

World Trade Centre Catastrophe Anniversary 2023

Mr Darren Handforth  
Head of High Hazards  
WorkSafe New Zealand

Dear Mr Handforth

### **How WorkSafe perpetuates the Circle of Permanent Failure (regrettably)**

This letter shows you the dangerous cocktail that has three lethal ingredients – ignorant PCBUs, incompetent certifiers and a highly-ineffective WorkSafe. The three ingredients combine to create a recurring cycle of failure that is being perpetuated, rather than defused. There are such obvious ways to do so that this letter does not even need to spell them out.

The specific rationale for my email to you dated 24 August 2023 (another example of a PCBU's massive failure, also that of the previous compliance certifier) was to provide you with another close-up example of why it is critical that WorkSafe properly discharge its duties to ensure that compliance certifiers are sufficiently able and competent to perform their roles. Borrowing from the adage of teaching a hungry man to grow rice to feed his family forever, if WorkSafe discharges its obligations as it ought to, the country would have more than 50 certifiers dealing competently with all obligatory compliance matters at more than 25,000 locations annually. This is how the compliance regime is designed to operate, yet most evidently is not.

Instead of driving the efficacy of the regime, WorkSafe is perpetuating what I describe below as the circle of failure propelled by this trifecta.

### **The plague of regulatory inaction still reigns supreme. Have we learned nothing?**

Inaction by regulators and administrators have plagued workplace safety in New Zealand for a very long time. The Royal Commission report into the ICI fire at Mt Wellington ought to have woken the government and businesses to the massive risks associated with small quantities of hazardous substances. It evidently didn't. The lack of action taken by the Department of Labour to known issues at Pike River was not dissimilar to the fiasco at WorkSafe in relation to adventure tour operators prior to the Whakaari Island eruption.

The hazardous substances' compliance regime has been blunted by many failures, including those of WorkSafe to act on obvious problems. The evidence of failure is abundant on both macro and micro levels. Thus, in the last two weeks, in the news we have read about:

- the extremely high cost of workplace injuries and death and how poorly NZ is faring vs other countries [Workplace deaths, injuries costing NZ \\$4.4 billion a year - report | Stuff.co.nz](#)
- fires at major industrial sites in Auckland [Large fire at solvent storage facility in East Auckland, public warned to stay away | Stuff.co.nz](#)
- extremely close call fatalities at other industrial sites in Auckland [Wairau Valley workplace accident: Handley Industries workers lost consciousness one at a time - boss | RNZ News.](#)

Add to that WorkSafe's data on the 750-900 workers who die annually from exposure to causes of insidious disease and there is only one shameful view of what has been achieved since WorkSafe was established. To add insult to injury were the High Court's criticism of the case brought by WorkSafe against the Buttle brothers.

Recent descriptions of WorkSafe by sophisticated market commentators as "incompetent" were no surprise. I described WorkSafe in a similar way in 2021 in a detailed letter to its then Chair – "failing and flailing." The CEO responded eventually but ineffectually. We all lurched forward, just not positively.

David Laurensen KC showed us how poor WorkSafe performed in the events leading up to Whakaari Island. [Whakaari White Island- WorkSafe report \(mbie.govt.nz\)](https://www.mbie.govt.nz/whakaari-white-island-worksafe-report). The same people remained in charge. We were promised improvement.

SageBush was equally harsh about WorkSafe in 2022. More promises were made by WorkSafe.

Evidence of material improvement is hard to spot, while evidence of decline in health and safety performance abounds. A lot is obviously wrong.

What I have been writing to you about for some time now is how WorkSafe is failing to adequately perform its roles. Chronic failures lead to very high social and economic costs. However, the message is most acutely painful with the individual stories of worker injuries, deaths and lives destroyed. Take the example from last week of Handley Industries Limited in the Wairau Valley, Auckland where the WorkSafe inspectorate has been idling in the face of serious non-compliance for a long time at a location where the consequences of failure can be lethal, as they so nearly were. People going home at night must not be left to luck or risk allowed to persist because, for some unknown reason, the Inspectorate is too spineless to force it to end.

That your response to my email (via your colleague) was to focus on the particular workplace that I referred to, rather than the certifier, told me, yet again, that you are unwilling to focus on the failures by certifiers, especially those who are obviously amongst the most incompetent. The certifier in question is issuing more than 800 certificates annually and by my calculations he is wrong more than 50% of the time. Worse than this, I can and will point to more than half a dozen massive disparities in how certifiers have been treated by WorkSafe that is not only scandalous; it is disgusting and leads to some very serious questions indeed.

I have seen no material improvements at WorkSafe in four years. I doubt that there is a person in WorkSafe's senior leadership team with any command of the requirements of the hazardous substances' compliance regime. This is a pointer towards where the organisation's priorities are not. We ought not be surprised, therefore, that we are falling backwards at an alarmingly poor rate in terms of the overall performance by PCBU's in terms of compliance with the hazardous substances' regulatory regime.

Because a new government will bring at least a kernel of hope for a better country (economically, socially and in terms of how the nation cares for our sons and daughters at work), I shall define again for you, and whoever might be inclined to make a difference (MBIE should heed this call, for one), what the problems and solutions are. The unfortunate aspect is that because all the power is concentrated by law in one place (WorkSafe), change must occur at WorkSafe first; from what I have seen, even MBIE feels hamstrung to act on the mounting evidence of failure. Since indolence is also evident, it is also obvious that the governance failures extend beyond the Board of WorkSafe.

New Zealand also needs to wean itself off the wearying sagas of (i) significant regulatory failure, leading to (ii) a massive incident to be followed by (iii) independent reports or a commission of inquiry which leads to (iv) promises to do better but which ultimately results in the same people failing all over again. This is what is evident in the various external reports that have been commissioned around what WorkSafe has done and failed to do. Government generally needs to be a place for action in pursuit of the organizational mandate, rather than a place of failure where consultants are called in to pick over the carcass like vultures.

### **Our data points to colossal non-compliance by PCBUs and compliance certifiers**

I have shared with you our data showing prolific certifier failures and then explained how I extrapolate the information in my various data sets to estimate that more than 60% of the certified locations in the country are not fully compliant with the Regulations. This is more than 15,000 locations - colossal non-compliance.

I have little doubt from the empirical data that I have been collating that the WorkSafe inspectorate continues to be poorly trained and, as a consequence, is doing a poor job overall in relation to assessing whether the many locations they should be visiting are compliant with the Regulations. The Health and Safety at Work (Hazardous Substances) Regulations 2017 (**Regulations**) present challenges for everyone; to ask a generalist inspector to assess compliance with complex rules is, by and large, unfair and destined to fail. This is what is happening. We see that even your most experienced people in the Inspectorate exhibit material weaknesses in their understanding and application of the rules; worse they get material issues affecting safety and compliance wrong. Others obviously guess regarding what the rules require and are frequently wrong also. (I have two shocking incidents from today alone). I have little doubt, therefore, that the feedback I have collated myself and receive from DGC's certifiers, is significantly more accurate and insightful than what WorkSafe has.

Thus, the two front lines in the compliance regime – compliance certifiers and WorkSafe - are failing badly. Unfortunately, there is a third more potent ingredient which is the ignorance of PCBUs upon whom the principal compliance burden falls. Together, this is a lethal cocktail, with the results that we find in NZ's dreadful workplace death, injury and true compliance statistics.

### ***Isn't this lethal cocktail the exact same ingredients that led to the shocking tragedies at ICI, Pike River and Whakaari Island?***

The question is obviously rhetorical. The real question is why lethal cocktails continue to be allowed to exist. Imagine your own family members being asked to walk into one of those businesses in NZ where the cocktail is fully ready to be ignited. I can show you how the cocktail has been made but you will need to explain why you can't or won't defuse it.

Ignorance, or at least lack of sufficient knowledge of the Regulations, permeates the entire regime, including:

- WorkSafe, especially the Inspectorate and the Regulatory Assurance Group (mentioned for reasons I will detail in further correspondence)
- The vast majority of PCBUs

- Most compliance certifiers (noting again the WorkSafe CEO’s acknowledgement of this before the Select Committee in 2022 – “significant skill deficiencies” amongst many aged compliance certifiers who are allowed to ply their trade despite being ignorant of what their roles truly require).

In practice, the “work arounds” for this lack of sufficient knowledge are:

- PCBUs rely on the **certifiers’** process as a check on their compliance.
- PCBUs rely on their **certifiers’** certification outcomes.
- WorkSafe principally relies on compliance certificates issued by **certifiers**.
- WorkSafe’s people lack the depth of skills in the Inspectorate to make the thorough assessments of compliance with the Regulations that fully competent certifiers undertake, and they rely principally on current compliance certificates issued by **certifiers**.

The common ingredient is highlighted in bold above. If a PCBU gets a compliance certificate (regardless of the skills of the certifier), the PCBUs assume all is well, when it is not.

The combination of an ignorant PCBU and an under-skilled certifier is a recipe only for systemic compliance failure. The tip of the iceberg (WorkSafe register of compliance certificates) is doubtless showing high compliance rates, the exact opposite of what is revealed in the iceberg below the surface – widespread non-compliance by PCBUs. As you and I know, many of the incompetent certifiers are producing >99% annual certification rates. This is one of the false indicators for WorkSafe, whereas in fact the workplaces are sitting ducks for worker harm and major property damage.

The most perverse situations are those we have encountered where, armed with a list of more than 20 specific non-compliances identified in a notification to WorkSafe of a refusal to issue a certificate, the only action that the WorkSafe Inspectorate takes is to issue an improvement notice that solely requires the PCBU to obtain a location compliance certificate from a certifier. This places even greater reliance upon the competence (and integrity) of the certifiers. If an incompetent certifier puts a “band aid on the ulcers” this leads to the end of the matter. The band aid is evidently in WorkSafe’s eyes good enough to move on and close the file.

### **The circle of recurring and permanent failure**

This leads me to define the circle of permanent failure which operates as follows:

- The PCBU is ignorant.
- The certifier is incompetent.
- WorkSafe can’t properly pinpoint and penalize the incompetence of the certifier.
- The certifier keeps certifying, as compliant, locations which are not.
- WorkSafe doesn’t change its practices.
- The PCBU remains ignorant.
- Cycle repeats.

- Deaths, injuries, fire, property damage eventuate.

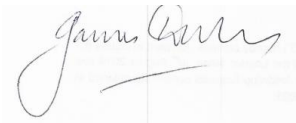
### **The message you failed to understand in my email**

It is simply this – WorkSafe must tackle the chronic failures by incompetent certifiers. This is one of the key interventions that will break the cycle of recurring failure.

My next letters will explain in detail how WorkSafe is apparently deliberately protecting the least able certifiers. They will show how the defective internal practices and skills at WorkSafe are perpetuating this cycle of failure and will ask rhetorically just how bad things need to get before you do something about them.

I hope someone in authority in government will pick up these threads and effect the changes that will give innocent workers in NZ a chance of getting home without being poisoned or killed because, let's remember, this is the entire reason for WorkSafe's existence.

Sincerely

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

James Dunphy

