IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-006
[2020] NZHC 2588

UNDER	the Judicial Review Procedure Act 2016; and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977; and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
IN THE MATTER OF	an application for judicial review
BETWEEN	MILES ROGER WISLANG Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	WHITE ISLAND TOURS LTD Second Respondent
	WORKSAFE NEW ZEALAND Third Respondent

Hearing:	31 August 2020
Appearances:	The applicant appears in Person (with J M Wilson in support) K G Stephen and A M Piaggi for the First Respondent G R Nicholson and O J Towle for the Second Respondent S V McKechnie and T J Bremner for the Third Respondent
Judgment:	1 October 2020

JUDGMENT OF GRICE J

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Introduction

[1] On 9 December 2019 Whakaari/White Island erupted. Forty seven people had been on the island participating in an adventure activity operated by White Island Tours Limited (WITL). Twenty one died and 26 were injured in the eruption. Dr Wislang filed these proceedings on 20 December 2019, shortly after the eruption. He seeks judicial review against WorkSafe and named ministers claiming that the tragedy would not have occurred had the adventure activity operator been regulated in the manner he suggests and, seeking a prohibition on visits to the island.

[2] Dr Wislang says that WorkSafe should have published a specific safety audit standard to regulate adventure activity operations on live volcanos. He says that the safety standard should have required the adventure activity operator to monitor volcanic activity by reference to the GNS[1] monitoring information and that adventure activity visits to the island should not have been permitted when the erupting volcano was at GNS alert level two. Dr Wislang also says that WorkSafe should have refused to register the private adventure operator for activities on Whakaari (an active volcano) as there was no condition requiring it to monitor the erupting volcano in the manner suggested by Dr Wislang nor prohibiting the operation at alert level two. Dr Wislang seeks judicial review in relation to WorkSafe and its minister's failures in regulating the activity.

[3] WorkSafe responds to the judicial review saying that the claim does not identify any relevant statutory decision or clearly articulate WorkSafe's alleged failures in exercising that power. Nevertheless, it says that it has published an adventure safety standard as it was required to do by regulation and, while it is a generic standard, it is responsive to safety issues in the specific adventure activity seeking certification. It registers adventure activity operators for a specified adventure activity and it was required to register the Whakaari adventure activity operator as it met the requirements of the regulations. WorkSafe is not the nominated safety audit certifier who is responsible for auditing the operator and providing a report to WorkSafe, nor could it impose conditions on the operator.

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[1] GNS is short for GNS Science. It was known as the Institute of Geological and Nuclear Sciences until 2005. It is the government-funded agency responsible for monitoring and measuring New Zealand's volcanic activity.

[4] Dr Wislang seeks injunctions against WorkSafe's responsible minister and the Minister of Foreign Affairs and Trade requiring them to prohibit visits to, and in the vicinity of, the island.[2] The Attorney-General represents those ministers.

[5] WorkSafe administers New Zealand's Health and Safety legislation and, in particular, adventure tourism regulations relating to adventure activity operations. WorkSafe registers adventure activity operators for specified adventure activities following their certification by an independent safety certifier. The operation must be audited by the safety certifier against a safety audit standard published by WorkSafe.

[6] One safety standard has been published which is generic but applies to any specific adventure activity by reference to good practice and the specific risks of the activity in question.[3]

[7] The Attorney-General says that the responsible minister had no power to interfere with the registration by WorkSafe of the Whakaari adventure operator and was prohibited by the Crown Entities Act 2004 from directing WorkSafe in relation to the registration of the operator.[4] The Attorney-General also submits that neither the WorkSafe Minister nor the Minister of Foreign Affairs has the power, as suggested by Dr Wislang, to prohibit visits to or within the vicinity of the island.

[8] Dr Wislang had also sought relief against the second respondent (WITL). It is the adventure activity operator which led the December 2019 Whakaari adventure activity. Dr Wislang had been seeking various orders against the company, including interim and permanent injunctions, to prevent it from taking members of the public to the island. Dr Wislang withdrew his claim for judicial review against the company partway through his submissions and indicated he no longer sought any remedies against it.

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2 The Minister for Workplace Relations and Safety (as responsible minister under the WorkSafe New Zealand Act 2013, the Health and Safety at Work Act 2015 and the Health and Safety at Work (Adventure Activities) Regulations 2016 promulgated under the 2015 Act); the Minister of Foreign Affairs (as the responsible minister under the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012).

3 "Health and Safety at Work (Adventure Activities) Regulations 2016–Publications of Safety Audit Standard" (23 March 2017) *New Zealand Gazette* No 2018-au1410 [Safety Audit Standard for Adventure Activities].

4 Crown Entities Act 2004, s 113.

[9] WITL is a private company registered as an adventure activity operator (AAO) under the Health and Safety in Employment (Adventure Activities) Regulations 2011 (the Regulations) for the purposes of "walking/running on White Island and Moutohora Island" (2014 registration) and "walking on a live volcano" (2017 registration).

[10] For the reasons below, I also dismiss Dr Wislang's judicial review application against the Attorney-General and WorkSafe. The present pleadings do not identify a coherent basis for judicial review.[5] There is no doubt that what occurred on Whakaari was a tragedy. However, this is not the forum to inquire into the events surrounding the eruption.

Background

[11] Dr Wislang brings the judicial review proceedings as a member of the public. He accepts he has no special personal standing in the matter.[6] Dr Wislang is also aware that there is an investigation by WorkSafe into the events surrounding the eruption led by an inspector from WorkSafe. That will consider health and safety matters including whether prosecutions should be laid for breaches of the health and safety legislation and regulations.

[12] At the same time, the Chief Coroner, with police assistance, is undertaking a coronial inquest into the deaths that occurred. A memorandum of understanding exists to regulate the effective management of, and co-operation between, the coronial inquiry and the WorkSafe investigations.

[13] Counsel advised that there was a statutory timeframe requiring the WorkSafe investigation to report by November 2020. There has been no date set for the Coroner's hearing but it is likely to occur in 2021 following the completion of the WorkSafe report.

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5 Dr Wislang was given the opportunity to amend his pleadings which he took. However, the amended statement of claim did not improve matters: *Wislang v Attorney-General* HC Wellington CIV-2020-485-000006, 19 June 2020.

6 Dr Wislang mentioned that he had been a burns doctor at Whakatāne Hospital. He had personally determined never to visit Whakaari due to the danger apparent from the activity of the island.

[14] Dr Wislang says that these investigations are unlikely to result in the type of outcomes that he is seeking from this Court. He says that he is not suitably qualified to prescribe the exact terms of any safety audit standard for adventure activity operations on erupting volcanoes but sees the involvement of GNS under the supervision of this Court, and the tying of an audit standard for activities on volcanoes to the GNS alert system, as being key to developing an effective safety audit standard.[7]

[15] Dr Wislang recognised there were some difficulties with his judicial review claim in view of the present statutory framework. Nevertheless, he was confident that the existing legislation and regulations were open to the interpretation he favoured and provided grounds for his judicial review claim and the remedies.

White Island Tours Limited

[16] Dr Wislang has discontinued his claim against WITL. I do not propose dealing with that further and dismiss the claims against that company.

[17] It follows that the voluntary undertaking given by WITL not to take any tours to Whakaari without the consent of the Court is no longer extant. There is no claim upon which to base the undertaking which was given in response to Dr Wislang's application for interim orders. To the extent necessary, any obligations by WITL based on its voluntary undertaking are now discharged.[8]

Claims against Attorney-General (for the responsible ministers)

[18] Dr Wislang claims that the responsible ministers should have prohibited landings on Whakaari, and had wrongly assumed that the rāhui (now lifted) imposed by local Māori following the eruption would prevent landings on the island.

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7 Dr Wislang said he did not go so far as to advocate an absolute prohibition for all time on people visiting Whakaari. However, he was of the view that if the volcanic activity is at alert level two, as it was before the December 2019 eruption, no members of the public should be allowed onto the island.

8 The voluntary undertaking was recorded in *Wislang v Attorney-General* HC Wellington CIV-2020-485-000006, 4 February 2020.

[19] Dr Wislang further claims that the responsible minister failed to direct WorkSafe to develop a specific health and safety standard applicable to safety certification and in simple terms to prevent registration of WITL.

Claims against WorkSafe

[20] Dr Wislang takes the view that the fact that the tragedy happened alone illustrates that the present audit standards are defective and that WorkSafe, as registrar, wrongly permitted the registration of WITL as an operator.[9] He said the failure occurred due to the lack of a safety standard tailored to adventure activities on active volcanos. He says a safety standard should be developed by WorkSafe using a process as follows:

> 4. Orders in the nature of mandamus requiring WorkSafe NZ to
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> a) Seek directly from the Institute of Geological and Nuclear Sciences periodic and, as the occasion requires, incidental advisories and reports on the volcanic activity status of White Island and New Zealand's other active volcanoes as that activity pertains to the health and safety of persons visiting or contemplating visiting those, including for the purpose of adventure-tourism.
>
> b) Develop, and periodically review health and safety standards applicable to the registration and safety-certification by audit of adventure-tourism and other tourism operators conducting or contemplating conducting tours on any and all of New Zealand's active volcanoes.
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> c) To make it compulsory for any and all New Zealand and foreign tour-operators to register their businesses with WorkSafe New Zealand, and to periodically monitor their activities in relation to the minimisation of risk in their adventure tourism activities.

[21] Dr Wislang pursued this aspect of this claim based on his interpretation of the Regulations which he says makes it mandatory for WorkSafe to publish a specific safety audit standard for active volcanos. Therefore, he said the failure to do so breached WorkSafe's statutory duty.

[22] The second failure alleged against WorkSafe was that it had failed to require the approved WITL safety auditor to place conditions on WITL's registration the tourism

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9 See [73] below. WorkSafe has not recognised a registrar pursuant to reg 13 of the Health and Safety at Work (Adventure Activities) Regulations 2016, and therefore WorkSafe is the registrar.

operator was required to monitor GNS alert levels and not take tours to Whakaari when the GNS volcano alert was at level two or higher. Dr Wislang said WorkSafe, as registrar, should have refused to register the company unless those conditions were imposed. This is despite no requirements made by the safety auditor in the audit report in support of registration that was sent to the registrar. A related ground was that the safety auditor should have required safety audits to be undertaken at intervals of less than the three years which was the requirement in the certification.

[23] Dr Wislang also seeks various orders in the nature of mandamus; requiring the responsible ministers to "immediately and effectively exercise their powers and duties … to ensure the physical safety of tourists and tour-operators … on White Island … prohibiting such visiting and landing all together" and to declare and enforce a permanent marine and air exclusion zone of a radii to be determined "by the Court in consultation with governmental experts in Vulcanology [sic], such as GNS scientists, to prevent sight-seeing tourist boats and overflying aircraft … from approaching White Island".

Response of WorkSafe and ministers

[24] The primary response of the respondents is that there was no justiciable statutory power of decision and no identified decision or decision-maker which could be the subject of a judicial review claim.

[25] WorkSafe says the only statutory power exercised by WorkSafe was to register WITL, however, no justiciable issue is identified in relation to the registration.

[26] The Attorney-General says the claim alleges a failure by the ministers to exercise powers, firstly, to prevent the public from visiting Whakaari and secondly, for failing to direct WorkSafe not to register WITL or to impose the proposed conditions on the registration. He says there is no justiciable power of decision identified.

[27] The Attorney-General also says the matters pleaded by Dr Wislang relate to policy which is for ministers or the Government and the Court should not trespass on the exclusive role of ministers to decide or apply policy.[10]

Principles of judicial review

[28] I now turn to the legal principles relevant to an application for judicial review. This application has been brought under the Judicial Review Procedure Act 2016 (the JRPA).

[29] These settled propositions were set out in the respondents' submissions upon which I base the following summary:

(a) New Zealand courts have the power to review all exercises of public power, whatever the source of the power exercised. I elaborate on the limits to this in relation to policy matters below.

(b) A flexible approach is taken to the meaning of "statutory power" and "statutory power of decision" for the purposes of s 5 of the JRPA.

(c) Judicial review is intended to be a comparatively simple process of testing that public powers have been exercised after a fair process in a manner which is both lawful and reasonable.[11]

(d) An applicant should identify:

(i) the relevant statutory power;

(ii) the decision to be challenged;

(iii) the relevant surrounding factual circumstances giving rise to the breach; and

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10 *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 352.

11 *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Wellington CIV-2006-485-697, 7 December 2006 at [15]. Adopted by Simon France J in *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance* [2020] NZHC 1012 at [13].

(iv) the basis upon which the breach is sought to be reviewed.

(e) In general terms judicial review is only available if the applicant can point to something that has been done or omitted to be done related to an exercise of statutory power and often involves the interpretation of an enactment. As Richardson J said in *Brierley Investments Ltd v Bouzaid*:[12]

> Availability of judicial review turns on a close construction of the statute under which the decision making authority exercised or proposes to exercise relevant statutory powers.

(f) In general terms the Court should be hesitant about stepping in and filling in any material gaps. The Court of Appeal observed that it is difficult for the Court to answer questions in the abstract where there are no reviewable decisions or exercise of statutory power identified. It noted:[13]

> [148] … if a party is to review the action … by way of judicial review, it is required to identify the relevant statutory powers, the decision to be challenged, the relevant surrounding factual circumstances giving rise to the breach and the basis upon which the breach is sought to be reviewed … The Court, on an application for judicial review, is unable to fulfil the function of a generalised commission of inquiry.

(g) The Court should be cautious and avoid undertaking a generalised inquiry outside the scope of the pleadings as such an inquiry may be "grossly unfair" to the respondent or respondents.[14]

[30] Cooke J in *Patterson v District Court, Hutt Valley* summarised the approach the Court should take:[15]

> In every judicial review case the Court's role is to review whether a decision is made in accordance with law. In all cases it does so in the same dispassionate way. The intensity with which it performs that task does not change. But the extent to which powers are substantively or procedurally controlled by legal limits varies considerably. …

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12 *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA) at [664].
13 *Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176 at [148].
14 At [149].
15 *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [16].

[31] Dr Wislang has now abandoned the claim as it relates to WITL. I note that decisions made by private organisations are generally not amenable to judicial review except to the extent that those decisions substantively involve the exercise of "public power" or have "important public consequences".[16]

Policy issues

[32] The supervisory function of this Court in judicial review can arise in any case where there is an exercise of public power, whatever its source. It is generally accepted that some exercises of public power are not suitable for judicial review because of their subject matter. They are described in shorthand as being not justiciable. The reason for this is based on the general principles of deference given to a government's policy development process leading to legislation. The larger the policy content, the more the decision will be within the "customary sphere of those entrusted with a decision, the less well-equipped the courts are to reweigh considerations involved and the less inclined they must be to intervene".[17]

[33] Mr Stephen, for the Attorney-General, pointed to two decisions in which the High Court had recognised that policy questions were for the executive and were not amenable to review by this Court. They involved the determination of the policy regarding smoking in prisons.[18]

[34] In *Taylor* Fogarty J commented:

> Substantial parts of the review arguments are challenging decisions of Ministers of the Crown, including the Attorney-General, for refusing to review the provisions of the Act disqualifying all prisoners from voting. Ministers of the Crown, including the Attorney-General, are Members of Parliament as well as being members of the Executive. As politicians, they are involved in formulating policy positions which lead to bills being introduced into the House and enacted into law. None of those political functions are in any way judicially reviewable by the High Court. Judicial review by the High Court is confined to ensuring that government is lawful. It has absolutely nothing to do, and does not reach, decisions which Ministers of the Crown and other politicians make as to what bills should be placed before the House and acted

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16 *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11–12; and *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

17 *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 (CA) at 546.

18 *Taylor v Manager of Auckland Prison* [2012] NZHC 1241 at [85] and the comments of Fogarty J in *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [19].

> upon. It is important to distinguish the Executive functions of Ministers of the Crown and other Members of Parliament from their conduct as politicians. The former are reviewable. The latter is not reviewable in any way at all.

[35] I now turn to consider the statutory framework against which the application for judicial review is brought.

Statutory framework

[36] The grounds pleaded for judicial review of the ministers' decisions are as follows:

> The grounds upon which the above orders on review are sought are:
>
> In their deciding jointly and severally not to restrict access and/or prohibit landings on and overflyings of White Island by tour operators and members of the public in the aftermath of the subject volcanic eruption, the Government Ministers responsible erred in law inasmuch as they:
>
> A. Misunderstood or misconstrued the nature and extent of their powers and duties as government ministers to regulate, in this case to prohibit, such landings and overflyings; and
>
> B. Failed to take into account the known risk and total unpredictability and destructive capability of further such eruptions; and
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> C. Wrongly assumed that the rāhui (now lifted) placed on White Island by local iwi was sufficiently preventive of tour operators and members of the public from landing on and overflying the island; and
>
> D. Misconstrued or mis-exercised their discretion as government ministers to prohibit such landings on the island; and
>
> E. Failed to direct WorkSafe NZ to develop health and safety standards applicable to adventure-tourism safety-certification and registration of White Island Tours Ltd.
>
> F. In its deciding to register White Island Tours Ltd as an adventure tourism operator, WorkSafe New Zealand:
>
> > a) Wrongly failed to act upon in an appropriately preventive way, or take into account as a relevant factor, easily-accessed information from the New Zealand Institute of Geological and Nuclear Science (GNS) on the risk of further volcanic eruptions that may have been provided directly to them in the form of periodic and incidental reports by GNS, or was publicly available on the website of GNS.
> >
> > b) Wrongly weighed, or failed to take into account, the generally known risk-factors contributing to the endangerment of human life

> and health pertaining to tour groups and other members of the public landing on White Island.

[37] In addition to that mandamus order, the remedies sought in the statement of claim are as follows:[19]

> 1. An injunction against White Island Tours Limited, to restrain it from continuing its business of overflying and ferrying tourists to and landing them on White Island, for any purpose whatever.
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> 2. Orders in the nature of mandamus directed to the ministers, including the Prime Minister of New Zealand, responsible for administering White Island as a part of New Zealand's territories, requiring them, individually and collectively, to immediately and effectively exercise their powers and duties, by such means as the Court sees fit, to ensure the physical safety of tourists and tour-operators and other private persons who are or may be minded to visit and land on White Island for any purpose whatever, by prohibiting such visiting and landing altogether.
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> 3. An order in the nature of mandamus requiring the responsible ministers cited in 2 above , in co-operation with the Minister of Foreign Affairs, to exercise their powers conferred by the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, to declare and enforce a permanent marine and air exclusion zone of radii to be determined by the Court in consultation with governmental experts in Vulcanology [sic] such as GNS scientists, to prevent sight-seeing tourist boats and overflying aircraft, including helicopters, from approaching White Island; and to thereby minimize or eliminate the physical risk to private persons, including tourists, who might otherwise endangeringly land on or overfly White Island.

[38] Dr Wislang identified a number of pieces of legislation that he said were relevant to the judicial review claim.

[39] In the statement of claim the following statutory instruments relevant to the regulation of adventure tourism in New Zealand were listed:

(a) the Health and Safety in Employment Act 1992;

(b) the WorkSafe New Zealand Act 2013;

(c) the Health and Safety at Work Act 2015 (HSWA); and

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[19] See [20] above.

(d) the Health and Safety in Employment (Adventure Activities) Regulations 2011 (now the Health and Safety at Work (Adventure Activities) Regulations 2016). The 2011 Regulations were replaced by the Health and Safety at Work (Adventure Activities) Regulations 2016 which were almost identical to the 2011 Regulations although the numbering of the Regulations changed. Nothing turns on that.

[40] The following were also referred to in the intituling:

(a) the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (TSCZEEZ Act 1977); and

(b) the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZCS Act 2012).

[41] Dr Wislang pleaded that based on the TSCZEEZ Act 1977 or the EEZCS Act 2012 the Minister of Foreign Affairs and Trade was able to prohibit visits to, or in the vicinity of, Whakaari. He did not pursue this in any detail in either his written or oral submissions.

[42] Dr Wislang seeks the remedy of mandamus by requiring the responsible ministers to prevent sightseeing tourist boats and overflying aircraft from approaching Whakaari. However, there is nothing in those pieces of legislation that enables either the Minister for Workplace Relations and Safety (who is the responsible minister under the health and safety legislation) or the Minister of Foreign Affairs and Trade to exercise powers required for these orders.

[43] The TSCZEEZ Act 1977 is administered by the Ministry of Foreign Affairs and Trade. The long title of that Act states that it is:

> An Act to make provision with respect to the territorial sea and the contiguous zone of New Zealand; and to establish an exclusive economic zone of New Zealand adjacent to the territorial sea, and in the exercise of the sovereign rights of New Zealand to make provision for the exploration and exploitation, and conservation and management, of the resources of the zone and for matters connected with those purposes.

[44] Whakaari is located within the territorial sea of New Zealand and that Act provides power to promulgate regulations for specific purposes in relation to the territorial sea.[20] However, the purposes for which regulations may be made relate to matters such as scientific research, protection of the marine environment, artificial islands, exploration, exploitation of the sea and matters affecting New Zealand's sovereignty.[21] There is no provision in that Act giving ministers the powers to make the orders sought in the present circumstances.

The extra territorial legislation

[45] The purpose of the EEZCS Act 2012 is:[22]

> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
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> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incarceration of waste or other matter.

[46] These purposes are not relevant to the judicial review claims here. The ministers have no power under that Act to take the steps sought by Dr Wislang.

[47] I now turn to the health and safety-related legislation.

The health and safety legislative framework

[48] The WorkSafe New Zealand Act 2013 is administered by the Ministry of Business, Innovation and Employment. WorkSafe is a Crown entity.[23] They must give effect to government policy when directed by the responsible minister. The responsible minister, in this case the Minister for Workplace Relations and Safety, may

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20 Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, s 8.
21 Section 8(a)-(e).
22 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 10.
23 WorkSafe New Zealand Act 2013, s 6.

direct WorkSafe to give effect to government policy that relates to WorkSafe's functions and objectives.

[49] WorkSafe's main objective is to promote and contribute to a balanced framework for securing the health and safety of workers and workplaces.[24] Its functions include advising on the operation of workplace health and safety systems, monitoring and enforcing compliance with relevant health and safety legislation, and developing codes of practice.[25] [26] It does so by performing its functions under the health and safety legislation.

[50] WorkSafe may only exercise such powers as are given to it by statute.[27] It is New Zealand's main health and safety regulator and exercises a number of public powers in that role. These are found principally in the HSWA and the Regulations made under that Act.

[51] The Minister for Workplace Relations and Safety has responsibility for appointing members to the WorkSafe board.[28]

[52] The Minister however, cannot interfere with the decisions of the board. Section 113 of the Crown Entities Act ensures that Crown entities remain independent. Ministers are not authorised to direct a Crown entity, or a member, employee, or office-holder of a Crown entity requiring the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons.

[53] Therefore, the Minister for Workplace Relations and Safety cannot direct a particular applicant be refused registration to conduct adventure tourism activities or that conditions are imposed on such an operator.

[54] The regulatory scheme for adventure activities is governed by the HSWA and specifically by the Regulations promulgated under that Act. The Regulations require

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24 WorkSafe New Zealand Act 2013, s 9(1).
25 Section 10.
26 Section 9.
27 Crown Entities Act 2004, s 19.
28 WorkSafe New Zealand Act 2013, s 7.

adventure activity operators to submit to regular safety audits and to register their operations with WorkSafe.

The Health and Safety at Work (Adventure Activities) Regulations 2016

[55] The Regulations require adventure activity operators to register in order to provide "adventure activities". In summary, the Regulations provide that:[29]

(a) to be registered, an activity adventure operator must undergo an audit by a recognised safety auditor (also known as a certifying body);

(b) if a prospective adventure activity operator passes a safety audit, the safety auditor will issue a safety audit certificate specifying the adventure activities audited, the period for which the audit is valid (no more than three years) and any conditions to which the certificate is subject; and

(c) the certificate must be promptly supplied to the Registrar of Adventure Activities (which is WorkSafe).

[56] The definition of "adventure activities" is set out in the Regulations as follows:[30]

> **4 Meaning of adventure activity**
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> (1) Subject to subclauses (2) to (5), in these regulations, *adventure activity*—
>
> (a) means an activity—
>
> (i) that is provided to a participant in return for payment; and
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> (ii) that is land-based or water-based; and
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> (iii) that involves the participant being guided, taught how, or assisted to participate in the activity; and
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> (iv) the main purpose of which is the recreational or educational experience of the participant; and

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29 This is based on a summary provided by counsel for WorkSafe.

30 Health and Safety at Work (Adventure Activities) Regulations 2016, reg 4.

(v) that is designed to deliberately expose the participant to a serious risk to his or her health and safety that must be managed by the provider of the activity; and

(vi) in which—

(A) failure of the provider's management systems (such as failure of operational procedures or failure to provide reliable equipment) is likely to result in a serious risk to the participant's health and safety; or

(B) the participant is deliberately exposed to dangerous terrain or dangerous waters;

…

[57] By definition, therefore an adventure activity is an activity that is not only dangerous, but deliberately exposes the participant to danger.

[58] The primary duty of care under the health and safety legislation rests with the person conducting the business or undertaking, referred to as a PCBU. Under s 30 of the HSWA, that duty requires the PCBU to eliminate risks to health and safety, as far as is reasonably practicable and if it is not reasonably practicable to eliminate risks then to minimise those risks so far as it is reasonably practicable.

[59] An adventure activity operator is a PCBU for the purposes of the Regulations if it provides an adventure activity to a participant. It is an offence for a person to provide or offer to provide adventure activities unless it is registered as an adventure activity operator.[31] To obtain registration the operator must undertake a safety audit administered by a recognised safety auditor.

[60] WorkSafe may recognise a person or an organisation as a safety auditor on written application if it is satisfied that the applicant:[32]

(a) has the appropriate expertise and qualifications to carry out the proposed audit;

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31 Health and Safety at Work (Adventure Activities) Regulations 2016, reg 8.
32 Regulation 9.

(b) is likely to carry out the audits in a way that is objective and that promotes safety and the public interest; and

(c) is unlikely to have a conflict of interest that cannot be appropriately managed in carrying out the audits and in doing anything else that the person or organisation does or is likely to do, and it is otherwise appropriate to recognise the person or organisation as a safety auditor.

[61] The functions of a safety auditor include:[33]

(a) providing safety audits of an adventure activity operator's compliance with one or more safety audit standards;

(b) issuing certificates;

(c) providing copies of certificates and related information to the registrar "so that adventure activity operators are registered";

(d) monitoring adventure activity operators for compliance with conditions of certificates that the auditor issues; and

(e) providing the registrar with the auditor's views on any matter in regs 7(2) or (3) or 18(1) or (2).[34]

[62] The functions of the registrar are presently exercised by a WorkSafe employee who is delegated that function.[35] The registrar's functions and powers include keeping and maintaining a public register of adventure activity operators[36] and cancelling or suspending the registration of an operator.[37] The primary function of the registrar is to register adventure activity operators.[38]

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33 Health and Safety at Work (Adventure Activities) Regulations 2016, reg 12.
34 See [64] below.
35 WorkSafe is the only registrar at present.
36 Health and Safety at Work (Adventure Activities) Regulations 2016, reg 17.
37 Regulation 18.
38 Regulation 7.

[63] To obtain registration, an adventure activity operator must pass a safety audit under reg 6 in respect of its provision of adventure activities. That audit must be conducted by a recognised safety auditor. An audit requires the following:[39]

(a) the adventure activity operator providing the safety auditor with specified information such as a description of the adventure activities which it provides; and

(b) an audit of the operator for compliance with any adventure activities safety audit standard.

[64] The safety auditor must notify the adventure activity operator whether or not it has passed the safety audit and if it has passed, the safety auditor must issue a certificate specifying what adventure activities were audited, the period for which the audit is valid (a maximum of three years) and any conditions to which the certificate is subject. The safety auditor must promptly provide the registrar with a copy of the safety audit certificate.

[65] The registrar must then promptly register the adventure activity operator,[40] unless registration is declined under reg 7(2) or (3) as follows:

(a) Under reg 7(2) the registrar *must* decline registration if satisfied on reasonable grounds that:

(i) false information or evidence was provided to obtain the certificate;

(ii) the entity is not an adventure activity operator (e.g. the activity in question does not meet the reg 4 definition of an adventure activity); and/or

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39 Health and Safety at Work (Adventure Activities) Regulations 2016, regs 12 and 17.
40 Regulation 7(1).

(iii) the person is unfit to be registered because of the improper way in which they have previously provided adventure activities.

(b) Regulation 7(3) provides that the registrar *may* decline registration if satisfied on reasonable grounds that:

(i) the person hasn't complied with a condition of the certificate or a previous certificate;

(ii) the person's previous failure to safely provide adventure activities, so far as is reasonably practicable, has previously endangered or may have endangered someone's life; and/or

(iii) the person previously provided adventure activities that they were not registered to provide.

[66] The grounds for declinature may be informed by the views of the safety auditor or of an inspector resulting from the exercise of his or her functions under the HSWA.

[67] Therefore, the registrar must register an applicant if they pass a safety audit unless the application either must be declined under reg 7(2) or the registrar has grounds to decline it at the registrar's discretion under reg 7(3).[41] Otherwise, there appears to be little room for the registrar to decline a registration. The matters to which the registrar may have regard are directed primarily at the adventure activity operator itself rather than the activity in question. This is in keeping with the design of the health and safety legislation which places the primary responsibility for safety on the person operating the adventure activity.

[68] Regulation 18 provides that the registrar must or may cancel or suspend an adventure activity operator's registration, if satisfied on reasonable grounds that:

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41 These relate to the provision of false information, demonstrated unfitness due to previous operations (reg 7(2)); failure to comply with a condition of the certificate or any previous certificate, endangering a person's life previously or providing adventure activities that the applicant was not registered to provide (reg 7(3)); if the registration has been cancelled or suspended (reg 18(1) and (2)). Health and Safety at Work (Adventure Activities) Regulations 2016.

(a) the registration occurred by mistake;

(b) the person provided false information or evidence to obtain their current certificate; or

(c) the person is not an adventure activity operator (i.e. does not actually provide adventure activities).

[69] The registrar must also cancel an adventure activity operator's registration, or suspend the registration for any period it thinks fit, if satisfied on reasonable grounds that:

(a) the person is unfit to be registered because of the improper way in which they have provided adventure activities;

(b) the person has not complied with a condition of their current certificate;

(c) the person's failure to safely provide adventure activities, so far as is reasonably practicable, has endangered, or may have endangered, a person's life; or

(d) the person has provided adventure activities when not registered to do so (while the Regulations have been in force).

[70] As with the granting of registration, the registrar's grounds under reg 18 may be informed by the views of the current safety auditor, or by the views of an inspector resulting from the exercise of their functions under the HSWA.

Safety audit standards

[71] WorkSafe has the responsibility of developing and continuing to review one or more safety audit standards. Safety audit standards must specify the standards or requirements with which adventure activity operators must comply to reduce risks to health and safety when providing adventure activities.[42] The Regulations give

[42] Health and Safety at Work (Adventure Activities) Regulations 2016, reg 19.

WorkSafe a discretion as to whether to make different safety audit standards applicable to different types of adventure activities.

WorkSafe's role under the Regulations

[72] WorkSafe is a Crown entity and so must operate within its statutory functions. WorkSafe's statutory role in relation to adventure activity operators is relatively constrained. It is limited to three principal functions under the Regulations:

(a) recognising safety auditors;

(b) recognising a registrar (though there is no requirement to do so); and

(c) developing one or more safety audit standards.

[73] To date WorkSafe has recognised a number of safety auditors and developed one safety audit standard (a generic standard for all activities which has since been updated).[43] WorkSafe has not recognised any other registrars.

Registration of White Island Tours Ltd

[74] WorkSafe registered WITL as an adventure activity operator in 2014 and 2017. The ownership of WITL changed between the 2014 and 2017 registrations.

[75] WITL's predecessor was audited by a recognised safety auditor, Bureau Veritas, on 6 October 2014. This appraisal found nothing which prevented the registrar from registering WITL as an adventure activity operator. The auditor's report referred to minor non-conformities which needed to be rectified before the registration was effected. These are not relevant here.

[76] The amended safety audit report noted that the safety auditor considered the types and levels of harm in previous incidents involving WITL were reasonable, with good evidence of engagement, reporting and compliance. WITL was advised on

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43 Safety Audit Standard for Adventure Activities, above n 3.

24 November 2014 that it had been registered effective from 21 November 2014. The registration was valid for a three-year period until 20 November 2017.

[77] The new owners of WITL continued to operate the adventure activity operations under the 2014 registration.

[78] On 17 November 2017 WITL was audited by another recognised safety auditor, AdventureMark. AdventureMark issued a safety audit certificate on 20 November 2017 which was referred to the registrar that day. The appraisal again noted minor non-conformities but nothing that prevented registration.

[79] WITL was registered for a further three-year period from 21 November 2017 to 19 November 2020. In December 2019 Whakaari erupted.

What are the statutory decisions?

[80] The statement of claim does not plead that WorkSafe made any statutory decisions. However, the following pleading directed at the ministers refers to a decision by WorkSafe to register WITL. I have set out the grounds pleaded against the ministers in full above but repeat the pleading insofar as it relates to WorkSafe's decision:

> F. In its deciding to register White Island Tours Ltd as an adventure tourism operator, WorkSafe New Zealand
>
> a) Wrongly failed to act upon in an appropriately preventive way, or take into account as a relevant factor, easily-accessed information from the New Zealand Institute of Geological and Nuclear Science (GNS) on the risk of further volcanic eruptions that may have been provided directly to them in the form of periodic and incidental reports by GNS, or was publicly available on the website of GNS.
>
> b) Wrongly weighed, or failed to take into account, the generally known risk-factors contributing to the endangerment of human life and health pertaining to tour groups and other members of the public landing on White Island.

[81] In simple terms Dr Wislang alleges that WorkSafe failed to publish a safety standard tailored for activities on live volcanoes. The claim against WorkSafe in that

regard is also to be found in the grounds pleaded against the ministers just above the pleading referred to in [36], that they erred in law inasmuch as they:

> E. Failed to direct WorkSafe N Z to develop health and safety standards applicable to adventure-tourism safety-certification and registration of White Island Tours Ltd.

[82] Dr Wislang submitted that this claim was based on an interpretation of reg 19 of the Regulations which he said required WorkSafe to promulgate a specific safety standard for adventure activities where the need arose. He said the need arose for activities undertaken on erupting volcanoes. This was indicated by the exceptionally dangerous nature of erupting volcanoes. Dr Wislang said an expansive approach to the words of reg 19 was required.

[83] Regulation 19 provides:[44]

> **19 Publication of safety audit standards**
>
> (1) WorkSafe must develop, and continue to review, 1 or more safety audit standards.
>
> (2) WorkSafe may publish a safety audit standard, or a change to a safety audit standard, by notice in the Gazette.
>
> (3) Safety audit standards must specify standards or requirements with which adventure activity operators must comply to reduce risks to health and safety when an operator provides adventure activities.
>
> (4) Safety audit standards must include standards or requirements to manage the risks of drug and alcohol use by operators, employees, or other persons through whom adventure activities are provided.
>
> (5) Different safety audit standards may apply to different types of adventure activities that operators provide.

[84] Dr Wislang said that reg 19(5)[45] should be read as if the words "need to" were inserted between "may" and "apply" as follows:[46]

> (5) Different safety audit standards may *need to* apply to different types of adventure activities that operators provide.

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44 Health and Safety at Work (Adventure Activities) Regulations 2016, reg 19.
45 This is equivalent to reg 20(4) of the 2011 Regulations.
46 Emphasis added.

[85] Dr Wislang said that this meant that WorkSafe was required to develop a tailored safety audit standard for activities on erupting volcanoes because by their nature, erupting volcanoes are so dangerous that WorkSafe "needed" to develop a safety standard for them. He submitted that the approach to interpretation he advocated was in line with the purposive approach promulgated by Lord Denning in *Seaford Court Estates Ltd v Asher*[47] and his book *The Discipline of Law*.[48] Dr Wislang said the underlying purpose of adventure safety regulation was to mitigate or minimise the danger of people engaging in such a dangerous activity and to promote suitable mitigation. Therefore, the purposive approach demanded an interpretation of reg 19 that would achieve that result.

[86] Putting to one side the difficulty that Dr Wislang faces in that he has not pleaded that WorkSafe exercised a statutory power of decision, I now consider the interpretation proposed.

Interpretation

[87] The usual rules of statutory interpretation apply here. Interpretation commences with the text informed by the purpose and the context[49] including the statutory scheme of the relevant legislation.[50]

[88] In my view, Dr Wislang's interpretation strains the meaning of the Regulations on the plain wording in its context. Dr Wislang urges me to follow Lord Denning in seeking out the mischief that the Regulations was seeking to address and then ensure it achieves its purpose by "ironing out the creases in the Act". However, the Court should not rewrite the Regulations.

[89] Regulation 19 uses the words *must* and *may* in different places. For instance, reg 19(1) says WorkSafe *must* develop one or more safety audit standards. However, the wording does not require it to develop any more than one. It *may* publish a safety

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47 *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481; affirmed in *Asher v Seaford Court Estates Ltd* [1950] AC 508 (HL).

48 Lord Denning *The Discipline of Law* (Butterworths, London, 1979).

49 Interpretation Act 1999, s 5; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24].

50 *Westfield (NZ) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597.

audit standard or changes to a standard,[51] and the safety standards *must* specify standards or requirements with which the adventure activity operators *must* comply to reduce health and safety risks.[52] The standards *must* also include standards or requirements to manage the risks of drug and alcohol use by operators and others.[53]

[90] Therefore, reg 19 uses the words *may* and *must* deliberately. The ordinary meaning of the words in reg 19(5) indicates that WorkSafe must publish at least one safety standard but it is not required to publish multiple standards. It has a discretion as to whether it develops more than one safety audit standard. There is nothing to require it to develop standards for every adventure activity.

[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.

[92] The safety audit standard for adventure activities was gazetted in March 2017. In the part concerning standard operating procedures (SOPs) it says:[54]

> The operator must develop, implement, and maintain SOPs for each activity.
>
> … SOPs must conform to good practice for the activity, and address each of the following items under the section on SOPs.

[93] The standard provides for the continuous identification and management of risks for the relevant activity as follows:[55]

> 6.3 DYNAMIC MANAGEMENT OF RISKS
>
> 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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51 Health and Safety at Work (Adventure Activities) Regulations 2016, reg 9(2)
52 Regulation 19(3).
53 Regulation 19(4)
54 Safety Audit Standard for Adventure Activities at [6.1] (footnotes omitted).
55 At [6.3].

[94] It is apparent WorkSafe did develop a safety audit standard as it was required to do under the Regulations.

[95] The purpose of the HSWA is set out at s 3: "to provide for a balanced framework to secure the health and safety of workers and workplaces…" by protecting workers and other persons "against harm to their health, safety, and welfare by eliminating or minimising risks arising from work…".[56] That is to be achieved by "providing a framework for continuous improvement and progressively higher standards of work health and safety".

[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.

[98] Therefore, the publication by WorkSafe of a general safety audit standard which is tailored to the activity involved and provides for continuous identification and management of risks is consistent with the purpose of the Act.

[99] Dr Wislang himself recognised the development of safety standards was a matter for experts. The legislature has entrusted that role to WorkSafe and it has made no error of law in developing a general safety audit standard.

Conditions on WITL's registration

[100] Dr Wislang submitted that it was open to WorkSafe and/or the minister to require that conditions be imposed on WITL before permitting registration. He said that it was an option available as the safety certifier was able to impose conditions as

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[56] Health and Safety at Work Act 2015, s 3(1)(a).

illustrated by its requirement in the 17 November 2017 audit report that minor non-conformities be closed out by 22 December 2017.

[101] Dr Wislang's point was that conditions could have been imposed at WorkSafe's behest by AdventureMark (the safety auditor) that required WITL to monitor the risk of eruption of the volcano using the GNS monitoring data and prohibiting tours if the GNS alert reached level two.

[102] A number of difficulties arise with that argument in these proceedings. First, it is AdventureMark which is the certifying authority, not WorkSafe. It is the body responsible for auditing and certifying as to safety and for monitoring the applicant. Dr Wislang responded to that by saying that WorkSafe should have rejected the registration because the certificate did not include that condition. However, there is nothing in the statutory regulations which would permit WorkSafe first, to require such a condition and second, to refuse to register WITL. There was no suggestion that the grounds for refusal to register under reg 7 existed.

[103] Dr Wislang said that nevertheless WorkSafe should have been on guard because activities on erupting volcanoes were extremely risky. WorkSafe should have looked more carefully at the conditions or required a shorter period than three years between audits.

[104] There is little doubt that activities on an active volcano expose participants to some level of risk. However, the definition of adventure activity presupposes their inherent danger and the exposure of the participants to a "serious risk". An activity could not be registered unless it exposed participants to serious risk.[57] Secondly, the design of the legislation is such that the primary responsibility for managing risk and danger to participants was on WITL as the PCBU with auditing and monitoring by the approved safety auditor as an independent check. There were no apparent grounds upon which WorkSafe could have rejected the application for registration or required the conditions suggested by Dr Wislang.

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[57] Health and Safety at Work (Adventure Activities) Regulations 2016, reg 4(1)(a)(v).

[105] WorkSafe made no error in registering WITL as is indirectly alleged in the pleadings.

[106] The relevant safety auditors are not parties to these proceedings.

The evidence

[107] Much of the evidence adduced by Dr Wislang in exhibits to his affidavits was news reports or third-party commentary about the eruption of Whakaari. It included reports of comments by a minister and a DVD of Dr Cas, an Australian volcanologist, who apparently expressed his views about the dangers of Whakaari.

[108] Dr Wislang sought leave to file further material being mainly up-to-date news reports. That application together with applications for discovery, third party discovery against GNS, and for leave to issue interrogatories, were dismissed shortly before this hearing.[58] WorkSafe had already discovered a number of documents which Dr Wislang relied upon including sections of the audit reports. I have found those useful and referred to some of them in my judgment.

[109] Gwyn J dismissed these further applications filed shortly before this hearing. She commented that the late applications had been a distraction for all the parties in the crucial pre-hearing preparation period.[59] She urged Dr Wislang to focus on the preparation of the case on the basis of the pleadings and evidence as filed.

[110] Even if the evidence in the news reports and commentary by third parties was relevant it is hearsay and not reliable. The comments are taken out of context and have not been tested. The other parties have had no opportunity to test the evidence nor to call rebuttal evidence. The news reports and third-party comments were of little assistance to the Court other than providing background information.

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58 *Wislang v Attorney-General* HC Wellington CIV-2020-485-000006, dated 14 August 2020.
59 At [24].

Standing

[111] The writ of mandamus is a remedy for the wrongful failure to discharge a legal duty or to compel performance where a duty has been wrongly exercised.[60] There are limits to the exercise of that discretion. The duty of the decision-maker must be reasonably precise.[61] In this case Dr Wislang has pointed to no precise duty.

[112] The Attorney-General indicated he did not take issue with Dr Wislang's standing in general terms although he contested Dr Wislang's right to seek relief by way of the prerogative mandamus. This, he said, required the breach of not only a public duty, but also a breach of a duty to the applicant as an individual.[62]

[113] Dr Wislang's standing to bring the judicial review and seek declarations in the public interest is not in dispute here. However, Dr Wislang has not established what impact the alleged failings of government ministers have had on him as an individual. It is not necessary to consider the issue of standing for the prerogative writ given my findings above that the application for judicial review must fail.

Summary

WorkSafe

[114] The applicant's second amended statement of claim does not plead any justiciable issue against WorkSafe concerning its registration of WITL. The additional issues raised by the applicant in his written and oral submissions do not change that position.

[115] The only statutory decision made by WorkSafe relevant to WITL was to register it as an adventure activity operator. This was not pleaded against WorkSafe but, in any event, WorkSafe made no error in accepting the registration and acted lawfully in terms of the statutory requirements.

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60 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed Brookers, Wellington 2014) at [27.2.3].

61 *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP 201/93, 10 October 1995 at 45-46; and *Bleakley v Environmental Risk Management Authority* [2004] 11 ELRNZ 289 (HC) at [41], citing *Padfield v Minister of Agriculture, Fisheries & Foods* [1968] 1 UKHL 1, [1968] AC 997.

62 *Environmental Defence Society Inc v Agricultural Chemicals Board* [1973] 2 NZLR 758 (SC).

[116] WorkSafe was under no statutory obligation to publish a safety audit standard specific to activities involving erupting volcanoes. It was required by reg 19 to produce "one or more safety audit standards". It did so.

The Attorney-General (for the responsible ministers)

[117] The statement of claim does not point to a statutory power of decision exercisable, or exercised by, the responsible ministers related to Whakaari.

[118] There are no provisions in the TSCZEEZ Act 1977 or the EEZCS Act 2012 which are relevant to the matters raised in these proceedings.

[119] The minister responsible for the health and safety legislation is not permitted to direct WorkSafe to deal with any individual in a particular way.[63] He could not direct WorkSafe in relation to the treatment of an individual application for registration.

[120] Dr Wislang is seeking changes to the regulation of adventure activity operations. That might be achieved, for instance, through regulations requiring specific standards for adventure activities on volcanoes or for WorkSafe to have a more direct role in imposing conditions and monitoring registrants.

[121] Any such changes are matters of policy and for legislation. Such changes should be made based on appropriate information and expert input. This Court has little, if any, primary evidence about the circumstances surrounding the tragedy and is not the body to make any such policy decisions.

Discretion

[122] All remedies on judicial review are discretionary.[64] The default position is that there is an extremely narrow and exceptional scope for exercising a discretion to refuse

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63 Crown Entities Act 2004 s 113.

64 There is no difference between the discretion under the Judicial Review Procedure Act and that applicable to common law judicial review: Judicial Review Procedure Act 2016, s 18(1).

a remedy once the claim is made out.[65] If some form of relief would have practical value then it ought to be granted.[66]

[123] If the judicial review claims here had otherwise been made out, in any event, I would have exercised my discretion to refuse the remedies sought. In simple terms this is because the matters involved concern events for which investigations are underway. Those investigations will involve more extensive enquiries and expert input not available to this Court. Any remedy is best left for consideration by the appropriate bodies following the completion of those investigations. For that reason, this case would fall into the exceptional category.

Conclusion

[124] I have concluded in relation to WorkSafe that no statutory power of decision has been clearly identified nor are there any errors specified in the exercise of any decision-making power. The only statutory power exercised by WorkSafe was the registration of WITL. No justiciable issue concerning that registration is identified.

[125] I have concluded that in relation to the claim as it relates to the responsible ministers there is no statutory power of decision involved. There is no relevant decision or failures to make a decision that are challengeable by judicial review.

[126] The Minister for WorkSafe is prohibited by s 113 of the Crown Entities Act from giving any specific directions to WorkSafe of the nature that Dr Wislang suggests.

[127] In addition, the nature of the remedies sought against the ministers relate to policy matters which are properly within the realm of ministers and the government, not this Court.

[128] The events that occurred and the tragic loss of life and injuries suffered in the eruption of Whakaari on 9 December 2019 are the subject of investigations which are ongoing. It may be that further policy for future adventure activity operations on

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65 G Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [5.29].

66 *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA) at [39].

volcanoes is developed as a result of those investigations. However, this Court is not the appropriate forum for such investigations and policy development.

[129] The application for judicial review is dismissed against all respondents.

Costs

[130] If the parties are unable to agree upon costs, memoranda should be filed as follows:

(a) by the relevant respondents on or before five days from the date of delivery of this judgment;

(b) by the applicant in response on or before five days thereafter; and

(c) any replies to be filed and served within a further three days.

Grice J

Solicitors:
Crown Law Wellington for first respondent
Anthony Harper, Auckland for second respondent
Simpson Grierson, Wellington for third respondent

Copy to:
The applicant