

**IN THE DISTRICT COURT
AT AUCKLAND**

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

**CRI-2020-004-009514
[2024] NZDC 4149**

**WORKSAFE NEW ZEALAND
Prosecutor**

v

**INSTITUTE OF GEOLOGICAL NUCLEAR SCIENCES LIMITED
Defendant**

Hearing: 29 February 2024

Appearances: K McDonald KC, S Symon, D Dow, L Dalton, S Forrest for the
Prosecutor
R Reed KC and G Gallaway for the Defendant

Judgment: 1 March 2024

NOTES OF JUDGE E M THOMAS ON SENTENCING

GNS is fined \$54,000.

REASONS

The offending

[1] The Institute of Geological and Nuclear Sciences Limited (GNS) is a Crown research institute and Crown-owned company. Its purpose is to undertake research that, among other things, increases New Zealand's resilience to natural hazards and enhances our understanding of geological and Earth-system processes. GNS does this by conducting research and sharing information and technology with stakeholders and the public. It monitors all New Zealand's volcanos (including Whakaari) on a 24/7 basis through the GeoNet and the National Geohazards Monitoring Centre. A multidisciplinary team of volcanologists is employed to carry out the work of obtaining and interpreting various volcanological monitoring data. This requires GNS to regularly visit volcanic fields, including Whakaari.

[2] As Whakaari is offshore, GNS engaged or contracted helicopter pilots to transport its scientists to the island for their field work. The pilots would transport GNS scientists to the island. Once they had done so they were required to remain while GNS scientists conducted their field work. This was to ensure that there was always an available means of evacuation in the event of an emergency, and there being no other practical choice but to remain given Whakaari's distance from the mainland.

[3] The eruption on Whakaari of 9 December 2019 demonstrated the tragic consequences of an eruption occurring while people were on the island. At the time of that eruption, there were no GNS scientists on the island. However, the ensuing investigation revealed deficiencies in the approach GNS took to contracting helicopter pilots.

[4] GNS was acutely aware of the risks posed by Whakaari. In respect of any planned GNS trip to Whakaari, it conducted qualitative risk assessments (QRA). The QRA critically evaluated current risk to assist GNS in determining whether it was safe to conduct a visit. If so, the QRA would include exclusion zones for its staff, if that was required by the risk posed. The information contained in the QRA went far

beyond information otherwise made publicly available by GNS through volcanic alert level (VAL) or volcanic alert bulletin (VAB) releases.

[5] However, GNS did not have a process to formally share the information contained in the QRAs with the helicopter pilots. So, while GNS scientists on the island were aware of the risks and exclusion zones, there was no formal process for the helicopter pilots to have that same knowledge.

[6] GNS has pleaded guilty to a charge under ss 36(1)(a) and 49 of the Health and Safety at Work Act 2015. The maximum penalty is a fine not exceeding \$500,000.

Approach to sentencing

[7] I consider the purposes and principles set out in the Sentencing Act 2002. I also bear in mind the purpose of the Act, and that any sentence imposed must reflect:

- (a) the Act's intention of providing a balanced framework to secure the health and safety of workers and workplaces¹ and
- (b) 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, as reasonably practicable.²

The applicable judgment for sentencing under the Act is *Stumpmaster v WorkSafe New Zealand*.³

Reparation

[8] No GNS contractors were on Whakaari when it erupted, the last GNS trip being several days prior. No other possible claim for reparation has been advised to WorkSafe.

¹ Health and Safety at Work Act 2015, s 3(1).

² Health and Safety at Work Act 2015, s 3(2).

³ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

The appropriate fine

[9] The omissions involved a failure to communicate risk adequately formally to contractors. This was a systemic failure; it affected every contractor who took GNS staff to Whakaari throughout the charge period. There were 25 such trips in 2019, and trips in the years prior.

[10] The risk of harm was significant. While the risk of an eruption was low on any given day, the risk of serious harm occurring should an eruption occur while people were on Whakaari was always very high.

[11] The hazard was obvious.

[12] Having the formal process would have been straightforward, inexpensive and an efficient means to meet its duty.

Aggravating and mitigating factors relating to the offending

[13] Although there were no applicable industry standards, it is fundamental that contractors be protected as much as a PCBU's own workers. Following a near miss in the Tongariro National Park in 2012, workplace health and safety consultants IMPAC investigated. In its report, it made the same point. It was a specific recommendation that GNS conduct risk assessments for helicopter pilots contracted to transport GNS staff to volcanos. In relation to trips to Whakaari following the release of that report, GNS did not consider separate QRA's for helicopter pilots to be necessary. WorkSafe argues this is an aggravating feature.

[14] It would be if and only to the extent GNS was placed on notice of the need to consider the safety of helicopter pilots. There is no evidence however that GNS was not always aware of that. Other actions it did take demonstrate that.

[15] Among them was the regular, informal discussion that would occur prior to or during any given trip between the scientists and pilot, colloquially referred to as tailgate meetings. GNS claims that some of these would have resulted in full risk information being given to pilots transporting them that day. It accepts there are likely

to have equally been occasions when it was not. We cannot establish how often the information given was inadequate. No records of tailgate meetings were ever kept. That demonstrates the need for formal processes, which reduces the risk of failing to adequately consult. However, the regular tailgate meetings are a mitigating feature of the offence.

[16] GNS contracted pilots whose companies ran commercial tours to Whakaari. Those companies therefore had existing obligations under the Act to conduct risk assessments, not only in relation to pilots conducting tours but pilots conducting site visits for GNS. GNS was aware that those companies knew of their obligations in that respect. It was entitled to assume those companies were performing that task. These were not pilots who were new to flying to Whakaari. They regularly did so with their own health and safety duties. However, this mitigating factor is reduced by GNS's awareness that they may not doing so to the extent that GNS was in relation to its own scientists. That the information GNS held was likely more detailed and specific to risk than the assessments likely being performed by the helicopter companies.

[17] These factors place GNS in the low end of the medium culpability band. I set a starting point of \$90,000.

Personal aggravating and mitigating features

[18] There are no aggravating features personal to GNS.

[19] GNS pleaded guilty on 15 May 2023, eight weeks before it was scheduled to proceed to trial with other defendants charged out of the 2019 eruption at Whakaari. Charges were initially laid in late 2020, so the guilty plea has come a long way from that point. It pleaded guilty following a resolution with WorkSafe, which it initiated with an approach to WorkSafe in April 2023. Given that approach came six months after the other charge against it was dismissed, it cannot claim to be at the first reasonable opportunity. Given the complexities of this case, it does still warrant recognition of 20%.

[20] GNS has a flawless health and safety record. It has a long history of significant public and scientific contribution. While co-operation with a WorkSafe investigation is mandatory, it did so in a timely and conscientious way. It made a senior scientist available to testify for WorkSafe at trial and incurred the time and expense in briefing them. It has invested in obtaining expert assistance to ensure it meets all health and safety obligations. These factors warrant specific recognition of 20%.

Other orders

[21] WorkSafe seeks no other order.

Totality assessment and financial capacity

[22] GNS observes that as a public body there will be a negative impact on the important service it provides given any fine would need to come from its operating budget. However, the public interest in holding all entities, including important public entities, to account outweighs that. Neither party advances any other submission justifying an adjustment.

Result

[23] GNS is fined \$54,000.

Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 01/03/2024