Dangerous Goods Compliance Limited
PO Box 204361 | Highbrook | Auckland 2161
Tel: 09 257-5790
Email: info@dgcompliance.co.nz

20 July 2023

Mr Phil Parkes •
CEO
WorkSafe New Zealand

Dear Mr Parkes

Failures by WorkSafe New Zealand especially in relation to its supervision of compliance certifiers operating in the hazardous substances' compliance regime and how this is creating unnecessary risks at workplaces

This is an open letter to be published on our website. For a long time now, I have alerted WorkSafe to its many failures and I have not received any adequate responses; indeed, most responses have reinforced the erroneous path WorkSafe is on, whilst performance by many certifiers continues to exhibit a profound lack of ability and accuracy.

I am also publishing the letter dated 20 June sent to the Minister at the time (since sent to Ms Sepuloni's office following her appointment). This letter spells out the many facts (many of which come from WorkSafe's own data) that underpin my statements below.

The legislation has been written to ensure that the risk of harm from the storage and use of hazardous substances is significantly reduced. The probability of harm increases with non-compliance. As you will see in the examples discussed in this letter, the twin effects of certifier and WorkSafe failures set the country up for failures which will span the full gamut of potential harm, including catastrophic failure. I highlight some recent examples below which tie together the twin failures of certifiers and WorkSafe.

A. Certifiers are akin to WOF issuers and they must be supervised. While recalcitrant WOF issuers are disciplined, their certifier cousins are mostly not.

The front-line auditing and certification of locations and assets with the defined quantities of hazardous substances is exclusively done by compliance certifiers. The regime is akin to that applying to motor vehicle warrants of fitness. Both regimes require effective regulatory oversight to maintain the integrity of the process – if you don't lasso the failing cowboys, the herd will run amok. While WOFs can be issued by government entities (VTNZ) and the private sector, the only compliance certifiers are private sector operators. Alas, whilst recalcitrant WOF issuers are periodically punished or brought into line, this is very much not the case when it comes to compliance certifiers, despite all the powers reserved for WorkSafe if Part 6 of the Regulations. I explain below how WorkSafe has evidently followed the wrong criteria when it comes to its supervisory activities.

My letter to the Minister contains our proof of the very high failure rate by certifiers, just as it contains WorkSafe's own data showing WorkSafe's failure to perform its functions under Part 6. Just as we have proved extensively in relation to many technical and process issues in which WorkSafe has involved itself, I can also show how WorkSafe has veered off track when it comes to Part 6.

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The facts that certifiers must verify, and the proof they must obtain, before issuing certificates is in almost every case very highly prescribed by the Regulations and the performance standards. Certifiers are persons without any required tertiary qualifications. Their primary role is checking compliance and evidence gathering to prove or disprove compliance by PCBUs. They perform an exactly analogous role to the one VTNZ employees perform daily. Both worlds are black and white. Their outcomes are pass or fail and they are not allowed to be involved in the remediation of the problems due to the conflicts of interest this creates. It is parliament that has made these black and white rules and the certifiers must follow them.

Darren Handforth described the requirements in relation to the use of AS 1940 cabinets used in workplaces to store flammable liquids to comply with regulation 11.29. He wrote "the specific requirements in reg 11.29 are prescriptive." I agree. What I believe Darren does not fully appreciate is that the requirements in relation to every other item that a certifier must sign off on are, almost without exception, similarly "prescriptive." Certifiers are not authorised to exercise discretion when assessing whether PCBUs have met these prescriptive requirements. The VTNZ analogy applies here too; a VTNZ employee whose role it is to assess the specific elements that must be met before a WOF is issued has no discretion to waive non-compliance and rightly so. Whilst the exact same outcome ought to be the case when it comes to certifiers and what WorkSafe expects, it is not.

I quote again from Darren Handforth's email to me: "*It is the responsibility of the compliance certifier to provide a service that promotes safety and is within the scope of their authorisation, and what the Regulations require*." In fact, the legislation leads to a quite different description of responsibilities which I would rewrite as follows: "Parliament has set a prescriptive set of rules that certifiers must follow objectively. This will promote safety. Enforcement activities are the domain of WorkSafe." The critical difference is that the certifier's and WorkSafe's role start with following prescriptive rules. Whilst reg 6.8(2)(d) requires WorkSafe to form a view that a certifier applicant will perform her functions "in an objective manner that promotes safety" this does not introduce some God-like power to not enforce a prescriptive requirement. They are most definitely not qualified to do that, and it is absurd to think that parliament would contemplate this role being performed by lay persons with few specialist skills and poor track records.

In addition, Mr Handforth has purported to explain the extensive certification of underground petroleum tanks in circumstances where the required dossiers required by Part 17 of the Regulations do not exist or are inadequate, by reference to the discretion in reg 6.23 available to a certifier. In order to exercise this discretion, there must be an identified and documented failure. In lurching without factual basis for 6.23 as the panacea to what would be obvious failure to meet the requirements in Part 17, Mr Handforth is recognising what is obvious from the results – certifiers are not abiding by prescriptive requirements and this is being generally tolerated by WorkSafe. Confusingly, WorkSafe is apparently aware of the potential non-compliance across the petroleum industry but has collated no data to pinpoint precise problems, while tolerating widespread non-compliance by certifiers – these confusing facts and admissions come also from Mr Handforth in response to my OIA requests.

B. The importance of a certifier's training, ability and conduct and the dangers of "toot and wave" certification. These are the focus of WorkSafe's supervision of what certifiers do according to Part 6

Understanding many of the prerequisites which must exist before issuing a certificate requires a sound understanding of the Regulations. For example, reg 10.34(1)(j) demands that the certifier verify that

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"the requirements of Part 11 are complied with" by the PCBU. This is where training, ability and conduct come to the fore. All three are relevant. Without any one of these three, the accuracy of the certifier will be impaired. I could add as a subset of "conduct" the time that a certifier takes and the processes she follows. As one expert certifier witness statement[1] noted last year, spending small amounts of time only on site is a form of "toot and wave" certification and highly likely to be error-ridden (which is what the expert concluded from the 50 or so files he reviewed). The record-keeping requirements of the performance standards are onerous. A competent and careful certifier is highly unlikely to be issuing more than 700 certificates annually having regard to all obligations to which he is subject, yet WorkSafe is aware of some certifiers who issue more than 1000 certificates annually. This ought to be a flashing red light for the investigative teams to see whether the excessive certificate issuance ("conduct") is leading to error-ridden results.

WorkSafe's supervisory powers include certifier audits, and investigations, specifically empowered by reg 6.15, the focus of which is on the certifier's "ability" and "conduct." They are, of course, different concepts. A poorly-trained certifier will lack ability, while a "toot and wave" certifier who might otherwise be considered competent, is likely to have inaccurate certification outcomes due to the manner in which he conducts his business. **There is no requirement in reg 6.15 for the complaint to also include an element of "safety" before WorkSafe is empowered to act. There is also no reference to "safety considerations" in reg 6.20 which deals with the punishment that WorkSafe can impose on recalcitrant certifiers.** The regulations are wholly unambiguous in this regard.

Regulation 6.16 introduces the element of "necessary for safety" when it comes to the powerful right to suspend a certifier. It makes sense that this element of safety considerations be present when it comes to suspension – the requirement is that it be "necessary for safety" to suspend. The introduction of this element solely in regulation 6.16 reinforces the interpretation of regs 6.15 and 6.20 as I have explained above and important conclusions flow from the lack of reference in these sections.

WorkSafe has some serious explaining to do when it comes to when it has, and has not, invoked reg 6.16. Any certifier who has been suspended for much more minor transgressions, while the certifier discussed in the "Whanganui and retail failures" referred to below remains unimpeded in what he can do as a certifier, should be sending WorkSafe a "please explain" letter or instructing lawyers.

The conflation by WorkSafe of safety concerns (from reg 6.16) into "conduct or ability" has led to the paucity of WorkSafe's investigations into certifiers' ability and conduct over the last few years, while the threshold for invoking the powers of suspension has evidently evolved from suspending for minor process issues to not suspending when the threshold of "necessary for safety" has been easily established.

WorkSafe's supervisory powers, as described above, also make sense from a practical perspective, especially in the context of the role that a certifier is required to perform. If a certifier cannot, does not, or will not follow the prescriptive requirements of the law before issuing certificates, she is not suited to the role. The purposive effect of Part 6 is that WorkSafe can, and should, exercise its disciplinary powers when complaints show a lack of ability or poor conduct with some element of frequency. If WorkSafe does not do so, we could reasonably expect compliance standards to deteriorate - this is what I say is proved by the data I have compiled (refer letter to the Minister which has been provided also to WorkSafe under a formal complaint).

[1] In the context of proceedings in the High Court.

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C. WorkSafe's 2019 policy document appears to be the culprit and the reason WorkSafe has sailed so far off course

WorkSafe has disclosed that almost every complaint made about a certifier in the last three years or so has not led to an investigation under reg 6.15. I have read several WorkSafe letters where the author (invariably a lay person without the qualifications to make such determinations in any event) cites the absence of a "safety concern" as the reason for not turning a complaint into an investigation. Alternatively serious indications of limited ability and poor conduct have been ushered down the aisle of an audit.

I suspect that WorkSafe has followed the Compliance Certifier Audit Policy -Compliance certifier audit | WorkSafe - it authored in 2019, which was signed off by the SLT, or Senior Leadership Team. It contains the following statement:

> "any non-compliance observed in an audit may be grounds for a concern about the conduct or ability of the compliance certifier. **When these concerns relate to a serious risk to health and safety** an investigation **may** be initiated, which could lead to an amendment, suspension or cancellation of the authorisation." (emphasis added).

The first error lies in the introduction of "serious risk to health and safety" which is not a prerequisite for investigations and disciplinary action. Not only is WorkSafe acting ultra vires by introducing such a prerequisite, it is also dangerously close to usurping the clear rules in this area that parliament has enacted. The second error lies in the thinking that there is a discretion on WorkSafe's part to not take decisive action when there is a "serious risk to health and safety." This is alarmingly what I have seen has been happening in practice which ought to alarm you in the context of your disclosures to the parliamentary select committee.

Whyever and however WorkSafe is acting as it has been, the paucity of investigations it has conducted into certifiers is shocking. It is not a stretch to expect that a lack of investigations into the activities of certifiers whose abilities you yourself, Phil, described to the parliamentary select committee last year as "an ageing group with skill deficiencies" will show up somewhere and the results will not be good. The database I have compiled reveals that there is a chronic failure by many certifiers in our list of 50 certificates where we have discovered a 100% failure rate in relation to the absence of all prerequisites to be verified before certificates were issued. I say there is a *prima facie* lack of both ability and poor conduct by many of the certifiers in this list, the significance of which Dr Gardener (at WorkSafe) promptly purported to downplay after I sent the list to her. How many hundred failures does she need to see before she will act on the very obvious problems?

A trilogy of material failures by another certifier more than six months ago have not led to an investigation. This beggars belief and raises some questions about why this is so.

A dozen or so examples of failure by two other certifiers to follow prescriptive requirements of the Regulations, apparently without this creating any material trigger for action by WorkSafe.

Then we come to class 1's (explosives and fireworks) which appears on the back of insightful information I received last week, to be a lot worse.

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Strangely, while obvious examples of significant failure are under WorkSafe's noses, the Regulatory Assurance Group devotes huge resources to asserting compliance failures when they are quite wrong (according to legal opinions we have obtained) and turning spurious minutiae into issues when they simply are not. Profoundly-erroneous assertions of major non-compliances are alleged where none exist. Audits that are meant (according to WorkSafe's policy) be completed with 8 hours of au auditor's time, but are taking total time of more than nine months with peanuts to show as the end result for the wasted time and effort.

It is time for WorkSafe to focus on the failing elephants in the room, not the peanuts on the floor. You yourself have alerted the nation to the elephants' failures so why does your team apparently carefully navigate their way around the biggest underperformers? There surely must be other facts causing this and I encourage you to root out the issues.

In my letter to the Minister, I explain how WorkSafe's failure to supervise the conduct of certifiers correctly and in accordance with the law is much the same as WorkSafe's abject lack of supervision of the adventure tour operators on Whakaari Island. My own view of the footage taken on the day of the Whakaari Island eruption is that there were shocking and obvious aspects of non-compliance with the law. Using its own benchmark of PCBUs originally lined up for prosecution, WorkSafe's own failures in the performance of its supervisory activities of the PCBUs operating on the Island would also be part of the current proceedings in the High Court.

D. "Houston. We have some problems" - Whanganui, Hamilton, retail certification for starters and explosive manufacturing in the middle of Auckland

Last week, I read reports prepared by WorkSafe into an unplanned and potentially very dangerous explosion of ordnance (military explosives) in Whanganui which occurred in January 2022. There is little doubt that this location should never have been certified, including because there was a school within the required (but not implemented) exclusion zone.

WorkSafe is also now aware (and ought to have been aware in 2012 because the information was hiding in plain sight in its register of certificates) that the quantities of class 1's at the location took it above the threshold for a major hazard facility. This is a problem I have seen before and have alerted WorkSafe to without action being taken.

Despite the failures in Whanganui, the certifier in question is still operating as a certifier and has not been suspended. I highly suspect the parents at the school in question and the parents near other locations he may have certified when the requirements were not met will wonder why the power in reg 6.16 has not been invoked. I have already seen WorkSafe take no action in relation to the same certifier's failed certification of hundreds of retail shops. This really does need some investigation by you, Phil.

I understand, as well, that the fireworks display in Hamilton at the final of the Super Rugby Competition was not compliant with the Regulations. There were tens of thousands of people within the mandatory exclusion zone. Innocent people attending these matches with their families assume that the compliance regime will keep them safe. I say they should go and buy a bigger TV because the system is failing them. Worse, the failure is apparently soon to be repeated at multiple venues when it hosts matches in the FIFA Women's World Cup this month. I sincerely hope that someone at FIFA will pick up this letter and demand that only compliant fireworks displays take place, the proof of which is not regrettably in the form of the certificate issued.

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Safety issues and fires associated with fireworks are relatively commonplace after all: https://www.nzherald.co.nz/nz/stray-fireworks-strike-fans-at-eden-park/ONXANZI37XCXDXECP56U23YQW4/

People will be assuming that WorkSafe is doing its job to enforce the rules that are there. People will be alarmed to learn the facts. I sincerely hope that their factual recognition comes other than through the debris of tragedy. Taxpayers should be asking how bad a compliance certifier has to be before s/he will be suspended – how can the examples before you not rise to the threshold of "necessary for safety." Surely tragedy ought not to be the prerequisite?

E. The failures originate in (lack of good) management, people and process issues at WorkSafe

WorkSafe must address these issues in the context of why WorkSafe was created in the first place. You need reminding that it was failures by the government entity responsible for enforcement that contributed to the Pike River disaster. Based upon the findings of David Laurenson KC, this was also the case at Whakaari Island. I see everywhere further failures by an administrator that has yet to get a good grasp of what the rules require and what its focus ought to be.

Today, you have an excellent legislative environment that creates robust rules and a large organisation to perform your roles as an administrator. Your productivity statistics are poor, however, and I have no doubt that our wonderful country's workplaces are hurting a lot more people every day than they ought to. New Zealand deserves better from you. As I wrote to the Minister, I am prepared to roll up my sleeves and help, but you will first have to reflect on where the start of the many failures is.

Yours sincerely

James Dunphy
Managing Director