

20 June 2023

The Right Honourable Michael Wood
Minister of Workplace Relations & Safety

The Right Honourable Paul Goldsmith
National Party Spokesperson for Workplace Relations & Safety

The Right Honourable David Seymour
Leader – ACT Party

Dear Minister Wood, Mr Goldsmith and Mr Seymour

WorkSafe New Zealand and the performance of compliance certifiers

This letter and its attachment contain proof of systemic delinquency by compliance certifiers and extensive supervisory failures by WorkSafe in relation to performance of their respective roles in the hazardous substances' compliance regime. The risk of catastrophic failure is being fueled, not averted, by these failures and then accentuated by the neglect of PCBUs. Innocent workers continue to be recklessly exposed to toxins and other risks of harm at work. This letter explains why you must act. I am willing to help.

What am I asking you to do and why this letter is addressed to you

I implore you to exercise your Ministerial authority to thoroughly investigate the allegations in this letter regarding profound failures by the executive of WorkSafe New Zealand (**WorkSafe**) to perform key supervisory functions which WorkSafe is required to perform under Part 6 of the Health and Safety at Work (Hazardous Substances) Regulations 2017 (**Regulations**). Part 6 deals with supervision of the performance of the only front-line auditors of regulatory compliance at workplaces with hazardous substances, "compliance certifiers", who have a unique and highly-trusted role in the compliance regime¹; by definition, the quality of their performance and supervision by WorkSafe are pivotal to achieving the risk mitigation which the Regulations have legislated.

The term "hazardous substances" is apt. The Pike River tragedy was evidently caused by the ignition of a flammable gas (methane). In relation to the very real risks downstream of the issues raised in this letter, please consider what the impacts will be at one particular workplace with several sources of ignition close to oxygen and flammable gases where there are also large quantities of cyanide. Or consider the 750-900 deaths² suffered annually by workers poisoned for decades at work whose cancers and deaths are largely hidden from the public eye when they die painfully in palliative care. Now ask whether you would be concerned if WorkSafe had not regularly (or even periodically) inspected many sites which have this level of danger. Ask whether you would allow your family members to work in the riskiest workplaces in New Zealand. These are the disaster scenarios I

¹ They alone are the persons empowered under the Regulations to issue certificates of compliance which are required to be obtained by some PCBU's.

² The numbers are WorkSafe's.

encourage you to keep in mind, especially since WorkSafe exists to prevent such disasters from occurring and to give workers every reasonable opportunity to not be poisoned.

For several years now, I have implored WorkSafe to address the profound failures by compliance certifiers, without any meaningful action resulting. I have spelled out many issues in extensive correspondence for the previous Chair, Mr Wilson, and the new Chair, Ms Kerr, and senior executives at WorkSafe. Their³ failures to make any meaningful positive change are the reasons this issue is being brought to your attention. Their alleged systemic failures in many areas, including those beyond the scope of this letter are creating high-risk workplaces unnecessarily. The high recurrence of (i) PCBUs exhibiting high levels of ignorance regarding their legal obligations, (ii) Kiwi business' "cut the corners" attitudes, and (iii) the costs of compliance (with the obvious risks) are being fuelled, not quelled, by both compliance certifiers' abysmal performance of their front-line obligations to audit compliance thoroughly and a regulator largely missing in action and handicapped by its own major skill deficiencies.

There is a close analogy between motor vehicle WOF issuers and the role of compliance certifiers. The absence of strong industry supervisory functions such as exist in the classical professions makes the regulators' active and effective supervisory role important. The data unveiled in this letter prove what I describe as pervasive certifier delinquency. Whilst the newspapers carried yet another story on 17 June 2023 about the scandalous conduct of yet another recalcitrant Auckland WOF issuer and the effective intervention of Waka Kotahi, evidence of comparable activity by WorkSafe is largely absent. I describe for you in this letter WorkSafe's own data which point to failures to perform its legislated supervisory functions and further evidence of its skill deficiencies exhibited by WorkSafe when it comes to inspecting the most dangerous workplaces in the country, including those governed by the Major Hazard Facilities Regulations 2016.

The WorkSafe New Zealand Act 2013 is now 10 years old. New Zealand should be benefitting from a mature, capable regulator which is making positive progress in relation to the very reason the Act was passed. Disappointingly, however, there is a documented trail of woeful performance that has been described in successive independent reviews and/or independent specialist commentary, including:

- David Laurenson's (KC) review into the events leading up to Whakaari Island
- Barrister, Tim Smith's review into the certifier notifications issue
- The SageBush review of WorkSafe's performance
- HASANZ review into the performance of various workplace health, safety and compliance providers
- Simpson Grierson partner, Bronwyn Heenan's article (Business desk) entitled "WorkSafe – not working for employers or employees" published last week.

In these pieces, there are eerie repetitions of conduct by the regulator that the Royal Commission of Inquiry into Pike River identified as contributing to the Pike River tragedy and that the legislation created subsequently was designed to prevent recurring. NZ's health & safety legislation is excellent, in my opinion, but the administration of it remains poor. I have little doubt that the underlying trends and performance remain in decay, while WorkSafe has changed the goalposts by which its performance (and that of PCBUs) is measured.

³ I wish to totally exclude Dr Simon Buckland, Brian Prince and Christoph Hasenhoerl who have consistently demonstrated a strong command of their roles, technical ability and excellence in the performance of their roles. Their high technical skills raise create a remarkable contrast to the weak skill sets exhibited elsewhere.

Commissions of Inquiry and expensive, but valuable, independent reviews normally occur after tragedies or obvious failure. The data I have compiled provides proof of failures which will lead to tragedy if left unchecked. We saw exactly this sequence of failures identified, inadequate action and then tragedy in the events leading up to Pike River and Whakaari Island. Indeed, it would be irresponsible of you to not act in a much more decisive way than simply asking for an explanation from those who have been closely associated with the many failures at WorkSafe.

List of Certifier Failures

With this letter, I am publishing for the first time a list of 50 sites that DGC's certifiers have inspected in the last 12 months or so that have revealed a 100% failure rate by other, non-DGC, certifiers whose certifications we have followed (**List of Certifier Failures**). This is compelling evidence of very high certifier delinquency⁴. That such high delinquency exists is also compelling evidence of WorkSafe's failure to perform the critical function that it alone has in relation to the administration of the hazardous substances' regime which is to police the performance of certifiers.

For many years now, I have implored WorkSafe to address the very issue that its Chief Executive has publicly acknowledged – that NZ has an aging cohort of certifiers with defective skills. I honestly believe Mr Parkes' statements⁵ in March 2022 were highly euphemistic descriptions of the problems in the industry. The problem is not just (for many of them but not all) their defective skills, but the obvious, expected consequence – locations with some very large quantities of highly toxic or dangerous chemicals are being wrongly certified as compliant when they have significant risk of causing serious harm to property and people.

In mid-2021, I wrote a lengthy letter to the previous Chair of WorkSafe which presented a reasoned basis for my conclusion that WorkSafe was "failing and flailing." My letter was given short shrift by the Chair and Chief Executive and, having regard to the apparent attitude of staunch denial (until perhaps proven to be a failure), it is no surprise that virtually nothing has been done by many certifiers⁶ or WorkSafe to address the many problems with the result that certifiers' profound delinquency has been allowed to continue.

By virtue of its legislative functions and broad powers to oversee, police and punish certifiers, it surely ought to be the case that WorkSafe has larger data sets and more information about certifier delinquency than anyone else has, yet the actions that WorkSafe has taken over the last four years have been totally impotent and, worse, have many more characteristics of dereliction of WorkSafe's statutory functions, than performance of them. The List of Certifier Failures is also a list of WorkSafe's failures because it is only through systemic failure by WorkSafe that we could have such widespread certifier delinquency.

Although not explained in detail in this letter, I have now seen instances where, after being notified of a site's non-compliance, the only matter which is documented in improvement notices issued by WorkSafe has been a requirement that the PCBU obtain a location compliance certificate (which can only be issued by a compliance certifier). I say this is an abdication of WorkSafe's role, very highly

⁴ I use the terms "delinquent" and "delinquency" in the formal sense – that is, that there has been neglect of duty, especially the requirements that must be verified before a compliance certificate can lawfully issue a certificate of compliance.

⁵ The fact he referred to compliance certifiers as "test certifiers" – a term outdated in 2017 – suggests he is far from familiar with the hazardous substances regime.

⁶ Certifiers have their own legal responsibilities to learn their trade and ply it correctly. This aspect must not be overlooked. Many are generating revenue of more than \$600,000 per annum operating as a very small business. Profits are well ahead of their skill development.

probably arising because of the weak skill sets in WorkSafe's Inspectorate generally⁷. The high level of certifier delinquency I can now prove means that the highest probability is that improvement notices result in further inspections by certifiers with skill deficiencies who, more often than not, issue compliance certificates when the regulatory requirements have not been met. Thus, WorkSafe is passing off its responsibilities (to identify regulatory breaches by the PCBUs) to persons whom it must know continue to exhibit very high levels of delinquency. I doubt even Joseph Heller could have conceived that such a destructive circle of failures could be operating in the way that this system is today.

When Tim Smith was appointed in 2021 to conduct his review into the dreadful compliance by certifiers with their Notification obligations, I argued that the biggest cause of all the problems was certifiers' delinquency in their audits and certification processes; these would inevitably lead to low Notification numbers. Mr Smith's scope was not extended to address these much wider issues of certifiers' performance. His excellent report led to some changes by WorkSafe, however WorkSafe's reluctance to publish anything other than one row of aggregate Notifications data⁸ suggest to me that WorkSafe is more intent upon hiding the glaring issues, rather than following the spirit of Mr Smith's recommendations⁹. The review also described the ludicrous approach at WorkSafe when Notifications were received – it had no intelligent system for dealing with what it received and WorkSafe employees with inadequate training were somehow expected to decide what to do with them¹⁰.

I believe now that WorkSafe is not just failing and flailing as I put it to the previous Chair, it is actively contributing to the very high levels of non-compliance that exist. The twin effects of WorkSafe's failures and certifiers' delinquency present material dangers. I am willing to describe these for you, Minister, by reference to sites in the attached list if you are willing to meet. Several have the very real potential to dwarf the scale of New Zealand's worst disasters. The other shocking aspect is the absence of any inspections by WorkSafe at sites that present such obvious high danger.¹¹

Proof of certifiers' delinquency

In late 2022, it became apparent to me in the face of denials by WorkSafe of a problem - that was obvious, serious and large - that to prove my claims about the poor state of certifiers' performance, I had to collate proof. I already had a very large data set (shared with Mr Smith) arising from the transition of "New DGC"¹² away from the practices of Old DGC¹³ which provided me with results that the prior senior certifiers and directors of Old DGC had issued certificates approximately 85 times per 100 inspections when the prescribed (and obligatory) regulatory requirements had not been met (85% failure or error rate). The results emerged after I demanded in 2020 that all DGC's certifiers follow the rules without fear or favour to the exact standards required by the law and we trained our

⁷ I have written to WorkSafe regularly about this with many specific examples.

⁸ This aspect is discussed in more detail below.

⁹ Mr Smith's report sensibly did focus on the massive divergence in rates of Notifications by certifier with most large certifiers issuing between zero and a few Notifications annually.

¹⁰ Thus, eight years into its existence as WorkSafe, basic systems and approaches to simple matters were highly lacking.

¹¹ This takes us into the area of WorkSafe's deficiencies in terms of training its inspectorate and the dreadfully-low productivity of its inspectorate, aspects that I have alerted WorkSafe to and have written about publicly. Because WorkSafe receives details of what is at each location, it could quickly identify potentially very high-risk workplaces. It apparently does not do this.

¹² Dangerous Goods Compliance Limited (DGC). I am Managing Director and controlling shareholder.

¹³ The predecessor "DGC business" previously owned by DGC Limited and sold to New DGC in 2019.

certifiers properly. The causes of the identified failures were many. There was obvious, objective evidence of favoured outcomes for major clients, evidence of technical weakness (failure to know and/or apply the rules), evidence of poor inspections (some which an independent expert¹⁴ described as certifying by “tooting and waving” during a particular whistle-stop schedule of an Old DGC certifier in the South Island in 2019¹⁵) and evidence of soft (and therefore wrong) decisions¹⁶. The critical question was whether Old DGC’s failures were representative of the rest of certifiers’ standards, or an aberration. I believed then, and now, that Old DGC’s results were representative of the entire industry generally (and no doubt there were, and continue to, be exceptions), both then and now.

If any certifier has poor knowledge of the rules (ability¹⁷), poor practices (conduct¹⁸) and, as a consequence, has issued large numbers of certificates when the regulatory requirements were not met (delinquency), there will either be continuation of the same conduct, or, if he turns over a new leaf as I made sure DGC did, there will be a period of massive change with obvious impacts (for example, high refusal to issue rates and a large number of notifications of such refusals to WorkSafe). There either is, or is not, a change in the certifier’s skill sets, performance standards and performance numbers. WorkSafe’s Notification data show that there have not been any of these periods of massive change by any other certifiers, therefore any objective review would likely show very high non-compliance with the requirements of the Regulations by many certifiers – in essence, if your practices were suspect and nothing has changed, then the non-compliance will be evident. Whilst WorkSafe has the power to collate such data (and literally is provided large volumes of data every week through certifications and Notifications at least), it is only through new customer acquisition that a firm such as DGC can collate its own proof of what is happening in the rest of the market.

The List of Certifier Failures contains the outcomes for all 50 inspections¹⁹ when a DGC auditor/certifier has followed the prior certification by a non-DGC certifier (almost exclusively this is where we are asked to consult or certify a location previously certified by other non-DGC certifiers). I asked that all such inspections be reported to me so that all the results could be collated. The List is attached without the names of the certifiers or the PCBUs.

The results are even worse than I had anticipated (~85% failure rates) on the back of the Old DGC results. **In 100% of the listed inspections, the PCBU did not meet the regulatory requirements and, therefore, every prior certification has been classified by me (with the assistance of our senior certifiers) as a “failure” by the prior certifiers (14 certifiers).** Having regard to the size of the data set and that it covers 14 different certifiers, the outcomes are statistically significant. Even if a generous assumption is made that there is a cohort of highly compliant and accurate certifiers, I am confident

¹⁴ In a sworn brief of evidence that was for use in High Court proceedings.

¹⁵ Stuff article on Waka Kotahi and the rascal WOF issuer noted that the WOF issuer had clearly not had sufficient time to conduct the required inspections before issuing the WOFs. There are similar obvious issues which are obvious to me from the most prolific certifiers. I have a strong view (based upon our firm’s experience) with maximum volumes that are realistic to ensure that quality and accuracy are maintained. There is at least one South Island certifier whose certificate numbers are off the charts and he has several entries in the List of Certifier Failures.

¹⁶ Indeed, the prior owners’ audit outcomes changed markedly from the final period in which they were deriving the profits to the next period when they were not. This highlights the most pronounced conflict issues (because they are economic or profit-related) in the certifier regime.

¹⁷ This is a reference to reg 6.15 which requires WorkSafe to investigate when it is apparent.

¹⁸ Op cit 13.

¹⁹ I waited until we had a data set of 50 before publishing it today.

that the extrapolation of our results to the entire market suggests that well more than 50% of audits and certifications are not completed to the requirements of the Regulations.

I am also very highly confident that there are very large certification categories where certifiers invariably do not follow regulatory requirements – these include, for example, certification of retail shops²⁰ and certification of underground stationary container systems (petrol station tanks) in relation to which the likely failed inspections or incorrect certifications exceed in aggregate 1000 in number approximately annually. In relation to other types of assets, there have been further widespread failures by certifiers – for example, in relation to compliance with the requirements of reg 10.6 and AS 60079, and AS 1940 cabinets. There has been a veritable fiasco in relation to checking compliance requirements for AS 1940 (hazardous substances) cabinets²¹ (probable installed base of more than 5,000 nationally). Thus, the top-down estimates of failed certifications quickly add up to a range of 5,000-10,000 (or approximately ~40% of certifications for stationary container systems and locations). There are other categories which take this top-down calculation above 50%. The numbers may well be much higher than this.

There is, without doubt therefore in my view after considering all relevant factors, massive failure/delinquency by certifiers. This must be known at WorkSafe, especially having regard to the conclusions of the 2019 HASANZ study, and WorkSafe's CEO's acknowledgement before the parliamentary select committee in 2022 that there was an 'ageing cohort of compliance certifiers with skill deficiencies' which WorkSafe has since spent large amounts of money attempting to rectify (largely unsuccessfully). If WorkSafe is aware of the problem, and is spending large amounts of money on Massey University²² training modules, then surely it must be monitoring the ongoing degrees of delinquency to assess the impact of its spending to improve certifier performance? If it has been monitoring the activities with any diligence, it is obviously not doing anything to address the widespread problems.

There are no plausible explanations other than certifiers' delinquency

No doubt, there will be nay-sayers, especially at WorkSafe, who will construct weak, unsupported theories in an attempt to discredit my conclusions. These can be addressed now.

Since 2020, DGC has had a 100% success rate with all new certifier candidates and its existing certifiers' applications for increased authorisations (in aggregate, nine). These processes have involved extensive review by WorkSafe in relation to how DGC's certifiers have followed regulatory

²⁰ Complaints I have made to enable WorkSafe to investigate it simply seem to languish rather than investigated properly.

²¹ There may well be more than 4,000 defective fire-proof storage cabinets in workplaces. I have written about this also. [WorkSafe Issues | DGC Website \(dgcompliance.co.nz\)](#) "AS 1940 death traps."

²² WorkSafe should account for what it has spent on the certifier courses offered through Massey University and whether this has been money well spent. In my opinion, WorkSafe took a classically "Wellington or government approach" to a real issue and it will have achieved much less at considerable expense than sticking to its role as a regulator and leaving the private sector world of certifiers to respond in ways that the free market always does. Had, for example, WorkSafe said to certifiers "you've got 12 months to clean up your acts or you will be excised from the regime" positive changes (and exits by the least able) would have been inevitable. I believe the only certifier (who fit the description of the CEO's comments to the select committee) who enrolled in one of these courses quit without completing the course. Others evidently think their skills are adequate.

requirements, their knowledge of all rules, and the systems New DGC has developed. The 100% success rate shows that DGC is following the law. This rules out the theory that DGC is operating to standards above (or different from) what is required by the Regulations.

Our vast experience with auditing PCBU locations is that there are only rarely structural changes at locations²³ from year-to-year which impact compliance considerations. Thus, for example, “type B, C or D storage” locations are moved very infrequently; LPG locations also move infrequently only, and photographs can always verify this. There is, therefore, only an inconsequential impact attributable to PCBU changes at locations from year to year.

Over the last 24 months, very few changes have occurred in relation to the legal requirements that certifiers must verify. The effect of changes in the law is also, therefore, a non-factor in what our data point to.

All indicators, therefore, point to only one conclusion – that there are many certifiers who have not been operating to the standards required by the Regulations. It is of no import whether that is a function of their “skill deficiencies” or more deliberate causes. Mr Tim Smith rightly noted that there is a tension between some clients’ demand for a compliance certificate vs the demands on a certifier to follow the requirements of the Regulations²⁴. There are obvious commercial risks which could well have impacted how some certifiers attended to their legal responsibilities - the risk of upsetting clients by not kowtowing and issuing certificates can have significant commercial consequences if clients show their dis-satisfaction by leaving²⁵.

It is no secret that some certifiers have 100% pass rates from one year to the next – clients issued a certificate the prior year are, therefore, 100% certain of being recertified. This is a very highly unlikely to be due to the excellent performance of every one of their clients.

I can proudly say that there is a recurring characteristic of commitments to compliance in our client base (now). Sophisticated clients want compliance first, and certificates second, making us allies with them in shared compliance and certification objectives. We would be doing them a dis-service were this not the case, yet this is what is likely happening at many other certifiers. Certifiers not following regulatory requirements are exposing the community to risk, adding to risk that insurance claims may be denied, putting workers in harms’ way, and creating material tortious liabilities for themselves²⁶. Many clients in the attached List (who have moved on from certifiers who have failed them) are pleased that they finally know exactly what the law requires and they have committed to make their site(s) compliant. This is the irony of what is being allowed to happen – many PCBUs place great reliance upon what a compliance certifier decides and tells them. With poor or inaccurate advice, the PCBUs are not being given the opportunity to become fully compliant. This is also why it makes no sense for WorkSafe to be demanding that certifiers follow the rules and to weed out those who can’t, won’t or don’t.

My theory was always that WorkSafe would welcome a company of certifiers committed to the very high standards we set. This is not the case. I am convinced we (and me particularly) are seen as the “upstart” intent upon upsetting a wobbly old apple cart that WorkSafe and certifiers have been

²³ Tank wagons are entirely different. This is a comment about locations only.

²⁴ Once again, the analogy with issuers of WOFs is directly applicable.

²⁵ We have received such threats and demands from large PCBUs (who have now left).

²⁶ If they haven’t read it already, the High Court decision in Tasman District Council is essential knowledge for them.

pushing around the neighbourhood together, such as might have been done in the 1970's²⁷. I say it is time for WorkSafe to get real about the very reason it exists – all stakeholders must be required to follow the one set of rules, including WorkSafe, and it is WorkSafe's failure that is preventing certifiers from reaching an acceptable standard.

The Notifications data do provide some insights (if presented with sufficient detail) but WorkSafe has refused to do this

The law requires a certifier to make a decision promptly whether to issue, or refuse to issue, a certificate. After 15 working days, unrectified failures at the PCBU must be notified to WorkSafe²⁸. Notifications thus provide a litmus test of many things. In some periods, DGC has accounted for more than 75% of all Notifications, while having market share of around 10%. Our Notification rates have exceeded the rest of industry average by 7-10x at times. This alone ought to have been a siren call for WorkSafe to get to the bottom of the causes of such massive differences. No action was taken that I am aware of.

What we do know is that if a certifier has a 100% pass/certification rate, s/he will have a nil Notification rate. As I have said frequently, 0% (or low) Notification rates are highly likely evidence of the certifier's delinquency, not his client's proficiency, yet WorkSafe has apparently actively turned a blind eye to the aberrant data that demanded investigation. There is, in fact, a father/ son combination who have filed zero Notifications in some years²⁹ while issuing a very large number of certificates. Their partner shareholder has issued fewer than three Notifications annually for years. It is their Notification and certification outcomes as they communicate to WorkSafe that is creating the illusion of perfect clients and 100% pass rates. The two errors identified in my List by two of these certifiers are basic errors that I would be disappointed if our trainee certifiers made. Then, in addition, there will be several hundreds of stationary container system certificates that ought to be closely audited by WorkSafe³⁰.

Earlier this year (acting upon the recommendations of the Smith Report), WorkSafe wrote to every certifier providing each of them with his/her individual Notification and certificate numbers for the nine months to December 2022. To do this, WorkSafe evidently had a spreadsheet (or other format) with every certifier's individual data.

Despite my imploring requests³¹ that WorkSafe publish its Notification data (which only it has) in ways that would provide the readers with real information (including by listing all certifiers without names alongside and the types of certificates issued), it elected not to do so, meaning I have had to make OIA requests to obtain the necessary granularity. Thus, while WorkSafe has disclosed only the aggregate certificates and Notification numbers for all certifiers (with a calculated industry

²⁷ As I discovered, this still happens in Cefalu in Sicily where the vendor speaks a dialect that is as confusing as the message peddled by many NZ compliance certifiers! His fruit is good though which is where the analogy breaks down when it comes to WorkSafe.

²⁸ If no certificate has been issued in the interim. The 15 days has been specified following the Smith Report. Of course, if you are perfect certifier the additional requirements of abiding by the 15-day requirement has made zero difference.

²⁹ They also certify many underground petroleum tanks. WorkSafe will understand why this footnote is here! Each of their names is in our list even though we see very few of "their" sites.

³⁰ I will donate \$5,000 to WorkSafe (or a safety organization nominated by WorkSafe) if it can provide reasonable proof that the certifiers at "Father & Son" are operating in compliance with the standard that WorkSafe defined in its 2022 audit of a DGC certifier for the stationary container system certificates issued by certifiers at the firm in 2022.

³¹ To both Messrs Comben and Handforth.

Notification rate of around 2.4% (which is heavily influenced by DGC's Notifications), I have some details (from prior OIA requests) which do provide some critical insights. For example, WorkSafe's data show that in relation to the certification of tank wagons³² in 2022:

- DGC's certifier, who issued approximately 33% of all tank wagon certificates in the total market, had a Notification rate of 15% (approx. 2 Notifications for every 15 inspections), while
- all other tank wagon certifiers had a Notification rate of 0%! Yes, not one certifier who accounted for the other 67% of the market had any Notifications.

The other interesting fact is that the DGC certifier was mostly certifying tank wagons in 2022 which had previously been certified by other certifiers. He is, therefore, an excellent proxy for the entire market (because the tank wagons he inspected rule out the theory I have heard: "my clients were and are very compliant and this is why every one of them gets a certificate 100% of the time." The differences are not explainable by any other reason that this – certifier delinquency, perhaps with some (precluded by law) conflict of interest issues thrown in³³.

The DGC certifier's Notification rate for non-tank wagons was very similar to his tank wagon outcomes, or more than 7 times the rate of the rest of the industry. **Our List of Certifier Failures is highly probative that the reason for this astonishing difference is the same as it is for the differences in tank wagon certification and Notifications – certifier delinquency.**

Given that every objective indicator points to a continuation of the curse identified by WorkSafe's CEO - ageing certifiers with skill deficiencies – the Notifications data are one way to identify which certifiers have amended their ways. When presented in aggregate only, WorkSafe is concealing the meaningful data and, therefore, the very reason that Tim Smith recommended that the data be published.

What I believe can be fairly described as concealment of the granular results is a clue that WorkSafe has contributed to the long-term certifier delinquency.

You, Minister, issued a press release when the news broke in the NBR in 2021 that were massive apparent discrepancies in the Notifications data by certifier. Have you had a thorough update since? The same discrepancies exist today.

WorkSafe's role as an administrator of the hazardous substances' compliance regime

WorkSafe's role is to administer the hazardous substances compliance regime. It is neither a lawmaker, nor arbiter on what the rules require (much as it attempts to play this role). It has very few discretions with regards to what compliance certifiers do and this is a very important point. The regime is one, therefore, where certifiers have specific aspects which they must verify before issuing a certificate and there is, by definition, an objective assessment that be conducted by WorkSafe, or anyone, to ascertain whether this occurred.

It is parliament that has established the laws which govern the hazardous substances regime and has defined specific requirements that a certifier must follow. It is for WorkSafe to administer those rules. There is, for example, no discretion for WorkSafe to say to any certifier: "you don't have to obtain evidence that the PCBU has a compliant emergency response plan" or any way listed

³² These are mainly petrol tankers that WorkSafe has asserted present material risk of rolling over and exploding – by their definition, a very high-risk asset class.

³³ WorkSafe has been alerted to the certifiers to whom this comment applies.

requirement. The rules and the elements that a certifier must follow are black and white. Whether s/he has followed all requirements before issuing a certificate can be assessed objectively.

Part 6 contains the machinery for WorkSafe to audit what certifiers do. The power to remove or suspend authorisations (ending a certifier's career) can be, and has been, invoked³⁴. This is the countervailing control on delinquent certifiers; few of them would willingly risk a lucrative income stream by not following the rules if they believed that WorkSafe will perform the audit and investigation functions diligently and objectively - why risk it? There are, however, WorkSafe data sets that suggest strongly that WorkSafe does not exercise its powers diligently and objectively, or even fairly.

Given that, in meeting its requirement to conduct formal audits four-yearly, WorkSafe could confine itself to auditing only four files per certifier³⁵ out of perhaps 2,000 certificates issued by him, it would not be surprising if a positive audit outcome could be engineered especially by choosing to audit only those certificates with very high expected compliant inspections and records. There are three immediately obvious areas of judgment calls to be made by WorkSafe which can hugely impact what is that it discovers about a certifier's ability and conduct:

- frequency of audits;
- number of files in each audit; and
- types of files selected for audit.

To demonstrate my concern, consider this hypothetical - It would be truly shocking if a certifier did not have at least 5% of her certifications completed reasonably accurately and competently, making for 100 files (5% of 2000) that might suggest she is competent. Like the game of battleships, in any random selection, there is a very low probability only of not picking up at least one of 1,900 files for audit that would suggest her incompetence. The probabilities can change if you have some inside information about the competitor's naval fleet / types of files that she is good at.

Conversely, selecting any of the thousands of underground petroleum tank certificates issued in the last four years would have a very high probability of "discovering" non-compliance by the certifier because there is absolutely no doubt that almost every certifier certifying such assets is not following the requirements of Part 17³⁶. There is a massive "battleship" that WorkSafe can hit with 90% confidence³⁷ if it wishes to.

A second way for WorkSafe to avoid invoking the powers in Part 6 diligently and objectively is to cherry pick what happens with complaints and to exceed its authority when it comes to applying the discretions that do exist to not investigate some complaints. These aspects are discussed below.

In whatever manner WorkSafe is approaching its roles in Part 6, it is surely failing having regard to the high levels of certifier delinquencies because this is what the Part 6 powers and required procedures are designed to catch.

³⁴ One example from 2018 was one certifier who was formally told his authorisations would not be removed for a handful of reasons, including that he had not made any Notifications. It is evident that now WorkSafe must have a different view about this.

³⁵ This is WorkSafe's recurring number – audits of four files. What it takes WorkSafe months to do, it takes skilled DGC certifiers less than a day to do. This is one of many indicators of dreadful productivity at WorkSafe.

³⁶ WorkSafe's reluctance to investigate this is evident from its written responses in 2023 which have suggested that WorkSafe has no tangible information in relation to the accuracy of certifiers' compliance with Part 17.

³⁷ And it has done exactly this. The burning question is why certifier certifying underground petroleum tanks has not been hit in the same way.

What WorkSafe does with complaints³⁸

The long duration answer to this question is that, at one extreme, WorkSafe has used complaints to wage campaigns against certifiers, while massively exceeding its powers and any semblance of fair play and objectivity, while other complaints have evidently been shuffled down the most benevolent (for the certifier) corridor that WorkSafe has been able to find. There is direct evidence of both extremes. Much has turned for some time upon who someone is, rather than one's performance as a certifier. This is the foundation for my allegation of bias on WorkSafe's part³⁹.

It ought to be trite to observe that many complaints should be a valuable source of evidence regarding "the ability or conduct of a compliance certifier."⁴⁰ Thus, for example, the 50 instances of failure identified in the attached list will, this week, be turned by me into formal complaints about each of the affected certifier's ability and conduct. One would expect a regulator performing its role objectively and fairly to investigate almost all of these, especially because:

- WorkSafe may have audited fewer than 0.2% of the certifier's files whilst I am providing as many as ten or more instances which show the certifier's failure and, therefore,
- complaints provide a much more valuable opportunity for WorkSafe to thoroughly assess the "ability and conduct" of the certifier.

Whether it is us or others complaining, the opportunity to investigate a complaint about what a certifier has done (and how the alleged failures occurred) provides the opportunity for much greater insights into the complainees' ability and conduct. This is the bread and butter of the supervisory (and disciplinary) arms in most professional services industries (eg lawyers and accountants) which provide oversight of their members. Most often the complaints are what lead to sanctions because at the heart of many complaints is evidence of failure or unacceptable conduct. For example, the disciplinary body of the New Zealand Law Society has a strong vested interest in dealing with complaints diligently and taking appropriate disciplinary action because it is very much in the interests of the profession as a whole that this occurs.

The purposive effect of reg 6.15 is that WorkSafe should conduct an investigation when a complaint raises concerns about the ability or conduct of a certifier unless one of the listed discretions in reg 6.15(2) applies. The provision does not give WorkSafe a series of outs (reg 6.15(2)) and then a sweeping discretion to, for example, not investigate the "Teflon certifiers." This is why WorkSafe's data that it did not turn any of 32 complaints into an investigation is surely evidence of its failure to follow its responsibilities as shown in WorkSafe's own table below supplied in response to an OIA request.

³⁸ The formal process is governed by reg 6.15 and subsequent regulations.

³⁹ This allegation has been put formally to WorkSafe many times and there has never been an adequate denial.

⁴⁰ This is the focus of reg 6.15.

Appendix One

Table One – Compliance Certifiers

Certifier	Date of Completion of last formal "Audit" (A Date)	Date of completion of prior audit	Substantial reviews of Performance from 1/1/2020 -1/9/2022	Number of Complaints made about performance or ability during: 1/1/2020-1/9/2022	Number of Investigations undertaken by WorkSafe pursuant to reg 6.15 during: 1/1/2020-1/9/2022
A	January 2018	September 2015	1	1	0
B	In progress	Not held by WorkSafe	In progress	5	0
C	November 2018	May 2015	1	6	0
D	October 2022	June 2017	1	0	0
E	November 2018	January 2018	In progress	2	0
F	Not applicable	June 2017	1	2	0
G	May 2019	May 2019	In progress	4	0
H	May 2021	Not held by WorkSafe	1	1	0
I	May 2022	August 2015	1	4	0
J	October 2021	May 2015	In progress	3	0
K	March 2021	May 2015	In progress	0	0
L	June 2021	May 2015	In progress	2	0
M	June 2021	Not held by WorkSafe	0	1	0
N	February 2021	May 2015	1	1	0
O	In progress	May 2015	1	0	0



Level 6, 86 Customhouse Quay
PO Box 165, Wellington 6140
0800 030 040 worksafe.govt.nz

Borrowing from the analogy of why a supervising body (eg process for obtaining a driver’s licence) ought to pay particular attention to ability and conduct is that inability or poor conduct will likely lead to problems and failure at some point. Any licensing/ supervisory body should not wait for the driver to crash the car before intervening to remove the driver’s licence. The lack of ability or conduct may be apparent from what has already occurred (for example, an old driver whose physical faculties have become impaired as demonstrated by some minor crashes) and ought to precipitate intervention. Yet WorkSafe has made a point of not proceeding as required by Part 6 in these documented ways:

- Between the period 1 January 2020- 1 September 2022, it received 32 complaints in relation to the top 15 certifiers, yet did not turn any one of those complaints into an investigation - not one!⁴¹
- Relative to the mandatory four-yearly audit requirement, some audits of top 15 certifiers have been allowed to balloon out to six years (without any adequate explanation).
- Anecdotally, I know one certifier was able to push off a required audit by as much as 12 months⁴² with apparent full acquiescence by WorkSafe.

⁴¹ A more detailed discussion of this issue is on DGC’s website at [WorkSafe Issues | DGC Website \(dgcompliance.co.nz\)](http://WorkSafe Issues | DGC Website (dgcompliance.co.nz)) “Analysis of the performance of WorkSafe’s Regulatory Assurance Group.”

⁴² The very close personal relationship between the certifier and a senior WorkSafe employee has been brought to WorkSafe’s attention and WorkSafe has been invited to state that it has addressed all aspects of conflict of interest arising from this relationship. WorkSafe has not done so and has provided no reassurance that there is no substance to my concerns. As has been in the news extensively of late, conflicts of interest are important and when not addressed properly should lead to severe repercussions.

- WorkSafe has wrongly conflated its (lay) perspectives on “safety risk” with the implications of the lack of “ability or conduct”⁴³ – safety issues are wholly irrelevant to reg 6.15 (meaning WorkSafe is effectively asserting that it will only be after the site has blown up that it will take action).
- WorkSafe has itself admitted to a lack of ability to understand what the (even basic) requirements of the Regulations are (e.g. the preclusion of having a HSL in class 5’s inside a retail shop).
- WorkSafe’s preliminary investigative steps have been obviously flawed at times (as noted below) in such obviously lame ways that someone in management ought to have caught these errors and put a stop to them.

Most investigative bodies appreciate that when evidence of failure is identified, provided the investigation occurs lawfully⁴⁴, conducting broader enquiries is prudent because this can establish whether there are profound or systemic failures by the complaine. In my experience, WorkSafe has only been willing to make broader investigations when it is choosing to victimise a certifier, including when acting *ultra vires*⁴⁵. There is no need for this when WorkSafe develops a reasonable concern about a certifier’s conduct or ability.

Had, for example, our complaints about Certifier A in 2020 or 2022 been investigated properly, WorkSafe would surely have discovered the many failures in ability and conduct which are evident in the files shown in our List of Certifier Failures. WorkSafe did not even, for example, ask for a copy of the certifier’s report (or records which s/he is required to keep under the performance standards) when investigating the 2022 complaint. Even on the limited information we obtained under the OIA request, there were flaws in what the certifier did and WorkSafe apparently did not pick these up⁴⁶. I suspect that in certifier A’s client list are more than 1000 clients who have defective site plans, for starters. The certifier’s recent messaging to clients along the lines of “I can’t approve last year’s site plans because WorkSafe is all over me this year” might have been expected in 2018 (after the new Regulations came into force) but not in 2022 – there are, in all likelihood, many thousands of flawed certifications in the certifier’s last five years of “work.” What exactly did WorkSafe do to audit this certifier between 2019 and 2022? He epitomises what I describe as a Teflon certifier.

Certifier reauthorisations delays point to further problems at WorkSafe

Certifiers must apply every five years (most commonly) for their authorisations to be renewed. This is another time when WorkSafe must assess the performance, at least, of the compliance certifier.

When I compare the recurring names in my List of Certifier Failures with the status shown on the WorkSafe register of compliance certifiers for certifiers whose reauthorisations have been extensively delayed, I find:

⁴³ WorkSafe has written exactly this when explaining why it has not taken a complaint very far at all. This has been the reason given even when there is direct evidence of a wholesale lack of ability or poor conduct by the complaine certifier.

⁴⁴ WorkSafe’s powers to do this come exclusively from reg 6.15. There are instances of the powers being invoked when the pre-requisites have not existed.

⁴⁵ One such egregious example has been under review by the Ombudsman for more than two years.

⁴⁶ Concerns about the profound lack of technical ability have also been brought to WorkSafe’s attention without any evident adequate response or action being taken.

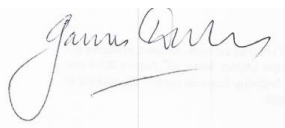
- Certifier A has more than 10 entries in my list and his reauthorisations have been pending for more than 12 months.⁴⁷
- Certifier B also has more than 10 entries in my list and his reauthorisations have been pending for more than 12 months also.
- Certifier C has three entries in my list – authorisations expired more than 12 months ago.
- Certifier D had his authorisations renewed right around the time he was issuing the certificates in my list that were pointing to the individual’s lack of ability or poor conduct.

Ultimately WorkSafe controls the timing of the reauthorisation applications. I simply say that, if the candidates can’t establish the required standard within a reasonable period, it is time for the regime to move on without them. Why can’t WorkSafe make decisions in a timely manner? If there are concerns about any certifier, why does WorkSafe allow him to play Russian roulette with what is certified by him?

Conclusion

I trust you will make the necessary, and obvious, changes. I welcome the opportunity to discuss these issues with you and I have several obvious and easy steps that could be followed to achieve a significant turn-around at WorkSafe within 12 months. It will involve more than rearrangement of deck chairs.

Sincerely

A handwritten signature in black ink, appearing to read 'James Dunphy', written over a light grey grid background.

James Dunphy

⁴⁷ WorkSafe knows the exact length. It is a staggeringly-long time.

						Compliance with selected mandatory requirements?						
DGC Client	Full insp (F) /other	Prior certifier(s) (concealed in this version)	Certified for	Assessment	Compliance issues with Part? (10, 11, 12 13, 16 and 17, as applicable)	Reg 10.6	Site plan	Worker train	ERP	Signage	Fire ext	Security
Not shown	F	Concealed	LPG	FAIL			No		No	No	No	
Not shown	Other	Certifier F	Class 3	FAIL	breaches Part 11 (esp 11.31)		No					
Not shown	Other	Certifier F	LPG & Class 2,3,5,6&8	FAIL	Not compliant in any class	No	No					
Not shown	F	Concealed	LPG & Class 3	FAIL		No	No	No				
Not shown	F	Concealed	LPG	FAIL			No		No			
Not shown	F	Certifier B	LPG	FAIL				No	No			
Not shown	F	Certifier B	LPG	FAIL			No					
Not shown	F	Certifier B	LPG	FAIL			No		No			
Not shown	F	Certifier B	LPG	FAIL			No		No	No	No	No
Not shown	F	Certifier B	LPG	FAIL	breaches Part 11	No	No					
Not shown	F	Certifier B	LPG	FAIL		No	No		No			
Not shown	F	Certifier B	LPG	FAIL	breaches Part 11		No			No		
Not shown	F	Certifier B	LPG	FAIL	breaches Part 11		No		No			
Not shown	F	Certifier B	LPG & Class 3	FAIL	breaches Part 11	No	No	No	No	No		No
Not shown	F	Certifier B	LPG & Class 3	FAIL	breaches Part 11							
Not shown	F	Certifier B	Class 6&8	FAIL	Breaches Part 13							
Not shown	Other	Certifier B	LPG	FAIL	breaches Part 11							
Not shown		Certifier B	LPG & Class 3&5	FAIL	breaches Part 11		No	No	No	No		
Not shown		Certifier B	LPG & Class 3&6	FAIL	breaches Part 11		No	No	No	No		
Not shown												
Not shown	Other	Concealed	LPG	FAIL	breaches Part 11							
Not shown	F	Concealed	Class 3	FAIL								
Not shown	F	Concealed	LPG	FAIL		No	No					
Not shown	F	Certifier C	Stationary containers	FAIL								

DGC Client	Full insp (F) /other	Prior certifier(s) (concealed in this version)	Certified for	Assessment	Compliance issues with Part? (10, 11, 12 13, 16 and 17, as applicable)	Reg 10.6	Site plan	Worker train	ERP	Signage	Fire ext	Security
Not shown	F	Certifier C	LPG	FAIL			No		No	No		No
Not shown	F	Certifier C	Class 3	FAIL	breaches Part 11		No	No	No			No
Not shown	F	Certifier B	Class 6&8	FAIL	Breaches Part 13							
Not shown	F	Certifier D	LPG & Class 3	FAIL	breaches Part 11	No						
Not shown	F	Certifier D	Class 3	FAIL	breaches Part 11		No	No		No		No
Not shown	F	Certifier D	Class 3	FAIL	breaches Part 11	No	No					
Not shown												
Not shown	F	Certifier E	LPG & class 2&3	FAIL	breaches Part 11		No	No		No		
Not shown	F	Certifier E	Stationary containers	FAIL								
Not shown	F	Concealed	TW	FAIL	No TAN number							
Not shown	Other	Certifier A	Class 6&8	FAIL	FAIL		No	No	No			
Not shown	Other	Certifier A	Class 6&8	FAIL	FAIL		No	No	No			
Not shown	Other	Certifier A	Class 5,6&8	FAIL	FAIL		No	No	No			
Not shown	Other	Certifier A	Class 8	FAIL	FAIL		No	No	No			
Not shown	Other	Certifier A	Class 4,5,6&8	FAIL	FAIL		No	No	No			
Not shown	F	Certifier A	Class 6&8	FAIL	FAIL		No	No	No			
Not shown	F	Certifier A	Class 6&8	FAIL	FAIL		No	No	No	No		
Not shown	Other	Certifier A	Class 6&8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	LPG	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	LPG & Class 5,6&8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	Class 5&6	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	Class 4,6&8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	Class 8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	Class 4,5,6&8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	Class 8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	Class 8	FAIL	FAIL		No	No	No	No		
Not shown	F	Certifier A	LPG & Class 5&8	FAIL	FAIL		No	No	No	No		