Complaint made by Dangerous Goods Compliance Limited

in relation to

the conduct of employees of WorkSafe New Zealand generally, specifically

in relation to its audit, investigation and censure of

Warren Romak[1] (Warren), and more broadly in relation to the conduct of

WorkSafe's Regulatory Assurance Group

A. Overview

We make this complaint about each of the WorkSafe people named herein - Costello, Pille, Patena, Gardner and Handforth. We allege that each of them contributed in some way to:

a. breaches by WorkSafe and by them individually of the Health and Safety at Work Act 2015 (**HSWA**)

b. processes and outcomes that had significant flaws; and

c. the absence of any factual finding reached lawfully that justified the severe penalty that WorkSafe imposed on Warren Romak.

We have alerted the Board of WorkSafe for the last several years about the many problems with WorkSafe's performance, including the conduct of some of the people we now formally complain about. There must, therefore, be some accountability at Board level for the conduct which leads to the unusual situation of the regulator responsible for the administration of HSWA being itself accused of breaches of HSWA, the primary legislation it administers. Even if we put the legislation to one side, isn't the conduct generally repugnant?

Management's rejection of this complaint and every other one about the conduct of its people has not surprised us. To acknowledge the failures would likely involve acknowledging serious management failures after all. It is up to the Board of WorkSafe whether it wishes to follow management's lead on this episode and other similar ones that we urge certifiers to bring forward through their industry bodies.

The analysis of the duties owed by WorkSafe described in this complaint has been reviewed by a senior solicitor who is a specialist in health and safety law at one of the country's premier law firms.

This complaint has been made privately already to management and the Board. Management's responses have been far from satisfactory and have included:

a. denials that WorkSafe owes duties under HSWA to certifiers;

b. assertions that external solicitors provided independent legal advice regarding the conduct of WorkSafe towards Warren prior to the end of 2022. WorkSafe implied that the further bullying of Warren that continued in 2023 had been addressed by the 2022 review;

[1] We have used an alias for confidentiality reasons.

c. assertions that parts of Mr Patena's affidavit were merely illustrative of the concerns that arose when certifiers did not perform their roles competently; and

d. soft threats of legal action presumably based in defamation.

We have chosen to stand tall, to rely on the truth that is contained in this complaint, and to implore the Board to fully investigate and then take appropriate disciplinary action in relation to the people responsible for the acts, together with accountability at Board level. Rather than it being "unwise" to publish this complaint, we believe it is the sole remaining non-litigation related avenue to effect a change of practices we regard as abhorrent. We make a public call for the two certifier industry bodies to bring forward other similar examples through an independent research effort in relation to which DGC is prepared to fund significantly more than its pro rata share of the cost.

B. Warren Romak

1. The name "Romak" has been created as a reference to the Roma people, noting their persecution over centuries.

2. From 2018 to 2024, Mr Romak endured laborious WorkSafe processes associated with applications for higher authorisations (which involved the submission and review by WorkSafe of more than 50 files in 2020), an investigation in 2019 which principally emanated from the back-office chaos at our predecessor entity, a further preliminary investigation in 2019/20, an audit in 2022, an investigation in 2023, and preliminary investigations in relation to a complaint made at "Lee's Windmill" which is described in detail below because it forms part of this complaint. In pursuing some of these complaints, WorkSafe demonstrated poor knowledge of the rules and poor judgement – these are strange aspects given that mostly WorkSafe spends months in some type of what it refers to as "triage" to establish that there is a reasonable basis to take any matter forward to an investigation. A sceptical view is that each process was designed to weaken Romak's resolve to remain in the regime and, if this were the objective, WorkSafe has "succeeded."

C. The precedent from the prosecution of Whangarei Boys High applied to WorkSafe

3. The board of trustees of the Whangarei Boys High School was recently prosecuted by WorkSafe for breaches of HSWA. Most know the sad story - school boards are volunteers doing their best. There is no denying the tragedy and the pain for family and friends. The duties under HSWA apply to all persons carrying on a business or undertaking and that one is a volunteer with lay skills makes no difference. Is making an example of a board of trustees a "social good" to deliver punishment and a warning to others, or is the inevitable trauma of the board of trustees' punishment enough? Therein lies the prosecutorial dilemma, but WorkSafe chose to prosecute.

4. The submissions of WorkSafe's lawyer explain, if less than eloquently based upon the reporting in the NZ Herald, the breach and the rationale for prosecution[2]:

> "WorkSafe's lawyer Emma Jeffs said the failings had occurred before the excursion in that the school had no emergency or health and safety plan prepared should anything happen in the caves.

[2] The quote is from The NZ Herald's article on 27 September 2024.

> "Part of the failing was failing to have an emergency plan, my understanding is they went in and there was nothing of note that was going to be particularly difficult – the water was running but not more than the teachers had previously experienced.
>
> "However, when they were in the cave the lack of an emergency plan is the failing of the school," Jeffs said.

5. Thus:

   - There was a duty owed by the school/ Trustees
   - Not enough had been done to discharge the duty
   - There was harm, including death.
   - WorkSafe prosecuted the trustees.

   We say the same factors were all present in relation to the harm caused to Romak as we explain below.

6. We allege WorkSafe behaved extremely poorly in relation to its treatment of Romak – not only with its processes and decision-making, but it also acted in disregard for its HSWA duties. Thus, we allege:

   - There was a duty owed by WorkSafe (its board and its workers).
   - There is no evidence that anything was done to discharge the duty.
   - There was significant harm to the mental welfare of Warren.

7. If the Whangarei Boys High School was a sound prosecution, the same logic applies to this scenario. There are, of course, additional factors:

   - WorkSafe is the administrator of HSWA and ought to know the law better than most.
   - WorkSafe itself has focused extensively on mental harm in the workplace.
   - WorkSafe evidently does not have policies and procedures[3] to deal with what we define as the high risk of harm scenario that Warren was exposed to.
   - WorkSafe had multiple opportunities to divert its people from its harmful behaviour, but didn't require them to provide the space and time that the situation obviously demanded.

8. We also allege further that in relation to most of the Part 6 processes – certifiers' applications for qualifications, audits, investigations, suspensions and applications for reauthorisations – there is an inappropriate dearth of defined practices and procedures with the result that:

   - There is significant variation from the processes and outcomes from one certifier to the next and from one investigator to the next.
   - There are excessive discretions that are, by default, vested in the persons from WorkSafe performing the Part 6 processes and exercising the powers therein.

[3] We have asked for these in connection with 2024 Part 6 procedures and nothing has been provided despite the DGC directors alerting WorkSafe to our concerns that the meeting they proposed to hold was "high risk" to the certifier's health.

- There are large variations in outcomes especially in relation to what and who is punished hard vs what is tolerated.
- The time that has been allowed to be taken has become extraordinarily long - time itself is used as an instrument of harm, despite the explicit time frames in Part 6 which appear designed to prevent this from occurring.

9. We have recently observed that the outcomes of several WorkSafe processes where the certifiers' lack of skill, diligence and ethics have been discovered by WorkSafe through its investigative processes, yet the penalties imposed have been somewhere between nil and totally benign, while Romak's authorisations were removed. We believe WorkSafe is leaving some of the least skilled and poor performers on the street to keep on issuing certificates to PCBUs who have been non-compliant for years. WorkSafe appears willing to tolerate some certifiers' failures on an industrial scale, while targeting the likes of Warren Romak.

D. WorkSafe's HSWA duties to compliance certifiers

10. Under s 36(1)(b) HSWA, WorkSafe must ensure, so far as is reasonably practicable, the health and safety of "workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out that work". Certifiers are expected to and do carry out work which is "influenced or directed by" WorkSafe. This occurs in a myriad of ways – from following WorkSafe technical bulletins (class 6&8 and AS 1940 cabinets, for example), to co-operating with its Inspectorate especially when they have queries regarding a site certified by, or more frequently, refused certification by the certifier and, of course, participating in the various processes that originate under Part 6.

11. WorkSafe, itself, has recognised, in his role as a certifier, Warren was a "third-party verifier" and a "proxy for WorkSafe." WorkSafe's terminology (quoted below) is entirely consistent with certifiers being akin to contractors, triggering duties for WorkSafe in relation to how it interacted with Warren. The following are quotes4 from WorkSafe's October 2023 document titled "Consideration of Submissions":

> "The certifier correctly points out that compliance certifiers are third-party verifiers of regulatory compliance. As proxies for WorkSafe, ... "

12. Alternatively, under s 36(2) WorkSafe must ensure, so far as is reasonably practicable, "that the health and safety of other persons is not put at risk from the work carried out as part of the conduct of [WorkSafe's] business or undertaking." If Warren is not a "worker" for the purpose of s 36(1)(b) during WorkSafe's audit and investigation activities, he is clearly an "other person" whose health and safety could be put at risk from work carried out as part of WorkSafe's business or undertaking (including the carrying out of its functions under Part 6 of the Regulations).

13. Whichever applies, the risk to Warren's health and safety (primarily psychosocial harm in the form of stress and mental health impact) arises from the nature of the processes which

[4] At page 2 of WorkSafe's Consideration of Submissions document. This was a very important document, containing WorkSafe's decisions on Warren's submissions on the draft investigation report.

WorkSafe carries out under Part 6 of the Regulations, including the manner in which its employees engaged with and/or treated him when performing audit and investigation activities in particular. This is an obvious risk, and the manner in which Part 6 activities are carried out is clearly a matter which WorkSafe has, or would reasonably be expected to have, the ability to influence and control for the purpose of s 30 of HSWA.

14. In connection with other processes involving WorkSafe's engagement with one of our employee certifiers in relation to its performance of a Part 6 process, the DGC directors took many steps to mitigate the risk of harm to 'Fred." After WorkSafe demanded an in-person meeting with Fred, we categorised this as a "High Risk" event and were particularly keen to agree with WorkSafe procedures for the safe conduct of the meeting; having regard to WorkSafe's own publications on the topic, we were cognisant of the overlapping duties we had as directors, with those owed by WorkSafe. What we discovered and experienced was that:

    - WorkSafe denied it owed Fred any duties under HSWA.
    - Despite being asked for them, WorkSafe supplied no policies and procedures relating to the safe conduct of Part 6 processes, especially in relation to the meeting.
    - WorkSafe changed its conduct from the agreed procedure of hearing Fred's responses (as agreed) to a discussion/ interrogation – precisely the conduct which the DGC directors had forewarned WorkSafe posed unnecessarily high risk to Fred's health.

15. Despite the harm caused to Warren, WorkSafe still apparently has no procedures to fulfil its duties. We have observed this in more recent Part 6 processes as well.

E. How Warren was harmed by WorkSafe

16. Warren's performance as a compliance certifier was audited in 2022. Enda Costello was heavily involved in this process, although the named auditor was Karly Skinner (in relation to whose conduct we make no complaint provided she acted in good faith when setting up the 4 November telephone call between Warren and Costello).

17. The trigger for a major adverse mental health event suffered by Warren was a phone call that Mr Costello had with Warren while he was driving back home at the end of a busy week. What was said during this call is described in detail on the following pages. This call precipitated a serious mental health issue for Warren that he had never ever experienced before. On medical advice received after Warren sought assistance from his doctor to deal with the immediate consequences of adverse mental and physical effects he suffered, he:

    - was prescribed medication to deal with the adverse effects he experienced;
    - immediately took significantly time off work; and
    - ceased all contact with WorkSafe – this was the very direct instruction of his doctor.

18. The following extracts from Warren's affidavit dated 5 December 2022 prepared in relation to an application for a restraining order against WorkSafe, explain what happened:

21. At or about 1 pm on Friday 4 November, I received a call from Karly Skinner (WorkSafe) who explained that she was calling on behalf of Mr Costello to set up a call, "hopefully this afternoon", to discuss "nothing technical with my submitted files."

22. When Karly called, I was driving back home after a busy week in Auckland. I agreed to receive a call from Mr Costello that afternoon because it sounded as though the issues were of a routine nature, and I preferred that the Audit be completed as soon as reasonably practicable.

23. When Mr Costello called, I was still driving. I pulled over in Coatesville for the call.

24. Mr Costello was initially polite and explained there were "just a few simple matters" that he wanted to address. He repeated the phrase used by Karly that there was "nothing technical" about the files." His first questions were about conflict issues and were addressed in a couple of short explanations by me.

25. Mr Costello and I then discussed matters arising from the files he had reviewed, one relating to Caltex Manurewa and the other to a certified handler certificate I had issued (both "files"). At this point, we were getting outside the premise upon which I had agreed to take his call that busy Friday afternoon.

26. After listening to my responses, I believe Mr Costello's approach quickly changed from that of an investigator seeking information to be evaluated in an orderly manner, to an interrogator with a threat to convey to me.

27. After discussing the files which he quizzed me about, Mr Costello said words to the effect:

    a. "that's a red flag for us"

    b. "You did not have enough information to make a decision to certify"

    c. "This is troubling. It's problematic. A red flag"

d. "The consequences are not for me to decide but will need to be considered by senior management"

e. "I am going to have to investigate further next week."

28. When he made these comments, Mr Costello's tone changed to an officious, prosecutorial tone. The impression I took from all aspects of his approach was that he had the objective of making serious adverse findings when, in fact, none of my explanations ought to have precipitated any concerns.

19. The demands that followed were further explained in Warren's affidavit:

h. On 11th November, my employer accurately informed WorkSafe regarding aspects of the medical advice I received and strongly urged WorkSafe to cease all communications with me. (Annexure F)

i. On 15th November WorkSafe responded by requesting my medical records. My employer explained that this was unnecessary. (Annexure G)

j. On 18th November, WorkSafe issued my employer with an ultimatum that I had to either provide my medical records or WorkSafe needed to speak directly with my doctor. (Annexure H)

k. After this, my doctor explained that no organisation has the right to make the demands for medical records that WorkSafe had made.

l. On 22nd November 2022, my employer informed WorkSafe that I would apply for a restraining order if WorkSafe did not agree to not contact me. (Annexure I)

m. On 28th November 2022, WorkSafe sent me an email from its "regulatory assurance" email address informing me that,

although delayed temporarily, it still intends to contact me regarding the audit. (Annexure J).

20. Like us, Warren's doctor was appalled at WorkSafe's requests. We wrote to Mr Thornborough to tell him that we had seen the medical records that had been provided to DGC on a "for our eyes only" basis, that the health issues were extremely serious, and it was unnecessary to supply the records.

F. WorkSafe completed its audit and immediately commenced an investigation

21. Thereafter, while Warren was either off work completely or on a carefully-managed return to work with considerably reduced duties, but without the all-clear from his doctor to re-engage with WorkSafe, WorkSafe:

    - completed the audit;
    - closed the audit without any Certifier Action Plan, one of the few mandatory steps in what its Audit Policy requires;
    - commenced an investigation; and
    - completed the investigation and announced its intention to remove all Warren's authorisations.

22. During most of this time, Warren was still abiding by his doctor's instructions, including after further consults in 2023.

23. In the next stage, Warren's extremely capable solicitors pointed out the many defects in WorkSafe's approach, legal analysis and conclusions. The submissions in response to the draft investigation report were swiftly rejected, and by 14 November 2023, a final recommendation of Mr Costello and Ms Pille was sent to the decision-maker, Mr Patena.

24. We believe the most exact explanation for WorkSafe's motivations, putting to one side for now the open threats that DGC's Managing Director received in 2019 from WorkSafe about the consequences of not complying with WorkSafe's demands, is contained in WorkSafe's (Mr Costello's presumably) penmanship in the investigation report:

> "Disengagement from the mandatory audit process, which is a statutory requirement and one that the certifier agreed to participate in upon acceptance of his authorisation, is relevant behavioural history and calls into question the ability for the certifier to meet the Fit and Proper requirement."
>
> "It would establish a poor precedent if an authorised person can claim an alleged health condition to avoid participating in an audit or investigation. Without the requested evidence of any alleged medical condition, it would be inappropriate for WorkSafe to accept the existence of, or decide on the appropriate support mechanisms for said condition. Further, the certifier has failed to assert how he is simultaneously medically well enough to perform his functions as a compliance certifier, while being medically unfit to participate in an audit of his work as a compliance certifier."

25. There are several aspects to this statement which are problematic:

    - "*claim an alleged health condition*" – the use of both "claim" and "alleged" in short succession is designed to cast doubt on the veracity of the condition. WorkSafe did not have any evidence to dispute the very precise information that had been accurately conveyed by the directors of DGC;

    - "*avoid participating*" is wrong – Warren's actions were taken in order to look after his mental health;

    - "*requested evidence of any alleged medical condition*" – Warren's doctor was incredulous that any organisation anywhere would regard it as its prerogative to require evidence in the form of medical records.

    - WorkSafe was not asked to "*decide on the appropriate support mechanisms for said condition*' – it was asked to give him time to recover which was surely reasonable. It was the directors of DGC that had legal duties towards Warren and the best course was to follow Warren's doctor's instructions to not have anything to do with WorkSafe. Because it denies it owed HSWA duties to Warren, it is strange that it regarded that it had some obligation to "decide on appropriate support mechnaisms."

    - The difference between performing a role in which you receive positive feedback (Warren as a certifier) and being exposed to a source of mental harm (WorkSafe's audit and investigation) was explained in correspondence with Darren Handforth, the decision-maker at the time, despite it being obvious. Warren's performance was monitored by DGC's directors as well with fact-finding calls to a major corporate client and to a senior WorkSafe inspector while Warren was getting back into the flow of work. Feedback from both was extremely positive.

26. We can restate WorkSafe's speculative theories and poor logic with our synopsis of what we believe actually happened:

    Warren did not accede to WorkSafe's demands for his medical records or equivalent proof. WorkSafe disregarded the confirmations received from all parties, including two very highly experienced and professionally qualified directors of DGC. Worse, WorkSafe regarded Warren's withdrawal for medical reasons as a breach of the standards of expected conduct by a certifier that was punishable by removal of authorisations."

27. We believe that the only poor precedent that has been established is that WorkSafe can demand full compliance by certifiers, regardless of how unreasonable the request is. This precedent aligns exactly with the threat issued by Peter Nicholls to DGC's Managing Director in 2019, in response to a query about the process that was then ongoing in relation to Warren, to the effect that 'WorkSafe can make certifiers life a misery if they do not fully co-operate with WorkSafe'[5].

[5] Nicholls was to set the fastest time that we have ever seen in propelling a very misguided complaint from a member of WorkSafe's inspectorate into a full-blown letter commencing an investigation in 2023. Compared to

28. As detailed primarily in the last section of this complaint, the investigation report was riddled with hyperbole and basic legal flaws. Even stranger things followed as we were to learn after Warren appealed WorkSafe's decision.

G. Patena's decision-making

29. Mr Patena, Chief Operating Officer and one of a handful of Deputy Managing Directors at WorkSafe, received the final report, associated documents and the guillotine recommendation of his team on 14 November 2023. The submission was signed by Catalijne Pille, a solicitor by training, who was also the head or acting head of the Regulatory Assurance Group at the time.

30. Mr Patena did nothing of note with Ms Pille's final and complete documentation for 179 days.

31. On 10 May 2024, Mr Patena wrote to Warren:

> **WorkSafe's decision after considering your submission.**
>
> 5. Having considered the investigation report and its findings, as well as your submission on it, I have decided to cancel your authorisations in accordance with regulation 6.20(1)(b) of the Regulations.
> 6. I have made this decision because I am satisfied that your conduct has fallen below the standard expected by WorkSafe for a compliance certifier.
> 7. WorkSafe acknowledges there have been significant delays associated with this investigation.

32. Warren appealed the decision in the District Court and applied also for a stay of it. This was opposed by WorkSafe. In its notice of opposition, an affidavit sworn by Mr Patena was filed. The clear impression conveyed in the affidavit was that it was only the investigation which had led to the removal of Warren's authorisations – just as stated in Patena's 10 May letter. Mr Patena's affidavit included the following paragraph:

other WorkSafe processes that take several months, Mr Nicholls obtained approval from Ms Pille in a matter of days. Within a month, WorkSafe identified its own flaws and withdrew the process.

> 35. For a recent example, I am aware that WorkSafe was notified of a location with over 500 kilograms of liquified petroleum gas (LPG), which was being stored against a building constructed of timber with wooden cladding, contrary to regulatory requirements. If a fire were to occur, I understand the risk of an event known as a 'boiling liquid expanding vapour explosion' poses a significant risk for workers, the public and attending fire fighters. It is for this reason that compliance certifiers are required to ensure that there is no combustible material within the proximity of LPG and the area where it is stored needs to be fire resistant.

33. When we read this, we assumed this paragraph referred to a location compliance certificate issued by Warren. This was confirmed by Mr Patena in response to DGC's communication. We refer to the location as "Lee's Windmill."

34. After receiving responses to our OIA requests, we ascertained that:

    - A complainant (a certifier) made <u>three</u> complaints about the issues at Lee's Windmill.
    - All complaints were directed at Warren's certification.
    - The first complaint was made in November 2023.
    - The third complaint was received by WorkSafe on 20 February 2024.

35. The complainant wrote "*Im <stet> very concerned that this is a historical building made of wood – that should a fire start due to the non compliance <stet> the whole building would be destroyed*." The complainant used phrases "***very dangerous***" and noted that "the cladding does not completely cover the wooden exterior of the building." We observe:

    - The complainant expressed an elevated level of danger.
    - The complainant made obvious technical errors in what he alleged.
    - The complainant also made highly defamatory remarks about Warren which were wholly without foundation.

36. WorkSafe did nothing in response to this complaint for at least three months despite the elevated alarm that the complainant was striving to communicate. Here, one has to pause and ask rhetorically – why did WorkSafe not react, especially when it knew that the alarm was being rung by someone that they themselves had qualified as a compliance certifier with supposed expertise in relation to LPG locations, at least.

37. WorkSafe's inspectorate visited the Lee Windmill we assume in March or April 2024, around 4 months after the elevated danger had been complained about. We have requested details regarding exactly when WorkSafe first visited the location, but this has been withheld by WorkSafe's Mrs Tracey Conlon because of its ongoing process now with Warren; yet, to quote WorkSafe's Regulatory Assurance team in September 2024, four months after Mr Patena's affidavit, they were only at a "preliminary stage in relation to their inquiries"[6].

[6] This is closer to the normal pedestrian pace of what WorkSafe does. It can be contrasted with the alacrity displayed by Mr Nicholls referenced above.

38. It was only after the execution of a settlement agreement between WorkSafe and Warren that further details became known, including:

    - The largest location at the site is 270 kg (and as any technical reader will know this changes the requirement for fire protection as compared to a 500kg location, noting the reference in Mr Patena's affidavit).
    - At no time was there any interruption to the LPG supply at Lee's Windmill, in particular due to any elevated safety concerns (such as, for example, the concerns described by Mr Patena in his affidavit or the alarmist nature of the complainant's three complaints).
    - WorkSafe required the PCBU to make some changes to one of the LPG locations as shown below.

H. Before and after at Lee's Windmill

39. The photos below show the LPG enclosure in February 2024 and again in September 2024. One can see that the change required by WorkSafe was the addition of the black-coloured board (which is not fire-resisting or fire-rated) above the height of the cylinders, shown in the third photo below. The first photo is showing the "other side" of the enclosure with its fire-resisting material behind the cylinders. The second is showing the same side as in photo three taken from Romak's 2023 inspection report. The motivation of WorkSafe, as explained by the PCBU, was to stop ventilation above the height of the cylinders.

40. Because "ventilation of LPG is your safety friend" and because the requirements for fire-resisting material apply up to the height of the cylinder, there is a sound argument that what WorkSafe demanded was (i) not required by law and (ii) reduced the safety of the location by reducing the ventilation which, in turn, increased the risk of concentration of any vapour that could leak from any of the cylinders. On this logic, WorkSafe's intervention impaired the safety of the LPG location. Extending the logic further, the complaint would more correctly be considered "frivolous" or potential "frivolous and vexatious".

41. What we can say is that WorkSafe's inspectorate did not share Mr Patena's concern that this location posed the threat of a "boiling liquid expanding vapour explosion" because, one would have to assume, that, had they shared this concern, the location would have been issued with a prohibition notice and/or more significant changes would have been demanded.

42. It is, of course, not prohibited by the Regulations for there to be "combustible material within the proximity of LPG" (note the reference in Patena's affidavit) as any experienced industry participant understands. Nor did WorkSafe's inspectorate require that any such "combustible material" be removed according to the PCBU. As both Mr Patena and the complainant know, the surrounding buildings are all constructed of timber.

I. Final aspects in relation to Lee's Windmill

43. When we queried whether the Lee Windmill had been a factor in the decision of Mr Patena to remove Warren's authorisations, Mrs Conlon, Deputy Chief executive of WorkSafe, responded:

> "*We strongly refute any allegation that any information contained in the affidavit of Kane Patena was anything other than a true and accurate record to the best of his knowledge. It appears that you have interpreted his reference to the <"Windmill" > incident as evidence that he relied on that incident when making his decision. This is inaccurate. Mr Patena simply referred to that incident to express to the court the potential practical impacts of what may go wrong*."

44. Mrs Conlon therefore ruled out the idea that the Lee Windmill "incident" was a factor in Mr Patena's thinking or decision despite:

- there being no other factor identified to explain the 179-day delay between November 2023 (when all the work had been completed and the final recommendation was in front of Patena for his signature) and May 2024 when the decision was made;
- WorkSafe's involvement at Lee's Windmill was in late March or April 2024; and
- WorkSafe surely had thousands of examples of poor certification (at least in their view) creating elevated risks to public safety which could just as easily have been used in Mr Patena's affidavit.

J. Issues arising from the chronology from November 2023 to the Lee Windmill and to Mr Patena's decision

45. We believe the chronology raises the following questions:

- Why, when Mr Patena had a completed file and a strong recommendation from his team on his desk in November 2023, did he delay making his decision for 179 days?

- Could it be that the conclusion reached by some at WorkSafe when it investigated at Lee's Windmill was the final straw for Mr Patena and this was what caused him to make his final decision?
- Were Mr Patena's statements true that he made the decision to remove Warren's authorisations only on the basis of the Investigation and not the Lee Windmill?
- If the Lee Windmill situation was a factor in Mr Patena's decision, was there a significant breach of natural justice because Warren was not given the opportunity to respond to the complaint and the prejudice WorkSafe took from it?
- Were Ms Conlon's explanations credible?

K. Roles that WorkSafe performs poorly

46. WorkSafe performs many roles that are akin to what compliance certifiers do. Had WorkSafe been adequately managed since the introduction of the 2017 Regulations, we would have expected it to have detailed policies and procedures and for it to conduct itself broadly in keeping with the basic tenets of (i) ISO systems, such as ISO 9001 and ISO 17020 (which deals with testing and certification bodies) and (ii) sound and fair play. Although we don't have every response to our recent OIA requests, we have some and, on the basis of what is clearly missing from the information that we sought, we are reasonably confident that there is an astonishing dearth of basic documents to define how tasks which have a very significant impact on certifiers are to be performed. There is a checklist which WorkSafe has developed which replicates the requirements in the Regulations and the performance standards, but this does not define how each process should be conducted. This is about one tenth of what we believe should be in place. In the absence of specific required procedures, the inevitable result is that excessive discretion is reserved to the people performing the Part 6 functions and the attendant risks referred to in this complaint.

47. We have little doubt, for example, that there is vast discretion in relation to how an investigator selects files for audit. With discretion comes a risk of inequity and abuse in relation to how it is applied:
    - Should an investigator be required to select a random sample only?
    - Should the investigator be allowed to go on a file mining exercise to isolate files that have what s/he believes are material issues?
    - Can an investigator do the opposite for certifiers s/he likes, choosing only files which are unlikely to identify errors by the certifier?
    - What is the thinking behind not having statistically-significant samples of files?
    - If the very worst files only are selected, what conclusions can be drawn?
    - If only the very best files are selected, what conclusions can be drawn?
    - Is there an approval process that applies prior to the investigator selecting files for audit? What has to be disclosed as part of that internal approval process?
    - Can the processes vary from certifier to certifier?

- How is an investigator's work evaluated if there is such discretion?
- How will the manager be able to assess whether the investigator has been objective or not when it comes to all aspects of the process?
- How exactly should the investigator interact with the certifier?
- Are any interview tactics allowed/ precluded[7]?
- Can an investigator pick and choose what s/he write up as a record of an interaction with a certifier and so create a biased view?
- Are pointed questions with clear aspects of criticism[8] allowed or encouraged?
- Should there be clear separation of people and roles when WorkSafe's preliminary investigation reports are challenged[9]?

These are examples of matters which ought to be the subject of precise procedures. Why do they not exist seven years at WorkSafe after the enactment of the 2017 Regulations?

The specifics of the conduct in relation to the examples below also point to different standards for different certifiers. In relation to one in particular, we find it indicative of bias because:

- Confidential complaints were made
- The complaints were met with some of the most ridiculous reasons for them to not make it past "triage"
- The complainee was directly informed about the complaints, suggesting that the complainee certifier has a strong ally[10] inside the Regulatory Assurance Group and that ally abused the confidential information.

48. WorkSafe has also developed its own unique measurements of time. A certifier seeking to renew her authorisations must apply at least 20 working days prior to the expiry date of such authorisations. WorkSafe has 20 working days to make a decision on such an application. The legislative intent is clear - that WorkSafe's consideration of such applications should take approximately 20 working days. In fact, the time between application and decision has blown out to four years or more, with several that we are aware of taking more than two years. WorkSafe has developed its own view of time by asserting (and we say wrongly) that the 20 working days starts only when WorkSafe has received all the answers to all the questions it might wish to ask over a period of 12 months or more. Many certifiers have expressed concerns that WorkSafe has weaponised time because the reservation of unlimited time during WorkSafe's investigative phases totally marginalises the statutory requirement. Despite its laborious, expansive practices, the evidence of WorkSafe's impacts on the quality of certifiers' performance is tilted to ongoing poor performance rather than positive changes achieved. In an environment of bang for buck in government, much needs

[7] In an interview conducted by Smith in 2019, the interviewee was asked the same question four times by Smith and only one of those answers was written up by Smith into the draft investigation report. The three other answers were different. The certifier was also denied his OIA rights to the full transcript of this interview.
[8] This is what we have seen as well. Aside from antagonising the certifier, how does this help the pursuit of the facts?
[9] This does not happen and, as explained later, is problematic.
[10] Mrs Kerr, if you call us, we will provide you with the identity of the "ally" assuming that you can't figure this out for yourself.

to change - certifiers' rights are being denied for outcomes that remain poor in any event with significant resource being deployed. There are clearly material issues.

49. DGC can audit what all its staff do based upon manuals which define how each role is to be performed. We have standards for interactions with clients and with other stakeholders. We can measure accurately and objectively evaluate the performance of every role. We have adopted ISO 9001 and 17020 which established an overarching quality system. These procedures and documents have evolved in less than half the time WorkSafe has had post the introduction of the 2017 Regulations and DGC does not have the vast resources that WorkSafe has.

50. As we have been advised by our solicitors that WorkSafe owes duties to Romak and other compliance certifiers, the lack of policies, procedures and standards of conduct, including so that the certifiers' health and wellbeing is not put at risk, is problematic. Even if WorkSafe is right regarding the HSWA duties question (that none are owed by it), this complaint will require the Board to consider whether the Board regards the types of conduct, and the quality of the processes followed in their entirety, as appropriate. At a minimum, there ought to be some due diligence in relation to how each successive manager of the Regulatory Assurance Group and the Authorisations Group has apparently failed to implement the types of policies and practices referred to above and to permit the huge increases in time that processes take.

51. Over the last two weeks, we have received some of the most astonishing correspondence from WorkSafe. The examples show the effects of missing practices and policies and excessive discretion. Every certifier knows that the inspection reports they keep are mandatory (required by the performance standards), and that they form part of the verification evidence; further, the reports may be compelled to be produced by WorkSafe in connection with applications for authorisations, applications for reauthorisations, audits and investigations. WorkSafe, itself, obviously regards such reports as "evidence" of something because they devote a lot of time to forensic examination of them.

52. When it came to, for example, WorkSafe's now five-month triage period in relation to the complaints about Romak's certification of "Lee's Windmill" (see later in this complaint), an unnamed investigator from the Regulatory Assurance team requested Romak's 2023 inspection report and other documents. These were supplied promptly on 30th July. Notwithstanding that nothing at Lee's Windmill has changed probably in more than five years, in September, WorkSafe announced that it also wanted to investigate the 2024 certificate and requested Romak's 2024 report not later than 4 November, eleven days before Romak's scheduled retirement. We assume this "evidence" has been requested in order to assist WorkSafe with what it describes as its "triage" of the complaint. WorkSafe's best case scenario is that it might commence an investigation after Romak has retired. Perhaps the Board believes this is a sensible use of resources, but we don't. If there is no reason for what is happening that is aligned with the purpose the powers exist, what other motivation is there? Where is the management oversight at the level of the WorkSafe senior leadership team?

53. We can compare and contrast this determination to pursue the Lee's Windmill complaint with the comments to a PCBU who was concerned at the approach taken by WorkSafe's investigator, Smith, who explained to her that he would not get support internally for the complaint to be turned into an investigation having regard to the "near term retirement of the certifier" in that case. Nine months on from this Whangarei complaint, the certifier is still working and his authorisations have years to run. In 2021, Ms Pille refused to take other complaints forward on the basis that the certifiers were not proposing to renew their authorisations. When we compare each of these with Womak and the Windmill, there is a significant difference.

54. We can also compare the Regulatory Assurance Group's focus on the audit report and other documents held by Romak in relation to Lee's Windmill with this written response to the exact same information supplied by us in response to WorkSafe's request for information to "triage" a complaint made about another certifier. After we provided the site plan, the certifier's audit report and other documents, together with an explanation that there was no dossier (especially an electrical certificate of compliance) relating to the assessment of an electric dispenser for a petrol tank, and a suggestion that WorkSafe look up the notification of refusal to issue the certificate (shall we say five items of evidence) WorkSafe responded:

> "Again, the information you are providing is just a copy of xxxx's assessment that you have received …. and your opinion.
>
> **Unless you are able to provide evidence** to support your allegation, be it by way of photograph or a copy of your assessment report we cannot proceed any further."
>
> **(emphasis added)**

55. There is confusion within the Regulatory Assurance Group about what evidential value there is in the principal documents which certifiers are required to have in their files and which WorkSafe itself regularly requests and uses. If not confusion, there are divergences in practices that create obvious contradictions. This is some of the most curious logic one could imagine from persons dedicated to types of investigation – that a photograph taken some 12 months after the same photographs taken as part of the certifier's prior certification was somehow better or essential "evidence" as compared to the material that the prior certifier had in his report when issuing the prior certificate. Of course, there could well be a second agenda for the investigator's fascination with obtaining our assessment report (which we cannot supply for confidentiality reasons anyway).

56. Applications for reauthorisation can take between one year and up to five years based upon WorkSafe's performance over the last few years. All the while, the sword of Damocles is dangled over the certifier's head. We believe that reauthorisation processes are allowed to be run as full inquisitions with unfair file-mining exercises designed to create a slanted perspective of the quality of the work done and the skills on display. The lack of procedures, combined with the vast discretion vested in the investigator, create the avenues for unfairness and harm.

57. Audits that are supposed to take less than 10 hours of WorkSafe's time, according to its audit document, extend beyond 12 months at times. The same bending of the rules of time occurs to turn a short sharp process into a lengthy tortuous ordeal.

58. A consequence of non-standardised practices is that WorkSafe has made final decisions that are wholly misaligned with the findings and the findings themselves are devoid of the requisite statistical connection to the work examined. The explanation for why Part 6 exists (and one has to wonder whether the experiment of having WorkSafe perform the roles should be declared a failure at this point) is surely that certifiers falling short of required standards are removed from the regime. This was the destination reached when it came to Warren Romak. Given the importance of their audits and certifications, and their role in ensuring compliance with rules designed to keep persons safe, compliance certifiers need to perform competently[11]. They should not miss the types of situations that have led to some of NZ's most appalling tragedies yet, as detailed herein, this is occurring and WorkSafe appears untroubled about this.

59. The death of Jamey Bowring in 2015 was explained in the following quote from the NZ Herald:

> "The young man was atop Tank 20 … in Wiri, South Auckland, when it exploded. It was later discovered he had been welding on the tank, unaware it contained a flammable mix of fumes with an ignition point around 17 degrees Celsius."

60. At Pike River, it was also a flammable gas (methane) that was ignited, a risk associated with coal mining that has been known for more than a hundred years.

61. These examples highlight the risk of death associated with ignition of flammable vapours. One would reasonably have expected WorkSafe to have an elevated sense of concern when presented with multiple of examples of a certifier who failed to complete the obvious verification steps required when there is electrical equipment inside hazardous areas. We have observed the opposite – a desire for the complaints and the issues to be buried. Has the organisation so lost its way that it cannot connect the dots between (i) dangerous incompetence that may be in evidence in relation to an expert – a compliance certifier – that WorkSafe alone supervises, and (ii) the very reason that WorkSafe exists?

62. The complaint referred to in paragraph 54 above relates to a site where all the documents WorkSafe has reveal the existence of:

    - a large petrol tank with an electric dispenser without earthing or bonding or an electrical certificate of compliance, and
    - nearly a tonne of LPG.

    The location has been approximately the same for a decade or so. It is within a short drive from one of NZ's five largest cities where there is a WorkSafe office. What has WorkSafe's

[11] Mr Patena's affidavit referred to below says almost exactly the same thing. Thus, we have perhaps our one and only point of agreement with WorkSafe.

inspectorate done and not done in that time? What was done when it received the notification of refusal to issue a certificate? Who received that Notification? What training was s/he provided and what happened next? To a trained reader, the notification highlighted that there was a source of ignition inside the hazardous area placing a high risk into an unknown probability of occurrence. Is this one to ignore or one to act on? Evidently the former.

63. Risks normally exist in degrees of probability that the risk will lead to harm. The compliance regime is generally striving to reduce both. A certificate will be evidence of something but that depends very much upon the issuer. The certificate may, for example, paper over the failure. Regardless, WorkSafe has an administrative role which calls for independent assessments of compliance to be conducted at workplaces and to take action when there is evidence of non-compliance in the form of either lack of certification, or evidence of non-compliance. If WorkSafe confines its role to only investigating whether certificates are issued, it will miss the independence its role calls for and it will simply ask for certificates. Jamey Bowring's mother has publicly queried why WorkSafe did not do more in the years leading up to her son's death. As reported in the NZ Herald, WorkSafe had its opportunity to intervene, but failed to do so effectively:

> "As well as being mislabelled as a low-risk hazard, the tank should also have had a "stationary container system test certificate". Salter had been warned about needing the certificate on two previous occasions, in 2011 and 2015, but did not apply for approval.
>
> "The certificate would not have been given because the tank did not comply with legal requirements for venting, anchorage and earth connections."

64. One of the most frequently used nouns in WorkSafe's 2022/23 annual report is "insights." WorkSafe has claimed to be an "insights-driven regulator" and then informed readers on page 22 of the 2022/23 report that "among the impacts we want our mahi to have" is that "knowledge and insights inform practice." We query whether the organisation has a large disconnect between the authors of the Annual Reports and its performance.

65. There is a resounding echo in these concerns of the words of Judge Evangelos Thomas who noted the "spectacular failures contributed to by WorkSafe itself"[12] when it came to WorkSafe's administration of the adventure tourism activities on Whakaari Island. If any WorkSafe Board members have not read the report of David Laurenson KC, they ought to do so right away. Why does NZ have to wait for the next KC's report to explain to the parents and widows and widowers of workers how the administration of Part 6 was so poor that the calamity that took the next workers' lives could have been easily avoided – there are thousands of non-compliant locations/ assets (eg petroleum tanks) in the country with certifiers' certificates. WorkSafe surely knows this, yet has done nothing about it that we have observed.

66. For a long time now, we believe WorkSafe has been issuing promissory notes, rather than reports of significant achievements. One of the first things that we agitated about was the

[12] Judge Thomas' judgment in relation to the Whakaari Island proceedings.

failures in the administration of the rules which require WorkSafe to be notified when a certifier refuses to issue a compliance certificate. The defects were known to Handforth when we first met with him[13] in 2021, yet an independent review[14] was commissioned to prove what everybody seemed to already know; in fact, the primary reason for the data is that certifiers have extraordinarily high certificate issuance rates (many at 99%, some at 100%). One recommendation from the Smith Report was that Notifications should be reviewed and something done with them. This system was implemented with junior people only acting in "triage roles." Last week we learned that the persons in these roles had received virtually no training and one who had been in that role for nearly two years was unable to name more than one hazardous substance, let alone know anything about any relevant rules! What we experienced after this new system was established were calls from these people to ask whether a certificate had been issued…because, despite their roles, they did not have access to WorkSafe's register of compliance certificates. This was mostly the only follow-up that we observed. How can anyone without training perform any serious role? These failures also probably explain why there has been a distinct lack of activity in relation to situations which pose high risk to persons and/or environment. How is it responsible to not provide employees that the taxpayer is paying for, with any training so that they can perform a role adequately or perhaps competently?[15] The promise of performance is far removed from the actuality of WorkSafe's achievements.

67. The Part 6 regime is unique certainly amongst professions because of the role created for WorkSafe in the Regulations. The manner in which WorkSafe has chosen to perform these roles has led to some extraordinary comparisons with the private sector:

    - Private sector retention or renewal of qualifications involves annual participation in learning/ upskilling sessions. For others, annual renewal is relatively straightforward. These are the private sector mechanisms to ensure that qualifications remain current.

    - Private sector disciplinary procedures involve investigation and review by senior members of the profession who bring the senior practitioners' experience to the conduct complained about.

    - Today, WorkSafe's Part 6 processes run through the management of Enda Costello who, from his prior disclosure on LinkedIn, it appears has no formal university or equivalent training in relation to HSWA or the Regulations. He has been at WorkSafe for less than four years and has likely rarely been to site to perform the type of audit and certification process that compliance certifiers perform and that he audits. Others who have been involved in managerial positions also lack, on paper, the experience and skills that are found in the private sector for comparable Part 6 processes. There is an apparent dearth of experience to perform the roles that people are performing. Here also we find clues about why the outcomes are generally poor.

Just as we were alerted to by William Golding in his most famous novel, in a power or leadership vacuum, outrageous behaviour can become normalised. We believe it is time for more

[13] May 2021.
[14] Report by the very capable Tim Smith, barrister, which is available on WorkSafe's website.
[15] The fellow we spoke to could not name four hazardous substances after two years in this role at WorkSafe.

orthodox behaviour to be restored in a professional management environment to diligently pursue the goals that parliament set.

The many issues with WorkSafe's decision to remove Warren's authorisations

L. Fatal Flaws

68. The two significant findings that drove WorkSafe's decision to remove Warren's authorisations were heavily flawed. They are explained in detail in this complaint (and in the attached Wotton Kearney submissions):

a. There was nothing in the findings that met the threshold of a concern relating to a serious risk to health and safety regarding Warren's performance. This is what WorkSafe's Audit Policy defines as the threshold that must exist before WorkSafe takes strong punitive steps such as removal of Warren's authorisations. It also accords with common sense that this concern must truly exist. WorkSafe was expressly asked to make this linkage, but it did not, principally because it could not.

b. WorkSafe has not correctly applied the test for a "fit and proper person" – a statutory test which is defined in regulation 6.7 – despite the orthodox approach to the interpretation of this regulation with which it was provided by Wooton Kearney, Warren's solicitors.

69. The argument contrived by WorkSafe that withdrawal from an audit is a 'removal of authorisations offence' is specious. The importance of this factor to the principal architect of everything that happened in relation to this matter, Mr Costello, appears evident. We believe that the best explanation for everything that happened following Mr Costello's phone call to Warren is that Costello was personally affronted and chose to wield the power of the government and the powers in the Regulations. His problem is that he did this so poorly, and we say so unfairly that his conduct becomes the subject of our complaint.

M. Managerial and Legal Failures

70. That not one of the people in supervisory roles – Handforth, Pille, Gardner, Thornborough or, eventually, Patena, including those among them with extensive legal training – intervened adequately, is the basis for our allegation regarding the failure by management.

71. We doubt, that an experienced lawyer acting diligently and reasonably, would make the basic statutory interpretation error in relation to the application of the provision which defines what is not a fit and proper person, especially after it was spelled out for them by Warren's expert solicitors. That there was no detailed analysis of this most important point in the documents supplied to us suggest that the solicitors' submissions were never properly considered.

N. Mental health issues

72. We find WorkSafe's approach to Warren's mental health condition despicable. The very regulator responsible for protecting the interests of mental health in the workplace hounded Warren, presumably with the objective of causing him to capitulate16.

73. The decisions of Ms Pille and Mr Thornborough to not call off the team when WorkSafe was informed about Warren's mental condition is an essential element of this complaint. Neither appears to have any training in mental health. Common sense and fair play demanded space and time for Warren. It was, however, we suspect essential for Mr Costello's agenda that the very real mental health issue Warren was facing be discredited.

74. Mental health issues are among the trickiest issues for directors to manage in the context of their duties under HSWA. We believe the DGC directors did everything right and had as their number one priority throughout the wellbeing of Warren. It was challenging because of the continuing barrage from WorkSafe which was conducted as though it could impose a stronger duty on the DGC directors than those arising under HSWA. WorkSafe's poor approach to these issues is partially demonstrated by this quote in the final report:

> "Without the requested evidence of any alleged medical condition, it would be inappropriate for WorkSafe to accept the existence of or decide on the appropriate support mechanisms for said condition."

75. We believe the exact opposite to be the case. When reputable company directors inform WorkSafe about a serious mental health issue, WorkSafe should provide the space and time required. The appropriate support mechanism was simply to back off. By comparison, Mr Handfroth suffered a medical event around the same time and this was the reason that Mr Thornborough became involved. We did not even contemplate that we should ask for a medical certificate to explain Handfroth's absence from work.

76. Among similar instances (outside DGC) of such disgraceful conduct was the demand it made for a certifier to attend an interview in connection with the certifier's reauthorisation process while the certifier was recuperating from a serious brain injury. Others assert a linkage between the stresses caused by WorkSafe to terminal medical conditions of those whom they bullied. Others recall the words of Mr Smith that "my starting point is that all certifiers are liars." These incidents go back more than five years. If they truly occurred, the conduct spans a lengthy period. Is it condoned? Who knows about it, but hasn't acted?

The entire episode is the most disgusting performance by a government entity that the directors of DGC have ever seen in their cumulative more than sixty years of professional work experience.

[16] We are aware of several examples of exactly this. It is for these people, however, to come forward.

O. Role of Costello

77. The authorship of presumably Mr Costello in the audit report, the draft investigation report and the final investigation report (supplemented by his internal emails) is far from the careful, evidence-based work of a careful investigator. What was most needed from him was objectivity and what was needed from his managers was proper oversight. Audits of work done by certifiers who keep the records Warren kept can be conducted objectively via a process which attempts to fairly evaluate the certifier's work involving more than 2000 certifications completed in a four-year period. What was then most needed was some empathy for a person in mental distress, not an attack on his character and integrity.

78. If you strip away Costello's specious logic and re-examine everything that he did, our allegation is that he:

    - handpicked the files to audit with the intent of finding problems;
    - made highly inappropriate comments to Warren during the call on 4 November 2022;
    - never evolved a "certifier compliance plan"; and
    - failed to consider most of Warren's solicitors' submissions in an objective manner with appropriate expert input (for example, on the issue of what is meant by a "fit and proper person."

79. We submit there is a significant weakness in WorkSafe's process that Mr Costello appeared also to be the primary reader, and person who made decisions in relation to, Warren's solicitors' submissions. Most private sector organisations would regard the submissions in this scenario as akin to an appeal of the preliminary decision which would need to be considered by a person appropriately removed from the prior processes. This weakness, supplemented by what we believe was poor management oversight of the entire process, exacerbated this weakness.

80. In addition, of course, WorkSafe must address:

    - Its alleged breaches of section 36 HSWA; and
    - Mr Costello's alleged breaches of section 45 HSWA.

Appendix : Detailed Submissions in Support of the Complaints

1. **There never was a finding made by WorkSafe that Warren's alleged failings presented a "serious safety issue". Without this, WorkSafe was in breach of its Audit Policy requirement that an issue of this magnitude would need to exist before severe sanctions would be invoked.**

   The audit should never have been turned into an investigation in the absence of this finding.

   The investigation should never have led to a removal of Warren's authorisations in the absence of this finding.

   WorkSafe was challenged by Wootton Kearney to show that such an issue existed and then failed to respond to it.

   The omission of this finding in the Investigation can be contrasted, somewhat ironically, with Mr Patena's colourful description of such a serious issue in his affidavit reference to Lee Windmill as discussed below.

2. **The second fatal aspect to the legitimacy of WorkSafe's decision is that WorkSafe applied the wrong tests to make its finding that Warren was not a fit and proper person.**

   If WorkSafe made no finding regarding a "serious safety issue" and was wrong in its legal test for what was not a fit and proper person, there was no basis to remove Warren's authorisations.

   Ironically, again, and proving the flimsiness of WorkSafe's critical thinking, were WorkSafe to believe he was not truly a fit and proper person, why would it have entered into a settlement agreement with Warren to allow him to continue as a certifier. That would surely be reckless; the better explanation is that Mr Patena did not believe in his team's finding in the Investigation.

3. **WorkSafe exhibited a flawed approach to the factors that would render someone to not be a fit and proper person. Its flawed approach rendered its findings unsupportable. The basic rules of statutory interpretation were carefully explained by Warren's solicitors, Wootton Kearney, but these appear to not have been considered at all by WorkSafe. Why not?**

   The "not fit and proper" finding was a pivotal part of WorkSafe's findings.

   What WorkSafe wrote at paragraph 48 of the final report is unarguably wrong. WorkSafe wrote:

   > Disengagement from the mandatory audit process, which is a statutory requirement and one that the certifier agreed to participate in upon acceptance of his authorisation, is relevant behavioural history and calls into question the ability for the certifier to meet the Fit and Proper requirement.

The “fit and proper person” requirement is found in regulation 6.7.

The statutory interpretation rule of “ejusdem generis” is one that few law students can graduate from law school without understanding and applying correctly. The manner in which this rule is applied to regulation 6.7 was explained in Wootton Kearney’s submissions at paragraphs 45-51.

The documentation supplied by WorkSafe in response to an OIA request show that there was nothing written anywhere which showed that WorkSafe considered these submissions despite this “fit and proper finding” being one of its principal reasons for its proposed, and we assume, final decision to remove Warren’s authorisations.

In short, to fall foul of the catch-all in reg 6.7(1)(f) “any other relevant matters” the only orthodox interpretation of this is that the “matters” must have the same element of criminal prosecution, violence towards people, or some other matter of concern to the police which are listed in (a) to (e). Even were WorkSafe correct that Warren withdrew for an inappropriate reason (and they are wrong about this), it most assuredly did not render him to be not a fit and proper person in relation to the only provision that is relevant – reg 6.7.

WorkSafe’s approach is wrong as matter of law. WorkSafe’s findings and final decision was made as if regulation 6.7 allowed considerable latitude in relation to what conduct could render someone not fit and proper.

Despite having two lawyers (Pille and Patena) in key roles and clearly in positions where the errors of interpretation should have been corrected, there is no written material that shows that either of them:

a. was aware of the statutory interpretation rule;
b. considered the issue; and
c. considered Wootton’s submission which would have alerted them to a above.

Despite WorkSafe’s RAG team not having any person with any formal legal training, they appear to have been the only people to:

a. prepare the draft report;
b. consider the submissions made by Wootton Kearney; and
c. contemplate that they should evaluate those submissions (something they failed to do based upon the written material supplied in response to our OIA).

That neither lawyer in the managerial/ decision-making roles turned his/her mind to the issues, especially after they were so clearly explained by Wootton Kearney, points to a managerial failure.

4. **Warren has been prejudiced by the opinions reached by WorkSafe's non-medical people about his mental health issue. Their denial that the issue existed and demands for medical records was among the worst abuses of position and power that one can imagine. WorkSafe's behaviour appeared intended to aggravate a serious medical condition.**

   WorkSafe has established a dangerous precedent that its lay people can determine how a person should be expected to behave when someone is suffering from a metal health issue. Its people caused the issue by their conduct. It is abhorrent behaviour by the very regulator whose role it is to prevent such abuses in the workplace.

   WorkSafe did not accept, as a matter of fact, that Warren suffered a serious mental health episode, despite:

   a. his behaviour at the time strongly suggesting that something like this had occurred;

   b. confirmation of this from Warren's doctor, such confirmation being passed on to WorkSafe;

   c. Warren's extended leave from work immediately afterwards; and

   d. formal confirmation of this from each one of DGC's directors, both of whom have professional backgrounds, who wrote their communications to WorkSafe after having access to Warren's doctor's report on his condition.

   WorkSafe has expressly made adverse findings against Warren for his conduct while he was mentally unwell.

   WorkSafe made adverse findings against Warren because he made application for a restraining order to prevent the harm that his doctor confirmed WorkSafe was causing him.

   WorkSafe has indulged its own extremely lay views regarding how someone suffering from a mental health issue ought to behave. This is reckless by WorkSafe.

   At paragraph 48 of the final report, WorkSafe wrote:

   > "As proxies for WorkSafe, disengaging from this process calls into question the certifier's honesty, integrity, and law-abiding approach, particularly as he is continuing to issue certificates during this timeframe."

   Whereas, in fact:

   e. Warren was mentally unfit to do anything other than take time away from everything work related.

   f. Disengaging for a mental health reason did not call into question any of these dreadfully self-serving allegations referenced in the quote above.

   g. There was a lengthy delay between Warren's original disengagement and the progressive return to his role as a compliance certifier.

h. His return was made after due consideration by the directors of DGC who carefully considered their duties under HSWA having regard to what was best for Warren's mental health.

5. **Because Warren followed a long-time industry practice when certifying Moga Holdings, and because also he is the only certifier that we know of to have had his authorisations removed for doing what most other certifiers do routinely, Warren has been singled out.**

WorkSafe's position in relation to what a compliance certifier must verify before issuing a stationary container system certificate is that:

a. He must adhere to the exact requirements of reg 17.91; or
b. He must expressly exercise discretion pursuant to reg 6.23(3).

WorkSafe must surely know that:

c. these are not the practices that have been followed by compliance certifiers; and
d. WorkSafe has expressly acquiesced in relation to what certifiers have been doing.

Proof of the divergence in what WorkSafe regards as acceptable practices is found in the email response to an email sent by Darren Handforth when he solicited views in relation to DGC's position paper on certification of petroleum tanks. That comment from a person who was clearly senior enough in the organisation for Darren to send the email to, noted that the approach that Costello had taken towards Warren's certification of xxxxx was "overly harsh."

DGC has brought to the attention of WorkSafe that the practice of the majority of compliance certifiers is aligned with what Romak did. DGC has also formally notified WorkSafe of precise examples in relation to which we have full knowledge of what documents don't exist.

WorkSafe's position, at least in relation to Warren, is that a strict approach was appropriate and it formed its view on the basis of his "conduct on one occasion" whereas had WorkSafe investigated the complaint made about Certifier Y's certification of petroleum tanks, and the activities of almost every other certifier, then it would have discovered that Warren's submission was accurate.

> Para 40.5: This investigation is about the conduct of a certifier on one occasion, not about the conduct of certifiers generally.

This is an example of how Costello sidestepped conveniently what is, **in fact**, a massive industry issue. It is absolutely the case that:

- PCBUs owning the vast majority of underground petroleum tanks, in particular, do not have dossiers of documents that are listed in reg 17.91 (which a certifier must verify);
- Compliance certifiers issuing stationary container system certificates for these tanks have not been doing so by exercising the discretion in regulation 6.23(3).

These issues were brought to the attention of the Certifier Reference Committee (established by WorkSafe in 2023 but disbanded before the year was out), and the feedback was that this was acknowledged as an issue for WorkSafe to address. That this committee was disbanded

by WorkSafe before any action was announced on this did not remove the need for these issues to be addressed. Why, then, did no-one at WorkSafe (Handforth, Pille, Patena) consider that this was an example where the broader industry compliance issues needed to be addressed, rather than penalising Warren for following the common industry practice?

If WorkSafe is adamant that its approach was correct, why has this same standard not been applied to every certifier issuing stationary container system certificates?

Our complaint that other certifiers were doing exactly what Warren did at Moga Holdings was dismissed on a flimsy basis.

Costello's view was that what other certifiers do was not relevant when it came to Warren. To deny this leads to the significant discrepancies that WorkSafe has created:

- Will WorkSafe now apply the "Costello rule" to every certifier who does not comply with the Regulations when issuing stationary container system certificates? We very much doubt it.
- Will WorkSafe continue to allow some certifiers to be handpicked for punishment? This is exactly what is happening today.

6. **WorkSafe's failure to abide by its Audit Policy is suggestive of an unfair agenda**

WorkSafe's Audit Policy states:

> "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)

In its haste to erase Warren as a certifier, WorkSafe failed to identify a certification decision that he made that raised "a serious risk to health and safety."

This was a key matter raised by Warren's solicitors at paragraph 40.8

> "We invite WorkSafe to consider if there are any potential adverse effects from PCBUs' failure to hold original documents as records of compliance, that is not satisfactorily avoided by relying on the prior stationary container system certificates issued as a record that the original documentation evidencing compliance was available at the time that prior certificate was issued."

In essence, WorkSafe was being asked to fit its proposed decision regarding Warren into its Audit Policy and to link the alleged failures in relation to Moga Holdings to its proposed decision. It was Mr Costello who entirely missed this point, writing to his colleagues via email:

> "This is a matter for a compliance certifier to consider, not WorkSafe. A certifier must also record if they elect to issue a certificate under Reg 6.23(3), otherwise it must be presumed that they have not utilized Reg 6.23(3)."

Costello is wrong. It is for WorkSafe to establish that the failures related to a serious health and safety matter. There is never a presumption of guilt that applies to any disciplinary process such as this.

Costello's conclusion that it could have been possible for Warren to exercise certifier discretion defeats the theory that there ever was a safety issue.

P. The broader picture

WorkSafe is aware of scurrilous conduct by parts of its organisation. The revelations about the alteration of the expert report and conclusions about the conduct of Kahu Helicopters in the matter of Whakaari Island stands out as a serious example. We assume WorkSafe regards such conduct as improper and, therefore, will wish to rid the organisation of it.

We strongly urge WorkSafe to expand the scope of this investigation to examine the conduct and culture inside the Regulatory Assurance Group that has led to abuses of power, victimisation of selected certifiers, extraordinary weaknesses in technical skills and massive divergence in how individual certifiers have been treated.

Our Managing Director's first direct contact with Peter Nicholls in 2019 involved Nicholls making a direct threat about adverse effects were we to not fully co-operate with WorkSafe – Worksafe could, he said, "make a certifier's life a misery if they did not fully co-operate with Worksafe" or words to that effect. I took this to mean that Worksafe could and would use every power it had at its disposal to coerce everything it wanted from a certifier. The context for this abrasive threat was my query regarding whether the activities he was engaged in at the time were part of an investigation pursuant to regulation 6.15 or not – a reasonable question, surely? These threats can be viewed now in the context of several incidents. Nicholls was behind two of the most flawed theories of breach by Warren that we have seen – his alacrity to charge into investigations was not aligned with the weak theories he had about non-compliance with the Regulations.

We believe it is time for all these matters to be properly considered independently in a reporting process that also involves the certifier industry bodies, not just WorkSafe.