SEMAPHORE

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Whakaari | White Island Litigation Clarifies Legal Points

Litigation which followed the Whakaari | White Island eruption has clarified some aspects of the application of the Health and Safety at Work (H&SW) Act 2015, and some key learnings can be gained from the case.

A total of 22 people were killed and 47 people injured when the active volcano erupted on 19 December 2019. Wotton + Kearney special counsel Neil Beadle and senior associate Elliot Copeland presented to the New Zealand Branch conference of MLAANZ on the subject, and pointed to some significant takeaways from the subsequent trials.

Neil Beadle and Elliot Copeland

Whakaari Management (WML), the licensor of Whakaari, was found at trial to owe a duty to do a risk assessment, consult, co-operate and co-ordinate as to hazards and risks, monitor and review those, ensure visitors were supplied with personal protective equipment (PPE) and ensure there was an adequate means of evacuation – although not engaged in the tourism operations/activity itself.

The Government body, the Institute of Geological Nuclear Sciences (GNS), produced qualitative risk assessments for each visit its workers made to the island but pleaded guilty for not sharing and having no process to share those with helicopter pilots who flew GNS staff to the island. The information GNS held was likely more detailed and specific to risk than the assessments likely being performed by the helicopter companies.

There was a failure of regulation. Auditing by WorkSafe of operations was inadequate, and the Whakaari Response Plan (by Civil Defence) failed. Civil Defence did not involve WML in their emergency response planning.

“While the detailed reasons bear analysis, I query the optics of GNS being fined $54,000 for not sharing its qualitative risk assessments for its own staff with helicopter pilots, while helicopter companies were fined four-to-six-times that amount,” commented Mr Beadle.

The litigation saw WorkSafe prosecute 13 entities under the H&SW Act including adventure tourism operators and Government agencies. Pre-trial, a charge against the National Emergency Management Agency (Civil Defence) was struck out.

Guilty pleas were entered by White Island Tours (which conducted tours to and on the island), three helicopter companies, Inflite Charters and GNS. Six defendants defended the charges: WML was convicted after a lengthy trial; charges against three directors of WML were struck out/acquitted as

were charges against two companies which WorkSafe charged as operating in the supply chain between the tour operator White Island Tours and tourists buying tours to Whakaari | White Island.

Six defendants were sentenced. WML was fined $1.045 million with $4.88 million of reparations but has no assets. White Island Tours was fined $517,000 with $5 million reparations but is not trading and has no income. Volcanic Air Safaris was fined $468,750 with $330,000 reparations but is in liquidation, and three other operators were fined between $196,000 and $227,500.

Mr Beadle pointed out that the Court reduced the fine and increased the reparation which had to be paid by White Island Tours, a decision that was plainly factored on the operator having the benefit of insurance cover. He viewed this as wrong in principle.

Giving context to adventure tourism in New Zealand, Mr Beadle said it is neither possible nor desirable to remove all risk, because the instinct for adventure must remain. However, the risk must be managed.

What the defendant company is required to do, so far as reasonably practicable, is ensure the health and safety of workers who work for the business, and of other people from its work. The core question in the White Island case was whether this was done.

Mr Copeland explained that under the H&SW Act, a key element is how far does a company have to go to protect people other than workers who work for the business? WorkSafe's case was that all 13 defendants bore some failure of duty. However, the Court process allows the Judge to dismiss charges where appropriate, and this was done in the case of the companies which were only operating in the supply chain between the tour operator White Island Tours and tourists.

The Court found that the duty under H&SW Act did not extend to them because their duty to their customers, rather than their workers, had to arise from the company's work activity. They had no ability to influence or direct what happened to customers once they arrived on White Island, and their duty did not extend that far.

Mr Beadle added that it was interesting that in convicting WML the Court had found that a Person Conducting a Business or Undertaking (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.

WML argued that consistent with those principles it did not "manage or control" the workplace enough to be caught by the charge and simply controlling access by granting or revoking a licence is insufficient to constitute active control over any workplace on the island. The Judge found that WML's business was providing the hazard and the thrill of an active volcano and exposure to that was the recreational activity, which was enough. WML is appealing its conviction.

Also, while a business can be compelled to make a statement to WorkSafe, directors retain the right to silence in that role. Given the strike out of the charges against the WML directors for want of evidence, why would any director give a statement voluntarily? It would be counter-intuitive to put themselves at risk, said Mr Beadle.

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