

Health and Safety Legal Update

Sally Togher, Associate

Grow | Protect | Operate | Finance

Agenda

1. Whakaari prosecutions & the 'Other Persons' duty
2. Whakaari sentencing
3. Recent cases
4. Recent and upcoming changes



Whakaari prosecutions

Whakaari: officer duties

WorkSafe v Buttles

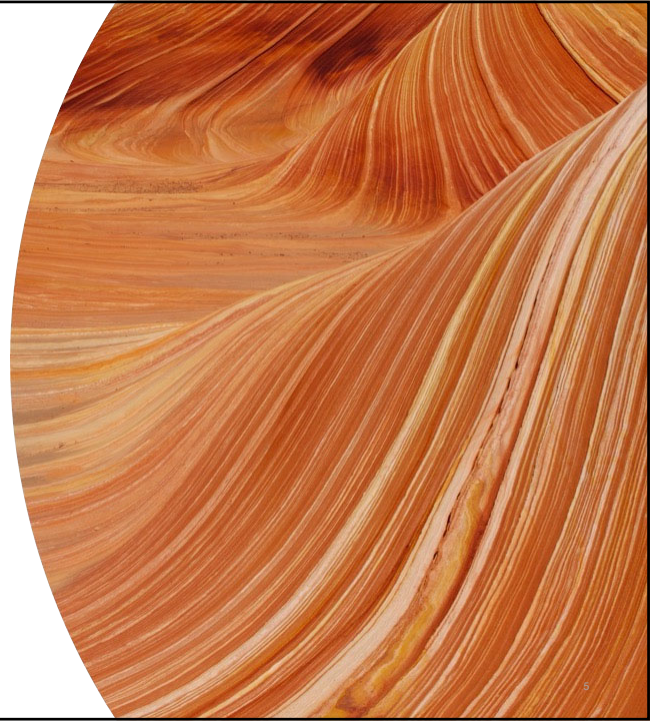
- Andrew, James and Peter Buttle were the directors of Whakaari Management Limited (WML)
- Charged separately as individuals under section 44 with failing to exercise the necessary due diligence as directors of WML
- Court found there was insufficient evidence to charge the Buttles as individuals
- All the evidence pointed to the Buttles as a group / board of directors
- Court dismissed the charges against the Buttles as individuals

4

Whakaari: the 'other persons' duty

WorkSafe v NEMA

- NEMA charged under s 36(2) for failing to consult, co-operate and coordinate with GNS and Whakaari Management and failing to communicate risk posed by volcanic activity to public.
- Section 36(2) requires a PCBU to ensure that the health and safety of other persons is not put at risk from work carried out as part of the PCBU.
- NEMA applied to have their charges dismissed



Whakaari: the 'other persons' duty

WorkSafe v NEMA

Section 36(2) must
be read alongside
section 36(1)

Court distinguished
'work activity' from
'work product'

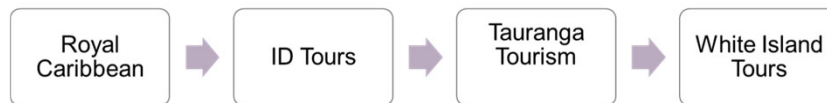
The 'other persons'
duty did not extend to
the general public

6

Whakaari: the 'other persons' duty

WorkSafe v ID Tours and Tauranga Tourism

- ID Tours and Tauranga Tourism were intermediary inbound tour operators within a supply chain



- Both charged under s 36(2)
- Followed *NEMA* decision
- Charges were dismissed

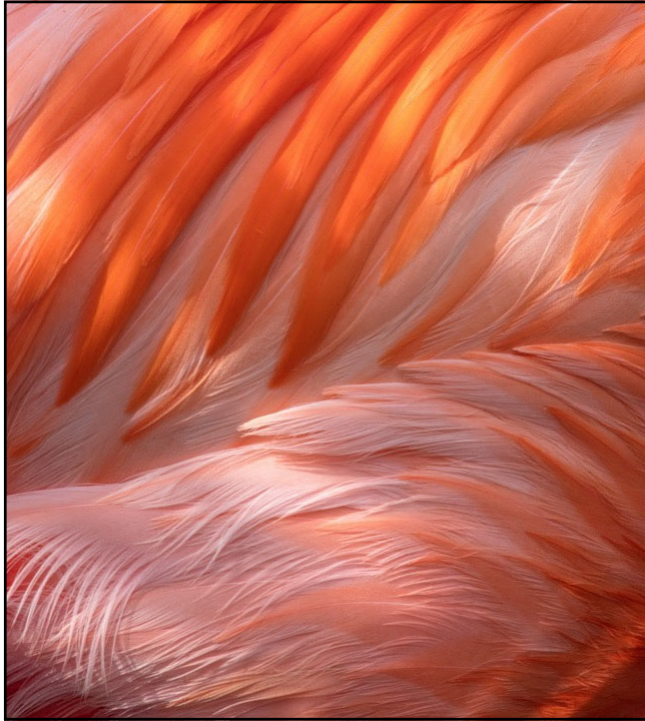
7

Whakaari: the 'other persons' duty

WorkSafe v Whakaari Management Limited

- Whakaari Management Limited (WML) were charged under sections 36(2) and 37.
- **Section 36(2):** the Court followed the *NEMA* decision and dismissed the alternative s 36(2) charge (the 'other persons' duty)
- **Section 37:** applies to a PCBU who manages or controls a workplace
 - Decision turned on whether WML managed or controlled Whakaari
 - Licence agreements between WML and tour operators an indicator of active management / control

8



Departing from *NEMA*?

WorkSafe v RDAgritech Ltd

- Did not apply *NEMA*
- RDA prepared a health and safety report for Electrix but had no on-site involvement
- RDA stated its report was intended for discussion towards preparing a design plan for the works, but Electrix made no attempt to discuss it

9

Departing from *NEMA*?

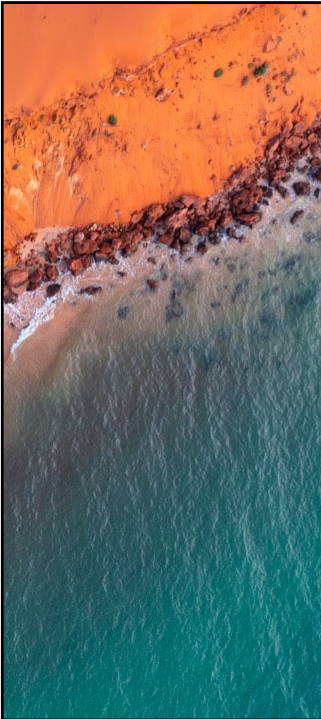
WorkSafe v The National Science Technology Roadshow Trust Board

Roadshow contracted
Fleet Image to do
repair work on their
trailer units

Fleet Image
worker injured

Did not apply *NEMA*

10



7 parties found guilty

1. Whakaari Management Limited
 2. White Island Tours Ltd
 3. Volcanic Air Safaris Ltd
 4. Aerius Ltd
 5. Kahu NZ Ltd
 6. Institute of Geological Nuclear Sciences (GNS)
 7. Inflite Charters
- } *Tour operators*

Sentencing of WML and tour operators

General observations

- None of the defendants had any volcanology expertise
- Reliance on the involvement of other large agencies
 - E.g. safety audits approved by WorkSafe
- Past-eruptions should have highlighted deficient health and safety processes
- Culpability not reduced if not aware of obligations



13

Fines and reparations

	Whakaari Mgmt Ltd	White Island Tours	Volcanic Air Safaris	Aerius Ltd	Kahu NZ Ltd	GNS	Inflite Charters Ltd
Starting point	\$1.1m	\$1.1m	\$750,000	\$375,000	\$375,000	\$90,000	\$350,000
Guilty plea reduction	--	15%	7.5%	7.5%	7.5%	20%	35%
Previous good character reduction	--	--	5%	5%	5%	20%	
Co-operation reduction	5%	7.5%	5%	5%	5%		--
Remorse reduction	--	10%	10%	5%	5%	--	
Assisting in the aftermath reduction	--	--	10%	--	25%	--	--
Total fine	\$1.045m	\$517,000	\$468,750	\$290,000	\$196,000	\$54,000	\$227,500
Total reparation	\$4.88m	\$5m	\$330,000	--	--	--	--
Total sum=	\$4.925m	\$5.517m	\$798,750	\$290,000	\$196,000	\$54,000	\$227,500

14



Recent cases

Can a trust be a PCBU?

WorkSafe v RH & Jury Trust

- HC considered whether a trust is a PCBU under HSW Act
- Higher penalties if trust is a PCBU
- Section 48(2) – a person who commits an offence under s 48 is liable on conviction, –
 - a) For an individual who is not a PCBU or an officer, a fine not up to \$150,000
 - b) For an individual who is a PCBU or an officer, fine up to \$300,000
 - c) For any other person, fine up to \$1.5 million.

16

Can a trust be a PCBU?

HSW Act Definitions

- Section 17(1)(a) – definition of PCBU:

*means a **person** conducting a business or undertaking whether... alone or with others and whether or not the business or undertaking is conducted for profit or gain*

- Section 16 – definition of a person:

*includes the Crown, a corporate sole, and a **body of persons** whether corporate or unincorporate*

17

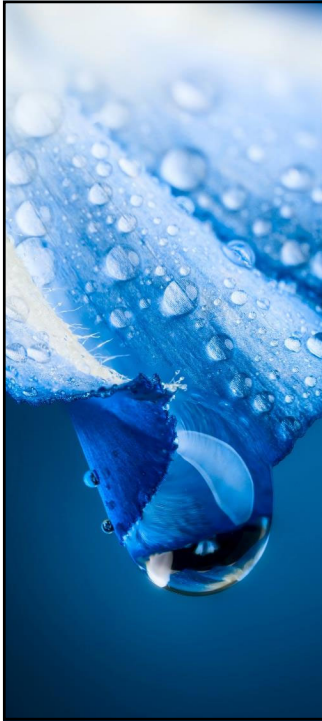
Can a trust be a PCBU?

Technically, no. But the trustees as a collective can be a PCBU

Trust is not a person, but the trustees are a 'body of persons'

Consistent with definition of person under HSW Act

18



WorkSafe New Zealand v Icepak New Zealand Ltd

- Electrocution causing serious injury.
- Icepak charged under section 36(1)(a) of the HSW Act (duty to ensure the health and safety of workers while working in the PCBU's business or undertaking, exposing workers to a risk of death or serious injury).
- Court ordered enforceable undertaking (alternative to WorkSafe EU)

19



WorkSafe New Zealand v Stephen Graham Burton

- Fatal electrocution of a builder following the installation of a rangehood by Mr Burton
- Mr Burton failed to conduct tests correctly using the appropriate test equipment
- Mr Burton convicted of a charge under section 163C(2) of the Electricity Act 1992 and regulation 63 of the Electricity (Safety) Regulations 2010
- Sentenced to 8 months home detention and \$150,000 in reparations

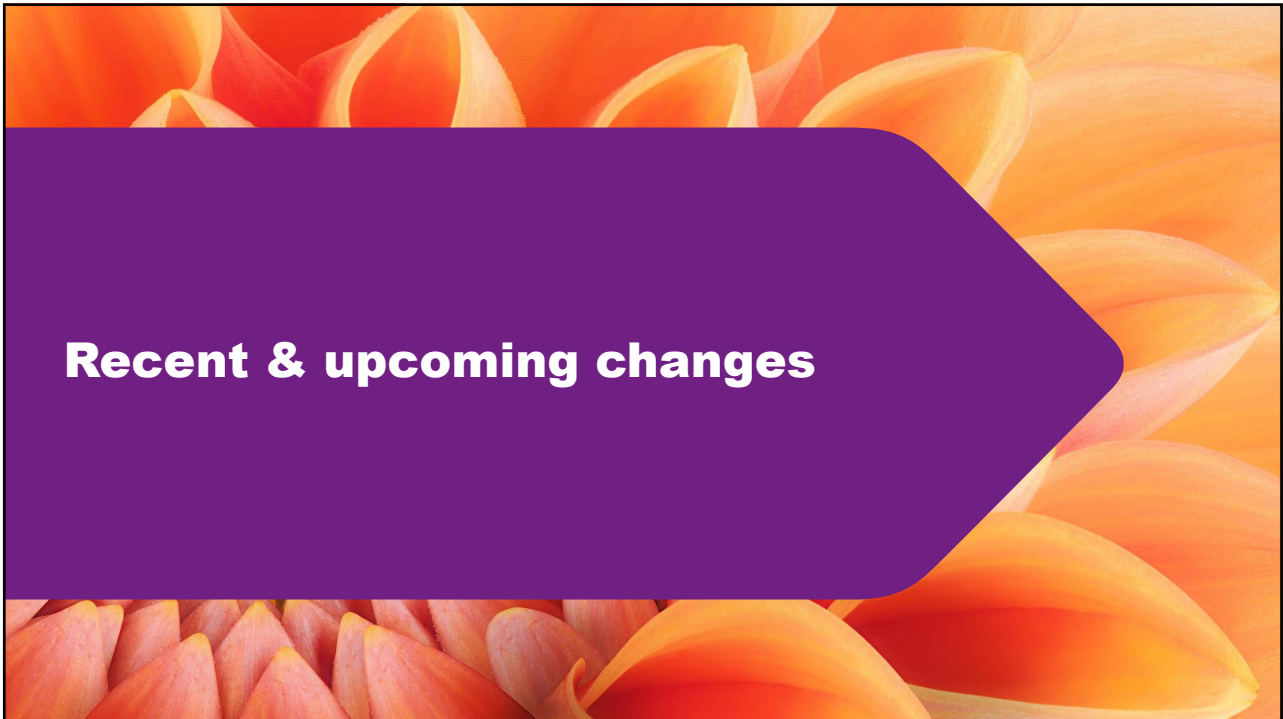
20



WorkSafe New Zealand v Port of Auckland Limited

- Port of Auckland pleaded guilty to two charges under sections 36(1)(a), 48(1) and (2)(c) of the HSW Act
- Fatal incident of container falling from a crane onto the worker was a serious departure from their duty which caused the death
 - '3-metre rule' was inadequate
 - Serious reduction in health and safety policies following the COVID-19 pandemic

21

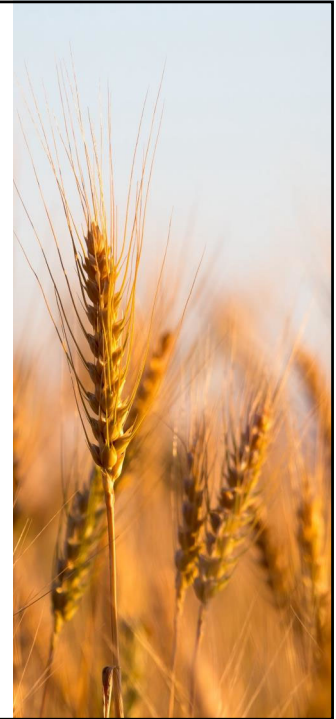


Recent & upcoming changes

Proposed employment law reforms

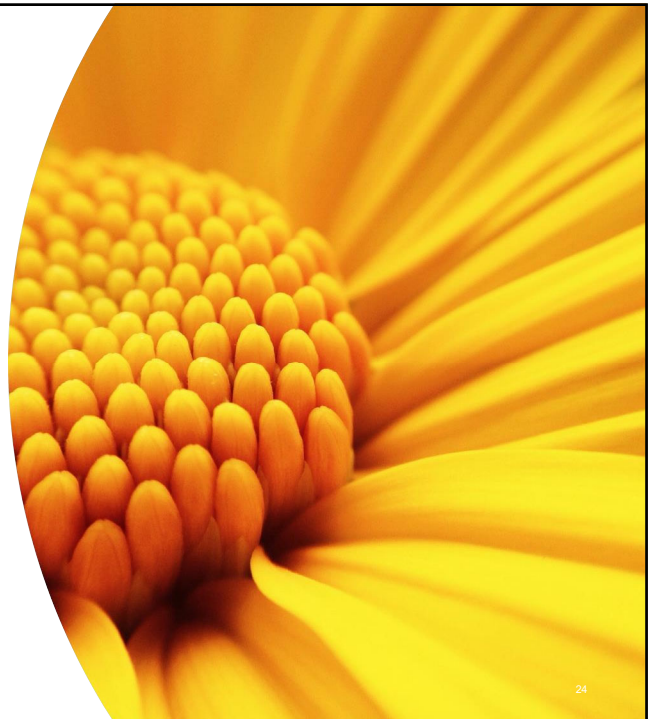
Minister for Workplace Relations and Safety, ACT's Brooke van Velden, delivered a speech to the Auckland Business Chamber on 12 March 2024 on her priorities for health and safety and employment relations reform. Including:

- Simplifying health and safety framework
- Improving frontline services – performance targets



Recent changes

- First ever prosecution against a CEO in NZ for workplace health and safety neglect
- Business Leaders' Forum taskforce report
- Adventure Activities overhaul



24

Questions?



Sally Togher
Associate
+64 4 915 5903
sally.togher@dentons.com

25

DENTONS

Thank you



Sally Togher
Associate
+64 4 915 5903
sally.togher@dentons.com



Greg Cain
Partner
+64 4 916 0963
greg.cain@dentons.com

© 2024 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal advice and you should not take, or refrain from taking, action based on its content. Please see dentons.com for Legal Notices.