



## BRIEFING

### Whakaari/White Island – reviewing policy settings

<b>Date:</b>	23 January 2020	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2048 19-20

<b>Action sought</b>		
	<b>Action sought</b>	<b>Deadline</b>
Hon Iain Lees-Galloway <b>Minister for Workplace Relations and Safety</b>	s 9(2)(g)(i), s 18(d)  <b>Refer this briefing to the Minister of Local Government.</b>	27 January 2020

<b>Contact for telephone discussion (if required)</b>			
<b>Name</b>	<b>Position</b>	<b>Telephone</b>	<b>1st contact</b>
Ruth Isaac	General Manager, Labour and Immigration Policy	04 901 3883	s 9(2)(a) ✓
Susan Adams	Principal Policy Advisor, Health and Safety Policy	04 901 8623	

<b>The following departments/agencies have been consulted</b>
Department of Prime Minister and Cabinet (PAG), Department of Internal Affairs, WorkSafe New Zealand

**Minister's office to complete:**

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

**Comments**



# BRIEFING

## Title

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## Purpose

This paper outlines work underway by agencies in response to the Whakaari/White Island eruption, and our recommendations for policy review, to support you in discussion of this matter at Cabinet on 28 January 2020.

## Executive summary

Investigations are underway by WorkSafe New Zealand (WorkSafe NZ) and the Coroner into the circumstances of the Whakaari/White Island eruption on 9 December 2019 and whether there were potential breaches of the law. WorkSafe NZ will investigate the conduct of duty holders under the *Health and Safety at Work Act 2015* (HSWA), to determine if they complied with their duties under that Act, including the underpinning *Health and Safety at Work (Adventure Activity) Regulations 2016* (the Adventure Activity Regulations).

The investigations may result in prosecutions being taken. The investigations are likely to take up to 12 months to conclude. Sufficient time is needed to ensure robust processes and findings that can support prosecutions being brought successfully, if merited.

WorkSafe NZ is also undertaking an operational review of the Adventure Activities scheme and register, and identifying businesses that could be subject to the Adventure Activities Regulations. DIA is conducting an internal review into roles and responsibilities for offshore islands, and will report the results to the Minister of Local Government.

The investigations underway will not consider the policy settings of the Adventure Activity Regulations or their implementation. The Ministry of Business, Innovation and Employment (MBIE) has a planned post-implementation review of the Adventure Activity Regulations that it could bring forward. This would have resource and delivery implications for the wider HSWA regulatory reform work programme.

s 9(2)(g)(i), s 18(d)

Initiating an additional formal inquiry at this point into potential failures in the regulatory framework, with corollary investigative powers, risks cutting across the investigations running their course and undermining their integrity. If Ministers decided to commission an independent inquiry or review, our advice is that the appropriate timing would be after the investigations are completed.

## Recommended action

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The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

- a **Note** the Whakaari/White Island investigations will not consider policy settings or implementation of the *Health and Safety at Work (Adventure Activity) Regulations 2016*.

Noted

s 9(2)(g)(i), s 18(d)

Noted

- e **Refer** this briefing to the Minister of Local Government for her information.

Agree/Disagree

Ruth Isaac  
General Manager,  
Labour and Immigration Policy, MBIE

23/1/20  
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Hon Iain Lees-Galloway  
Minister for Workplace Relations and  
Safety

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## Investigations underway

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1. Following the events on Whakaari/White Island on 9 December 2019, investigations are underway by the Coroner and WorkSafe NZ into the circumstances of what happened on the island, whether there are potential breaches of the law, and, if so, whether any prosecutions should be brought.
2. When there has been a sudden and unexpected death, the New Zealand Police investigate on behalf of the Coroner. They may also investigate whether an offence has been committed under the laws the NZ Police are responsible for. The Civil Aviation Authority (CAA) is also conducting an inquiry.
3. Collectively, the investigations underway are expected to cover the range of inquisitorial questions being raised on what happened and why on the island. The investigations are expected to take several months to work through, with a statutory deadline of 12 months for WorkSafe NZ's investigation to complete and bring any charges (noting there is scope under HSWA to apply for an extension of up to a further 12 months).
4. Expediting these processes would likely undermine the integrity of the investigations' recommendations and the ability of the agencies to develop a substantive and successful case for any prosecutions, if merited. Any prosecutions will be under the law as it stands.

### WorkSafe NZ investigation

5. WorkSafe NZ has opened a health and safety investigation under the *Health and Safety at Work Act 2015* (HSWA), into the harm and loss of life caused by the eruption. As the work health and safety regulator and administrator of the *Health and Safety at Work (Adventure Activity) Regulations 2016* (the Adventure Activity Regulations), WorkSafe will be investigating and considering all of the relevant work health and safety issues surrounding this tragic event.
6. Once WorkSafe NZ decides to investigate, it begins a formal, structured process of inquiry. Investigations involve a number of steps and considerations. These will vary depending on the circumstances and generally include:
  - examining the scene and collecting evidence
  - interviewing relevant people
  - reviewing documents relating to the incident
  - engaging experts to help it understand what has happened and why, and
  - liaising with other agencies and regulators.
7. Once WorkSafe NZ has completed its investigation, it will use the information it has gathered to decide what further action to take. This might include enforcement action, such as taking a prosecution if there is sufficient evidence of a breach of relevant legislation and doing so is in the public interest. It may take other action, such as:
  - referring the incident to another agency
  - providing a report to the Coroner to help them establish the causes and circumstances of a death, or
  - ensuring that action is taken to deal with immediate risks of harm, and to prevent similar incidents from happening.
8. WorkSafe NZ will investigate the conduct of duty holders under HSWA to determine if they complied with their duties under that Act, including the underpinning Adventure Activity

Regulations. Table 1 below outlines, for illustrative purposes, how the HSWA would generally apply.

9. Breaches of HSWA duties carry a range of penalties up to and including criminal sanctions.

Table 1: Illustration of HSWA duty holders

Duty holder	Nature of activity	Duty and standard of care	Illustration of general application
<p><b>PCBU – person conducting a business or undertaking</b></p> <p>Usually a company or business entity</p> <p>Holds the primary duty of care under HSWA</p>	<p><b>Operation of the business</b></p> <p>PCBU's primary duty of care arises from the work that the business does</p>	<p>Must do what is <b>reasonably practicable</b> to ensure the health and safety of workers and others is not put at risk by its work</p>	<p><b>Tour operators</b> must do what is reasonably practicable to eliminate or minimise risks to health and safety of its workers and others, based on what it can influence or control. Operators that provide adventure activities as defined in the regulations must pass an audit and be registered.</p> <p>The <b>land owner</b> will have duties to the extent that it is a PCBU and a work arrangement exists. The extent of its duties depend on what it can influence and control.</p> <p><b>Emergency responders</b> should have processes in place for understanding and managing the risks that their workers and others may be exposed to.</p>
<p><b>Officer</b></p> <p>Directors, partners, senior leaders exercising significant influence in management</p>	<p><b>Governance</b></p> <p>Making management, policy and investment decisions that affect work health and safety</p>	<p>Exercise <b>due diligence</b> to ensure their PCBU complies with its duties.</p> <p>Officer duties are separate and different to the PCBU duties.</p>	<p><b>Officers</b> must take reasonable steps to understand how their business works and how it manages work health and safety, and ensure their decisions take account of the need for the PCBU to meet its duties.</p>
<p><b>Worker</b></p> <p>Employees, contractors, labour hire workers, trainees, volunteer workers</p>	<p><b>Work activities</b></p>	<p>Take <b>reasonable care</b> for their own health and safety and not adversely affect the health and safety of others</p> <p><b>Cooperate</b> with PCBU's policies and procedures</p> <p><b>Comply</b> with reasonable instructions from the PCBU</p>	<p><b>Workers</b> should take reasonable care not to cause harm to themselves or others, and cooperate with policies and comply with instructions.</p>
<p><b>Others at a workplace</b></p> <p>Workplace visitors, customers, casual volunteers when at a workplace</p>	<p><b>Activities at a workplace</b></p> <p>Visits, workplace tours, meetings, client or customer activities</p>	<p>Take <b>reasonable care</b> at workplaces for their own health and safety and not adversely affect the health and safety of others</p> <p><b>Comply</b> with reasonable instructions from the PCBU</p>	<p><b>Clients</b> should take reasonable care not to cause harm to themselves or others, and comply with instructions.</p>

s 6(c)

## Access to Whakaari/White Island

s 6(c)

13. An inspector can issue a prohibition notice under HSWA to a PCBU, where they reasonably believe an activity is occurring at a workplace that involves (or may involve) a serious risk to health and safety arising from an immediate or imminent exposure to a hazard.

s 6(c)

14. A decision to issue a prohibition notice is an operational one made on a case by case basis by an inspector, having been satisfied that grounds exist. These considerations would apply to each PCBU on their own merits, and there is no possible blanket approach.

s 6(c)

15. DIA is conducting an internal review into roles and responsibilities for offshore islands, and will report the results to the Minister of Local Government. The review will:

- assess the Department's role in discharging the territorial authority function for White Island
- review the adequacy of the Department's current arrangements with the Bay of Plenty Regional Civil Defence and Emergency Management Group, and
- consider wider issues and options about the regulatory framework for providing territorial authority functions to offshore islands.

16. MBIE is also working with the Department of Conservation, as a significant public landowner of locations where adventure activities occur (including around volcanic activity),

s 9(2)(g)(i), s 18(d)

17. We note also that a judicial review around restricting access to Whakaari/White Island is being sought by a private individual.

18. We believe that wider questions of access warrant consideration at a cross-government level. These are not appropriate to place solely within the HSWA framework or for MBIE to

lead alone. The risk, if these matters are not considered and addressed from a wider, co-ordinated perspective, is that the HSWA regime takes the full weight of regulating these issues and is relied upon to address them. This would likely lead to a sub-optimal solution, given the limitations of the regime to do so. For example, the HSWA regime is not designed to regulate public safety matters that are not related to work.

## **Work Health and Safety policy and operational workstreams**

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### **WorkSafe NZ**

19. As well as its investigation under HSWA, WorkSafe is currently scoping three further pieces of work relating to adventure activities:
  - identifying businesses that could be subject to the Adventure Activities Regulations
  - undertaking an operational review of the Adventure Activities register, its completeness and operational procedures
  - a reflective learning assessment for WorkSafe - consideration of its regulatory performance in respect of the regulation of adventure activities.
20. You have requested a full report of the operational review from WorkSafe NZ once this is completed. As you are aware, WorkSafe NZ is also considering the funding implications of its Whakaari/White Island investigation and related activity, and is working with MBIE to report to you on this matter.

### **MBIE policy and monitoring work**

21. MBIE is the lead policy agency for the Adventure Activities Regulations and monitoring department for WorkSafe NZ.
22. The investigations underway will not consider the policy settings of the Adventure Activity Regulations or their implementation.
23. The Adventure Activities Regulations are relatively new, passed in 2011 and coming into force in November 2014, following widespread concerns over the appropriate management of risk in the adventure tourism sector. The regulations were updated in 2012 to reflect changes in the sector and in response to incidents in skydiving and hot air ballooning, and in 2016 to update the regulations to align with the new HSWA and make it an offence to offer activities while not being registered.
24. In October 2016 WorkSafe briefed the former Minister for Workplace Relations and Safety and the former Minister of Tourism on the results of a survey of the Adventure Activities scheme's performance during the three year period to March 2016. The report made some recommendations for changes to the scheme, none of which would require amendments to the regulations.

s 18(d)

s 18(d)

Out of Scope

29. As monitoring department we will continue to engage with WorkSafe NZ on a regular basis to discuss performance and other issues. This includes continuing to actively consider changes in their operating environment and factors that may impact their operations and performance including consequential financial impacts.

### Options for policy review and impacts

s 9(2)(g)(i), s 18(d)

36. There has been a reduction in fatalities since the regulations were implemented. There were 31 deaths in the five years prior to the review (2004-2009). Since 2014, when the regime was fully in force, we had seen eight deaths in these regulated adventure activities, until the Whakaari/White Island tragedy. At the same time, New Zealand's tourism sector has grown by more than 55% since 2009.

s 9(2)(g)(i), s 18(d)



s 9(2)(g)(i), s 18(d)

SECRET

Out of Scope

### **A formal inquiry could cut across the investigations**

51. Initiating an additional formal inquiry at this point into potential failures in the regulatory framework, with investigative powers, risks cutting across the investigations and undermining their integrity. If Ministers decided to commission an independent inquiry or review, our advice is that the appropriate timing would be after the investigations are completed.
52. It would remain open to Cabinet to commission an independent or wider-ranging review at a later stage, including in light of any new information arising from the investigations or any policy review suggesting there are systemic failures of institutions or regulatory approach. In those circumstances, more independence may be important to maintain public confidence and manage conflict of interest.

### **Next steps**

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53. We understand the response to Whakaari/White Island will be an oral item for discussion at the 28 January 2020 Cabinet meeting. We are available to discuss this matter with you, including options for policy review, at the first officials' meeting on 27 January 2020.
54. We will provide you with talking points if required for the Cabinet meeting.