

## Analysis of the Performance of WorkSafe's Regulatory Assurance Group

### Abstract

Object failures by WorkSafe over a long period: acting *ultra vires*, lacking technical ability and basic investigative techniques, and unexplained differences suggesting biased approaches while creating "fear and trepidation" are contributing to WorkSafe's failure to perform the essential supervisory role that it must perform pursuant to Part 6 of the Health and Safety at Work (Hazardous Substances) Regulations 2017. WorkSafe's failure to adequately supervise the activities of many compliance certifiers, whom we estimate are issuing more than 50% of certificates when the required compliance aspects have not been met, are likely contributing to NZ's deteriorating workplace injury and property damage statistics in relation to hazardous substances.

James Dunphy

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Regulators are in the best position to regulate when they are intimately knowledgeable about the activities they are regulating.

John Thain

**Catching poachers requires knowledge of their ways. Best find one, if you don't already know one – poachers don't write manuals and leave them behind.**

Aasir Bandile

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**We query how WorkSafe can perform its roles monitoring, auditing and investigating the activities of compliance certifiers when there are evident deficiencies in their technical abilities throughout the Regulatory Assurance Team**

## A. Introduction and Executive Summary

WorkSafe is ill-equipped technically, and failing extensively, to perform its essential and necessary roles of supervising, and exerting quality control in relation to, the performance of compliance certifiers contained in Part 6 of the Health and Safety at Work (Hazardous Substances Regulations 2017 (**Regulations**) (**Supervisory Role**). This role is exclusively that of WorkSafe to be exercised through two primary mechanisms: investigations into their “ability and conduct” and audits of their performance. The supervisory role is an important one because compliance certifiers have unique “trusted” roles as they spearhead the regular audit of the PCBUs requiring certification and, thus, they are the principal investigators of compliance with hazardous substances requirements<sup>2</sup> (**Regulatory Requirements**). The group at WorkSafe which performs audits and investigations is called the Regulatory Assurance Team (**RAT Group**). Their own data show just their extensive failures.

It is axiomatic that, in order to perform their respective roles, certifiers and WorkSafe’s RAT Group must understand the Regulatory Requirements. In many important areas, this is not the case. In 2022, WorkSafe’s Chief Executive publicly referenced euphemistically the skills gaps<sup>3</sup> among certifiers which it has invested significant sums of money attempting to address through its funding of certifier training courses<sup>4</sup>. The presumption must be that the skills gaps remain because there is no evidence of improvement by most certifiers. DGC has a growing, statistically significant sample to prove that the industry’s “skills gaps” are extensive, they are not closing and apparently going undetected; we estimate that 50-75% or more of all compliance certifiers’ certificates (other than DGC’s) have been issued when Regulatory Requirements have not been met. This should indicate that there is a crisis of non-compliance which it is WorkSafe’s role to monitor.

Thus, whilst one would expect the RAT Group has been inundated with complaints and would have conducted many investigations which have led to significant penalties, WorkSafe’s data reveal in relation to

<sup>1</sup> John Thain is an American businessman, investment banker, and former chair and CEO of the CIT Group. Thain was the last chairman and chief executive officer of Merrill Lynch before its merger with Bank of America.

Aasir Bandile is the Wildlife Protection Director for the Kruger National Park.

<sup>2</sup> These are contained in many Acts, regulations, safe work instruments, Australian Standards, codes of practice and performance standards, most of which contain legal requirements for PCBUs which a certifier must understand and check.

<sup>3</sup> Comments before the Parliamentary Select Committee by Phil Parkes in March 2022. Op cit 8 below.

<sup>4</sup> Offered now by Massey University which none of the ageing fleet of certifiers with skill gaps have completed so far.

the most prolific certifiers (by numbers of certificates issued) during the period from 1 January 2020 to 30 October 2022 that:

- 32 complaints were made about the performance or conduct of these certifiers;
- ZERO investigations were commenced by the RAT Group (yes, none!);
- approximately 50% only of the required<sup>5</sup> four-yearly audits of these certifiers have been completed by WorkSafe within the required time frame; and
- actions taken against recalcitrant certifiers were mostly benign.

Relative to the outcomes of complaints processes in self-regulating professional services industries (law, accounting) or among effective government entities (eg the Fair Markets Authority), WorkSafe's outcomes are so low that the conclusion has to be that WorkSafe has entirely failed to perform adequately most of its required functions pursuant to Part 6 of the Regulations. Based upon the quotes above, we can assume that Mr Thane and Mr Bandile would immediately question the skill sets and techniques at WorkSafe (due to the absence of "intimate knowledge" because there must be a problem); our experience of WorkSafe generally, and in relation to the activities of the RAT Group, in particular, helps demonstrate how and why the failures have occurred. The specific situations discussed in this paper point to many deficiencies at WorkSafe:

- a) WorkSafe has poor knowledge of key technical matters from the top of the organization through to the Inspectorate.
- b) Managers of the RAT Group, especially, lack the technical training in the Regulatory Requirements and this must surely result in a lack of any adequate direction or input, especially in relation to the technical proficiency of the team.
- c) The "foot soldiers" in the RAT Group exhibit poor knowledge of Regulatory Requirements and evidently do not consult their more knowledgeable colleagues on technical matters even when the technical decisions are fundamental to the issues before them.
- d) WorkSafe's approach to Part 6 and regulation 6.15, in particular, has not been correct as a matter of law. Over-reaching wrongly with the discretion in reg 6.15(20c) means they have been acting *ultra vires*; this is a major factor in the bizarre statistic that zero investigations have been undertaken in relation to a top 15 certifier under reg 6.15 in nearly three years.
- e) Their approach to audits is flawed conceptually, structurally and statistically. They audit infrequently and they do not examine sufficient files to derive a representative assessment of the deficiencies of the certifiers. The failure to inspect the locations certified means more than 60% of the critical evidence will not be gathered in forming an assessment.
- f) They fail to understand the explicit requirements of what a certifier is clearly required to sign off on before issuing a compliance certificate and they fail to understand that there is a strong thread in the Regulations to direct WorkSafe to focus hard on certifiers' compliance with all aspects of the law – these expectations are laid out, for example, in regulation 6.20.
- g) The combination of the flawed approach to audits, the technical weaknesses and the *ultra vires* behaviour is lethal because it is a material contributing factor to our view that other certifiers are conducting flawed certifications more than 50% of the time and this lack of compliance will cause deaths. This supports our thesis that WorkSafe is itself contributing to NZ's deteriorating workplace safety statistics.

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<sup>5</sup> Regulation 6.37 of the Regulations.

- h) There are inexplicable material differences in how different certifiers are treated which raises a suspicion of bias.
- i) They have openly acknowledged that their audits and investigations strike “fear and trepidation” and their abuses of this power are now the subject of proceedings in the District Court.
- j) That each of WorkSafe’s RAT Group managers live and work more than 600km from their subordinates cannot be helping them to detect poor conduct within the team.

Most people would assume that anyone who gets nothing right during an inspection (certifier) or assignment (accountant or other professional), there would be an automatic prima facie significant concern about that person. In several examples, WorkSafe has taken a benign view of the evident significant lack of “ability” or poor “conduct”<sup>6</sup> that these examples have displayed.

#### ***Renewal of authorisations by certifiers – more astonishing outcomes***

Closely related to the audits, receipt of complaints and investigations that WorkSafe (ought to) conducts is considering applications by certifiers for renewal of authorisations. From a practical perspective, the essence of the enquiry in relation to renewals must be the ability and conduct of the certifier, including the specific listed criterion<sup>7</sup> that WorkSafe may decline to grant the renewal if the certifier has “failed to a significant degree to comply with performance standards.” The outcomes in relation to renewals are staggering – many renewals have not been granted more than 12 months after expiry of the prior authorisations and, in one case, the time elapsed from expiry to current (with the outcome still pending) is now more than 28 months. There are either material issues with certifiers’ performance or material issues with WorkSafe’s processes. We believe the issues at WorkSafe are not explained by lack of resources but by lack of ability and efficiency when benchmarked at DGC’s audit functions.

There are parallels between, on the one hand, the essential roles of dentists’ prevention of tooth decay and gum disease through regular check-ups, and, on the other, what ought to be happening through the roles of skilled compliance certifiers detecting issues and holding up issuing certificates until non-compliance has been rectified. Just as there is an industry body overseeing the performance of dentists and a government ministry (Department of Health) that ought to be focused on the nation’s oral health statistics, WorkSafe’s Supervisory Role is critical and its obligation to perform this role is statutory, not optional. The difference is that NZ’s deteriorating tooth decay statistics are being driven by economic factors<sup>8</sup> not the performance or capability of dentists, whereas NZ’s deteriorating workplace accidents are caused by the underperformance of certifiers and WorkSafe.

#### ***Known weaknesses yet avoidance of actions by WorkSafe to address the biggest issues***

WorkSafe’s CEO has publicly spoken of the skills gaps<sup>9</sup> amongst certifiers yet his organization has been ineffective in addressing them, notwithstanding the existence of a powerful regulatory framework in Part 6 of the Regulations for doing so. He reported to the parliamentary select committee that “we’ve increased our monitoring activity about how those test certifiers are performing their obligations” which has not been evident, at all, to us. Thus, when all the pieces discussed in this paper are assembled, we have:

- acknowledged deficiencies in compliance certifiers that it is WorkSafe’s role to supervise and correct;

<sup>6</sup> The specific words are in reg 6.15 and, therefore, are exactly what WorkSafe should be investigating.

<sup>7</sup> Regulation 6.14(4).

<sup>8</sup> Impacting lower socio-economic groups who are baulking at the non-subsidised dental care costs

<sup>9</sup> Meeting of parliamentary select committee in March 2022. Statements by Parkes “We’ve been working for a number of years now since the creation of WorkSafe to improve the capability and competence of those test certifiers. There’s <sic> a number of challenges with the model.”

- despite its comments to the contrary, evidence that WorkSafe is actively avoiding holding certifiers to proper account, including by acting *ultra vires* when it comes to decision-making following receipt of complaints;
- evidence that WorkSafe lacks the necessary technical skills to perform its Supervisory Roles;
- concerns regarding bias in the RAT's team's approach; and, as a consequence,
- deteriorating national workplace safety statistics.

WorkSafe's decision to fund a Massey University course is misguided and is not going to change the paradigm. WorkSafe ought to simply set the bar where it is, leave it to certifiers to lift their games or suffer the consequences. As we will see through "Houdini" most of the failures come from business decisions and choices made by the certifiers themselves. The power to change behaviour and performance sits right in the middle of Part 6 of the Regulations. WorkSafe must acquire the necessary skills and then use its powers for the reason they were granted under the Regulations.

***When will WorkSafe recognize its deficiencies and act?***

New Zealand and the world are full of scenarios which ought to be acted upon by regulators who, instead, willingly turn a blind eye to serious problems that are within their remits. In NZ, the seminal warnings ahead of the Pike River disaster were not acted upon by PCBU or regulator. The performance of WorkSafe in the events leading up to Whakaari Island were chaotic and a disgrace, bearing eerie similarities with the Department of Labour. The NZ regulatory regime for workplace health and safety has been built around prevention. The foil to the "she'll be right" attitude that remains pervasive is the role that WorkSafe ought to be performing.

Netflix has an enlightening documentary on Bernie Madoff, the perpetrator of the largest financial Ponzi scheme (impacting more than US\$19 billion of investor funds). One large, sophisticated market participant wrote to the Securities and Exchange Commission three times, alerting them more than eight years ahead of the collapse of Madoff's firm that the world's biggest Ponzi scheme was occurring. One alert contained a list of 18 documented red flags. On each occasion, the SEC's efforts were totally ineffective. A not dissimilar story happened in Germany and can be viewed on Netflix - "Skandal."

It will be better, WorkSafe New Zealand, to concede previous failures than wake up to another Whakaari disaster. The failings in your current administration of the hazardous substances' regime are all around you.

## B. A hypothetical – meet Houdini, the certifier who should have been struck off long ago

Whilst the remaining sections show through specific situations the deficiencies listed above, a hypothetical certifier is used in places in the next sections to highlight whether WorkSafe’s investigative techniques would have scooped up Houdini’s obvious inadequacies. Our hypothetical certifier is described in a way that reflects features uncovered through WorkSafe’s OIA responses and from our experience generally.

Our hypothetical certifier (**Houdini**) exhibits the following characteristics:

- Is the sole executive director of a company providing certification services and is the sole certifier working in the business with three employees which has more than \$1.2 million in revenue and \$600,00 in pre-tax profit<sup>10</sup>
- Long-term certifier and, like many peers, holding authorisation to certify almost every substance in unlimited quantities (a legacy of history not ability)
- Issues more than 700 certificates per year
- Weak knowledge of Regulatory Requirements – never properly trained in them
- 50-75% error rate in terms of issuing certificates when Regulatory Requirements were not met
- Has pass rates (certificates issued following audits) of >99% and Notification Rate of less than 0.5% of audits (one per 200 audits)
- Has 100% follow-on certification rates (if a certificate was issued last year, there is a 100% probability that a certificate will be issued the following year)
- Does not prepare detailed audit reports at least 25% of the time
- Does not possess some of the Australian Standards in relation to which some sites must be evaluated (akin to flying blind)
- Has defective audit templates because they do not match Regulatory Requirements (creating high probabilities of certifier errors)
- Operates with material conflicts of interest through involvement in a combination of consulting activities (precluded by the Regulatory Requirements)
- Has not been audited within the last five years (a breach of obligation by WorkSafe)
- Has not enrolled in any substantial courses or training to improve skills (“too busy”)
- Has not bothered to incorporate the requirements of the 2021 Performance Standard into all aspects of the business.

The other key point is that the excessive gaps between audits of Houdini means that Houdini’s knowledge of the 2017 Regulations has never been tested by WorkSafe. Houdini has, therefore, issued more than 3500 certificates without verification that Houdini’s knowledge of the Regulatory Requirements exists or is adequate.

The (at times) rhetorical questions in the sections below ask whether WorkSafe’s techniques would have a very high probability of picking up that Houdini is not fit to be performing the role of a compliance certifier.

As with his namesake, Houdini has many tricks up his sleeve including:

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<sup>10</sup> The financial performance is important because (i) Houdini’s financial success is driven by 99% repeat business from customers who really like that they always get certificates from Houdini and (ii) Houdini could have spent money educating everyone on technical requirements – this hasn’t happened – Houdini has continued doing everything the same way for more than a decade despite the introduction of the Regulations and several safe work instruments and performance standards during the last five years.

- creating a fiction that a junior employee was writing the consultancy reports and that he was therefore able to issue certificates for such sites where the same firm (and combined certifier and executive director) had provided consultancy advice;
- at locations where there were both compliant locations and non-compliant ones, certifying only the compliant ones and turning a blind eye to the others (in breach of reg 10.34 for starters);
- not taking photographs during audits;
- relying principally on inadequate templates as proof of the evidence for issuing a certificate;
- having a family member working within the firm prepare the site plans that Houdini then certified; and
- having more than one “interpretation” of key provisions of the Regulations even when it meant applying one interpretation in one place and another across town.



### C. How large is the problem of certifications which are made when the requirements that must be met are not, in fact, met?

#### HUGE!

At DGC, we have evolved scientific views about the maximum number of audits or certificates can be issued by one person without compromising accuracy<sup>11</sup>. The industry numbers reveal that some certifiers production rates (audits and certifications per day) of 125%-250% of our assessed maximum without any red flags from WorkSafe despite the existence of the most advanced and efficient systems having been implemented at DGC (which assists certifier's productivity). High/excessive certifier workloads will be correlated with high error rates and poor certification decisions and evidence that is below the standard required in the performance standards<sup>12</sup>.

Workload is only one factor, however. There are many others which likely exist in Houdini's business:

- a) Houdini does not have a thorough and sound understanding of the Regulatory Requirements, never catching up completely with the intricacies of the 2017 Regulations (which by our estimation would have needed hundreds of hours of study and training).
- b) Houdini's clients do not like audit outcomes which are "non-compliant." Houdini fears he will lose business if he produces such outcomes.<sup>13</sup>
- c) Houdini's use of "competent persons" who have not had adequate training and whose reports are not properly scrutinized.<sup>14</sup>
- d) Once Houdini has passed a site as compliant, if nothing changes, Houdini has the problem of explaining why there is a difference from one year to the next. Houdini is stuck on the running mouse wheel of years of incorrect audit decisions that Houdini simply cannot get off.
- e) Houdini has not been audited for some time and believes in his "untouchable status" – in other words, Houdini has no fear of WorkSafe's audit and investigative practices and powers.

Our empirical evidence derived from when we audit sites in the year after other certifiers points to material weaknesses in the other certifier's performance; **our failure rates when we follow other certifiers were more than 75% in 2022 and, therefore, we conclude that Houdini's (representative of industry statistics) rate of actual errors (issuing a certificate when none should have been) would be at least two out of every four audits Houdini conducted.** The basis for this alarming conclusion is that Houdini passes/certifies 99/100 files meaning he fails 1/100, whereas our data show that the correct decisions ought to have been to fail 50-75 sites per 100 inspections.

A cross check on these staggering conclusions exists in relation to New DGC's audit outcomes in 2020/21. A change in ownership and a commitment to following the rules led to a change in audit outcomes from 10% non-compliant in 2019 to 80% non-compliant in 2020/21. These data have been shared with

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<sup>11</sup> We also have read expert evidence from an experienced certifier whose views are very similar to ours, but massively different from what we observe in relation to other certifiers.

<sup>12</sup> The requirements in this regard in the 2021 performance standard are extensive. We doubt that many certifiers can comply with all the requirements and we have seen that some have not even tried to – their audit templates do not seek evidence that the certifiers are now required to obtain.

<sup>13</sup> We shared with Tim Smith (barrister) the Old DGC outcomes which showed a massive difference between the outcomes for major clients vs the outcomes for other clients. The explanations were "retention of clients" and not explainable by anything else.

<sup>14</sup> This was another area where Old DGC's practices fitted this bill.

WorkSafe – thus, WorkSafe knows the above issues and really ought to be pulling the certifiers hard into line. It is not.

### **D. WorkSafe’s failure to correctly exercise its powers under regulation 6.15 and in Part 6 generally**

Despite the exclusive focus of reg 6.15 being on the “ability or conduct” of a certifier, WorkSafe has significantly exceeded the scope of the discretions to not investigate” complaints and this is a major contributing factor to it not investigating any of the 40 most recent complaints about the most active certifiers. Reg 6.20 clearly empowers WorkSafe to take disciplinary action when any legal requirements are not followed by a certifier. WorkSafe’s written responses closing out some complaints demonstrate its failure to understand the basic framework of Part 6 and the nature of the obligations to which it is subject and the extent of the powers it has.

It is helpful to set out in full reg 6.15 to assist the discussion which follows:

*Disciplinary provisions*

**6.15 WorkSafe may investigate complaints and concerns**

- (1) If WorkSafe receives a complaint, or has a reasonable concern, about the ability or conduct of a compliance certifier, WorkSafe may conduct an investigation of the matter.
- (2) WorkSafe may decide not to investigate a complaint if satisfied that the complaint—
  - (a) is frivolous, vexatious, or malicious; or
  - (b) is more appropriately addressed in the course of an audit under [subpart 3](#); or
  - (c) if upheld on investigation, would not provide grounds for taking disciplinary action under [regulation 6.20](#) (for example, because the matter is very minor).
- (3) WorkSafe must notify the complainant of a decision not to investigate a complaint.

The heading for reg 6.15 indicates that a lack of ability or poor conduct can be expected to lead to disciplinary actions, which include a wide range of possible sanctions as laid out in reg 6.20.

Most frequently WorkSafe relies upon 6.15 (2) c) when deciding not to investigate after receipt of a complaint and we know from WorkSafe’s data that it has not investigated any of 32 consecutive complaints made regarding the top 15 certifiers in the country – therefore it has a 100% rate of applying the discretions not to turn any of these complaints into investigations. We have no doubt that the bases upon which WorkSafe has made decisions to not investigate some complaints are wrong as explained below.

The table below is an extract from WorkSafe’s repose to an OIA request in which we sought information regarding the top 15 (defined as issuing the most certificates) certifiers, including the timing of audits and substantial performance reviews, the number of complaints made, and the number of investigations conducted by WorkSafe.

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

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One can see from the above table some astonishing performance issues, in particular that:

- Certifier O has not had a completed audit in more than 7 years, whereas certifiers A and C were both audited twice within 3 ½ years.
- Certifier C has been the subject of six complaints and not one (or any for anyone) has turned into an "investigation."

It is also important to note that WorkSafe’s role is principally to administer NZ’s health and safety at work legislation. Its role is not to make the law or make any types of determinations. It must follow the law and exercise any discretions granted to it with due regard for the specific directions in the legislation and following the basic rules of statutory interpretation to understand exactly when powers and discretions may be exercised., Thus, we find in the WorkSafe New Zealand Act in section 9 (main objectives) the following:

“WorkSafe New Zealand must act in a way that furthers any relevant objectives or purposes stated in that legislation.”

In section 3 (“Purpose”) of the Health and Safety at Work Act 2015 is the following description of one of the purposes of the legislation at section 3(1)(f):

“securing compliance with this Act through effective and appropriate compliance and enforcement measures.”

The 2017 Regulations establish precise requirements for both PCBUs and certifiers to follow. Putting the above legislative provisions together, WorkSafe must administer the 2015 Act and 2017 Regulations including by securing compliance by compliance certifiers. Read slowly, every word in section 3(1)(f) sets a

high bar for WorkSafe to live up to and the machinery for “enforcement measures” in relation to certifiers is in Part 6 of the Regulations.

### ***Ability or conduct of a certifier – the sole focus of reg 6.15***

Reg 6.15 is exclusively focused on the “ability or conduct of a compliance certifier.” The two words have different meanings that need not be explained except to note that a failure in either aspect can lead to the issuance of certificates when the requirements of the Regulations have not been met.

The provisions of reg 6.20 augment the core focus of reg 6.15 and they provide exacting detail regarding what types of conduct by certifiers can be punished. Reg 6.20 can be read as explaining what WorkSafe should focus on in administering section 6(1)(f) by “securing compliance with this Act.”

Reg 6.29 has a similar construct but contains an additional concept not included in reg 6.20. Reg 6.29 is concerned with the “ability or conduct” of a person who holds a compliance certificate. It includes the following clause “*or about any other matter relating to a certificate that could affect safety.*” The rationale for the words in italics is obvious. It is noteworthy, having regard to what WorkSafe confuses itself with, that there are no such words in reg 6.15(1). WorkSafe has been prone to wrongly conflate “performance issues” and “safety issues” when it receives a complaint under reg 6.15.

In its letter announcing a decision to not investigate complaint WSCA2206, the following statement was included “*WorkSafe has spoken to the <PCBU>. WorkSafe is satisfied there are no prevailing safety concerns with the location.*” The existence of safety issues at the location inspected is irrelevant when a complaint is made under reg 6.15. The inclusion of the statement in the letter indicates that the existence or otherwise of safety issues was a factor in WorkSafe’s decision to not investigate. This was not something WorkSafe is empowered to take into account (as reasoned above) and, therefore, its decision was flawed.

### ***Exercise of the discretion in reg 6.15 (2)c***

WorkSafe closed the complaint relying upon reg 6.15(2)c without an investigation or without requiring that the certifier provide his full report and evidence to WorkSafe; neither did WorkSafe go to the location itself despite it being less than 15 km from a large WorkSafe office. Its preliminary enquiries were, therefore, wholly deficient in examining whether there were “ability or conduct” issues.

WorkSafe’s decision in WSCA 2206 was one of many examples of an incorrect application of the (2)c discretion.

There are two indications from within the legislation regarding when the discretion in reg 6.15 (2) c) may be invoked; including:

- The specific statement “because the matter is **very** minor” (emphasis added);
- The specific reservation of power in reg 6.20 for WorkSafe to take action if the compliance certifier has failed to comply with:
  - a provision of the Act, these regulations, or any relevant safe work instrument
  - a performance standard
  - a condition of the certifier’s authorization
- The sections referenced above from the WorkSafe New Zealand Act and the Health and Safety Act 2015.

Reg 6.20 has no qualifying words such as “material” or “significant.” There is little doubt, therefore, that the powers in reg 6.15 are intended to apply to all aspects of non-compliance with regulatory requirements and the discretion in (2)c) is very narrow. Parliament has determined specific requirements for PCBUs and

certifiers to observe and created the disciplinary machinery to be deployed when requirements are not met.

WorkSafe's inappropriate introduction of "safety concerns" and failure to focus on the certifier's ability and conduct" and the invocation of the (2)c discretion is tantamount to denying parliament the clear expectations regarding administration of the regime. WorkSafe's expansion of its lawful discretion under (2)c is, therefore, *ultra vires*. WorkSafe must administer the law, not attempt to divine what is important and what is not.

It is very highly unlikely that all 40 complaints about certifiers since 1/1/20 were all "very minor" and, therefore, the failures to investigate any of them were the result of WorkSafe acting *ultra vires*. Indeed, our knowledge of many complaints allows us to note that many have been serious and have indicated highly probable lack of ability or poor conduct. Because WorkSafe's CEO is confident about material skill gaps amongst ageing certifiers, there is a major disconnect between these two reference points.

***There are many examples of WorkSafe turning material incompetence into benign outcomes and no investigations***

Another of our specific complaints about the performance of a certifier was made at the specific direction of the PCBU who was disappointed that the certifier in question had issued a certificate for his location when, in fact, not one of six required elements had been met. In effect, the scorecard for the certifier's audit was 0/6. WorkSafe invoked regulation 6.15 (2)c in deciding not to commence a formal investigation, writing that WorkSafe "is satisfied that the complaint can be closed pursuant to regulation 6.15(2)(c) in that the matter raised if upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20."

There could not be a clearer example of a situation indicating a lack of ability or poor conduct, or both. There was another exactly like this one that we also complained about. WorkSafe agreed with our view of the failures but took the most benign action imaginable.

Incompetence can be displayed on the simplest inspection. Surely the objective of reg 6.15 is to catch the incompetence of the certifier before s/he contributes to a major adverse incident?

## E. Basic Investigative Concepts and WorkSafe’s audit design weaknesses

WorkSafe’s audits of certifiers have the following elements:

- a “pedestrian”<sup>15</sup> questionnaire must be completed
- audits in detail of up to five files
- written and oral questions for the certifier to answer following completion of the file reviews
- a draft report to which the certifier is able to respond
- a final report.

This basic approach is heavily flawed and highly prone to not provide an adequate perspective regarding the certifiers “ability and conduct”:

- There is no attempt to obtain a complete “top down” view of the certifier’s business activities.
- There is no attempt to explore all the various types of activities which create conflicts of interest which ought to preclude a certifier from engaging in certification activities<sup>16</sup>. There is, for example, no attempt to examine all “buckets” of income which might for example show the certifier deriving income from consulting, worker training, and preparation of site plans.
- There is one question only which requires the certifier to briefly explain the approach to Notifications, despite the findings of the Smith Review<sup>17</sup> highlighting that this was an area that was ripe for abuse by certifiers. There is no attempt to dig into the underlying outcomes to understand why Houdini’s Notification rates are so low<sup>18</sup>.
- The numbers of files reviewed are too few by a factor of least 6. In six years, Houdini will have audited more than 3,000 sites, meaning the audit rate is one per 600 files.
- If Houdini’s files contain limited evidence of exactly what was occurring at sites, how will WorkSafe be able to investigate the large amount of information not contained in Houdini’s files? These issues are further compounded by the defects in Houdini’s inspection templates. Absence of evidence helps little when the exclusive material considered by WorkSafe is what is contained in Houdini’s files<sup>19</sup>.

The last point is critical. Take, for example, certification of class 2’s and 3’s which requires the certifier to sign off on the specific requirements of reg 10.34. This will include, for class 3’s for example, (i) that the site plan contains, amongst other requirements, a clear depiction of all hazardous areas, (ii) that all workers handling the class 3’s have been provided training that complies with reg 4.5 and (iii) an evaluation of all storage and usage of class 3’s to verify that the requirements of Part 11 are complied with.

Houdini’s reports and approach are wildly defective based upon the description. If Houdini has information relating to, for example, one only type B location which is shown on the site plan and this is all that Houdini’s records show, how will WorkSafe be able to obtain any perspective regarding the hazardous areas at the location (is there, for example, a spray booth?) and whether the usage of the class 3’s complies

<sup>15</sup> The questionnaires are next to useless and miss many obvious and important aspects of the certifier’s conduct that should be included in the audit.

<sup>16</sup> Examples of reasonable questions would be (i) list all PCBU’s your firm has provided both certification and consulting roles for (ii) list all PCBU’s you have certified for whom you have also provided other types of revenue-generating activities (including, for example, preparation of site plans or the provision of worker training).

<sup>17</sup> Independent report into the Notifications issue prepared by barrister, Tim Smith, in October 2021.

<sup>18</sup> The reason is, of course, that Houdini’s entire approach is shoddy and he does little but issue certificates to every client.

<sup>19</sup> Bandile’s note that “poachers do not leave manuals behind” applies here.

with Part 11? This is clearly a massive problem with what WorkSafe doesn't include in audits. Houdini's described practice of turning a blind eye to what is not compliant will not register on WorkSafe's radar screen during an audit.

On the other hand, a scientific approach would encompass the following:

- A full picture of all sources of income of the certifier from the "certification" business
- Audit of at least 30 files
- Physical inspections of at least 10 of the locations audited by someone highly skilled in completing such audits to the standard expected in the Regulations
- Certifier to specifically answer whether any of the certificates issued does not have an adequate audit report/ proof of evidence of all required elements for the location to be certified

DGC's senior certifiers can, and do, audit the work of their peers at the rate of approximately 8-10 files per day (depending upon the complexity of the file). Review of four files might provide a clue, however review of 30 files provides a sound perspective and a statistically significant sample from which reasonable conclusions can be based. DGC's certifiers can also audit up to five locations in a day, producing high quality, detailed reports. Our benchmark for auditing certifier's work is that a comprehensive picture of ability and accuracy can be derived in one week of work. WorkSafe, on the other hand, takes 3-6 months to complete audits of only five files supplied. There must be, therefore, huge inefficiencies in what WorkSafe does.

Any basic level of understanding of statistics alerts us to the need to collate a statistically significant sample of a certifier's files, in this context, before one could reach any considered opinion about his competence assuming, of course, that a small sample did not reveal such incompetence to make it appropriate for WorkSafe to invoke its powers of suspension or other penalties.

Conceivably as few as three "bad" files could create a *prima facie* view that the certifier was not sufficiently diligent or competent. The onus to reverse the negative presumption would then reside with the certifier, however, if an audit of a small sample reveals no issues, there is no statistical basis for making any positive findings about the certifier – a small sample reveals nothing of note, nor does it provide sufficient evidence to support decisions that WorkSafe makes.

Considerations of natural justice suggest that, once a *prima facie* negative presumption or serious concern exists, WorkSafe needs to significantly broaden its audit or investigation to evolve a reasonable, significant view regarding the certifier's ability and performance. The audit may well need to be followed by an examination to test for weaknesses or to form balanced views about the certifier's ability. The legislation draws a distinction between "ability" and conduct" which must be assumed to be deliberate – someone who lacks the required accuracy (poor conduct) despite being highly knowledgeable (high ability) will fall foul of the need to conduct oneself appropriately.

Of course, an advantage of a narrow enquiry is that it might turn up nothing of note and this may suit the patterns of "certifier favourites" that have been part of WorkSafe's approach to some certifiers. Fuel for this criticism exists in the dramatic differences in how WorkSafe has conducted investigations when we compare and contrast some certifiers' investigations vs others'.

### ***The important inter-relationship between audits and investigations***

Having noted that WorkSafe does not undertake detailed location audits when auditing a certifier underscores the absolute need to utilize complaints correctly and judiciously because a complaint made by a certifier will usually be supported by the complainant's detailed evidence – this provides insights into the certifier's performance that doesn't otherwise appear on WorkSafe's radar screen. Most locations change

to small degrees only year-on-year and, therefore, defects not picked up the prior year will likely still exist a year later.

We are appalled, therefore, that serious complaints about one certifier did not include a WorkSafe inspection of the location which was less than 10km from a WorkSafe office. The complaint presented a potential treasure trove of insights into a certifier and, therefore, an opportunity to perform the roles for WorkSafe mandated in Part 6. WorkSafe's failure to do so increases the concerns about how **and why** WorkSafe chooses wrongly to invoke the discretions under reg 6.15 (2)c). This segues into the topic below regarding the unexplained differences between how different certifiers have been treated when complaints are made.

### ***Material differences in how WorkSafe has audited different certifiers***

WorkSafe has exhibited two different theories when faced with certifiers who issue large numbers of certificates. In relation to one person, the large number of certificates issued was a cause for concern which led WorkSafe to query whether any inappropriate short-cuts were taken, whilst in relation to others, not even a flashing amber light has apparently lit up on WorkSafe's dashboard when it clearly should have based upon the certifier's productivity. For example, WorkSafe expanded its investigation into Certifier A because of the number of certain types of certificates he issued, whilst paying no apparent regard whatsoever for certifiers who issued 1.5-2.0x as many certificates as A. Why?

There also has to be a maximum number of certificates that a certifier can issue year-in, year-out because there are many things which consume a certifier's time – audits, travel, completion of documentation, correspondence with the PCBU's before and after inspections, review of competent persons' work, training competent persons and the other tasks associated with running a small business which are time consuming. Houdini simply must be cutting corners in many places and these are not the reasonable practices of a competent certifier. Systems which drive efficiency can make a meaningful difference to productivity, but few certifiers have anything that is remotely effective in this regard.

WorkSafe has followed widely-divergent practices when it comes to different certifiers which concerns us. Natural justice requires that there must be one set of rules set and applied by WorkSafe for all certifiers to abide by. In relation to some, a complaint has led to the commencement of a formal process under reg 6.15 and has been rapidly expanded in scope; for others, serious failures have been dealt with in the context of soft audits (without any obvious expansion in scope beyond a five-file review), parked literally in the "it's too hard for us" basket, or have led to benign (but ineffective) encouragement for the certifier to do better. We query whether there are factors at play beyond an objective assessment of performance and ability (which are the two factors referred to in reg 6.15). These differences are described in detail in section G below.

In summary, "the poachers" are getting away with unacceptable practices, despite the many leading indicators of problems that should be decisively addressed by the regulator which has publicly stated that there are material "skill deficiencies" in the certifiers.



## **F. The pervasive technical weaknesses in its front line also significantly hamper WorkSafe’s ability to act correctly under Part 6**

We have previously noted the lack of training and technical ability in WorkSafe’s general inspectorate. To this, we can add the surprising (and alarming) recent differences in assessments at major hazard facilities (MHF). Were these different parts of WorkSafe’s front line – the general inspectorate and the MHF Team - able to accurately pinpoint all compliance deficiencies, there would be:

- a) a natural flow of referrals of conduct for investigation under reg 6.15 from within WorkSafe
- b) valuable internal (WorkSafe) assessments of what certifiers missed during their audits and the other trigger for investigations in reg 6.15 – that WorkSafe has a “reasonable concern” about a certifier.

The opposite is also true – a lack of competence in WorkSafe’s front line hampers its ability to investigate the actions of certifiers. Four examples point to pervasive technical weaknesses in the front line.

At location 1, a certifier identified more than 20 material deficiencies at a large and complex high-risk site and issued a Notification. WorkSafe’s inspectorate evidently identified no issues of concern when they went to the site in the weeks following receipt of the Notification. Had WorkSafe been confident in the quality and accuracy of the work of its inspectorate, it ought to immediately have sent a “please explain” letter to the certifier. This did not occur; thus, there are two irreconcilable outcomes and one of them is highly problematic – we are confident it was WorkSafe that failed.

WorkSafe’s inability to make progress with the complaint about the next certifier (at Location 1) was evidently hampered by the defects with the work of its Inspectorate. The adequacy of the evidence that supported the second certifier’s certification was not disclosed by WorkSafe. Were the second certifier the equivalent of our “Houdini” the evidence simply would not exist.

At location 2 (a major hazard facility), WorkSafe had issued two improvement notices. Our inspection revealed more than 25 items of non-compliance, the majority of which were highly material and problematic. The only explanation is that WorkSafe missed more than 23/25 non-compliance items.

At location 3, WorkSafe managed to get itself into a complete “Fawlty Towers” fiasco in which the inspectorate relied upon the promise of the PCBU as adequate after it received a Notification and WorkSafe’s RAT Group relied upon the fact the inspector had already closed out the file. No-one from WorkSafe inspected the premises and we say with absolute certainty that the location was and is not compliant.

At location 4, WorkSafe’s inspector simply had no idea what the implications of the requirements of regs 11.20 and reg 10.6 were when he had a listing of the non-compliances in a Notification.

## **G. Specific examples of WorkSafe’s technical failures hampering its ability to handle complaints with due care and skill**

### **1) AS 1940 cabinets – Complaint WSCA2206**

There is absolutely no doubt that, before a compliance certifier can issue a compliance certificate for a class 2.1.1, 2.1.2, or 3.1 substance, the requirements of Part 11 of the Regulations must be complied with<sup>20</sup>. Part 11 covers many topics, including permitting a PCBU to keep flammable liquids inside buildings in AS 1940 cabinets subject to particular constraints. The items that a certifier must sign off on are therefore:

- a) Each cabinet must comply with the paragraphs of AS 1940 which are listed in reg 11.29<sup>21</sup>
- b) No incompatible substances may be stored with the class 3’s in the cabinet
- c) Each cabinet must be three metres away from each other cabinet
- d) The total number of cabinets must comply with the reg 11.29 (4)
- e) There must not be sources of ignition within the hazardous area around each cabinet

The last of the above requirements must be checked by the compliance certifier by virtue of the specific requirement in reg 10.34(1)(d) that reg 10.6 has been complied with.

The complaint made about one certifier (who issued more certificates in the last 12 months than almost any other certifier) included that he did not even open the cabinet during his inspection, meaning he obviously could not have obtained evidence about compliance with at least two of the above requirements. It appears also he had no way of confirming several other of the other requirements.

Aside from the many obvious defects in the process that followed after the complaint was made, the most astonishing comment by the RAT Group were these:

*“WorkSafe is satisfied there are no prevailing safety concerns with the location.”* (This is the erroneous conflation of considerations discussed in Section D above.)

*“Issues associated with the compliance of AS 1940 cabinets are PCBU responsibilities”<sup>22</sup>* implying that they were not required to be audited as part of a compliance certifier’s audit and certification processes. This is plainly wrong and shows a failure to understand the express requirements of reg 10.34.

Both of these “reasons” are flawed for the reasons explained above.

In December 2022, WorkSafe published a discussion document on AS 1940 cabinets indicating that, finally, WorkSafe is getting to grips with the technical requirements and responding to concerns we raised on our website about its failures with regards to AS 1940 cabinets<sup>23</sup>.

The suggestion that failure to pay any attention to specific matters which a compliance certifier must check by law, is not misconduct unless there are “prevailing safety concerns at the location” misses the point of the need to investigate the conduct of the certifier. If WorkSafe is correct, then the implication of this is

<sup>20</sup> Regulation 10.34.

<sup>21</sup> They are “sections 4.9.2, 4.9.5, and 4.9.7 of AS 1940:2017”

<sup>22</sup> This comment was made by a manger of the RAT Group which highlights the issues associated with having people without deep knowledge of the regulations performing management roles with any degree of reasonable competence in relation to the RAT Group.

<sup>23</sup> See [www.dgcompliance.co.nz/WorkSafe](http://www.dgcompliance.co.nz/WorkSafe) Issues

that a compliance certifier needs only look at the important things. This cannot be correct due to the specific listed items in reg 10.34 for starters. It also presupposes that WorkSafe has the power to discern which of the express requirements in the Regulations are important – this is wrong. WorkSafe has no such power.

In addition, the same investigator at WorkSafe was prepared to make an adverse finding about Certifier A in relation to one inspection done on one tank wagon that travelled at speeds of no more than 15km/h. At most, the investigation identified some process issues, yet the penalties imposed were conjured up on the basis that “tank wagons can “roll over and explode.” This is now, and was then, a nonsense. It also highlights the extreme subjectivity that WorkSafe has brought to its role.

The outcome in WSCA 2206 also points to the marked difference in treatment of certifiers investigated by WorkSafe. AS 1940 cabinets can explode and the consequences could be devastating. If a certifier does not check the cabinet, should Lady Luck work in his favour?

Even though WorkSafe did not inspect the location, it somehow was able to rule in his favour and dismiss the complaint under reg 6.15 (2)c).

## 2) Class 4 and class 5 Hazardous Substance Locations inside retail shops

Having a compliant class 5 hazardous substance location (HSL) inside a retail shop is virtually impossible and, therefore, certifying one is a nonsense. To do so demonstrates a profound lack of understanding of the rules and can result in dangerous quantities of oxidisers being present in such places. Even after we explained this to WorkSafe, the RAT Group was apparently unable to discern why such a HSL was prohibited by the regulations and came back with a “we don’t know.” However, the investigator’s colleagues at WorkSafe do know the answer and stated it accurately and semi-publicly. This highlights further failures of teamwork within WorkSafe.

Attached is the letter we received when WorkSafe purported to close out this complaint and others like it. In essence, WorkSafe’s RAT Group reached a conclusion to the effect “it is too hard for us to figure out what the law requires.”

This is an example of many problems at WorkSafe and the lack of technical skills in the RAT Group because:

- a) We explained the technical position correctly when WorkSafe first asked us about it.
- b) At the “11.33 workshop” held in Auckland, everyone attending from WorkSafe was able to conclude confidently that a retail shop can never meet the controls required to have class 4 and class 5 hazardous substance locations inside a retail shop. This workshop included senior WorkSafe representatives – thus, we can conclude that the RAT Group does not consult with the more technically-able people at WorkSafe.
- c) It took WorkSafe more than 15 months to reach its conclusion (whereas a skilled person ought to be able to come up with the correct answer in less than an hour).

Its decision not to commence an investigation was explained as follows:

*“Based on the information you have currently provided, WorkSafe is satisfied that the complaint can be closed pursuant to regulation 6.15(2)(c) in that the matters raised if upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.”*

*'As the matter is of a technical nature, namely interpretation and application of the Regulations, this matter has been forwarded to the Hazardous Industries Team for consideration.'*

The underlying premise was that the matter was of a "technical nature." The very essence of a certifier's role is to understand all the technical requirements (how else can the certifier do his job?) so this statement is very highly concerning.

The RAT Group is effectively saying:

- a) This is too hard for us
- b) We haven't consulted our colleagues (the Hazardous Industries Team)
- c) Because of this, we won't be able to take any disciplinary action, and in other words
- d) We can't expect a compliance certifier to know the requirements of the regulations better than we do in the RAT Group (despite our limited skills).

We say this is flawed on many levels and highlights the lack of technical skills and teamwork at WorkSafe:

- e) Paraphrasing Mr Thain<sup>24</sup>, the regulators (in the RAT Group) need to be upskilled.
- f) Why didn't members of the RAT Group consult their colleagues?
- g) The boundaries for what a compliance certifier has to know is not what someone at WorkSafe knows, in particular someone handed the file in the RAT Group.
- h) The outcome of this complaint further highlights the lack of technical ability generally at WorkSafe, especially when it comes to retail shops – two years after explaining how reg 11.33 worked, WorkSafe is still bumbling around trying to correct its poor understanding of the rules.

### 3) Hazardous Areas

Next we come to some of the essential concepts that simply have to be well understood and applied by all market participants. Hazardous areas are those areas proximate to hazardous substances in which there may be sufficient concentrations of flammable vapours such that there are prohibitions on having anything inside that area which can ignite the vapour ("sources of ignition"). The challenging part is that the size and shape of the hazardous area is impacted by many factors; the less challenging part is that almost every answer is provided in AS 60079 which is specifically referenced, for example, in reg 10.6:

#### 10.6 Duty of PCBU to establish hazardous area

- (1) A PCBU with management or control of work using a class 2.1.1A, 2.1.1B, 2.1.2A, 3.1A, 3.1B, or 3.1C substance at a place within a workplace must ensure that a hazardous area is established at the place that complies with—
  - (a) AS/NZS 60079.10.1:2009, if the threshold quantity in that standard for a particular substance is met; or
  - (b) a relevant safe work instrument that specifies hazardous areas and takes into account the risk of the presence of flammable materials.

Complaint WSCA 2218 required **only** that WorkSafe understand the difference between an adequately-ventilated and inadequately-ventilated location; the size and shape of the hazardous area for an LPG location which is inadequately ventilated is larger and different from the area that applies at a location which is adequately ventilated<sup>25</sup>. The answers are provided by AS 60079.

<sup>24</sup> Quoted at the start of this memorandum.

<sup>25</sup> In this case the difference is a 1.5 metre cone-shape vs a 2.0 metre cylindrical shape.

The hazardous area for an inadequately-ventilated location for (non *in-situ* filled) LPG is 2 metres in a cylindrical shape from the cylinder. As shown in the photo below from the site in question, inside this two-metre required hazardous area is an open flame – the califont for the hot water heater shown.



Photo 14

WorkSafe closed the complaint and opined that the smaller (1.5 metre) hazardous area applied by the prior certifier was correct. WorkSafe wrote:

*"WorkSafe conducted enquiries into your complaint, as a result we are satisfied that the location, (XXXXX), <THE CERTIFIER'S> assessment, and <his/her> subsequent issue of a location compliance certificate all meet the requirements of the Regulations.*

*"Moreover, we are satisfied that her interpretation and application of the Hazardous Area Atmosphere Zone from AS/NZ 60009.10.1:2009 is correct "*

Unfortunately for the author of this letter at WorkSafe, the RAT Group generally and the certifier about whom the complaint was made:

- a) **The letter's technical conclusion is wrong** – this was confirmed by one of the country's foremost experts – an electrical inspector with extensive experience with hazardous areas.
- b) His colleagues in the Hazardous Industries Team confirmed that his conclusion as wrong when meeting with certifiers in November 2022.

This is a further example of the lack of technical skills in the RAT Group and the lack of teamwork at WorkSafe.

**A. Specific Differences in relation to the processes followed by WorkSafe after complaints have been made**

The vast differences in what WorkSafe has done after receipt of complaints about certifiers really does needs coherent explanation from WorkSafe to dispel the impression of bias on its part. The lack of WorkSafe's technical skills have also been displayed, however this cannot fully explain the disparity in how different certifiers have been treated.



**Example A**

The high-water mark for us was the events that played out in relation to Certifier A:

- Two complaints precipitated a decision by WorkSafe to expand the locations it placed into the investigation scope. Two rapidly became seven thereafter.
- **WorkSafe misled Certifier A** by explaining in writing that the expansion of the investigation was precipitated by further “complaints” whereas the additional five files investigated had been included because WorkSafe decided to increase the scope of its investigation – they were not (external) complaints but (internal) WorkSafe concerns.
- WorkSafe formally commenced and expanded an investigation.
- Copies of all inspection reports were requested from the certifier (and supplied).
- WorkSafe went to none of the locations added to the scope of the investigation to examine the accuracy of the certifier’s work<sup>26</sup>.
- WorkSafe did not inspect the tank wagon which was the subject of one of the complaints and, notwithstanding this, was willing to immediately suspend the certifier
- In arriving at some of its adverse findings, **WorkSafe ignored the correct, written advice of its experts in some important aspects**; the investigator preferred his own lay views to those of his internal expert.
- In putting the file in front of the decision-maker (Phil Parkes), **the investigators omitted the exculpatory opinions of its internal experts and what the weight of evidence showed to be the case on other facts which were critical to WorkSafe’s decision-making**.
- All WorkSafe’s adverse findings were contested and none of them has been sustained following extensive processes post completion of at least two draft investigation reports.
- **WorkSafe effectively destroyed the certifier’s business.**

Our views on this are:

- WorkSafe’s failure to understand the technical issues were major factors in every investigatory mis-step it made during nearly 21 months of an excruciatingly-painful investigation.
- If concerns about the “ability or conduct” of the certifier had been reasonably developed, then examining other certificates/ sites would have been prudent and reasonable (in concept, developing a concern and then expanding the scope is sound but it is hideous that WorkSafe misled the certifier in this regard)
- It was WorkSafe’s lack of ability and shoddy procedures that caused the investigation to take more than 5 times the time allowed in the regulations for investigations.
- The investigations overall were a chaotic disgrace.

**Contrasted with Certifier B**

More than two complaints have been made about Certifier B’s ability and conduct pointing to:

- Certification failures
- Poor records
- A lack of understanding of the Regulations

Despite this:

- No formal investigation has been commenced by WorkSafe;

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<sup>26</sup> As explained above, this is the best way to see for oneself. The curious thing is why WorkSafe does not do this as a matter of normal procedure.

- WorkSafe’s enquiries confirmed material weaknesses in the certifier’s work (although it appears that WorkSafe failed to pick this up);
- No enforcement or other disciplinary actions were taken by WorkSafe; and
- No warning letter was issued to the certifier.

Thus, despite evidence that ought to have indicated the need to broaden the scope of the “enquiry” (and to conduct a formal investigation as was done to Certifier A), this did not happen.

In relation to two of the complaints, WorkSafe was evidently unable to decipher what the Regulations required, or did so erroneously.

Certifier B’s treatment was radically different from the treatment of Certifier A. His performance was found to be materially wanting, but there were no consequences. Why?

### ***Certifier C***

Certifier’s C’s track record, as measured by the number of complaints about his performance and the warning letters issued to him by WorkSafe, is materially worse than that of any of his peers.

A complaint about his inspection and certification of a site resulted in the following responses from WorkSafe:

- His inspection reports were not required to be provided
- The information the certifier did supply revealed defective approaches to certification
- No investigation was conducted
- WorkSafe did not visit the location in question.

In our opinion, based upon what ought to have been readily apparent, WorkSafe’s investigator was unable (or unwilling) to understand the obvious deficiencies in the certification vs the requirements of the Regulations which were obvious from the correspondence between WorkSafe and the certifier that we obtained under OIA.

### ***In summary***

- Three different approaches in response to complaints
- Recurring themes of failure by WorkSafe in relation to knowing and applying the rules
- Decisions to narrow vs extensively broaden the scope of the enquiries
- The most adversely impacted certifier (by WorkSafe’s actions) is the one with the fewest identifiable and proven errors.



File Ref: WSCA2116  
21 January 2022

**PRIVATE AND CONFIDENTIAL**

Mr James Dunphy



Dear Mr Dunphy,

**Complaint under Regulation 6.15 of the Health and Safety at Work (Hazardous Substances) Regulations 2017**

1. Thank you for alerting WorkSafe New Zealand to your concerns about the ability and conduct of Compliance Certifier [REDACTED]
2. As you are aware, the role of Regulatory Assurance is to audit compliance certifiers and investigate complaints.

*Complaint*

3. Upon receiving a complaint about the ability or conduct of a compliance certifier, WorkSafe may conduct an investigation pursuant to regulation 6.15(1) of the Health and Safety at Work (Hazardous Substances) Regulations 2017 (the Regulations).
4. Pursuant to regulation 6.15(2)(c) WorkSafe may decide not to investigate if satisfied that the complaint if upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20 (for example, because the matter is very minor).
5. The WorkSafe Policy 'Investigation of Hazardous Substances Authorisations' provides that WorkSafe will prioritise investigations based on assessed risks to health and safety or where harm has occurred.
6. We operate under a mixed model approach aligned to a responsive risk-based framework.
7. A mixed model approach means using the best intervention or strategy to manage the risk.
8. Being responsive means when we plan interventions, we consider:
  - our regulated community's behaviours and attitudes toward health and safety
  - our constraints as a regulator
  - how well we are managing the risk
  - how health and safety systems change over time
9. We use risk-based analysis to identify and prioritise risks, allocate resources, and make effective decisions.

*Enquiries*

10. WorkSafe's enquiries following the receipt of your complaint by Regulatory Assurance discovered that [REDACTED] was engaged in the authorisation renewal process with the Hazardous Industries (Certifications) Team.
11. A component of their enquiries involves an assessment of previous and on-going complaints and investigations.
12. In addition to this WorkSafe's General Inspectorate received a 'notification of refusal to issue a compliance certificate' in relation to this location and they have carried out an intervention with the PCBU to manage any residual safety concerns.

*Outcome*

13. Based on all the information currently before WorkSafe, WorkSafe is satisfied that the complaint can be closed pursuant to regulation 6.15(2)(c) as an investigation of this matter would not result in disciplinary action.
14. We are satisfied that any issues in relation to [REDACTED] abilities will be addressed during his authorisation renewal<sup>1</sup>.
15. Accordingly, this complaint will now be closed.

Yours sincerely



Enda Costello  
Senior Advisor – Regulatory Assurance Team

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<sup>1</sup> **6.8 Grant of authorisation** -(2) If the applicant is an individual, WorkSafe must be satisfied that—  
(d) the applicant is likely to ensure that the functions of a compliance certifier are performed in an objective manner that promotes safety.

File Ref: WSCA2218  
10 August 2022

**PRIVATE AND CONFIDENTIAL**

Mr James Dunphy

Dear Mr Dunphy,

**Complaints under Regulation 6.15 of the Health and Safety at Work (Hazardous Substances) Regulations 2017**

1. Thank you for alerting WorkSafe New Zealand to the issue you discovered in relation to the ability and conduct of [REDACTED]
2. As you are aware, the role of Regulatory Assurance is to audit compliance certifiers and investigate complaints.

*Complaint*

3. Upon receiving a complaint about the ability or conduct of a compliance certifier, WorkSafe may conduct an investigation pursuant to regulation 6.15(1) of Health and Safety at Work (Hazardous Substances) Regulations 2017 (**the Regulations**).
4. Your complaint alleged that [REDACTED] inspection of the [REDACTED] was flawed in that she (i) incorrectly identified a vent at an entrance into the building, (ii) failed to correctly assess the hazardous area as inadequately ventilated, (iii) there is a caliphant (sic) within the inadequately-ventilated hazardous area.

*Outcome*

5. WorkSafe conducted enquiries into your complaint, as a result we are satisfied that the location, [REDACTED] assessment, and her subsequent issue of a location compliance certificate all meet the requirements of the Regulations.
6. Moreover, we are satisfied that her interpretation and application of the Hazardous Area Atmosphere Zone from AS/NZ 60009.10.1:2009 is correct.
7. Based on all the information currently before WorkSafe, WorkSafe is satisfied that the complaint can be closed.
8. Accordingly, the complaint will now be closed.

Yours sincerely



**Andrew Smith**  
**Principal Advisor (Regulatory Assurance)**  
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File Ref: WSCA2139  
30 August 2022

**PRIVATE AND CONFIDENTIAL**

Mr James Dunphy



Dear Mr Dunphy,

**Complaints under Regulation 6.15 of the Health and Safety at Work (Hazardous Substances) Regulations 2017**

1. Thank you for alerting WorkSafe New Zealand to the issues you identified in relation to the ability and conduct of [REDACTED]
2. As you are aware, the role of Regulatory Assurance is to audit compliance certifiers and investigate complaints.

*Complaint*

3. Upon receiving a complaint about the ability or conduct of a compliance certifier, WorkSafe may conduct an investigation pursuant to regulation 6.15(1) of Health and Safety at Work (Hazardous Substances) Regulations 2017 (**the Regulations**).
4. Pursuant to regulation 6.15(2) WorkSafe may decide not to investigate if satisfied that the complaint is
  - a) Frivolous, vexatious, or malicious; or
  - b) More appropriately addressed in the course of an audit; or
  - c) If upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.
5. The WorkSafe Policy 'Investigation of Hazardous Substances Authorisations' provides that grounds for not progressing to an investigation are where the findings, if upheld would not be grounds to amend, vary or cancel an authorisation, and as an example if the matter were very minor.

*Enquiries*

6. WorkSafe has reviewed your complaint in which you allege [REDACTED] issued a location compliance certificate for a site when the requirements of part 11 of the Regulations had not been met.
7. WorkSafe contacted [REDACTED] to obtain its inspection report for the site, and had an inspector go to the site, to conduct an assessment.
8. WorkSafe agreed with your assessment that part 11 of the Regulations had not been met.
9. [REDACTED] was made aware of WorkSafe's findings and given an opportunity to respond.

10. Based on the response received, and further interactions with the Compliance Certifier, WorkSafe is satisfied that this site and similar sites will be assessed by this Compliance Certifier in an objective manner that promotes safety.

*Outcome*

11. Based on the information you have provided, the assessment made of the site, and its interaction with [REDACTED] WorkSafe is satisfied that the complaint can be closed pursuant to regulation 6.15(2)(c) in that the matter raised if upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.
12. Accordingly, the complaint will now be closed.

Yours sincerely



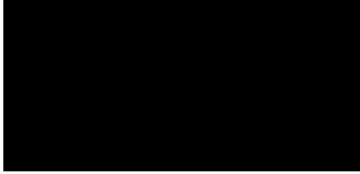
Enda Costello

Senior Advisor, Regulatory Assurance

File Ref: WSCA2137  
03 November 2022

**PRIVATE AND CONFIDENTIAL**

Mr James Dunphy



Dear Mr Dunphy,

**Complaints under Regulation 6.15 of the Health and Safety at Work (Hazardous Substances) Regulations 2017**

1. Thank you for alerting WorkSafe New Zealand to your concerns about the ability and conduct of [REDACTED]
2. As you are aware, the role of Regulatory Assurance is to audit compliance certifiers and investigate complaints.

*Complaint*

3. Upon receiving a complaint about the ability or conduct of a compliance certifier, WorkSafe may conduct an investigation pursuant to regulation 6.15(1) of Health and Safety at Work (Hazardous Substances) Regulations 2017 (**the Regulations**).
4. Pursuant to regulation 6.15(2) WorkSafe may decide not to investigate if satisfied that the complaint is
  - a) Frivolous, vexatious, or malicious; or
  - b) More appropriately addressed in the course of an audit; or
  - c) If upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.
5. The WorkSafe Policy 'Investigation of Hazardous Substances Authorisations' provides that grounds for not progressing to an investigation are where the findings, if upheld would not be grounds to amend, vary or cancel an authorisation, and as an example if the matter were very minor.

*Enquiries*

6. WorkSafe has reviewed your complaint in which you allege [REDACTED] has issued a compliance certificate in circumstances that were impossible to meet the requirements of Part 12 of the Health and Safety at Work (Hazardous Substances) Regulations 2017.
7. As the matter is of a technical nature, namely interpretation and application of the Regulations, this matter has been forwarded to the Hazardous Industries Team for consideration.
8. Furthermore, you will be aware of the Compliance Certifier Reference Group, on which your company DGC Limited has representation. This Group will allow for a consultative approach to addressing ambiguities within the Regulations, such as raised in this instance.

*Outcome*

9. Based on the information you have currently provided, WorkSafe is satisfied that the complaint can be closed pursuant to regulation 6.15(2)(c) in that the matters raised if upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.
10. Accordingly, the complaint will now be closed.

Yours sincerely



Enda Costello

Senior Advisor, Regulatory Assurance

File Ref: WSCA2129  
03 November 2022

← 16 months from complaint to  
"we don't know" ←

**PRIVATE AND CONFIDENTIAL**



Dear [REDACTED]

**Complaints under Regulation 6.15 of the Health and Safety at Work (Hazardous Substances) Regulations 2017**

1. Thank you for alerting WorkSafe New Zealand to your concerns in relation to the ability and conduct of [REDACTED]
2. The role of Regulatory Assurance is to audit compliance certifiers and investigate complaints.

*Complaint*

3. Upon receiving a complaint about the ability or conduct of a compliance certifier, WorkSafe may conduct an investigation pursuant to regulation 6.15(1) of Health and Safety at Work (Hazardous Substances) Regulations 2017 (**the Regulations**).
4. Pursuant to regulation 6.15(2) WorkSafe may decide not to investigate if satisfied that the complaint is
  - a) Frivolous, vexatious, or malicious; or
  - b) More appropriately addressed in the course of an audit; or
  - c) If upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.
5. The WorkSafe Policy 'Investigation of Hazardous Substances Authorisations' provides that grounds for not progressing to an investigation are where the findings, if upheld would not be grounds to amend, vary or cancel an authorisation, and as an example if the matter were very minor.

*Enquiries*

6. WorkSafe has reviewed your complaint in which you allege [REDACTED] has issued a compliance certificate in circumstances where the location could not comply with the requirements of the Regulations.
7. As the matter is of a technical nature, namely interpretation and application of the Regulations, this matter has been forwarded to the Hazardous Industries Team for consideration.
8. Furthermore, you may be aware of the Compliance Certifier Reference Group, on which your employer, DGC Limited has representation. This Group will allow for a consultative approach to addressing ambiguities within the Regulations, such as raised in this instance.



*Outcome*

9. Based on the information you have currently provided, WorkSafe is satisfied that the complaint can be closed pursuant to regulation 6.15(2)(c) in that the matters raised if upheld on investigation, would not provide grounds for taking disciplinary action under regulation 6.20.
10. Accordingly, the complaint will now be closed.

Yours sincerely



Enda Costello

Senior Advisor, Regulatory Assurance