

Lessons from the WorkSafe prosecutions after the Whakaari/White Island eruption

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What will we cover today:

- Recap on what happened at Whakaari
- Legal issues and lessons affecting the various insureds who were investigated and prosecuted
- Practical and insurance issues


Whakaari – recap on what happened

- On 9 December 2019 Whakaari/White Island erupted while tour operators and tourists were on the island
 - 22 people were killed, and 25 others were injured – mostly international tourists from a cruise ship
- In late November 2020 WorkSafe laid charges against 13 defendants
 - Six defendants entered guilty pleas prior to trial
 - Two defendants had charges dismissed before trial, and five others had charges dismissed at the close of the prosecution case
 - Only one defendant was convicted at trial
- Sentencing of convicted defendants was completed on 1 March 2024
 - Whakaari Management – fined \$1.045m and ordered to pay reparations of \$4.88m
 - White Island Tours – fined \$517,000 and ordered to pay reparations of \$5m
 - Volcanic Air – fined \$468,750 and ordered to pay reparations of \$330,000
 - Aerius – fined \$290,000
 - Inflight Charters – fined \$227,500
 - Kahu – fined \$196,000
 - Institute of Geological and Nuclear Sciences – fined \$54,000




Legal issues


WorkSafe's prosecutions raised important and interesting questions about the interpretation of the Health and Safety at Work Act 2015 (**HSWA**) and the management of health and safety generally:




How should businesses assess and manage risks?




When do businesses need expert advice to help them assess relevant risks?



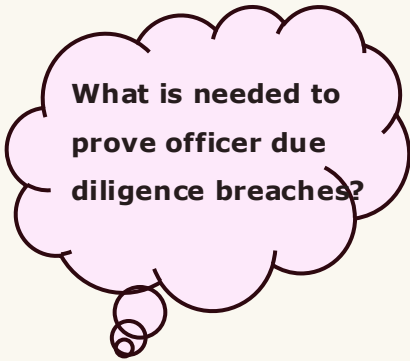
How do HSWA duties apply in a commercial supply chain?



How should natural hazards be managed?



What do landowners need to do when activities take place on their land?



What is needed to prove officer due diligence breaches?

Lesson 1: Managing risk

The Whakaari investigation and prosecutions identified three key issues with the way health and safety was being managed by the tour operator defendants:

- Failure to conduct adequate risk assessments and properly understand the nature and extent of risks involved in their activities
- Failure to provide appropriate personal protective equipment to workers and customers
- Inadequate consultation and information sharing in the supply chain
 - Insufficient consultation with GNS about volcanic risk
 - Failure to ensure safety information was getting to passengers booked by third parties before activities



What does this mean for insureds?

- Undertaking proper risk assessments is critical to all aspects of their business operations, including when purchasing and commissioning new plant and equipment, developing standard operating practices for work activities, and managing changes in their work environments
- These risk assessments inform the decisions insureds make about appropriate controls (including PPE), and should capture information that will need to be shared with others (e.g. workers, contractors, and visitors)

Lesson 2: Landowners

- Judge Thomas held that a landowner only has obligations under section 37 of the HSWA when it exercises active control or management over a workplace in a practical sense
 - Owning it is not enough
 - Making money from it is not enough
 - Being able to manage or control the workplace (but not doing so) is not enough
- Evidence proved that Whakaari Management was not a passive landowner and instead took an active role in facilitating access to Whakaari
- Whakaari Management's conviction is being appealed – hearing in December 2024



What does this mean for insureds?

- Landowners need to consider risks and the extent to which they exercise control or management
- Risks arising from natural environments should be considered separately from risks arising from operational activities

Lesson 3: Directors

- When considering whether an individual officer has met the due diligence obligation in section 44 of the HSWA, the key questions are:
 - What were the relevant circumstances, including those of the PCBU and those of the particular officer, including the position of the officer and the nature of the responsibilities undertaken by the officer?
 - Given those circumstances, did the officer exercise the care, diligence, and skill that a reasonable officer would?
- Judge Thomas' decision reinforces that:
 - Due diligence is a personal obligation on officers
 - What is sufficient for one officer to do by way of due diligence may not be sufficient for another officer – even within the same PCBU
 - It may be helpful for officers to keep appropriate records of their due diligence activities, to demonstrate the steps they have taken
 - WorkSafe and other regulators need governance focused evidence about the role and actions of each officer defendant

Lesson 3: Directors (2)

- *Maritime New Zealand v Gibson* will soon provide more guidance for officers
 - Former Chief Executive of Ports of Auckland Limited has been prosecuted as an officer after a port worker was crushed by a container
 - Judge Bonnar KC's reserved decision is due soon



What do these cases mean for insureds?

- WorkSafe and other regulators are becoming more active
- Individual officers need to understand both their duties and their insurance cover in order to manage their legal risk

Practical and insurance issues

- Regulatory prosecutions are gaining media profile and becoming more complex – this creates lengthy and disruptive legal processes, and reputational risk, for insureds
- Insureds need to consider the insurance cover they will need:
 - Statutory liability, public liability and/or general liability?
 - Quantum of cover for:
 - Legal costs?
 - Reparations?
 - Cover for enforceable undertakings?
 - Cover for Coronial inquests?
 - Primarily reputational risk, but legal costs can be significant
- Potential for conflicts of interest (and the appointment of multiple lawyers) when WorkSafe investigates multiple parties covered by one insurance policy
 - PCBUs
 - Officers
 - Workers



Practical and insurance issues (2)

- Effect of insolvency on defendant insureds
 - Role of liquidator
 - Payment of liquidator's costs (and hence willingness to engage)
 - Evidence about financial capacity at sentencing and the impact cover limits may have on outcomes
- Uncertainties in assessing provisions for insurers – when claims are made there is often incomplete information until a late stage
- Potential publicity for insurers – benefit in keeping insurance policy terms confidential?



Questions



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