IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-009514
[2023] NZDC 23224

WORKSAFE NEW ZEALAND
Prosecutor

v

WHAKAARI MANAGEMENT LIMITED
Defendant

Trial:	11 July – 21 September 2023
Appearances:	K McDonald KC, M Hodge, S Symon, D Dow, L Dalton, L Wright and S Forrest for WorkSafe New Zealand J Cairney and P Brash for Whakaari Management Limited
Judgment:	31 October 2023

TRIAL JUDGMENT OF JUDGE E M THOMAS

A. The charge under s 37 of the Health and Safety at Work Act 2015 is proved and WML is convicted.

B. The charge under s 36 is dismissed.

REASONS

Whakaari

[1] Whakaari (White Island) is an active offshore volcano in the eastern Bay of Plenty. It has a long eruptive history and is commonly referred to as New Zealand's most active volcano.[1] On 9 December 2019, it erupted. There were 47 people ashore: 42 paying tourists and their five tour guides employed by commercial tour operators. All were on the crater floor, at different locations along a circular route used by the operators for their tours.

[2] The eruption was a phreatic explosion which created a pyroclastic density current, also known as a base surge.[2] Essentially, the erupting column collapsed in on itself, resulting in a flow of ash, steam, volcanic gases, and rocks that surged across the crater floor. It engulfed everyone on the island, with tragic consequences. Twenty-two people lost their lives from injuries they sustained in the surge. The remaining 25 were all injured, most seriously. Many continue to suffer. Families and communities in New Zealand and around the world were and continue to be deeply affected.

[3] I pay special tribute to the survivors who gave evidence during this trial:

(a) Lauren and Matthew Urey,

(b) Annie Lu,

(c) Brian Depauw,

(d) Jesse Langford, and

(e) Stephanie Browitt.

[4] Each was remarkable. Each showed great strength, insight, poise, and dignity. They were a powerful and respectful voice for all the victims. Their contribution to

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[1] Formal statement of Professor Noel Procter, exhibit WSE.008.02504 at para 7.5.
[2] Formal statement of Sir Stephen Sparks, exhibit WSE.008.02501 at paras 6.16–6.23.

this trial was necessary for the legal analysis that follows. Their stories were confronting, poignant, and left a deep and enduring impression. I thank them for their strength and courage.

Investigation

[5] After the eruption, WorkSafe conducted a wide-ranging investigation, ultimately charging 13 defendants under the Health and Safety at Work Act 2015. Six have pleaded guilty.[3] Six have had their charges dismissed either prior to or during trial.[4] The remaining defendant is Whakaari Management Limited (WML).

Whakaari Management Limited

[6] Throughout the charge period,[5] Whakaari was owned by Whakaari Trustees Limited. It leased Whakaari to WML, whose responsibility was to manage the island.[6] WML entered into licence agreements with various tour operators, enabling those tour operators to access Whakaari for the purpose of conducting commercial walking tours on the island.[7] In general terms, those licence agreements provided:

(a) the rights of access conferred by the licence,

(b) the terms upon which WML would be paid for this access by the tour operators, and

(c) conditions the tour operators were required to meet, including some relating to health and safety.

[3] Inflite Charters Ltd has pleaded guilty and been sentenced. Institute of Geological and Nuclear Sciences Ltd, White Island Tours Ltd, Volcanic Air Safaris Ltd, Aerius Ltd, and Kahu NZ Ltd have pleaded guilty and are awaiting sentence.
[4] National Emergency Management Agency, ID Tours NZ Ltd, Tauranga Tourism Services Ltd, Andrew Buttle, James Buttle and Peter Buttle.
[5] 4 April 2016 – 10 December 2019.
[6] Transcript of WML PCBU interview, dated 10 September 2020, exhibit 40000C126 at p 5.
[7] Licence agreements, exhibits 40000B54; 40000D20; 40000C9; 40000C11; and 40000H4-13.

[7] At the time of the eruption, and throughout the charge period, WML had licence agreements with several tour operators, enabling those operators to conduct commercial tours on Whakaari.[8] During the charge period, each operator did so.

[8] Aside from entering into those licence agreements, the evidence did not establish that WML conducted any other business. From time to time its directors[9] did participate to varying degrees in meetings, discussions and other engagement with tour operators and other stakeholders. But WML had no staff or permanent presence on Whakaari or at nearby Whakatāne.[10] It did not conduct any tours or engage in any activity on Whakaari itself. Its business was to generate income by the granting of access to tour operators through licence agreements.

The charges

[9] WML faces two charges:

(a) under s 37(1), being a PCBU[11] that manages and controls a workplace, namely Whakaari, having a duty to 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, failed to comply with that duty; and

(b) under s 36(2), being a PCBU having a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons, namely persons the PCBU has permitted to be on Whakaari, is not put at risk from work carried out as part of the conduct of the business or undertaking, namely the management of Whakaari, failed to comply with that duty.

[10] In each charge, WorkSafe alleges that failure exposed any individual to a risk of death or serious injury arising from volcanic activity.

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[8] White Island Tours Ltd, Volcanic Air Safaris Ltd, Aerius Ltd, Inflite Charters Ltd, and Kahu NZ Ltd.
[9] Andrew Buttle, Peter Buttle and James Buttle.
[10] Evidence of Patrick O'Sullivan, notes of evidence/trial transcript at p 461 from line 25 (T461:25).
[11] Person conducting a business or undertaking, defined in s 17.

[11] The particulars in relation to each charge are identical. That it was reasonably practicable for WML to:

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

(b) consult with GNS,[12] 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 is a change in Volcanic Alert Level and/or the issuing of a Volcanic Alert Bulletin,[13]

(d) ensure that workers and tourists were supplied with appropriate personal protective equipment, and

(e) ensure there is an adequate means of evacuation from Whakaari.

WML's interview with WorkSafe

[12] As part of the investigation, WML was required to attend an interview with WorkSafe. It did so on 10 September 2020. WML challenges the admissibility of this interview. It argues that WorkSafe resorted to powers that it did not have in compelling the interview. WorkSafe argues that the interview is admissible. Before considering the individual charges, I must determine:

(a) whether the evidence (i.e. the interview) was improperly obtained, and

[12] Institute of Geological and Nuclear Sciences Ltd.

[13] Volcanic activity on Whakaari is measured by the Volcanic Alert Level (VAL) system. Levels 0, 1 and 2 apply when inactive (ie: not erupting) and 3, 4 and 5 during an eruption. Whakaari is always showing some unrest so when not in eruption is either in VAL1 or VAL2. For Whakaari, VAL1 is low level activity with fumaroles weakly active, no or low earthquake activity and low gas emissions. This is Whakaari's background state. Under VAL2 this activity is elevated. Volcanic Alert Bulletins (VABs) are brief bulletins informing on current levels of volcanic activity: formal statement of Sir Stephen Sparks, exhibit WSE.008.02501 at paras 6.1–6.3. VAL settings and VABs are issued by GNS: evidence of Dr Gill Jolly, T82:3; see also formal statement of Prof Noel Procter, exhibit WSE.008.02504 at paras 10.6–10.14.

(b) if so, whether it should nevertheless be admitted.[14]

Did WorkSafe improperly obtain the evidence?

[13] Yes.

[14] Section 168 confers power of safety and inspection. Relevantly, s 168(1)(f) states:

> …
>
> for the purpose of performing any function of the regulator or an inspection under relevant health and safety legislation, any inspector may, at any reasonable time, enter any workplace and
>
> …
>
> require the PCBU or a person who is or appears to be in charge of the workplace to make or provide statements, in any form and manner that the inspector specifies.

[15] WorkSafe exercised that power in relation to WML. After email exchanges about possible voluntary interviews, WorkSafe sent an email to WML's counsel on 6 August 2020. The relevant part of that email states:

> WorkSafe New Zealand have considered your response and are of the view that it does not provide a legitimate or compelling reason for WorkSafe to agree to forego or delay the interviews requested.
>
> Therefore, WorkSafe formally **requires** the following pursuant to s 168(1)(f) and 168(2) of the Health and Safety at Work Act 2015:
>
> A required statement by way of interview from Whakaari Trustee Limited.
>
> A required statement by way of interview from Whakaari Management Limited.
>
> Both these interviews will be conducted at WorkSafe's Whakatāne office … on **separates days** (sic). The statements will be recorded on DVD with either both audio and picture or just audio.
>
> As a concession WorkSafe offers your clients the following sequential days for them to consider and choose over the next two weeks: Tuesday 11 August and Wednesday 12 August 2020, to commence at 10.00 am on both days.

[14] Neither party bears an onus: *Kearns v R* [2017] NZCA 51.

> Or Tuesday 18 August and Wednesday 19 August 2020, to commence at 10.00 am on both days.
>
> WorkSafe would also like to draw your clients (sic) attention to s 176 of the Health and Safety at Work Act 2015 requiring that your client must give all reasonable assistance.[15]

[16] The evidence would be improperly obtained if it was unlawfully or unfairly obtained. It is unlawfully obtained if WorkSafe did not have a lawful power to obtain it. WML argues that WorkSafe did not have the power under s 168(1)(f) to compel WML to attend an interview at a certain time and place.

[17] The reference to "in any form or manner specified" is language equivalent to the previous legislation.[16] The Court of Appeal held that provision was an attend for questioning power.[17] Section 168(1)(f) has not yet been considered. There appears to be no reason to interpret that section any differently. For the purposes of this challenge, WML accepts WorkSafe had the power to compel an interview. During argument, WML contained its challenge to WorkSafe's insistence that interview occur at a certain place or time.[18] WML argues there is no power to compel attendance at a certain place or time. WML is right. The section does not expressly permit it.

[18] Attending for questioning is meaningless without there being a means to effect it, including by stipulating time and place. If WorkSafe does not have that, arguably I should imply into s 168(1)(f) the power to also demand what is necessary to give effect to attendance for questioning. However, that power does exist. A PCBU must give all reasonable assistance. If it does not, it can be prosecuted.[19] That means it must reasonably comply with an interview demand. That would include reasonably engaging with WorkSafe in setting time and place. Given that existing obligation on a PCBU, there is no need to imply a power to demand time and place into s 168(1)(f) where the section does not expressly confer one. This interpretation:

(a) fits with the plain language of the provision,

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[15] Email from WorkSafe to WML's counsel Mr Meech dated 6 August 2020, exhibit WSE.005.00572.
[16] Health and Safety in Employment Act 1992, s 31(1)(f).
[17] *Utumapu v Bull* [2013] NZCA 175.
[18] This was not argued in *Utumapu v Bull*.
[19] Section 176 of the Act.

(b) is consistent with the Act's purpose without diminishing it, and

(c) is consistent with the Act's context, including the need to recognise the dangers of implying enforcement powers where those powers have not been expressly provided.

[19] Other legislation has expressly provided such powers.[20] In each case the power existed in the relevant provision prior to and still at the passing of the Health and Safety at Work Act 2015. Yet it was not brought into the Act. This is another indication Parliament chose not to confer such a power on WorkSafe.

[20] Demanding an interview take place at a certain time and place was exercising a power that WorkSafe did not have. It was therefore unlawful to that extent. That makes the evidence improperly obtained.

[21] WML also argued that WorkSafe could not use the s 168(1)(f) power as WML was not in charge of the relevant workplace. It accepts this turns on my findings in relation to s 37. For the reasons set out later in this judgment, WML cannot rely upon this ground.

[22] WML also initially argued that the s 168(1)(f) notice was defective as it did not identify the workplace. It did not actively pursue this ground during the hearing. There is no statutory requirement to identify the workplace. However, it would have been clear from WorkSafe's dealings with WML throughout the investigation up until the issue of the notice that the relevant workplace was the area in which tours were being conducted.[21] During the interview, WML appeared fully aware of why it was there.[22]

[23] Evidence is improperly obtained if it is also unfairly obtained. If an enforcement agency operates beyond its power, that is likely to be unfair.

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[20] E.g.: Financial Markets Authority Act 2011, s 25; Commerce Act 1986, s 98; and Serious Fraud Office Act 1990, s 9.

[21] E.g.: Letter from Christian Bell to Brett Harris dated 2 June 2020, Tab 5 to WorkSafe's admissibility submissions; letter from Christian Bell to Peter Buttle dated 14 July 2020, Tab 6 to WorkSafe's admissibility submissions.

[22] Transcript of WML PCBU interview dated 10 September 2020, exhibit 40000C126.

However here we are talking about whether there is any additional unfairness. WML initially argued possible confusion around a person's right to leave the interview. It did not pursue this ground during oral argument about whether the evidence was improperly obtained. However, I will return to WML's awareness of its rights as part of the next step.

Is excluding the evidence proportionate to the impropriety?

[24] No.

[25] This requires me to balance several factors. I must give appropriate weight to the impropriety and take proper account of the need for an effective and credible system of justice.[23]

[26] This was the use of a power WorkSafe did not have, under the spectre of prosecution for non-compliance. It would have required time and financial cost in travelling from Auckland to Whakatāne for interview.[24] However, WorkSafe did offer some other dates, albeit still in Whakatāne. It did hint at some flexibility. WML could not avoid an interview – that was something WorkSafe could compel. The only realistic venues would have been Auckland (being more suitable for WML) or Whakatāne (being more suitable for WorkSafe investigators). WorkSafe and WML did have further discussion about time and venue despite the terms of the s 168 request. Ultimately the interview did take place in Auckland despite the terms of the s 168 request.

[27] There has been no evidence of any prejudice to WML. Here I have also considered:

(a) The lack of any reference to which workplace in the request. However, it would have been very clear from previous correspondence what the interview related to.

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[23] Evidence Act 2006, s 30(2)(b).

[24] Those attending the interview on behalf of WML were its directors, Andrew Buttle, James Buttle and Peter Buttle. All resided in Auckland.

(b) Possible ambiguity or confusion about the caution given: the attendees on behalf of WML were advised at the commencement of the interview that they could leave, but someone would need to remain to answer for WML. There was no evidence that this advice was confusing, although I accept it had that potential. However, WML had its legal counsel present. Counsel who had corresponded with WorkSafe about the interview in the time prior, and counsel who stated that he would ensure his clients understood their rights.[25]

[28] WML points out that it is only facing category 1 offences. As such, they are only punishable by a fine, placing them at the lower end of the sentencing hierarchy. However, WML faces significant jeopardy in respect of charges of this kind. The maximum fines themselves are significant. Importantly, this was an event that caused devastating harm. There is a high public interest in ensuring a prosecution fairly goes ahead.

[29] The interview is admissible.

Burden and standard of proof

[30] WorkSafe must prove each charge beyond reasonable doubt. Proof beyond reasonable doubt means I must be sure WorkSafe has proved each legal element of a charge.

Am I sure WML owed the duty WorkSafe alleges under s 37?

[31] Yes.

PCBU

[32] WML accepts that it was a PCBU.

[25] E.g.: emails from WML's counsel Mr Harris to Mr Bell at WorkSafe dated 6 and 11 August 2020, Tabs 8 and 9 to WorkSafe's admissibility submissions.

Workplace

[33] The charge alleges Whakaari as a workplace. WML argues this is insufficiently pleaded. That the charge needs to specifically identify the workplace for me to determine the extent of any control or management WML exercised over it, if any. WML argues that it is now too late for WorkSafe to argue, as it does, that the workplace is the crater floor at Whakaari. However:

(a) WML never applied pre-trial for further or better particulars,

(b) it has always been apparent that the investigation and prosecution was built around the walking tours on Whakaari undertaken by the tour operators, and

(c) given that WorkSafe's case in terms of control and management is primarily focused upon access to Whakaari itself, there is no prejudice to WML in the way the charge has been framed.[26]

[34] Under the Act, unless the context otherwise requires, a workplace is a place where work is being carried out, or is customarily carried out, for a business or undertaking and includes any place where a worker goes or is likely to be while at work.[27] Conducting walking tours on Whakaari was the work of the tour operators. Where they then carried out those tours constitutes the relevant workplace under s 20.

Did WML manage or control that workplace?

[35] Yes.

[36] Section 37 imposes duties upon a PCBU "who manages or controls a workplace".[28] That means a PCBU to the extent that the business or undertaking involves the management or control (in whole or in part) of the workplace.[29]

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[26] A more particular examination of what constitutes the workplace may still be necessary in determining the extent, if any, of WML's management or control.
[27] Section 20(1).
[28] Section 37(1).
[29] Section 37(4)(a).

WML argues that it did not manage or control the workplace enough to be caught by WorkSafe's charge.

[37] To interpret a legal provision, we start with its wording. The words "manages or controls" are broad. The terms both overlap and can be mutually exclusive. There are myriad ways in which an entity can act which involves some element of management or control. The words do not require management or control to be exclusive or comprehensive. This is, on its face, a very broad and far-reaching provision.

[38] We then turn to the purpose of the Act. As the High Court has said:

> Four things about all this stand out. First, the breadth of duties created by the Act. Second, the Act's emphasis of its purpose, including through creation of the principle that workers and others should be given the highest level of protection. Third, the breadth of the concept of a PCBU. Specified exemptions alleviate a wide-ranging definition. Fourth, the Act's emphatic rejection of form in the advancement of purpose.[30]

[39] Parliament's intention in passing legislation can reveal its purpose. The Ministry of Business, Innovation and Employment (MBIE), in its report to the select committee considering this legislation, recommended that Parliament place an obligation upon the PCBU *with* management or control, as opposed to a PCBU who merely *had an ability* to manage or control. It identified that it would then depend on the circumstances of each case whether a PCBU has management or control, and it would be concerned with active control of the workplace.[31]

[40] The select committee specifically picked up that recommendation, suggesting that the legislation apply to those who managed or controlled workplaces in a practical sense, rather than PCBU's who merely have an ability to.[32]

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[30] *WorkSafe New Zealand v Dong SH Auckland Ltd* [2020] NZHC 3368 at para [28].

[31] MBIE *Health and Safety Report Reform Bill: Official's report to the Transport and Industrial Relations Committee for the Health and Safety Reform Bill: Part A* at paras 89–94.

[32] *Explanatory report of the Transport and Industrial Relations Committee regarding the Health and Safety Reform Bill 192-2* at p 8, noting that the recommended change to "with management and control" appears to have been recommended to expand the definition rather than restrict it.

[41] Based on that recommendation, Parliament changed the draft legislation to the language which appears in s 37. That is a clear sign of its purpose. 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.

[42] WML accepts that it had the rights any landowner has but argues that these are insufficient to engage s 37.

[43] WorkSafe has established that WML was not merely a passive landowner. Examples include:

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

(b) it entered into the licence agreements;[33]

(c) it had termination rights for breach under those agreements, which it understood;[34]

(d) it maintained a direct and continuing relationship with tour operators, including attending and contributing to Whakaari user group meetings;[35]

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[33] In general terms the agreements granted the tour operators the right to access Whakaari for the purpose of conducting guided tours. Those operators were permitted to take paying tourists to the crater floor. Operators were required to attend operator meetings, notify tourists that Whakaari is an active volcano, understand risks and dangers, obtain written acknowledgment from tourists, obtain independent advice regarding volcanic and seismic activity levels, monitor risks and dangers, refrain from taking tourists to Whakaari if it were unreasonable or imprudent to do so, provide the necessary equipment and clothing, provide incident reports and advise WML of events or activities that materially increased the risk and dangers to visitors. Exhibits 40000B54, 40000D20, 40000C9, 40000C11, and 40000H4-13. See also email from Phil Barclay (Volcanic Air) to Andrew and Sigal Buttle dated 8 February 2011 where Volcanic Air reports "a small incident "involving a lady in her early 60s dislocated her hip, exhibit 40000C99.

[34] Transcript of WML PCBU interview, dated 10 September 2020, exhibit 40000C126 at pp 12, 19 and 24.

[35] Evidence of Patrick O'Sullivan, T430:33: T434:1; T437:29; T468:1; Transcript of WML PCBU interview dated 10 September 2020, exhibit 40000C126 at p 12.

(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;[36] and

(f) occasional direct engagement with WorkSafe and GNS.[37]

[44] The licence agreements show WML was proactive in setting conditions around access to Whakaari. WML did not simply then leave the tour operators to their own devices. It remained proactively involved with tour operators and other relevant stakeholders once the licence agreements were signed. That was understandable given that its own income depended upon the collective success of the tours. WML's directors also began work on a strategy for developing other revenue generating tourism opportunities on Whakaari.[38]

[45] WML argues that its involvement was only ever around access to Whakaari. That there was no active control or management of any workplace on Whakaari. That in fact there were no workplaces until the tour operators determined where they would be and began taking tours there. WML points to evidence that, fundamentally, workplaces on Whakaari were under the management and control of those who used them. GNS determined where and when and for how long it would go to sites on Whakaari.[39] The tour operators, within the geographic boundaries set by WML in the licence agreements, could determine themselves where their workplaces would be.[40] WML says that it had no influence or control over any of that.

[46] It had, however, the ability to control access to whatever workplaces there were on Whakaari. It could terminate, or threaten to terminate, the licence agreements with any breach. WML argues that controlling access in that limited way is insufficient to constitute active control over any workplace on Whakaari. Every landowner can

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[36] *Whakaari Planning for the Future* dated November 2018, exhibit 40000C25 at pp 25–41.
[37] Transcript of WML PCBU interview dated 10 September 2020, exhibit 40000C126 at 9–10; email correspondence between Aidan Tansell and Andrew Buttle, dated between 6 August 2018 – 16 October 2018, exhibit 40000L-54.
[38] White Island User Group Meeting Minutes dated 16 October 2014, exhibit 40000C52 at 1; Meeting on Long Term Plan for Whakaari/White Island Tourism dated 14 September 2018, exhibit 40000C61; *Planning Protection Policies into the Future* dated 30 April 2019, exhibit 40000C25 at 17.
[39] Evidence of Dr Gill Jolly, T145:16.
[40] Evidence of Patrick O'Sullivan, T457:13.

control access to their land. Did Parliament intend every landowner to be caught by the section? Some landowners might do very little to control access to their land, others may do more. Was what WML did enough to amount to control and management of the workplace? Besides the wording of the section and purpose of the Act, I must also consider the Act's context in answering these questions.[41]

[47] The Act applies to adventure tourism operations, as it does to any work. Risk is a common element of those operations. This context is important. There is a high public interest in protecting workers and customers. There is also a high public interest in fostering and enabling that industry, and in a safe way.

[48] WorkSafe has a responsibility to promote workplace safety.[42] As part of that, it issues guidance to the marketplace. Some of the necessary context is looking at what WorkSafe itself says the obligations of a landowner are. Its Recreational Access Guidance applies to access to land if that access is for a recreational activity (which would include adventure activities).[43] This guidance is published on WorkSafe's website. It applies whether the activity is commercial or not, whether the landowner charges for access to the land or not. That guidance states that the landowner is not responsible for the risks from activities conducted on their land which are not part of its own activities or workplace. That it is not responsible for the risk associated with the recreational activities.[44] The FAQ attached to that guidance includes the statement that:[45]

> "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".

[49] However, as MBIE noted in its advice to the select committee, it will always be a question of fact as to whether a PCBU has active management or control of a

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[41] Legislation Act 2019, s 10.
[42] WorkSafe New Zealand Act 2013, s 9.
[43] Evidence of Casey Broad, T1348:26.
[44] WorkSafe policy clarification: *Recreational access and the Health and Safety at Work Act*, exhibit 50145.
[45] Exhibit 50144.

workplace.[46] If it does, that engages a s 37 duty. It will not always be as straight-forward as differentiating between a landowner and a tour operator. The guidance contemplates that. The same FAQ cites an exception when:

> "…the landowner/PCBU also provides the recreational activity. Then they're also responsible for managing the activity's risks, so far as is reasonably practicable."

[50] WML accepts that but argues that it would not apply in this case as it was the tour operators providing the tours, not WML. That is too simplistic. There are different ways to provide a recreational activity. In most cases perhaps, a landowner would not provide a recreational activity other than granting access. For example, a tour operator who constructs a zipline, where the recreational activity comes from the thrill of riding a zipline, is providing the recreational activity. A ski operator, who builds lifts and ski trails, can be said to be providing the recreational activity, which is the thrill of skiing. Here, however, the active volcano itself is the product. Exposure to it is the recreational activity. It is both the hazard and the thrill. WML's business was to provide that.

[51] After the eruption in December 2020, WorkSafe published further guidance relevant to landowners in respect of adventure activities. That guidance states that the landowner's responsibilities include seeking proof of an operator's current registration, and warning operators and participants about hazards on the site. It does not refer to any requirement to manage any of the risk associated with the activity itself.[47] WML accepts that these were not published during the charge period but relies upon them as important context for interpreting s 37.

[52] In the aftermath of the eruption, the Minister for Workplace Relations and Safety directed MBIE to undertake a review of the adventure activities regime.

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[46] MBIE *Health and Safety Report Reform Bill: Official's report to the Transport and Industrial Relations Committee for the Health and Safety Reform Bill: Part A* paras 89–94. WML relies upon *Inspector Nicholson v Pymble No.1 Pty Limited & Anor* [2001] NSWIRComm 96 (July 2011). However, that case can be distinguished on its facts, the court finding that the respondent did not retain sufficient control under the terms of the contract that existed in that case. It also relies upon *King v RCO Support Services Limited* [2001] ICR 608. However, there a duty was found, but the extent of control was insufficient to amount to a breach of that duty.

[47] WorkSafe *Information for landowners and land managers when adventure activities are being provided on their land*, 4 December 2020, exhibit WML.001.0005.

MBIE looked at activities in naturally hazardous environments.[48] After this review there was a further consultation and review process. Some regulations were changed, some were not. MBIE considered whether duties on landowners should be extended. Whether landowners should be required to manage and provide information on natural hazard risks or whether there should be a risk classification system to access and communicate risks. Those options were rejected, due to implementation costs and the potential for negative impacts on access to activities.[49]

[53] WML argues that these are clear statements, including from MBIE, a Ministry central to the passing of s 37 itself. However:

(a) MBIE and WorkSafe, prior to publication of these documents, understood that the degree of active control or management sufficient to engage s 37 is a fact-based inquiry in each case;

(b) while in most cases any duty may be limited to checking registration and providing hazard information, there will be other instances where landowners have a role to play in managing risk; and

(c) whether they do is a fact-based inquiry.

[54] Decisions about whether to add to these landowner obligations, in the aftermath of the eruption, do not assist WML.

[55] As with any fact-based inquiry, universal guidelines may be difficult to design and understand. In a health and safety context, operators understandably rely heavily on any guidance WorkSafe issues. It should therefore be clear, simple to understand and unambiguous. The guidance referred to during this trial does not meet that test. That is not material to whether a PCBU owes a duty under s 37. It may become material to whether it has taken reasonably practicable steps, for example if it has relied upon that guidance.[50]

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[48] MBIE *Targeted Review of the Adventure Activities Regulatory Regime* dated December 2020, exhibit WML.001.0024 at p 3.

[49] MBIE *Regulatory Impact Statement: Strengthening the adventure activities regulatory regime* dated 14 June 2022, exhibit WML.001.0021 at p 4.

[50] Similarly, for example, if it has relied on adventure tour operators being successfully registered.

Am I sure WML failed to comply with its duty under s 37?

[56] Yes.

[57] The relevant duty was for WML to ensure, so far as was reasonably practicable, that the health and safety of persons it had permitted to be on Whakaari was not put at risk from work carried out as part of the business or undertaking. WorkSafe does not allege that it was reasonably practicable for WML to eliminate the risk of an eruption. Rather, it says that WML failed to minimise the risk as far as was reasonably practicable.[51] A PCBU must comply with a duty to minimise risk to the extent that it can influence and control the matter to which the risk relates.[52] Here the specific risk is that to tourists and tour guides from an eruption.

[58] WML argues that it did not "permit" people to be on Whakaari. That it granted licences to tour operators only. That it was the tour operators who decided who came onto the island. However, permission takes various forms. The broad permission WML gave to permit tours is still the act of permitting. Without WML's permission, no tourist or guide would have been able to visit Whakaari.

[59] WorkSafe has set out steps it alleges WML failed to take. The mere failure to take a reasonably practicable step does not necessarily mean that WML has failed in its duty. Its duty is to ensure that the health and safety of persons was not put at risk. That is what it must meet. If it met that duty without taking some or all these steps, it still met its duty.

Risk assessment

[60] Taking tourists to Whakaari exposes them to risk of an eruption. Eruptions on Whakaari cannot be predicted.[53] Given that WML had the duty it did under s 37, it was fundamental that it engaged the necessary expertise to assess risk arising from the

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[51] What is reasonably practicable is what is reasonably able to be done, considering the non-exhaustive factors provided in s 22.

[52] Section 30(2).

[53] Evidence of Dr Gill Jolly, T259:1. WML was aware that GNS could never predict an eruption: evidence of Dr Jolly at T121:1, referring to a presentation she gave to WML's directors, exhibit 40000C101.

conduct of commercial tours on its active volcano. This was critical to ensuring tours could be conducted safely. While that was the expert evidence,[54] it is also common sense. It needed to do that as part of investigating feasibility prior to licencing any tour operators to conduct tours. This 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.[55]

[61] WML did not just need to do that at the outset. It needed to continue that work throughout the charge period to account for what it knew to be the variable and unpredictable conditions and characteristics of Whakaari affecting the nature and predictability of an eruption.[56] WML did not do that.[57]

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[54] Evidence and formal statement of Richard Gibson, T683:30; T684:1; exhibit WSE.008.02505 at paras 8.1–8.26.

[55] Section 9 of the Act; formal statement of Richard Gibson, exhibit WSE.008.02505, at paras 8.1–8.21.

[56] Formal statement of Richard Gibson, exhibit WSE.008.02505, at paras 8.22–8.26.

[57] Transcript of WML PCBU interview dated 10 September 2020, exhibit 40000C126 at pp 37, 47–48 and 53; WML did not provide any risk assessments in respect of its business in response to WorkSafe's request for documents: letter from WorkSafe to WML dated 13 February 2020, exhibit 40000C3 at para 9; letter from WorkSafe to WML dated 2 June 2020, exhibit 40000C29 at para 6; letter from Brett Harris to WorkSafe dated 20 March 2020 exhibit 40000C15: letter from Peter Buttle to WorkSafe dated 26 May 2020, exhibit 40000C32; letter from WML to WorkSafe dated 18 June 2020, exhibit 40000C34; evidence of Dr Gill Jolly, T134:32; T141:25; T277:20.

[62] This was a reasonably practicable step for WML to take:

(a) it understood Whakaari and its eruptive history, given its long association with the island,[58]

(b) it had an existing relationship with GNS, which it knew could supply the necessary expertise,[59]

(c) it understood the need for good risk assessment,[60] and

(d) it had the resources to engage the appropriate experts.[61]

[63] WML did understand the risk.[62] It engaged actively with GNS and other stakeholders. Its purpose in doing so was to ensure that tours were being conducted appropriately and safely. It argues that this engagement and reliance upon information provided by GNS meant that undertaking any further risk assessment would not be a reasonably practicable step. That it was not reasonable for it to take steps that had already been done by others.

[64] If a PCBU has a duty under the Act, that duty always remains with the PCBU. It is not transferrable.[63] However, what steps it may be required to take to fulfil that duty can be affected by those same steps already having been done by others.

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[58] Transcript of WML PCBU interview dated 10 September 2020 exhibit 40000C126 at p 5; letter from GNS to one of the directors of WML dated 13 December 2012 acknowledging that WML understood the risk, exhibit 40000E960 at para 2.

[59] Transcript WML PCBU interview dated 10 September 2020, exhibit 40000C126 at p 7; evidence of Dr Gill Jolly, T289:7.

[60] E.g.: licence agreements, exhibits 40000B54; 40000D20; 40000C9; 40000C11; and 40000H4-13; PowerPoint presentation by GNS that WML attended in November 2013, exhibit 40000C101: this presentation outlined that GNS could never say when Whakaari was going to erupt, only that it was at a heightened risk; transcript of WML PCBU interview dated 10 September 2020, exhibit 40000C126 at p 65, where WML acknowledged that it was aware that the Volcanic Alert Bulletins issued by GNS noted that an eruption could happen on Whakaari at any time; WML correspondence with tour operators regarding the need to obtain risk assessments, exhibit 40000C26 at p 7.

[61] Exhibit 40000C26 at p 7. There was no argument that cost would be disproportionate to the risk in terms of s 22.

[62] Letter from GNS to one of the directors of WML dated 13/12/12 acknowledging that awareness, exhibit 40000E960 at para 2; evidence of Dr Gill Jolly, T289:27.

[63] Section 31.

For example, it would no longer be reasonably practicable for a PCBU to provide the appropriate safety equipment if another PCBU had already provided that equipment.

[65] Here, the information provided by GNS and WML's engagement with GNS was insufficient to relieve WML of the need to ensure the necessary risk assessments were done:

(a) The risk associated with WML's work was fundamentally different from that of GNS.[64] 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.[65]

(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.[66] It also occurred far less during the charge period than in the time prior.[67]

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[64] Evidence of Richard Gibson, T677:27; T666:20; formal statement of Richard Gibson, exhibit WSE.008.02505 at paras 9.2 – 9.4; supplementary formal statement of Richard Gibson, exhibit WSE.009.02891 at para 3.4.

[65] Evidence of Richard Gibson, T710:1.

[66] WML's risk was different from that assessed by GNS for its own workers: evidence of Richard Gibson, T677:27; T666:20; Formal statement of Richard Gibson exhibit WSE.008.02505 at paras 9.2–9.4; supplementary formal statement of Richard Gibson, exhibit WSE.009.02891 at para 3.4; WML did not consider how to adapt qualitative risk assessments done by GNS for its own workers to WML's risk: evidence of Richard Gibson, T710:1; evidence of Dr Gill Jolly, T250:1.

[67] Under s 168(1)(e) of HSWA, on 13 February 2020 WorkSafe requested any reports received/sighted over the past three years from GNS in relation to volcanic activity and/or change in the level status on Whakaari, exhibit 40000C3 at para 9. On 26 May 2020, WML provided material in respect of this request. No documents containing updates on GNS staff restrictions were provided. At interview WML stated that it was not aware of the safe distances put in place by GNS from its staff in late 2019, nor was WML aware that this was a measure utilised by GNS: transcript of WML PCBU interview dated 10 September 2020 exhibit 40000C126 at pp 58–60.

(d) The information that GNS did provide to WML were not risk assessments,[68] particularly given the complexity of the risk.[69]

[66] WML, through the licence agreements and other engagement with tour operators, was concerned that tour operators did the necessary risk assessment. It was insufficient for WML to rely on risk assessments done by tour operators when:

(a) WML's risk was fundamentally different from that of an individual tour operator,[70] and

(b) WML did not take 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.

[67] From 2014/2015, Emergency Management Bay of Plenty (EMBOP) and others developed a Whakaari Response Plan, which included various stakeholders.[71] Under the plan, Bay of Plenty Civil Defence Emergency Management (BOP CDEM) was responsible for assessing and managing the hazards and risk associated with Whakaari.[72] There was no identified role for WML regarding risk under the plan.

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[68] Formal statement of Richard Gibson, exhibit WSE.008.02505 at paras 9.3, 9.33 and 9.36; PowerPoint presentation by GNS that WML attended in November 2013, exhibit 40000C101; GNS emailed the PowerPoint presentation to WML on 30 November 2013, exhibit 40000C47; GNS presentation delivered to WML in 2018 exhibit 40000E733: the presentation was delivered by GNS at the User Group meeting on 14 September 2018, which directors of WML attended, exhibit 40000B217. To the extent WML received Volcanic Alert Bulletins from GNS, these were not assessments of risk: formal statement of Richard Gibson, exhibit WSE.008.02505 at para 9.31; evidence of Dr Gill Jolly, T86:12; T87:1; the 2004 GNS *Assessment of risk posed by the crater lake* dated October 2014, exhibit 40000E499, was inadequate as a risk assessment for WML's business as it was dated, and referred to a specific risk at a specific point in time: evidence of Dr Gill Jolly, T278:6; T288:23; evidence of Sir Stephen Sparks, T343:9; in any event, WML did not appear to rely on it: transcript of WML PCBU interview dated 10 September 2020, exhibit 40000C126 at p 63.

[69] Evidence of Richard Gibson, T691:4.

[70] Formal statement of Richard Gibson, exhibit WSE.008.02505 at paras 9.1–9.8.

[71] December 2015 Response Plan, exhibit WSE.003.00232. Stakeholders with stated responsibilities under the plan included GNS, Minister of Local Government, Ministry of Civil Defence Emergency Management (MCDEM) which later became NEMA, Bay of Plenty Civil Defence Emergency Management (BOPCDEM), EMBOP, WorkSafe, Bay of Plenty Regional Council – Harbourmaster, Bay of Plenty District Health Board, and NZ Police: table 1.1.

[72] Exhibit WSE.003.00232, table 1.1 at para 6. This remained unchanged through various iterations of the plan, including the Sept 2019 version, which was operating at the time of the eruption, exhibit 40000.C55.

[68] The plan was operational from 2015.[73] WML argues under the plan EMBOP (as the operational arm of BOP CDEM) was responsible for assessing risk, not WML. The evidence was equivocal about the status of the plan as a business as usual (BAU) document or whether it was operative upon heightened unrest or an eruption.[74] The plan needed to clearly state when it was to apply. It did not. On its face, it was open to WML and others to interpret it as a BAU document. If WML understood that EMBOP was the agency assessing risk, and did that work, this may have absolved WML from performing that task. That is particularly given GNS had a role under the plan in providing advice to EMBOP regarding unacceptable risk on Whakaari.[75]

[69] WML also points to the WorkSafe-approved audits done of WIT.[76] These audits would fairly have led WML and others to assume that the risk assessment and safety processes of WIT were sound and appropriate. That is the whole point of audits. 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 WIT processes for assessing the risk of an eruption while tourists were on the island.[77] This was an astonishing failure, contributed to by WorkSafe itself.[78] It made the audits worthless. WML and others were unaware of that failure.[79] So, to the extent that WML would have understood WIT were assessing risk, it would not have been reasonable to require WML to have to do the same thing. WML raises the same argument in respect of various certifications of other tour operators.

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[73] December 2015 Response Plan, exhibit WSE.003.00232; the Response Plan had been in effect in various iterations since December 2015: evidence of Casey Broad, T1178:19.

[74] Dr Gill Jolly testified that the Response Plan covered responsibilities in the event of an eruption: T209:1; T281:24; that "response" being one of the 4Rs in relation to risk/hazard management (reduction, readiness, response and recovery) had that meaning, and in the Whakaari context meaning after an emergency: T59:6; T211:14; EMBOP in an email dated 20 July 2016 refers to plan for "heightened risk or eruption", exhibit 40000G24; however, that is not made clear in the plan; also compare evidence of Dr Jolly that Whakaari was always in a state of unrest: T194:3; some duties under the plan are more relatable to readiness than response, e.g.: WorkSafe's responsibility for ensuring tour operators comply with the Act at para 1.1.

[75] Exhibit WSE.003.00232, table 1.1 at para 6.

[76] WIT was audited in 2014, and again in 2017: evidence of Patrick O'Sullivan T454:25; T515:1; timeline of audit activity, exhibit 40000F234.

[77] Evidence of Casey Broad, T1313:8.

[78] Evidence of Casey Broad, T1320:8; David Laurenson QC, *Review of WorkSafe NZ's performance of its regulatory functions in relation to activities on Whakaari White Island* dated 8 September 2021, exhibit WML.001.0026 at para 25.

[79] Evidence of Casey Broad, T1326:5.

[70] Hindsight is perfect and often artificial. Instead, we should view any potential breach of the Act through the same lens we would have looked through at the time of the breach. To a point, WML perhaps could have taken some comfort from responsibilities assumed by others, or stated to be assumed by others, in assessing risk on Whakaari. It could then reasonably expect that it need not take steps that it may otherwise be required to take.

[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.[80] By then WIT had been audited.[81] By then the Response Plan was operating.[82] Thankfully, the 2016 eruption occurred during the night when no people were on the island.[83] Consistent with what GNS has always said about Whakaari, it was unable to predict that eruption.[84] It had been at VAL1 at the time.[85] Had people been on the island, the eruption would have been life-threatening.[86]

[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.[87] As a bare minimum, it needed to engage volcanology and health and safety expertise to

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[80] As did the 9 December 2019 eruption: evidence of Dr Gill Jolly T75:1; formal written statement of Sir Stephen Sparks, exhibit WSE.008.02501, at para 6.25.

[81] WIT was audited in 2014, and again in 2017: evidence of Patrick O'Sullivan, T454:25; T515:1; timeline of audit activity, exhibit 40000F234.

[82] December 2015 Response Plan, exhibit WSE.003.00232; the plan had been in effect in various iterations since December 2015: evidence of Casey Broad, T1178:19; the Dec 2015 iteration of the Response Plan was largely identical to the Sept 2019 iteration.

[83] Formal statement of Richard Gibson, exhibit WSE.008.02505 at para 9.24.

[84] Evidence of Dr Gill Jolly, T259:1. WML was aware that GNS could never predict an eruption: evidence of Dr Jolly at T121:1, referring to a presentation she gave to WML's directors, exhibit 40000C101.

[85] Evidence of Dr Gill Jolly, T256:33.

[86] Evidence of Dr Gill Jolly, T76:12; T79:7. Kilgour et al, *Phreatic eruption dynamics derived from deposit analysis: a case study from a small, phreatic eruption from Whakaari/White Island, New Zealand*, 2019, exhibit 50018; formal statement of Sir Stephen Sparks, exhibit WSE.008.02501 at paras 6.24–6.26.

[87] Formal statement of Richard Gibson, exhibit WSE.008.02505 at para 9.24; Dr Peace testified that in his professional opinion, the risks could not be sufficiently minimised so tours should have been halted after the 27 April 2016 eruption: T646:8; Formal statement of Dr Peace, exhibit WSE.008.02502 at para 8.6.

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.

Other reasonably practicable steps

[74] WorkSafe has identified other reasonably practicable steps WML failed to take. As I have already found that it has breached its duty, I do not need to consider those steps in detail. Where those steps relate to an unjustified failure to act or consult in relation to risk assessment, much of the same analysis applies. It should have been no surprise, particularly after the 27 April 2016 eruption, that Whakaari could erupt at any time and without warning, with the risk of death or serious injury to tourists or tour guides who may be there at that time. Without properly assessing this risk, WML had little chance of successfully managing it. 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,[88]

(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.[89]

[88] Formal statement of Richard Gibson, exhibit WSE.008.02505 at paras 9.28–9.36.
[89] Formal statement of Richard Gibson, exhibit WSE.008.02505 at para 9.39.

[75] It could not properly take any of these steps without knowing clearly what the risk was.

Did WML owe a duty to tourists and workers on Whakaari under s 36(2)?

[76] No.

[77] WorkSafe argues that the reference to "other persons" in s 36(2) means that WML owed a duty to tourists and workers on Whakaari by virtue of its work activity.

[78] The starting point is the decision concerning NEMA.[90] There, I held s 36(2) must be read with reference to s 36(1). Despite the term no longer being used, it still applies to the concept of occupation health and safety.[91] I do not repeat again here the full analysis I undertook in *NEMA*. The key points from that decision are:

(a) section 36(2) is not a standalone provision,

(b) it must be read together with s 36(1), and

(c) any duty a PCBU has under s 36(2) must arise from its work activity as opposed to its work product.

[79] That is supported by:

(a) the language and structure of s 36 and the Act as a whole,

(b) the indicators of purpose within the Act, and

(c) the legislative history both in Australia and New Zealand.

[80] WML never had workers on Whakaari. In that sense, it was also never its workplace. However, in interpreting s 36, I must consider context.[92] WorkSafe points

[90] National Emergency Management Agency, formerly the Ministry of Civil Defence and Emergency Management.
[91] *WorkSafe v National Emergency Management Agency* [2022] NZDC 8020.
[92] Legislation Act 2019, s 10.

to contextual elements it says favours an expansive interpretation of s 36(2) in relation to WML:

(a) WML had overarching control over whether tours could occur at all. But for WML's business, tourists would not have been exposed to risks to their health and safety that needed to be managed.

(b) WML alone had influence and control over the totality of tourism on Whakaari. In that respect, the profile for societal risk would have been different (and greater) than any individual tour operator. Without WML having a duty to assess risk in that way, no PCBU would have had that responsibility.

(c) As a PCBU generating revenue from a high-risk activity, not having a health and safety duty runs counter to the need to protect workers and other persons.

[81] These are valid considerations. However, they are met by my finding that WML has a duty under s 37. None require an interpretation of s 36(2) to be broader than *NEMA*.

[82] WorkSafe has cited authority it has previously relied upon. It adds another, recently decided since *NEMA*.[93] It rightly argues that I should consider these cases considering WML's context. I have done so. The context does not demand that I apply them any differently than in *NEMA*.

Influencing or directing other workers

[83] A PCBU has a duty under s 36(1)(b) in respect of workers whose activities in carrying out work are "influenced or directed" by that PCBU. WorkSafe argues that WML influenced and directed the workers of the tour operators through the contractual obligations contained in the licence agreements. It argues that it therefore has a

[93] *WorkSafe v Te Roopu Taurima O Manukau Trust* [2023] NZDC 4212.

concurrent duty under s 36(2). It will have a s 36(2) duty if it has a duty under s 36(1)(b). However, it does not.

[84] WorkSafe does not advance any authority in support of its brief submission on this point. In *WorkSafe New Zealand v Athenberry Holdings Limited* the Court considered influence and direction in a different context.[94] The factors the Court considered were closely linked to the actual conduct of the work. That was the context of that case, but it is also the focus of the Act as a whole. The Court approached the question as one of fact and degree. There is no compelling reason to do otherwise here.

[85] WorkSafe argues WML influenced or directed the workers of the tour operators because through the licence agreements it determined:

(a) the places on Whakaari that those workers could go to (and therefore the places that the tourists could go to),[95]

(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),[96]

(c) how those workers were to coordinate activities with other workers (including through user group meetings),[97]

(d) the minimum PPE that the workers had to provide to tourists,[98] and

(e) the requirement for workers to obtain acknowledgment from visitors that they were visiting Whakaari at their own risk.[99]

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[94] *WorkSafe v Athenberry Holdings Limited* [2018] NZDC 9987, (2018) 16 NZELR 267.
[95] Licence agreements, exhibits 40000B54, 40000D20, 40000C9, 40000C11, and 40000H4-13 at cl 2.2.
[96] Licence agreements, exhibits 40000B54, 40000D20, 40000C9, 40000C11, and 40000H4-13 at cl 4.2(a).
[97] Licence agreements, exhibits 40000B54, 40000D20, 40000C9, 40000C11, and 40000H4-13 at cl 4.8.
[98] Licence agreements, exhibits 40000B54, 40000D20, 40000C9, 40000C11, and 40000H4-13 at cl 4.3.
[99] Licence agreements, exhibits 40000B54, 40000D20, 40000C9, 40000C11, and 40000H4-13 at cl 4.2(a).

[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 pre-conditions. The evidence established that, in practice, this was also true.[100] In a fundamental sense then, WML did not influence or direct the tour operators' activities in carrying out work.

Did WML's failure to comply with its s 37 duty expose any individual to a risk of death or serious injury?

[87] Yes.

[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.[101] 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.

[89] The tragedy of 9 December 2019 bears that out.

[90] A breach of a duty does not need to have caused the harm suffered by workers or other persons. But there needs to be a causal link between the failure and the risk to which an individual was exposed.[102] WML knew tours would take place on Whakaari. That was the whole purpose of the licence agreements. That activity continued throughout the charge period. It grew to substantial levels with thousands

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[100] Evidence of Patrick O'Sullivan, T457:13.

[101] Dr Peace considered this the only reasonable outcome: formal statement of Christopher Peace, exhibit WSE.008.02502 at paras 7.23 and 7.26.

[102] *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 at para [130]; *Simpson Design and Associates Pty Ltd v Industrial Court of NSW* [2011] NSWCA 316 at para [115].

of tourists per annum visiting Whakaari each year.[103] It was the entity that permitted access and could refuse access. Without WML's work activity there would have been no tours to Whakaari.

[91] WML's breach, its failure to undertake the necessary risk assessments, was a significant and substantial cause of an individual being exposed to risk of death or injury. Its breach was not, and does not need to be, the sole cause of the exposure to the risk of death or serious injury. Other causes contributed. However, it is enough to amount to "substantial". It was more than a minimal causal factor, making it also "significant".[104]

Result

[92] The charge under s 37 is proved and WML is convicted.

[93] The charge under s 36 is dismissed.

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Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 31/10/2023

[103] Evidence of Sir Stephen Sparks, T305:8.
[104] *WorkSafe v Centreport Limited* [2019] NZDC 3155 at para [15].