the Buttle brothers' grandfather, George Buttle, purchased Whakaari in 1935. He did so after sulphur mining was discontinued on the Island. In 1958, ownership passed to his son, John.

[19] In the 1990s, Peter and Jenny Tait – who operated a fishing charter business – began to land tourists on Whakaari. Their business developed into White Island Tours Ltd ("White Island Tours"). White Island Tours grew to become the main provider of

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[7] The words "impulsively" and "violently" have been used deliberately. They were coined by Sir Stephen Sparks, an Emeritus Professor of Geology at the University of Bristol and expert volcanologist, who gave evidence for WorkSafe at the trial.

tourists to the Island. John Buttle informally granted the Taits access to Whakaari for this purpose. Originally, he requested only a donation to charitable organisations in return. However, a licence fee model was later introduced. This is relevant because it shows that walking tours on Whakaari had been operating for roughly thirty years before the 2019 eruption.

[20] John Buttle died in 2006. On his death, ownership passed to his wife Beverley and to their three sons, Andrew, James and Peter.

[21] In 2008, the Buttle brothers incorporated WML and WTL. The brothers were (and indeed still are) directors of both companies. WTL was incorporated to own Whakaari and to hold it on trust for John Buttle's descendants. WML was incorporated to "manage" the Island and to generate revenue through this "management".[8] This arrangement allowed the financial management of Whakaari to be separated from its legal ownership.

[22] WML generated revenue from Whakaari by granting licences to tour operators. These licences permitted tour operators to conduct paid walking tours for tourists on "the part of the Island within the lower slopes of the crater walls that is safe to walk on". In return, the tour operators were required to pay an annual licence fee and a commission for each customer taken by them to the Island.

[23] Despite its name, WML operated from Auckland rather than the Bay of Plenty. Its registered office was – and still is – in Greenhithe. WML never had any staff or other permanent presence on either Whakaari or nearby Whakatāne. And, crucially it says, it never conducted any tours nor engaged in any activity on Whakaari itself.

Tour operators

[24] Five tour operators held licence agreements to conduct tour guides on Whakaari with WML during the charging period. These were White Island Tours;

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8 I use quotation marks deliberately given one of the central issues in this case is whether WML, as a matter of law, managed or controlled the walking tour workplace on Whakaari for the purposes of s 37 of HSWA.

Kahu NZ Ltd ("Kahu"); Volcanic Air Safaris Ltd ("Volcanic Air"); Aerius Ltd ("Aerius"); and Inflite Charters Ltd ("Inflite").

[25] White Island Tours had the exclusive right under its licence agreement to conduct tours by boat out of Whakatāne and to licence other marine-based operators to take tours to the crater area. Its customers comprised the majority of all the tourists who went to Whakaari. At the start of the charging period, White Island Tours was owned by Peter and Jenny Tait. In 2017, it was sold to Ngāti Awa Group Holdings Ltd.

[26] Kahu operated tours by helicopter out of Whakatāne and had an exclusive licence to do so. It had been operating helicopter tours to the Island since 2009.

[27] Volcanic Air operated tours by helicopter out of Rotorua and also had an exclusive licence to do so. Like Kahu, it had been operating helicopter tours to the Island since 2009.

[28] Aerius operated tours by helicopter out of Tauranga and, like Kahu and Volcanic Air, also had an exclusive licence to do so. It had been operating helicopter tours to Whakaari since 2014.

[29] Inflite operated out of Auckland but did not operate tours itself. Rather, after flying passengers to Whakatāne, it subcontracted to other helicopter operators such as Kahu, to transport passengers to Whakaari. Inflite had been operating tours in this way since 2018.

[30] The effect of these licence agreements was that tourists were taken to Whakaari either by boat or helicopter. After landing on the Island, they were taken from either the jetty or helicopter landing areas via a circuit that took them to the edge of the crater lake before returning to the place where they had first landed.

WML's licence agreements

[31] WML's various licence agreements with the tour operators were all materially the same. In essence, and as already noted, the licence agreements provided tour

operators with access to undertake their own businesses – walking tours on the crater floor – in return for a licence fee, and a commission for each customer taken.

[32] Under the terms of the licence agreements, tour operators were required to form an "operator" or "user" group. The purpose of this group was to allow the tour operators to co-ordinate with each other and to "operate harmoniously so as not to interfere with one another's activities". This included co-ordinating collective risk management.

[33] The licence agreements also imposed (or at least purported to impose) extensive obligations on the tour operators as licensees. For example, the agreements required licensees to "acknowledge and accept full responsibility for the safety and wellbeing of their officers, employees, contractors and invitees" while on the Island. The licence agreements also required tour operators to:

(a) not allow anyone to visit the Island without a thorough understanding – and written acknowledgment – of the risks and dangers inherent in landing on and remaining on an active volcano;

(b) obtain independent advice regarding volcanic and seismic activity levels;

(c) prepare and maintain suitable safety plans for the operation of tours on the Island which, at a minimum, needed to include "identification of the risks involved" and how "such risks" would be monitored;

(d) ensure that their safety plans had been audited by an "external expert";

(e) monitor the risks and dangers of visiting the Island, so as to ensure they were reasonable for visitors;

(f) refrain from taking tourists to Whakaari if the risks and dangers of visiting the Island were such that it was unreasonable or imprudent to do so; and

(g) ensure that all visitors were properly equipped to manage any hazards, including by wearing "suitable clothing and footwear, gasmask and hard hat".

[34] The licence agreements also included a mechanism for WML to receive records and information. They provided this to WML on or prior to the twentieth of each month. Licensees were also required to provide a "monthly return" detailing every trip made to the Island under the licence.

[35] Finally, the licence agreements gave WML the right to terminate in certain circumstances. The relevant rights of termination for the purposes of the present appeal gave WML the right to terminate "at any time and with immediate effect by written notice" where:

(a) the licensee committed a material breach "not capable of being remedied"; or

(b) the licensee committed a material breach capable of being remedied, but failed to do so within 14 days after notice of the breach and a request for remediation had been provided.

[36] By 2019, WML was earning close to $1 million per year through its licence agreements with the tour operators.

Monitoring by GNS

[37] Due to its nature as an active volcano, Whakaari was – and indeed still is – regularly monitored by GNS.[9] GNS is New Zealand's lead agency for monitoring volcanoes.[10] It measures volcanic activity on all volcanoes in New Zealand using the New Zealand Volcanic Alert Level ("VAL") System.

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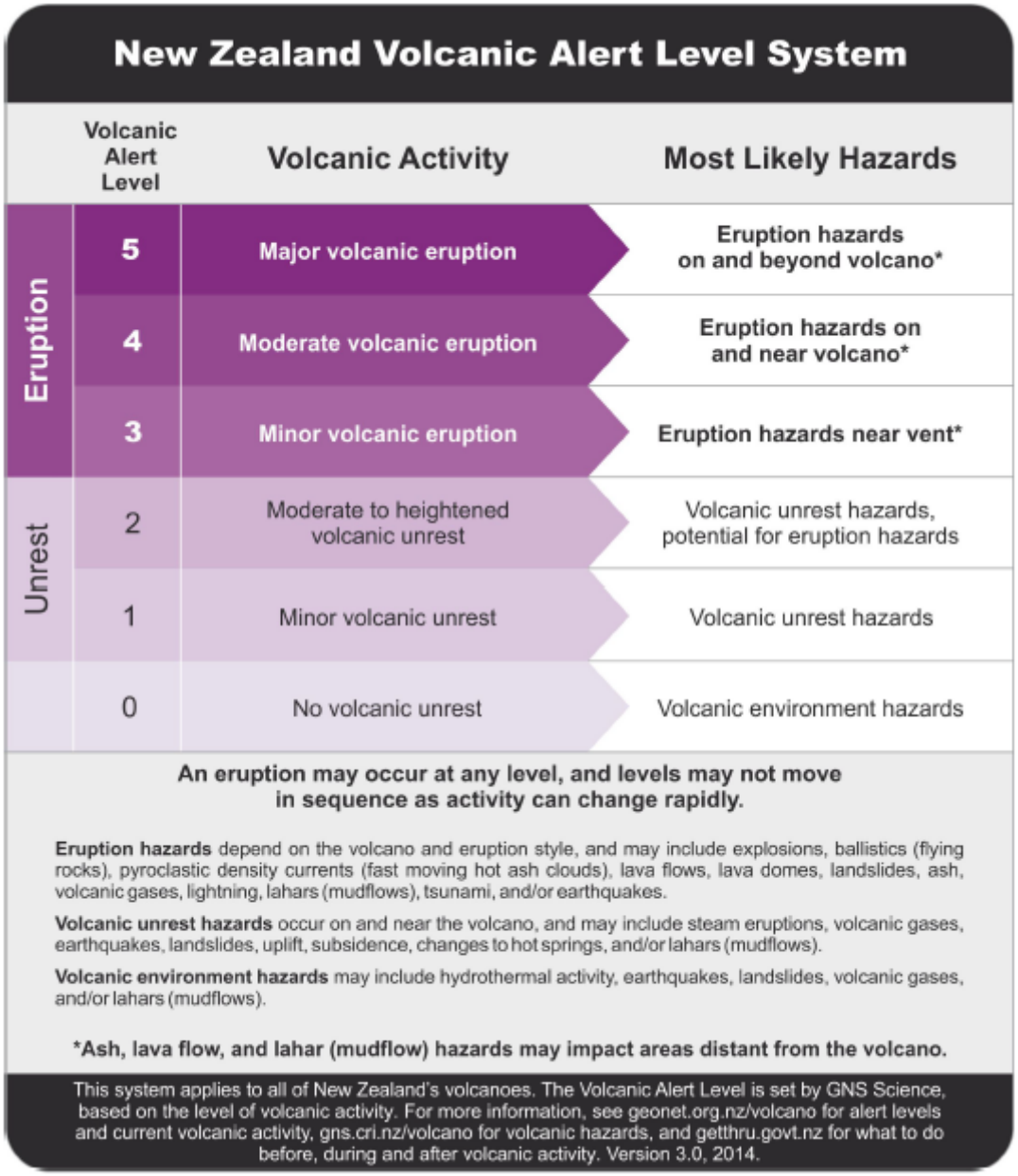
9 Although still formally registered as the Institute of Geological and Nuclear Sciences Ltd, GNS now goes by GNS Science, Te Pū Ao.

10 Of course, GNS is not limited to the monitoring of volcanoes. Its purpose is, among other things, to undertake research that "increases Aotearoa New Zealand's resilience to natural hazards".

[38] As can be seen in the table below, GNS's VAL System consists of six alert levels ranging from VAL 0 (no volcanic unrest) to VAL 5 (major volcanic eruption). Due to its volcanic activity, Whakaari always sits at VAL 1 (minor volcanic unrest) or above.



New Zealand Volcanic Alert Level System

	Volcanic Alert Level	Volcanic Activity	Most Likely Hazards
Eruption	5	Major volcanic eruption	Eruption hazards on and beyond volcano*
Eruption	4	Moderate volcanic eruption	Eruption hazards on and near volcano*
Eruption	3	Minor volcanic eruption	Eruption hazards near vent*
Unrest	2	Moderate to heightened volcanic unrest	Volcanic unrest hazards, potential for eruption hazards
Unrest	1	Minor volcanic unrest	Volcanic unrest hazards
	0	No volcanic unrest	Volcanic environment hazards

An eruption may occur at any level, and levels may not move in sequence as activity can change rapidly.

Eruption hazards depend on the volcano and eruption style, and may include explosions, ballistics (flying rocks), pyroclastic density currents (fast moving hot ash clouds), lava flows, lava domes, landslides, ash, volcanic gases, lightning, lahars (mudflows), tsunami, and/or earthquakes.

Volcanic unrest hazards occur on and near the volcano, and may include steam eruptions, volcanic gases, earthquakes, landslides, uplift, subsidence, changes to hot springs, and/or lahars (mudflows).

Volcanic environment hazards may include hydrothermal activity, earthquakes, landslides, volcanic gases, and/or lahars (mudflows).

***Ash, lava flow, and lahar (mudflow) hazards may impact areas distant from the volcano.**

This system applies to all of New Zealand's volcanoes. The Volcanic Alert Level is set by GNS Science, based on the level of volcanic activity. For more information, see geonet.org.nz/volcano for alert levels and current volcanic activity, gns.cri.nz/volcano for volcanic hazards, and getthru.govt.nz for what to do before, during and after volcanic activity. Version 3.0, 2014.

[39] VALs are based on a description of activity at a volcano but are not explicitly linked to forecasts of when an eruption might occur. However, while not quantified, an increase in a volcano's VAL (that is, from VAL 1 to VAL 2) necessarily implies that the probability of an eruption has increased. During the charging period, GNS set Whakaari's VAL based on external observations and measurements, and through what

it was able to learn from monitoring equipment that it had set up on the Island. It held weekly meetings to review the data it gathered. The output of these meetings was to set and review the VAL and, if required, to issue Volcanic Activity Bulletins. GNS's VAL assessments were published online through its website, GeoNet.

[40] GNS was able to set up and maintain its on-the-ground equipment on the Island due to a historic verbal licence agreement that it had with WML permitting it access to Whakaari, free of charge.

[41] GNS also released, as noted, Volcanic Activity Bulletins ("VABs"). These bulletins contained information about the current levels of volcanic activity on a volcano and were (and still are) used to explain changes in a volcano's VAL. However, where GNS believed there to be an immediate risk to public safety at Whakaari, its approach in practice was to get in touch with tour operators directly while it drafted its VABs, so information could be provided as soon as possible.

[42] After WorkSafe's charges were laid, WML revoked GNS's licence. As such, GNS has been unable to return to Whakaari and can no longer maintain its equipment or monitor the volcano from the ground.

Other Government agencies

[43] Naturally, GNS was not the only Government agency with an interest in Whakaari and public access to it. Several others require mentioning.

[44] The first is the National Emergency Management Agency, otherwise known as "NEMA". NEMA was established on 1 December 2019, replacing the Ministry of Civil Defence and Emergency Management. Together with GNS, its role was to maximise community safety from natural hazards through routine hazard monitoring and, in the case of volcanoes, the offering of advice during eruptive periods and periods of volcanic unrest. It was also responsible for research and emergency response when a major hazard occurred.

[45] NEMA received information from GNS under a Memorandum of Understanding that the organisations executed in 2015.[11] Under this MoU, there were two regimes for the provision of advice – "business as usual" and "emergency response". "Business as usual" applied when volcanoes were at VAL 1 and above with an unchanged status. "Emergency response" applied when volcanoes were experiencing eruptive episodes and periods of unrest. The nature of Whakaari's volcanic activity was such that GNS was always required to provide information to NEMA. When changes in activity at the volcanic centre of Whakaari took place, the MoU required GNS to provide NEMA with, among other things, ongoing assessments of the volcanic hazards and associated risks (as provided through VABs); a range of monitoring data on Whakaari as provided through the GeoNet website and volcanic ashfall prediction maps at NEMA's request.

[46] The MoU between these two organisations also set out how GNS personnel would assist NEMA during periods of volcanic unrest or when eruptive episodes were occurring. It stated:

> - When a period of volcanic unrest is identified, the GeoNet Duty Officer, Science controller, or nominated GNS Science staff member will contact the MCDEM Duty Officer (or National Controller (or equivalent) if the NCMC is activated), and be available to provide advice within 60 minutes of the event starting.
>
> - Throughout the duration of an eruption episode, the GeoNet Duty Officer, Science controller, or nominated GNS Science staff member will continue to be available to provide advice as appropriate.
>
> - A staff member from GNS Science may also be required to attend and brief ODESC in support of the Director CDEM or National Controller.

[47] The second organisation deserving of mention is the Bay of Plenty Civil Defence Emergency Management Group and its "operational arm", Emergency Management Bay of Plenty ("EMBOP").[12] Under s 17 of the Civil Defence Emergency Management Act 2002 ("CDEMA"), the Bay of Plenty Civil Defence Emergency Management Group was required to identify, assess, and manage hazards

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[11] The MoU was executed between GNS and the Ministry of Civil Defence and Emergency Management (as NEMA then was at the time).

[12] As the parties did, I refer to the broader Bay of Plenty Civil Defence Emergency Management Group as EMBOP, even though EMBOP was technically just the former's "operational arm".

and risks in the Bay of Plenty, including Whakaari. Because of its role, EMBOP authored a Whakaari/White Island Response Plan ("Whakaari Response Plan") in 2015. The Whakaari Response Plan will be discussed in detail later in this judgment.

[48] The third and fourth agencies are the Minister of Local Government and the Police. The Minister of Local Government was the territorial authority for Whakaari. The New Zealand Police's role – at least prior to the 2019 eruption – was concerned with the evacuation of the Island in the event of an eruption. To that end, it had developed its own White Island Eruption Response Plan.

Whakaari Response Plan

[49] The Whakaari Response Plan was, as noted, prepared by EMBOP. The Plan went through several iterations but was operational from 2015, when it was first developed. In that sense, it was described as a "living document". The latest version, prior to the 2019 eruption, was issued in September 2019.

[50] EMBOP authored the Whakaari Response Plan to manage the hazards and risks associated with Whakaari, consistent with its statutory obligations. To that end, the Plan included:

(a) a list of key agencies and their responsibilities with respect to Whakaari;

(b) a task list setting out what to do at a particular VAL when a VAB was issued; and

(c) a list of options for restricting access to the Island in the event of "unacceptable risk to the public".

[51] The Whakaari Response Plan recorded that EMBOP was "responsible for managing the hazards and risks associated with Whakaari/White Island", including – if necessary – implementing measures to minimise risks. It recorded that WorkSafe

was "responsible for overseeing the Health and Safety in Employment Act",[13] and for "ensuring tour operators compliance with the [A]ct". It provided that any review of the tour operators' risk management plans should be led by WorkSafe and that WorkSafe was to be informed when additional caution to the public was being advised.

[52] Under the heading of "public risk", the Response Plan detailed information about the Island's ownership, and those tour operators who landed on it. The Plan said:

> **Tour operators risk management**
>
> Tour operators have agreed to provide their risk management plans to [EMBOP] on request if required.
>
> All operators are aware of the risks to themselves and customers when visiting Whakaari/White Island and manage the risk in essentially the same way as outlined below:
>
> - Regular communication with other tour operators to share knowledge of observations while on the island.
> - Regular direct communication with GNS.
> - Individual assessment on the island before landing (pilot fly around or in the case of [White Island Tours] a walk around by one of the guides prior to landing customers).
> - If necessary they will adjust the walking route around the island and keep clear of the areas of increased activity.
> - Visitors are provided with gas masks and hard hats.
> - Daily assessments of the activity and risk of visiting.
>
> All operators receive direct communication from GNS and emails from the EMBOP Duty Manager and have indicated that they will take advice from GNS on the activity status of the island. In addition they use their personal experience (most are on the island daily during the peak season) to make a decision whether or not to visit.
>
> **Warning to consider risk**
>
> All operators are aware of the risks visiting, landing and walking on an active volcano and communicate this openly to their customers. To reinforce this practice all communication from the [EMBOP] to the tour operators should contain this message:

[13] This, of course, should have been HSWA.

Civil Defence urges you to take this latest information into careful consideration when making the decision to visit Whakaari/White Island.

[53] The Whakaari Response Plan also acknowledged, however, that any risk to the public might, on occasion, be too great to permit landing. To that end, and under the heading "Unacceptable risk to the public", the plan provided:

> There may be a point in time when the BOP CDEM Group, considers that the risk to the public is too great for people to be walking on the Island or be in its immediate vicinity. This decision will be made by the BOP CDEM Group Controller in consultation with GNS, MCDEM, Police and the tour operators, cognisant of the significant financial impact to tour operator[s], but with a primary focus on managing risk to life and safety.
>
> Following this decision the BOP CDEM Group Controller shall notify all the tour operators in writing (email) that the BOP CDEM Group considers the risk to the public safety to be significantly great that it ***advises*** tours landing on the island to cease until such time as the risk to the public has reduced. This message will also be reflected on the group website and any media releases.

[54] Accordingly, the Plan set out a number of options available to EMBOP in order to manage public access when it considered the risk of visiting the Island to be too great. These options were:

> **Option 1**
>
> The first and preferred option is to come to a mutual agreement with the tour operators. This would be the result of considered discussion and dialogue between the tour operators, CDEM Group, and GNS Science. The end result would be that visitors are restricted from landing on the Island while the situation is constantly monitored and assessed.
>
> Should the tour operators and CDEM Group be unable to come to an agreement the group may need to take some other more formal action. Options for more formal action include:
>
> **Option 2**
>
> Engaging with the island owners to gain agreement to restrict access while the situation is constantly monitored and assessed.
>
> **Option 3**
>
> Section 18(2) of [CDEMA] allows the [EMBOP] to erect signs in order to manage the risk to the public. Signs warning the public of the danger may be erected on the island or the mainland if the group controller deemed this was necessary.

Option 4

> Section 68 of [CDEMA] allows for a local declaration to be made by the joint committee chair on the recommendation of the group controller that they consider an emergency may occur. A declaration would be considered a final option after all other processes had been tested. It is important to note that a declaration will only be in place for seven days before it either lapses or requires to be extended.
>
> WorkSafe has a programme of proactive and reactive action. If they became aware of increased risk then they would appraise what next steps they should take. In recognition of the Whakaari/White Island situation and increased inquiries that Worksafe has received about the island, they have engaged with operators to see how they are managing the risks and we will continue to monitor.
>
> The BOPRC Harbourmaster can issue a maritime advisory requiring people to keep their distance from the Island should there be a significant risk to maritime safety. A maritime exclusion zone can only be established if there is an actual maritime hazard present. This would require information from GNS detailing the potential expected range of debris fall. It is important to note that an exclusion zone is only likely to be able to be established after or during an eruption.

[55] The Whakaari Response Plan was circulated to the relevant agencies, including WorkSafe, when it was updated in September 2019. WorkSafe responded with just one amendment: regarding its contact details.

Adventure Activities Regulations

[56] Finally, it is necessary to explain that since 2011, specific regulations have applied to the provision of "adventure activities" in New Zealand. "Adventure activities" are activities which, in essence, are designed to deliberately expose their participants to serious risks to their health and safety for recreational or educational purposes.[14] Prime examples include bungy jumping; kayaking; and outdoor rock climbing.

[57] Prior to the enactment of HSWA, the Health and Safety in Employment (Adventure Activities) Regulations 2011 governed the provision of these activities. Once HSWA came into effect, the Health and Safety at Work (Adventure Activities) Regulations 2016 ("Adventure Activities Regulations") applied.

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[14] Health and Safety at Work (Adventure Activities) Regulations 2016, reg 4.

[58] The effect of these regulations was to require those who provided adventure activities to be registered before they could do so.[15] In order to be registered, adventure activity operators had to obtain and pass a safety audit in respect of how they provided their adventure activities from a WorkSafe-recognised safety auditor. The Adventure Activities Regulations made it an offence to operate without registration.

[59] At the time of the 2019 eruption, it was WorkSafe's responsibility to recognise a person or organisation as a safety auditor if satisfied, among other criteria, that they had the appropriate experience and qualifications to carry out the audits.[16] It was also WorkSafe's responsibility to ensure compliance with the Adventure Activities Regulations, including the prosecution of any adventure activity operator who continued to provide adventure activities without registration.

[60] Significantly, these regulations were applied inconsistently across the various walking tour operators. White Island Tours was audited and registered in 2014 and 2017 for the adventure activity of "walking on a live volcano" but the helicopter walking tour operators were not. This meant that at the time of the 2019 eruption, only White Island Tours was registered to operate. How White Island Tours came to be audited and registered, and why the helicopter tour operators were not, form part of the key events leading up to why people were on the Island at the time it erupted.

[61] With that context in mind, it is now appropriate to turn to the key events in the lead up to the eruption on 9 December 2019.

Events prior to the charging period – 2008 to 2016

[62] After over a decade of relative stability from 2001 to 2012, Whakaari began showing signs of increased volcanic activity in July 2012. In December 2012, GNS

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15 Following the 2019 eruption, the Health and Safety at Work (Adventure Activities) Regulations 2016 were amended. The regulations now provide WorkSafe with greater powers to suspend, cancel and refuse registration, but the essential premise – that adventure activity operators must pass a safety audit and be registered before they can provide activities – remains the same.

16 This was provided by reg 9 of the Adventure Activities Regulations as they stood at the time of the charging period. The current position is still effectively the same under reg 9 of the current Adventure Activities Regulations.

wrote to Andrew Buttle in respect of its own role at the time. It sent similar letters to EMBOP and to each tour operator.

[63] Four events are of note here, despite being before the charging period. First, on 6 February 2012, WML sent an email to its licensee tour operators noting the increased risk on Whakaari. WML also informed the tour operators that GNS could provide quantitative risk assessments for guided tours on the Island. No walking tour operator ever took up the suggestion. WorkSafe also emphasises, however, that WML did not engage GNS for this purpose either.

[64] Secondly, in July and September 2013, WML renewed licence agreements with Volcanic Air and Kahu, respectively, as walking tour operators. In both, access was confined to the "crater area" on Whakaari.

[65] Thirdly, in July 2014, WorkSafe advised Volcanic Air that it was not required to be registered under the then Adventure Activities Regulations. WorkSafe considered – in light of information Volcanic Air had provided – that Volcanic Air was "unlikely to be subject to" the then regulations. As such, it advised Volcanic Air that its business had therefore been removed from the register of businesses potentially subject to the regulations.

[66] Finally, in November 2014 (and notwithstanding WorkSafe's advice to Volcanic Air), White Island Tours was audited for the purposes of registration as an adventure activity operator under the then 2011 regulations by Bureau Veritas, a WorkSafe-approved auditor. It was registered for the activity of "walking on a live volcano".

The eruption on 27 April 2016

[67] On 4 April 2016, both HSWA and the Adventure Activities Regulations came into force. Twenty-three days later, on 27 April 2016, Whakaari erupted at approximately 9:50pm. The eruption occurred when Whakaari was at VAL 1. As it occurred at night, no one was on the Island at the time.

[68] As with the 2019 eruption, the 2016 eruption was a phreatic explosion. It generated a PDC that covered 95 per cent of the tourist trail along the floor of the main crater. Thus, had the eruption occurred during the day when tourists were visiting, it is likely that many would have suffered a similar fate to those who were killed and seriously injured three years later.

Government response to 2016 eruption

[69] Two days after the eruption, on 29 April 2016, a meeting was held between the Ministry of Civil Defence, Bay of Plenty Civil Defence Emergency Management, the Bay of Plenty Regional Council Harbourmaster, officials from WorkSafe and the Department of Internal Affairs. The meeting was called following concerns by the then Minister of Civil Defence – the Hon Nikki Kaye – as to visitor safety at Whakaari, and the statutory powers available to government agencies.

[70] That same day, the Director of Civil Defence Emergency Management reported back in writing to the Minister. The Director advised that all agencies were confident that when "significant volcanic activity occurs there are robust arrangements for escalating the response". The Director's reporting memorandum concluded by saying:

> We consider that the current statutory framework provides adequate protections, in line with the principle of placing responsibility for safety at the appropriate level, and notwithstanding that there is always a residual safety risk in areas where natural hazards occur without warning.

[71] A brief overview of the meeting also appears to have been covered in an internal email between WorkSafe officials, sent that same day. The author of the email explained that the purpose of the meeting "was the need to provide reassurance to Ministers that across all agencies there is an ability to provide for the safety of [the] public involved in these activities". The author said:

> My key points regarding HSWA were:
>
> - The two tour operators do have a duty under s36 with regard to the health and safety of the tourists.
>
> - The Act places responsibility on them to manage the risk in accordance with the prevailing conditions.

- It is challenging for the regulator to make a determination of risk levels of a volcano at any given time.

- We would not routinely inspect such operations – but we could possibly become involved in dealing with a complaint.

- Tools that we have under HSWA could not practicably be used to stop activity should a third party determine that the volcano is less safe at a particular time. Our focus would therefore need to be on whether the risk management approach is robust.

- The fact that GNS has stopped workers going to the Island does not necessarily mean it is unsafe for the tourists as they undertake different activities and will likely have different evacuation arrangements.

During the discussion I was asked if the Adventure Activity regs applied. I have since checked and discovered that one of the two operators is registered. [WorkSafe] is doing some internal correspondence checks to determine why the other operator is not.

There is a possibility that we could be asked to look at the risk management approaches of these operators. An adventures activities audit should satisfy any such request.

[72] Notably, the WorkSafe official who authored this email made no reference to any responsibilities or duties borne by the owners of Whakaari.

Tour operator registration under the Adventure Activities Regulations

[73] White Island Tours was, as noted, audited and registered to provide walking tours in both 2014 and 2017. The first audit was carried out by Bureau Veritas, in October 2014. Following certification on 21 November 2014, WorkSafe registered White Island Tours on 27 November 2014 for a three-year period. The second audit was carried out by AdventureMark in November 2017. White Island Tours was then registered, again, for the activity of "walking on a live volcano". As a registered adventure activity operator, it was listed on WorkSafe's website. Both Bureau Veritas and AdventureMark were – as required – WorkSafe approved safety-auditors.

[74] Despite White Island Tours' registration, the helicopter tour operators were not audited or registered. This discrepancy stemmed, as noted, from WorkSafe's advice to Volcanic Air that it was not required to be registered in July 2014. This, of course, was despite the fact that White Island Tours was required to be, and in fact was, audited in November that same year.

[75] WorkSafe eventually expressed a change of opinion as to the need for registration in November 2017. In a letter dated 7 November 2017, it advised the unregistered helicopter operators of its "provisional view" that the operators needed to be registered under the Adventure Activity Regulations. However, it was slow to require compliance. Notably, it left an email from one of the unregistered operators that queried this view unanswered for over a year. Rather, WorkSafe communicated with WML in the apparent hope that it could convince WML that the unregistered operators needed to be registered, and so should not be permitted access to Whakaari until they did so.

[76] On 5 November 2018, a Senior Adviser at WorkSafe wrote to Andrew Buttle setting out his view as to why the Adventure Activity Regulations applied to walking tours on the crater of Whakaari. The email was long and detailed, but several extracts are important for the purposes of this appeal. The first was the Senior Adviser's discussion of the "context" of the Adventure Activities Regulations:

> The goal of these Regulations is to provide customers (and government) with internationally credible assurance that operators are managing safety in a systematic way, to a high standard. This helps to support safety for customers of course, and is also expected to protect the industry from reputational damage: if the inherent risks of adventure should lead to death or permanent injury but an un-controllable factor caused the incident, registration (and the auditable system trail) gives demonstrable confidence that the operator was not at fault. Any improvements in safety are a beneficial side-effect, but not the main purpose of the regulations, which were developed on the basis that most operators were already doing a reasonably good job of avoiding serious harms. Similarly, any closure of businesses as a result of the regulations is expected to impact only on those that were already marginal, and any such closures may lead to improved viability for registered businesses that can provide the desired level of assurance.
>
> There is a clear understanding that some 'notifiable events' will continue to occur in adventure activities at a low rate – including a (reduced) possibility of deaths. There is also a clear expectation that post-incident investigations should be able to prove that an operator has in fact been thorough and diligent in managing the risks, and preparing for emergencies, so that the main cause of harm would reasonably be assigned to aspects of the risk that are in fact outside the operator's control. In your context, that may be illustrated as the difference between acid gas and ash emissions (genuinely uncontrollable), versus a subsequent injury due to panic-ed customers "blundering about in a steam cloud with eyes shut against acid drops"* (which can be managed through staff training, provision of equipment, and customer management). *the quote is from Naim, 1996.

> These regulations aim to provide confidence that we won't have blinded, panic-ed customers falling into a vent some day – even though there still remains an un-controllable risk of death from an event like the April 2016 overnight eruption if it should occur during a tour day.

[77] The email also explained why, in WorkSafe's view, walking tours on Whakaari qualified as activities that "deliberately expose" its participants to a serious risk to their health or safety. It said:

> The activity design is to walk into an active volcanic crater. At face value, there is a risk of death involved in visiting this location, shown by a history of fatal events arising from the location itself, and scientific assessment. Note, the 'seriousness' of the risk is further assessed in the following two points. As PCBUs, the operators have a legal duty to manage the risks arising from their work. Specifically, they must provide a work environment that is without risks to health and safety [s.36(3)(a)] and does not put the safety of other persons (customers) at risk [s.36(2)]. A key principle relating to that duty suggests that recreational/ educational exposure to the risk should be eliminated (tours stopped) if safety cannot be ensured by the hierarchy of controls because there is no compelling requirement for the exposure to the risk in its current form and ceasing tours is reasonably practicable. In other words, arguably the crater tours is not permissible under the general HSW Act 2015 and HSW (GWRM) Regulations 2016, so it could only be allowed to continue under an AAO registration which gives permission to accept and manage avoidable serious risks for recreation/education purposes.

[78] The email also explained why WorkSafe viewed the tours as occurring on "dangerous terrain" as follows:

> The view that the tours are in 'dangerous terrain' is based on the following logic, which draws on the publication "Volcanic hazards at White Island" by I.A. Naim, 1996; as well as advice from an MBIE solicitor in 2013.
>
> - A volcano is able to cause harm but it may not be likely to do so, if it is unlikely to erupt, or if an activity is in a zone that is substantially protected from the likely risks (for example: some parts of Ruapehu are known lahaar paths but other parts, such as higher ridgelines, are low-risk for lahaars). 'Dangerous terrain' might be just the parts scientifically assessed as most likely to expose people to immediate danger.
>
> - White Island is among the most volcanically active sites in NZ, and the tours go directly into the active crater zone.
>
> - Unlike members of the public at volcanically active sites such as Kuirau Park (Rotorua), visitors to Whakaari are reliant on tour operators to manage the risk to them, because inherently unstable ground and active vents are not fenced off.
>
> - The installation in 2016 of a containerised shelter and emergency equipment store is further supporting evidence

> that this location is viewed as dangerous by others with relevant background and expertise.

[79] WorkSafe then later met with WML and the unregistered operators in March 2019 to confirm its view that registration was required. However, it took no steps to require registration from this point. This was because it then reconsidered its decision that registration was required at the request of one of the unregistered tour operators. It was only on 18 November 2019 – a mere three weeks before the eruption – that it confirmed its conclusion that registration was required, and that it expected "clear movement towards compliance in a reasonable time-frame".

[80] Following the eruption, David Laurenson KC was tasked with reviewing the way in which WorkSafe performed its regulatory functions under the Health and Safety at Work (Adventure Activities) Regulations 2016 with respect to Whakaari. His review was damning and, importantly, his findings were unchallenged at the hearing before me.[17]

[81] Mr Laurenson concluded that the safety audits of White Island Tours in 2014 and 2017 were seriously deficient. This was because neither Bureau Veritas nor AdventureMark had a technical expert with the appropriate experience or qualifications to carry out an audit of an adventure activity that involved walking tours on a live volcano (the very thing that made registration required under the regulations).[18]

[82] Mr Laurenson's investigation revealed that the technical expert used by Bureau Veritas was a qualified mountain guide, but one who had no expertise in respect of volcanic hazards. And, even more critically, it revealed that Bureau Veritas had not been assessed as having the appropriate expertise or qualifications to carry out such an audit because the very list of activities for which it was meant to be capable of auditing did not include activities expressed to be on or near a live volcano.[19] In other words, Bureau Veritas' audit was deficient both because its own personnel lacked the

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17 David Laurenson KC *Review of WorkSafe New Zealand's Performance of its Regulatory Functions in Relation to Activities on Whakaari White Island* (8 September 2021).
18 At [183].
19 At [161].

required expertise and because WorkSafe never ensured that Bureau Veritas was required to have such expertise in the first place.

[83] Mr Laurenson's investigation also revealed that by 2017, WorkSafe had still not ensured that its approved safety auditors were capable of auditing activities taking place on a live volcano, notwithstanding that this had been considered in September 2015 and 2017.[20] He found that because White Island Tours had engaged GNS as its technical advisor, WorkSafe accepted that it was not necessary for AdventureMark to appoint a technical expert with experience in volcanic risks and hazards to audit White Island Tours' own safety management system in respect of how it identified and managed those risks.[21] He concluded that because of this, WorkSafe ought to have known that the AdventureMark audit would not cover the risks and hazards that made White Island Tours' operation registrable as an adventure activity.[22]

[84] Ultimately, Mr Laurenson concluded that WorkSafe did not take the appropriate steps required to carry out its regulatory functions in order to ensure that White Island Tours was audited by an auditor with the appropriate experience and qualifications.[23]

[85] Mr Laurenson's investigation also concluded that WorkSafe failed to take the appropriate steps required to monitor and enforce compliance with the Adventure Activity Regulations in respect of helicopter operators providing tours on Whakaari. He concluded that WorkSafe had been aware since at least 2014 that there were potentially unregistered operators carrying out activities on Whakaari, but that by November 2019 it had not even reached the stage of referring the matter to the WorkSafe inspectorate to consider enforcement action against the unregistered operators. He considered the delay in requiring registration of those operators until November 2019 to be unjustified in the circumstances.[24]

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20 At [198].
21 At [202].
22 At [204].
23 At [184].
24 At [228].

WML's actions over the charging period

[86] Over the course of the charging period, WML granted or renewed licence agreements with Aerius in November 2016; Ngāti Awa Investments Ltd (that is, White Island Tours) in April 2017 and Inflite in July 2018.

[87] WML also maintained a direct and continuing relationship with tour operators and interested government agencies, both through meetings and email and phone correspondence. For example, it participated in a meeting chaired by EMBOP on 14 September 2018 attended by the tour operators, the New Zealand Police, GNS, and others. At this meeting, GNS gave an update on the then "current situation" at Whakaari and the placement of a container which it had arranged, with the New Zealand Defence Force, to be located on the Island. The New Zealand Police also advised at this meeting that it had completed a "mass rescue plan" for Whakaari, and that it would be running a "table top exercise" for the plan to be tested together with other emergency services.

[88] Later that same day, WML participated in a meeting which it had organised with tour operators for the purpose of developing a "long-term plan" for tourism on Whakaari. This meeting was a pre-meeting for a "Future Planning Forum" that would be held in 2019. The topics of discussion included "enhancing" the tourist experience through offering "tour products outside the crater area", such as overnight stays on the Island. WML also remained in regular contact with tour operators through the monthly reports of passenger numbers that tour operators were required to provide under their licence agreements. But, aside from this and its attendance at the occasional user group meeting, the evidence of White Island Tours' General Manager, Patrick O'Sullivan, was that WML's communications with tour operators was limited. Mr O'Sullivan said that beyond the monthly reporting of passenger numbers, any remaining contact comprised the "odd cup of coffee" when the Buttle brothers were in town.

[89] WML was, however, actively involved in discussions about developing tourism to Whakaari, as the meeting on 14 September 2018 shows. On 30 April 2019, it co-hosted a meeting with Whakatāne Council for this purpose which was attended

by the tour operators, GNS, Civil Defence, the Department of Conservation, and the Department of Internal Affairs. The meeting discussed the feasibility of developing "new products" on the Island, such as reinstating the miners' track from Bungalow Bay to the Crater Rim; offering overnight camping or glamping, and opening the Island up for tourism opportunities more generally beyond the current crater route.

[90] WML was also in fairly regular communication with various interested government agencies. For example, in July 2019 the Buttle brothers requested that they be added to GNS's distribution list for its VABs. In September 2019, the Buttle brothers were sent a copy of the Whakaari Response Plan developed by EMBOP. And, of course, from August 2018, WML was engaged in discussions with WorkSafe about whether the walking tour operators were required to be registered under the Adventure Activities Regulations.

[91] WorkSafe also highlights that WML omitted to do certain things throughout the charging period. It says that its primary omission was that it did not conduct or obtain a risk assessment, either prior to entering into its licence agreements or at any point thereafter. And while WML knew that GNS was capable of providing it with a bespoke quantitative risk assessment for the activity of "permitting tourists to travel to Whakaari", it failed to do so. Rather – as already noted – it advised tour operators that GNS could provide this service, and that they might want to obtain it themselves.

Volcanic activity in the months preceding the 2019 eruption

[92] On 25 May 2019, GNS advised White Island Tours of an "earthquake swarm" near Whakaari. White Island Tours subsequently stopped tours for that day. Just over a month later, on 27 June 2019, a VAB was issued and Whakaari's VAL was increased to VAL 2. Mr O'Sullivan, from White Island Tours, was informed and emailed the tour operators' user group to inform them. Whakaari's VAL was later lowered to VAL 1 on 1 July 2019.

[93] On 26 September 2019 and 30 October 2019 further VABs were issued. Whakaari's VAL remained at VAL 1. The VAB of 30 October 2019 stated that volcanic unrest continued and that "some monitored parameters showed an increase in activity, with a level of uncertainty about what this means". It also noted that while "VAL 1 is

mostly associated with environmental hazards", "eruptions can still occur with little to no warning".

[94] On 18 November 2019, Whakaari's VAL was increased to VAL 2. Another VAB was issued. The VAB relevantly explained:

> Overall, the monitored parameters are just above the expected range for minor volcanic unrest and associated hazards. The patterns of signals are similar to those through the 2011—2016 period and suggest that Whakaari/White Island may be entering a period where eruptive activity is more likely than normal, recent observations can also be explained by the increased gas flux which leads to geysering and lake level changes.
>
> **The Volcanic Alert Level is raised to Level 2.**
>
> **The Aviation Colour Code is increased to Yellow.**
>
> GNS Science and the National Geohazards Monitoring Centre continues to closely monitor Whakaari/White Island for further signs of activity. Volcanic Alert Level 2 is mostly associated with unrest hazards on the volcano and could include eruptions of steam, gas, mud and rocks. These eruptions can occur with little or no warning.

[95] The same day, a GNS volcanologist told Radio New Zealand that "tour groups can still visit the Island". A GNS volcanologist also told a NEMA Duty Officer that he believed the increase in activity to be "very small" and that, as such, there was "no higher risk for people visiting the Island". Consistent with that advice, the Duty Officer advised that "no action was needed" at that stage.

[96] On 25 November 2019, a further VAB was issued. Whakaari's VAL remained at VAL 2. The VAB said:

> There has been no change in activity at the volcano after the deep magnitude 5.9 earthquake, that occurred beneath eastern Bay of Plenty on Sunday 24 November.
>
> Gas emissions continue to be high to moderate in the last week, since Monday 18 November, and volcanic tremor remains at moderate levels. There have been few earthquakes near the island.
>
> The crater lake level has not changed for the last week, and gas-driven fountaining activity continues to be observed around the active vents on the west side of the crater floor. This fountaining is regularly throwing mud a few metres into the air at the vent but at current levels does not pose a hazard to visitors.

> Overall, the monitored parameters continue to be in the expected range for moderate volcanic unrest and associated hazards. The monitoring observations are similar to those seen in the more active 2011—2016 period and suggest that Whakaari/White Island may be entering a period where eruptive activity is more likely than normal.

[97] The VAB of 25 November 2019 then repeated its standard advice that VAL 2 was mostly associated with "unrest hazards on the volcano and could include eruptions of steam, gas, mud and rocks". It stated that these eruptions could occur with little to no warning.

[98] The last VAB prior to the eruption was published on 3 December 2019. It contained similar messages to the previous VAB issued on 25 November 2019. It said:

> Explosive gas and steam-driven mud jetting continues from the active vent area at the back of the crater lake on Whakaari/White Island. The level of activity at the vent is variable and when in a stronger phase, some material is being deposited about the vent area. This style of activity has been present since late September, although it is occurring more frequently now. No volcanic ash is being produced.
>
> Volcanic gas emission and seismic activity continue to remain elevated. Occasional gas smell may have been noted on the North Island mainland, pending on the dominant wind direction. Volcanic tremor also remains at moderate levels in the last week, with some periodic variations, matched with episodes of increased gas-steam jetting and fountaining.
>
> The water level of the crater lake has not changed for the last week, and gas/steam-driven mud fountaining activity continues to be observed from the active vent area on the west side of the 1978/90 Crater Complex, near the 2012 lava dome, at the back of the crater lake.
>
> This fountaining is regularly throwing mud and debris 20-30 metres into the air above the vent. The level of activity is variable and remains within the range expected for moderate volcanic unrest. While the activity is contained to the far side of the lake, the current level of activity does not pose a direct hazard to visitors.
>
> Overall, the monitored parameters continue to be in the expected range for moderate volcanic unrest and associated hazards exist. The monitoring observations bear some similarities with those seen during the 2011-2016 period when Whakaari/White Island was more active and stronger volcanic activity occurred. Observations and data to date suggest that the volcano may be entering a period where eruptive activity is more likely than normal.

[99] On the evening of 8 December 2019 – the day before the eruption – a large spike in seismic energy and geysering activity was observed. The expert evidence of

Sir Stephen Sparks – a world-leading volcanologist who gave evidence at the trial – was that the spike was an indicator that the probability of an eruption had increased.

[100] On 9 December 2019, the day of the eruption, GNS drafted a VAB that was not published before the eruption. The VAB recorded that seismic activity and volcanic gas emissions continued to remain elevated. It stated that this level of activity remained "within the range expected for moderate to heightened volcanic unrest", and that observations and data suggested "that the volcano is entering a period where eruptive activity is more likely than normal". The VAB recorded that Whakaari's VAL remained at VAL 2.

The eruption on 9 December 2019

[101] At the time of the eruption, seven tours had already been conducted on Whakaari that day. Two tours were conducted by White Island Tours; three by Volcanic Air; one by Aerius and another by Kahu, as a subcontractor to Inflite.

[102] When Whakaari erupted, two tours were being conducted. One, conducted by White Island Tours, was for customers who had travelled to Whakatāne from the cruise ship *Ovation of the Seas*, operated by Royal Caribbean Cruises Ltd, which had docked in the Port of Tauranga. The other was conducted by Volcanic Air.

[103] The White Island Tours' group was split into two groups of 19 people. Each group was led by two tour guides. The first group commenced the walking tour first and headed toward the crater floor. It left the crater lake at approximately 1:50 pm to return to the wharf. That group was half-way to the wharf at the time of the eruption. The second group arrived at the crater lake at approximately 1:50 pm. It left the crater lake at approximately 2:08 pm and had not walked far from the crater lake by the time Whakaari erupted.

[104] The Volcanic Air tour group comprised four tourists and a pilot guide. After leaving Rotorua at approximately 12:26 pm, the group landed on Whakaari at approximately 1:30 pm. When Whakaari erupted, the Volcanic Air group was close to completing the walking tour and were approximately 200m from the wharf.

[105] Of the 42 people that comprised the White Island Tour group, 21 died as a result of injuries sustained in the eruption. Three died in the first group while 18 died in the second. Of the five that comprised the Volcanic Air group, one died several months later as a result of injuries suffered in the eruption. As noted, all remaining survivors suffered serious injuries.

Charges against WML

[106] Following its wide-ranging investigation, WorkSafe laid two alternative charges against WML on 30 November 2020. The first was for committing an offence under s 48 of HSWA for breaching a duty owed under s 36(2). The second was for committing an offence under s 48 of HSWA for breaching a duty owed under s 37(1).

[107] The first charge – for breach of a duty under s 36 – alleged that WML had a duty to ensure, so far as reasonably practicable, that the health and safety of other persons who it had permitted to be on Whakaari were not put at risk from "work carried out as part of the conduct of the business or undertaking, namely the management of Whakaari". It alleged that WML failed to comply with this duty, and that this failure exposed individuals to a risk of death or serious injury arising from volcanic activity. It further alleged that:

> It was reasonably practicable for Whakaari Management Limited to:
>
> 1 ensure adequate risk assessments of the activity of conducting tours on Whakaari had been undertaken;
>
> 2 consult, co-operate and co-ordinate with Institute of Geological and Nuclear Sciences Limited, National Emergency Management Agency (formerly the Ministry of Civil Defence and Emergency Management) and the tour operators as to the hazards and risks posed to workers and tourists from volcanic activity;
>
> 3 monitor and review known hazards when there is a change in Volcanic Alert Level and/or the issuing of a Volcanic Alert Bulletin;
>
> 4 …
>
> 5 ensure that workers and tourists are supplied with appropriate personal protective equipment;
>
> 6 …
>
> 7 ensure there is an adequate means of evacuation from Whakaari.

[108] The second charge – for breach of s 37 – alleged that WML had a duty to ensure, so far as reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace were without risks to the health and safety of any person. It alleged that WML failed to comply with this duty and that this failure exposed individuals to a risk of death or serious injury arising from volcanic activity. It further alleged that:

> It was reasonably practicable for Whakaari Management Limited to:
>
> 1 ensure adequate risk assessments of the activity of conducting tours on Whakaari had been undertaken;
>
> 2 consult with Institute of Geological and Nuclear Sciences Limited, and consult, co-operate and co-ordinate with the PCBUs that conduct tours on Whakaari as to the hazards and risks posed to workers and tourists from volcanic activity;
>
> 3 monitor and review known hazards when there is a change in Volcanic Alert Level and/or the issuing of a Volcanic Alert Bulletin;
>
> 4 …
>
> 5 ensure that workers and tourists were supplied with appropriate personal protective equipment;
>
> 6 …
>
> 7 ensure there is an adequate means of evacuation from Whakaari.

[109] Particulars 4 and 7 under both charges have been left blank because they were withdrawn at trial.

[110] The charges were laid as alternatives. This meant that in practice, WorkSafe was not seeking convictions on both. As noted, the Judge found WML guilty of the second charge and acquitted it of the first charge. However, the Judge did not acquit WML simply because he found the second charge proven, as might be expected. Instead, he went on to consider whether the first charge was proved – independently of the second – and concluded that it was not. His reasons for doing so are important to this appeal, notwithstanding that WorkSafe does not challenge the Judge's conclusion in respect of that charge.

Health and Safety at Work Act 2015

[111] Before embarking on the Judge's reasons and the questions that arise on this appeal, it is necessary to say a little about HSWA as a whole.

[112] HSWA replaced the Health and Safety in Employment Act 1992 ("the 1992 Act"). The major catalyst for the replacement of the 1992 Act was the Pike River Coal Mine tragedy.

[113] Following that tragedy, the then Minister of Labour established an Independent Taskforce on Workplace Health and Safety in June 2012. The Taskforce's mandate was to critically assess whether New Zealand's workplace health and safety system was fit for purpose, and to recommend practical strategies for reducing the rate of workplace fatalities and serious injuries by 2020. One of its key recommendations was for the enactment of a new work health and safety statute based on Safe Work Australia's "model" workplace health and safety law for the Australian commonwealth, states, and territories.[25] Safe Work Australia developed this "model" law in order to harmonise workplace health and safety laws across Australia's state and federal jurisdictions.[26]

[114] The Independent Taskforce's recommendation was ultimately accepted. In 2014, the Health and Safety Reform Bill was introduced for its first reading. It was based largely on the Australian "model" law. In 2016, HSWA was passed into law.

[115] HSWA's "main purpose" is to provide "a balanced framework to secure the health and safety of workers in workplaces".[27] It does this by:

> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
>
> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and

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25 *The Report of the Independent Taskforce on Workplace Health and Safety | He Korowai Whakaruruhau* (April 2013) [Report of the Independent Taskforce].

26 See Safe Work Australia "History of the model WHS laws" <www.safeworkaustralia.gov.au>.

27 Health and Safety at Work Act 2015, s 3.

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and

(d) promoting the provision of advice, information, education, and training in relation to work health and safety; and

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

(f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

[116] The first of those objects – protecting workers and other persons against harm to their health, safety, and welfare – is of obviously especial importance.[28] This is because the Act provides that in furthering that aim:[29]

> regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[117] The 1992 Act was based principally on the employee/employer relationship. The significance of HSWA (and the Australian "model" law that inspired it) is that it goes further. This is because HSWA imposes duties aimed at ensuring workplace health and safety not simply on employers, but on all "persons conducting a business or undertaking" ("PCBUs"); their officers; and those carrying out work in any capacity for them.

[118] The concept of a PCBU was adopted to ensure that the responsibility for workplace health and safety extended to "all relationships between those in control of workplaces and those who are affected".[30] As such, the definition of a PCBU is broad. Unless the context otherwise requires, a PCBU:[31]

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28 *WorkSafe New Zealand v Doug SH Auckland Ltd* [2020] NZHC 3368, (2020) 17 NZELR 841 at [28].

29 Health and Safety at Work Act 2015, s 11

30 The Independent Taskforce recommended that as part of this new legislation, the concept of a PCBU should be adopted so that workplace health and safety duties "extend to all relationships between those in control of workplaces and those who are affected": Report of the Independent Taskforce, above n 25, at 4.

31 Health and Safety at Work Act 2015, s 17(1).

(a) means a person conducting a business or undertaking—

(i) whether the person conducts a business or undertaking alone or with others; and

(ii) whether or not the business or undertaking is conducted for profit or gain; but

(b) does not include—

(i) a person to the extent that the person is employed or engaged solely as a worker in, or as an officer of, the business or undertaking:

(ii) a volunteer association:

(iii) an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work:

(iv) a statutory officer to the extent that the officer is a worker in, or an officer of, the business or undertaking:

(v) a person, or class of persons, that is declared by regulations not to be a PCBU for the purposes of this Act or any provision of this Act.

[119] In the same vein, a "worker" means an individual who carries out work in *any capacity* for a PCBU.[32] This includes not only employees but also contractors or subtractors; apprentices or trainees; or – in certain contexts – volunteers.[33]

[120] The primary responsibility for workplace health and safety under HSWA rests with PCBUs. To that end, HSWA imposes no less than eight duties on PCBUs. The first, and most fundamental,[34] is the "primary duty of care" set out in s 36. Section 36 relevantly provides as follows:

(1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and

(b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

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32 Section 19.

33 HSWA limits those who are "volunteer workers". For example, those who participate in a fund-raising activity; or who assist with sports or recreation for an educational institute, sports club or recreation club, are not volunteer workers under the Act.

34 *Linfox Logistics (NZ) Ltd v WorkSafe New Zealand* [2018] NZHC 2909 at [52].

(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.

(3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—

(a) the provision and maintenance of a work environment that is without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling, and storage of plant, substances, and structures; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

[121] Section 37 – the duty with which this appeal is principally concerned – is one of several so-called "upstream" duties imposed on PCBUs. The provision imposes a duty on a PCBU "who manages or controls a workplace". Given its centrality to this case, it is appropriate to set the provision out in full:

(1) A PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.

(2) Despite subsection (1), a PCBU who manages or controls a workplace does not owe a duty under that subsection to any person who is at the workplace for an unlawful purpose.

(3) For the purposes of subsection (1), if the PCBU is conducting a farming business or undertaking, the duty owed by the PCBU under that subsection—

(a) applies only in relation to the farm buildings and any structure or part of the farm immediately surrounding the farm

buildings that are necessary for the operation of the business or undertaking:

(b) does not apply in relation to—

(i) the main dwelling house on the farm (if any); or

(ii) any other part of the farm, unless work is being carried out in that part at the time.

(4) In this section, a PCBU who manages or controls a workplace—

(a) means a PCBU to the extent that the business or undertaking involves the management or control (in whole or in part) of the workplace; but

(b) does not include—

(i) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or

(ii) a prescribed person.

[122] Section 20(1) supplies the definition of a "workplace". It provides – again, unless the context requires otherwise – that a workplace:

(a) means a place where work is being carried out, or is customarily carried out, for a business or undertaking; and

(b) includes any place where a worker goes, or is likely to be, while at work.

[123] It follows from that definition that a workplace is not simply a physical location. Rather, it is a physical location *when used* for a business or undertaking. A "workplace" therefore has a temporal element.[35] Some physical locations may only be workplaces when specifically used for work while others may always be workplaces given they are locations where work is always "customarily carried out".

[124] It is important to appreciate that s 37 sits within a series of duties that apply to PCBUs insofar as they do something. For example: if they manage or control a workplace (s 37); manage or control fixtures, fittings or plant at a workplace (s 38), or design plant, substances or structures that are to be, or could reasonably be expected

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[35] Michael Tooma *Tooma's Annotated Health and Safety at Work Act 2015* (Thomson Reuters, Wellington, 2016) at [HS20.02].

to be used, at a workplace (s 39). The duties imposed on PCBUs here are duties to ensure that, insofar as the PCBU does something, it does it so far as is reasonably practicable "without risks to the health and safety" of any person, or specified persons under the relevant section. What is "reasonably practicable" for a PCBU with a duty under HSWA to do is:[36]

> that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
>
> (a) the likelihood of the hazard or the risk concerned occurring; and
>
> (b) the degree of harm that might result from the hazard or risk; and
>
> (c) what the person concerned knows, or ought reasonably to know, about—
>
> (i) the hazard or risk; and
>
> (ii) ways of eliminating or minimising the risk; and
>
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
>
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[125] In short, ss 37 to 43 identify the different contexts in which PCBUs may owe health and safety duties to persons or particular persons alongside, or in addition to, their primary duties of care under s 36.

[126] The content and parameters of the duties imposed by HSWA are defined by ss 27 to 34. It is not possible to contract out of any duty;[37] or to transfer a duty to another person.[38] Furthermore, a person may have more than one duty and more than one person may have the same duty.[39] Where a PCBU has a duty in relation to the same matter as another PCBU, those PCBUs also have a duty – so far as is reasonably

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36 Health and Safety at Work Act 2015, s 22.
37 Section 28.
38 Section 31.
39 Sections 32 and 33.

practicable – to consult, co-operate with, and co-ordinate activities with each other in relation to the same matter.[40]

[127] Section 30 provides the contents for the duties provided under HSWA. It provides that a duty imposed on a person under the Act requires the person:

> (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
>
> (b) if not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

[128] However, the obligation to eliminate or mitigate only goes so far. This is because s 30(2) provides that:

> a person must comply [with those requirements] to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate.

[129] Finally, in order to ensure compliance with the duties created, HSWA makes it an offence for a duty-holder to fail to comply with these duty provisions. As this Court observed in *Stumpmaster v WorkSafe New Zealand*,[41] the three offences – in ascending order of seriousness – are:

> (a) section 49 – failing to comply with a duty;
>
> (b) section 48 – failing to comply with a duty and thereby exposing someone to a risk of death, serious injury or illness; and
>
> (c) section 47 – reckless conduct in respect of a duty.

[130] In this case, WML was charged with an offence under s 48 of HSWA, for failing to comply with its duty under s 37(1). It was, as already noted, charged alternatively with an offence under s 48 for failing to comply with its duty under s 36(2).

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40 Section 34.

41 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

District Court decision

[131] The Judge's decision was comprehensive, and his analysis is obviously essential to the disposition of this appeal. At this stage however, it is sufficient to set out only a precis of his reasons.

[132] First, the Judge was sure that WML had a duty under s 37. WML accepted that it was a PCBU.[42] The relevant workplace was where the walking tour operators carried out their tours on the crater floor of the Island (that is, the walking tour workplace).[43] He interpreted s 37 as applying to those PCBUs "exercising active control or management of the workplace in a practical sense". As such, the Judge said that "owning [was] not enough".[44] He considered WML met this test because it:

(a) was "not merely a passive landowner" and was "proactive in setting conditions around access to Whakaari";[45]

(b) could terminate – or threaten to terminate – its licence agreements with any breach;[46] and

(c) provided the recreational activity of exposure to the Island itself, which was "both the hazard and the thrill".[47]

[133] Secondly, the Judge was sure that WML breached its duty under s 37. While it was not reasonably practicable for WML to "eliminate the risk of an eruption", the Judge said WML failed to minimise that risk as reasonably practicable.[48] Specifically, WML failed to engage the necessary expertise to "assess risk arising from the conduct of commercial tours on its active volcano" as part of investigating the feasibility of licencing to tour operators.[49] It was reasonably practicable for WML to have done so because WML understood Whakaari's eruptive history; had an existing relationship

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42 District Court decision, above n 4, at [32].
43 At [33]–[34].
44 At [41].
45 At [43]–[44].
46 At [46].
47 At [50].
48 At [57].
49 At [60].

with GNS; understood the need for "a good risk assessment" and had the resources to engage the appropriate expertise.[50]

[134] The Judge further rejected that it was not reasonably practicable for WML to undertake its own risk assessment, given its relationship with GNS; the existence of the Whakaari Response Plan; or the fact that White Island Tours had been approved to operate under the Adventure Activities Regulations.[51] He considered that it might have been reasonable for WML to have not done so prior to the 2016 eruption. However, he concluded that after that eruption WML needed to at "a bare minimum", engage volcanology and health and safety expertise to fully understand what its obligations were and to ensure that it was doing what was necessary to meet them.[52]

[135] Thirdly, the Judge considered the other reasonably practicable steps that WML should allegedly have taken to follow from its failure to properly assess the risk of death or serious injury if Whakaari erupted while tourists and tour guides were on the Island at the time.[53] The Judge said:

> [74] … Without properly assessing risk, other failures would inevitably follow. For example, WML consequentially failed to:
>
> (a) properly consult, co-operate and co-ordinate as to the hazards and risks posed to workers and tourists from volcanic activity,
>
> (b) monitor and review those hazards,
>
> (c) ensure that workers and tourists were supplied with appropriate personal protective equipment, and
>
> (d) ensure there was an adequate means of evacuation from Whakaari.
>
> [75] It could not properly take any of these steps without knowing clearly what the risk was.

[136] The Judge then turned to consider whether WML owed a duty to tourists and workers on Whakaari under s 36(2) of HSWA. He concluded that it did not. His statutory interpretation of s 36(2) was that it had to be read with reference to s 36(1).

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50 At [62].
51 At [64]–[70].
52 At [71]–[73].
53 At [74].

He said "any duty a PCBU has under s 36(2) must arise from its work activity as opposed to its work product".[54]

[137] In light of that interpretation, the Judge observed that WML never had any workers on Whakaari and that, "in that sense", the Island was never its workplace. The Judge further rejected that WML "influenced or directed" workers to the extent that it owed a duty under s 36(1)(b). WorkSafe argued that WML influenced or directed the workers of the tour operators because, through its licence agreements, it determined:[55]

> (a) the places on Whakaari that those workers could go to (and therefore the places that the tourists could go to)
>
> (b) the circumstances under which those workers could go (namely, with a thorough understanding of the risks and dangers that are inherent in landing on and remaining on an active volcano),
>
> (c) how those workers were to coordinate activities with other workers (including through user group meetings),
>
> (d) the minimum PPE that the workers had to provide to tourists, and
>
> (e) the requirement for workers to obtain acknowledgment from visitors that they were visiting Whakaari at their own risk.

[138] However, the Judge rejected that these were sufficient to impose a s 36 duty. He said:[56]

> However, these are all pre-cursors to access. Individual tour operators could determine all aspects of their operations on Whakaari once they met these pre-conditions. The evidence established that, in practice, this was also true. In a fundamental sense then, WML did not influence or direct the tour operators' activities in carrying out work.

[139] Finally, the Judge turned to the question of whether WML's failure to comply with s 37 meant that any individual was exposed to a risk of death or serious injury. He noted that a breach of duty did not need to have caused the harm, but that there needed to be a causal link.[57] He said:

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54 At [78].
55 At [85].
56 At [86].
57 At [90].

> [88] Had WML complied with its duty and obtained the necessary expert advice on risk and health and safety, it would have fully understood the risk. It would have had two options:
>
> (a) stop tours entirely. The failure to do so exposed any individual to a risk of death or serious injury; and
>
> (b) implement effective controls if that were possible. Such controls, to be effective, would have eliminated or minimised the risk. The failure to do so resulted in tours occurring to Whakaari without adequate controls, exposing individuals to a risk of death or serious injury.

[140] The Judge accordingly convicted WML of an offence under s 48 of HSWA for a breach of s 37(1) and acquitted the company of an offence under s 48 for a breach of s 36(2).

WML's grounds of appeal

[141] WML advances several grounds of appeal against its conviction. As noted, it challenges all three planks of the Judge's decision: that it had a duty under s 37; that it breached any such duty and that even if had not breached any such duty, that this would have ensured that tourists and tour guides were not exposed to a risk of death or serious injury.

[142] WML challenges the Judge's finding that it had a duty under s 37 on four interrelated grounds of appeal. It says that:

(a) the Judge was wrong in law in respect of what was required for a PCBU to have a duty under s 37;

(b) the Judge's assessment as to WML's "management or control" comprised was not supported on the evidence;

(c) the Judge erred in concluding that WML's "management or control" gave rise to a duty that required it to take the reasonably practicable steps alleged in the particulars of the charge laid against it; and

(d) the Judge erred in his assessment of the relevance of guidance provided by WorkSafe and the Ministry of Business, Innovation and

Employment ("MBIE") in respect of landowners' obligations under HSWA.

[143] WML similarly challenges the Judge's findings that it breached any such duty under s 37 on various bases. It says the Judge:

(a) erred in concluding that the eruption in 2016 ought to have resulted in WML reconsidering its reliance on GNS, EMBOP and the Whakaari Response Plan;

(b) erred in concluding that WML could not rely on the fact that White Island Tours had twice been audited and approved for registration under the Adventure Activities Regulations;

(c) erred in concluding that WML could not rely on EMBOP or the Whakaari Response Plan and – relatedly – failed to adequately consider EMBOP's statutory role; and

(d) failed to adequately consider the other particulars to the charge under s 37, beyond the particular that WML needed to ensure that risk assessments were undertaken.

[144] WML's challenge against the Judge's last conclusion – that its breach of duty exposed individuals to a risk of death or serious injury – is, by comparison, succinct. It says that the evidence does not support that even if it had carried out the reasonably practicable steps alleged, that this would have "made a difference".

[145] Accordingly, the three broad issues for determination are:

(a) did WML have a duty under s 37;

(b) if so, did it breach it; and

(c) if so, did its breach expose any individual to a risk of death or serious injury?

Approach on appeal

[146] The approach on appeal is well-established. The appeal court must allow an appeal against conviction if satisfied in the case of a Judge-alone trial that the Judge erred in their assessment of the evidence to such an extent that a miscarriage of justice has occurred;[58] or if a miscarriage of justice has occurred for any reason.[59]

[147] A miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that:[60]

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[148] The appeal proceeds by way of rehearing.[61] This means that if the appeal Court comes to a different view on the evidence; the trial Judge will have necessarily erred and the appeal must be allowed. However, the onus is on the appellant to show that an error has been made. And, importantly, the appeal Court must take into account any advantages that the trial Judge may have had.[62]

Did WML have a duty under s 37?

[149] WML's principal ground of appeal is that it did not have a duty to ensure the walking tour workplace, or indeed the whole of Whakaari, were without risks to the health or safety of any person under s 37. It says that for the purposes of that provision it was not, as a matter of law, a PCBU who "managed or controlled" the walking tour workplace and that the Judge erred in concluding from the evidence that it was. Its argument focuses first on the correct statutory interpretation of the provision, and then on its proper application to the facts of this case.

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58 Criminal Procedure Act 2011, s 232(2)(b).
59 Section 232(2)(c).
60 Section 232(4).
61 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [32].
62 At [38].

[150] Accordingly, two issues arise:

(a) what does it mean to be "a PCBU who manages or controls a workplace" for the purposes of s 37; and

(b) in light of that meaning, did WML "manage or control" the walking tour workplace under the Act?

[151] In order to answer these two questions, it is necessary to first delve into the Judge's reasons in more detail.

The Judge's reasons

[152] The Judge began with interpreting s 37. He noted that the words "manage" and "control" were broad, and that there were "myriad ways" in which an entity could act which involved an element of management or control. He considered that the words did not require "exclusive" or "comprehensive" management or control and that the section, on its face, was a "very broad and far-reaching provision".[63]

[153] The Judge acknowledged the purpose of the Act and its legislative history. In particular, he acknowledged that the wording "who manages and controls" was deliberate.[64] In light of that purpose and history, the Judge said:[65]

> To be caught by s 37, a PCBU must in fact be exercising active control or management of the workplace in a practical sense. Owning it is not enough. Making money from it is not enough. Merely being able to manage or control a workplace, but not doing so, is not enough.

[154] Applying that interpretation, the Judge was satisfied that WorkSafe had established that WML was "not merely a passive landowner". This was because:[66]

(a) its business was to generate income through the enabling of commercial walking tours on Whakaari;

(b) it entered into the licence agreements;

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63 District Court decision, above n 4, at [37].
64 At [38]–[40].
65 At [41].
66 At [43].

(c) it had termination rights for breach under those agreements, which it understood;

(d) it maintained a direct and continuing relationship with tour operators, including attending and contributing to Whakaari user group meetings;

(e) it engaged with tour operators and other relevant entities, including GNS, civil defence and various agencies interested and involved in increasing tourist numbers to Whakaari; and

(f) occasional direct engagement with WorkSafe and GNS.

[155] The Judge rejected WML's argument that it was only ever involved "around access to Whakaari", and that both GNS and the walking tour operators (within the geographic bounds of their licences) determined for themselves where their workplaces would be. The Judge considered the licence agreements showed that WML was "proactive in setting conditions around access to Whakaari", and that it had the ability to control access to whatever "workplaces" were on Whakaari by terminating or threatening to terminate with any breach.[67]

[156] The Judge then turned to consider WorkSafe's own guidance to landowners who granted access to their land for recreational purposes at the time of the 2019 eruption. He acknowledged that WorkSafe's guidance was that a landowner who granted access did not have to "manage the risks of the recreational activity". However, he also noted that this guidance cited an exception when the landowner "also provides the recreational activity", in which case they would also be responsible for managing the activity's risks, so far as reasonably practicable:[68]

> A landowner that charges for access to their land … [does not] have to manage the risks of the recreational activity … That's the responsibility of the person doing the activity.

[157] In light of that guidance, the Judge considered that it was "too simplistic" to say that it was the walking tour operators, rather than WML, who provided the recreational activity of visiting Whakaari. He said:[69]

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67 At [44]–[46].
68 At [48]–[49].
69 At [50].

> Here, however, the active volcano is itself the product. Exposure to it is the recreational activity. It is both the hazard and the thrill. WML's business was to provide that.

What does it mean to be a PCBU who manages or controls a workplace?

[158] The required approach to statutory interpretation is well-established. The meaning of any statute must be ascertained from its text and in light of its purpose and context.[70] That guiding principle ensures that all the relevant indicia of meaning are considered, but that no single indicator holds decisive sway. Thus, the literal meaning of the words in a statute are not superior to its purpose and context.[71] And yet, in giving effect to a statute's purpose and context, the Court's interpretation must not be untethered from that statute's text.[72]

[159] Considering these principles, there is a surprisingly large degree of common ground between WML and WorkSafe (notwithstanding their sharp disagreement on the ultimate question of whether WML managed or controlled the walking tour workplace) as to what s 37 means in the abstract.

[160] WML and WorkSafe each accept that in light of HSWA's legislative history, the focus must be on whether a PCBU has "active" management or control, rather than a "mere ability" to control. They each accept too that s 37 applies not only to a PCBU's own workplaces, but also to those workplaces that are not a PCBU's own, given the provision refers to a PCBU who manages or controls "a workplace". Indeed, such was the extent of the apparent common ground that Ms Reed KC, counsel for WML, repeatedly said during the hearing before me that WML agrees with the Judge's interpretation of s 37 when he said (repeated here for convenience):

> To be caught by s 37, a PCBU must in fact be exercising active control or management of the workplace in a practical sense. Owning it is not enough. Making money from it is not enough. Merely being able to manage or control a workplace, but not doing so, is not enough.

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70 Legislation Act 2019, s 10.

71 *Hua v Department of Corrections* [2024] NZCA 59, [2024] 2 NZLR 204 at [32], citing *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [32] and [41]; *Fuati v Jin* [2023] NZCA 165 at [81]; *Kiwi v Commissioner of Police* [2023] NZCA 106; [2023] 2 NZLR 776 at [106] and *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR 1 at [88]–[94].

72 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 395. As the learned author writes "one is no longer confined to the words of the statute, but one is, as Felix Frankfurter said in 1947, confined by them. The text of the Act is, quite simply, the law.".

[161] I agree with the parties on all these points. As both rightly acknowledge, the legislative history shows that the Judge was right to say that s 37 is concerned with "active" control or management, "in a practical sense".

[162] As noted, HSWA is modelled on Australia's "model" workplace health and safety law. The equivalent to s 37 of HSWA is s 20 of the "model" law:

> **20 Duty of persons conducting businesses or undertakings involving management or control of workplaces**
>
> (1) In this section, person with management or control of a workplace means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include:
>
> (a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or
>
> (b) a prescribed person.
>
> (2) The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.

[163] At its first reading, the Health and Safety Reform Bill was cast in similar terms: it described the PCBU duty-holder as one "with management or control of a workplace". However, at the second reading, the language was changed to the present: a PCBU "who manages or controls".

[164] This change followed – at least in part – from advice to the Transport and Industrial Relations Committee (the Select Committee tasked with reviewing the Bill) from MBIE. MBIE's advice was that:[73]

> (a) submitters considered the nature of the s 37 duty to be "very broadly framed" and "onerous" for "workplaces where the PCBU does not always have continuous or active control, such as public parks, conservation areas, and remote areas of farms";[74] and

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[73] Ministry of Business, Innovation and Employment *Health and Safety Reform Bill – Officials' Report to the Transport and Industrial Relations Committee (Part A)* (19 March 2015).

[74] At [103].

(b) a change in wording to "who manages or controls" would clarify that the relevant duty-holder was a PCBU "who manages or controls, rather than any PCBU with the ability to manage or control" and would "signal that these duties were concerned with active control of the workplace".[75]

[165] The Committee accepted MBIE's advice and the rationale for it. In its own report back to the House, it said:[76]

> We recommend amending [the clauses that would eventually become ss 37 and 38], which set out the duties of PCBUs who manage or control workplaces, or fixtures, fittings, or plant at workplaces. We recommend making the language in these clauses active. The duties should apply to PCBUs who manage or control workplaces, fixtures, fittings, or plant in a practical sense, rather than PCBUs who merely have an ability to manage these things.

[166] This change of wording was further reflected on by the Hon Michael Woodhouse, the then Minister of Workplace Relations and Safety, at the second reading of the Bill. The Minister said:[77]

> Changes have also been recommended by the [Select Committee] to address concerns that a workplace could be considered a workplace for all time, even after work is finished or where the person conducting a business or undertaking does not have active control. The committee agreed that such an interpretation could have a considerable impact on the obligations of persons conducting a business or undertaking who manage or control such workplaces, and it has changed the definition of "workplace" to address this. Similarly, changes have been made to make it clear that persons conducting a business or undertaking who manage or control workplaces will not owe this duty to those who are in the workplace for unlawful purposes.
>
> The duty of persons conducting a business or undertaking who manage or control workplaces has also been amended to recognise the practical dynamics of this duty when it applies to farming situations. In such circumstances it has been made clear that the duty of persons conducting a business or undertaking who manage or control workplaces will extend to the buildings and structures in the surrounding areas. The farm workplace for these purposes will not include other parts of the farm when work is not being carried out there. This provides farmers with greater clarity about their obligations. Many farmers generously provide access to, and through, their land for recreational activities. This change will provide assurance to everyone to ensure, for example, that cycleways, walking tracks, and beach access through farmland is not negatively affected by unclear legislation.

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75 At [105]. See also page 19.
76 Transport and Industrial Relations Committee *Health and Safety Reform Bill* (24 July 2015) at 8.
77 (30 July 2015) 707 NZPD 5520.

[167] The legislative history is thus revealing in two ways. First, it shows that Parliament was concerned with imposing the s 37 duty on PCBUs "who manage or control" a workplace as part of their own businesses or undertakings, as a plain reading of s 37(4) suggests. Indeed, as the very title to its Australian "model" law equivalent says, on those "persons conducting businesses or undertakings *involving* management or control of workplaces".

[168] Secondly, it shows that Parliament was anxious to adopt legislation that was focused on PCBUs possessed of "active" management or control of workplaces. It indicates that Parliament was deliberate in its use of the words "who manages or controls" in order to limit the potential scope of PCBUs that might otherwise have been captured by the provision simply because they possessed some element of management or control.

[169] Both parties responsibly acknowledge, however, that while Parliament clearly intended to capture PCBUs with "active" management or control, the use of the word "active" is liable to mislead. As WorkSafe submits, if the question is whether a PCBU "actively" manages or controls a workplace, a PCBU could avoid having a duty under s 37 by electing not to exercise any control. And, notwithstanding Parliament's focus on "active" control or management, such an interpretation could not have been what it intended, given it would perversely incentivise PCBUs "to do nothing to avoid having to do anything".

[170] Notwithstanding the use of the word in the legislative history, I share the parties' concerns. Plainly, it would be inconsistent with the overarching purpose of HSWA, and the specific purpose of s 37, if PCBUs could escape a duty to ensure the safety of workplaces within their management or control simply by failing or neglecting to "actively" manage or control them. The purpose of the Act is surely to provide that a PCBU's failure in that regard should be proof of, rather than an escape from, liability.

[171] However, while I appreciate that the legislative history shows that the phrase "who manages or controls" was adopted to exclude "PCBUs who merely have an ability to manage", I disagree that focusing on a PCBU's "ability" (or "power" or

"capacity") to control or manage a workplace is the wrong inquiry. It bears repeating that the language "who manages or controls" was adopted to exclude PCBUs with the "ability to manage or control" because Parliament was concerned to impose the duty on those who *have* active control. But whether a PCBU has "active control" is a different question to whether they then exercise that control to ensure the safety of a workplace. If a PCBU has such control and fails to use it in that way if reasonably practicable to do so, they will be liable for a breach of s 37. The assessment of a PCBU's ability to take active control is therefore a useful touchstone.

[172] In that regard, I consider *Moore v Adelaide Brighton Cement Ltd* – a case referred to by WML – to be instructive.[78] There, the Court said – in respect of the then Occupational Health, Safety and Welfare Act 1986 (SA):[79]

> … the purpose of the legislation is to sheet home the responsibility for safety to the person appropriately and actually possessed of control.

[173] Notwithstanding that the Court in *Moore* was speaking to different legislation, I agree with WML that this language aptly captures what Parliament was trying to achieve here with HSWA and with s 37. That is, insofar as the object is to capture PCBUs who manage or control a workplace, the standard of management or control is, as the Judge said, those who were "actually possessed" of "active" management or control in a practical sense.

[174] The more difficult question is what it actually means to "manage or control a workplace", as distinct from the standard of management or control required for a duty under s 37 to arise. That is, what would it mean for a PCBU to actually "manage or control" a workplace in practice? Or, put another way, what would such management or control actually look like? It is on this question that the parties' differences are more acute.

[175] WorkSafe's position is that s 37 is concerned with management or control of the workplace as distinct from the work taking place there. And, in the case of a PCBU who "manages or controls" the workplace of another, it says that the inquiry is with

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78 *Moore v Adelaide Brighton Cement Ltd* [2004] SAIRC 78.
79 At [14].

whether the PCBU manages or controls that other PCBU's workplace as opposed to whether it controls that other PCBU's work. ACAT advances a somewhat similar position: it submits that s 37 is concerned with the risks of the workplace rather than the work itself, although it acknowledges that the distinction can be difficult to draw in practice.

[176] WML accepts that there may be occasions where management or control of a workplace will be different to management or control of the work taking place there as, for example, where a PCBU owns a building that another PCBU uses as its workplace. However, it says that in the circumstances of this case – involving bare land – that this is a distinction without a difference.

[177] In *Inspector Nicholson v Pymble No 1 Pty Ltd*, the Industrial Court of New South Wales confronted this problem as it arose in the language of s 10(1) of the Occupational Health and Safety Act 2000 (NSW).[80] That provision relevantly provided:

> A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.

[178] Relevantly, that Act included a duty on employers to ensure the health, safety and welfare at work of all its employees, similar to s 36. After a review of the authorities referred to it and a consideration of the purpose of the Act, the Industrial Court said:[81]

> It may be concluded, therefore, that "control" involved an ability to direct or command the way *in which work was performed*. It was necessary that the defendant have "the ability … to compel corrective action to secure safety".

[179] The Court went on to approach the issue of whether the defendant company had control of the premises (in that case, a construction site) by asking whether it "could have directed or commanded that the state of affairs on the building site be rectified".[82] The Court said:

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80 *Inspector Nicholson v Pymble No 1 Pty Ltd & Molinara (No 2)* [2010] NSWIRComm 151.
81 At [64] (emphasis added).
82 At [80].

> 83 I am unable to conclude that there is any basis upon which it could be determined that Pymble No 1 *had any ability to give directions to anyone performing building work at the construction site* in connection with any matter involving any aspect of the building works. There is no evidence, nor could it be concluded, that Pymble No 1 had the ability to compel the taking of any action or to compel that anyone desist from taking any about safety matters, whether under the contract or otherwise.

[180] The Court's interpretation and conclusion was confirmed on appeal. The appeal Court agreed that the defendant company "had no capacity to oversee or effectively manage the building works".[83] The appeal Court also referred, approvingly,[84] to another case – *WorkCover Authority of New South Wales (Inspector Callaghan) v Rowson* – where the defendant had been found not to have had control of a site that he owned and which was being repaired by a contractor because he had "no control over the method of work which resulted in the fatality".[85]

[181] Thus, *Pymble* would appear to be authority for the proposition that a PCBU will have management or control of a workplace if it can control or manage the way in which work is performed at that workplace. Or, put another way, that it will have control if it has control over what is happening at the workplace in order to compel corrective action to ensure safety.

[182] By contrast, a more limited approach was taken by the Court of Appeal of England and Wales in *King v RCO Support Services Ltd*.[86] In that case, the relevant regulation provided that:

> … every person who has, to any extent, control of a workplace … shall ensure that such workplace … complies with any requirement of [the Workplace Regulations].

[183] The relevant requirement in that case was a requirement to, so far as reasonably practicable, ensure that "every floor in a workplace … be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall". The

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83 *Inspector Nicholson v Pymble No 1 Pty Ltd & Molinara (No 4)* [2011] NSWIRComm 96 at [35].

84 At [31].

85 *WorkCover Authority of New South Wales (Inspector Callaghan) v Rowson* [1994] NSWIRComm 199, [1994] NSWIRC 76 at 7. I acknowledge however that in *Rowson*, the relevant legislation expressly excluded the possibility that the defendant owner and contractor could be jointly liable. The relevant legislation also provided that the contractor became the relevant occupier by virtue of being in a contract for the maintenance or repair of the premises.

86 *King v RCO Support Services Ltd* [2001] ICR 608 (CA).

issue of what "control" meant in the context of that regulation surfaced because the claimant sued his employer, and a bus company which had engaged his employer, to supply cleaning services at one of the bus company's yards. The claimant sued the bus company because he slipped on ungritted ice on the yard while working there, suffering an injury.

[184] The first instance Court held that the regulation did not apply to the bus company because the ice was not within the control of the bus company and that the "duty of dealing with it" fell on the claimant's employer. The Court of Appeal rejected this reasoning. It held that the bus company was "someone" with a degree of control over that workplace (its own bus yard) and so the relevant regulation did apply to it.[87] Indeed, it seems from how automatically it reached that conclusion that the Court considered it axiomatic that the bus company had control of the claimant's then workplace given the work was taking place on *its own* yard. However, as the regulations also provided that the requirement needed to relate to matters within the bus company's control, it found that the bus company was not liable given the slippery ice was the very thing which the claimant's employer was engaged to deal with (and thus that it was not something which related to a matter within the bus company's control).[88]

[185] That decision, by contrast, suggests that "control" of a workplace is not limited simply to what happens at the workplace itself and that, if anything, control of a workplace follows from the fact of ownership of it.

[186] WorkSafe submits that if "management or control of a workplace" is interpreted to mean "management or control of what is happening at the workplace", this would effectively render s 37 redundant. This is because management or control of what is happening at a workplace (that is, the work) is the province of s 36. It thus submits that this could not have been what Parliament intended.

[187] The cases I have referred to demonstrate that "management and control of a workplace" might be viewed as something of a continuum on a spectrum of increasing

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87 At [35].
88 At [35]–[36].

intensity. At the bottom end, a PCBU may be said to have "management or control" simply by virtue of ownership of a workplace alone. At the other end, a PCBU may be said to have "management or control" because they have control over the work itself – that is, what is happening at the workplace.

[188] It is clear from the legislative history, however, that an interpretation which would include the former is not what Parliament intended: the concern is with a PCBU's capacity for "active" management or control "in a practical sense". And yet, as WorkSafe rightly emphasises, an interpretation focused solely on the latter would leave s 37 itself with little to do. This is because ensuring that *what happens* at a workplace is without risks to the health and safety of others is effectively what s 36 is designed to do. And, while HSWA provides that duties may overlap, it cannot be the case that Parliament legislated for a duty which is ultimately superfluous. A statute's words should not be read into redundancy.

[189] The need to avoid an interpretation that is either under or over inclusive necessitates, in my view, a cautious approach. The value of the common law method is that it proceeds incrementally and on a case-by-case basis. This ensures that the law remains flexible to circumstances that neither legislatures nor courts can foresee at the time. I consider that approach to be necessary here. The consequences of an under and over inclusive interpretation of s 37 will be profound. One particular reason for caution is that this issue of interpretation comes to the fore on remarkable facts: the licencing of an active volcano to third parties that, in turn, brought people to the Island. But another is that I have not heard argument on how any such interpretation might apply to commercial landlords and others who own not only land, but buildings, upon which the workplaces of others are situated. And because of this, I have not explored for myself what Parliament intended in this respect either.

[190] For that reason, I consider only the following should be said at this stage, consistent with the conservative approach inherent in the common-law method. In enacting s 37, it is clear that Parliament was concerned with imposing a duty on PCBUs who actively control or manage workplaces, in a practical sense. On that point I agree with the Judge. But, as the parties rightly acknowledge, it would be entirely contrary to the purposes of HSWA if PCBUs could avoid any duty simply by being

inactive or passive. The inquiry must, in my view, therefore be one of whether the PCBU has the power or capacity to actively control or manage the particular workplace in a practical sense.

[191] A central aspect of this inquiry must therefore be on what the workplace actually is (as the very thing that is being "managed" or "controlled") and the extent to which the PCBU's own business or undertaking involves (whether in whole or in part) the active management or control of that workplace in a practical sense. The need for there to be a link between a PCBU's own business or undertaking and their management or control of the workplace in question follows from the wording of s 37(4). Accordingly, I consider any inquiry as to whether a PCBU "manages or controls" a workplace under s 37 to require a focus on three things (although all may be answered simultaneously):

(a) first, what is the workplace for which a PCBU is alleged to owe a duty under s 37?

(b) secondly, what would it mean for a PCBU to have the power to actively manage or control that particular workplace?

(c) and, finally, did a PCBU in fact have the power to actively manage or control that particular workplace (whether in whole or in part) as part of its own business or undertaking?

[192] I consider the focus on the workplace to be especially important because what it means to "manage or control a workplace" will depend of course on what the workplace actually is. So, for example, what it means to manage or control a building will be different to what it means to manage or control – as here – bare land.

[193] However, the emphasis on the workplace should not – in my view – lead to the inherent dangerousness or riskiness of that workplace (that is, the nature of the hazard it presents) dictating the analysis. Provided the focus is on the type of workplace that a PCBU purportedly manages or controls for the purposes of s 37 (for example, a building versus bare land), the inherent dangerousness or riskiness of that workplace

is otherwise irrelevant. As ACAT submits, whether WML had management or control of Whakaari for the purposes of s 37 "should be the same whether Whakaari is an active volcano with tours to see the crater or a benign predatory-free island sanctuary with tours for those wishing to see the rare native birds".

[194] Before embarking on whether WML managed or controlled the walking tour workplace for the purposes of s 37 in light of these principles, it is necessary to make one final point. WML submits that s 37's meaning is also informed by the Adventure Activities Regulations; WorkSafe's Safety Audit Standards; WorkSafe's guidance to landowners at the time of the 2019 eruption ("the WorkSafe Landowner Guidance") and MBIE's review of the Adventure Activities Regulations following the 2019 eruption. In essence, it says that all of these instruments and MBIE's review, demonstrate that as a matter of policy, it is activity operators – rather than the landowners whose land such activities are conducted on – who are, and should be, possessed of ensuring the health and safety of those participating in adventure activities. For this reason, it submits that this context militates against an interpretation of s 37 that would impose such a duty on landowners or a finding that WML had such a duty in this case.

[195] With respect, I consider the usefulness of this broader "regulatory context" to the question of the proper statutory interpretation of s 37 rather limited. Both the Adventure Activity Regulations and the Audit Standards are relevant to the specific context of this case, but the question of statutory interpretation is broader. The inquiry required by the words "who manages or controls a workplace" must be the same across the different contexts in which s 37 will apply.

[196] Furthermore, the WorkSafe Landowner Guidance to which WML refers militates against its argument on the question of duty. This is because that guidance is as follows:

> **7. So what do PCBUs actually have to do?**
>
> PCBUs can often meet their duties in simple ways (eg passing on warnings about work-related hazards through signs, emails, in person or on the phone).
>
> It's possible some risks will remain even after the PCBU has done what is reasonably practicable.

> They don't have to manage the risks of the recreational activity. That's the responsibility of the person doing the activity.
>
> The only exception is when the PCBU also provides the activity. Then they're also responsible for managing the activity's risks, so far as reasonably practicable.
>
> …
>
> **8. What happens when a landowner charges for recreational access?**
>
> A landowner that charges for access to their land is recognised as a PCBU under HSWA. They can meet their duties in the same way as any other PCBU.
>
> As with all PCBUs, they don't have to manage the risks of the recreational activity. That's the responsibility of the person doing the activity.

[197] If anything, the WorkSafe Landowner Guidance presupposes the existence of a duty on landowners who grant access to their land for recreational purposes by others, given it speaks to how such PCBUs can "meet their duties". The guidance would thus suggest that PCBU landowners like WML have a duty under s 37. But, as WorkSafe responsibly submits, the question of statutory interpretation and whether WML had a duty under s 37 is one for the Court.

[198] For similar reasons, I consider WML's reliance on MBIE's review of the Adventure Activities Regulations following the 2019 eruption to also be of limited utility.[89] In that review, MBIE was tasked with reviewing whether weaknesses existed in the Adventure Activities Regulations as they applied to activities taking place in naturally hazardous environments. As part of this, it considered whether to create a regulatory duty requiring landowners and managers who provide access to their land to either provide information about natural hazards on their land to operators using their land or to assess and manage the risks of such hazards when granting permission for adventure activity operators to conduct their operations. MBIE ultimately declined to recommend the adoption of either of those regulatory duties due to "the implementation costs and potential for negative impacts on access to activities that would result".

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[89] Ministry of Business, Innovation and Employment *Targeted Review of the Adventure Activities Regulatory Regime* (December 2020).

[199] WML submits that the express rejection of these regulatory duties therefore tells against an interpretation of s 37 that recognises a landowner as having a duty under that provision simply because it permits an adventure activity operator to operate on its land. The difficulty with this argument is that – as WorkSafe emphasises – MBIE expressly acknowledged that "landowners and managers have existing requirements under [HSWA] to manage risks, as a PCBU with management or control of a workplace …". Indeed, MBIE acknowledged in its advice that the "extent of" the s 37 duty was likely to be an issue in this very case. Accordingly, MBIE's decision not to recommend the adoption of these regulatory duties does not assist WML. Rather at its very highest it shows that MBIE considered it to be a live issue whether landowners who permit the use of their land for adventure activities by others can be considered to be PCBUs who have "management or control" of the adventure activity operator's workplace.

[200] In short, but for the sake of completeness, I do not consider this broader regulatory context to be instructive to the question of statutory interpretation or the specific question of whether WML managed or controlled the walking tour workplace. I consider – as I shall come to – this regulatory context to be more instructive to the question of what a duty under s 37 would have required WML to do, if indeed it had such a duty.

[201] Accordingly, I now turn to the central question in this case – did WML manage or control the walking tour workplace for the purposes of s 37?

Did WML manage or control the walking tour workplace?

[202] While WML accepts that there will be occasions in which active control of the work is different from active control of the workplace itself, it says – as already noted – that this is a distinction without a difference in this case. It submits that there was nothing on the walking tour workplace to be controlled or managed other than the work itself and that for this reason the work and the workplace were "interdependent and indivisible". It says that it did not actively manage or control the walking tour workplace because:

(a) it did not influence or control the tour operators' activities in carrying out the work;

(b) the tour operators could determine all aspects of their operations on Whakaari if they simply met the terms of their licence; and

(c) the licence agreements were simply precursors to access, meaning that WML did not dictate the "day-to-day" in anyway.

[203] WorkSafe, as acknowledged, says that this confuses s 37 for s 36 and that such a position would leave s 37 redundant. It says that in this case, WML had management or control of the walking tour workplace for the purposes of s 37 because:

(a) it had control over the Island and decided to licence it out for use by the walking tour operators;

(b) it exerted management and control through the terms of its licence agreements; and

(c) it exerted management and control through its actions after granting access.

[204] WorkSafe also says that it is important to bear in mind two factors: first, that WML was the only one with oversight of the societal risk that allowing the public to visit Whakaari presented and secondly, because its business was to make money from permitting tour operators to take people there. It says that these two factors further inform why WML had management or control for the purposes of s 37.

[205] With respect, I am unable to accept WorkSafe's submissions. My interrelated reasons follow.

(a) The grant of access

[206] First, I consider WorkSafe's reliance on the grant of access to be entirely contrary to the legislative history of the provision.

[207] While management or control of a workplace will often be distinct from management or control of the work taking place there, I agree with WML that it is difficult to see a meaningful distinction between the two in this case. As WML rightly emphasises, aside from granting access to the Island in the first place, there was nothing for WML to manage or control on the Island but the work itself.

[208] WorkSafe says, as noted, that this renders s 37 redundant. Notwithstanding that a PCBUs duties under HSWA can necessarily overlap, I consider that submission to have merit insofar as it applies to situations where there is something on the land which a PCBU might realistically manage or control. So, for example, it is reasonable to suppose that if a PCBU owns a building that it leases, it might have a duty under s 37 to ensure that the building is structurally sound for the workplaces of its tenants.[90] For that reason, one can realistically see how defining "management or control of the workplace" as tantamount to "management or control of what happens at the workplace" to be at risk of being underinclusive and contrary to what HSWA was ultimately enacted for.

[209] But in this case, there was nothing for WML to manage on the Island (other than granting access to it in the first place) beyond the work itself. And WML had to have "managed" or "controlled" something other than simply granting access to the walking tour operators, given granting access is merely an incident of ownership which the legislative history shows Parliament sought to exclude. Furthermore, s 37 sits within the "upstream" duties that require PCBUs to ensure safety insofar as they "do something". Thus, there must be "something" for the PCBU to manage or control. Indeed, if WML truly did have an obligation to ensure that the workplace was without risks to health and safety, it needed to have some levers to pull in order to achieve this. In short, it needed to have something to manage or control at the workplace in order to meet its duty to ensure health and safety.

[210] For that reason, I consider the concerns that otherwise arise with conflating the work and the workplace to be limited in this context, where the PCBU is said to manage or control bare land. Moreover, it bears repeating that a PCBU can have more

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[90] For the avoidance of doubt, I do not purport to decide this point. It was neither an issue in this case nor the subject of argument before me.

than one duty and that a duty can be owed by more than one PCBU. This necessarily suggests that an overlap in duties was contemplated by Parliament in certain contexts.

[211] Accordingly, on the approach I have referred to, the first two questions are what was the workplace and what would "active" management or control of it look like for the purposes of s 37? The workplace here was where the walking tour operators were permitted to conduct tours, going ultimately from the wharf or helicopter landing zones to the crater lake and back. There was nothing on this workplace to manage, save for a container that had been placed there by GNS in conjunction with the NZ Defence Force. And the evidence in respect of that container shows that it was something managed and controlled by the tour operators as opposed to WML.

[212] ACAT submits that granting access to another PCBU is best seen as the conduct which creates the workplace, but that this conduct should be seen as distinct from control of the workplace after access is granted. It submits that the inquiry should thus be on whether the PCBU has active management or control of the workplace *after* it grants access to its land for that other PCBU's workplace to be created.

[213] As I have explained, the legislative history supports this. The legislative history shows that Parliament consciously and deliberately chose the words "who manages or controls a workplace" to exclude those who merely had an ability to exercise some element of management or control. Those who can grant access to their land simply by virtue of their ownership fall squarely within that category.

[214] In this case, WML controlled the workplace through granting access insofar as the grant of access created the walking tour workplace. But the grant of access did not give WML the ability to manage or control what happened on the walking tour workplace and certainly not in an active or practical sense after it was created. As ACAT submits, all landowners can control who accesses their land. It does not follow that such landowners therefore have power to actively and practically manage or control what happens on their land following access being granted.

(b) The terms of the licence agreements

[215] Secondly, I am unable to accept that the terms of WML's licence agreements or the fact that its own business was to generate revenue through them meant that WML had management or control of the walking tour workplace for the purposes of s 37 either.

[216] WorkSafe's argument under this heading is that WML had management or control under s 37 because its licence agreements stipulated who, where and under what conditions Whakaari was accessed. It emphasises that the agreements only permitted the tour operators to take tourists to "the part of Whakaari that is safe to walk on within the lower slopes of the crater walls". It also emphasises that the agreements required tour operators to ensure that:

(a) no person was taken to Whakaari without a thorough understanding of the risks and dangers inherent on landing on an active volcano, and a written acknowledgment to that effect;

(b) tour operators obtained independent advice regarding volcanic and seismic activity levels;

(c) tours operators monitored the risks and dangers of visiting Whakaari to ensure they were reasonable for visitors;

(d) no tourist was taken to Whakaari if, in the tour operator's view, the risks and dangers were unreasonable or made a visit imprudent; and

(e) all tourists were properly equipped to manage hazards, including by providing suitable clothing, footwear, gas mask and hard hat.

[217] WorkSafe also emphasises that the tour operators' obligations were intended to apply in respect of every tourist taken to Whakaari and that if a tour operator failed to comply, WML had a right to terminate the agreement.

[218] I consider *Pymble* to be instructive here. In that case, the defendant was the owner of a construction site. The defendant was charged for breach of its duty, as a person who had "control of premises used by people as a place of work", to ensure that "the premises" were safe and without risks to health. The defendant had engaged a contractor to carry out certain construction works at the site. The construction site was unsafe because there were subcontractors and employees of those subcontractors who were required to work at six metres or greater from ground level without any fall prevention system in place. The issue was whether the defendant, as the owner of the premises, had "control of" the premises.

[219] The contract between the defendant and its main contractor imposed an obligation on the contractor to "maintain a satisfactory occupational health and safety system on site". The prosecutor argued that this obligation, and the defendant's ability to terminate its contract for failure to do so, meant – among other reasons – that the defendant had the requisite "control of premises". The Industrial Court rejected the argument. In light of the fact that the test was whether the defendant could direct or command the way in which the building works were conducted, it noted that there was no provision in the contract that would have enabled the defendant to direct that work cease instantly, nor any obligation on it to visit the site or seek access to it.[91]

[220] I consider the same approach should apply here. Aside from creating the walking tour workplace in the first place, there was nothing in these licence agreements which gave WML the ability to direct and control what was happening at the workplace day to day. Put another way, there was nothing which gave it an "active" and "practical" ability to ensure corrective action to secure safety. The ability of WML to terminate or threaten to terminate the licence agreements depended on the licensee walking tour operators committing a material breach of their agreements in the first place. But there was no practical mechanism for WML to ensure that its licensees were adhering to their obligations, or to learn of a breach. From a practical perspective, WML would have only learnt of any such breach from customers of the tour operators, other tour operators or perhaps from regulators such as WorkSafe itself. The ability of WML to terminate or threaten to terminate was thus entirely reactive.

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91 *Inspector Nicholson v Pymble No 1 Pty Ltd & Molinara (No 2)*, above n 80, at [85].

WML could not have said on any day to tour operators "don't go" without reason. And thus – even leaving aside any issue about whether WML could have terminated its licence agreements effective immediately on written notice given the Property Law Act 2007[92] – the ability to terminate did not give it the ability to manage or control what was happening at the walking tour workplace. Indeed, the right to terminate access under its licence agreements was essentially an incident of its right as a landowner to permit access.

[221] Furthermore, the number of visitors on the Island was – as WML says – controlled practically by the operators. It wasn't until almost a month later that WML would learn through its licence agreements just how many visitors there had been. And once the licence agreements were signed, WML had no rights under the licence agreements to direct the tour operators on how they conducted their activities on the Island in a practical sense. If the necessary standard of control is "active control in a practical sense", it is difficult to see how WML could have exerted this kind of control when it did not have the ability to suddenly refuse access to the Island for any reason, or the ability or means to command corrective action to ensure safety.

[222] Relatedly, I disagree with WorkSafe's submission that WML had management or control because it was the evidence of its health and safety expert, Richard Gibson, at trial that WML did. As a health and safety expert, Mr Gibson's expert evidence was germane to the question of how WML might reasonably have discharged its duties as a PCBU-duty holder if it had certain duties under HSWA. Mr Gibson's expert evidence was also germane to understanding what a risk assessment comprises and why it can be so important for a PCBU duty-holder to obtain one. But as WML submits, the question of whether it had a duty under s 37 is a legal question for the Court to determine. Indeed, it is one that primarily turns on the statutory interpretation of s 37. Thus, by itself, I do not consider Mr Gibson's evidence to justify finding that WML had a duty under s 37.

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92 WML notes that the Property Law Act 2007 may have prevented it from terminating its licence agreements effective immediately, given the provisions of that Act that require notice to be given. The submission was not advanced beyond this and it is unnecessary to decide whether, had it elected to do so, WML could have terminated for an irreparable breach effective immediately on written notice.

[223] Similarly, I am unable to accept WorkSafe's reliance on the evidence of Patrick O'Sullivan (who, as noted, was the General Manager of White Island Tours at the time). WorkSafe submits that Mr O'Sullivan's evidence supports a finding that WML was "the entity with overall control of the workplace" because, under cross-examination, Mr O'Sullivan said "… if an operator would not stop, the second step I think was ask the owners to stop them". WorkSafe submits that this indicated that White Island Tours saw WML as retaining ultimate control over access to Whakaari.

[224] The relevant portion of Mr O'Sullivan's cross-examination was as follows:

> Q. Of course, it wasn't for Whakaari Management to advise White Island Tours how to run its business. That was essentially none of its business, was it?
>
> A. Not in terms of day-to-day operations, no.
>
> Q. And Whakaari Management never advised White Island Tours how to run its business on a day-to-day basis?
>
> A. Not that I recall.
>
> Q. And Whakaari Management Limited never had any control over your business other than in the terms of this licence, did they?
>
> A. The only thing which I can recall is that under the, the emergency management plan there were steps which facilitated how, if an operator would not stop, the second step I think was ask the owners to stop them. Of course, all operators would stop if we were asked.
>
> Q. Yes, of course, and Whakaari Management have no power in this document to make you stop tours, did they?
>
> A. I'm not familiar enough with the document since I wasn't involved in its creation. I would need to probably have a big read again.
>
> Q. Of course I imagine that if Whakaari Management, or anyone for that matter said to you that it's a bit too dangerous to run tours at the moment, you would take that very seriously, wouldn't you?
>
> A. Yes, of course.

[225] With respect, the quoted excerpt shows that Mr O'Sullivan's evidence was more equivocal. In talking of asking the "owners to stop them", he was referring to the Whakaari Response Plan which provided that failing mutual agreement with tour operators, EMBOP would engage with "the island owners to gain agreement to restrict access". And the rest of the cross-examination shows that he did not explicitly accept

that WML had the power to stop the tour operators under the Whakaari Response Plan. Moreover, the mere fact that WML might have been viewed in this way does not – without more – mean that it necessarily had the requisite management or control required to be a duty-holder under s 37. And, of course, Mr O'Sullivan was simply speaking to WML's right to control access – an incident of ownership.

[226] There is in my view, however, another reason why the terms of the licence agreements were – and indeed should be – insufficient to impose a duty under s 37. In essence, WorkSafe's argument is that WML had management or control because it responsibly imposed obligations on its walking tour licensees aimed at ensuring that their own businesses were conducted safely. The corollary of that argument, however, is that if WML were less responsible, it would have escaped a duty under s 37. With respect, that cannot be right. It would be entirely antithetical to the purposes of HSWA if being responsible was a path to liability and being irresponsible (or electing not to be responsible) was an escape from it. As ACAT submits, this would lead to perverse incentives: landowners would either deny access to their land at all or fail to impose otherwise sensible conditions (such as a requirement to wear a helmet while climbing or wearing a flotation device while kayaking on their land).

(c) WML's actions after granting access

[227] Thirdly, I cannot accept that WML's actions after granting access showed that it "continued" to manage the walking tour workplace even after the licence agreements had been executed.

[228] WorkSafe's argument under this heading emphasises the following factors:

(a) WML maintained direct and continuing relationships with the tour operators. This included emailing them about signage and engaging in correspondence about registering tour operators as adventure activity operators.

(b) WML maintained control over infrastructure at Whakaari. While it did very little itself, it always approved what the tour operators wanted to do, including:

(i) supporting the placement of a shipping container on the Island;

(ii) supporting an application for funding to repair the wharf; and

(iii) permitting helicopter operators to upgrade their landing pads.

(c) WML entered into licence agreements with the tour operators when previous agreements expired.

(d) WML was "directly involved" in user group meetings, where various matters relating to management of tours were discussed.

(e) WML was copied into material correspondence from GNS relating to conditions on Whakaari and had, to a limited extent, engaged further with GNS about conditions from time to time.

(f) WML took an active role in developing tourism on Whakaari to bring in further revenue for its business and had considered new tours of the Island's gannet colony and overnight stays at the Island.

(g) WML engaged from time to time with various government bodies regarding access to Whakaari, including EMBOP, Whakatāne District Council, WorkSafe and the Department of Internal Affairs.

(h) WML engaged with the tour operators in regard to the calculation and payment of the commission that it was entitled to under the licence agreements.

[229] The question in this case is whether that evidence supports a finding that WML had actual, practical management or control of what happened at the walking tour workplaces. In my view, the evidence does not.

[230] First, there is no evidence that WML made decisions for the tour operators about their day-to-day work at any meetings that WML attended. Indeed, as WML emphasised, the contrary was often true. For example, in a user group meeting in 2015

(albeit outside the charging period), James Buttle suggested that tour operators put in place a "do and don't go" policy based on the Volcanic Alert Level System. The minutes recorded that GNS's representative explained that the Volcanic Alert Level System was more of a "heads up" warning system and that it was ultimately left to each operator to make the decision. I agree with WML that this indicated a distinct lack of active management or control.

[231] Secondly, the evidence from the two witnesses who could give evidence of any actual, practical control or management – Patrick O'Sullivan of White Island Tours and Dr Gill Jolly of GNS – support the inference that WML lacked the requisite control or management. Mr O'Sullivan's evidence – as set out at [224] – shows that WML had no powers over, or control over, White Island Tours' day to day operations, which is the very thing it would have needed to exercise control over in order to ensure safety in an active sense. White Island Tours was permitted to go anywhere within the terms of its licence and WML never sought to tell it where to land its boats. Mr O'Sullivan's evidence was also equivocal as to whether WML was empowered to stop tour operators from going to Whakaari at any given day under the EMBOP. And that equivocality is unsurprising when the evidence shows – as noted – that these decisions were often made collaboratively, and informed – as best possible – by the information provided by GNS. Other than the terms of its licence (with respect to granting access), the only other mechanism by which WML had control over White Island Tours's business was the Whakaari Response Plan, and that was only in respect of intervening if an operator refused to stop tours itself. Dr Jolly's evidence was to a similar effect. WML had no control over GNS's monitoring sites, nor where it went on the Island or what it did on it.

[232] Thirdly, WML's active role in "developing tourism" on Whakaari needs to be viewed in context. The real question here is whether this was either a means for it to exert management or control over what was happening at the walking tour workplace, or if it was symptomatic of this. Respectfully, it shows neither. First, as WML emphasises, the minutes of the relevant user group meetings show that the focus was on "enhancing" the tourist experience "outside the crater area", and thus away from the walking tour workplace. It was not, therefore, a means for exerting control over the walking tour operators while they carried out their work on the Island. Secondly,

I cannot accept that this evidence shows that WML was the masterminding operator here or that any such involvement should render it liable under s 37. To the contrary, the evidence shows that the responsibility for developing tourism in this way was a shared project between WML and other users.

[233] Ultimately, the evidence relied upon shows that WML carried out its role as an interested and engaged landowner. It attended user group meetings to keep abreast of what was happening on its land and kept in touch with GNS and other Government agencies for that purpose. It did not, however, have active management or control in the sense of being able to direct or control what happened on the walking tour workplace or, as in the case of GNS, the Island itself. Rather, my review of the documentary record leads me to the conclusion that it was the walking tour operators and other users of the Island (like GNS) who took the leading role. The evidence does not, in my view, support a finding that it exercised (or could have exercised) the kind of active management or control that is required.

(d) Money and societal risk

[234] Finally, I do not accept that WML had management or control of the workplace simply because it made money from charging for access to its land and or because it was the only entity with the ability to appreciate and understand the "societal risk" of permitting people to access the Island.

[235] I accept, as WorkSafe submits, that the money that WML made through its licence agreements is relevant to understanding what WML's business actually was. The central question however is whether WML had active management or control, in a practical sense, of the walking tour workplace. The relevance of the payment of money then lies in whether the receipt of money gave WML management or control of the walking tour workplace for the purposes of s 37. The payment of money in this case was in consideration for the grant of access to Whakaari. But it did not give WML more. As already explained, WML did not have the ability by virtue of its licence agreements to manage or control the walking tour workplace for the purposes of s 37.

[236] I accept too that it was important that the "societal risk" of permitting the public to access the Island was understood and managed, as opposed to the more individualised risk of allowing a particular person or set of people to visit the Island at a single point in time. But, to repeat, the question is whether the PCBU has management or control of a particular workplace for the purposes of s 37. As ACAT submits (and as already mentioned), that analysis should focus on the conduct of the PCBU rather than the nature of the hazard which a workplace might represent. A PCBU should not be rendered to have management or control of a workplace simply because the workplace poses a risk to the health and safety of others that needs to be managed. Rather, the analysis must begin with whether there was management or control in the first place. For that reason, I reject the submission that WML must have managed or controlled the walking tour workplace because it was an active volcano in need of risk management. With respect, that submission rather puts the horse before the cart.

[237] Finally, it is worth observing that in light of the proper test as applied to WML – whether it had the ability to direct and control what was happening at the walking tour workplace – the Judge himself concluded that the answer was "No". This is because the Judge rejected that WML had a duty under s 36 through its licence agreements, when it determined:

> (a) the places on Whakaari that those workers could go to (and therefore the places that the tourists could go to),
>
> (b) the circumstances under which those workers could go (namely, with a thorough understanding of the risks and dangers that are inherent in landing on and remaining on an active volcano),
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> (c) how those workers were to coordinate activities with other workers (including through user group meetings),
>
> (d) the minimum PPE that the workers had to provide to tourists, and
>
> (e) the requirement for workers to obtain acknowledgment from visitors that they were visiting Whakaari at their own risk.

[238] As WML emphasises, the Judge rejected that this gave WML the ability to influence or direct the workers of the tour operators. Rather, the Judge said (again, repeated here for convenience):

> [86] However, these are all pre-cursors to access. Individual tour operators could determine all aspects of their operations on Whakaari once they met these preconditions. The evidence established that, in practice, this was also true. In a fundamental sense then, WML did not influence or direct the tour operators' activities in carrying out work.

[239] It is difficult to see how, if WML did not "influence or direct the tour operators' activities in carrying out work" it could have had the kind of active management or control required.

[240] Accordingly, for all these reasons, I consider that WML did not have a duty under s 37 to ensure that the walking tour workplace was without risks to the health or safety of any person. It follows, therefore, that WML's appeal against conviction must be allowed.

If WML had a duty under s 37, did it breach it?

[241] Given my finding that WML did not have a duty under s 37 to ensure that the walking tour workplace, the means of entering and exiting it, and anything arising from it was without risks to the health and safety of any person, it is not strictly necessary to go on to consider whether – had such a duty been owed – it was breached. However, as this question also assumed much of the argument before me, and will no doubt be germane to any appeal against this decision, I shall proceed to consider it.

[242] Notwithstanding its position that no duty was owed, WML denies that it breached any such duty and challenges the Judge's finding that it did. Before turning to the specific challenges that WML now makes to that finding, it is necessary to provide some introductory context in order to understand its challenges on appeal.

WorkSafe's case, WML's defence and the Judge's reasons

[243] WorkSafe's case at trial was that WML had breached its duty under s 37 because it failed to:

(a) ensure that adequate risk assessments of the activity of conducting tours on Whakaari had been undertaken;

(b) consult with GNS, and consult, co-operate and co-ordinate with the PCBUs that conducted tours on Whakaari as to the hazards and risks posed to workers and tourists from volcanic activity;

(c) monitor and review known hazards when there was a change in Volcanic Alert Level and/or when a Volcanic Alert Bulletin was issued;

(d) ensure that workers and tourists were supplied with appropriate personal protective equipment ("PPE"); and

(e) ensure that there was an adequate means of evacuation from the Island.

[244] WorkSafe argued that WML needed to understand the "risks of its business", and that it should have done this by engaging suitably qualified experts to assist with a risk assessment of "the business of permitting tours to occur on Whakaari". This was because WML needed to recognise that it, and it alone, had "oversight of, responsibility for and control over the totality of tours on Whakaari". WorkSafe submitted that WML needed to appreciate that the risks of its own business were therefore broader than those of each individual tour operator given it was the only PCBU with oversight across the "total" or "societal" risk posed by Whakaari to those visiting it.

[245] Once WML properly appreciated this risk, WorkSafe argued that WML should then have taken the remaining reasonably practicable steps described. That is, it should have consulted with the tour operators as to the hazards and risks of Whakaari's volcanic activity and satisfied itself that appropriate controls had been implemented to ensure that anything arising from the workplace was without risks to the health and safety of any person. It submitted that WML could have done this by ensuring that people were given appropriate PPE and had an adequate means of evacuation. WorkSafe's case was that WML breached its duty because it never took any of these allegedly reasonably practicable actions.

[246] WML's defence at trial was that, insofar as it had a duty under s 37, none of these actions were reasonably practicable for it to take. It argued at trial that it was

not reasonably practicable for it to undertake a risk assessment, nor any of the further allegedly reasonably practicable steps that would have supposedly followed from a risk assessment. This was because of:

(a) its engagement with, and reliance upon, information provided by GNS;

(b) the requirements in its licence agreements and in its engagement with tour operators that individual tour operators undertake their own risk assessments;

(c) the existence of the Whakaari Response Plan and, in particular, the role of EMBOP; and

(d) the WorkSafe approved audits of White Island Tours for the purposes of White Island Tours' registration as an Adventure Activity operator, both before and after the 2016 eruption.

[247] Needless to say, the Judge disagreed. He concluded that it was "fundamental" that WML "engaged the necessary expertise to assess risk arising from the conduct of commercial tours on its active volcano".[93] Had WML done so, the risk assessment would have identified:

(a) the likelihood of an eruption occurring while tourists were on Whakaari,

(b) the degree of harm that might result (ie: the consequences),

(c) what WML knew, or ought reasonably to know, about:

  (i) the risk of such an eruption, and

  (ii) ways of eliminating or minimising the risk,

(d) the availability and suitability of ways to eliminate or minimise that risk, and

(e) after assessing the extent of that risk and the available ways of eliminating or minimising it, the cost associated with doing so, including whether the cost is grossly disproportionate to the risk.

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93 District Court decision, above n 4, at [60].

[248] The Judge found that this was a reasonably practicable step to have taken given:[94]

(a) WML understood "Whakaari and its eruptive history" due to its long association with the Island;

(b) WML had an existing relationship with GNS, which included knowing that it could supply the necessary expertise required;

(c) WML understood "the need for a good risk assessment"; and

(d) WML had the resources to engage the appropriate expertise.

[249] The Judge also disagreed with WML that the factors mentioned at [246] meant that it was not reasonably practicable for WML to have engaged its own risk assessment. He did so for the following reasons.

[250] First, the Judge considered the information provided by GNS, and WML's engagement with GNS, to be insufficient to "relieve WML of the need to ensure the necessary risk assessments were done".[95] He said:[96]

(a) The risk associated with WML's work was fundamentally different from that of GNS. GNS assessed risk to its own workers. It did not assess risk for or on behalf of tour operators individually. It did not assess the societal risk of multiple tours conducted by multiple operators to Whakaari.

(b) WML could not rely on GNS without having a clear understanding about what the qualitative risk assessments undertaken by GNS for its staff meant.

(c) The interaction between WML and GNS was not enough to amount to taking necessary expert advice on the risk of permitting tours to Whakaari. The information passing from GNS to WML was ad hoc, infrequent, unstructured, informal, and incomplete – when much more was required. It also occurred far less during the charge period than in the time prior.

(d) The information that GNS did provide to WML were not risk assessments, particularly given the complexity of the risk.

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94 At [62].
95 At [65].
96 At [65].

[251] Secondly, the Judge considered it insufficient for WML to rely on the risk assessments undertaken by the tour operators. He considered WML's "risk" to be "fundamentally different" to that of individual tour operators and noted that WML had not taken steps to "verify what the tour operators were doing to assess risk or to comply with the obligations imposed on them under the licence agreements".[97]

[252] Finally, the Judge rejected that it was sufficient for WML to rely on the Whakaari Response Plan, the EMBOP or on the WorkSafe approved audits of White Island Tours. However, his rejection of these factors centred on the significance of the eruption in 2016.[98] Prior to that eruption, he considered that WML may have been "absolved" of assessing risk, if it understood this to be the EMBOP's task. He also acknowledged that, prior to the eruption, WML should have been able to rely on the WorkSafe approved audits of White Island Tours. On this, he said:[99]

> WML and others should not be required to effectively audit an audit, particularly when they did not have the expertise to do so. They should have been able to rely on those audits, in the absence of any information that they were in some way incomplete. There was no such information. The audits did not include [White Island Tours'] processes for assessing the risk of an eruption while tourists were on the island. This was an astonishing failure, contributed to by WorkSafe itself. It made the audits worthless. WML and others were unaware of that failure. So, to the extent that WML would have understood [White Island Tours] were assessing risk, it would not have been reasonable to require WML to have to do the same thing.

[253] In light of those considerations, the Judge noted that hindsight was "perfect and often artificial". For that reason, he said that "to a point", WML could perhaps have taken "some comfort from responsibilities assumed by others, or stated to be assumed by others, in assessing risk on Whakaari". He said that WML "could then reasonably expect that it need not take steps that it may otherwise be required to take".[100] But the Judge considered that things changed after the 2016 eruption. He said:

> [71] If it did take that comfort, it should have all ended with an eruption on Whakaari on 27 April 2016, which generated a pyroclastic density current. By then [White Island Tours] had been audited. By then the Response Plan was operating. Thankfully, the 2016 eruption occurred during the night when no

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97 At [66].
98 At [71].
99 At [68]–[69].
100 At [70].

people were on the island. Consistent with what GNS has always said about Whakaari, it was unable to predict that eruption. It had been at VAL1 at the time. Had people been on the island, the eruption would have been life-threatening.

[72] What should then have been obvious to every Whakaari stakeholder was that any risk assessment and risk management processes in place had failed. They would not have prevented serious injury or loss of life had tours been operating on the island at the time. In WML's case, it should have appreciated it could no longer rely on risk assessment work being done by others to relieve it of its own obligation in relation to risk. Whatever it thought was in place prior, it needed to stop and re-evaluate. As a bare minimum, it needed to engage volcanology and health and safety expertise to fully understand what its obligations were and to ensure that it was doing what was necessary to meet them. That included assessing risk.

[73] It is clear from WML's interview that it did not appreciate this was its duty. There is no evidence that it deliberately ignored its duty. However, that further illustrates the need to have taken expert advice right from the outset. Its failure to do so then, and at any time since, was always within its control. It was a reasonably practicable step it should have taken to ensure it met its duty. This was a major failure and amounts to a breach of its duty under s 37.

[254] On the strength of that finding, the Judge considered the further particulars against WML to also be proven.[101] WML could not, he concluded, have properly taken any of those further steps "without knowing clearly what the risk was".[102]

WML's challenge on appeal

[255] WML accepts that it never obtained a risk assessment for its own business – that of granting licences for walking tour operators to conduct walking tours on Whakaari for a fee. Rather its challenge to the Judge's finding is that this was not a reasonably practicable step for it to have taken. WML submits that the Judge erred in concluding that it was by incorrectly finding that:

(a) it should have undertaken its own risk assessments following the 2016 eruption;

(b) it could not rely on the WorkSafe approved audit of White Island Tours; and

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101 At [74].
102 At [75].

(c) it could not rely on EMBOP, despite the Whakaari Response Plan or EMBOP's statutory role.

[256] WML submits that the Judge further erred in his finding that it failed to take the additional allegedly "reasonably practicable" steps with which it was charged because the Judge failed to adequately consider those other particulars. And, as a broader matter, WML emphasises that the Judge erred as a matter of law when he described its duty as being to ensure, so far as was reasonably practicable, that "the health and safety of persons that it had permitted to be on Whakaari was not put at risk from work carried out as part of the business or undertaking". WML emphasises that this is the language of s 36 – a duty which the Judge found WML not to have had – rather than the language of s 37, with which he was concerned.

[257] While WML's four grounds of appeal under this heading are distinct, the first three all principally relate to the Judge's finding that it was reasonably practicable for WML to have undertaken a risk assessment of its own business. The last – that the Judge failed to adequately assess the remaining particulars – relates to the Judge's finding that WML failed to take those further allegedly reasonably practicable steps.

[258] Accordingly, this aspect of the appeal turns principally on whether it was reasonably practicable for WML to have undertaken a risk assessment for itself and, depending on the answer to that question, whether the Judge erred in his conclusion that the remaining particulars should also have been complied with in the event that WML did have a duty under s 37.

Was it reasonably practicable for WML to obtain a risk assessment for its business?

[259] WorkSafe submits that it was not only reasonably practicable but indeed fundamental that WML obtain a risk assessment for its business. The crux of its submissions on this point come down effectively to three planks:

(a) First, this was the expert evidence of Mr Gibson, its health and safety expert. Mr Gibson's evidence was that WML needed to obtain a detailed risk assessment from suitably qualified experts in volcanology and health and safety. The risk assessment needed to be specific to

WML's "venture" and needed to analyse risk from three perspectives: that of the visitor, the worker and society. The third perspective – concerned with society in general – was critical given WML was the only PCBU in a position to assess the risk that arose from "the totality of tourism" on Whakaari.

(b) Secondly, it was unreasonable for WML to rely – in lieu of obtaining its own risk assessment – on GNS, the tour operators, EMBOP, the Whakaari Response Plan and the fact that White Island Tours was an approved Adventure Activity Operator, whether before or after the 2016 eruption. Neither GNS or the tour operators were concerned with the "societal risk" of allowing all workers and visitors onto the Island, and the audits of White Island Tours neither considered nor focused on this critical factor. While the EMBOP was responsible for "managing the hazard and risks associated with Whakaari" under the Whakaari Response Plan, its statutory functions did not derogate from WML's duty under s 37 of HSWA. And, in any event, the Whakaari Response Plan was concerned with "readiness and response" rather than risk reduction.

(c) Finally, the eruption in 2016 put beyond doubt that WML "could no longer rely on risk assessment work being done by others". It was wrong to say that after this event, the highest levels of government concluded that tour operators could continue as usual. The eruption showed that the Whakaari Response Plan had failed and that even an audited safety management system had not resulted in sufficient controls to eliminate risk. And while the 2016 eruption may have been different to the 2019 eruption, none of these differences reinforced the false perception of tour operators that there would be advanced warning before potentially fatal eruptions.

[260] WML's essential argument in response is that in the circumstances of this case it was entitled to take comfort in EMBOP's role, the Whakaari Response Plan and in the fact that White Island Tours had been approved twice for registration as an

Adventure Activity Operator, both before and after the 2016 eruption. It contends that the Judge erred in finding to the contrary and that he was led into this error through "hindsight bias" in respect of the eruption in 2016. WML also submits that Mr Gibson's evidence should be viewed sceptically given that he had inappropriately opined on what were effectively issues of statutory interpretation in respect of whether it owed a duty under s 37 at all.

[261] The question here is whether it was "reasonably practicable" for WML to have obtained a risk assessment (or indeed, risk assessments) for its business of permitting tours to occur on Whakaari. Whether it was "reasonably practicable" turns on whether – at the relevant time – this was something reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters. As s 22 provides, all relevant matters include (but importantly are not limited to):

> (a) the likelihood of the hazard or the risk concerned occurring; and
>
> (b) the degree of harm that might result from the hazard or risk; and
>
> (c) what the person concerned knows, or ought reasonably to know, about—
>
> (i) the hazard or risk; and
>
> (ii) ways of eliminating or minimising the risk; and
>
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
>
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[262] I agree with WML that – in the circumstances of this case – it was not reasonably practicable for it to obtain its own risk assessment (or, indeed, risk assessments) for the business of permitting others to access Whakaari. I say this for two main reasons: first, because of the nature of WML's business and secondly, because I do not consider its reliance on Government agencies to have been unreasonable. I take each in turn.

(a) WML's business

[263] The assessment of what is reasonably practicable must be viewed in light of a PCBU's actual business or undertaking at the time. Here, WML's business was to permit commercial walking tour operators to undertake walking tours on the crater floor of Whakaari, subject to the terms of a licence agreement, in consideration for an annual fee and commission per tourist. In short, its business was effectively that of a landowner permitting access to other parties more specialised and capable of understanding the risks of the activity that those parties wanted to undertake on its land, to its land, for a price.

[264] It is here that I consider WorkSafe's Landowner Guidance – that is, its Policy Clarification with respect to "Recreational access and HSWA" issued in May 2019 – and its associated "Frequently Asked Questions" document to be instructive. As noted, in that, WorkSafe advised that where a PCBU permitted access to its land for recreation, the PCBU was only responsible for the risks arising from the work or workplace, but not the risks associated with recreational activities. It advised that:

> PCBUs can usually meet their duties to recreational visitors in simple ways (eg using signs, emails or verbal warnings to let people know about work hazards).

[265] Furthermore, in answer to the question "what happens when a landowner charges for recreational access", WorkSafe's FAQ advised that (again, repeated for convenience):

> A landowner that charges for access to their land is recognised as a PCBU under HSWA. They can meet their duties in the same way as any other PCBU.
>
> As with all PCBUs, they **don't** have to manage the risks of the recreational activity. That's the responsibility of the person doing the activity.
>
> The only exception is when the landowner/PCBU also provides the activity. Then they're also responsible for managing the activity's risks, so far as is reasonably practicable.

[266] The Judge considered that exception to militate in favour of finding that WML had a duty under s 37 given his view that "exposure" to Whakaari was WML's business and his conclusion that it provided "both the hazard and the thrill". However, it is implicit in the Judge's reasons that he must also have considered that exception to

apply in respect of how WML discharged its duty. That is to say, the Judge must also have considered that WML was required to go further than what WorkSafe itself advised in its guidance (that any such duty was primarily information-focused for landowner PCBUs).

[267] With respect, I disagree. While the risk of a volcanic eruption was always inherent to the workplace itself, the risk that people might be on the Island when this happened was one that arose as a consequence of the work activity taking place there – that is, conducting walking tours on the Island when it erupted. After all, it was only as a consequence of that work activity that people were exposed to that risk.

[268] It is in this regard that I consider ACAT's helpful submissions to be particularly instructive. ACAT submits that a principled approach to help guide the inquiry into whether a risk arises from the workplace or the work activity taking place there is to ask whether any naturally occurring hazards are a reasonably foreseeable consequence of engaging in the work activity (and therefore to be construed as part of the activity) as opposed to unexpected dangers. It offers the case of a whitewater kayaker who is permitted to kayak in another's river, and who is knocked out of their kayak by the motion of a rapid, as an example. It submits that on that test:

> … the motion of the rapid in the river … would be foreseeable and understood [as a consequence] of engaging in the activity. Whereas, for example, if there was a wreck of an old tractor submerged (and thus hidden) in the river, one might think that might not be so expected or anticipated, and thus might more readily be a risk of the workplace.

[269] I respectfully agree. As ACAT says, where someone knowingly signs up to an activity involving inherent but foreseeable natural hazards, the risks should be seen as arising from the work activity rather than the workplace. The walking tour operators all knowingly signed up to the risks of taking people to Whakaari.

[270] WorkSafe submits that its Policy Clarification with respect to "Recreational access and HSWA" should not be used as a barometer for what was "reasonably practicable". It emphasises that there is no evidence that WML ever relied on this guidance and that this guidance was not intended to apply to landowners who permitted adventure activities to be conducted on their land. To the contrary, it submits

that its guidance to those who permitted adventure activities to be conducted on their land for payment was (as reflected on its webpage, last updated on 4 September 2017) as follows:

> - The landowner or manager must take all practicable steps to ensure that the adventure activity is conducted safely.
>
> - We consider that this will include asking the operator to see proof of their registration; and
>
> - This also includes warning visitors about hazards on the site (all hazards and not just out-of-the ordinary hazards must be identified and notified).

[271] WorkSafe emphasises that, if anything, that guidance was more exacting on landowners who permit their land to be used for adventure activities for payment. And it rejects any suggestion that its Policy Clarification with respect to "Recreational access and HSWA" in any way supersedes its online clarification, as referred to above. The implication of this argument is thus that it does, in fact, see any duty on landowners under s 37 to be more than simply an obligation to provide information in respect of hazards on their land.

[272] While I accept that WorkSafe gave more targeted guidance to landowners who permitted adventure activities to occur on their land, I disagree that this guidance detracts from the position (or the reasonableness of the position) stated in its Policy Clarification in respect of recreational access (that is, what I have earlier been referring to as the "WorkSafe Landowner Guidance"). The Policy Clarification was issued in May 2019, some twenty months after the webpage on which WorkSafe's other advice is stated was updated. And while it may have been the evidence of one of its inspectors that adventure activities are not a subset of recreational activities, it is difficult to understand why this is right and, in any event, controlling as a conclusion of law. The Policy Clarification specifically defined "recreational access" as "when people use the land's features (e.g. forests, cliffs or waterways) for different outdoor activities (e.g. walking, cycling, kayaking, hunting, fishing, rock climbing and swimming). Indeed, the Adventure Activity Regulations even referred (and still refer) to some of those activities (kayaking and rock climbing (if done outdoors)) as examples of an adventure activity in its second schedule. As such, it is difficult to accept WorkSafe's submission that its own guidance was – as it now says on appeal – more exacting.

[273] Ultimately, the question of what is reasonably practicable depends, in large part, on who it is that is alleged to be obliged to do something. As Lord Hoffman stated in *Tomlinson v Congleton Borough Council*:[103]

> It will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land.

[274] The reasonableness of that proposition is obvious. Indeed, as ACAT submits, where the risks associated with an activity are properly to be regarded as arising from the activity, public policy supports imposing a duty on any PCBU who provides that activity. This is because they are likely to be the people best qualified to make the required assessments based on their knowledge of their own and or their clients' capabilities; the inherent risks of pursuing their chosen activity (including the potential for and likelihood of harm), and because they will be the ones with the means to manage such risks.

[275] Moreover, my review of WorkSafe's own materials leads me to the conclusion that this was – objectively viewed – the message which WorkSafe itself sent out to the world: that the duty on landowners who permitted others to use their land for their own activities was one to pass on information, so that others could decide whether to take on the risks of an activity for themselves.

[276] Contrary to WorkSafe's submission, the relevance of its own guidance is not that WML relied on it to its detriment. As it emphasised at the hearing, WML does not advance a defence of "officially-induced error". Rather, the guidance is relevant in my view because it informs what was reasonably practicable for WML to do. Indeed, if this was WorkSafe's own independent view of the position prior to the 2019 eruption, it is difficult to see why a contrary view should have been reasonably taken.

[277] Accordingly, I consider any responsibility that WML might have had under s 37 (if, indeed, it had such a duty) to have been discharged here. In the licence agreements it had, WML required its licensees to ensure that:

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[103] *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46 at [45].

(a) no officer, employee, contractor or visitor of the licensee landed on the Island "without a thorough understanding of the risks and dangers that are inherent in landing on and remaining on an active volcano";

(b) it obtained independent advice, as reasonable in the circumstances, regarding the volcanic and seismic activity levels on the Island if, in the licensee's opinion, the risks and dangers of visiting the Island were unreasonable or imprudent with regard to danger; and

(c) all visitors were properly equipped at all times to "manage safely such hazards as they may encounter", including "suitable clothing and footwear, gasmask and hard hat".

[278] These were all responsible requirements for WML to have imposed, consistent with its obligation to ensure that the walking tour operators were properly appraised of the risks of being there and operating on the walking tour workplace.

[279] As a landowner who was merely permitting others to undertake their own activities on their land for a fee, it is difficult to see what more could reasonably have been expected of WML.

(b) Reliance on Government agencies

[280] Notwithstanding the foregoing analysis, I do not accept that it was unreasonable for WML to have relied on EMBOP, the Whakaari Response Plan or the indications from all key government stakeholders that tour operators could continue, business as usual, after the 2016 eruption in lieu of obtaining its own risk assessment. Or, for that matter, that it was not reasonably practicable for it to conclude that in light of those arrangements, adequate risk assessments had been undertaken. My reasons follow.

[281] First, I disagree with WorkSafe's position on this appeal that it was unreasonable for WML to rely on the EMBOP and the Whakaari Response Plan to ensure that the "societal risk" was managed on Whakaari, whether before or after the 2016 eruption.

[282] I acknowledge Mr Gibson's evidence that it was necessary for WML to understand the "societal risk" that would be created through its "operations" – namely, permitting tours to proceed on the Island. Mr Gibson defined that risk as "the maximum number of fatalities and serious injuries that could occur (based on [the] expected maximum number of people on the Island at any given time), and the frequency of high numbers of people on the Island". His expert opinion was that WML needed to understand this risk, that WML had placed "an over reliance on GNS to assess and monitor volcanic risks" and that WML could not rely on an assessment for GNS staff or a tour operator. He said:

> To meet its duty, WML needed to conduct (or obtain) an assessment for its specific context, which included allowing workers to regularly (e.g. daily) visit the island and be exposed to the volcanic risk (while guiding visitors), along with many visitors (e.g. over 50 people) being exposed on busy days. WML needed to understand the risk associated with an eruption in terms of how many people could be seriously harmed or killed, and the likelihood of those consequences occurring at the various alert levels that providing access was going to be considered.

[283] However, while I accept Mr Gibson's evidence that the societal risk of permitting access to Whakaari needed to be understood, I disagree with WorkSafe's submission that it follows from Mr Gibson's evidence that it was only WML which was capable of doing so and thus that it therefore had to obtain a risk assessment for itself in this case.

[284] With respect, I consider that submission to ignore the wider regulatory context in which Whakaari was overseen and, in particular, the role that EMBOP played. As noted, under s 17 of CDEMA, EMBOP was required to identify, assess and manage the hazards and risks associated with Whakaari. It was to that end that it authored the Whakaari Response Plan. Under that Plan it was EMBOP who was responsible for "managing the hazards and risks" associated with Whakaari. The Plan provided that it was EMBOP who was to inform the public of the risks associated with the Island and, if necessary, to implement measures to minimise those risks. The Plan also provided that it was EMBOP who would make any decision to restrict access to the Island. The Whakaari Response Plan's "purpose" was to provide a "clear procedure" for EMBOP to follow in response to changes in activity on Whakaari. And, most

significantly of all, the Plan specifically addressed the issue of when risk to the public might be unacceptable when it said (again, repeated for convenience):

> There may be a point in time when [EMBOP] considers that the risk to the public is too great for people to be walking on the Island or be in its immediate vicinity. This decision will be made by [the EMBOP] Group Controller in consultation with GNS, MCDEM, Police and the tour operators, cognisant of the significant financial impact to tour operator[s], but with a primary focus on managing risk to life and safety.

[285] Because of this, the Whakaari Response Plan detailed a series of options available to EMBOP in order to manage public access when it considered the "risk of visiting the Island" as being "too high". It follows from all of this that EMBOP was seized of the societal risk of allowing the public to visit Whakaari. Its very function was to do so. Indeed, as WML submits, if a risk assessment was required in respect of allowing the public at large to visit Whakaari, it was only reasonable for WML to assume (given EMBOP's role and expertise) that EMBOP would be the body to have obtained this.

[286] Relatedly, I cannot accept WorkSafe's further submissions that there is no evidence that WML relied on this plan, that WML did not consult with EMBOP to "ensure a clear framework of roles and responsibilities", or that WML could not have relied on the Plan because EMBOP "explicitly confirmed to WML" that its role was "solely in relation to response and readiness, not risk reduction".

[287] These points may be dealt with in turn. First, the relevance of the Whakaari Response Plan lies not in whether WML subjectively relied upon it but rather with whether its existence rendered it reasonably practicable for a PCBU in WML's position to have obtained its own risk assessment. And, relatedly, I fail to see why the Court cannot conclude that WML relied on it when the Buttles were explicitly mentioned in it and their contact details were provided. Secondly, the EMBOP provided a clear framework of roles and responsibilities – it set that right at the very beginning of the document. The fact that WML did not have a role (save for in the event that owner co-operation was needed in halting tours) does not mean that WML could not rely upon it; rather if anything it shows that others reasonably considered it to have no role to play (which is, of course, consistent with my finding that WML did not have a duty under s 37 in the first place). Finally, the meeting minutes that WorkSafe refers to in

support of its submission that EMBOP expressly disavowed any role in risk reduction do not in fact do that. Rather they simply say that EMBOP's core services were "readiness and response". As such, I cannot make the inference that WorkSafe argues for.

[288] Accordingly, the Whakaari Response Plan was not simply, as WorkSafe submits, a "response plan", and not a "risk reduction" or "risk readiness plan". Rather, as WML rightly submits, it is clear from both the Whakaari Response Plan as a whole and from EMBOP's statutory responsibilities under CDEMA that EMBOP was, itself, required to understand the broader "societal risk" of allowing people to access the Island and that the Whakaari Response Plan was integral to how it understood and managed this risk.

[289] WorkSafe further submits that WML could not rely on EMBOP or the Whakaari Response Plan during the charging period because of s 6 of CDEMA. That provision provides as follows:

> Unless this Act otherwise provides, this Act does not limit, is not in substitution for, and does not affect the functions, duties, or powers of any person under the provisions of any enactment or any rule of law.

[290] With respect, I cannot accept the submission. The issue here is not whether EMBOP's responsibilities affected the existence of WML's duties under HSWA (for which s 6 of CDEMA makes clear that they do not), but rather whether EMBOP's responsibilities shaped the way in which WML discharged its own duties. This is because under HSWA, the discharge of any duty turns principally on what is reasonably practicable to expect a duty-holder to do in order to ensure health and safety. The fact that EMBOP was tasked with the obligation to understand and manage the societal risk of permitting tours to Whakaari is obviously relevant to whether it was reasonably practicable for WML to – in the furtherance of any duty it held under HSWA – obtain a risk assessment. Indeed, a similar point was made by Mr Gibson when he said that it might not be reasonably practicable to expect every PCBU in a building, for example, to obtain a report on the building's structural integrity after an earthquake if this is the kind of thing that every PCBU will need to have access to.

[291] Of course, with the benefit of hindsight, it is apparent that neither EMBOP nor the Whakaari Response Plan was capable of preventing the tragedy which unfolded on 9 December 2019. But the critical question is whether it was reasonably practicable for WML to have expected EMBOP and the Whakaari Response Plan to have been adequately appraised of the societal risk that needed to be understood at the time of the charging period. Given EMBOP's statutory role, the involvement which GNS had in creating the Whakaari Response Plan and the institutional health and safety expertise that it possessed, it is difficult to see why WML should not – at the time – have trusted that EMBOP and the Whakaari Response Plan had its bases covered.

[292] Secondly, I disagree that any such reliance on the Whakaari Response Plan or the EMBOP was unreasonable after the 2016 eruption, as the Judge concluded. It pays to recall that immediately after that eruption, the Minister of Civil Defence directed that a meeting take place among the interested government agencies. Its purpose was to report back to the Minister on the sufficiency of the statutory powers available for managing visitor safety on Whakaari. As noted, the outcome of that meeting was that the relevant agencies were confident that when "significant volcanic activity occurs there are robust arrangements for escalating the response". The relevant agencies all considered the then statutory framework to "provide adequate protections, in line with the principle of placing responsibility for safety at the appropriate level, and notwithstanding that there is always a residual safety risk in areas where natural hazards occur without warning". Importantly, the Whakaari Response Plan was also updated after the 2016 eruption. Indeed, it was adopted less than three months before the 2019 eruption took place.

[293] As WML rightly emphasises, several different government agencies, with relevant expertise available to them, came to the collective view that tour operators could effectively continue business as usual after the 2016 eruption. They did so knowing full well what the likely consequences would have been if the 2016 eruption took place during the day, while tours were taking place. Indeed, in WorkSafe's own efforts to persuade WML of the need for the walking tour operators to be registered under the Adventure Activities Regulations, one of its officials referred to the regulations as providing confidence that injuries would not result from controllable

risks "even though there still remains an un-controllable risk of death from an event like the April 2016 overnight eruption if it should occur during a tour day".

[294] Moreover, these agencies were, as WML says, comprised of some of New Zealand's leading experts in health and safety. And, in any event, they were organisations charged with considering risks to the public at large. In that regard, it is difficult to see why WML should be expected to have second guessed this assessment for itself, contrary to all the indicators that it had at the time. With great respect to the Judge, I consider it difficult to see why WML was not entitled to do so unless, of course, one takes advantage of hindsight.

[295] Finally, I cannot accept WorkSafe's submission that it was unreasonable for WML to rely on the audits of White Island Tours in 2014 and 2017 in order for the tour operator to be registered under the Adventure Activities Regulations, in lieu of obtaining its own risk assessment. And, relatedly, that White Island Tours' registration was a further factor militating against it being reasonably practicable to obtain its own risk assessment.

[296] On this point, WorkSafe submits that any reliance by WML was misplaced because:

(a) The audits were not "WorkSafe approved". At the time of the 2019 eruption, the regulatory regime was entirely devolved – once an applicant passed a safety audit, WorkSafe was required to register the applicant as an adventure activity operator, unless certain exceptions applied. To this extent, WorkSafe's role was administrative.

(b) The audit of White Island Tours was not an audit of WML's business. Nor was it one that considered "the totality of the risk of permitting tours to Whakaari". In that regard it could not relieve WML of its own obligations to obtain a risk assessment.

(c) The expert evidence was that any such reliance was unreasonable.

[297] Again, these objections can be taken in turn. First, I cannot accept that WML's reliance on the audits of White Island Tours were unreasonable because they were undertaken by an independent third party. Under reg 9 of the Adventure Activities Regulations as they stood at the time, it was WorkSafe's responsibility to recognise a person or organisation as a "safety auditor" if satisfied, among other things, that they had the appropriate experience and qualifications to carry out the proposed audits. Thus, while the audit of White Island Tours was not undertaken by WorkSafe, it was necessarily undertaken by a WorkSafe approved auditor. It follows that if WorkSafe approved an organisation to be a safety auditor, and that safety auditor gave an approving audit to a PCBU, then reliance on the result of that audit was reasonable. It is wholly unrealistic to expect WML to go beyond that. Indeed, as the Judge said, WML should not have been required to "audit an audit".

[298] Secondly, while an audit of White Island Tours would not have been an audit which appraised the total societal risk of allowing people to visit Whakaari, that particular risk was – as I have mentioned – already addressed (or could reasonably have been expected to be addressed) by EMBOP under the Whakaari Response Plan. As such, any reliance that WML had on these audits was reasonable in this case because it was coupled with its reliance on EMBOP and the Whakaari Response Plan.

[299] Relatedly, it is also worth noting that White Island Tours provided the vast majority of tours to Whakaari (taking approximately 80 per cent of all tourists to the Island in the 2017 to 2018 year). As such, any risk assessment that it undertook would have been a risk assessment that appraised the risk of a fatality from multiple group visits over a year. It would, therefore, have been entirely reasonable in my view for WML to rely on the fact that White Island Tours had been successfully audited twice, including after the 2016 eruption.

[300] Thirdly, I cannot accept that WML's reliance on the audits of White Island Tours was unreasonable simply because there was expert evidence to the contrary. On this point, WorkSafe referred to the expert evidence of Mr Gibson and Dr Christopher Peace, another leading health and safety expert in New Zealand. The evidence of Dr Peace was that, in his opinion, White Island Tours could only have obtained "misguided comfort" from the fact that it passed its audit for registration as

an adventure activity operator in 2017. Similarly, the evidence of Mr Gibson was that any such audits "would not have provided any assurance" in his mind. However, both Dr Peace and Mr Gibson properly acknowledged that their views were informed by their expertise with respect to workplace health and safety. And they also acknowledged that from the perspective of the "layperson", reliance on these audits was reasonable. Dr Peace accepted this in response to questions from Judge Thomas himself, while Mr Gibson plainly acknowledged that "assurance" was "the intention of the Adventure Activity Regulations".

[301] Fundamentally, the purpose of requiring an audit under the Adventure Activities Regulations was to provide assurance than an adventure activity operator's own operations were safe, and that the relevant risks were understood and managed. Indeed, as WorkSafe said to Andrew Buttle in its email of 5 November 2018 (again, repeated for convenience):

> The goal of these Regulations is to provide customers (and government) with internationally credible assurance that operators are managing safety in a systematic way, to a high standard. This helps to support safety for customers of course, and is also expected to protect the industry from reputational damage: *if the inherent risks of adventure should lead to death or permanent injury but an un-controllable factor caused the incident, registration (and the auditable system trail) gives demonstrable confidence that the operator was not at fault.*
>
> (Emphasis added).

[302] As WML submits, WorkSafe's own message was effectively that the purpose of the audit was to ensure that in the event of an eruption like that in April 2016, an audit should make clear that a registered adventure activity operator's safety systems were not at fault. And while Mr Laurenson KC's review revealed serious deficiencies with these audits, it was the Judge's unchallenged finding that WML did not know of these deficiencies. In these circumstances, it is difficult to see how WML could not have relied on the fact of White Island Tours' successful registration as an adventure activity operator both before and after the 2016 eruption.

[303] It follows in my view that it was not reasonably practicable for WML to obtain its own risk assessment. Fundamentally, any duty that it reasonably had was one to proffer information about the risks inherent its land, as a landowner. However, and

notwithstanding that position, it was EMBOP's statutory role and responsibility under the Whakaari Response Plan to manage the societal risk of permitting the public to visit the Island. The objective message that was sent by White Island Tours' successful registration as an adventure activity operator was that the largest provider of tourists to the Island carried out its business safely, that it understood and managed the risks of sending multiple groups of people to the Island for most of the year and that its processes for managing health and safety were rigorous.

[304] Finally, and perhaps most importantly, the status quo was effectively endorsed after the 2016 eruption: the conclusion of interested agencies was that the current statutory regime was working, White Island Tours was successfully audited again in 2017 and the Whakaari Response Plan was updated again in 2019, just mere months before the 2019 eruption took place. It necessarily follows in my view that WML was entitled to rely on the Government agencies to address the need to understand and respond to the societal risk that WorkSafe says only it had the ability to understand and therefore control. And it was not unreasonable for WML to think that adequate risk assessments had been undertaken by others.

Was it reasonably practicable for WML to carry out the further particulars?

[305] The Judge concluded that because WML failed to undertake a risk assessment (as he found it was required to do), WML necessarily failed to successfully manage its risks. He concluded, as a result, that WML consequently failed to:

(a) properly consult, co-operate and co-ordinate as to the hazards and risks posed to workers and tourists from volcanic activity;

(b) monitor and review those hazards;

(c) ensure that workers and tourists were supplied with appropriate PPE; and

(d) ensure that there was an adequate means of evacuation from Whakaari.

[306] WML challenges the Judge's conclusion on the basis that he failed to give adequate consideration to these further particulars. Fundamentally, WML says that even if it was under an obligation to conduct a risk assessment, it did not necessarily follow that it therefore failed "in every other aspect".

[307] WorkSafe submits that the Judge was right to conclude that WML's failures in respect of the other particulars followed from its failure to obtain or to ensure an adequate risk assessment was undertaken. In essence, it says that WML could not have taken these further reasonably practicable steps if it did not obtain a risk assessment that enabled it to understand the necessity of these steps in the first place. For that reason, it says that the Judge did not err in failing to adequately consider the further particulars with which it was charged. WorkSafe nevertheless submits that justice did not miscarry from the Judge's economical consideration of the further particulars in any event, given there was sufficient evidence to prove each of these particulars.

[308] Given my conclusion that it was not reasonably practicable for WML to have obtained a risk assessment for its own business; I agree with WML that the Judge's findings in respect of the other particulars must be impugned. The foundation for the Judge's conclusion that these steps were reasonably practicable was that they would have been identified by a risk assessment had WML obtained one, or ensured that one was undertaken. It necessarily follows that if it was not reasonably practicable for WML to have done this (or if WML was entitled to conclude that such a risk assessment had been obtained from others), it was not reasonably practicable for WML to have taken the further steps said to arise from that condition precedent. That, in my view, provides a complete answer to the evidence which WorkSafe refers to in respect of the other particulars.

[309] It follows, therefore, that on my review of the evidence, WML did not breach any duty under s 37 that it might have had.

Would compliance with its duty have prevented risks of death or serious injury?

[310] Given my foregoing conclusions it is not strictly necessary to deal with this final challenge brought by WML. However, I shall briefly consider it if only because

it was subject to argument and because it will be instructive to any appeal against this decision.

[311] WML submits that the Judge nevertheless erred in finding that it committed an offence under s 48 of HSWA because, fundamentally, none of the reasonably practicable steps it should supposedly have taken would have made a difference. It says in this case no one predicted the 2019 eruption, and there were no effective controls to mitigate against the risk of an eruption, short of stopping tours altogether, which was not WorkSafe's case. It also says that even with better communication with GNS, such communication would not have made a difference given GNS's advice on 18 November 2019 was that there was "no higher risk" for people visiting the Island.

[312] On this aspect of WML's appeal, I must disagree. The inquiry here is whether, assuming that WML had a duty under s 37 and assuming that it was reasonably practicable for it to have taken the particular reasonably practicable steps alleged, that its failure to do so exposed any individual to a risk of death, serious injury or illness. That is not a "but for" test but rather, as WorkSafe submits, a test of whether the failure was a "substantial" or "significant cause" of exposing any individual to a risk of death, serious injury or illness.

[313] If WML was under an obligation to obtain its own risk assessment and to have better consulted with GNS and the tour operators, it is likely that these steps would have reduced the risks that tourists were exposed to. And, relatedly, while it may not have been WorkSafe's case that WML should have halted tours to Whakaari, it is plausible to think that if these steps had been carried out, tours would have been halted after the 2016 eruption.

[314] Furthermore, I agree with WorkSafe that it is too speculative to suppose that GNS's advice would have been the same as that which GNS tendered to NEMA in late November 2019, and so it would not have made a difference. The expert evidence of Professor Noel Procter, another leading volcanologist who gave evidence at trial, is instructive here. As part of its own internal staff risk analysis, GNS created reports that contained hazard maps illustrating a constantly changing baseline level of risk. This level of risk was then represented as a map with a circular ring around the crater

lake. The area within that ring represented the area that GNS considered too dangerous for its own staff to enter without approval from a specified GNS staff member. In short, the greater the risk; the wider the exclusion zone was. In the lead up to the 9 December 2019 eruption, the exclusion zone went from 220m from the crater rim on 30 September 2019 to 520m by early December 2019. Professor Procter's expert evidence was that this showed that GNS was aware of the increasing risk of an eruption over the course of these months and that it communicated this risk internally via an easily digestible and comprehensible visual aid. In short, the use of these maps with increasing danger zones illustrated that the probability of eruptive activity on Whakaari had increased, and that GNS was reacting to that increased risk by imposing access restrictions for its workers.

[315] Professor Procter's expert opinion was that this information would have been "very useful" for WML, the tour operators, and NEMA. It follows from this evidence that if WML had been under an obligation to obtain the kind of risk assessment from GNS which it had urged on the tour operators, and if it had kept in regular communication with GNS, that it would have learnt of precisely the same information that GNS was circulating amongst its own staff in respect of the risks on Whakaari. It is reasonable to suppose, therefore, that if WML had the duty alleged and if it breached that duty, that its failure to obtain the kind of insight that Professor Procter refers to here would have directly informed any decision as to whether to continue to allow tours to take place (supposing that WML had such a power in the first place).

[316] For these reasons, I do not accept that even if WML had breached any duty under s 37, it would not have exposed any individual to a risk of death, serious injury or illness. Accordingly, had I not found in WML's favour on the earlier issues, I would not have allowed the appeal on this final challenge to the Judge's reasons.

Concluding comments

[317] In coming to this decision, I have not overlooked nor minimised the unquantifiable tragedy that will forever be linked to 9 December 2019 and Whakaari. Nor do I ignore the unfathomable pain, grief and suffering of the families and loved ones of the 22 people who died as a result of the eruption, nor the pain and suffering

of those who survived and have been irreversibly emotionally and physically scarred forever by the horrific events of that day.

[318] The 47 people who were on Whakaari at the time it erupted should never have been there. The fact that they were reveals, in great measure, the multiple systemic failures which are discussed earlier in this judgment. It is impossible not to be deeply moved and affected by the sheer scale and nature of the human loss in this case.

[319] However, this appeal has been decided on what I consider the particular law and facts reveal on the question of WML's criminal liability. That has been the focus of the inquiry on this appeal. The task of every Judge is to apply the law objectively, clinically and dispassionately, uninfluenced by their personal views and natural human sympathies. That approach reflects the judicial oath which every Judge is bound by, that is to judge without fear or favour, affection or ill-will.

[320] The determination of this appeal has turned on what essentially boil down to relatively narrow legal questions: the interpretation of s 37 of HSWA; its application to the facts and the question of what was reasonably practicable for WML to have done as required under HSWA. In doing so, I have departed from the trial Judge's conclusions. I intend no criticism of him in doing so. In some respects, this is a case where reasonable minds have differed.

Result

[321] The appeal is allowed. Whakaari Management Ltd's conviction under s 48 of the Health and Safety at Work Act 2015 for a breach of s 37 is quashed.

Moore J