

**REVIEW OF WORKSAFE NEW ZEALAND'S PERFORMANCE OF ITS REGULATORY FUNCTIONS IN  
RELATION TO ACTIVITIES ON WHAKAARI WHITE ISLAND**

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8 September 2021**

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## EXECUTIVE SUMMARY

1. This is a review of the way in which WorkSafe New Zealand (**WorkSafe**) performed its regulatory functions in relation to Whakaari White Island from when the adventure activities regulations came fully into effect on 1 November 2014 and 9 December 2019 when the eruption occurred. In this review I:
  - (a) assess the adequacy and appropriateness of the steps taken by WorkSafe in performing those functions;
  - (b) consider whether there are further steps that ought to have been taken; and
  - (c) identify any changes to WorkSafe’s systems, processes and practices that I consider are necessary or desirable taking into account the findings in MBIE’s Draft Report: *Targeted review of the adventure activities regulatory regime*.

### WorkSafe’s regulatory roles

2. WorkSafe has four key regulatory roles in respect of the Adventure Activities regime:
  - (a) the primary regulator of the regime;
  - (b) the Registrar of the register of adventure activities operators (**AAOs**);
  - (c) to recognise safety auditors to authorise them to conduct safety audits on AAOs;
  - (d) to develop and review the safety audit standards, which set the requirements operators must meet to pass a safety audit.
3. WorkSafe’s functions as the regulator include monitoring and enforcing compliance with the regime’s statutory and regulatory requirements. It is an offence for an AAO to provide, or to offer to provide, an adventure activity if the operator is not registered to provide the activity.
4. WorkSafe has published one safety audit standard (**SAS**). The purpose of the SAS is to specify standards or requirements with which AAOs must comply to reduce risks to health and safety. Safety auditors (also known as certification bodies) are required to audit an AAO’s compliance with the SAS.
5. One of the primary functions and objectives of the Adventure Activities regulatory regime is to ensure that an AAO is not registered unless its operation has been audited by a safety auditor that has the appropriate experience and qualifications to carry out an audit of the adventure activity provided. The aim of this is to reduce risks to the health and safety of those involved in the adventure activity.
6. A precondition of WorkSafe being permitted to recognise a person or organisation as a safety auditor is that it must be satisfied that the person or organisation “*has the appropriate experience and qualifications to carry out the proposed audits*”. Consistent with this precondition is that WorkSafe may impose a condition of recognition that limits the safety auditor to specified types of adventure activity – ie, to those that WorkSafe is satisfied the safety auditor has the appropriate experience and qualifications to audit.
7. WorkSafe and Joint Accreditation System of Australia and NZ (**JAS-ANZ**) developed the New Zealand Adventure Activities Certification Scheme (**NZAACS**)\* as the primary means by which safety auditors are recognised by WorkSafe. JAS-ANZ carried out accreditation assessments under the NZAACS after JAS-ANZ endorsed it on 1 November 2015. Prior to that, JAS-ANZ conducted assessments against the New Zealand Adventure Activity Certification Scheme Temporary Recognition Checklist (**Temporary Checklist**), which included:

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\* JAS-ANZ note that New Zealand Adventure Activities Certification Scheme was developed by a scheme technical committee which consisted of representatives from MBIE (and subsequently WorkSafe), JAS-ANZ, Department of Conservation, Maritime NZ, industry representatives and audit bodies.

- (a) requirements relating to ensuring that the audit body being assessed has personnel with the appropriate technical competency and expertise relevant to the adventure activities that will be audited by the audit body;
  - (b) a 'Technical competency table', which listed 'Activity groups' (which did not include any activity that is expressed to be on or near a live volcano) and 'Qualifications or attestation' for each of those Activity groups, and states the "*activities listed are not exhaustive but are activities usually subject to the regulations*".
8. During June 2014, JAS-ANZ conducted assessments against the Temporary checklist of five certification bodies, including [Quality Solutions International (New Zealand) Limited]\* and Bureau Veritas Australia Pty Ltd (**Bureau Veritas**). JAS-ANZ's assessment of Bureau Veritas raised issues in respect of Bureau Veritas's ability to meet the auditor/technical expert technical competency requirements.
  9. On 13 June 2014, WorkSafe recognised, among other certification bodies, [Quality Solutions International (New Zealand) Limited] and Bureau Veritas as safety auditors for the period 13 June 2014 to 31 December 2014. The Bureau Veritas certificate of recognition was granted on conditions, which included that WorkSafe could specify the scope of the adventure activities for which Bureau Veritas could issue safety audit certificates – which would be assessed by WorkSafe based on whether it was satisfied that Bureau Veritas met the personnel requirements under the Scheme Rules.
  10. WorkSafe did not specify the scope of adventure activities that could be audited by Bureau Veritas, which meant there was no limit on the types of adventure activities it could audit. WorkSafe has acknowledged that this fell short of good regulatory practice and resulted in the risk that Bureau Veritas could audit adventure activities it did not have the technical expertise to audit.

#### **Registration of White Island Tours Ltd**

11. White Island Tours Ltd (**White Island Tours**) is a tourism operator that, among other things, transports customers by boat to Whakaari White Island and then provides guided walking tours on the Island. Bureau Veritas audited White Island Tours in October 2014. The technical expert used by Bureau Veritas for the audit was a qualified mountain guide but had no expertise in respect of volcanic hazards. And, of course, Bureau Veritas had not been assessed by JAS-ANZ as having the appropriate experience or qualifications to carry out an audit of an activity carried out on or near a live volcano – because the Temporary Checklist technical competency table did not include an activity of that type.
12. Bureau Veritas issued a Certification dated 21 November 2014 to White Island Tours for a three year period from 21 November 2014 to 20 November 2017. WorkSafe registered White Island Tours on 27 November 2014 for that three year period on the basis of the Bureau Veritas Certification. White Island Tours was therefore registered without being audited by a safety auditor that had the appropriate experience and qualifications to audit its adventure activity operation on Whakaari White Island.
13. On 27 January 2015, WorkSafe issued recognition certificates for the three year period 1 January 2015 to 31 December 2018 to, among others, [Quality Solutions International (New Zealand) Limited] and Bureau Veritas. The [Quality Solutions International (New Zealand) Limited] recognition certificate contained a condition to the effect that WorkSafe could, by written notice, specify the scope of the adventure activities for which safety audit certificates could be issued – and that WorkSafe NZ would make that "*assessment based on whether it is satisfied that QSI meets the requirements under the Scheme for engagement of personnel with the relevant technical competencies*".
14. WorkSafe and JAS-ANZ entered into a Memorandum of Understanding dated 16 October 2015 to define their relationship in respect of the NZAACS. The Operational Agreement setting out

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\* Note MBIE has updated references to this company throughout the report to refer to its full legal name ("Quality Solutions International (New Zealand) Limited") or trading name ("AdventureMark").

WorkSafe's roles and responsibilities attached to the Memorandum of Understanding includes obligations relating to ensuring that auditors have the relevant technical expertise in respect of the adventure activities to be audited and providing for communication between WorkSafe and auditors in respect of particular audits. WorkSafe is required to:

- (a) maintain and update, in conjunction with JAS-ANZ, the technical competency table for audit team personnel;
- (b) alert certification bodies to any specific matters to be considered in their evaluation, certification, or surveillance activities;

15. The 2015 NZAACS (dated 1 November 2015) contains provisions to the same effect:

- (a) it records that the scope of a certification body's accreditation by JAS-ANZ and recognition by WorkSafe NZ is confined to the specific adventure activities for which it meets the knowledge and skill requirements defined in the NZAACS – and that a certification body is therefore only able to audit those adventure activities it is accredited and recognised for, subject to any conditions imposed by accreditation and recognition;
- (b) certification bodies are required to:
  - (i) send WorkSafe the operator profile, which includes identifying the nature of the adventure activity, as soon as practicable once the contract for services has been agreed; and
  - (ii) provide WorkSafe with the opportunity to alert them of any specific matters to be considered in their evaluation, certification, or surveillance activities;
- (c) at any time, WorkSafe may advise the certification body of any concerns it has in respect of an applicant or certified operator;
- (d) in terms of personnel, certification bodies are required to hold either a current qualification or attestation "*as outlined in the Technical Competency Table*";

16. The Technical competency table is important to certification bodies in terms of identifying the technical experts and/or the qualifications and experience required to audit particular adventure activities. It is part of the audit planning process, including in terms of staffing requirements.

17. The Technical competency table does not contain an activity expressed to be carried out on a live volcano. WorkSafe and JAS-ANZ considered including an activity - "*Volcanic area hike*" - to cover White Island Tour's operation on Whakaari White Island in both September 2015 and April 2017 but ultimately did not do so.

18. JAS-ANZ endorsed the 2015 NZAACS on 1 November 2015 and then carried out accreditation assessments under that scheme. JAS-ANZ accredited [Quality Solutions International (New Zealand) Limited] in November 2016. The JAS-ANZ accreditation assessment report (which noted that [Quality Solutions International (New Zealand) Limited]'s accreditation activities would be carried out by AdventureMark) recommended that [Quality Solutions International (New Zealand) Limited] be accredited under the 2015 NZAACS for "*Adventure activity scopes*" that listed all "*activity groups*" in the 2015 NZAAC Technical competency table other than bungy jumping. WorkSafe has advised that it does not have any record of being informed of this limitation of accreditation.

19. At that stage, [Quality Solutions International (New Zealand) Limited] was still subject to the WorkSafe recognition certificate issued for the three year period 1 January 2015 to 31 December 2018, which provided that WorkSafe could "*by written notice, specify the scope of the adventure activities for which safety audit certificates could be issued*". WorkSafe did not provide any written notice to [Quality Solutions International (New Zealand) Limited] specifying the scope of the adventure activities it could issue audit certificates for. WorkSafe has acknowledged that this fell short of

good regulatory practice and could create risks that audit bodies were certifying activities in respect of which they were not competent.

20. The NZAACS was updated in July 2017. The 2017 NZAACS technical competency table was updated to include three additional activity groups, but not one expressed to be carried out on a live volcano.
21. White Island Tour's registration was due to expire on 20 November 2017. Prior to that, White Island Tours advised WorkSafe to the effect that it did not consider it was required to re-register because there were five other operators operating on Whakaari White Island that were not registered. WorkSafe then confirmed its view that White Island Tour's activity of walking tours on Whakaari White Island was an adventure activity because of the risks that passengers were exposed to as a result of the live volcano. These risks were identified by reference to a 1996 report, which included the risks of an eruption and being exposed to volcanic gases.
22. White Island Tours engaged [Quality Solutions International (New Zealand) Limited]/AdventureMark to carry out the re-registration audit. Before the audit was carried out, there was a conversation between [AdventureMark] and WorkSafe relating to the scope of the audit. This is consistent with their respective obligations under the 2017 NZAACS relating to the provision of information and advice in respect of particular audits before they are carried out. [AdventureMark] said it was agreed during that conversation that it would audit the "*low level mountaineering*" aspects of the operation because White Island Tours had engaged GNS as its technical expert in respect of the volcanic risks/hazards on the island. [AdventureMark] therefore appointed a technical expert that had expertise in respect of low level mountaineering but no expertise in respect of the management of volcanic risks or hazards.
23. WorkSafe does not agree with everything [AdventureMark] said about that conversation. The WorkSafe employee involved in the conversation said he did not say it would be acceptable for the auditor to have no technical expertise in volcanic risk – and that it appeared to him that the AdventureMark auditor had sufficient expertise, despite not being a volcanologist. He understood that GNS Science was filling the role of White Island Tours' technical adviser. A "technical adviser" engaged by an AAO is different from an audit team's "technical expert". A technical expert must be part of the audit team and independent of the AAO.
24. Regardless what expertise in volcanic risks WorkSafe thought the AdventureMark auditor had:
  - (a) WorkSafe did not suggest that the AdventureMark auditor had any expertise in the volcanic risk aspects of the White Island Tours safety management system that it understood GNS Science was advising on;<sup>1</sup> and
  - (b) it appears that it was considered that the AdventureMark audit certificate would cover those volcanic risks because all that was required was for the AdventureMark auditor to verify that GNS Science had been involved as White Island Tour's technical adviser.
25. WorkSafe was therefore in effect accepting that, because White Island Tours had engaged GNS Science as its technical adviser, it was not necessary for [AdventureMark]:
  - (a) to appoint a technical expert as part of its audit team that had the appropriate experience and qualifications in respect of the very risks and hazards that made White Island Tours' activity registrable as an adventure activity; or

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<sup>1</sup> Including: whether or not tours should go ahead based on Whakaari White Island volcanic alert levels; once boats arrive at the island, decisions as to whether or not passengers actually go onto the island and, if so, to which parts; the types of protective clothing and equipment that would be used; and what action should be taken in the event of an eruption or a volcanic event.

- (b) to audit White Island Tours' safety management system (**SMS**) in terms of how it, among other things, identifies and manages those risks and hazards.
26. In any event, it appears White Island Tours had not engaged GNS Science as its technical adviser. A document (which was not provided to WorkSafe) prepared by AdventureMark in respect of the audit records that the White Island Tours SMS was developed with the assistance from Bureau Veritas and that its technical adviser was one of its own employees – although there is an auditor comment noting “*There is a relationship with GNS Science*”.
27. The end result is that White Island Tours was registered without its SMS, in terms of how it (among other things) identifies and manages the risks and hazards that makes its operation registrable as an adventure activity, having been audited.

#### Conclusions – registration of White Island Tours Ltd

28. One of the primary functions and objectives of the Adventure Activities regulatory regime is to ensure that an AAO is not registered unless its operation has been audited by an auditor that has the appropriate experience and qualifications to carry out an audit of the adventure activity provided. That did not occur in the case of White Island Tours when it was registered by WorkSafe in November 2014 and November 2017. Neither Bureau Veritas nor [AdventureMark] had a technical expert that had the appropriate experience or qualifications to carry out an audit of an adventure activity that involved walking tours on a live volcano – an activity that was registrable as an adventure activity because of the volcanic risks and hazards that participants are exposed to.
29. WorkSafe did not take appropriate steps in carrying out its regulatory functions to ensure that White Island Tours was audited by an auditor that had the appropriate experience and qualifications.

#### *Bureau Veritas audit*

30. Before it registered White Island Tours on 27 November 2014, WorkSafe would have been aware that the Temporary Checklist technical competency table did not include an activity expressed to be on or near a live volcano and therefore that:
- (a) the JAS-ANZ assessment of Bureau Veritas did not involve assessing whether Bureau Veritas had the appropriate experience and qualifications to carry out an audit of an adventure activity of that type; and
  - (b) Bureau Veritas did not have the benefit of the technical competency table in its audit planning as a means of identifying the technical expert and/or the qualifications and experience required to audit an adventure activity of that type.
31. A process should have been put in place by WorkSafe for the purpose of ensuring that an auditor engaged to audit an adventure activity that was not on the Temporary Checklist technical competency table at the time the auditor was recognised had the appropriate experience and qualifications to carry out that audit. The process could have included an obligation on the auditors of the same nature as was included in the NZAACS, which required them to:
- (a) send WorkSafe the operator profile, which includes identifying the nature of the adventure activity, as soon as practicable once the contract for services has been agreed; and
  - (b) provide WorkSafe with the opportunity to alert them of any specific matters to be considered in their evaluation, certification, or surveillance activities.
32. This would have enabled WorkSafe to identify the appropriate experience and/or qualifications required to carry out the audits of any such adventure activities (as it does with activities on the



technical competency table) so that arrangements could be made to ensure the auditor had access to a person or persons with that experience and/or those qualifications.

33. The result of WorkSafe not putting such a process in place was that White Island Tours was registered and remained registered for a three year period when it had not been audited by an auditor with the appropriate qualifications and/or experience – and so those involved in the adventure activity did not have the protection (in terms of reduced risks to their health and safety) of that having occurred.

*[AdventureMark] audit*

34. WorkSafe had an obligation under the October 2015 Memorandum of Understanding to maintain and update the technical competency table. White Island Tours had been registered as an AAO in respect of its operation on Whakaari White Island since November 2014. WorkSafe should have ensured that the technical competency table was updated to include an activity expressly referring to the activity taking place on an active volcano. This would have identified what was required in terms of qualifications and/or experience to audit an activity that exposed participants to risks and hazards from exposure to volcanic activity.
35. The technical competency table is an important planning tool for safety auditors in identifying the qualifications and experience required to audit particular adventure activities. Inclusion of an activity relating to Whakaari White Island would therefore have gone some way to fulfilling WorkSafe’s responsibility to ensure that safety auditors that, at the time it recognised them, it could not have been satisfied had the appropriate qualifications and experience to audit adventure activities on Whakaari White Island, had the appropriate qualifications and experience at the time they audited any such adventure activities.
36. As a result of its conversation with [AdventureMark], WorkSafe’s understanding was that GNS Science had been engaged by White Island Tours to perform the role of “technical adviser”. Regardless who White Island Tours might have engaged as its technical adviser, WorkSafe should have made it clear to [AdventureMark] that it was required to engage a technical expert as part of its audit team who had the appropriate qualifications and experience in respect of the volcanic risks and hazards passengers are exposed to on Whakaari White Island.

Changes to WorkSafe’s systems, processes and practices

37. I recommend that WorkSafe takes the following steps to ensure AAOs operating on Whakaari White Island are audited by auditors with the appropriate experience and qualifications:
- (a) recognise activities carried out on Whakaari White Island as a discrete adventure activity;
  - (b) identify the appropriate experience and qualifications required to carry out an audit of those activities – to ensure that the measures put in place by AAOs to address the risks and hazards to which those involved in the activity are exposed as a result of being in close proximity to a live volcano satisfy the SAS good practice requirement; and
  - (c) include that adventure activity and the experience/qualifications on the technical competency table.
38. I understand there might be some difficulties involved in identifying the persons and/or organisations that have the appropriate experience/qualifications and/or they might be in short supply in New Zealand. If that is the case, then I recommend that WorkSafe, or some other appropriate industry body, should identify who the appropriate persons and/or organisations are and take steps to ensure that they are available to be engaged as a technical expert as and when required. Unless this is done, it is difficult to see how WorkSafe could be satisfied that any of the



auditors it has recognised have the appropriate experience and qualifications to audit adventure activities on Whakaari White Island.

39. The process provided for in the NZAACS will ensure that WorkSafe is advised when an auditor is engaged to audit an AAO operating on Whakaari White Island – ie, when WorkSafe receives the operator profile. WorkSafe should put in place a system that ensures that, at that time, it advises the auditor of the need to engage an appropriate technical expert and provides the details of those technical experts available to be engaged.
40. I also recommend that WorkSafe, in partnership with the identified technical experts, should consider whether it is appropriate to develop activity safety guidelines for activities on Whakaari White Island.

#### **Actions in respect of unregistered operators**

41. WorkSafe’s function of enforcing compliance with the Adventure Activities regulatory regime registration requirement is an important function because participants in an adventure activity carried out by an unregistered AAO do not have the protection of that AAO’s compliance with the SAS having been audited and certified.
42. WorkSafe did not take appropriate steps to monitor and enforce compliance with the registration requirement in respect of unregistered operators carrying out activities on Whakaari White Island. WorkSafe had been aware since at least July 2014 that potentially there were unregistered operators carrying out activities on Whakaari White Island. Yet by November 2019 it had not reached the stage of even referring the matter to the WorkSafe inspectorate to consider enforcement action against the unregistered operators. This delay cannot be justified in the circumstances:
  - (a) After advising one of the unregistered operators in July 2014 that it was unlikely to be required to be registered, the issue of an unregistered operator operating on Whakaari White Island arose in August 2015 when another of the operators queried whether it was required to register. There is no record of anything being done by WorkSafe in response to that query.
  - (b) The next record of the issue being considered is on 29 April 2016 when an internal WorkSafe email noted that there was one unregistered operator that was likely to be required to be registered.
  - (c) That email went unanswered, and there is no record of anything being done in response to it, until the email was followed up on 1 November 2017. It appears the only reason it was followed up then is because White Island Tours had advised WorkSafe that there were five unregistered operators operating on Whakaari White Island.
  - (d) After forming the view that the unregistered operators were required to register (based principally on the risks arising from volcanic activity referred to in a 1996 report), WorkSafe advised the unregistered operators of its “provisional view” to that effect in letters dated 7 November 2017. One of the unregistered operators queried that view in an email dated 8 November 2017.
  - (e) That email was not replied to for over a year - until 5 December 2018, when WorkSafe confirmed its view that the unregistered operators were required to register and offered to provide guidance on how to register. In the meantime WorkSafe communicated with Whakaari Management Ltd, the owner/manager of Whakaari White Island, in the hope it could convince Whakaari Management Ltd that the unregistered operators should be required to register and so should not be permitted to land on Whakaari White Island until

they were registered. However, WorkSafe's first email to Whakaari Management Ltd was not until almost nine months later – on 6 August 2018.

- (f) During a meeting with Whakaari Management Ltd and the unregistered operators on 29 March 2019, after WorkSafe had confirmed its view that the unregistered operators were required to be registered, it was indicated that those present wanted to challenge that view and asked how they could do that. WorkSafe advised them that, if they thought they had new information, they should put it in writing and WorkSafe would have to consider it.
  - (g) One of the unregistered operators then sent WorkSafe an email dated 10 April 2019 advising why it considered they should not have to register. Even though there is no statutory or regulatory basis for such a process, WorkSafe treated that email as seeking a review of the indication that registration was required.
  - (h) WorkSafe conducted the review, which involved its policy team considering and determining what WorkSafe's position should be. That position was set out in an email dated 18 November 2019 confirming its advice that the unregistered operators were required to register. In a further email that day, in response to a query from one of the unregistered operators, WorkSafe advised "*I suspect that WorkSafe would now be looking for clear movement towards compliance in a reasonable time-frame*".
  - (i) WorkSafe confirmed that it had not initiated any enforcement action before this time and that the intention was to give the unregistered operators a few weeks before passing the matter to the WorkSafe inspectorate to consider enforcement action.
43. As soon as WorkSafe became aware that there were unregistered operators operating on Whakaari White Island, it should have taken the following steps:
- (a) Obtain all relevant information required to determine whether the operators are providing adventure activities and so are required to register. This would include identifying the operators and obtaining information from them and any other relevant sources as to the nature of their operations and the risks and hazards they expose participants to.
  - (b) Determine whether the operators are required to register. This would be the time to involve the policy team if considered appropriate in the circumstances.
  - (c) If it is determined that registration is required, advise the unregistered operators that they are required to be registered, the process involved in becoming registered and the legal consequences of continuing to operate without being registered.
  - (d) Monitor the situation – in terms of whether the unregistered operators become registered or continue to operate unregistered.
  - (e) If it becomes apparent that any of them are continuing to operate unregistered, refer them to the WorkSafe inspectorate for the purpose of taking appropriate enforcement action aimed at ensuring they do not operate while unregistered.
44. The length of time taken by WorkSafe to reach the stage where it considered referring the unregistered operators to its inspectorate for enforcement action is unacceptably long and cannot be justified in the circumstances. This is in the context of a regulator that must have been aware that, during this period, participants in an adventure activity that it considered should be registered did not have the protection of registration – a significant purpose of which is to reduce risks to the health and safety of those involved in adventure activities.

## WORKSAFE'S REGULATORY ROLES

45. WorkSafe has four key regulatory roles in respect of the Adventure Activities regime:
- (a) the primary regulator of the regime, as part of the Health and Safety at Work regulatory system;
  - (b) the Registrar of the register of **AAOs**;
  - (c) to recognise safety auditors to authorise them to conduct safety audits on AAOs;
  - (d) to develop and review the safety audit standards, which set the requirements operators must meet to pass a safety audit.

### The primary regulator

#### *WorkSafe New Zealand Act 2013*

46. WorkSafe's functions are set out in s 10 of the WorkSafe New Zealand Act 2013. They include to:
- (a) advise on the operation of the work health and safety system;
  - (b) make recommendations for changes to improve the effectiveness of the work health and safety system;
  - (c) monitor and enforce compliance with relevant health and safety legislation;
  - (d) provide guidance, advice and information on work health and safety to persons who have duties under the relevant health and safety legislation and to the public.
47. In carrying out its functions under relevant health and safety legislation, WorkSafe is required to act in a way that furthers any relevant objectives or purposes of that legislation.<sup>2</sup>
48. "*Relevant health and safety legislation*" includes the *Health and Safety at Work Act 2015 (HSW Act)* and regulations made under that Act, such as the *Health and Safety at Work (Adventure Activities) Regulations 2016 (2016 AA Regulations)*.<sup>3</sup>

#### *The Health and Safety at Work Act 2015*

49. The HSW Act provides the primary powers of the regulator for WorkSafe to achieve its functions. Part 4 of the HSW Act provides WorkSafe, as the regulator, with powers related to enforcement, inspection and requiring PCBUs to produce information for WorkSafe to perform its functions.
50. The HSW Act is also the primary source of duties on PCBUs<sup>4</sup> relevant to WorkSafe's enforcement function. Part 2 of the HSW Act provides the primary duties of parties to manage health and safety risks and offences associated with breaches of these duties. Regulations made under the HSW Act provide further duties and offences.

### The Registrar

51. The 2016 AA Regulations provide that WorkSafe may recognise a person or an organisation as the recognised Registrar - but that WorkSafe will be the Registrar if there is no recognised Registrar.<sup>5</sup> WorkSafe has acted as the Registrar since the predecessor of the 2016 AA Regulations, the Health

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<sup>2</sup> Section 9 (2).

<sup>3</sup> WorkSafe New Zealand Act 2013, s3, which refers to the definition of "*relevant health and safety legislation*" in s 16 of the Health and Safety at Work Act 2015.

<sup>4</sup> Person conducting a business or undertaking as defined in s 17 of the HSW Act.

<sup>5</sup> 2016 AA Regulations, rr 3 and 13.

and Safety in Employment (Adventure Activities) Regulations 2011 (**2011 AA Regulations**), came fully into force on 1 November 2014.

52. The Registrar has three main functions:

- (a) to keep and maintain a public register of AAOs who are authorised to provide activities, recording specified information about each authorised operator;<sup>6</sup>
- (b) to cancel or suspend the registration of AAOs if satisfied on reasonable grounds that specified grounds, including that the person was registered by mistake, are met;<sup>7</sup>
- (c) to promptly register a person as an authorised AAO upon receipt of their safety audit certificate and other information required for registration, unless satisfied on reasonable grounds that one of the specified grounds to decline registration are met.<sup>8</sup>

53. It is an offence for an AAO to provide, or to offer to provide, an adventure activity if the operator is not registered to provide the activity.<sup>9</sup>

### **Recognising safety auditors**

54. WorkSafe may, on written application, recognise a person or organisation as a safety auditor if satisfied of specified grounds, which include:

the person or organisation has the appropriate experience and qualifications to carry out the proposed audits;<sup>10</sup>

55. Other powers relevant to recognising safety auditors include:

- (a) when granting recognition of a safety auditor, WorkSafe may impose conditions on recognition, including a condition *“that limits the safety auditor to only specified locations or types of adventure activity or equipment”*;<sup>11</sup>
- (b) WorkSafe may withdraw recognition of a safety auditor if satisfied on reasonable grounds the auditor has breached a condition of their recognition, or it is in the interests of safety to do so.<sup>12</sup>

56. The functions of a safety auditor include:<sup>13</sup>

- (a) to provide safety audits of an adventure activity operator’s compliance with the 1 or more safety audit standards that apply to the adventure activities that the operator provides; and
- (b) to issue safety audit certificates to adventure activity operators who pass safety audits, subject to appropriate conditions (if any); and
- (c) to provide copies of safety audit certificates and related information to the Registrar so that adventure activity operators are registered; and

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<sup>6</sup> 2016 AA Regulations, rr 16(a) and 17; 2011 AA Regulations, rr 14(a) and 15.

<sup>7</sup> 2016 AA Regulations, rr 16(b) and 18; 2011 AA Regulations, rr 14(b) and 16.

<sup>8</sup> 2016 AA Regulations, r 7; 2011 AA Regulations, r 6.

<sup>9</sup> 2016 AA Regulations, r 8; under r 7 of the 2011 AA Regulations, it was an offence for an AAO to provide, but not to offer to provide, an adventure activity if the operator was not registered to provide the activity.

<sup>10</sup> 2016 AA Regulations, r 9(1)(a); 2011 AA Regulations, r 11(3)(a).

<sup>11</sup> 2016 AA Regulations, r 10(1)(b); 2011 AA Regulations, r 12(1)(b).

<sup>12</sup> 2016 AA Regulations, r 11; 2011 AA Regulations, r 13.

<sup>13</sup> 2016 AA Regulations, r 12; 2011 AA Regulations, r 10 contains the same wording in all material respects.

## Safety audit standards

57. WorkSafe must develop, and continue to review, one or more safety audit standards, which must, among other things:<sup>14</sup>
- specify standards or requirements with which adventure activity operators must comply to reduce risks to health and safety when an operator provides adventure activities.
58. Different safety audit standards may apply to different types of adventure activities that operators provide.<sup>15</sup>

## WORKSAFE CARRYING OUT ITS REGULATORY ROLES – THE FACTUAL CONTEXT

### Developing/reviewing safety audit standards

59. WorkSafe has published one safety audit standard, the Safety Audit Standard for Adventure Operators dated March 2017 (**2017 SAS**). The 2017 SAS updated the first version of that safety audit standard (dated March 2013) to make consequential changes resulting from the establishment of WorkSafe (in December 2013) and the passing of the HSW Act and the AA Regulations.
60. In dismissing a judicial review claim that WorkSafe was required to publish a specific safety audit standard to regulate adventure activity operations on live volcanoes, the High Court stated WorkSafe has a discretion as to whether it develops more than one safety standard and there is nothing requiring it to develop standards for every adventure activity.<sup>16</sup> The Court also stated the following when referring to the 2017 SAS:
- [91] The safety standard puts the onus on the adventure activity operator (the PCBU) to ensure conformity with good practice for the specific activity being undertaken in its standard operating procedures. This is in accordance with the design of the legislation which places the primary responsibility for managing risk on the PCBU.
- . . .
- [96] In accordance with the Regulations, WorkSafe has developed a safety standard for adventure activities. The standard is designed to be flexible and incorporate good practice as it applies to the particular adventure activity under scrutiny.
- [97] Counsel indicated there are approximately 350 adventure activity operators registered providing a range of different adventure activities. A change in policy requiring WorkSafe to develop safety audit standards in respect of all such adventure activities would require careful consideration and expert input. That is a matter of policy for ministers and the government.
61. The 2017 SAS (and the March 2013 version in most material respects) contained, among others, the following provisions:
- (a) The operator’s requirements in respect of a Safety Management System (**SMS**):
- The operator must establish, document, implement, maintain, and continually improve an SMS in accordance with the requirements of this standard, and must determine how they will fulfil these requirements.
- . . .

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<sup>14</sup> 2016 AA Regulations, r 19(3); 2011 AA Regulations, r 20(3) contains the same wording other than the words “to health and safety”.

<sup>15</sup> 2016 AA Regulations, r 19(5); 2011 AA Regulations, r 20(4).

<sup>16</sup> *Wislang v the Attorney-General and Ors*, [2020] NZHC 2588, at [90].

- (b) The operator's requirements in respect of "*Leadership and Management*" (section 4.2 in the 2017 SAS) include:

The operator must identify the legislation (including local bylaws), standards, activity safety guidelines, codes of practice, and similar information that is relevant to the safe management of their adventure activities. Similarly, the operator should do this for their ancillary services also.

This information must be used to inform development of the SMS. Reports obtained by the operator from technical advisers and/or technical experts should also be used to inform development of the SMS.<sup>17</sup>

The operator must monitor this information to ensure the SMS remains up-to-date and consistent with any changes as appropriate and that their operations continue to comply with such requirements.

- (c) The operator's requirements in respect of "*Risk and Hazard Management*" (section 5.1 in the 2017 SAS) include:<sup>18</sup>

The operator must implement a systematic process to:

- > identify the reasonably foreseeable risks arising from their activities
- > identify the reasonably foreseeable hazards that could give rise to risks in their activities
- > assess each risk and hazard to determine whether it is serious.

...

The operator must ensure that a technical adviser, either in-house or external, is involved in this process of identification and assessment.

...

- (d) The operator must develop, implement and maintain Standard Operating procedures (**SOPs**) for each activity, which must conform to good practice for the activity and address each of a number of items, including:

### **6.3 DYNAMIC MANAGEMENT OF RISKS<sup>19</sup>**

In addition to outlining control measures for serious risks, SOPs must require staff to continually identify and manage risk levels during each activity.

Staff must have the authority to halt an activity if they identify increased risks (or combination of risks) that threaten the safety of any person associated with the activity.

...

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<sup>17</sup> The March 2013 version does not include the words "*technical advisers and/or*".

<sup>18</sup> The March 2013 version contains the following similar wording at 4.1:

The operator must implement a systematic process to:

- a) identify hazards
- b) asses them for significance.

The operator must ensure that a technical expert, either in-house or external, is involved in this process of identification and assessment.

<sup>19</sup> The March 2013 version contains the following very similar wording at 5.3:

In addition to outlining control measures for significant hazards, SOPs must require staff to continually identify and manage hazards during each activity.

Staff must have the authority to halt an activity if a hazard threaten the safety of any person associated with the activity.

## 6.5 CLOTHING AND EQUIPMENT

SOPs must specify the clothing and equipment that is required to ensure safety during the activity.

...

- (e) Good practice is defined as:

Range of actions currently accepted within the adventure and outdoor sector to manage the risk of harm to staff, participants and visitors. Good practice should also reflect relevant standards recognised within the sector for the safe provision of adventure activities where these exist. This may include, but is not limited to:

- > activity safety guidelines
- > codes of practice or conduct
- > other recognised/approved guidelines
- > accepted professional practices.

- (f) The operator must establish and maintain emergency preparedness and response plans:

The operator must establish and maintain emergency preparedness and response plans for foreseeable emergencies.

...

The plans must include procedures for:

- > stabilising the situation and accounting for staff and participants
- > assigning responsibilities and authority for implementing emergency response plans, including who must notify emergency services and when.
- > rescue or evacuation of people involved in the activity.<sup>20</sup>

...

### Activity safety guidelines

62. The [SupportAdventure](#) website is managed by Tourism Industry Aotearoa and Recreation Aotearoa, and endorsed by WorkSafe. As well as containing general guidance, tools and templates to assist operators in understanding their responsibilities, it also contains Activity Safety Guidelines. Activity Safety Guidelines, which are developed by industry technical experts in partnership with WorkSafe, provide detailed information about risk identification and management in particular activities. To date 12 Activity Safety Guidelines have been developed – 11 are listed on the SupportAdventure website and one, for rafting, is on the WorkSafe website.
63. The only Activity Safety Guidelines that appears to have any relevance to the activity of guided walking trips to Whakaari White Island is the Alpine Hiking Activity Safety Guideline:
- (a) The guideline is stated to cover the following:

The guideline describes what alpine hiking operators and technical experts consider is good practice for actively managing safety when providing commercial alpine hiking in New Zealand.

It includes all non-technical alpine activities that take place in alpine and sub-alpine environments. Snow cover can be permanent or seasonal.

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<sup>20</sup> The March 2013 version does not include a reference to this procedure.



Activities such as driving are outside the scope of this guideline. Operators who provide these activities need to manage the associated hazards.

This guideline focuses on preventing death or other serious harm. It identifies common significant hazards that participants and staff may be exposed to during alpine hiking trips, and makes recommendations for managing these hazards.

- (b) It makes the following references to volcanic activity when considering hazards relating to terrain and natural events:

#### **Changes to the hazards of terrain**

Significant events such as earthquakes, volcanic activity, avalanches, slips, floods, tree or rock fall may affect known existing hazards or create new hazards.

...

#### **3.3 Natural events**

Alpine hiking can be exposed to the effects of weather events such as high winds, heavy rain, and lightning. Natural events can be volcanic activity or earthquakes that can create rock fall, gas clouds, and landslides.

Hazard management options include:

- identifying and assessing the risk of hazardous weather and other natural events
- ensuring that pre-activity procedures include checking that conditions are suitable
- ensuring guides know and use the best available methods for predicting mountain conditions such as forecasting services and local indicators
- two-way communications to access the latest forecasts and reports throughout the activity
- using local no-go indicators and procedures for cancelling due to concerns about conditions
- establishing procedures for when alpine conditions change, such as safe waiting areas, emergency supplies, escape routes and evacuation
- establishing a range of support and emergency procedures
- briefing the participants on their roles and responsibilities.

#### **June 2014 recognition of safety auditors**

64. WorkSafe, with the assistance of JAS-ANZ,\* developed the NZAACS, which established the auditing, certification and surveillance requirements associated with the implementation of the 2011 and 2016 AA Regulations. NZAACS accreditation by JAS-ANZ is the primary (but not exclusive) means by which safety auditors (certification bodies) are recognised by WorkSafe to undertake the safety audits of AAOs. JAS-ANZ endorsed the NZAACS on 1 November 2015 and from that date was able to accept applications from certification bodies for accreditation.
65. Over the period May to July 2014, as part of a short-term recognition process undertaken by WorkSafe, JAS-ANZ conducted assessments against the Temporary Checklist, which drew criteria from the then current draft of the NZAACS (among other sources).
66. The Temporary Checklist included the following:
- 43 . . . How does the audit body engage, on an on-going basis, sufficient personnel such that their combined technical competency is relevant to each of the adventure activities the audit body is accredited for under the scheme?

...

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\* JAS-ANZ note that the New Zealand Adventure Activities Certification Scheme was developed by a scheme technical committee which consisted of representatives from MBIE (and subsequently WorkSafe), JAS-ANZ, Department of Conservation, Maritime NZ, industry representatives and audit bodies.

52 . . . Does the audit body have criteria and processes for the selection of audit teams to ensure they have the appropriate qualifications, knowledge, and skills to establish whether an operator complies with the safety audit standards applying to the adventure activity or activities being audited?

. . .

54 . . . **Audit team technical competency**

Does the audit body establish the technical competency required of an audit team in relation to the specific adventure activity or activities being audited?

55 . . . For each activity, is there an auditor or a technical expert who is a member of the team and whose technical competency is relevant to that specific activity?

67. The Temporary Checklist also included a 'Technical competency table', which listed 'Activity groups' and 'Qualifications or attestation' for each of those Activity groups, and states the "*activities listed are not exhaustive but are activities usually subject to the regulations*". There is no activity that is expressed to be on or near a live volcano. "Attestation" is described as follows:

*Attestation is the process by which an independent opinion is sought and expressed on the technical competency of a person in relation to the safe delivery of one or more adventure activities.*

In accepting an attestation for a technical expert, does the audit body ensure that:

- The person became technically competent through substantial professional experience in instructing or guiding participants at a level involving dynamic management of the risks involved
- Through their professional experience, the person is conversant with, the risks presented by the New Zealand environment to the safe management of the activity or activities eg weather, terrain, waters, and other natural hazards.
- evidence is provided that the technical expert's knowledge and skills reflect continuing substantial professional experience and development in instructing or guiding participants in the activity or activities at a level involving dynamic management of risks?

68. JAS-ANZ conducted assessments against the Temporary checklist of five certification bodies, including [Quality Solutions International (New Zealand) Limited] and Bureau Veritas.

69. The assessment of Bureau Veritas comprised two assessments – an "*off-site, desk-top*" assessment on 3 June 2014 and an "*on-site, desk-top*" assessment on 10 June 2014.

Confidential information

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<sup>21</sup> JAS-ANZ advised me that the 'technical expert register' is a reference to the 'Technical Expert Summary List' referred to below.

70. JAS-ANZ advised that they emailed the report containing the two assessments and the completed Temporary checklist to WorkSafe. JAS-ANZ also advised that, after conducting the assessments against the Temporary checklist in June 2014 and providing the assessment reports to WorkSafe, it then had no further role in the process of recognising certification bodies until after it endorsed the NZAACS on 1 November 2015 and then carried out accreditation assessments for WorkSafe.<sup>22</sup>
71. On 13 June 2014, WorkSafe recognised [Quality Solutions International (New Zealand) Limited] and Bureau Veritas as safety auditors under the 2011 AA Regulations for the period 13 June 2014 to 31 December 2014. The “Certificate of Safety Auditor Recognition” issued to Bureau Veritas provided:

**Preamble**

In this Certificate, references to:

...

**the gap assessment**, are references to the gap assessment report, New Zealand Adventure Activity Certification Scheme Temporary Recognition Checklist, dated 10 June 2014 commissioned by WorkSafe NZ and undertaken by JAS-ANZ to inform WorkSafe NZ of Bureau Veritas’s suitability for recognitions;

...

In accordance with Regulation 12 of the Regulations, this recognition is granted on the following conditions:

(1) Bureau Veritas shall ensure that:

...

- b. It at least maintains the level of compliance with the Scheme Rules demonstrated during the JAS-ANZ assessment; and endeavours to comply with any updated or additional requirements, or the final version, of the Scheme Rules.
- c. It satisfies WorkSafe NZ that it has made substantial progress in addressing the gaps outlined in the JAS-ANZ assessment by 20 June 2014 in a form to be agreed with WorkSafe NZ. In particular, it must show that it meets, or outline how it attends to meet, the:
  - i. personnel requirements; ...

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<sup>22</sup> On 11 December 2014 WorkSafe engaged Ernst & Young “to perform a series of surveillance assessments to determine whether the CABs are conducting the audit activities in accordance with the Safety Audit Standard for Adventure Activities (March 2013)”.

- (2) Bureau Veritas shall maintain evidence, in the form to be agreed with WorkSafe NZ, of how its personnel meet the requirements under the Scheme Rules; and make this available to WorkSafe NZ upon request.
- (3) WorkSafe NZ may, by written notice to Bureau Veritas, specify the scope of the adventure activities for which Bureau Veritas may issue safety audit certificates under the Regulations. WorkSafe NZ will make such an assessment based on whether it is satisfied that Bureau Veritas meets the personnel requirements under the Scheme Rules.
- (4) WorkSafe NZ may, by written notice to Bureau Veritas, require Bureau Veritas to take part in a surveillance assessment during a time-period determined by WorkSafe NZ to ensure its continual compliance with the conditions of recognition. This surveillance assessment may include an onsite assessment of the personnel requirements and witness assessments of audits and certification.
- (5) WorkSafe NZ may, by written notice to Bureau Veritas, otherwise request any documentation as evidence of its continual compliance with its Certificate of Recognition.

...

72. WorkSafe's comments on my draft report include the following in respect of its recognition of Bureau Veritas:

WorkSafe acknowledges that in the initial recognition of Bureau Veritas (BV) in June 2014, it imposed conditions allowing WorkSafe to specify the scope of adventure activities for which BV could issue safety audit certificates. However, it appears no such specification was made in practice, meaning that BV had, in terms of the regulations, no limitation on the types of activities it could audit. This is accepted as falling short of good regulatory practice. WorkSafe acknowledges the resulting risk that BV would audit activities in respect of which it did not have the technical expertise but also notes, in addition, the obligations and expectations on safety auditors themselves, as professionals, to ensure they had that expertise in each particular audit.

#### **November 2014 registration of White Island Tours Ltd**

73. Bureau Veritas audited White Island Tours Ltd on 6 October 2014. The undated audit report, which was emailed to WorkSafe on 24 November 2014, states:

- (a) *"Adventure Activity Type" – "Guided walks on two island Moutohoro and White Island. Moutohora Island (an Island sanctuary) is 7 km off shore from Whakatane, and White Island (an active volcano) is 49 km off shore."*
- (b) *"Scope of Supply" – "Walking/running on White Island and Moutohora Island".*
- (c) In the Appendix, which lists the *"Sites and Activities . . . included within the scope of the audit" - "Activities . . . Guided walks on Moutohora Island Sanctuary and guided walks on White Island around the inner crater rim"*.
- (d) The following in the Executive Summary:

#### **Executive Summary**

...

The auditor concludes that the operator's delivery of adventure activities is not in compliance with the relevant safety audit standards.

There were 5 non-compliances, 0 observations and 2 opportunities for improvement identified from this audit.

#### **Comment on Strengths / Weakness of the Safety Management System**

The operator has a high level of knowledge about the tours they run.

They are in the unique situation of being the only operator to run trips to, and land on the Island.

The company has close links with Vulcanologists globally and has in house knowledge in this area.

The skippers of the boats are also local and again have a huge knowledge of the Islands and the local conditions. The trips are well known globally and the demand for them is such that they are scheduled daily.

Due to this unique activity, comparisons with other operations for one of the tours, White Island, are hard to make. Review of the incidents reported shows a number of incidents arising from uneven ground resulting in participants falling tripping and rolling their ankles. The other incident area that comes up, is injury arising from the sea state, that can become severe on the trip to or from the Island being some 75 + kms from the mainland. In all sampled incidents the process was well followed and closed. It is recommended that the company look into supplying walking sticks to give support for the island walk. It is also recommended that the company swap there operators with other guided walking tours to address best practices. The SMS has evolved over a number of years and has also been part of Qual Mark. The SMS, the SMP, the guides book and associated documents address the hazards and the expectations of the participants in a robust and practicable manner. A few non conformances are raised that can be readily addressed and closed

- (e) There were five “*minor nonconformities*”, which included “*Emergency plans need to be tested*”:

The operator must establish and maintain emergency preparedness and response plans for foreseeable emergencies.

The plans must include procedures for:

- a) Stabilising the situation and accounting for staff and participants
- b) Assigning responsibilities and authority for implementing emergency response plans, including who must notify emergency services and when.

The emergency preparedness and response plans must be known by staff and made available to participants and other relevant parties.

- (f) The following in respect of what is meant by a minor nonconformity:

**Minor nonconformity**

A nonconforming matter that is a not major nonconformity, including leadership, policy and process matters that do not immediately affect the management of the significant hazards and operating conditions involved in an adventure activity.

**Consequence**

A Corrective Action Plan to address identified **minor** nonconformities shall be submitted to the BV Certification office within 90 days to confirm the actions planned. Corrective Action should then be carried out and records maintained with supporting evidence.

*Note:* Bureau Veritas may issue a certificate despite the existence of minor nonconformities we have accepted the proposed corrective action plan and timetable, and has agreed the methods by which completion of the actions will be verified.

74. Bureau Veritas issued a Certification to White Island Tours Ltd for a three year period from 21 November 2014 to 20 November 2017 - “*SCOPE OF CERTIFICATION . . . WALKING/RUNNING ON WHITE ISLAND AND MOUTOHORA ISLAND*”.
75. According to the WorkSafe Registrar Appraisal form in respect of that audit, White Island Tours was registered on 27 November 2014. That form records “*Dangerous terrain especially – active*

volcano” in the “*Is the operator an AAO; Regulation 6(2)(b) Checklist*” section in answer to the question

4(vi) in which Failure of the provider’s management systems (such as failure of operational procedures or failure to provide reliable equipment) is likely to result in serious harm to the participant; **OR** The participant is deliberately exposed to dangerous terrain or dangerous waters

76. I interviewed the WorkSafe employee who filled out that appraisal form, [Privacy] registers White Island Tours as an AAO. He said as follows when I asked him about the minor nonconformity in respect of the emergency preparedness and response plans:

[I said] . . . One of them related to emergency preparedness and response plans, and it records: 'The operator must establish and maintain emergency preparedness and response plans for foreseeable emergencies'. So, that appears to say that there just wasn't one; White Island Tours didn't have an emergency response plan and they needed to establish one. Would that be a fair reading of that?

It's a fair first reading. Because it's marked as a minor non-conformity, that's defined in a particular way which is that it doesn't immediately affect the management of significant hazards and operating conditions. Typically, that would imply that there is a plan but it's not documented.

. . .

So, the matter of minor non-conformities and the rulebook for how the audits are conducted, allows the certifier to use a discretion to issue a certificate with minor non-conformities in place if it's being managed and resolved in a way that's satisfactory to them—so the decision lies with the audit company. That statement, that it is not in conformance with the standard, gave me pause. I don't have a really clear distinct memory but I do know that that would stand out, that phrase would typically stand out, and if we move - if I read on, because I would then have had to have read carefully, page 6 includes a note which confirms Bureau Veritas may issue a certificate despite the existence of minor non-conformities: 'We have accepted the proposed correction action plan and timetable and has agreed the method by which completions of the action will be verified'. So, that's consistent with the Scheme, it expresses a conscious decision on the part of the audit company and ...

77. The same WorkSafe employee said the following in relation to the “*Scope of Supply*” – “*Walking/running on White Island and Moutohora Island*”:

It's non-standard, by which I mean it's not the same list of words that we would typically see, but again, at that point the certificate had arrived and the briefing was very clear that we need to register them promptly. It's the auditor's discretion how they describe the certificate, ah, sorry, how they describe the *activity* on the certificate.

. . .

[I said] Yep, how about Moutohora Island, given that that's in the scope and what the White Island Tours was registered for, the scope that covered walking or running on that island?

Yeah, at that time I wouldn't have felt that I needed to check on BV's description. I was aware of White Island, that one is clearly an Adventure Activity, and they've listed another island as part of the same provider. It didn't stand out as needing further investigation.

[I said] And you didn't - well, was it an issue at all, given that the scope of supply didn't refer at all to the fact that it was on an active volcano? Is that a ...

Again, under the guidance at the time, no.

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<sup>23</sup> Although, as referred to above, WorkSafe has in fact acted as the Registrar since the 2011 AA Regulations came fully into force on 1 November 2014.

## January 2015 recognition of safety auditors

78. A WorkSafe internal memorandum to the WorkSafe CEO dated 27 January 2015:
- (a) advised that on 21 January 2015 it came to their attention that recognition status of the five recognised safety auditors/certification bodies had expired on 31 December 2014;
  - (b) recommended re-issuing certificates for a three year period from 1 January 2015 to 31 December 2018.
79. Recognition certificates for that three year period were issued on 27 January 2015 to, among others, [Quality Solutions International (New Zealand) Limited] and Bureau Veritas. The [Quality Solutions International (New Zealand) Limited] certificate included the following condition:
- WorkSafe NZ may, by written notice to QSI, specify the scope of the adventure activities for which QSI may issue safety audit certificates under the Regulations. WorkSafe NZ will make such an assessment based on whether it is satisfied that QSI meets the requirements under the Scheme for engagement of personnel with the relevant technical competencies.
80. WorkSafe's comments on my draft report include the following in respect of its recognition of [Quality Solutions International (New Zealand) Limited]:

In respect of the recognition of QSI in January 2015, again WorkSafe imposed conditions providing that it could limit the scope of activities in respect of which QSI could provide safety audit certificates. However, again, it appears no such specification was made in practice meaning that QSI had, in terms of the regulations, no limitation on the types of activities it could audit. This is also accepted as falling short of good regulatory practice and as a situation that could create risks that audit bodies were certifying activities in respect of which they were not competent. Balanced against this, however, are the requirements on the audit bodies themselves to ensure they carry out their activities competently and in accordance with the scheme. See, for example, the overarching requirement on safety auditors to ensure competence, as set out in part 2, paragraph 3 of the NZAACS. . . .

## The 2015 NZAACS

81. WorkSafe and JAS-ANZ entered into a Memorandum of Understanding dated 16 October 2015 to define their relationship in respect of the NZAACS, which includes the following:
- ...
- 16 WorkSafe will exercise its responsibilities by:
- Developing, reviewing and publishing safety audit standards
  - Contributing to the accreditation services provided by JAS-ANZ
- ...
- Supporting, developing, maintaining and publicising the [NZAACS].
- 17 JAS-ANZ will provide services as follows in relation to the [NZAACS]:
- Accreditation as the primary (but not exclusive) means by which certification bodies will be recognised
- ...
82. The roles and responsibilities of Work Safe and JAS-ANZ are further defined in operational agreements attached as schedules to the Memorandum of Understanding. The Operational Agreement setting out WorkSafe's roles and responsibilities includes:

...

WorkSafe will maintain and update, in conjunction with JAS-ANZ, the technical competency table for audit team personnel.

In relation to a certification body, WorkSafe will:



- a) Alert a certification body to any specific matters to be considered in its evaluation, certification, or surveillance activities.
- b) Advise a certification body, and JAS-ANZ, of any concerns that has in respect of an applicant or certified adventure activity operator, including concerns about safety performance.
- c) Review the audit report and any other information requested from a certification body, in order to understand a certification decision for the purposes of registration of an adventure activity operator (unless there is reason to decline registration).

83. The New Zealand Adventure Activities Certification Scheme - Requirements for bodies certifying adventure activity operators' safety management systems dated 1 November 2015 (**2015 NZAACS**) includes:

**Purpose**

...

2 The scheme:

- i. is established to enable bodies to seek and maintain accreditation as a way to demonstrate to WorkSafe New Zealand (WorkSafe NZ) that the requirements to be recognised, and to maintain recognition, as a safety auditor<sup>1</sup> have been met under the Health and Safety in Employment (Adventure Activities) Regulations 2011 (the regulations), which are administered by WorkSafe NZ
- ii. relates to the approved standards published by WorkSafe, which operators must comply with to reduce risks when providing adventure activities

...

3 The scheme establishes auditing, certification, and monitoring requirements. It requires certification bodies to:

- i. audit an operator's safety management system for the delivery of adventure activities and establish whether their operations comply with the relevant safety audit standards both in intention and in practice
- ii. certify operators that pass an audit, subject to an appropriate term and any conditions
- iii. monitor the certified operators for continuing compliance during the period that the certification is valid.

4 JAS-ANZ accreditation is the primary way that a certification body can demonstrate to WorkSafe NZ that it meets, and continues to meet, the criteria in the regulations as a safety auditor. It is not the only way to be recognised.

...

**Background**

...

7 Becoming accredited under the scheme provides a way to demonstrate to WorkSafe NZ that the requirements to be recognised as a safety auditor have been met. When granting recognition WorkSafe NZ must be satisfied that a certification body:

i. has staff with the appropriate knowledge and skills;

...

8 The scope of a certification body's accreditation by JAS-ANZ and recognition by WorkSafe NZ is confined to the specific adventure activities for which it meets the knowledge and skill requirements defined in the scheme. A certification body is therefore only able to audit those adventure activities it is accredited and recognised for, subject to any conditions imposed by accreditation and recognition.

...

### Terms and definitions

...

**Good practice** Range of actions currently accepted within the adventure and outdoor sector to manage the risk of harm to staff, participants, and visitors. Good practice should also reflect relevant standards recognised within the sector for the safe provision of adventure activities where these exist. This may include activity safety guidelines, codes of practice or conduct, other recognised guidelines, and accepted professional practices (Safety Audit Standard).

...

## 2 Certification Body

### Responsibilities

1 The responsibilities of a certification body are to:

i. Send WorkSafe NZ (through the WorkSafe NZ established process) the operator profile (**Appendix C**)<sup>24</sup> as soon as practicable once the contract for services has been agreed.

...

4 To provide WorkSafe NZ with the opportunity to alert the certification body of any specific matters to be considered in its evaluation, certification, or surveillance activities:

i. Once the contract for services has been agreed with the operator, the certification body will send WorkSafe NZ the **Operator Profile information** at Appendix C (through the standard process)

ii. On request, the certification body will make available to WorkSafe NZ a schedule of planned audit activities, detailing the names of the operators and anticipated audit dates, together with any related information WorkSafe NZ may reasonably request.

iii. At any time, WorkSafe NZ may advise the certification body of any concerns it has in respect of an applicant or certified operator.

---

<sup>24</sup> The Appendix C Operator's Profile included recording the operator's "number and nature of adventure activities".

...

### 3 Personnel

#### Auditors

##### Non-technical competencies

...

#### Technical experts

##### Non-technical competencies

Non-technical competencies are not required.

##### Technical competencies

As outlined in the Technical Competency Table below, a Technical Expert must either hold a current qualification or attestation, as required.

##### Audit team role

Responsible for independently auditing an adventure activity in accordance with this Scheme and the Safety Audit Standard, as supported by a technical expert except where the auditor is also a technical expert.

##### Audit team role

Support auditor/s by advising on the activity or activities for which they are technically competent – this includes any comparable adventure activities. An auditor may require the technical expert to support the audit in all aspects, beyond those related to the specific activity.

...

#### Resources for Evaluation

- 1 This section details the mandatory requirements for the competence of a certification body's audit teams, audit team leaders, auditors, technical experts and the certification decision maker. Competency requirements are defined in accordance with, and are additional to, ISO/IEC17021-1 Annex A.
- 2 The certification body must engage on an on-going basis sufficient personnel such that their combined technical competency is relevant to each of the adventure activities the certification body is accredited for under the scheme. The certification body:
  - i. May employ or contract personnel.
  - ii. Will maintain a register of their personnel – see the example form **Appendix B: Audit Personnel Register** (Appendix B).

...

#### Auditors

- 4 The competencies of auditors are non-technical competencies for auditing the compliance of an operator's adventure activities with the relevant safety audit standards, as further detailed below. Auditors will understand the limits of their personal competency and know when to seek advice from a technical expert . . .

...

#### Technical experts

- 9 A technical expert is someone who meets the technical competency requirement - see Technical Competency below, namely:

- i. meets the technical qualification requirements – see **Qualifications**, or
  - ii. holds an attestation that satisfies the requirements for technical knowledge and skills – see **Attestation**, and
  - iii. is recognised by the certification body as a technical expert.
- 10 The requirements for technical experts as defined above recognise that:
- i. They have a high level of skill and knowledge of the adventure activity being audited, including knowledge of current good practice and how this can be reflected in a safety management system.
  - ii. Maintaining the currency of such a qualification or attestation demands a continuing high-level of experience and professional development.
  - iii. People who hold such a qualification or attestation have the knowledge and experience to provide technical expertise to an audit of relevant adventure activities, provided they have kept up-to-date with good practice in those adventure activities.
  - iv. Nationally recognised high-level qualifications are not available for all adventure activities.

#### **Audit team**

...

#### **Technical competency**

- 16 The technical competency required of an audit team will be determined in relation to the specific adventure activity or activities being audited, along with the type of operation.
- 17 For each activity, there must be a technical expert who is a member of the team and whose technical competency is relevant to that specific activity. . . .

...

#### **Attestation**

- 21 Attestation is the process by which an independent opinion is sought and expressed on the technical competency of a person in relation to the safe delivery of one or more adventure activities.
- 22 In accepting an attestation for a technical expert, the certification body will ensure that:
- i. The person became technically competent through substantial professional experience in instructing or guiding participants at a level involving dynamic management of the risks involved.
  - ii. Through their professional experience, the person is conversant with, the hazards presented by the New Zealand environment to the safe management of the activity or activities e.g. weather, terrain, waters, and other natural hazards.
  - iii. Can provide evidence that the technical expert’s knowledge and skills reflect continuing substantial professional experience and development in instructing or guiding participants in the activity or activities at a level involving dynamic management of risks.
- 23 An attestation will:

- i. Be provided by an independent person who is recognised within the adventure and outdoor sector as a suitable person to provide such an attestation. . . .
- ii. Detail the name, contact details, position, affiliations, and experience of the person providing the attestation.
- iii. Detail the relationship between the parties.
- iv. Detail the scope of the technical competencies for which attestation is provided, including its application to the safe delivery of comparable adventure activities.
- v. Detail any limitations to the attestation.
- vi. Detail the evidence used e.g. training, logbook, testing, references, in the assessment and formation of the attestation provided.

### Qualifications and Attestation

30 The **Technical competency** table should be read in conjunction with the list of adventure activities published on the [WorkSafe NZ website](#). The activities listed are not exhaustive but indicate activities that could be subject to the regulations, depending on whether they meet all the criteria in regulation 4. The table shows the groups of comparable activities, of which the same technical expert can be used because they involve broadly similar hazards and risk management.

...

### Technical competency table

Activity groups	Qualification or attestation
-----------------	------------------------------

[There is no reference to activities on or near a live volcano]

84. During my interview with JAS-ANZ, when I referred to the requirement in clause 10 - that technical experts *“have a high level of skill and knowledge of the adventure activity being audited, including knowledge of current good practice and how this can be reflected in a safety management system”* – JAS-ANZ said WorkSafe had published a table of recognised technical experts in the different disciplines, which was the main source of technical experts for certification bodies and that:

It listed a whole lot of, ah, technical experts, albeit not every technical expert was available for contracting, because the technical experts you know, that competency table it’s got the different qualifications WorkSafe had put together all of the people with those qualifications that were sort of you know, within the industry, and then that gave the start of a team certification bodies to start identifying technical experts.

85. I asked for a copy of that table and JAS-ANZ provided me with a document titled ‘Technical Expert Summary List’ containing information as at 9 June 2014, which lists technical experts and indicates, among other things, the qualifications each technical expert had relevant to the same activity groups listed in the Temporary Checklist technical competency table (and in the 2015 NZAACS technical competency table<sup>25</sup>).

86. A WorkSafe employee I interviewed said the following when I asked if he was aware of the Technical Expert Summary List:

Only indirectly—it's only from having been in the same open plan workspace. I know a little bit but very little.

---

<sup>25</sup> The activity groups are from an earlier version (Version 1.15) of the NZAACS.

...

My understanding is that, as part of the work to stand up enough auditor capacity to ensure that the industry could meet the registration deadline, a list of potential technical experts was collated as, I guess, an above and beyond step to assist the audit bodies with finding people they could ring or email and then begin their process of assessing whether that technical expert fitted their needs.

...

I think, I think that this was done without vetting, on the understanding that the audit companies would do their vetting having been placed in contact with the potential . . . [TEs], but again I really don't know that.

He also said that WorkSafe would not refer to that document to check whether a technical expert referred to on an audit report had the required expertise to carry out the audit – because his *“understanding is that would be infringing on the independence of the audit company”*.

87. In its comments on my draft report, WorkSafe commented as follows in respect of the Technical Expert Summary List:

The list was intended to reflect available experts as . . . at June 2014, but after this date it was not maintained as it was no longer considered necessary. Consistent with WorkSafe's approach to the list, it did not form any part of the SOP or checking process for registration decisions.

And:

During the initial implementation of the scheme, WorkSafe provided a Technical Expert List as a practical means to help safety auditors and intending adventure activity operators to “get across the line” before the requirement to be registered applied to all operators. It was considered as a starting point for safety auditors, but it was expected that audit bodies themselves would assure themselves of the competence of any proposed technical experts before appointing them. This technical expert list has not been current since 2014 and does not factor into WorkSafe's decision-making. More generally, from a scheme perspective it is unrealistic to expect that WorkSafe will continue to maintain a list of all technical experts for all adventure activities, and nor would it be WorkSafe's role to do so, as a regulator in the system. . . .

88. WorkSafe provided me with a number of documents when I raised the issue whether any consideration was given to including an ‘Activity group’ on the various versions of the NZAACS Technical competency table that would cover White Island Tour's activities on Whakaari White Island:

(a) An email from WorkSafe to JAS-ANZ dated 8 September 2015 attaching a draft version of the Technical competency table and stating - *“I've attached some thoughts on the activity groupings. It's just a discussion piece, really.”* The attached draft Technical competency table included at the end an *“Other”* category that included *“Volcanic area hike”*.

(b) An email from JAS-ANZ to WorkSafe dated 8 September 2015 stating:

...

I'm nervous about reworking the details of the existing activity categorisation table, but am ok with introducing new activities into it (although see next paragraphs). Reason for nervousness is that development of the table was contentious and completed by MBIE and the scheme technical committee, and then put out to public consultation (by MBIE). I have hard copies of the submissions received; attached is the submission summary. One of the problems arising from the public consultation was the broad and contrasting views on most things – including auditor competencies.

In the table, increased detail/description of the activities is useful – provided it is not at the expense of exclusion of activities not specifically listed. For example, the original table had a

'catch all' for alpine activities...which in the proposed table are specifically listed e.g. snow caving, avalanche education. Tobogganing and snow mobiles aren't specifically listed so it could be argued are excluded.

Having said the above, it was always recognised that the table would grow with new activities as they, and the auditor competency requirements, were identified.

So where does that leave us? Probably in a situation that if the table is going to be expanded WorkSafe NZ should seek comment from some key . . .

(c) An email from WorkSafe to JAS-ANZ dated 8 September 2015:

Yes, that's the reason I sent a very limited suggestion first! Everything has multiple stakeholders with a sense of ownership... and strong views.

With your comments in mind, some adjustments to the attached. The listing of activities is very much based on registrations experience, and a read-through all current registrations to confirm what we have already.

I'd suggest that the key stakeholders (now that the system is up and running) would be the CB's, and industry bodies to a lesser extent. Consultation would definitely be required.

(d) An email from JAS-ANZ to WorkSafe dated 6 April 2017:

Thanks for reminding me of your earlier email on your suggested alternate activity grouping and quals. I've had a good look at it, and compared it to that in the existing scheme.

There are significant changes required to the scheme if those changes are to be considered/adopted, and a number of the suggestions suggest that some of the fundamentals established by MBIE have changed. For example:

...

So I conclude:

1. There will be merit in updating the scheme where WorkSafeNZ is already aware of additional activities (including future proofing) which need to be explicitly stated in the scheme
2. On face value the changes are significant; there is potential broadening of the scheme and some uncharted territory.
3. There are changes proposed which had previously been considered at length by the committee, if MBIE/WorkSafeNZ fundamentals have changed/matured, then there will no doubt be wider amendments required.
4. The changes are of a character and risk that they can only be considered and adopted via a scheme review process. This would require a scheme committee to be formed, and would usefully include MBIE to guide interpretation of their regs. Note that the current scheme update (HWSA) is an update of the scheme to prevailing legislation, and is anticipated to be non-contentious; hence the review mechanism adopted in that instance.

...

(e) An email from WorkSafe to JAS-ANZ dated 10 April 2017 attaching an "alternate activity grouping & quals" table, which includes in the "other" group "eg. . . Volcanic area hike . . ."

89. I interviewed the WorkSafe author of these emails, who said as follows:

(a) In respect of what the technical competency table is:

Sorry, the technical competency table is part of the audit planning section. It's part of how the audit company plans, staffs, and then the process follows to carry out. So, I don't actually know for myself whether JAS-ANZ looks to see that there's a TE available in every area, or



whether JAS-ANZ looks to see that there's a process to ensure that a TE is onboarded at the audit company. I don't actually know how that fits in with the accreditation . . .

- (b) In relation to the reference to “*Volcanic area hike*” in the 8 September 2015 draft version of the technical competency table:

That will clearly relate to White Island, and I guess leaving it open for the potential of other volcanic areas.

[I said] So why at that time were you thinking of including 'volcanic area hike'?

I am pretty sure one of those emails refers to 'this reflects everything that's on the register', so I think that once I started the process of looking at how activities grouped, that I simply went through the entire register and made sure everything would be within that alternative grouping framework.

[I said] Mm, yeah, cos at that time of course White Island Tours had been registered.

Yes.

[I said] And of course, a significant part of the Adventure Activity that it was providing during its operation, was a volcanic area hike. And so, what you're saying is you looked at the types of Adventure Activities that were registered at that time, and you were looking to include all of those currently registered as an activity in the technical competency table. Is that right?

I think that's right. I'm not sure of all of my thinking back at that point in time. What you're saying is consistent with what I did, yeah.

[I said] What other reason would there be for potentially putting it in that table that you've attached?

I don't think, don't think. I don't know.

- (c) Given that, at the time of the 8 September 2015 emails, White Island Tours' activity on Whakaari White Island was already registered, which involved walking tours on a live volcano, he did not know of any reason for not including that adventure activity on the technical competency table. He also said that consultation would only be needed in respect of the inclusion of any activity that was contentious – but that to his knowledge whether or not White Island Tours' activities on Whakaari White Island should be registered as an adventure activity was not contentious at that time.
- (d) He thinks the reason the issue of updating the technical competency table arose in April 2017 was that the NZAACS was being updated at that time to reflect recent legislative changes.
- (e) He said the following when I asked whether there was any reason why '*volcanic area hike*' would not be included in the new version of the technical competency table:

I guess you wouldn't if it was already covered by the existing groupings of competency, which ...

[I said] Is it?

I think like many things in this regime, it starts to become arguable on the semantics, because 'volcanic area' includes Waimangu Thermal Valley, it includes ...

...

... includes potentially Waimangu Thermal Valley near Rotorua. It potentially includes at least parts of the Tongariro Alpine Crossing, and there will be others that don't spring to mind. So, depending on how that's interpreted –

[I said] So, what would 'volcanic area hike' already be covered under in the ...

Well, if that hike is the volcanic area of the Tongariro Crossing, I would say it's covered under the mountaineering category, or alpine hiking sorry. There it is—alpine hiking.

[I said] Do any of those auditor TE qualifications in any way relate to assessment of risks relating to hazards from volcanic activity, eruptions etc.?

I would say any of those competent or, well, I wouldn't previously have queried whether they were competent to act as technical expert for an audit of mountaineering at say, dome shelter, near the summit of Mount Ruapehu, which is also within an active volcanic zone.

[I said] So, you're saying, you're telling me that these under the heading 'auditor's TE quals' in the table attached to your email of 6<sup>th</sup> April, . . . , people with those qualifications would have particular expertise in terms of assessing the management of risks relating to hazard from volcanic activity, including eruptions and harmful gases from volcanic activity?

That's not quite what I'm saying. I think they would be competent to act as TE for audit of a mountaineering or alpine hiking activity in an area subject to those hazards, and I will explain that in a moment, or at least the logic behind it.

. . .

So, this is not the only example of where I look at things in terms of compare and contrast, so parallels, but there are other activities within the Scheme where the activity technical expert, as sort of defined and established in here ...

. . .

... doesn't bring the entire package of every possible and relevant speciality, which relates to critical risks. So, the first example that springs to mind is high ropes courses, so if an activity involving people suspended at heights is built between telephone poles set in the ground, and concrete, there's a structural engineering component in establishing the environment being sufficiently safe. And so, the people who are coming through as technical experts with the audit companies are not structural engineers, they know to look for evidence of the structural engineering being managed. I think typically that would take the form of a report from a structural engineer to the PCBU, the operator, feeding into certain points of the management system. There are a similar parallels also in snow bikes, which I've mentioned, so it's a unique piece of equipment, never been seen in this country before, but if you have a mix of motor cross motorcycling background and some alpine expertise, it may take more than one lens to assess the whole activity.

[I said] Would that be an example where the auditor of a certification body would get another technical expert in a particular area of expertise to assist?

So, coming to the high ropes parallel again, no, not necessarily. There's, as I understand it, there's no expectation that with the operator having paid for one structural engineer and expenses of the audit being billable, I don't think there's an expectation that the audit team will bring in another second structural engineer to evaluate the work of the first structural engineer. It seems to be sufficient and it seems reasonable to me, that it's sufficient for the audit team to establish that the operator has brought in that specialist consultant.

[I said] So, that the audit team would view the - ensure that there is a report from an expert covering the risks or hazards that participants would be exposed to . . . ?

I've mentioned a report because that's a clear way to do it. The extent to which an audit team documents what it finds to its own satisfaction and to their certifier's satisfaction, is not a matter that I have expertise in. Again, that would be an accreditation question: Are they adequately documenting the grounds for their recommendation. There are other activities that are parallel but I think I've made the point for now.

- (f) He replied as follows when asked whether, when the NZAACS was updated in 2017, any consideration was given to how WorkSafe was going to ensure that certification bodies auditing Whakaari White Island had the necessary technical competency:

I don't think it was specifically considered. It was bundled back in with the accreditation function, and when I say, 'it was bundled', I don't think it was documented; it was just that we brought it through, here's the Certification Scheme, carry on.

90. WorkSafe's comments on my draft report include the following in respect of the fact that the technical competency table *"does not reflect the adventure activity that took place on Whakaari/White Island (described as a "volcanic area hike")"*:

... The table is primarily a reference for safety auditors under the NZAACS to determine how the competency of experts in particular fields should be assessed.

So long as an activity meets the definition in the Regulations, there is no limitation on what can be an adventure activity. The possibility always remains that new adventure activities will enter the market. In recognition of this, paragraph 30 of Part 3 of the NZAACS notes this table is not exhaustive, and paragraph 33 of Part 3 indicates that, pending updates to the table, attestation can be used as a basis for determining if an individual is an expert. The absence of reference to volcanic area hike is not, in itself, a barrier to the appointment of an appropriate expert to support the safety audit of such activities, whose appointment remains primarily the responsibility of the audit body under the NZAACS.

In respect of the non-inclusion of "volcanic area hike" or similar, WorkSafe notes the attempts that were made to include this additional activity in 2015, which were rebuffed by JAS-ANZ. The MOU with JAS-ANZ reflects that the technical competency table would be maintained and updated by WorkSafe *in conjunction with JAS-ANZ*. This was not a matter within the sole responsibility and discretion of WorkSafe. In fact, in practice JAS-ANZ maintained version control of this document, rather than WorkSafe. Given that WorkSafe did not have sole editorial control over the competency table, responsibility for the ongoing omission of volcanic area hiking from it cannot rest with WorkSafe alone.

#### **JAS-ANZ accreditation assessments**

91. After JAS-ANZ endorsed the 2015 NZAACS on 1 November 2015, it could carry out accreditation assessments. JAS-ANZ accredited [Quality Solutions International (New Zealand) Limited]. The accreditation assessment report dated 28 October 2016 records that the [Quality Solutions International (New Zealand) Limited] NZAACS accreditation activities will be *"operated by a division of QSI referred to as AdventureMark"* and contains the following:

...

QSI has demonstrated that the range of TEs identified and/or contracted provides for the anticipated scope of adventure activities subject to the NZAACS, with exception of bungy jumping (refer to mNC below). The NZAACS requires the CB to have on-going contractual arrangements with technical experts for all onboarded clients. QSI complies with this requirement and has further contract and/or contractible resources for additional operators in other adventure activity groups.

...

The JAS-ANZ assessment team concludes that QSI has sufficient auditor and technical resource to service and grow its client base. The company understands the scheme requirements regarding audit teams and their technical competency requirements and has systems designed and implemented to satisfy those requirements. Further, QSI has existing and developing networks which enables it to readily consider and identify further auditor and technical resource as required.

To that end the assessment team concludes that QSI satisfies the personnel and personnel competency requirements of ISO IEC 17021-1:2015 and the NZAACS.

...

#### **CONCLUSIONS**

...

#### **Conditions of Accreditation**

...

It is recommended that:

1. Quality Solutions International (NZ) Ltd is accredited to ISO IEC 17021-1:2015, IAF mandatory documents MD1, MD2 and MD4 and the New Zealand Adventure Activity Certification Scheme for the scope provided in the following table subject to:

(i) closure of all major and minor non-conformities (refer to the SharePoint portal)

#### **Adventure activity scopes**

[The “Adventure activity scopes” listed in the table contained all “activity groups” in the 2015 NZAAC Technical competency table other than bungee jumping.]

92. An email from JAS-ANZ to WorkSafe dated 4 November 2016 advised that JAS-ANZ had “*completed the QSI accreditation activities and they will shortly be accredited subject to some back office admin processes at our their end (e.g. invoicing, certificates, registers etc)*”. WorkSafe advised me that it has no record of receiving JAS-ANZ’s accreditation assessment report dated 28 October 2016.

#### **The 2017 NZAACS**

93. The HSW Act and the 2016 AA Regulations necessitated an update of the March 2013 version of the Safety Audit Standard for Adventure Operators, which was done in the 2017 SAS, and the 2015 NZAACS. The NZAACS was updated on 27 July 2017 (**2017 NZAACS**). The 2017 NZAACS contains provisions in all material respects the same as the 2015 NZAACS provisions referred to above. The 2017 NZAACS technical competency table contains the same activity groups as the 2015 NZAACS technical competency table together with three additional activity groups – “*Back-country ski/board*”, “*Cliff jumping (into water)*” and “*Inflatable ball rolling (e.g. ‘Zorb’)*”. In its comments on my draft report, WorkSafe stated that it “*did not have editorial control over the competency table*”.\*

#### **November 2017 registration of White Island Tours**

94. In a letter to White Island Tours dated 1 November 2017, WorkSafe reminded it that its safety audit certificate was due to expire on 20 November 2017. An email from WorkSafe to White Island Tours dated 1 November 2017 states:

Based on the information available at [website link] it appears that walking tours on White Island do meet the [definition](#) of an ‘adventure activity’ provided by regulation 4(1)(a) of the [Health and Safety at Work \(Adventure Activities\) Regulations 2016](#), assuming the payment test in 4(1)(a) is met, and the operator is not excluded by regulations 4(2) to 4(5).

Guided tours on White Island are therefore almost certainly required to undergo safety audit and registration, unless specific and reliable information has made the 1996 report (linked above) out-of-date or inaccurate in relation to the risks and hazards that an operator would be expected to manage for the clients.

WorkSafe has identified 5 other operators who we will be contacting very soon in regard to this registration requirement.

In the meantime, I encourage you to continue the audit and re-registration process for your operations.

95. The 1996 report<sup>26</sup> referred to includes the following:

---

<sup>26</sup> Nairn, I.A.; Houghton, B.F.; Cole, J.W. 1996 Volcanic hazards at White Island. 2nd ed. [Palmerston North, NZ]: Ministry of Civil Defence. *Volcanic hazards information series 3*. 27 p.

\* JAS-ANZ noted that the final draft would be agreed for use by both WorkSafe and JAS-ANZ.

## Introduction

White Island is currently New Zealand's most frequently active volcano. Situated 48 km offshore in the Bay of Plenty (Figure 1), its activity is often clearly visible to inhabitants of the surrounding region. The island was the scene of one of the three major volcanic disasters in New Zealand when 11 sulphur miners were killed there in 1914 (the other disasters were the 1886 Tarawera eruption, and the 1953 Tangiwai rail disaster). Since 1976, White Island has been more active than at any other time in the last few hundred years, and has aroused considerable public interest in the level of volcanic hazard it presents to people in the Bay of Plenty region.

Frequent explosive eruptions present an obvious threat to the increasing number of visitors to White Island, and to boats in close proximity offshore. The threat diminishes rapidly with distance, and no eruptions during the 160 years of White Island's written history have been large enough to produce significant effects on the Bay of Plenty coast. However, recent scientific investigations have shown that White Island has a potential to produce large eruptions, although these are apparently unprecedented in the long life of the volcano.

The volcanic hazard arising from White Island has therefore to be assessed under two headings: (a) the obvious but local risk arising from typical White Island eruptions affecting the relatively few people on or close to the island at any one time, and (b), the possible but much less likely, chance of an eruption big enough to affect the large number of people and investments around the Bay of Plenty coast.

...

## Volcanic Gases

Gases are continually emitted from the craters and fumaroles on White Island, at rates of several hundred to several thousand tonnes per day. These gases are mostly steam, carbon dioxide and sulphur dioxide, with small quantities of halogen gases (chlorine and fluorine). The acid gases combine with water in the steam/gas clouds to form liquid acid droplets which sting the eyes and skin, and affect breathing. They also severely damage cameras, electronic equipment and clothing. Visitors to White Island should avoid steam/gas clouds, and watch for wind changes that could blow clouds in their direction. Gas masks with acid gas filters are advisable, to be worn if gas becomes a problem.

...

## WHAT TO DO IN AN EXPLOSIVE ERUPTION

### A. For Visitors to White Island

Most of the recent explosive eruptions at White Island have affected only the western half of the main crater floor where blocks have fallen up to 500m from the active vents. Explosions have occurred from both 1978/1990 Crater and Donald Duck vents. Surges of hot gas and ash have swept across the main crater floor. If an explosive eruption occurs while people are on the island they should immediately run towards the eastern (factory) end of the crater floor. This area has been safe in all except the largest eruptions of the 1976-1990 period. If about to be caught in swirling steam or ash clouds, where visibility is nil, people should take shelter behind large rocks (if nearby) and breathe through clothing, handkerchiefs etc., if no gas mask is available. Move only when visibility is adequate, to avoid falling into areas of hot ground, fumaroles and craters. Boats close to White Island should move away, preferably into an upwind position, so that the fallout of ash and acid rain on to them is minimised. Be aware that some recent eruptions have thrown rocks into the sea around the island.

...

96. When interviewed, the WorkSafe author of that 1 November 2017 email confirmed it was his view that it was as a result of risks arising from the volcanic activity on Whakaari White Island referred to in the 1996 report that meant that the activity of walking tours on Whakaari White Island was registerable as an Adventure Activity. I also interviewed the WorkSafe employee who the author

of that email reported directly to, who said characteristic of guided tours on Whakaari White Island that make them registrable as an adventure activity was that they walk close to the volcano and so there is the risk of eruption and exposure to gases.

97. AdventureMark provided me with a copy of the White Island Tours Safety Management System (Version 11:17)<sup>27</sup> it audited during the November 2017 audit, which includes the following:

## Section 5: Volcanic Alert Level System and Risk Management for White Island

### 5.1 Introduction

White Island usually sits at Alert Level 1 – Minor Volcanic Unrest, which means that there is constant background activity occurring and a relatively low risk to visitors. The Volcanic Alert Level is set by GNS Science, based on the level of volcanic activity. GNS Science will contact us, and the other tour providers immediately if the Alert Level changes and we will adjust our Risk Management processes accordingly.

### 5.2 New Zealand Volcanic Alert Level System

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*
	4	Moderate volcanic eruption	Eruption hazards on and near volcano*
	3	Minor volcanic eruption	Eruption hazards near vent*
Unrest	2	Moderate to heightened volcanic unrest	Volcanic unrest hazards, potential for eruption hazards
	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), tsunamis, 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](http://geonet.org.nz/volcano) for alert levels and current volcanic activity, [gns.cri.nz/volcano](http://gns.cri.nz/volcano) for volcanic hazards, and [getthru.govt.nz](http://getthru.govt.nz) for what to do before, during and after volcanic activity. Version 3.0, 2014.

### 5.3 Risk Management Plan in the Event of Increased Volcanic Activity on White Island

#### Advise Staff & Passengers (S&R to do)

Forward all GNS update bulletins immediately to management and boat crew. Ring owners, management, and skippers if any urgent changes required. Auto-forward email rule also ensures bulletins are received as they come in. **Passengers will be informed prior to check-in by phone/email of any increase in the Alert Level.**

<sup>27</sup> As referred to below, this was not one of the documents provided to WorkSafe by Integra Ltd.



Safety Terms for Passengers (Health & Safety Representative to do)

Amend the Safety Terms if necessary to advise of the increased activity and the new Alert Level Rating (if applicable).

Website (Marketing Manager to do)

Advise of increased activity and the new Alert Level Rating (if applicable). Emphasize that we are still operating as usual.

Pre-Tour Check (Sea Operations Manager/Skipper to do)

Check seismograph and camera before departure and again on arrival at Crater Bay.

Before Landing Passengers

Always send a scout on to the island first to assess the risk. You are looking for any unusual or unexplainable activity or changes. As a rule of thumb, if the Main Crater is ashing, it is ok to land passengers but if it is evident from the boat that rocks are being ejected, do not land passengers. Once on the island, if the scout reports that rocks are being ejected higher than the Main Crater's edge, do not go up to the Main Crater.

Alert Level 2 or more

If the activity has increased to Alert Level 2 or more, the maximum number of passengers per tour group is 20, with two tour guides per group. There **must** be a guide ratio of 1 guide per 10 passengers.

Safety Talk on the Island

Advise visitors of the increased activity and of the new Alert Level Rating (if applicable).

Talk about the extra precautions we are taking – sending a scout, the need to stay in a tight group and that we will be reducing time at the Main Crater's edge.

Check that people have their hard hats fitted properly with chin straps on and that they are confident in securing their gas masks.

...

**Section 6: Safety Terms for Customers**

...

**6.2 Alert Level 2 / White Island Tour**

*Available in German & French*

**Reference: STALT020812 Alert Level 2**

**WHITE ISLAND TOURS LTD**

**SAFETY TERMS AND CUSTOMER DECLARATION**

...

White Island is an active volcano, the ground can be unstable, it has an uneven surface with numerous heated areas and volcanic gases are continuously emitted. At present the volcano is sitting at Alert Level 2 which means it is in an elevated state of unrest and that there is an increased hazard to visitors.

...

**6.3 Alert Level 3 / White Island Tour**

**Reference: STALT030416 Alert Level 3**

**WHITE ISLAND TOURS LTD**



## SAFETY TERMS AND CUSTOMER DECLARATION

...

White Island is an active volcano, the ground can be unstable, it has an uneven surface with numerous heated areas and volcanic gases are continuously emitted. At present the volcano is sitting at Alert Level 3 which indicates that a minor eruption has occurred recently and there is a potential for eruption hazards near the main vent. There is an increased risk to visitors.

...

### Section 7: Hazard Management

#### 7.1 Introduction

It is *White Island Tours'* intention to systematically identify and control hazards in our workplace. Our Hazard Registers have been approved by our in-house Technical Expert, [name].

...

Where hazards may only be minimized, we will ensure:

- Protective clothing and equipment is provided and used by employees at all times...

### Section 12: Emergencies

...

#### Emergency Evacuation Procedure (White Island)

*In the event of eruption or incident on White Island*

- Guide/s to quickly assess type and severity of incident.
- Ensure no further harm to victim/s. In the event of an increase in volcanic activity, take charge and instruct passengers clearly and calmly where to go and what to do. Keep constant headcounts.
- Contact boat with details of situation including type of incident, where you are, how many people are involved, how you are dealing with the situation.
- Request back up and resources if needed (i.e. Stretcher/helicopter).
- Evacuate island/administer first aid as required.

98. The AdventureMark audit report for White Island Tours dated 17 November 2017 recommends that White Island Tours be certified by [Quality Solutions International (New Zealand) Limited] *“for the following adventure activities at these locations **Walking on a live volcano: White Island**”* and includes the following:

#### **Audit scope**

All requirements of the ‘Safety Audit Standard for Adventure Activities, March 2017’ are being assessed, with the emphasis being on the provision of the adventure activity of walking on a live volcano.

99. An automatically generated email from WorkSafe to AdventureMark dated 20 November 2017 states:

Your online safety audit submission for **White Island Tours Ltd** was successful. This information will be processed by the Registrar of Adventure Activity Operators and will be published on the public register as soon as possible.

100. An internal AAO WorkSafe email dated 20 November 2017 states:

“QSI/AdventureMark™ has completed Safety audit form for White Island Tours Ltd.  
For your review and action.”

101. An internal AAO WorkSafe email dated 20 November 2017 attaching White Island Tours audit report states:
- Please find attached audit report for recently uploaded White Island Tours Ltd AAO 728.  
They have a condition. A few small paper based minor non conformities that we want closed out by December 22nd 2017  
Please let me know if you require any further supporting documentation
102. In a letter dated 21 November 2017 WorkSafe advised White Island Tours that its application to be registered as an AAO had been successful and that it was registered between 21 November 2017 and 19 November 2020.
103. WorkSafe provided me with a transcript of an interview conducted by WorkSafe inspectors on 29 September 2020 with the Managing Director of Integra Ltd<sup>28</sup>, which trades as AdventureMark, and the technical expert engaged by [AdventureMark] for the White Island Tours audit in relation to that audit – which includes the following information:
- (a) it was determined in advance during a conversation with WorkSafe that the audit would cover the trekking activity and not the volcanic risk;
  - (b) it was also agreed during that conversation that they did not need a volcanic expert because GNS Science was providing information to White Island Tours;
  - (c) the technical expert engaged for the audit has an international qualification as a mountain guide – he is not a technical expert for walking on a live volcano;
  - (d) the technical expert engaged by Bureau Veritas for its audit of White Island Tours did not have any volcanic expertise;
  - (e) the technical expert engaged by [AdventureMark] for the audit just accepted that the protective equipment used was appropriate for the volcanic hazard.
104. I interviewed the Managing Director of Integra Ltd and the person who had the conversation with WorkSafe (who was the General Manager of the AdventureMark brand from 2015/16 to October 2018):
- (a) The former AdventureMark General Manager said he would speak to a WorkSafe employee regularly in relation to audits:

... I used to speak with [WorkSafe employee], [redacted] Privacy [redacted]  
[redacted] I used to speak to him regularly, usually once or twice a week. I had a list of various queries because essentially he reviews every report that comes across his desk, so we always would have a discussion in advance if there was anything unusual that we would need to line out, because there’s no point in us proceeding with a client if we don’t have the thumbs up from WorkSafe essentially.
  - (b) The former AdventureMark General Manager said he and that WorkSafe employee discussed the nature of the White Island Tours audit – and it was agreed that AdventureMark would audit the “*low level mountaineering*” aspects of the operation because White Island Tours had engaged GNS as its technical expert in respect of the volcanic risk/hazard on the island:

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<sup>28</sup> [Quality Solutions International (New Zealand) Limited] changed its name to Integra Ltd in October 2018.

[I said] Given that when you got the JAS-ANZ accreditation, the scope of the accreditation didn't include anything like walking on a live volcano, was that issue discussed with WorkSafe in terms of whether or not you could audit White Island Tours and if so what the nature of the audit would be?

So we discussed what activity it best fitted because it was the only activity of that sort and it was discussed amongst us all and agreed that low level mountaineering is the closest thing we could get to, so for Whakaari there would be White Island Tours engaged GNS themselves as a technical expert and we felt that low level mountaineering was the closest activity on the Register.

[I said] Sorry could you just repeat that again, sorry White Island Tours engaged who?

They engaged with GNS themselves as part of their safety management system on advice on the alert levels and we discussed the actual activity and where it fitted best into the adventure activities and low level mountaineering was discussed as the best option, the best fit so to speak for the activity.

[I said] Ok. How about the issue of volcanic risk, volcanic hazard on the island was that addressed at all?

Yeah it was raised that they were using GNS as a technical expert and them being the only technical experts in New Zealand, it made no sense to engage them twice, they were already being engaged by White Island Tours as a technical expertise.

[I said] Ok, so who told you that?

Sorry that was with [WorkSafe employee], the discussion with [WorkSafe employee] and with [Managing Director of Integra Ltd] and with our Senior audit team at the time.

[I said] So what then, which aspect of the White Island Tours activities on Whakaari White Island were you auditing then?

Well we were auditing against the Safety Audit Standard, which looks at all their emergency procedures. It looks at the Standard Safety Audit Standard which you will have seen I'm sure, that every company has audited for Adventure activities, so it has 12 different sections and the main sections. It looks at your Emergency procedures, your communications, your staff training, and your staff competency, all those sorts of aspects and they were auditing against that standard. The same check list we would use for every adventure activity.

...

[I said] Ok. So [former AdventureMark General Manager] do you recall exactly what you were told by WorkSafe in terms of what the level of interaction was between GNS Science and White Island Tours in terms of?

It's a few years ago, so I've obviously dropped it because of the investigation, but they looked at, GNS essentially looked at alert levels on the island and they were in constant communications with them, they dealt with them regularly, so we knew that they were communicating with GNS and there were various alert levels for that island and they had that written into their safety management systems. So our audit team looked at that in detail at the time, . . . Essentially they communicated regularly almost on a daily/weekly basis with them on the alert levels on the island and kept monitoring it. They had an online system to see what the alert levels were.

- (c) They said it would not have been within the area of expertise of the technical expert engaged to assess whether there were measures in place to ensure people were adequately protected from volcanic gasses on the island.
- (d) They said their technical expert did not have any expertise, and they did not see it as their role, to assess whether or not the protective gear was appropriate for any volcanic hazard that might be present on the island.

- (e) They said it would not have been in the technical expert’s area of expertise to assess the adequacy of the process in the White Island Tours SMS under the heading “*Before Landing Passengers*” referred to above.
  - (f) They seemed to accept that they did not have the expertise to assess the adequacy of the steps to be taken in the event of an increase in volcanic activity while on the island (referred to in the White Island Tours SMS under the heading “*Emergency Evacuation Procedure (White Island)*” referred to above).
  - (g) The Managing Director of Integra Ltd said he would send me copies of all the documents sent to WorkSafe with the “*online safety audit submission for White Island Tours*” referred to in the automatically generated email from WorkSafe to AdventureMark dated 20 November 2017.
  - (h) The Managing Director of Integra Ltd said that, as far as he is aware, a copy of the White Island Tours SMS audit was not provided to WorkSafe – and that the SMS would only be provided if WorkSafe asked for it, which would have been very unusual.
105. The Managing Director of Integra Ltd subsequently advised that he believed that three documents had been provided to WorkSafe – the Audit report, a Document Review Assessment Sheet and an On-Site Evaluation Checklist. WorkSafe advised me that, having checked their records, the only document received was the two page audit report.
106. The Document Review Assessment Sheet:
- (a) in response to the question – “*Did you get input from any technical advisors when you developed your SMS?*”, which refers to section 4.2 of the 2017 SAS – records “*Was developed with assistance from Bureau Veritas*” in the “*Operator Initial evaluation*” column and the following in the “*Auditor Final evaluation*” column:
 

There is a White Island Operators Group who meet and discuss common issues There is a relationship with GNS Science
  - (b) records “[*White Island Tours employee*] is our technical expert”<sup>29</sup> in the “*Operator Initial evaluation*” column in response to the following question, which refers to section 5.1 of the 2017 SAS:
 

Do you involve technical advisors (whether a team member or an external expert) in identifying and assessing risks associated with your activities?
107. The only references to GNS Science in the White Island Tours SMS audited by AdventureMark appears to be to GNS setting the Volcanic Alert Level and contacting White Island Tours and other tour operators immediately if the Alert Level changes.
108. I interviewed the WorkSafe employee<sup>30</sup> who had the conversation with AdventureMark:
- (a) He said the following about what Adventure said about that conversation:
 

[I said] . . . in general what they're saying is that it was determined in advance during a conversation with you, that the Adventure Mark audit of Whakaari White Island would cover only the trekking activity and not the volcanic risk on the island, and therefore there was no need to have a technical expert that had any expertise in relation to volcanic risk, it was just the mountaineering trekking aspect.

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<sup>29</sup> That White Island Tours employee is referred to in the White Island Tours SMS as “*our in-house Technical Expert*”.

...

[I said] Do you agree that there was a conversation that you had with [former AdventureMark General Manager] or anyone at Adventure Mark to that effect?

Ha, to that effect, no. I do accept that the topic most likely came up because I remember the conversation and it would be a natural thing to come up. It may well be that that's what they took from the conversation or what they recall of the conversation, but I don't believe that I said words to that effect. It's completely inconsistent with a lot of other work around that and a number of other points.

...

I think principally, it's not the place of my role or even of WorkSafe as a whole, to determine the scope of what they audit as an independent third-party auditor. Most of my conversations would tend to be around what is or is not in the definition of an Adventure Activity, and the volcanic component as we've just discussed, is what brings this from being a hike on gravel, into deliberately exposing people to dangerous terrain. So, I can't reconcile their understanding with what I could have said, given that I'd previously documented the dangerous terrain as the basis for calling it an Adventure Activity.

...

[I said, after quoting from what AdventureMark said about the conversation] . . . So, first of all I suppose would you agree that you did have regular discussions with [former AdventureMark General Manager] in relation to the audits that Adventure Mark was carrying out?

Yes, within the limits of what I can and can't influence.

...

[I said, after quoting from what AdventureMark said about the conversation] . . . What they're saying is, what he's saying is that it was discussed with you that [AdventureMark] would only be looking at what they described as 'low level mountaineering', and [AdventureMark] wouldn't be looking at the volcanic hazard aspect of it because White Island Tours had engaged GNS Science as their technical expert in respect to those issues.

Mm. So, I don't claim to have a word-for-word recollection, but I'm happy to an extent to comment on [former AdventureMark General Manager] expressed understanding.

...

Because where he speaks about 'White Island Tours engaged GNS as a technical expert', I would accept that that's consistent with other information that I can verify. It would link very much with the parallels around the high ropes approach to the technical expert of the audit because what I believe I heard, prompted by this, but what I believe I heard and what makes sense, is that GNS was filling the role of technical expert, or technical advisor (in the language of the audit standard), and contributing into the safety management system. So, the difference there is between an operator that calls up the MET Service weather report, or an operator that gets MET Service to advise and contribute into their management system, who participates in meetings and reviews. So, the technical expert or technical advisor role that I probably accepted White Island Tours had engaged GNS for, has a very specific place in the audit scheme, sorry, the audit *standard*, which assuming I heard that and it's reported correctly, it starts to make other things cascade into place.

[I said] But okay, so you're saying that - so are you accepting what he's saying? I mean, tell me which.

Assuming for a moment that this is an accurate recall, and basically because I'm only relying on being prompted with this, I don't disagree with it. I'm not quite sure that I would endorse every word but that's not the point right now.

[I said] No, yeah, I mean but are you agreeing with them though, that it was agreed with between you and ...

Ah-ha, so that's where I stop agreeing. What I accept is that we discuss White Island Tours having GNS in that specific role, and I described it as a sounding board. So, this was my unprompted recollection in June 2020, I describe it as a sounding board conversation because they are the conversations that I can have with the audit companies. So, [former AdventureMark General Manager] slips into the passive voice here, he's actually talking about three conversations—he says: 'It was raised that they were using GNS as a technical expert'. I don't think that I raised that to him. I can't see how I would have known that unless White Island Tours had taken the time out to explain that to me themselves previously.

So, I'm not comfortable with the implication that 'it was raised by [refers to his own name]' that GNS had them as a technical expert. Following on from that, I'm not comfortable that I have any place or mandate or role to approve, to determine that that is the approach that they should take. Your question frames it as: 'What steps were taken by WorkSafe to ensure...?' Steps were taken by Integra to ensure because it's their decision. We, WorkSafe does not have a mandate in the system as currently [built], doesn't have a mandate to proactively oversee their technical expert selection. One of Integra's at least three steps, was to contact me. My approach to all of these types of conversations is not about, at least what I've understood, is that it's not about WorkSafe taking steps to ensure they get it right, but the part of their conversation with me is, does this appear to fit with the Certification Scheme, because we must promptly register is the certificate is in order.

I would only, and I have only pushed back, if there's an apparent mismatch with the Certification Scheme. So, I accept that we had the conversation, I accept that there was part of it that hinged around the role of GNS and their engagement with White Island Tours, but I don't accept that that makes me accountable for their decisions, when I'm only one of a number of steps. And I can't go ultra vires and tell them what they can and can't do; I can only ask—does it seem reasonable within the constraints of the Certification Scheme?

...

[I said] So, are you accepting though that it was at least discussed that White Island Tours was using GNS Science as a technical expert in terms of managing, addressing volcanic risks on the island, and therefore that AdventureMark wouldn't need an auditor or a technical expert with any expertise in relation to the volcanic risks on the island?

I think that the short answer is yes. I'll pause there.

[I said] You accept that?

Oh, I accept that it seems a reasonable construction of a conversation that I didn't particularly recall, and I think not recalling it is actually going to be relevant in the moment.

[I said] Oh, okay what do you mean by that?

Well, because I second guess myself quite seriously around some of these statements, and so I have had a look back through my work at the time and there are more than one, you know, there's a number of indications that, where a phone call seems to be significant, I follow up with an email. So, the fact that I didn't follow up this phone call ... and apparently this *topic*, with any form of email, only makes sense if **Maintaining conduct of public affairs**—it didn't seem to be out of the ordinary or controversial in any way.

So, I think that would be consistent with not having felt that I'd made any great decision that was sitting on WorkSafe or that I'd unduly influenced them. I think it was at least a component of 'this is what they think is an okay way to approach it', and I would have looked to the rule book - **Maintaining conduct of public affairs**: does this appear to be reasonable and consistent? And I've double-checked that and, yes, it does, so long as we accept that parallel around structural engineers and other consultants.

- (b) He said the following about what he thought the AdventureMark audit certificate would cover:

[I said] So, you knew that the audit certificate that you would be getting from AdventureMark, in respect of White Island Tours' activities on Whakaari White Island, would not have covered any of the volcanic risks arising.

See I don't, I also don't see that as a consequence that should have flowed from GNS having its - being discussed as a - sorry, [former AdventureMark General Manager] words: 'White Island Tours engaged GNS themselves as a technical expert'. The audit not covering it isn't a consequence of White Island Tours engaging GNS in that role in their safety management system.

[I said] And why is that?

Because when the high ropes expert goes in to look at the high ropes activity, they don't ignore the structural engineering component, they verify that the relevant consultant has done their thing.

- (c) He advised he did not have any discussions with GNS Science or make any enquiries as to whether or not White Island Tours had in fact engaged GNS Science as its technical expert.

- (d) He said the following in relation to what he thought the role of GNS Science would be:

[I said] . . . First of all, decisions of whether or not tours should go ahead based on Whakaari White Island volcanic alert levels, that's something that you would have thought from your conversation with AdventureMark, that GNS Science would have been advising on, is it?

Yes.

[I said] And once boats arrive at the island, decisions as to whether or not passengers [unclear] actually go onto the island and, if so, to which parts, is that something that you would have thought GNS Science would be advising on?

I doubt I asked myself that specific question at the time.

. . .

But I'd, generally speaking I wouldn't necessarily GNS to be on the phone or on the webcam or on the boat every day, but that they would have been involved in the development whatever protocol was in place.

[I said] How about the types of protective clothing and equipment that would be used?

Again, the technical advisor into the safety management system, is called up to that piece of work around hazard ID and management.

[I said] But is that something you would think that GNS Science might have a role in to an operator like ...

Yeah that was my understanding of what was in place based on, ah, and part of the reason I'm accepting [former AdventureMark General Manager's] statement is that I'd heard the same thing from the operator themselves, and others, this idea that we talk frequently with GNS was not new, and so where [former AdventureMark General Manager] says 'his understanding that we discussed is that White Island Tours engaged GNS as a technical expert', that didn't sound like an off-note, it was consistent with whatever I knew or had seen at the time.

[I said] . . . and also in terms of what action should be taken in the event of an eruption, or a volcanic event ...

Informed by your technical advisers, yeah.

[I said] And that's a role that you thought that GNS Science might provide to ...



Not so much as 'might', as they're *required to* I believe by the audit standard, if they are the technical expert advising the operator.

[I said] Oh, okay, so you understood that GNS Science was actually the technical expert that was advising White Island Tours on the volcanic risk aspects of their operation.

Yeah. [redacted] Maintaining conduct of public affairs [redacted] based on [former AdventureMark General Manager's] early comment there about the technical expertise, it would make sense for me to have accepted it, and that would be at least not contradicting their understanding of the conversation.

109. In its comments on my draft report, WorkSafe provided the following clarification from the WorkSafe employee I interviewed:

. . . where [WorkSafe employee] is quoted as accepting that it was “at least discussed” that because White Island Tours was using GNS as a technical expert, Integra “wouldn’t need an auditor or a technical expert with any expertise in relation to the volcanic risks on the island”. [WorkSafe employee] has asked to clarify this. He was not saying that it would be acceptable for the auditor to have no technical expertise in volcanic risk. What he accepted during the interview was that, during his call with Integra he agreed that the person they suggested to conduct the audit [name of auditor] did appear to have sufficient expertise. [WorkSafe employee's] view was that [name of auditor] particular mix of skills and expertise meant that he would be capable of conducting the specific audit capably, despite not being a volcanologist. [WorkSafe employee] was not agreeing that expertise in volcanic risks was not needed.

110. WorkSafe also commented that, under the NZAACS, the selection of an appropriate technical expert rests with the audit body - and that WorkSafe has neither any responsibility nor any relevant decision-making function or power in this regard. WorkSafe commented as follows in respect of the conversation with Integra Ltd:

It is noted in this particular case of the second White Island Tours Limited audit that there was a conversation between WorkSafe and Integra Limited relating to the selection of a technical expert for an audit of White Island Tours Limited. This was approached as a “sounding board” conversation, in reflection of the approach that ultimately technical expertise is a matter for the safety auditor, but one in which WorkSafe was not exercising any regulatory decision-making powers.

WorkSafe now understands that Integra relied on the comment about the technical expert during the sounding board conversation as being verification as to the appropriate scope of the audit, which informed the consequent composition of the audit team, including the appropriate technical expert. However, under the NZAACS both of these decisions rested solely with Integra as the audit body. In particular, the NZAACS required the scope of the audit to be determined by Integra in consultation with the operator being audited. It was this consultation, and the assertion that White Island Tours was already receiving advice from GNS, that resulted in Integra determining that the scope of the audit in this particular case did not need to focus on the risk posed by the volcanic hazard, such risk being appropriately managed through advice understood to be received from GNS.

111. WorkSafe commented as follows about what it was entitled to understand upon receiving the AdventureMark audit report for White Island Tours:

We note it is the volcanic nature of the terrain that makes the tour an adventure activity. In providing a safety audit certificate, a safety auditor is indicating that it has audited an adventure activity (as defined). By uploading the audit certificate to WorkSafe, Integra is indicated that it has audited and certified an adventure activity. Reflecting the roles and responsibilities within the scheme, WorkSafe was entitled to understand that Integra had audited the entire adventure activity, including the volcanic risk (because that is what made the activity an adventure activity).



## Actions in respect of unregistered operators

112. WorkSafe provided me with a number of documents relating to the issue whether operators transporting passengers to Whakaari White Island by air and then providing guided walks on the island were required to be registered as an AAO.
113. An email from an MBIE Client Service Adviser to Aao (a WorkSafe email address) dated 7 July 2014 (9:27 am):

Hi Team

Could you please contact [Volcanic Air]

[Volcanic Air] would like to see if the regulations apply to part of their business which involves tours of White Island where they would fly their customers to the island once there they would have a guided walk around the island.

114. An email from WorkSafe to Volcanic Air dated 7 July 2014 (10:45 am) states:

Thank you for contacting us.

You have reported to us that the operation that you provide has no element of being “designed to deliberately expose a participant to a risk of serious harm that must be managed by you.”

If an activity does not satisfy all the criteria in the HSE (adventure activities) regulations 2011 it would not meet the definition of an adventure activity operator and could not be registered.

Based on the information that you have reported to us, I agree that your business volcanic Air is unlikely to be subject to the HSE (adventure activities) regulations 2011.

I will remove your business from our register of potentially subject business’s and you should not hear from us again on this matter.

...

115. An email from Frontier Helicopters to WorkSafe dated 19 August 2015 queried an earlier email stating they are classed as an AAO:

I am the HSE Advisor for Frontier Helicopters and I just need to clarify an issue to see if the decision about our classification and non Adventure Activity still stands. [Name] received an email from MBIE saying we are classed as an Adventure Activity. I only want this clarified as I am writing documentation for White Island. If the decision does not stand I would like to request documentation that shows how we fall into this category.

I have attached the email received by [name].

116. The attached email referred to is an email from MBIE, dated 12 July 2013:

I’ve been waiting to receive legal advice, specifically in regard to activities on White Island but also applicable to activities on other active volcanoes such as Ruapehu.

I’ve now received that advice. The question became ‘whether the terrain where the activity is carried out is inherently dangerous’ and the advice is that parts of an active volcano could be and therefore activities on that terrain would be subject to the Adventure Activities Regulations 2011.

...

The Regulations place the primary onus on the operator to determine whether they’re subject to the Regulations. Whether the Regulations apply usually depends on the facts of each operation, in this case whether the terrain they use is inherently dangerous. Potentially, ‘dangerous terrain’ could be limited geographically, and could vary by the day, e.g. GNS alert levels (or avalanche danger levels on Ruapehu). I realise you understand this through your use of GNS alerts, which is one element in your safety management system.

This all means that you should determine whether you're operating in dangerous terrain and, if you decide you are, you're subject to the Regulations. . . .

117. An internal WorkSafe email dated 29 April 2016 states:<sup>31</sup>

Following your query from [WorkSafe employee] we identified White Island Tours as a registered AAO.

I have also found the operator page below, by internet search.

The legal entity involved is Frontier Helicopters, which is not registered. Given the "one hour guided tour around White Island's geologically active surface" it seems on face value that they are likely to be subject to the regs.

More at <http://www.whiteislandvolcano.co.nz/the-adventure>

They were contacted in 2013, see

<http://mako.wd.govt.nz/otcs/llisapi.dll?func=ll&objaction=overview&objid=23440869>

I can't find any subsequent correspondence – possibly in [WorkSafe employee's] email account?

I trust this helps. Can you please let [WorkSafe employee] and I know the context / any developments before we follow up next week?

118. I interviewed the WorkSafe author of that email dated 29 April 2016, who told me that, following a query from a WorkSafe employee, he was asked to have a look at what type of operators, registered or unregistered, were going out to Whakaari White Island. After checking the AAO register and carrying out a Google internet search, he found there was one unregistered helicopter operator, which he referred to in his email.

119. An internal WorkSafe email dated 1 November 2017 from the author of the 29 April 2016 email refers to his 29 April 2016 email and states:

Non-urgent, but when you have a minute, can you please check your email to see whether there's any trail following on from the mail-trail below?

. . . can you please check in [another WorkSafe employee to whom the 29 April 2016 email was copied to] old emails? The best search would be "white island" – complete with speech marks, to narrow down the results

This matter has come up again, with allegedly 5 unregistered operators, and the one registered AAO intending not to re-register.

120. An internal WorkSafe email in reply the same day, 1 November 2017 states:

I have looked at [WorkSafe employee to whom the 29 April 2016 email was copied to] mailbox and nothing further to what is below is visible.

121. An email from WorkSafe to White Island Tours dated 1 November 2017:

Based on the information available at [website link] it appears that walking tours on White Island do meet the [definition](#) of an 'adventure activity' provided by regulation 4(1)(a) of the [Health and Safety at Work \(Adventure Activities\) Regulations 2016](#), assuming the payment test in 4(1)(a) is met, and the operator is not excluded by regulations 4(2) to 4(5).

Guided tours on White Island are therefore almost certainly required to undergo safety audit and registration, unless specific and reliable information has made the 1996 report (linked above) out-of-date or inaccurate in relation to the risks and hazards that an operator would be expected to manage for the clients.

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<sup>31</sup> This email was to the author's Team Manager and was also forwarded to the author's senior advisor on 2 May 2016.

WorkSafe has identified 5 other operators who we will be contacting very soon in regard to this registration requirement.

In the meantime, I encourage you to continue the audit and re-registration process for your operations.

122. The WorkSafe author of the email dated 29 April 2016 also told me:

- (a) When I asked what happened between his emails of 29 April 2016 and 1 November 2017, he said he was not aware of anything that may have happened because the matter sat with another WorkSafe employee (whose email mailbox was searched)<sup>32</sup> who is no longer with WorkSafe (and who also sent the email to Volcanic Air dated 7 July 2014 referred to above). However, he said he sat next to that person and he thinks he would have known about it if that person *“was following up or taking any action in respect of helicopter operators flying people to Whakaari White Island”* – and he *“certainly can’t remember it”*. Although he clarified after the interview that that person did work from home and from another office on a regular basis and so he was not always in a position to know what he was working on.
- (b) His reference to *“[t]his matter has come up again”* was as a result of White Island Tours being reminded by WorkSafe that it was required to re-register<sup>33</sup> and then White Island Tours advising WorkSafe it did not intend to re-register because there were five unregistered helicopter operators operating on Whakaari White Island.
- (c) He agreed that it looked like the only reason WorkSafe was alerted to the fact that there were five unregistered operators was through White Island Tours bringing it to their attention.
- (d) When asked what he did after becoming aware of these five unregistered operators and sending letters to them dated 7 November 2017 (which are referred to below):

I did some more internet open-source checks confirming that it wasn't just a loose allegation from White Island Tours, that there were indications that these five businesses were advertising an equivalent product.

[I said] In what sense? When you say 'equivalent product' what do you mean by that?

Well, they were advertising tours to White Island for the volcano experience. I don't at this point have a clear memory which of their websites mentioned inside the crater and which of them didn't, or whether any of them did, but it was clearly a competing product. And from there it was probably trying to get my metaphorical ducks in a row so that these letters would stick and do their job.

[I said] What do you mean by that, 'stick and do the job'?

I wanted to avoid getting into a dispute about the definition. Regulation 4, 'Definition of an Adventure Activity' is frequently debated by operators, and I can't say exactly how large or small an amount of time it was, but I know I spent a bit of time trying to make the very best of the existing template letter and really make it as conclusive as possible with the caveats that are required in the template.

123. WorkSafe sent letters to the five unregistered operators dated 7 November 2017 advising of its provisional view that they were AAOs:

As the WorkSafe New Zealand adventure activities registrar, my role is to register adventure activity operators who have been issued a safety audit certificate by a WorkSafe recognised audit provider,

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<sup>32</sup> I was advised by WorkSafe that this person was senior to the author of the email at the time.

<sup>33</sup> WorkSafe sent a letter to White Island Tours dated 1 November 2017 reminding it that its safety audit certificate was due to expire on 20 November 2017.

unless there is a valid reason to decline the registration. The purpose of this letter is to inform you of the view I would take on this if you were to apply for registration. On 2 November 2017 I reviewed online advertising information about the activities [name of organisation] provides in regards to the White Island Volcano Experience. I also reviewed a scientific review of the volcanic hazards present at White Island Based on that information, it appears that you are an adventure activities operator. In this letter I explain what has led me to this opinion.

Our recent review aimed to assess whether your operation conducts an “adventure activity” as defined in the Health and Safety at Work (Adventure Activities) Regulations 2016 (‘the Regulations’). Rather than specify which activities are covered, the Regulations instead outline criteria to determine what constitutes an ‘adventure activity’. I have applied these criteria to your operation as described by you (attached as appendix 1).

Based on the information you have provided, it appears that you are an adventure activity operator (as defined by the Regulations) because walking in the White Island crater area exposes participants to serious risks relating to volcanic hazards, that must be managed by the provider of the activity.

Please review this letter carefully, including the information documented in appendix 1. If the circumstances of your operation as I have outlined them are not accurate, or if you consider that there is other information that may materially affect my provisional view, please contact me immediately.

It is your responsibility to correctly determine if [name of organisation] is subject to the Regulations and accordingly whether you are required to apply for registration. However, if I do not hear further from you within 10 working days from the date of this letter, I will take it that you agree with the provisional view that I have expressed above. I will then record your determination as being that your operation is subject to the Regulations. Please note that regulation 8 of the Regulations makes it an offence to provide an adventure activity while not registered to do so. It is also an offence to offer (advertise) to provide an adventure activity except under limited conditions. The Regulations provide for a fine of up to \$50,000 for these offences.

If any information about your operation changes, such as the nature of the operations, you should notify WorkSafe NZ (aao@worksafe.govt.nz) as this could affect the opinion I have expressed in this letter.

124. The document annexed as appendix 1 to those letters states that the operators’ activities are *“Designed to deliberately expose participant to serious risk that must be managed by the provider (4(1)(a)(v))”* because *“the activity is intentionally designed to travel within the active crater area, where there are no railings or similar structures, and participant safety must be managed by the guide”* – and states that the risks are detailed in a website link, which is a link to the same 1996 report referred to above.
125. An email from Volcanic Air Helicopters & Floatplanes (**Volcanic Air**) to WorkSafe dated 8 November 2017 refers to and attaches the email from WorkSafe to Volcanic Air dated 7 July 2014 referred to above and states:

As discussed back in 2014 we were approached by TIA, Qualmark and Worksafe in regard to Adventure Activity regulations.

At the time we went through a process and it was determined that because of the way we operate and conduct our activity on White Island that we don’t deliberately expose our passengers to risk of serious harm.

The parallels were drawn with Bungy Jumping and Skydiving at the time which obviously deliberately expose passengers to serious harm, as I explained yesterday we never deliberately expose our passengers to serious harm and we mitigate our risks in many ways.

These include monitoring of Volcanic Activity levels with GNS Science, working as a collective of operators (concessionaires) as a user group, providing passengers with appropriately trained guides and safety equipment and daily aerial observations of the volcano. We have also gone to some

lengths to position an emergency shelter (20 foot shipping container on the volcano with some survival provisions)

If at any stage we felt that given either the Volcanic Activity Level posed a threat or our own visual aerial observations of the Volcano indicated unusual or dangerous activity on the Volcano quite simply we would not land.

Below is a copy of e-mail correspondence between myself and [WorkSafe employee] (Worksafe back in 2014)

When I was talking to you yesterday I vaguely recalled the previous discussions I had with Worksafe but it was great to find this e-mail from [WorkSafe employee] agreeing that we were unlikely to be subject to the adventure activities regulations. I hope this is of some help.

...

126. The next document provided by WorkSafe in relation to the issue of the unregistered operators is a WorkSafe email to Whakaari Management Ltd (the owner/manager of Whakaari White Island) dated 6 August 2018. The author of that email:

(a) explained what happened during that period:

I would say that I paused it to try and find an approach that was going to be effective. I say that; we had a couple of other non-compliance, one in particular, a couple of other operators that were already in the works, and those ...

[I said] What do you mean by that ...

Ah sorry, they're already being, ah, so an unregistered operator which had already been I think at the point, referred to the inspectorate or was perhaps during December.

[I said] What, relating to Whakaari White Island or something different?

Not relating to Whakaari but I guess you could call it a test piece in a sense. I was still working through a large volume of re-registrations at that point, because there was this three-yearly surge in volume. So, the surge alone would account for some delay, pursuing or trying to work through the process and learn from the follow-up on this other operator, and then doing some work to try to find an effective approach was part of the delay. There was, I believe, a month ...

[I said] Effective approach to the issue raised by [Volcanic Air], or the other one you're talking about, the other ...

Ah, well both, but in particular we're talking in relation to [Volcanic Air] so yeah.

...

And the short version would be that as other priorities allowed and I began to get some clarity around process, I picked it up again at the date of the next email.

...

[I said] Did you make any - before then [sending the email of 6 August 2018] were you making any enquiries at all or making, looking into at all about the nature of the operation by the helicopter operators or anything like that?

I don't recall doing that and I don't have a record of it. I don't think I had the capacity to pick this up and pursue it.

[I said] Okay, so it was just basically pressure of work on other things meant that you weren't able to pursue it.

Yes.

(b) explained why he contacted Whakaari Management Ltd:

As the landowner/land manager, if I could have convinced Whakaari Management Limited that it was appropriate for them to require registration, it would have been dealt with very easily from my point of view and in terms of the workload.

[I said] Like in terms of the owner would say, you're not coming on here unless you're registered?

Yes.

127. The email from WorkSafe to Whakaari Management Ltd dated 6 August 2018 states:

My role here at WorkSafe includes advising on the interpretation and application of the Health and Safety at Work ([Adventure Activities Regulations](#) 2016). As you may be aware, the boat-based operator White Island Tours Ltd is [registered as an Adventure Activity Operator](#) (AAO) under these regulations. You may also be aware that the five helicopter operators running tours on the island are not registered as AAOs.

Part of my role includes clarifying situations where there is uncertainty or disagreement about whether equivalent products are required to achieve registration. Often, comparable operations are all required to register, OR all may be advised that registration is not required. Occasionally there may be a relevant difference we can identify, that clarifies why one operation is an AAO while the comparable operation is not in fact an AAO.

I have been requested to advise on the six operators working at Whakaari / White Island, with the goal of achieving consistency if possible, or clarity of any relevant difference that lets some remain un-registered while others are required to register as an AAO.

I have a number of questions that can best be answered by the land owner/manager – would you or another representative be available to follow up with me? In my experience a phone call is usually the best way to start this kind of conversation, and my contact details are in the signature below. We can then follow up in writing as appropriate. Of course, we can also work entirely by email if necessary.

I have an office-based week this week, with few fixed commitments – I expect to be at, or close to, my desk most of this week, between about 0830 and about 1645. I look forward to being in contact with you soon.

128. Whakaari Management Ltd replied in an email dated 9 August 2018:

More than happy to talk with you. Your phone details not below. If in the link then my internet not working presently while I write this.

Yes aware the boat operator has registered and something that I looked at whether required by the operators some time ago. White Island Tours may possibly allow individuals to engage in water activities or envisaging potential for other activities as part of their excursion which includes touring White Island.

129. WorkSafe replied to Whakaari Management Ltd in an email dated 16 October 2018:

Sorry about the delay in follow-up, a few other matters have had to take priority for the last few weeks.

I am still keen to discuss with you the adventure activities regulations in context of Whakaari /White Island.

If you would like to provide a contact phone number and a couple of times that would suit you, I would be happy to call you.

130. An email from WorkSafe to Whakaari Management Ltd dated 5 November 2018 includes the following:

Thanks for your time on the phone last week to discuss Whakaari Management Ltd's understanding of how the Health and Safety at Work (Adventure Activities) Regulations 2016 [the Regulations] might apply to walking tours in the crater of Whakaari / White Island.

...

**Do the Whakaari tours fit the legal definition of an 'adventure activity'?**

It appears that the walking tours at Whakaari / White Island fit with the tests of the regulations' [definition of an adventure activity](#) as follows:

...

I have heard anecdotal allegations that one or more operators are guiding customers in the Whakaari crater without the same equipment and precautions as the registered White Island Tours. Whether or not that's true, if it would represent a material difference from a safety perspective, it is exactly the kind of matter that the Regulations are designed to address. It is not my role in this job to decide on whether an operator's risk management systems are sound: when the regulations' definition of an adventure activity is met, I must advise that government requires the assurance of an accredited independent adventure safety audit.

...

I hope this is relatively clear, and helpful. If you can identify any factual errors or logical faults, we would prefer to know about them and correct our approach where necessary. Otherwise, I think that it is reasonably clear that we are tending towards a well-developed view that the crater tours meet the definition of an 'adventure activity' and are therefore required to undergo audit and registration as an 'AAO'.

I look forward to hearing your thoughts when you've had a chance to consider our view.

131. I asked the WorkSafe author of this 5 November 2018 email:

- (a) to explain his statement in that email – *"I have heard anecdotal allegations that one or more operators are guiding customers in the Whakaari crater without the same equipment and precautions as the registered White Island Tours"*.<sup>34</sup>

Yeah, an operator over there, I think it was - I think the allegation was made against one of the helicopter operators.

[I said] That what was happening?

That that operator over there 'doesn't even wear gas masks, maybe he doesn't even have them with them!' as an example. I think that was given to me as a reason why 'I'm safe and I don't need to be registered, but go and pursue somebody else'.

[I said] Oh, so one of the helicopter operators told you that.

It may have come from White Island Tours.

- (b) Whether anything had changed at this point in terms of the amount of information that WorkSafe had:

No, the - I guess what changed and what made it difficult, was that the operator was saying, 'no, no, I don't deliberately design ...' oh, and on behalf of a group of operators, [Volcanic Air] was saying, 'no, no, we don't expose our participants to serious risk'—and, in principle, he knows his better than I do, so it was trying to work through the implications of *the operator knows their business better than I do*, and yet I struggled to accept his statement.

...

---

<sup>34</sup> The author of the email referred to those anecdotal allegations later in the interview as "*low grade intel*" that he would not put on an inspectorate file.



The other thing that had been mentioned or stated to me, I believe by [Volcanic Air], in the interval, was that they do follow the same protocols as a registered operator. I think it was by this time I was told that whatever protocols your registered operator has, we have the same, and that's only relevant in so far as, I have a reason to think that those protocols are adequately managing safety, and so, if I was to refer this to the inspectorate, at face value it looks like the risk is being managed and you've only got a paperwork compliance non-conformance, ah, sorry, non-compliance.

[I said] But that would have nothing to do with whether or not they should be registered in the first place.

No, no-no. It's only relevant in terms of how it's being moved through WorkSafe's different channels.

132. An email from WorkSafe to Whakaari Management Ltd dated 28 November 2018 states:

I hope all is well with you. I'm just writing to ask whether you had any comment about the email I sent a month ago, explaining why we believe that the crater tours at Whakaari are 'adventure activities' of the type that are required to pass a safety management audit and be registered with WorkSafe.

If I don't hear from you this week, I'll follow up with the relevant operators next.

133. An email from Whakaari Management Ltd to WorkSafe dated 28 November 2018 suggests a meeting to discuss the issues:

Thanks for the follow up. Something I we have been considering as its important operators to White Island and ourselves make sure we keep in line with requirements.

...

Whilst the tour is on the crater floor, the operators select landing sites and paths to minimize risk and walking effort while in the crater. I find it hard to reconcile that the tour is "designed to deliberately...". That said if the intention is to include guided walks in or to areas of heightened risk such as geothermal areas, Tongariro national park, farms, glacier landings and beaches for example then there is little likelihood the operators will not be required to register. My comment would be that possibly an unintended class of activity is trying to covered by the same regulation. Maybe it is becoming difficult where to draw the line and increasingly more activities are included rather than just those for which the regulations were originally drafted.

To this end and in light of your upcoming contact with helicopter operators could I suggest we all meet. We all just had a meeting with Civil Defence and the police last month in Whakatane and I am sorry we missed that as an opportunity. I am sure we could get all operators to attend a meeting possibly in Rotorua, with you and other Worksafe representatives. A meeting with operators is next anticipated in February but could possibly be arranged sooner.

In the meantime happy to discuss this further.

134. An email from WorkSafe to Whakaari Management Ltd dated 3 December 2018 states:

Thanks for your speedy reply.

I don't think that the scope of the regulations is being expanded with this advice. It seems fair to say that time pressure during 2014 allowed some inconsistent advice to get out the door, and it was only relatively recently that my conversation with White Island Tours brought the discrepancy to light. I have been working to clarify the most appropriate advice so that all the affected operators receive the same consistent advice.

I've considered your comments below, and I remain confident that the 2014 decision to register White Island Tours was correct, therefore we're right to bring the helicopter operators up to date with consistent advice about their tours.

...



It would be valuable to meet with the affected operators, to continue the education and engagement approach from WorkSafe, so thank you for suggesting that opportunity. I would be available from the 11<sup>th</sup> February onwards, if you could please send through the details for the meeting.

However, the registration requirement is already fully in force, and I am required to point out to the operators that they will be in breach of the regulations if they provide (or in fact advertise) the crater tours before achieving AAO registration.

Thanks again for your time and feedback. I look forward to meeting you and the operators in February if possible.

135. WorkSafe replied to Volcanic Air's email of 8 November 2017 in an email to Volcanic Air dated 5 December 2018:

Thanks for your time on the phone just now. As we discussed, it is important that I should 'close the loop' with you after having worked through the points you raised last year, and discussed this question with [ . . . . ] of Whakaari Management Ltd.

The key point for you is that my earlier advice remains valid and expresses WorkSafe's view that the White Island crater walking tours are subject to the Health and Safety at Work (Adventure Activities) Regulations 2016.

. . .

It seems fair to say that time pressure during 2014 allowed some inconsistent advice to get out the door, and it was only relatively recently that the discrepancy came to light. I have been working to clarify the most appropriate advice so that all the affected operators receive the same consistent advice.

I've considered your comments below, and I remain confident that we're right to bring the helicopter operators up to date with consistent advice about their tours.

WorkSafe will have no issue with you having acted in good faith on written advice that you were reasonably relying on. However, there are sound reasons why I updated that advice with my letter last year, and I do recommend that you should take the newer advice as being more reliable.

I trust this is reasonably clear, if not exactly good news for you. If you would like guidance on how to achieve registration as an adventure activity operator, I am happy to help you with that information too.

136. An email from Volcanic Air to WorkSafe dated 6 December 2018 states:

Thanks for your time on the phone yesterday.

As discussed we would appreciate the opportunity to meet, discuss our situation and to receive the guidance you have offered.

I have spoken with [name] at Kahu (formally Frontier Helicopters) and he would be please to be involved in that meeting as well, if we could have a collective approach as a group of operators that would be appreciated. I also believe it would be beneficial for the Island's owners to be present.

The current aviation operators include ourselves, Kahu (Frontier), Aerius and Inflite.

I am sure they would all be keen to be involved.

Let me know if you need any further information at all.

137. An email from WorkSafe to Whakaari Management Ltd dated 13 February 2019 states:

I have a note that the next White Island / Whakaari tour operator's meeting was intended to be around February this year. I'm still keen to meet with everyone as we discussed last year.

Are you able to provide any update on when that meeting could take place? I have a meeting in the Central North Island to schedule, and it may be efficient if the two can be arranged into one trip.

I look forward to hearing from you.

138. An email from Whakaari Management Ltd to WorkSafe dated 4 March 2019 states:

Sorry for late reply. I have been away for a couple of weeks and catching up.

I have passed your update request on to [Volcanic Air and Kahu] so you should hear from [Volcanic Air]. I think you have recently talked to [Volcanic Air] in this regard and have his contact details. Let me know if you need my input in arranging a meeting or facilitating.

139. An internal WorkSafe email dated 20 March 2019 states:

You may recall that we have been invited to meet with helicopter operators that offer/provide walking tours on White Island, with the intention of ensuring that they achieve AAO registration, consistent with the boat operator that also provides walking tours on this most active and un-managed volcanic area.

The operators have proposed meeting in Rotorua at 1pm on Friday 29 March. . .

140. I asked the WorkSafe author of that email:

(a) what the purpose of the meeting 29 March 2019 meeting was:

Purpose of the meeting from my point of view was to talk through one last time, the rationale for why I believed that the definition, and therefore the registration requirement, applied to them, and say, this is how you get registered.

(b) what happened at the meeting:

Each of the three helicopter operators was there for at least part of the time; [Volcanic Air] was there for the whole time; [Whakaari Management Ltd] was there for the whole time. During that meeting I stepped through my reasoning one last time so it was clear for the people that had been out of the conversation between myself, [Whakaari Management Ltd], and [Volcanic Air]. I believe there was a little discussion around ways that the product might be adapted, that they could think about if they really felt it was non-viable for them to go through the registration process. I was careful to provide more than one option on anything that we discussed along those lines. I believe I pointed out that, if the economics don't work for three small businesses, then one amalgamated business might be worth looking at, but that I could not tell them what to do.

I believe the next part of the conversation was around, so how do we do this? And I explained the choice of audit companies, that they can get competing quotes and go ahead at their, you know, with their choice of audit provider. It was a long tiring meeting, at the end

Maintaining conduct of public affairs

I just made it clear one last time that I'm not here to carry out an enforcement action right now, but I'm telling you what you need to do, and your next step is to get registered. Then I believe it was [Whakaari Management Ltd] asked: 'So how do we appeal this? So, this is your view...' \*(yes, this is my view) 'your view as registrar' (well, although WorkSafe is the registrar, yes, effectively it was my view as registrar) '... how do we appeal this? How do we go over your head?' and, as I've stated somewhere else, my reply was: 'Well we have to have a review process'. That's my understanding. There is no established drill that - you know, I knew it would definitely go here, 'but if think you have new information, put it in writing, WorkSafe will have to consider it' and, as you see, that's what happen next.

141. Following the meeting Volcanic Air sent an email to WorkSafe dated 10 April 2019 states:

Thanks for taking the time to meet with the White Island helicopter operators and [Whakaari Management Ltd] last Friday, we all appreciate your time and the information that you relayed to us.

As you can see as a group of operators we do take the wellbeing of our clients seriously and it was pleasing to note that all operators were present at the meeting.

Having digested the information you supplied we believe that activities at White Island should fall within the same category as the Tongariro summer time activities which do not require Adventure Activity Operator certification. The parallels are almost identical and the key agency that monitors both Volcanoes also supplies DOC with information to make informed decisions with regards to the Crossing being operable or not.

GNS Science presently inform all operators as to any changes to the alert level on the Volcano and what those changes entail - I have attached a copy of an example alert bulletin for your reference.

Also attached is a copy of the Volcanic Alert level system provided by GNS Science.

The White Island user group in consultation with GNS have as a group of operators established that operations to the Volcano will cease landing above alert level three. That is not to say that in the event that prior to landing at a lower alert level if visual sightings concluded that activity levels were unsuitable landings would also not take place.

In this case we would argue that it is the user group and it's combined resources including the operators, White Island's owners, GNS Science, Civil Defence and additional stakeholders that are best placed to set operating parameters for the volcano, thus taking the equivalent of DOC's role for the Tongariro crossing in this case.

Below you will also find a copy of previous correspondence between then [ . . . ] and the user group operators detailing how we have previously communicated when activity levels increase

Hi all

As you all should be aware by now White Island had a minor eruption last night. GNS has upgraded the Alert rating to 3 and the Aviation code to orange.

At first we thought this seemed rather drastic, but remember there is now a new rating system in place. We have been informed that they will be meeting this afternoon to reassess these ratings after their visit this afternoon. Another report should be through to all by 5pm. Patrick has been briefed and shown the photos our crew took and is fielding the media enquiries.

After discussions with our crew who went to the Island today our Company is comfortable with carrying on with the tours under the current circumstances, although we have put in place our procedures for increased activity.

Would be good if all Users could respond to this email so we know everyone is up to play with the recent activity.

Cheers

. . .

I hope this gives you a level of comfort with the systems that we have in place to manage volcanic activity levels as a group and in an equivalent sense to the Department of Conservation regarding the Tongariro Alpine crossing.

We look forward to hearing from you soon.

142. The attached example GNS volcanic alert level bulletin dated 28 April 2016 states:

**Based on new observations, the Volcanic Alert Level for White Island has been lowered to 2 from 3. This indicates that the volcano is no erupting anymore but remains in a state of moderate to heightened unrest. The Aviation Colour Code remains at Orange.**

. . .

There is currently no indication that activity may be building up at White Island. However, GNS staff will not be visiting the main crater floor until further notice due to the heightened state of volcanic unrest. GNS Science volcanologists are continuing to monitor the volcano 24/7 using existing instrumentation on island and occasional measurements made from safe distance. Further bulletins will be released as required.

143. I asked the WorkSafe employee to whom this email was sent:

- (a) Whether the issue arose in WorkSafe that the unregistered operators would only cease landing above alert level three and yet the GNS Science bulletin indicated GNS Science would not let its staff land at level 2:

The short answer, no. From my perspective I didn't engage deeply with that bulletin because it was, ah, I needed to get this review. Yeah, and I missed that comment about the staff.

- (b) What the process was from this point. He said he treated the 10 April 2019 email as seeking a review of his indication that registration was required:

No, there was no established WorkSafe process for a review of this kind of view in the form of advice. There is a review process by that time for review of an actual regulatory decision that has been made using a power or a delegation, but this isn't one of those; this is a view as advice from an advisor not using any regulator's power.

[I said] So, would it be fair to sort of refer to it as a matter of fairness? The process you were putting in place was a matter of fairness to the operators ...

Yeah, yep.

[I said] ... to give them a chance to provide any additional information, and you were considering that?

Ah, that WorkSafe would consider it, not just me.

...

Because clearly they were getting nowhere with me and they felt that was, I don't know, insufficient.

[I said] Okay, and so that is then the process when you then referred this to the policy team ...

Yes.

144. He then commenced that review process by sending an internal WorkSafe email dated 26 April 2019 referring to Volcanic Air's email of 10 April 2019 stating:

As discussed, I'm keen to see what you make of this question. I can provide more info/background etc any time.

145. Another internal WorkSafe email dated 26 April 2019 also referring to Volcanic Air's email of 10 April 2019 states:

...

The email below follows an extended conversation with PCBUs who operate helicopter flights to White Island / Whakaari, and also guide their customers to walk within the active volcanic crater on un-managed paths. They are not currently registered as adventure activity operators. Another PCBU that operates boat transport to the island and guides their customers in the same active crater is registered as an adventure activity operator for the crater tour.

I have some thoughts on the question, but it's important to develop a collective view from WorkSafe, in order to conclude the conversation and either achieve a consistent application of the regulations, or identify a relevant difference to explain a difference in registration status between these apparently comparable PCBUs.

146. There were then internal WorkSafe emails addressing the issue from 30 May 2019 to 29 August 2019 during which WorkSafe's position and response was considered and determined.

147. WorkSafe's response to Volcanic Air's email dated 10 April 2019 was set out in an email from WorkSafe to Volcanic Air, Whakaari Management Ltd and Frontier Helicopters dated 18 November 2019 advising that the helicopter operators did need to register as AAO under the 2016 Regulations:

My apologies for the long delay in replying to this email. There has been a mix of reasons across the various WorkSafe teams involved.

The key point is that the policy team have reviewed the question of White Island tours and Adventure Activities registration, and they agree with the advice that I have previously provided to you.

I understand this is not your preferred outcome, but it is also not entirely unexpected.

You will need to consider your options and how to achieve compliance with the HSW (Adventure Activities) Regulations 2016. Could you please advise WorkSafe of your intentions when you have made a decision. – Can I ask, please, that you cc the team address [aao@worksafe.govt.nz](mailto:aao@worksafe.govt.nz) when you do reply, because I am currently seconded to another team, and may not be the best person to reply in the short term.

If you have any questions about the registration process, you can find information on the WorkSafe website, and/or email the team address.

148. One of the operators replied in an email to WorkSafe dated 18 November 2019:

Please send us the mix of reasons the various WorkSafe teams have come up with so we can better understand the drivers towards this decision and then we can consider these in due time as a collective.

149. WorkSafe replied in an email dated 18 November 2019:

The mix that I mentioned below is related only to the delay in replying to [ . . . . ] email – that mix includes an assortment of competing priorities, leave, scheduling for discussions etc.

The reasons why WorkSafe advises that the AAO regulations apply have been explored in the emails and conversations that we have previously had with the island's owners and the aviation collective. There is no change to the reasoning that we have previously covered in relation to the risk profile of the crater tours, and their fit with the Regulations' definition of an 'adventure activity'.

From my perspective, the various parties have probably had sufficient time to consider the advice and reasoning that has come from WorkSafe over an extended period; I suspect that WorkSafe would now be looking for clear movement towards compliance in a reasonable time-frame.

I trust that clarifies the situation.

150. The WorkSafe author of this email, who was responsible for dealing with the issue of the unregistered operators on behalf of WorkSafe from at least November 2017:

- (a) told me it was his intention after sending his email of 18 November 2019 to give the unregistered operators a few weeks before he passed the matter on to the WorkSafe inspectorate to consider enforcement action, which he thought would probably result in improvement notices to the unregistered operators;
- (b) confirmed that WorkSafe had not initiated any enforcement action before this time.

## **ASSESSMENT OF THE WAY IN WHICH WORKSAFE PERFORMED ITS REGULATORY FUNCTIONS**

### **Registration of White Island Tours**

151. One of the preconditions of WorkSafe being permitted to recognise a person or organisation as a safety auditor is that it must be satisfied that the person or organisation "*has the appropriate experience and qualifications to carry out the proposed audits*". Consistent with this precondition is that WorkSafe may impose a condition of recognition that limits the safety auditor to specified types of adventure activity – ie, to those that WorkSafe is satisfied the safety auditor has the appropriate experience and qualifications to audit.

152. A safety auditor is required to:

- (a) audit an AAO's compliance with the one SAS developed by WorkSafe, which *"is designed to be flexible and incorporate good practice as it applies to the particular adventure activity under scrutiny"*; and
  - (b) if the AAO passes the audit, to issue a safety audit certificate and provide a copy of it (and related information) to the Registrar so that the AAO can be registered.
153. The purpose of the SAS is to specify standards or requirements with which AAOs must comply to reduce risks to health and safety.<sup>35</sup>
154. WorkSafe and JAS-ANZ developed the NZAACS\* as the primary means by which safety auditors are recognised by WorkSafe. JAS-ANZ carried out accreditation assessments under the 2015 NZAACS after JAS-ANZ endorsed it on 1 November 2015. Prior to that, JAS-ANZ conducted assessments against the Temporary Checklist, which included:
- (a) requirements relating to ensuring that the audit body being assessed has personnel with the appropriate technical competency and expertise relevant to the adventure activities that will be audited by the audit body;
  - (b) a 'Technical competency table', which listed 'Activity groups' (which did not include any activity that is expressed to be on or near a live volcano) and 'Qualifications or attestation' for each of those Activity groups, and states the *"activities listed are not exhaustive but are activities usually subject to the regulations"*.
155. JAS-ANZ's June 2014 assessment of Bureau Veritas (which comprised two assessments – an *"off-site, desk-top"* assessment on 3 June 2014 and an *"on-site, desk-top"* assessment on 10 June 2014) against the Temporary Checklist raised issues in respect of Bureau Veritas's ability to meet the auditor/technical expert technical competency requirements.
156. After emailing the report containing the two assessments to WorkSafe, JAS-ANZ then had no further role in the process of recognising certification bodies until after it endorsed the NZAACS on 1 November 2015.
157. On 13 June 2014, WorkSafe recognised, among other certification bodies, [Quality Solutions International (New Zealand) Limited] and Bureau Veritas as safety auditors under the 2011 AA Regulations for the period 13 June 2014 to 31 December 2014. The Bureau Veritas certificate of recognition was granted on conditions including that:
- (a) Bureau Veritas was required to show that it meets, or how it intended to meet, the personnel requirements under the Scheme Rules;
  - (b) WorkSafe could specify the scope of the adventure activities for which Bureau Veritas could issue safety audit certificates – which would be assessed by WorkSafe based on whether it was satisfied that Bureau Veritas met the personnel requirements under the Scheme Rules.
158. WorkSafe has advised that:
- . . . it appears no such specification was made in practice, meaning that BV had, in terms of the regulations, no limitation on the types of activities it could audit. This is accepted as falling short of good regulatory practice. WorkSafe acknowledges the resulting risk that BV would audit activities in respect of which it did not have the technical expertise . . .
159. WorkSafe provided auditors with a Technical Expert Summary List (as at 9 June 2014), which lists technical experts and indicates, among other things, the qualifications each technical expert had relevant to the same activity groups listed in the Temporary Checklist technical competency table.

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<sup>35</sup> 2016 AA Regulations, r 19(3); 2011 AA Regulations, r 20(3) contains the same wording other than the words *"to health and safety"*.

\* JAS-ANZ note that the New Zealand Adventure Activities Certification Scheme was developed by a scheme technical committee which consisted of representatives from MBIE (and subsequently WorkSafe), JAS-ANZ, Department of Conservation, Maritime NZ, industry representatives and audit bodies.



It appears this was intended to assist auditors meet the registration deadline of 1 November 2014 by providing them with a list of technical experts with the appropriate technical competency and expertise relevant to the adventure activities being audited. WorkSafe has advised that the list *“was not intended to be an assurance of competence, it was to assist safety auditors by advising them of people potentially competent that they could contact to conduct their own diligence”*. The WorkSafe employee who decided to register White Island Tours described the technical competency table as part of how the auditor plans and staffs an audit.

160. Bureau Veritas audited White Island Tours on 6 October 2014 and emailed its audit report to WorkSafe on 24 November 2014. Bureau Veritas issued a Certification dated 21 November 2014 to White Island Tours for a three year period from 21 November 2014 to 20 November 2017.
161. There were no technical experts listed on the Technical Expert Summary List with any experience or qualifications relevant to an activity carried out near a live volcano – because an activity of that type was not on the version of the technical competency table on which that list was based (or indeed any version of the technical competency table). The technical expert used by Bureau Veritas for the audit is a qualified mountain guide but had no expertise in respect of volcanic hazards. And, of course, Bureau Veritas had not been assessed by JAS-ANZ as having the appropriate experience or qualifications to carry out an audit of an activity carried out near a live volcano – because the Temporary Checklist technical competency table did not include an activity of that type.
162. White Island Tours was then registered on 27 November 2014 for that three year period on the basis of the Bureau Veritas Certification. It was therefore registered without being audited by an audit body that had the appropriate experience and qualifications to audit its adventure activity operation.
163. On 27 January 2015 recognition certificates for the three year period 1 January 2015 to 31 December 2018 were issued to, among others, [Quality Solutions International (New Zealand) Limited] and Bureau Veritas. The [Quality Solutions International (New Zealand) Limited] recognition certificate contained a condition to the effect that:<sup>36</sup>
  - (a) WorkSafe could, by written notice, specify the scope of the adventure activities for which safety audit certificates could be issued;
  - (b) WorkSafe NZ would make that *“assessment based on whether it is satisfied that QSI meets the requirements under the Scheme for engagement of personnel with the relevant technical competencies”*.
164. WorkSafe and JAS-ANZ entered into a Memorandum of Understanding dated 16 October 2015 to define their relationship in respect of the NZAACS. The Operational Agreement setting out WorkSafe’s roles and responsibilities attached to the Memorandum of Understanding includes obligations relating to ensuring that auditors have the relevant technical expertise in respect of the adventure activities to be audited and providing for communication between WorkSafe and auditors in respect of particular audits. WorkSafe is required to:
  - (a) maintain and update, in conjunction with JAS-ANZ, the technical competency table for audit team personnel;
  - (b) alert certification bodies to any specific matters to be considered in their evaluation, certification, or surveillance activities;

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<sup>36</sup> The Bureau Veritas recognition certificate contained a condition to similar effect.

- (c) advise certification bodies, and JAS-ANZ, of any concerns it has in respect of an applicant or certified AAO;
  - (d) review the audit report and any other information requested from a certification body, in order to understand a certification decision for the purposes of registration of an AAO.
165. The 2015 NZAACS contains provisions to the same effect:
- (a) it records that the scope of a certification body’s accreditation by JAS-ANZ and recognition by WorkSafe NZ is confined to the specific adventure activities for which it meets the knowledge and skill requirements defined in the NZAACS – and that a certification body is therefore only able to audit those adventure activities it is accredited and recognised for, subject to any conditions imposed by accreditation and recognition;
  - (b) certification bodies are required to:
    - (i) send WorkSafe the operator profile, which includes identifying the nature of the adventure activity, as soon as practicable once the contract for services has been agreed; and
    - (ii) provide WorkSafe with the opportunity to alert them of any specific matters to be considered in their evaluation, certification, or surveillance activities;
  - (c) at any time, WorkSafe may advise the certification body of any concerns it has in respect of an applicant or certified operator;
  - (d) in terms of personnel, certification bodies are required to hold either a current qualification or attestation “*as outlined in the Technical Competency Table*”<sup>37</sup>;
166. The Technical competency table is important to certification bodies in terms of identifying the technical experts and/or the qualifications and experience required to audit particular adventure activities. A WorkSafe employee advised to the effect that the Technical competency table is part of the audit planning process, including in terms of staffing requirements.
167. The Technical competency table does not contain an activity expressed to be carried out on a live volcano. WorkSafe and JAS-ANZ considered including an activity - “*Volcanic area hike*” - to cover White Island Tour’s operation on Whakaari White Island, which had been registered as an adventure activity since November 2014, in both September 2015 and April 2017 but did not do so.
168. JAS-ANZ endorsed the 2015 NZAACS on 1 November 2015\* and then carried out accreditation assessments under that scheme. JAS-ANZ accredited [Quality Solutions International (New Zealand) Limited] in November 2016. The JAS-ANZ accreditation assessment report (which noted that [Quality Solutions International (New Zealand) Limited]'s accreditation activities would be carried out by AdventureMark) recommended that [Quality Solutions International (New Zealand) Limited] be accredited under the 2015 NZAACS for “Adventure activity scopes” that listed all “activity groups” in the 2015 NZAAC Technical competency table other than bungy jumping. WorkSafe has advised that it does not have any record of being informed of this limitation of accreditation.
169. At that stage, [Quality Solutions International (New Zealand) Limited] was still subject to the WorkSafe recognition certificate issued for the three year period 1 January 2015 to 31 December 2018, which provided that WorkSafe could “*by written notice, specify the scope of the adventure activities for which safety audit certificates could be*

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<sup>37</sup> Noting that the 2015 NZAACS states that the “*Technical competency table should be read in conjunction with the list of adventure activities published on the [WorkSafe NZ website](#)”.*

\* Note the scheme was jointly endorsed by both WorkSafe and JAS-ANZ.



issued". WorkSafe did not provide any written notice to [Quality Solutions International (New Zealand) Limited] specifying the scope of the adventure activities it could issue audit certificates for. Rather, WorkSafe has advised that:

. . . again, it appears no such specification was made in practice meaning that QSI had, in terms of the regulations, no limitation on the types of activities it could audit. This is also accepted as falling short of good regulatory practice and as a situation that could create risks that audit bodies were certifying activities in respect of which they were not competent.

170. The NZAACS was updated in July 2017. The 2017 NZAACS technical competency table was updated to include three additional activity groups, but not one expressed to be carried out on a live volcano.
171. White Island Tour's registration was due to expire on 20 November 2017. Prior to that, White Island Tours advised WorkSafe to the effect that it did not consider it was required to re-register because there were five other operators operating on Whakaari White Island that were not registered. WorkSafe then confirmed its view that White Island Tour's activity of walking tours on Whakaari White Island was an adventure activity because of the risks that passengers were exposed to as a result of the live volcano. These risks were identified by reference to the 1996 report, which included the risks of an eruption and being exposed to volcanic gases.
172. White Island Tours engaged QSI/AdventureMark to carry out the re-registration audit. Before the audit was carried out, there was a conversation between [AdventureMark] and WorkSafe relating to the scope of the audit. [AdventureMark] said it was agreed during that conversation that it would audit the "*low level mountaineering*" aspects of the operation because White Island Tours had engaged GNS as its technical expert in respect of the volcanic risks/hazards on the island. They therefore appointed a technical expert that had expertise in respect of low level mountaineering but no expertise in respect of the management of volcanic risks or hazards.
173. The WorkSafe employee involved in that conversation did not agree with everything [AdventureMark] said about that conversation. However, when interviewed he did accept that:

. . . it was at least discussed that White Island Tours was using GNS Science as a technical expert in terms of managing, addressing volcanic risks on the island, and therefore that Adventure Mark wouldn't need an auditor or a technical expert with any expertise in relation to the volcanic risks on the island
174. He said he believes he heard that GNS Science "*was filling the role of technical expert, or technical advisor (in the language of the [2017 SAS])*" and that he probably accepted that White Island Tours had engaged GNS Science for that role.
175. The term "technical adviser" is defined in the 2017 SAS, which includes a note that an operator's "technical adviser" is not the same as the audit team's technical expert and that the term "technical expert" is used (with a different definition) in the NZAACS in relation to audit team members:

Person or group of people that has professional credentials such as a high-level, nationally recognised qualification, or extensive knowledge, skills and experience to assist an operator with various technical tasks, including advising and reviewing the policies, procedures and practices relating to an activity.

**Note:** This term has been changed from Version 1.0 which used the term 'technical expert'. 'Technical expert' is used (with a different definition) by the NZ Adventure Activities Certification Scheme in relation to audit team members. This change clarifies that an operator's technical adviser is not the same as the audit team's technical expert.

An operator's technical adviser(s) may be contracted by, or closely connected to the operator. The credentials may be achieved by combining those of two or more people, who may be staff members.

In contrast, technical experts are required to be fully qualified as an individual and they must be independent of the operator.

176. For example, section 5.1 of the 2017 SAS requires that the operator must ensure that a technical adviser, either in-house or external, is involved in the following process:

The operator must implement a systematic process to:

- identify the reasonably foreseeable risks arising from their activities
- > identify the reasonably foreseeable hazards that could give rise to risks in their activities
- > assess each risk and hazard to determine whether it is serious.

177. The WorkSafe employee did not accept that the AdventureMark audit certificate would not cover the volcanic risks associated with the activity. He referred to an analogy of a high ropes course adventure activity – *“an activity involving people suspended at heights is built between telephone poles set in the ground, and concrete, there’s a structural engineering component in establishing the environment being sufficiently safe”* – and suggested it would be acceptable for a high ropes technical expert to rely on a structural engineer’s report to establish that the telephone poles were structurally safe. He suggested that, in the same way, it would be acceptable for the AdventureMark low level mountaineering technical expert to verify that GNS Science *“has done their thing”*.

178. In its comments on my draft report, WorkSafe provided a clarification from the WorkSafe employee I interviewed in terms of what he accepted was discussed during his conversation with [AdventureMark]. His clarification was to the effect that he was not saying it would be acceptable for the auditor to have no technical expertise in volcanic risk – and that it appeared to him that the AdventureMark auditor had sufficient expertise, despite not being a volcanologist. Regardless what expertise in volcanic risks he thought the AdventureMark auditor had:

- (a) the AdventureMark auditor’s experience and qualifications were in respect of mountain guiding, which WorkSafe should have known and, if it did not know, would have known had it made even the most cursory of enquiries;
- (b) at no time did the WorkSafe employee suggest that the AdventureMark auditor had any expertise in the volcanic risk aspects of the White Island Tours safety management system that he understood GNS Science was advising on;<sup>38</sup> and
- (c) it is apparent that he considered that the AdventureMark audit certificate would cover those volcanic risks because, as with the high ropes analogy he gave, all that was required was for the AdventureMark auditor to verify that GNS Science had been involved as White Island Tour’s technical adviser.

179. WorkSafe was therefore in effect accepting that, because White Island Tours had engaged GNS Science as its technical adviser, it was not necessary for [AdventureMark]:

- (a) to appoint a technical expert as part of its audit team that had the appropriate experience and qualifications in respect of the very risks and hazards that made White Island Tours’ activity registrable as an adventure activity; or

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<sup>38</sup> Including: whether or not tours should go ahead based on Whakaari White Island volcanic alert levels; once boats arrive at the island, decisions as to whether or not passengers actually go onto the island and, if so, to which parts; the types of protective clothing and equipment that would be used; and what action should be taken in the event of an eruption or a volcanic event.

(b) to audit White Island Tours' SMS in terms of how it, among other things, identifies and manages those risks and hazards.

180. In any event, it appears White Island Tours had not engaged GNS Science as its technical adviser. The Document Review Assessment Sheet (which was not provided to WorkSafe) prepared by AdventureMark in respect of the audit records that the White Island Tours SMS was developed with the assistance from Bureau Veritas and that its technical adviser was one of its own employees – although there is an auditor comment noting “*There is a relationship with GNS Science*”.
181. The end result is that White Island Tours was registered without its SMS, in terms of how it (among other things) identifies and manages the risks and hazards that makes its operation registrable as an adventure activity, having been audited.

### Conclusions

182. One of the primary functions and objectives of the Adventure Activities regulatory regime is to ensure that an AAO is not registered unless its operation has been audited by an auditor that has the appropriate experience and qualifications to carry out an audit of the adventure activity provided. The aim of this is to reduce risks to the health and safety of those involved in the adventure activity.
183. That did not occur in the case of White Island Tours when it was registered by WorkSafe in November 2014 and November 2017. Neither Bureau Veritas nor [AdventureMark] had a technical expert that had the appropriate experience or qualifications to carry out an audit of an adventure activity that involved walking tours on a live volcano – an activity that was registrable as an adventure activity because of the volcanic risks and hazards that participants are exposed to.
184. In my view WorkSafe did not take appropriate steps in carrying out its regulatory functions to ensure that White Island Tours was audited by an auditor that had the appropriate experience and qualifications.
- Bureau Veritas audit*
185. Bureau Veritas was recognised as a safety auditor on 13 June 2014. I make no findings in respect of that recognition as it is outside the scope of my review, which commences on 1 November 2014.
186. However, before it registered White Island Tours on 27 November 2014, WorkSafe would have been aware that the Temporary Checklist technical competency table did not include an activity expressed to be on or near a live volcano and therefore that:
- (a) the JAS-ANZ assessment of Bureau Veritas did not involve assessing whether Bureau Veritas had the appropriate experience and qualifications to carry out an audit of an adventure activity of that type; and
  - (b) Bureau Veritas did not have the benefit of the technical competency table in its audit planning as a means of identifying the technical expert and/or the qualifications and experience required to audit an adventure activity of that type.
187. A process should have been put in place by WorkSafe for the purpose of ensuring that an auditor engaged to audit an adventure activity that was not on the Temporary Checklist technical competency table at the time the auditor was recognised had the appropriate experience and qualifications to carry out that audit. Such a process was required in the circumstances where:

- (a) it was inevitable that operators carrying out adventure activities not envisaged at the time the auditors were recognised would apply for registration and so need to be audited;
  - (b) at the time the auditors were recognised, WorkSafe could not have been satisfied that they had the appropriate experience and qualifications to carry out the audits of those adventure activities;
  - (c) the certificates of recognition did not limit the scope of adventure activities for which safety audit certificates could be issued (although the conditions gave WorkSafe the ability to do so);
  - (d) WorkSafe accepts that not specifying the scope of adventure activities for which Bureau Veritas and [Quality Solutions International (New Zealand) Limited] could issue audit certificates fell short of good regulatory practice and resulted in a risk that they would audit activities in respect of which it did not have the technical expertise.
188. The process could have included an obligation on the auditors of the same nature as was included in the NZAACS, which required them to:
- (a) send WorkSafe the operator profile, which includes identifying the nature of the adventure activity, as soon as practicable once the contract for services has been agreed; and
  - (b) provide WorkSafe with the opportunity to alert them of any specific matters to be considered in their evaluation, certification, or surveillance activities.
189. This would have enabled WorkSafe to identify the appropriate experience and/or qualifications required to carry out the audits of any such adventure activities (as it does with activities on the technical competency table) so that arrangements could be made to ensure the auditor had access to a person with that experience and/or those qualifications.
190. I interviewed a manager Privacy who WorkSafe said could provide some general information about WorkSafe’s approach to third party regimes from a regulatory policy and systems perspective. The adventure activities regulatory regime is considered to be a third party regime because the audit function is carried out by independent certification bodies and, under the NZAACS, JAS-ANZ accreditation is the primary means by which certification bodies are recognised by WorkSafe. WorkSafe’s role in these circumstances was described as “*a sort of oversight*” role:
- So yeah, we've got quite a lot of experience of how these - different ways that these regimes are set up and how they operate, and they each have their own special flavour but I guess the general intent behind them is to make sure that, where the expertise or the knowledge to achieve the outcome that you're looking for, doesn't reside within the regulator, it's secured outside of the regulator—which kind of just shifts the role. The role of the regulator fundamentally shifts in those circumstances because it can rely on that third party to perform its part, or it ought to be able to rely on the third party performance part, and then its role becomes in that sort of oversight, rather than having to dive into the detail of the operations that are subject to that audit.
191. The regime was also described as contemplating “*a constant feedback loop between all parties*”:
- I think, yeah, I think the system contemplates a bit of a constant feedback loop between all parties really, that there should be that sort of active, and it goes to that sense of active regulatory stewardship where it's not, ah, at various times you hear people talking about these being arm's length regimes, and that's I don't think the way they're intended to work at all—it's not about saying, 'well, we've just gotta push the risk out'. So, there is that active feedback loop where all of the parties *you would hope* would be getting and giving information to each other as relevant about the quality of work—whether it's operators saying, 'oh nah it doesn't feel like it was a really great system'; JAS-ANZ cos they do regular audits of the bodies, if they picked up problems, letting

WorkSafe know; and, similarly, WorkSafe being able to flag to JAS-ANZ if they had any concerns about the performance of the audit bodies. So, it ought to be a self-reinforcing feedback loop with all of those parties in the system, as opposed to a 'we're just going to rely on this – job done, nothing further here', and certainly as I say, if an audit body was found by JAS-ANZ to be seriously wanting, it would be difficult for us to just say, 'oh well, nothing more to see here'.

...

Well, I think it goes back to the idea of this active feedback loop, that I think if anybody has found something which seems a little unusual or off, no matter where you sit in the system, if you're able to then put that in front of the people who need to know that, then that seems to be, ah, that's what a well-functioning system looks like in the theoretical, and I guess that's where I'm coming from, is looking at that. Because if you can rely on each party in the system behaving in that way, then it is going to - less is gonna fall through the cracks in that space.

192. In its comments on my draft report, WorkSafe referred to a regulator's "*stewardship role*":

As well as its assigned roles and responsibilities under the relevant legislative regime, a regulator has a regulatory stewardship role. This is described by Treasury as "adopting a whole-of-system, lifecycle view of regulation, and taking a proactive, collaborative approach, to the monitoring and care of the regulatory systems within which they have policy or operational responsibilities". Where, as here, the responsibility for the development of the regulatory regime and the operationalising of the regime sit with different agencies, the regulator's regulatory stewardship role includes monitoring and reviewing the system and raising any issues with the policy agency, intervening appropriately within the system, and taking appropriate steps (including by engaging with others) to ensure the ongoing integrity of the system.

And stated that WorkSafe has described its regulatory stewardship role in respect of the adventure activities regime as including:

- Taking a system view of the regulatory regime, and understanding the system, its participants, and their context
- Proactively escalating issues with the Regulations to MBIE
- Monitoring evaluating, and reporting on the performance of the system, and implement any identified improvements where possible
- Having checks and balances to provide WorkSafe and others with assurance that the regime is working as intended
- Intervening in the system where required.

193. The type of process that I have suggested should have been put in place by WorkSafe is consistent with WorkSafe's approach to third party regimes and with its view of the regulatory stewardship role it has in respect of the adventure activities regime. The starting point is that the NZAACS was not in force, and JAS-ANZ had not accredited the auditors, at the time they were recognised in June 2014. The circumstances were such that JAS-ANZ's assessments against the Temporary Checklist could not be relied on as satisfying WorkSafe that the auditors had the appropriate experience and/or qualifications required to carry out audits of adventure activities that were not on the technical competency table. The process is consistent with WorkSafe's regulatory stewardship role, ongoing oversight role and a "*constant feedback loop*". It would have ensured there were "*checks and balances to provide WorkSafe and others with assurance that the regime is working as intended*" – so that a registration application does not "*fall through the cracks*" with the result that an AAO is registered without having been audited by an auditor with the appropriate experience and/or qualifications.

194. In its comments on my draft report, WorkSafe states:

. . . it is not practical, and it is not WorkSafe’s role, to assess the technical expertise of those who conducted safety audits in each case. There are over 300 adventure activities registered under the Regulations – it would not be sustainable for WorkSafe to, in each case, check the technical expertise that was brought to bear in each safety audit. From a regulatory design perspective, once a third party is recognised to carry out a particular task, there is a responsibility on the third party to ensure they carry out that task diligently and professionally within the scope of that recognition. This balance of roles and responsibilities is reflected in the New Zealand Adventure Activities Certification Scheme (NZAACS).

195. However, I am not suggesting that it is WorkSafe’s role to assess the technical expertise of every audit carried out under the adventure activities regime. Rather, I am saying that, at a time when the NZAACS had not come into force, WorkSafe had a responsibility:

- (a) as the regulator of that regime;
- (b) as the body responsible for recognising safety auditors under that regime only if satisfied they have the appropriate experience and qualifications to carry out the proposed audits; and
- (c) in circumstances in which it had recognised safety auditors without limiting the adventure activities that they could audit to those WorkSafe could be satisfied they had the appropriate experience and qualifications to audit –

to put in place a process that would ensure that it could be satisfied that the auditors it recognised had the appropriate experience and qualifications to carry out the proposed audits – because it could not have been satisfied of that at the time it actually recognised the auditors.

196. The result of WorkSafe not putting such a process in place was that White Island Tours was registered, and remained registered for a three year period, when it had not been audited by an auditor with the appropriate qualifications and/or experience – and so those involved in the adventure activity did not have the protection (in terms of reduced risks to their health and safety) of that having occurred.

*[AdventureMark] audit*

197. [AdventureMark] was accredited by JAS-ANZ in November 2016. It was clear from the JAS-ANZ accreditation assessment report that the accreditation was based on the “activity groups” in the 2015 NZAAC Technical competency table. Although WorkSafe advised that it has no record of receiving JAS-ANZ’s accreditation assessment report, it accepted that not specifying the scope of adventure activities for which [Quality Solutions International (New Zealand) Limited] could issue audit certificates fell short of good regulatory practice and resulted in a risk that [Quality Solutions International (New Zealand) Limited] would audit adventure activities in respect of which it did not have the appropriate technical expertise.

198. WorkSafe had an obligation under the October 2015 Memorandum of Understanding to maintain and update the technical competency table. White Island Tours had been registered as an AAO in respect of its operation on Whakaari White Island since November 2014. WorkSafe should have ensured that the technical competency table was updated to include an activity expressly referring to the activity taking place on an active volcano. This would have identified what was required in terms of qualifications and/or experience<sup>39</sup> to audit an activity that exposed participants to risks and hazards from exposure to volcanic activity. This was not done – despite the issue of including an activity relating to Whakaari White Island (“*Volcanic area hike*”) having been raised in

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<sup>39</sup> Including an attestation as defined in the NZAACS.



September 2015 and April 2017 and the technical competency table being updated to include other activities in July 2017.

199. As WorkSafe commented, the technical competency table is not exhaustive and the absence of an adventure activity on the table does not prevent a technical expert with appropriate expertise being appointed by the auditor to audit that adventure activity. However, the technical competency table is an important planning tool for safety auditors in identifying the qualifications and experience required to audit particular adventure activities. Inclusion of an activity relating to Whakaari White Island would therefore have gone some way to fulfilling WorkSafe's responsibility to ensure that safety auditors which, at the time it recognised them, it could not have been satisfied had the appropriate qualifications and experience to audit adventure activities on Whakaari White Island, had the appropriate qualifications and experience at the time they audited any such adventure activities.
200. WorkSafe commented that it had joint responsibility with JAS-ANZ for maintaining and updating the technical competency table and that attempts to include a "*Volcanic area hike*" activity in 2015 were "*rebuffed by JAS-ANZ*". It is correct that WorkSafe was required to maintain and update the technical competency table in conjunction with JAS-ANZ. However, as the regulator of the adventure activities regime, WorkSafe should have ensured the table was updated to include an adventure activity of the type that was being carried out on Whakaari White Island.
201. WorkSafe and [AdventureMark] had a conversation relating to the scope of the audit of White Island Tours in November 2017. This is consistent with their respective obligations under the 2017 NZAACS relating to the provision of information and advice in respect of particular audits before they are carried out.
202. As a result of that conversation, WorkSafe in effect accepted that, because White Island Tours had engaged GNS Science as its technical adviser, it was not necessary for [AdventureMark]:
  - (a) to appoint a technical expert as part of its audit team that had the appropriate experience and qualifications in respect of the very risks and hazards that made White Island Tours' activity registrable as an adventure activity; or
  - (b) to audit White Island Tours' SMS in terms of how it, among other things, identifies and manages those risks and hazards.
203. WorkSafe's understanding was that GNS Science had been engaged by White Island Tours to perform the role of "technical adviser" as used and defined in the 2017 SAS. The 2017 SAS makes it clear that a "technical adviser" engaged by an operator is different from a "technical expert" required to be part of an audit team under the NZAACS. Regardless who White Island Tours might have engaged as its technical adviser, WorkSafe should have made it clear to [AdventureMark] that it was required to engage a technical expert as part of its audit team who had the appropriate qualifications and experience in respect of the volcanic risks and hazards passengers are exposed to on Whakaari White Island. This would have been a person or persons who had qualifications and experience in respect of a number of matters, which might have included for example:
  - (a) decisions as to whether tours should go ahead based on Whakaari White Island volcanic alert levels;



- (b) once boats arrive at Whakaari White Island, decisions as to whether passengers should actually go onto the island and, if so, to which part/s of the island;<sup>40</sup>
  - (c) protective clothing/equipment to be worn while on Whakaari White Island;
  - (d) action to be taken in the event of an eruption/volcanic event while passengers are on Whakaari White Island.<sup>41</sup>
204. WorkSafe therefore ought to have known that the [AdventureMark] audit, and so the audit certificate that the registration decision would be based on, would not cover the risks and hazards that makes the operation registrable as an adventure activity.
205. The WorkSafe employee who made the White Island Tours registration decisions did not accept this. He referred to the high ropes analogy and suggested it was acceptable for WorkSafe to rely on a technical expert without the appropriate volcanic risk/hazard qualifications and/or experience having verified that GNS Science had performed the role as technical adviser to White Island Tours.
206. I make no comment on whether that approach is acceptable in the circumstances of the high ropes analogy, in which the technical adviser is not advising on the main risks and hazards that make the activity registrable as an adventure activity. But it cannot be acceptable for WorkSafe to allow (as it did in the case of the [AdventureMark] White Island Tours audit) a situation to occur in which the audit team does not have a technical expert with the appropriate qualifications and/or experience in respect of the risks/hazards that make the activity being audited registrable as an adventure activity.
207. WorkSafe says that, under the NZAACS, it has neither any responsibility nor any relevant decision-making function or power in respect of the selection of appropriate technical experts – and that this rests with the audit body. I do not agree WorkSafe had no responsibility for the selection of the technical expert by [AdventureMark] for the White Island Tours audit. In the circumstances I have referred to, in which it must have been apparent to WorkSafe that [AdventureMark] was proposing using a technical expert who did not have the appropriate experience and qualifications to carry out the audit, WorkSafe had both the ability and an obligation to take steps to ensure that an appropriate technical expert was selected:
- (a) That the NZAACS requires audit bodies to select appropriate technical experts presupposes that the audit bodies have only been recognised by WorkSafe to carry out audits that WorkSafe is satisfied the audit body has the appropriate experience and qualifications to carry out – which did not occur in respect of [Quality Solutions International (New Zealand) Limited] .
  - (b) WorkSafe had the ability and an obligation to take these steps under:
    - (i) the NZAACC and the operational agreement attached to the memorandum of understanding with JAZ-ANZ;

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<sup>40</sup> For example, whether the following measures referred to in the White Island Tours SMS are appropriate:

Before Landing Passengers

Always send a scout on to the island first to assess the risk. You are looking for any unusual or unexplainable activity or changes. As a rule of thumb, if the Main Crater is ashing, it is ok to land passengers but if it is evident from the boat that rocks are being ejected, do not land passengers. Once on the island, if the scout reports that rocks are being ejected higher than the Main Crater's edge, do not go up to the Main Crater.

<sup>41</sup> For example, whether measures such as those referred to in the 1996 report under the heading "WHAT TO DO IN AN EXPLOSIVE ERUPTION" should be included in the White Island Tours SMS.

- (ii) its regulatory stewardship role/ongoing oversight role – to give itself and others assurance that the regime is working as intended.

#### Changes to WorkSafe's systems, processes and practices

208. I recommend that WorkSafe takes the following steps to ensure AAOs operating on Whakaari White Island are audited by safety auditors with the appropriate experience and qualifications:
- (a) recognise activities carried out on Whakaari White Island as a discrete adventure activity;
  - (b) identify the appropriate experience and qualifications required to carry out an audit of those activities – to ensure that the measures put in place by the AAOs to address the risks and hazards to which those involved in the activity are exposed as a result of being in close proximity to a live volcano satisfy the SAS good practice requirement; and
  - (c) include that adventure activity and experience/qualifications on the technical competency table.
209. I understand there might be some difficulties involved in identifying the persons and/or organisations that have the appropriate experience/qualifications and/or they might be in short supply in New Zealand. If that is the case, I recommend that WorkSafe, or some other appropriate industry body, should identify who the appropriate persons and/or organisations are and take steps to ensure that they are available to be engaged as a technical expert as and when required. Unless this is done, it is difficult to see how WorkSafe could be satisfied that any of the safety auditors it has recognised have the appropriate experience and qualifications to audit adventure activities on Whakaari White Island.
210. The process provided for in the NZAACS will ensure that WorkSafe is advised when an auditor is engaged to audit an AAO operating on Whakaari White Island – ie, when WorkSafe receives the operator profile. WorkSafe should put in place a system that ensures that, at that time, it advises the auditor of the need to engage an appropriate technical expert and provides the details of those technical experts available to be engaged.
211. I also recommend that WorkSafe, in partnership with the identified technical experts, should consider whether it is appropriate to develop activity safety guidelines for activities on Whakaari White Island.

#### **The unregistered operators**

212. It appears that the issue whether operators other than White Island Tours were required to be registered in respect of operations on Whakaari White Island first arose for WorkSafe in July 2014. In an email dated 7 July 2014, in response to a query from Volcanic Air, WorkSafe advised Volcanic Air that it was unlikely to be required to be registered.
213. The issue arose again in August 2015 when, in an email to WorkSafe dated 19 August 2015, Frontier helicopters queried advice provided by MBIE in July 2013 to the effect that its operation on Whakaari White Island was likely to be subject to the 2011 AA Regulations. I was not provided with any WorkSafe response to that email.
214. The next time the issue arose was in April 2016. WorkSafe looked into what operators, registered or unregistered, were going to Whakaari White Island. After checking the AAO register and doing a Google search, an internal WorkSafe email dated 29 April 2016 was sent advising that White Island Tours was the only registered operator and Frontier Helicopters, which was not registered, seemed on face value to be likely to be subject to the Adventure Activity regulations given the

215. The issue came up again around November 2017 when, as a result of White Island Tours being reminded by WorkSafe that it was required to re-register, White Island Tours advised it did not intend re-registering because there were five unregistered operators operating on Whakaari White Island. There was then an internal WorkSafe email following up on the email of 29 April 2016. It appears nothing had been done to flow up on that email. Certainly, I have not been provided with any documents suggesting otherwise.
216. WorkSafe then again considered the issue whether operators carrying out activities on Whakaari White Island were required to register. It was considered they were as a result of the risks arising from the volcanic activity on Whakaari White Island referred to in the 1996 report.
217. WorkSafe then sent letters to the five unregistered operators dated 7 November 2017 advising of its provisional view that they were AAOs and so required to register.
218. One of the unregistered operators, Volcanic Air, replied to this letter. In an email to WorkSafe dated 8 November 2017, Volcanic Air queried WorkSafe's view that it was required to be registered and attached WorkSafe's email to it dated 7 July 2014 advising that it was unlikely to be required to be registered. WorkSafe did not reply to that email until 5 December 2018.
219. In the meantime, it attempted to convince Whakaari Management Ltd, as the owner/manager of Whakaari White Island, that it was appropriate to require the unregistered operators to be registered. It was considered that, if Whakaari Management Ltd could be convinced to accept WorkSafe's view, Whakaari Management Ltd might refuse to allow the unregistered operators on Whakaari White Island unless they were registered – which would then in practice resolve the issue for WorkSafe.
220. WorkSafe did not make contact with Whakaari Management Ltd for this purpose until it sent an email dated 6 August 2018 advising WorkSafe had a number of questions relating to whether operators on Whakaari White Island were required to be registered. The WorkSafe author of that email explained that it was pressure of work that prevented him from pursuing that issue before then.
221. There were then a number of emails between WorkSafe and Whakaari Management Ltd during which WorkSafe explained why it considered the operators were required to register. An email from Whakaari Management Ltd to WorkSafe dated 28 November 2018 suggested a meeting with WorkSafe and the unregistered operators, which WorkSafe agreed to in an email dated 3 December 2018.
222. Before the meeting was held, in an email to Volcanic Air dated 5 December, WorkSafe replied to Volcanic Air's email dated 8 November 2017 confirming its view that the unregistered operators were required to register and offering to provide guidance on how to register. There were then emails relating to arranging the meeting with WorkSafe, Whakaari Management Ltd and the unregistered operators, which took place on 29 March 2019.
223. At the meeting, after WorkSafe had confirmed its view that the unregistered operators were required to be registered, it was indicated that those present wanted to challenge that view and asked how they could do that. WorkSafe advised them that, if they thought they had new information, they should put it in writing and WorkSafe would have to consider it.
224. Volcanic Air then sent WorkSafe an email dated 10 April 2019 advising why it considered they should not have to register. Even though there is no statutory or regulatory basis for such a process, WorkSafe treated that email as seeking a review of the indication that registration was required. There were then WorkSafe internal emails between 26 April and 29 August 2019

involving its policy team considering and determining what WorkSafe's position in response to Volcanic Air's email should be.

225. That position was set out in an email dated 18 November 2019 confirming its advice that the unregistered operators were required to register. In a further email that day, in response to a query from one of the unregistered operators, WorkSafe advised "*I suspect that WorkSafe would now be looking for clear movement towards compliance in a reasonable time-frame*".
226. WorkSafe confirmed that it had not initiated any enforcement action before this time and that the intention was to give the unregistered operators a few weeks before passing the matter to the WorkSafe inspectorate to consider enforcement action, which would probably result in improvement notices to the unregistered operators.

### Conclusions

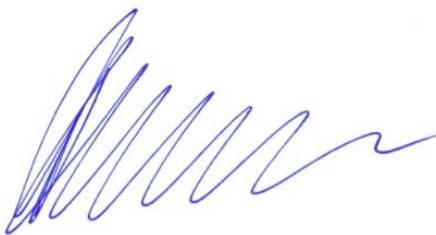
227. WorkSafe's statutory functions include monitoring and enforcing compliance with the Adventure Activities regulatory regime. This includes enforcing compliance with the registration requirement. This is an important function because participants in an adventure activity carried out by an unregistered AAO do not have the protection of that AAO's compliance with the SAS having been audited and certified.
228. WorkSafe did not take appropriate steps to monitor and enforce compliance with the registration requirement in respect of the unregistered operators. WorkSafe had been aware that potentially there were unregistered operators carrying out activities on Whakaari White Island since at least July 2014. Yet, by November 2019 it had not reached the stage of even referring the matter to the WorkSafe inspectorate to consider enforcement action against the unregistered operators. This delay cannot be justified in the circumstances:
  - (a) After advising Volcanic Air in July 2014 that it was unlikely to be required to be registered, the issue of an unregistered operator operating on Whakaari White Island arose in August 2015 when Frontier Helicopters queried whether it was required to register. There is no record of anything being done by WorkSafe in response to that query.
  - (b) The next record of the issue being considered is on 29 April 2016 when an internal WorkSafe email noted that there was one unregistered operator, Frontier Helicopters, that was likely to be required to be registered.
  - (c) That email went unanswered, and there is no record of anything being done in response to it, until the email was followed up on 1 November 2017. It appears the only reason it was followed up then is because White Island Tours had advised WorkSafe that there were five unregistered operators operating on Whakaari White Island.
  - (d) After forming the view that the unregistered operators were required to register (based principally on the risks arising from volcanic activity referred to in the 1996 report), WorkSafe advised the unregistered operators of its "provisional view" to that effect in letters dated 7 November 2017. One of the unregistered operators queried that view in an email dated 8 November 2017.
  - (e) That email was not replied to for over a year – until 5 December 2018. In the meantime WorkSafe communicated with Whakaari Management Ltd in the hope it could convince it that the unregistered operators should be required to register and so should not be permitted to land on Whakaari White Island until they were registered. However, WorkSafe's first email to Whakaari Management Ltd was not until almost nine months later – on 6 August 2018.

- (f) Then, arising out of the meeting on 29 March 2019, WorkSafe conducted a review for which there is no statutory or regulatory basis. That review took over seven months from when WorkSafe received the 10 April 2019 email (that was treated as the request for a review) to when it sent its 18 November 2019 email advising of the result of the review.

229. As soon as WorkSafe became aware that there were unregistered operators operating on Whakaari White Island, it should have taken the following steps:

- (a) Obtain all relevant information required to determine whether the operators are providing adventure activities and so are required to register. This would include identifying the operators and obtaining information from them and any other relevant sources as to the nature of their operations and the risks and hazards they expose participants to.
- (b) Determine whether the operators are required to register. This would be the time to involve the policy team if considered appropriate in the circumstances.
- (c) If it is determined that registration is required, advise the unregistered operators that they are required to be registered, the process involved in becoming registered and the legal consequences of continuing to operate without being registered.
- (d) Monitor the situation – in terms of whether the unregistered operators become registered or continue to operate unregistered.
- (e) If it becomes apparent that any of them are continuing to operate unregistered, refer them to the WorkSafe inspectorate for the purpose of taking appropriate enforcement action aimed at ensuring they do not operate while unregistered.

230. I cannot say how long that process should have taken in the circumstances. That depends on a number of factors, including WorkSafe's resourcing constraints – and I appreciate that some of the WorkSafe employees were under significant work pressure at the time. However, the length of time, which includes significant periods of inaction, taken by WorkSafe as the regulator to reach the stage where it considered referring the unregistered operators to its inspectorate for enforcement action is unacceptably long and cannot be justified in the circumstances. This is in the context of a regulator that must have been aware that, during this period, participants in an adventure activity that it considered should be registered did not have the protection of registration – a significant purpose of which is to reduce risks to the health and safety of those involved in adventure activities.



**David Laurensen QC**  
**8 September 2021**