

ELT ADVICE MEMO

To: Executive Leadership Team

From: Catherine Epps (GM, Health and Technical Services) and Bronwyn Turley (Acting GM, Regulatory Effectiveness and Legal) Adventure Activities Health Check project sponsors

Prepared by: Adventure Activities Health Check project team

Decision date: 22 September 2020

Subject: Adventure Activities – Issues, Opportunities, and Recommended Actions

PAPER FOR DISCUSSION

RECOMMENDATIONS

It is recommended that you:

- a. **Note** there are a number of issues and opportunities with the adventure activities regulatory regime, with the key findings being that:
- i. we (WorkSafe) need to better understand and recommit to our regulatory stewardship role for the adventure activities regime
 - ii. a suite of actions are recommended to strengthen how we administer the adventure activities regulatory regime
 - iii. delivery of the suite of recommended actions will require additional resourcing, and delivery through a programme management approach with an assigned sponsor, governance group, and delivery lead **NOTED**
- b. **Note** there are risks with the Health Check work, particularly if the recommended actions are not progressed **NOTED**
- c. **Agree** to work starting on the suite of recommended actions, as per the indicative timeframes and Appendix 1 **AGREED / NOT AGREED**
- d. **Agree** to not prioritise work to consider whether a specific regulatory regime for adventure activities is needed **AGREED / NOT AGREED**
- e. **Note** that work is underway to update delegations related to the registration function and powers, including new delegations to the Manager, Technical Programmes and Support and General Manager, Health and Technical Services, and the revocation of delegations to named individuals and disestablished roles **NOTED**
- f. **Note** a communications approach is needed to ensure the Minister, Board, staff, and stakeholders are informed **NOTED**
- g. **Note**, if approved, the ICT solution proposed would either require a separate funding bid or be incorporated into existing ICT build for WorkSafe **NOTED**
- h. **Agree** that this programme of work be an initiative under Taura Here Waka **AGREED / NOT AGREED**

PURPOSE

This memorandum summarises issues and opportunities with the adventure activity regulatory regime, and identifies actions WorkSafe should take to strengthen how we administer the regime, and to enable us to consider discussing improvements to the Regulations with MBIE.

BACKGROUND

As set out in memoranda dated 17 March 2020 and 4 May 2020, a cross-organisation project team was established to identify and consider issues relating to the registration of adventure activity operators, and provide advice to ELT. The project had two priorities:

- The recognition of the safety auditors and subsequent reconfirmation of the 76 safety certificates for the affected adventure activity operators (Priority One). This work was completed in May 2020.
- The health check of WorkSafe's current administration of the adventure activities regime to identify risks and issues, and recommendations for system improvements (Priority Two).

This memorandum relates to Priority Two.

WorkSafe is a party to judicial review proceedings brought by Dr Miles Wislang in relation to alleged failures in respect of Whakaari/White Island. In light



On 18 August 2020 the Adventure Activities Health Check project team¹ was reconvened to progress the Priority 2 work and begin work towards providing advice to ELT. In developing this advice the project team have been mindful of other related work that is underway². It is recommended that any opportunities for alignment are taken.

This memorandum and the appendices have been reviewed by the Adventure Activities Health Check governance group³, and are endorsed by the Adventure Activities Health Check project sponsors.

¹ The project team currently consists of Darren Handforth, Lisa Nickson, Emma Madison-Ross, and Tracey Ayre.

² This includes the Review of compliance with adventure activity operator registration requirements; Health and Technical Services' Authorisations Process Review; MBIE's work to review the legislative design of the Regulations in relation to natural hazards; Service design; and the investigation into the Whakaari/White Island incident on 9 December 2019.

³ The governance group currently consists of Kelly Hanson-White, Paul Molloy, Mark Scott, Caroline Gall and Tracey Conlon.

KEY FINDING 1: WORKSAFE NEEDS TO BETTER UNDERSTAND AND RECOMMIT TO ITS REGULATORY STEWARDSHIP ROLE FOR THE ADVENTURE ACTIVITIES REGIME

While MBIE is responsible for administering the legislative framework for adventure activities, we are accountable for the regulation of the sector and have a regulatory stewardship role. Being a regulatory steward is broader than delivering an authorisation function or undertaking engagement, education, or enforcement activities. As with any regulator, we are expected to keep our regulatory stewardship role in mind, commit to performing it, and ensure our priorities and resources are aligned.

This means we need to:

- Take a system view of the regulatory regime, and understand the system, its participants, and their context.
- Proactively escalate issues with the Regulations to MBIE.
- Monitor, evaluate, and report on the performance of the system, and implement any identified improvements where possible.
- Have checks and balances in place to provide us and others with assurance that the regime is working as intended.
- Intervene in the system when needed.

Note: adventure activities is just one of several authorisation regimes WorkSafe administers. Work is underway to review how other authorisation regimes Health and Technical Services administers are performing.

KEY FINDING 2: A SUITE OF ACTIONS ARE NEEDED TO STRENGTHEN HOW WE ADMINISTER THE ADVENTURE ACTIVITIES REGIME

A suite of actions are recommended to strengthen how we administer the adventure activities regulatory regime, and enable us to consider discussing improvements to the Regulations with MBIE. Our ability to delivery this suite of actions will require resourcing and funding decisions.

The full list of recommended actions is set out in the Appendix 1. Note: The project team considered proposing work to analyse whether a specific regulatory regime for adventure activities is needed. On balance, and after discussion with the governance group, it was felt that this work would not be a good use of WorkSafe's resources and unlikely to be desirable at this time.

In short, WorkSafe is accountable for the regulation of adventure activities, but the regime is highly devolved and we are heavily reliant on third parties. It is essential that there:

- is good regulatory design that supports the primary objective of the adventure activities regime, and WorkSafe as regulator and Registrar
- are checks and balances to assure ourselves and others that the regime is working as intended
- are clear processes, policies, practices, and guidance to ensure WorkSafe staff and others are clear on WorkSafe's expectations and functions
- is comprehensive stakeholder management and engagement (internally and externally) so there is alignment within WorkSafe and a well-rounded regulatory approach which includes engagement, education, and enforcement
- is role clarity and accountability for the regime, supported by appropriate prioritisation, resourcing, delegations, structure and support
- are sufficient participants (e.g. recognised safety auditors (or certified bodies)) to resource the audit function of the system
- are systems to ensure issues are escalated and we are aware of emerging issues and pressures such as when recognitions/ registrations are due.

The timeline below shows the priorities and timeframes for progressing the recommended actions.



KEY FINDING 3: DELIVERY OF THE SUITE OF ACTIONS WILL REQUIRE ADDITIONAL RESOURCING, AND DELIVERY THROUGH A PROGRAMME MANAGEMENT APPROACH WITH AN ASSIGNED SPONSOR, GOVERNANCE GROUP, AND DELIVERY LEAD

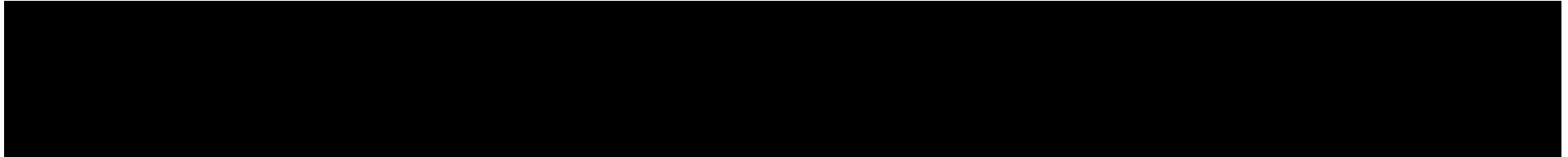
Delivery of the recommended actions will take significant resource from teams across WorkSafe and has not been scheduled for their 2020/21 work programmes. The resourcing required would be in addition to that needed for teams' planned 2020/21 work activities. Without resourcing and coordination there's a risk that the delivery of actions will be delayed, disconnected, misaligned, or not prioritised. You need to:

- Consider the resourcing required, and how the suite of actions can most efficiently be delivered. The project team recommend a programme management approach be taken to ensure all relevant teams are involved, work is coordinated, and there is sound planning and oversight of delivery of the actions.
- Identify who will be the sponsor, governance group, and delivery lead for the agreed actions.
- Provide clear direction to those delivering actions that this work is high priority and must be done.

RISKS AND MITIGATIONS

There are risks with the Health Check work, particularly if the recommended actions are not progressed. These risks can be broadly categorised as legal, reputational, resourcing and system integrity. Appendix 3 sets out the identified risks and their mitigations.

LEGAL REVIEW



COMMUNICATIONS APPROACH

We need a communications approach for this work. The project team has discussed this with Mark Scott, who will action it within appropriate timeframes. Note the first anniversary of the Whakaari/White Island incident is coming up on 9 December 2020, which means having a proactive and joined-up communications approach about WorkSafe's role in administering the adventure activities regime is critical.

NEXT STEPS

Once you have discussed the recommended actions you will need to consider who in your respective Groups will be involved in/responsible for delivering the recommended actions.

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Appendix 1: Issues/opportunities and recommended actions

A note about indicative resourcing: The resourcing requirements indicated in the tables below are a determination of the minimum full-time equivalent (FTE) staff required to deliver each recommended action as a discrete package of work. Over the next nine months, the same members of staff may work on multiple actions concurrently as part of these FTE allocations.

Legislative framework

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
<p>There are problems with the design of the Regulations – the Regulations are silent on or don't provide sufficient clarity regarding:</p> <ul style="list-style-type: none"> our oversight of third parties (e.g. recognised safety auditors; JAS-ANZ) and whether they are performing to an adequate standard the functions needed to support decision-making our role once adventure activity operators and recognised safety auditors have entered into the regime (i.e. after registration/recognition) the grounds for declining, suspending and cancelling a adventure activity operators' registration, which are narrow and do not expressly allow a broader view of the operator's safety performance in other regulatory contexts our ability to intervene in the event of recognised safety auditor market failure to ensure the system can continue to operate appropriateness of recognised safety auditors submitting safety audit certification with registration fees to WorkSafe on behalf of the operator the interface between and relevance of both HSWA and the Regulations, for example notification requirements. 	Consider areas where we think the Regulations could be improved.	By February 2021	Medium	1 FTE: Senior Advisor Regulatory Frameworks (lead)
	Once agreed internally, refer to MBIE Policy team for consideration.	April 2021	Medium	1 FTE: Senior Advisor Regulatory Frameworks (lead)

Operational Policy and Operational Guidance

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
<p>Given the difficulties with design, we need to make sure our operational policy and operational guidance (for both internal and external audiences) is clear, including in relation to:</p> <ul style="list-style-type: none"> • the level of assurance we require before granting registration i.e. <ul style="list-style-type: none"> ○ extent of inquiry into suitability for registration ○ use of intelligence and validating info ○ transparency about how this is taken into account • our role post-registration, and the importance of two-way information flows to this, including: <ul style="list-style-type: none"> ○ ongoing interaction with recognised safety auditors ○ the inspectorate acting as our 'eyes and ears' ○ our processes for receiving, analysing, and assembling surveillance audits • recognition of safety auditors • how oversight of recognised safety auditors and JAS-ANZ is provided • our enforcement approach • dealing with complaints received by the COS team and Contact Centre • coordination and integration between authorisations team and other teams (e.g. General Inspectorate). 	<p>Scope any required clarifications to operational policies and operational guidance, develop them, and publish them on the Practice Framework and website (as appropriate).</p>	<p>By November 2020: Scope and prioritise any new/clarified policies and guidance needed</p>	<p>High</p>	<p>~4 FTE: 1 x Senior Advisor Op Policy (lead) 1 x Advisor Regulatory Practice 1 x Inspector – GI 1 x TP&S 0.2 x Legal</p>
	<p>Review existing documents (including the risk matrix) and make sure they are fit for purpose and published on the Practice Framework.</p>	<p>By November 2020: Identify and prioritise policies and guidance</p>	<p>High</p>	<p>~4 FTE: 1 x Senior Advisor Op Policy (lead) 1 x Advisor Regulatory Practice 1 x Inspector – GI 1 x TP&S 0.2 x Legal</p>

Practice

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
<p>We should take a more proactive approach to ensuring the adventure activity regulatory regime is working as intended and take advantage of opportunities to improve it.</p> <p>This requires us to:</p> <ul style="list-style-type: none"> monitor, review and report on the regime review the <i>NZ Adventure Activities Certification Scheme</i> with JAS-ANZ and ensure it reflects international best practice assure ourselves that safety audits are in line with the most up to date versions of the <i>Scheme and the Safety Audit Standard for Adventure Activities: Requirements for a Safety Audit of Operators</i>, and that recognised safety auditors have the technical input needed clarify our expectations of recognised safety auditors and JAS-ANZ in ensuring the regime is working as intended. 	<p>Commission project(s) to support a more proactive approach to obtaining the assurance we need, including but not limited to projects that will:</p> <ul style="list-style-type: none"> ensure we are applying Government Expectations for Good Regulatory Practice review the Scheme (including the <i>Safety Audit Standard</i>) against international best practice, and ensure it keeps pace with relevant ISO standards formally assess the performance of JAS-ANZ consider how to reassure ourselves that safety audits are in line with the most up-to-date versions of the Scheme and the Standard (e.g. spot checks; stakeholder engagement), and have the technical input needed. 	By December 2020: Commission projects	High	<p>7 FTE:</p> <ul style="list-style-type: none"> 1 x Senior Advisor – TP and S (lead) 1 x Advisor Op Policy 1 x Advisor Regulatory Practice 1 x Inspector –GI 1 x Inspector - SI 1 x Legal 1 X Comms Advisor
To ensure continuity of recognition and registration, we need a system to flag recognitions and registrations that will soon be due, and monitoring / assessments that could be undertaken.	Set up calendar reminders in Outlook for registration and recognition renewals.	By October 2020: Set up calendar reminders	High	<p>1 FTE:</p> <ul style="list-style-type: none"> 1 x Senior Advisor - TP and S (lead)
	Include ICT solution for a bring-up system in the wider authorisation process review work.	Delivery by December 2022?	Medium	<p>2 FTE:</p> <ul style="list-style-type: none"> 1 x Senior Advisor - TP and S (lead) 1 x ICT
<p>We need to improve record-keeping, especially:</p> <ul style="list-style-type: none"> the checks and enquiries performed as part of the registration process meeting notes with industry version control of the Scheme 	Design and implement template to manually capture records while we wait for ICT database to be available.	By November 2020	High	<p>2 FTE:</p> <ul style="list-style-type: none"> 1 x Senior Advisor - TP and S (lead) 1 x Senior Advisor Regulatory Practice

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
<ul style="list-style-type: none"> having one source of information (files are currently stored in Guardian and/or MAKO). 	<p>Commission a project to address these areas, including whether a database would be advantageous.</p>	<p>Initiated by December 2020. ICT delivery by December 2022</p>	<p>Medium</p>	<p>2 FTE: 1 x ICT (lead) 1 x Advisor - TP and S</p>
<p>To support our compliance and enforcement functions, and connections back to inspectorate and other teams, there needs to be:</p> <ul style="list-style-type: none"> clear 'ownership' of the enforcement function clear transfer mechanisms (between those carrying out activities related to the registration function and the inspectorate) clear escalation pathways support for those carrying out activities related to the registration function when matters are escalated aligned priorities for the authorisations team and the inspectorate consistency with the enforcement decision-making model (EDM) and operational policy. <p>Note: There is a more general issue about WorkSafe compliance activities, and the use of EDM, in the context of authorisation regimes. Is EDM fit for that purpose and being used for the purpose for which it is intended? Is anything else needed to address registration/authorisation related issues?</p>	<p>Commission a project to ensure these areas are in place / improved, for example:</p> <ul style="list-style-type: none"> develop EDM training for inspectors for adventure activity work develop a MAHI module develop practice documentation, including enforcement scenarios. 	<p>By February 2021</p>	<p>Medium</p>	<p>7 FTE: 1 x Senior Advisor - Op Excellence (lead) 1 x Senior Advisor - TP and S 1 x Senior Advisor Regulatory Practice 1 x Inspector -GI 1 x Inspector - SI 1 x Advisor - L and D 1 x Legal</p>

Resources, capability, training, capacity

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
We need to ensure the focus and priority given to adventure activities continues to reflect the fact that a specific regulatory regime has been put in place.	Renew WorkSafe's focus on adventure activities, and evaluate the resourcing required to better support registration, recognition, monitoring compliance, education, engagement, enforcement, and other interventions.	October 2020	High	1 FTE: 1 x Senior/Principal Advisor – Engagement and Implementation and I (lead)
We should, as a matter of priority, clarify responsibilities and delegations, including primary responsibility for the performance of the regime. The project team think: <ul style="list-style-type: none"> the delegation of functions and powers should be held at a more senior level (Manager and above) than they are at present the delegations should refer to a position, rather than a named person the roles of senior advisor and Registrar are different and cannot be delivered by 1 person. 	Clarify responsibilities for the regime, and update delegations to reflect this.	October 2020	High	2 FTE: 1 x Senior Advisor – TP and S (lead) 1 x Legal
We need to better support those carrying out activities related to the registration function. This is difficult when there are competing demands on staff working across multiple areas.	Identify ways to better support those carrying out activities related to the registration function so they have what they need to deliver their role effectively.	October 2020	High	2 FTE: 1 x Senior Advisor – TP and S (lead) 1 x Senior Advisor – Regulatory Practice
There should be better integration of the registration function with other parts of the organisation.	Consider ways to better integrate the work of the adventure activities registration function into functions in Operations.	October 2020	High	2 FTE: 1 x Senior Advisor – TP and S (lead) 1 x Advisor – Operations
It is important there is a one WorkSafe approach to adventure activities and that: <ul style="list-style-type: none"> the right resources are used the best regulatory interventions are being used all those involved (incl. the inspectorate) 	Clarify the respective roles and interventions of the authorisations team and the inspectorate.	February 2021	Medium	3 FTE: 1 x Senior Advisor – TP and S (lead) 1 x Legal 1 x GI or SI

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
<p>have the skills, knowledge, and experience to deliver their role and interventions.</p> <p>Note: we are in the process of building inspector capability and understanding of their role in supporting the regime. We need to maintain and build this capability.</p>	<p>Develop MAHI training modules for those involved in authorisations (including inspectors) so they have the knowledge and skills they need to support them to deliver their role.</p>	<p>February 2021: engage trainer</p>	<p>Medium</p>	<p>3 FTE: 1 x Advisor Learning and Development (lead) 1 x Senior Advisor – Regulatory Practice 1 x GI or SI</p>
	<p>Stand up SAN group for Adventure Activities.</p>	<p>By end February 2021</p>	<p>Medium</p>	<p>6 FTE: 2 x GI per region (lead)</p>
	<p>Use knowledgeable inspectors as champions to upskill other inspectors.</p>	<p>By March 2021</p>		

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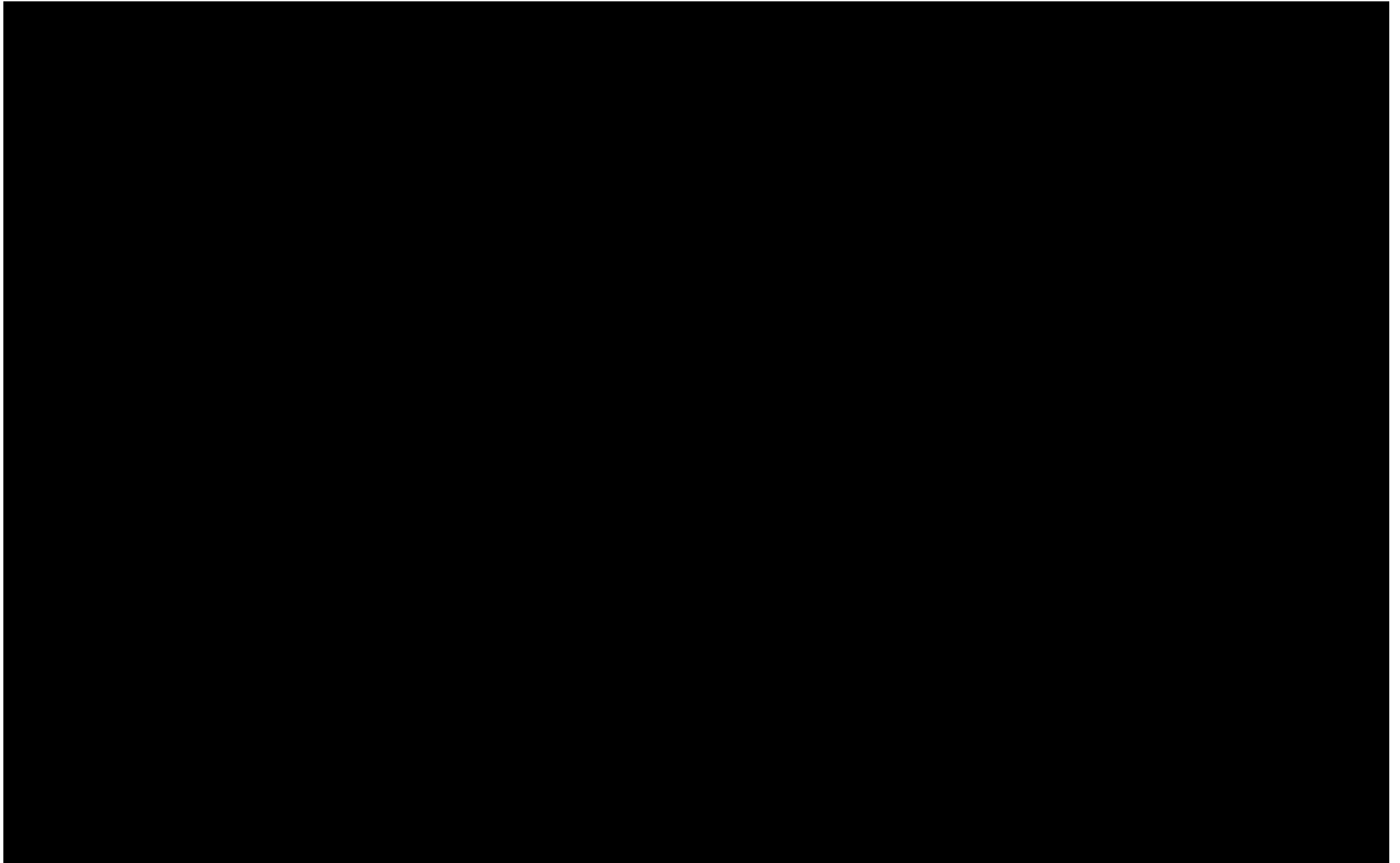
External stakeholder management and engagement

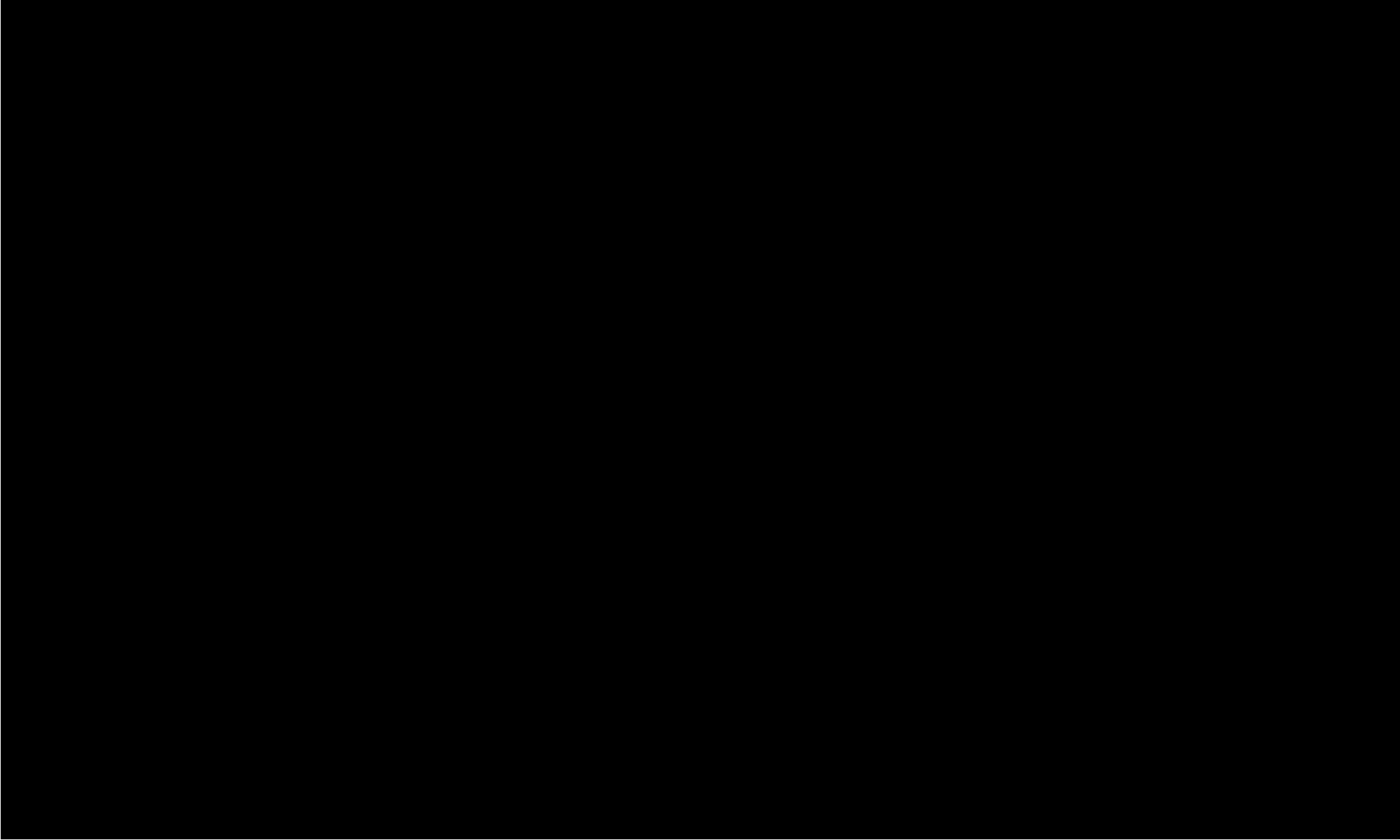
Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
We need to ensure our MOU with JAS-ANZ reflects any changes we make as a result of the recommended actions (e.g. steps we take to seek assurance, stakeholder management etc.).	Review the MoU with JAS-ANZ to ensure it is up to date and fit for purpose.	For immediate start	High	AA Health Check team (lead)
	Amend the MOU to reflect changes	By June 2021	Medium	1 FTE: 1 x Senior Advisor – Operational Policy (lead)
We need to make sure we communicate in a clear, effective, and timely way so: <ul style="list-style-type: none"> our expectations are clear, including our expectations of recognised safety auditors and JAS-ANZ we use our engage, educate, and enforce interventions (when appropriate) we maintain visibility in the adventure activities sector. 	Develop a stakeholder engagement strategy, including engagement with: <ul style="list-style-type: none"> JAS-ANZ recognised safety auditors adventure activity operators industry bodies incl. TIA and RIA iwi other government agencies (e.g. DOC). 	By 1 Oct 2020 (when rafting comes in)	High	2 FTE: 1 x Senior Advisor – Engagement and Implementation (lead) 1 x Advisor – Comms
	Consider opportunities to strengthen our educative role, such as through: <ul style="list-style-type: none"> developing the Activity Safety Guidelines to support regime identifying if there is a need for other products reviewing our existing guidance and education products and ensuring they reflect and be aligned with HSWA. 	July 2021	Low	3 FTE: 1 x Senior Advisor – Engagement and Implementation (lead) 1 x Advisor – Guidance and Education 1 x Advisor – Comms

Internal stakeholder management and engagement

Description of issues/opportunities	Recommended action	Indicative timeframe	Suggested priority	Resource required (indicative)
To support coordination of our registration, compliance and enforcement functions we need strong connections between the authorisations team, inspectorate and other teams (such as Operational Policy, Regulatory Frameworks, Legal, Communications)	<p>Establish a quarterly meeting so there is regular, timely communication between teams/functions.</p> <p>Consider developing an internal communications strategy.</p>	February 2021	Medium	<p>2 FTE:</p> <p>1 x Operational Excellence (lead)</p> <p>1 x Senior Advisor – TP and S</p>
Information about the regulatory regime, system, and participants in it doesn't always go to the right place in WorkSafe. For example, recognised safety auditor reports that identify major and minor issues – currently these are referred to those carrying out activities related to the registration function but perhaps they should go to the inspectorate.	Consider all the information we receive regarding the regime and system, and who should have that information, and what they should do with it.	February 2021	Medium	<p>1 FTE:</p> <p>1 x Advisor – Operational Excellence (lead)</p>
It is unclear how well people understand WorkSafe's role in the regime.	Raise awareness of our regulatory stewardship role and our people's role in that.	June 2021	Low	<p>3 FTE:</p> <p>1 x Senior Advisor - L and D (lead)</p> <p>1 x Senior Advisor – TP and S</p> <p>1 X GI/SI</p>

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Appendix 3: Risks and mitigations

Risks	Mitigations
Legal	
<p>[REDACTED]</p>	<p>[REDACTED]</p>
Reputation	
<p>If the recommended actions are not progressed Then there is a risk to WorkSafe and New Zealand’s reputation Resulting in potential damage to New Zealand’s image as a tourism destination and WorkSafe’s image as work health and safety regulator.</p>	<ul style="list-style-type: none"> • Update the Board and Minister highlighting the issues and opportunities, recommended actions, and work underway. • Commit to timely consideration, prioritisation and delivery of agreed actions.
<p>If we take longer than indicated to deliver this work Then the public may question why we have taken so long Resulting in people approaching the Minister to question WorkSafe’s implementation and administration of the regime.</p>	<ul style="list-style-type: none"> • Timely updates to the Minister highlighting that WorkSafe has needed time to consider the issues and opportunities properly and what we are doing.
System integrity	
<p>If one of the two recognised safety auditor in New Zealand stops operating Then there would only be one recognised safety auditor remaining Resulting in a monopoly, delays to re-registration of adventure activity operators, and market failure.</p>	<ul style="list-style-type: none"> • Proposed action to seek regulatory amendment so WorkSafe can intervene in the event of market failure. Further analysis will be needed to determine how we could intervene, and so we are prepared to do so.
<p>If current delivery continues and delegations are not changed while the recommended actions are progressed Then there may be significant demands on those carrying out activities related to the registration function, including work outside their primary area to deliver Resulting in impacts on the quality and timeliness of work, and delays to the registration process.</p>	<ul style="list-style-type: none"> • Update the delegations as soon as possible. • Support those carrying out activities related to the registration function to deliver their roles. • Provide those carrying out activities related to the registration function with the organisation’s backing so they are confident to ask for help and say no to demands outside their primary area. • Evaluate the resourcing required to deliver the registration functions.
Resourcing	
<p>If the approaching first anniversary of the Whakaari/White Island incident or this Health Check results in significant public interest Then there is likely to be increased awareness of us and our work Resulting in increased media interest and queries, and more pressure for some of our people.</p>	<ul style="list-style-type: none"> • Deliver communications internally and externally to set out what we have done/are doing. • Plan and allocate resource to respond to OIAs and correspondence. Provide support to our people who need it.