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DGC

22 April 2024

Mythomaniacs in WorkSafe's Regulatory Assurance Group

There is little doubt that WorkSafe is the king-maker when it comes to the hazardous substances' regime – it administers (or ought to) compliance by PCBUs and it has wide-ranging powers of granting authorisations, auditing, addressing complaints and reauthorising persons who plan to be, are and/or want to continue to be, compliance certifiers. There can be no doubting that, because compliance certifiers perform pivotal roles auditing PCBUs' compliance with the hazardous substances' law, WorkSafe must perform well its various functions associated with assessing certifiers' ability and performance (**Full Oversight**). A thoroughly ineffective regime would evolve, wouldn't it, if WorkSafe's Oversight was poor and most certifiers were performing poorly (this latter point is one that WorkSafe's senior management has publicly agreed with).

Whilst there have been several acknowledgements, including from WorkSafe, that certifiers have not performed well, historically and for a lengthy period that is ongoing, there is a dearth of proof, or even strong opinions, regarding the opposite conclusion. Given that WorkSafe has always had Full Oversight over certifiers' performance, some high proportion of the fault must lie with WorkSafe. It's a bit like the problem with gangs in NZ under a Prime Minister and a weak Police Minister who was encouraging the gangs in many ways – she should not have been surprised to find their criminal enterprises flourished under her reign.

Certifiers ought to be held to account for proving that their clients have met all prescribed requirements before they are issued certificates of compliance. They must also be monitored for the risk that they are issuing certificates because a paying client wants this outcome (this is where the rubber meets the road after all). WorkSafe's Regulatory Assurance Group (**RAG**) ought to be held to account through assessing its even-handedness and objectivity, or lack thereof, when it comes to Full Oversight of certifiers' performance. They must not, after all, be influenced by their personal affiliations with particular certifiers. This is where serious concerns exist because the feeble (certifiers) are being overseen by the frail (regulator) and are generally being left to fumble their way along. Worse than this are the types of conduct by members of RAG which ought to disgust many who will read this letter.

A. Introduction - Why the focus of this letter is on the Regulatory Assurance Group

We have long said it matters more who you are than what you do when it comes to the actions of the Regulatory Assurance Group. No-one could contemplate that the conduct described in this letter could occur with every certifier who crosses the path of members of this group.

I suspect the human resources strategies followed by WorkSafe shortly after its formation set the RAG up for the types of conduct that is described in this letter. I regard the role of certifiers as technical and process-oriented. They need to have very high integrity too because they have a duty to follow the rules in the Regulations which can be misaligned with what the person paying you wants (or thinks he needs). Certifiers' skills and weaknesses can be quickly pinpointed by their peers, including through desktop reviews of their work, provided their peers have been well trained. The same ought to be true of RAG. The rules are prescriptive and objective assessments are clinical, not emotional. One only needs good training and an objective reviewer to assess performance in a thoroughly objective manner.

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For starters and to set the tone for what follows in this letter, a senior barrister reported to me a member of RAG said on a call with him that his "starting point is that all certifiers are liars." From its inception, WorkSafe populated its RAG primarily with ex-cops, rather than people with technical backgrounds in hazardous substances. Their slow progression in basic concepts that affect thousands of hazardous substances locations has been evident through declarations of "we just don't know", tediously-long audits and investigations, and obsessions with minutiae. By my calculation, their accuracy and efficiency are less than one tenth of what our certifiers achieve daily. There are, embedded in all that follows, serious questions about management from the people whose actions are described in this letter to the person responsible around the Senior Leadership Group with its four Deputy Chief Executives.

B. Specific examples of Conduct by Senior Members of the Regulatory Assurance Group

Peter Nicholls
Conduct towards an excellent, but targeted certifier. I use the codename ETC.

During one of my first phone calls in November 2019 with a member of the Regulatory Assurance Group, I sought to establish whether WorkSafe had commenced an "investigation" under reg 6.15 because I was concerned that the person being "examined" was not being treated fairly. Certain powers that WorkSafe can invoke can only be used after it has decided to commence an investigation under reg 6.15. whether or not this decision had been made was pivotal to advising my colleague on his rights.
Both the process being followed and the answer from Peter Nicholls were opaque at best, however I did receive a direct threat from him with words to the effect "***If certifiers don't co-operate with WorkSafe, we can turn their lives into misery***." I noted the comments in an email back to Nicholls sent immediately after the phone call. Nicholls didn't deny it – he clearly meant me to hear it and, I firmly believe, be intimidated by it. Indeed, DGC's employees confirmed that this was exactly the type of environment that the RAG consistently created. I was immediately alert to the risk that this group was potentially engaged in a concerted abuse of administrative power. His boss at the time (Simon Humphries, from the same prior vocation as Nicholls) was to follow Nicholls' call with an amateurish attempt to trap me into admitting something that was just absurd. I assumed, probably rightly, they were both simply marking my card as a new player in the industry who needed to be roughed up a bit.

The target of the particular enquiry that Nicholls was conducting in 2019 was ETC. While Nicholls folded his 2019 enquiry/ triage/ investigation not long after his phone call with me, he returned in 2023 with a vengeance. In fact, the matter being investigated in late 2019 had absolutely no legs in any event. He was querying why worker training had not been checked as part of certifying 222kg in-situ fill cylinders – workers do not handle such cylinders and therefore their training is outside the requirements for a compliance certifier to check – reg 10.34(1) expressly refers to workers "handling." I obtained from the complainant some internal email correspondence which showed clearly that the complainant's motivation was to take business away from us – smack in the middle of the meaning of "vexatious and malicious" reasons for WorkSafe to not pursue the rather absurd complaint. There were two obvious reasons for WorkSafe to have dismissed the complaint without any attempted coercion of anyone.

WorkSafe's responses to my OIA requests in 2022 and 2024 revealed that, in relation to 32 complaints made about certifiers in the period from January 2020 to September 2022, not one of them was turned into an investigation. In 2023, based upon my calculations, only six of the 134 complaints (four remain pending more than four months on) about certifiers resulted in investigations. Investigations are, therefore, rare. The reasons for this are also, at best, opaque. We could say generally, based upon WorkSafe data, that the probability a complaint would lead to an investigation (under reg 6.15) is about

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5%. Of itself, this is an alarmingly small number, especially because most complaints come from people skilled enough to be certain about the infractions they are complaining about. Were we talking food security/ risk, we would surely be appalled at the low conversion of complaints into investigations.

WorkSafe's stated policy is to engage in "triage" processes following receipt of complaints. In some cases, these processes have taken more than four months. However, when a complaint was made about ETC from within the Inspectorate in 2023, the file was handed to Mr Nicholls and there was very obviously virtually no triage whatsoever (**2023 Complaint**). In short, I believe it is fair to say Nicholls attempted to follow through on his 2019 threat– the 5% probability disappeared along with what had become the norm of months of triage; instead:

- <u>Within days</u>, Nicholls sent a letter to ETC stating that it had formed a negative opinion about his ability and conduct (invoking the exact wording in reg 6.15).
- The letter stated that WorkSafe had commenced an investigation.
- The letter contained a section 168 demand for all documentation relevant to the investigation.

Nicholls was evidently in no mind to muck around. Much to his dismay, I am sure, there were many problems with his approach which we were quickly able to establish in written communication with WorkSafe:

- WorkSafe was entirely unable to state a coherent thesis for what ETC had done wrong – if you can't define the problem, you are not going to do a very good job investigating it! The lack of a coherent explanation also calls into question how WorkSafe could have reasonably formed the concern about ETC's ability and conduct. If there was no reasonable basis for this conclusion, this surely pointed to serious weaknesses in their internal authorisations process. The technical and process weaknesses that we have seen over and over again at WorkSafe were, once again, on full display.
- The section 168 notice was unlawful, as was pointed out to WorkSafe by one of the country's premier law firms that I engaged. This ought not to have surprised anyone given the legal weaknesses generally demonstrated by WorkSafe in relation to Whakaari Island. Following due processes carefully has not been a strong suit of WorkSafe's – a major problem when matters reach the courts.

Any low-level/pedestrian attempts at triage in relation to the 2023 Complaint would have revealed that the PCBU had obtained new information from an expert and this new information changed the classification of the tank in question. An engineer's subsequent reclassification of the tank could not make the certifier's decision wrong at the time he was required to certify the asset. WorkSafe backed down and folded its flawed complaint. The real question is why it got legs anyway. If there is a lack of skills in the management of RAG, inevitably excessive power is wielded poorly by the likes of Nicholls who showed us in 2023 that he was still making the same basic errors as he had made in 2019.

The 2023 Complaint provided further insights based <u>upon what WorkSafe did not do</u>, but ought to have done, were it treating certifiers even-handedly.

The prior certification by Peter Roche was made in exactly the same manner as ETC's. If the certification had, in fact, raised issues about ETC, it must have raised exactly the same issues about Roche's ability and conduct. The notification of refusal to certify the location contained eight failures, pointing to material prior certification failures by Aaron Donald, as well. The failures by Roche and Donald:

- were pointed out to WorkSafe (Catalijne Pille, the then acting head of RAG) in formal correspondence;

- lodged with WorkSafe as formal complaints made via letter and through the official complaints portal at WorkSafe; and
- must have been apparent, one would have thought, to the WorkSafe inspector who was actively working with the PCBU on various compliance issues. The inspector was the one who had brought the issues about ETC to the attention of RAG – why was he not concerned enough to complain about Donald, in particular, because he must have had the notification together with the 8 failures that he had apparently missed.

This is the clearest and most obvious example of very different treatment of ETC vs Roche and Donald (the latter two enjoying a very long term and close relationship with one of WorkSafe's senior executives, Kim Comben). For the avoidance of doubt, there never was an allegation made by WorkSafe that the reason it was investigating ETC was because of his history with WorkSafe. If that was a factor, it surely ought to have been explicitly stated. Thus, because the significant concerns about ETC arose solely from his certification at the workplace where the certification occurred, then why was there no investigation of Roche and Donald? The only objective factor which explains the difference must lie outside of the performance aspects.

WorkSafe's (Nicholls) historical investigations into ETC (and shall we simply say dislike of ETC) dated back to a large investigation conducted in 2019 which revealed several breaches by ETC. It is a matter of fact that many certificates issued in ETC's name were for amounts and classes that exceeded his authorisation. – in this aspect, WorkSafe was right. In a further example of Nicholls' general attitude, in the interview with ETC in early September 2019, Nicholls represented that WorkSafe's legal view was that this was an example of fraud – a very serious allegation which was wholly unjustified. Fraud requires intent and there was no evidence of this. The allegation was totally inappropriate especially given what was the obvious cause of the certificates at issue in his name. One might reasonably speculate that the reason for bringing this up was to intimidate ETC.

Nicholls' draft investigation report proposed a heavy censure for ETC. However, what was apparent from the interviews which Nicholls conducted during this investigation was the obvious chaos in the office at DGC Limited (Dangerous Goods Compliance Limited's predecessor entity controlled by Farquhar and Lelean). This was the obvious cause of the certificates in ETC's name as would be stated by ETC under oath in the High Court (the esteemed Judge in those proceedings expressed his confidence in the veracity of ETC's evidence). This ought to have led to a broader investigation focused on the two executive directors of the entity who were both certifiers. The theory that Nicholls and WorkSafe had no interest in Farquhar or Lelean was confirmed in a conversation ETC had with another senior WorkSafe person (H) whose view was that Nicholls/ WorkSafe was simply "happy to make you the fall guy." Any adequate investigation would have shown that the two directors were so underinvesting in the resources needed in the office that there was chaos and this led to the preparation of certificates of compliance in any random certifier's name. Had he probed even a little bit, Nicholls would have discovered that Lelean, in particular, was completing as many as a dozen or more inspections on some days and creating chaos that the underinvested office would be clearly unable to sort out. ETC was an entirely innocent victim of certificates created in his name with his electronic signature attached without his authority. Six months of investigation failed to bring Nicholls remotely close to the core issues and one has to wonder why this would be so if his core skill that led to his appointment was his investigative skills.

One could say that, in 2023 after being handed the 2023 Complaint and an opportunity to peg ETC, Nicholls came good on the threat he made in 2019.

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Some dubious conduct by Nicholls is also mentioned in the following section.

Since 2019, Nicholls has been promoted into a more senior role within RAG.

Andrew Smith
Good Old, but highly deceived, Certifier (GOC)

It is axiomatic to say that someone entrusted with the powers that exist in Part 6 of the Regulations should exercise that power honestly and with full regard for the required processes. The consequences for certifiers can be suspension or removal of their authorisations altogether. The Regulations establish exacting processes which create important rights for certifiers during investigations. Knowingly abusing the powers inevitably also robs the certifier of his rights and the financial and other consequences can be crippling. The law has many legal principles and statutes that enshrine basic protections for the rights of the individual when such administrative powers exist. It is a great pity that they were not observed.

Landing on Nicholls' and Smith's desks in 2018 and early 2019 were five matters which impacted GOC:

- A "heads-up" from an unrelated certifier that an XXXXX petrol tanker had been issued with a plaque following an inspection by a person who was no longer a compliance certifier ("**Flying tank wagon"**, Christchurch). The complainant/ heads-up certifier made it clear in his email that he had no concerns about the safety issues in relation to the tanker and, as we would find, the safety issues associated with the tanker in question were never considered or investigated by WorkSafe. (He was much too savvy to risk annoying a large potential client).

- A "notification of refusal to issue" a certificate made by a certifier (Menzies) who had (bizarrely) inspected a restaurant which had recently been inspected and passed by ("**Alice May**"). One cannot sensibly refuse to issue a certificate when you have no standing to issue one in the first place. His concern related to the fire rating of the wall behind the LPG enclosure. The easy proof was that the wall was fire-rated and, therefore, the whole matter was a storm in a teacup.

- A "notification of refusal to issue" a notification made ostensibly by a certifier (but signed by someone else, Kevin Towart) who was at an **Elgas location in Nelson** presumably touting for business, but otherwise without mandate to inspect the location. This flimsy and irresponsible notification would lead, as we shall see, to a massive fishing expedition by WorkSafe which was totally unreasonable. Towart was mid-stream at this time in becoming the most prolific complainant to WorkSafe in the industry by a country mile and, at that time, he did not even hold individual qualifications as a certifier.

- A strange suggestion received from a low-level manager at a government entity in Christchurch (**Strange Government Research Entity**) who expressed concern that he had been approached by a Kevin (as agent for GOC) for pre-audit documents, he had authorised the inspection which took place and then had been issued with a certificate of compliance issued by GOC. After this, the entity had been approached by a second Kevin (Towart) presumably touting for the same business. The manager's confusion and disorganisation automatically made his complaint frivolous. Was he complaining that there two Kevin's and he couldn't tell the difference between them? He was perhaps annoyed at his own behaviour and his complaint was entirely frivolous in the extreme.

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- A complaint made by another certifier about the certification of the **Comfort Flames Hotel**, a location that coincidentally would feature in the irresponsible utterances in 2021 from the Beehive's "pulpit of truth" by COVID Minister, Honourable Chris Hipkins, who contrived a fiction about a lawful trip north by two women who suffered the ignominy of being described as prostitutes for gang members (if The Minister is prepared to create such an elaborate fiction, we should be alert for other fictions by other government employees – maybe this is why the city is called Wellywood).

According to the certifier who issued the notification of refusal, Peter Menzies, his Alice May notification was followed up by a call from Nicholls who immediately referred to it as a "complaint". Menzies was adamant that he was not making a complaint, whereas, according to Menzies, Nicholls was pushing for him to define it as such. I assume that Nicholls understood that there had to be a basis for commencing an investigation and, according to Menzies, he was not provided him with one. Nicholls proceeded anyway. For the record, Menzies did adopt the word complaint in subsequent email correspondence that I have seen, but equally I have been assured by Menzies that Nicholls engaged with him exactly as described above.

Nicholls made no attempt to ascertain whether the wall in question at Alice May was fire-rated – which it was! This raises two threshold questions about what a triage process involves if it (i) skirts around the very essence of the issue (whether a wall or enclosure is fire-rated) and (ii) includes encouraging a third party to reclassify a notification as a complaint. The empowering provision – reg 6.15 – requires that WorkSafe have either a "complaint" or a "reasonable concern." One cannot have a complaint if there is only a notification and one cannot have a "reasonable concern" if the very essence of the alleged non-compliance has not been properly considered. Because there is an onus on the PCBU to have a fire-rated enclosure with more than 300 kg of LPG, this was a relatively obvious question for Nicholls to ask of the PCBU and to obtain proof one way or the other.

All these files were allocated to Andrew Smith.

The Flying tank wagon matter <u>potentially</u> gave rise to questions related to the <u>processes</u> followed by GOC. Was he, in fact, ensuring that reports prepared by a competent person were being reviewed by him before a certificate was issued, and had the certificate been issued before the plaque was provided to the client to enable him to attach it to the tank wagon? Maybe a corner or two had been cut? (Keep in mind that the industry standard was poor as WorkSafe's CEO acknowledged in 2022). This was the essence of the "heads-up" from the complaining certifier. There is a legislated right for a certifier to appoint a person to conduct inspections on his behalf, thus the sole issue that arose from the matter was whether GOC reviewed the competent person's report before authorising the issuance of the certificate of compliance. WorkSafe failed to understand throughout that the attachment of a plaque issued by a certifier to a PCBU is the PCBU's responsibility.

If DGC Limited (our predecessor company) was a benchmark for the industry around exactly the relevant time - with its chaos in the office - WorkSafe ought not to have been surprised to find other certifiers' processes were lacking. What WorkSafe was told by GOC was that his employer had invested in a major project with a software provider to massively upgrade the systems, something that was not occurring at DGC Limited. In fact, after WorkSafe ruined the business of XYZ Compliance Limited, one of the assets New DGC acquired in the fire sale was the rights to the system that had been built. In many ways it was superior to what I had chosen for New DGC but we were too far down the track to change. The system was extremely impressive and, based upon what I have seen elsewhere in the industry, nothing aside

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from DGCs systems comes remotely close to what XYZ had invested in. WorkSafe learned nothing about the system because it never showed any interest in learning about it despite the process issues being the sole matter for investigation.
WorkSafe's policy is that it will not investigate a complaint if an adverse finding would not result in any adverse action being taken against the certifier. Four of the files could, and should, have been put to rest in a short, sharp "triage process" because:

- ***Alice May*** - It is very much in doubt whether Nichols and then Smith had any basis to seek internal authority – reg 6.15 – to investigate the situation. The wall was fire-rated in any event. Proof should have been requested – it existed - and the matter should have been put to rest.

- ***Strange Government Research Entity*** – There was at most a confused individual who did not construct any type of theory for why GOC had done anything wrong. The low-level manager could have usefully been provided with some of the basics of organisation to stop him wasting taxpayers' money. It is a sign of a healthy market that certifiers will compete for business and a certifier is entitled to assume that the client will make its own decisions about whom to appoint. Solution – define the complaint as worse than vexatious (it was silly) and send the complainant a copy of *Management for Dummies*.

- ***Elgas Nelson*** – The notification was not a complaint and the matter alleged was wrong as a matter of basic facts. The location had been issued with a record of periodic investigation by an electrical engineer and that was the end of the enquiry that a compliance certifier ought to have made. If electrical inspectors have concerns about the safety at a location which they have inspected, they should require the operation to be shut down until the issues have been rectified. This was not what happened at all. It was entirely business as normal. This should have been the conclusion from an informed triage process.

- ***Comfort Flames*** – After investigating for more than a year, WorkSafe did not make any final adverse findings. The file was a simple one (an LPG location) and the same conclusion could have been reached in a very short triage process.

There are, therefore, serious issues about why all these matters were investigated over a period that was more than six times as long as the period allowed by the regulations for such investigations.
Reg 6.15 allows WorkSafe to not investigate complaints that are "frivolous, vexatious, or malicious" or "minor". Complaints may also be diverted to audits, however the essence of the enquiry as to competence and conduct of the certifier must remain central to how WorkSafe proceeds. The facts show that WorkSafe has used the options in reg 6.15(2) very liberally, as discussed elsewhere in this letter, and with outcomes that surely question what the objectives of the decision-makers were when they made the decisions they did.

The facts in relation to the Elgas Nelson notification were that:

- The notification purported to be signed by a certifier (the only person qualified to issue a certificate and therefore the only category of person who could refuse to do so).
- The signatory (KT) signed the document without the authorisation of the certifier whose name appears below the signature.
- KT was not invited onto the premises, including prior to his authorship of the notification on the day in question. His source of information was an electrical inspector with whom he had a relationship (meaning, of course, that the inspector was in breach of his duties of confidentiality to his client).

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- The matter complained about was a non-issue because the certifier was entirely correct in relying on the document (electrical record of inspection).
- WorkSafe took no action against Elgas for the alleged compliance failure but did then go aggressively after the certifier. If there was a serious safety issue – issues with electrical equipment inside hazardous areas at LPG filling depots will always be serious (except at WorkSafe from what we have seen many times subsequently, including investigations conducted by Mr Smith) – the site ought to have been shut down. This did not occur for reasons WorkSafe likely cannot explain.
- After more than 9 months of his investigation, Smith was provided with a correct and orthodox view about whether the Elgas record of inspection was adequate. He has told by the most senior expert in the area at WorkSafe that it was adequate, yet Smith chose to ignore this expert view, evidently in favour of his lay view.

There is a prima facie question about whether the complainant put his name to a document in a way and with the objective that breached the Crimes Act, something that WorkSafe was never prepared to consider – it was put to the Chair without any adequate response.

In addition to it being an egregious misrepresentation or worse, the Elgas notification was about the most obvious example one can expect to find of a matter (complaint it was not) that was frivolous, vexatious, and malicious – a clean sweep of these categories.

Rather than declaring the matter to be frivolous, vexatious, and malicious, **WorkSafe took it upon itself to conduct a fishing expedition** – visiting several other Elgas locations surreptitiously at least as far as GOC was concerned. The legality of this was, at best, dubious because:

- The powers of the inspectors under HSWA apply only when they go to locations to investigate compliance by the PCBU operating at the location. This was obviously not what occurred.
- The powers to investigate a compliance certifier can only be invoked after making a decision to investigate.
- WorkSafe did not visit the Elgas locations to investigate Elgas' compliance; it was conducting an investigation into GOC without authority to do so.

Just as an angler cannot be caught in the middle of a lake with a baited line in the water and then obtain a fishing licence the next day to cure his lack of authority, WorkSafe cannot conduct a fishing expedition without authorisation, or fix the defect after the fact. WorkSafe's documentary trail shows that it did not have authorisation to commence an investigation prior to a date in late February (there is some opaqueness about the exact date) and the fishing expedition occurred between mid-January and early February. In the criminal law, this would be an illegal search.

We can reasonably assume that the person with day-to-day responsibility for the file (Smith) had an obligation to act only with the requisite authority and to familiarise himself fully with all matters which were within his purview including triaging the notification and being kept informed about the fishing expedition. He must have known that the Elgas locations at Napier, Te Poi and New Plymouth were all part of the fishing expedition. He must have known that the fishing expedition at each fishing spot did not occur on the back of a complaint.

On 11 February 2019 Smith wrote an email to GOC in which he stated:

> *"WorkSafe have received **another complaint** about a compliance certificate you have issued.*

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*I suggest that in light of **the additional complaints** the most prudent course of action is for me to seek authorisation to undertake an investigation pursuant to section <stet> of the …Hazardous Substances Regulations 2017.*
*To allow you time to get this information together, I will list the compliance certificates we have received **complaints** about to date.*

1. *Elgas Napier*
2. *Elgas Te Poi*
3. *Elgas New Plymouth*
4. *Elgas Nelson*
5. *XXXX NZ*
6. *Comfort Hotel Flames" (emphasis added)*

The word "complaint" is used three times in a short email from Smith.

The description of all six matters as "complaints" was repeated in the email sent by Smith on 22 February 2019 which attached a letter dated 13 February 2018 (presumably the year was mis-stated and the day of the month was not updated before it was sent).

The emails of 11 February 2019 and 22 February 2019 were formal communications in relation to which critical words needed to be used accurately. Smith's email from earlier on the day of 11 February informed GOC that he was seeking "legal advise" <stet> which we can assume was obtained before he sent his email discussed above.

After several months, proof of the falsity of the classification of the listed matters universally as "complaints" came in the words of WorkSafe itself in subsequent communications and its draft investigation reports. Someone woke up internally to the travesties that were associated with the fishing expedition. One cannot conveniently paper over serious misrepresentations of the truth.

Given that Smith asserted that WorkSafe had its legal team involved in writing the letter dated 13 February 2018 and it included the paragraph quoted below (it was also clearly not written by an ex-cop), there must be a concern either that there was a widespread attempt to mislead GOC or there were some gross misrepresentations in what was provided to the decision-makers and Legal. WorkSafe can decide which it is and let GOC know. The letter, apparently approved by WorkSafe Legal, stated:

"Whilst waiting for an interview to be arranged, WorkSafe **has received six further complaints**, which included issues regarding…" (emphasis added)

Thus, the facts show that in January and February 2019, WorkSafe proceeded on the basis of several flawed premises:

- That it had received six "complaints"
- That it only commenced "investigations" from the date of its letter (13 February 2019) being presumably after internal authorisation was obtained
- That a decision to suspend GOC's authorisations could occur contemporaneously with a decision to investigate. In this regard WorkSafe cannot have its cake and eat it too – a triage process could not be regarded as sufficient to accumulate information to justify a suspension, whereas if there had been an investigation – from early January on – that investigation was not authorised because the requisite authority had not been obtained.

In addition to these defects, there are many other issues with the conduct of the investigation by Smith. Some of these issues arise from the interview Smith conducted with the competent person who inspected the XXXX tank wagon. The issues include:

- the non-disclosure of the trepidation of McQuoid arising from his earlier unsatisfactory experiences with WorkSafe (he was, for all intents and purposes, ejected from the compliance regime for his breaches) in the materials prepared for internal approval of draft investigation reports. The comments by a scared witness have to be considering in the same way we would contemplate the behaviour of a cowering puppy who had been previously beaten by the person in the room;
- the manner in which the findings from the interview were written up by Smith who chose one version only of key facts he selected from four answers related to the same question about what happened on the day of the inspection of the XXXX tank wagon – the weight of the evidence was against the one version of events written up by Smith in the draft investigation report; and
- in response to an OIA request in 2019, WorkSafe provided only a small extract -one minute only of a near 60-minute interview - denying GOC his right to receive a transcript of the full interview which revealed the serious issues noted above. There was, I say, much to hide given that WorkSafe was continuing to plough ahead with a flawed process. The full transcript was provided for the first time by WorkSafe in 2021 in connection with legal proceedings commenced by GOC. The full transcript of the interview raises serious issues about the integrity of WorkSafe's investigation – there are reasons why, perhaps, it was deliberately withheld.

The full legal consequences of WorkSafe's conduct remain to be tested before the court. Taxpayers would rightly be concerned about the potential risk of material damages being ordered to be paid. They might prefer that the perpetrator swings alone for his conduct if he were acting in bad faith and without authority. The difficulty for WorkSafe is that it has never adequately investigated all elements that it should have.

Smith's treatment of GOC is not the worst abuse of process and power that I have heard from the recent past, but that story is for another certifier to tell, and for WorkSafe to properly investigate.

Smith also features in my letter describing BIAS at WorkSafe because there is evidence of his "full throttle speed" when it came to GOC in 2019 and 2020 and his "idling speed" when it comes to certifiers with considerably less ability.

Jason Ujdur
Complaint made by a female certifier (Suffragette 1)
Investigation of a female certifier (Suffragette 2)

Ujdur has been with WorkSafe for some time, but part of RAG for a short time. He straddles a role as an inspector and as a RAG investigator – roles which present obvious concerns in terms of conflicts as we would find out.

Ujdur was allocated the complaint made by Suffragette 1 about the certification failures by Hickey at YYYYY which included that he certified a tank which met almost no mandatory regulatory requirements. The good news part of this story is that YYYYY, a responsible PCBU, replaced the tank with a lawful one

which has since been certified. There was no lawful alternative in any event. The complaint was 100% correct and the prior certification was 100% defective.

The bad news part of Ujdur's involvement related to the unnecessarily derogatory remarks he made about Suffragette 1 to the PCBU which were reported to me. I think we can say with confidence that Ujdur lacked training in the basic technical issues applicable to stationary container systems, despite his two roles at WorkSafe, because a competent inspector would have immediately noticed the many deficiencies with the tank in question. It is one of the most basic rules in the regime that a tank must be specifically approved by WorkSafe before it can be used to hold hazardous substances (HAZSUBS RULE 101). It would be inappropriate to denigrate the complainant in every scenario, anyway.

Worse was to come from Ujdur, however, when he was allocated an email (which was not a complaint) from another certifier who queried whether a petrol tank at a school with large playing grounds was, in fact, used for vehicle refuelling and, thus, fell within Suffragette 2's authorisations. This was, at best, a matter to refer to WorkSafe legal for an interpretation were Ujdur concerned, after his visit to the school, that the petrol tank might be used for different purposes, such as perhaps petrol sniffing at lunchtime. There was no need to do any of the things that he did:

- visit the school because of the nature of the issue – an interpretation issue (however in this regard, we note that Ujdur did what most of his colleagues never do – which is, in fact, the obvious thing to do if you have training which is go and see the location at the centre of a complaint);
- call the certifier – to ask about the "complainant's" interpretation of the words "vehicle refuelling facilities";
- make derogatory statements to the PCBU about the certification with the consequence that a long-term client relationship was destroyed by Ujdur's visit and his further interactions with the PCBU (you will appreciate my concerns about his straddling role);
- call Suffragette 2 after-hours;
- demand responses in short time-frames – demanding, bizarrely, that we supply what WorkSafe itself had written on the clarification of what was meant by "vehicle refuelling facilities"; and
- the *piece de resistance*, issue me with a section 168 notice (once gain unlawfully).

The underlying interpretation issue was not resolved by WorkSafe; instead, at the end of Ujdur's obnoxious and highly unacceptable involvement, the equivalent of a demand was issued by Darren Handforth that the certifier had to follow WorkSafe's assertion about what was meant by a "vehicle refuelling facility." In eight months since, WorkSafe has done nothing else about the matter. Handforth was, and is, quite simply wrong on this.

Ujdur's social media showed that he had made inappropriate and denigratory allegations about nurses (most of whom are, of course, female), a part of the economy that most people regard as highly skilled and highly undervalued. I concluded that Ujdur had simply found, through WorkSafe, a new outlet for his tendency towards misogynism and unreasonable criticism. WorkSafe never denied this after I put it to them directly. Perhaps WorkSafe agrees with me?

I assume that the failures by Hickey at YYYY were simply swept into the *benign solutions basket* and no action was taken. Who Hickey's friends are at WorkSafe is unclear. As we see regularly when it comes to WorkSafe and certifiers, age and stage is not correlated with ability and performance, however it is correlated with benign outcomes to investigations.

What Ujdur did do perfectly was allow us a further juxtaposition of the old chestnut – allowing us to compare how he dealt with the complaint about Hickey with how he dealt with the query about Suffragette 2's certification. The financial market theory from the post-GFC period of 'Too Big to Fail" has morphed into "Too Male to Nail."

Simon Humphries
Formerly Head of RAG, now at MBIE

From 2018-2020, Smith and Nicholls reported to Humphries, another ex-cop. Birds of a feather, as they say.

Aside from the conduct of Smith and Nicholls, he conjured his own special weapon to intimidate GOC. WorkSafe's powers are solely confined to HSWA – they have no skills or jurisdiction beyond HSWA. It would be alarming wouldn't it, if WorkSafe reached to all manner of statutes, usurping for itself administrative jurisdiction in relation to whatever statute that took its fancy?

Frustrated perhaps at the lack of any wrongdoing in any of the files investigated by his underlings in 2020, Humphries reached for obscure provisions in the Telecommunications Act and formally threatened a certifier with prosecution under this Act. Not only did he not have jurisdiction to do so, he would have got nowhere with it. I think you can speculate why he did this, but we should let him explain perhaps? Maybe now he is at MBIE, we will see MBIE taking over roles of the police, the Commerce Commission or the Fair Markets Authority?

Allegations of Bias

This letter will be read by some who have had similarly poor experiences. These should be communicated frankly but only to an investigator who is given the right mandate to get to the bottom of the issues. Otherwise, you should keep your head down for fear of reprisals by the very group you wish to complain about. My understanding is that one of the industry bodies was pushing for many aspects of unsatisfactory conduct by RAG to be investigated. Maybe they all turned scared and no-one has had the guts to stand up for what is right.

WorkSafe will need to read this letter alongside the letter about its bias when it comes to certifiers so that it grasps the magnitude of the issues. WorkSafe has more reading and explaining to do.