

*It seems that directors are being prosecuted more frequently by health and safety regulators in New Zealand and Australia. In this issue, we report on the first sentencing of a director following a WorkSafe prosecution and another conviction (under appeal) of a director in Queensland. We also look at the first Compliance Notice issued by the Privacy Commissioner and a substantial fine under the Fair Trading Act for a company selling unsafe hot water bottles. Finally, we briefly cover an official review which found that WorkSafe fell short of good practice in its regulation of activities on Whakaari/White Island before the devastating eruption in 2019.*

## First conviction of a director by WorkSafe results in \$35k fine and \$120k fine for the company

The first [WorkSafe prosecution](#) and subsequent conviction and sentencing of a director for health and safety failings resulted in a fine of \$35,000 for the director along with a fine of \$120,000 for the PCBU. Reparations of \$30,000 were also ordered. While the fine is not large, it may signal a new willingness by WorkSafe to pursue directors after serious or repeated health and safety failings are identified in a PCBU.

After the sentencing, WorkSafe said that directors have explicit legal duties to undertake due diligence on their company's adherence to health and safety obligations and failing to do so not only puts their workers at risk, but it also puts them in WorkSafe's sights.

The prosecution arose after a worker suffered crushing injuries while operating a metal press. The ends of his right middle and ring fingers required amputation as a result.

WorkSafe's investigation found that the press was not properly guarded and did not have the required emergency stop button. It also found a history of the machine not operating as expected and that the PCBU had not identified this as a risk. In addition, the company's induction and staff training was haphazard and

undocumented, and the company could not produce any evidence of the victim having been properly trained in the press's use.

WorkSafe commented that: "What makes this case all the more concerning is that the company has had two previous convictions for incidents involving presses and injuries to workers' hands and fingers. At the time of the incident the company was also non-compliant with three WorkSafe Improvement Notices relating to non-implementation of a health and safety manual; inadequate safe operating procedure; and training issues." Notably, WorkSafe said the director should have known he had to step up and fix the "litany of problems" evident in his business.

Prosecutions of directors both in New Zealand and Australia are becoming more common. In [June](#) we covered a prosecution in Australia which saw a director receiving a suspended prison sentence. We also provided [links](#) to guidance on health and safety leadership. In [September](#), we reported on charges being filed against the ex-CEO of Ports of Auckland. And we cover another Australian prosecution in this issue.

## Reserve Bank receives the first Compliance Notice issued by the Privacy Commissioner

The Privacy Commissioner recently issued his [first Compliance Notice](#) under the new Privacy Act. But it didn't go to a business; rather it went to the Reserve Bank of New Zealand.

The Notice was triggered by a cyber attack in December 2020. The Privacy Commissioner said that the attack was a significant breach of one of the Bank's security systems and raised the possibility of systemic weakness in the Bank's systems and processes for protecting personal information. An independent review revealed multiple areas of non-compliance with Privacy Principle 5 which says agencies that hold personal information must have reasonable security safeguards in place to protect personal privacy.

Notices and enforcement action over privacy breaches may become more common. The Privacy Commissioner warned: "Where we identify issues that compromise the security of personal information, we will use our

compliance powers to make sure that these risks are addressed."

You can read more about the new powers available to the Privacy Commissioner in VL's September issue of [UnderCover](#).



*"We've updated our privacy policy...  
it's so private we can't even tell you."*

## Queensland company fined AU\$500k and its director sentenced to six months imprisonment

A [Queensland company](#) has been fined AU\$500,000 and its director sentenced to six months imprisonment, wholly suspended for a period of 12 months, after both were convicted of charges relating to reckless conduct in relation to workers' health and safety.

The company operated a sand mine and the director managed the operations at the site. In March 2019, the suction line to the sand wash plant broke. A few days later, the director decided that the valve on the pipe of the sand wash plant would be fixed by two of the workers repairing it while working from a wheel loader's bucket.

One worker operated the wheel loader and lifted its bucket containing the two workers to an approximate height of 4.5 metres. The worker then drove it towards the sand wash plant to allow them to work on the valve. A chain was attached to the wheel loader's boom close to where one worker was in the bucket and the other end was hooked onto the pipe of the sand wash plant to stop it falling when it was disconnected. The worker then knelt on the edge of the bucket, holding tools, and commenced repairing the valve. As he was doing so, the other worker in the bucket held onto him, attempting to prevent him falling forward out of the bucket.

The wheel loader's bucket containing the workers then tilted forward. One worker jumped from the bucket onto the metal cross beam of the sand wash plant to avoid falling to the ground. The other worker went to stand up in the bucket and caught the back of his head against the chain. The worker could not move his head and could feel the bucket pushing against it. Both workers yelled for the operator to stop and the bucket stopped tilting forward

and released the worker's head. The bucket was lowered to the ground. An ambulance was called, and the injured worker was transported to hospital where he was found to have two lacerations on his head, measuring 60mm and 100mm, requiring stitches.

Two days later scaffolding was erected, at a cost of \$4,400, and the valve was repaired.

The investigation found that the company had procedures for working at height while repairing blockages which stipulated that a safety harness and a cherry picker or scaffolding or tools were to be used as required. It also had another procedure for front end loaders which said: "No persons are to ride on the plant or attachments." Yet it was established that several of the workers involved in the incident had performed work from the bucket of an excavator or a wheel loader on other occasions at the workplace.

The Judge acknowledged it was the conduct of the director which constituted the offending of the company. The director directed workers to engage in work using unsuitable machinery, despite documented procedures identifying the appropriate measures, and there was a risk posed to the workers from the instability of the plant, whether through human operation or otherwise. The Judge also accepted the offending conduct was serious and its associated risk was high and commented that it was fortunate more extensive consequences did not result. The reckless conduct was not just engaged in without reasonable excuse but with a degree of planning and reflection. It was not conduct engaged on the spur of the moment.

## Business feels ComCom heat after selling unsafe hot water bottles

We have previously reported on the Commerce Commission prosecuting companies under the Fair Trading Act for selling [unsafe toys](#). In August, a wholesaling company was [fined](#) \$104,000 under the same Act for selling unsafe hot water bottles. The company pleaded guilty to five charges including three for making false and/or misleading representations that two types of the hot water bottles it supplied complied with the relevant safety standard when they did not.

The Judge accepted the Commerce Commission's submission that had the company carried out a brief visual inspection of the hot water bottles, the multiple compliance failures would have been evident, and noted that the company was a sufficiently large enough business to have a robust compliance scheme.

## WorkSafe's regulatory performance "fell short" in relation to Whakaari/White Island

Following the Whakaari/White Island eruption, the Minister for Workplace Relations and Safety asked [MBIE](#) to provide him with advice on whether WorkSafe had carried out its obligations appropriately in relation to Whakaari/White Island. As a result, a review was carried out by David Laurenson QC.

The [review](#) found that WorkSafe fell short of good practice in its regulation of activities on Whakaari/White Island over the 2014-19 period. The review says that improvements are needed in WorkSafe's management of the adventure activities system.

[WorkSafe](#) said it accepted that there were significant shortcomings in its implementation and enforcement of the Adventure Activities Regulations in relation to adventure activities on Whakaari and deeply regretted this. It also said it particularly welcomed the review's recommendation to introduce a group of independent technical experts, identified by an appropriate industry body, who would be available as an extra layer of assurance for the safety audits of adventure activity operators on Whakaari.