

## LPG – Industry Issues which showcase WorkSafe’s and industry’s failures

Highly reminiscent of WorkSafe’s dreadful malfeasance in the lead-up to Whakaari Island.

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**“If a 9kg BBQ cylinder can lead to this, you should be highly concerned about the widespread failures in the LPG industry generally. WorkSafe has a case to answer for its profound ongoing failures.”**

**James Dunphy  
6/6/2024**

## Introduction and Summary of Issues

*“The four dangerous combinations when it comes to LPG risk are the flammable vapour, oxygen, sources of ignition and a lackadaisical, ineffective regulator.”*

1. This paper explains the roles of the various stakeholders when it comes to the safe supply, use, storage and certification of LPG at workplaces, including:
  - PCBUs
  - LPG suppliers
  - LPG customers
  - Gasfitters
  - Compliance certifiers
  - WorkSafe New Zealand.
2. The paper explains the basis for the author’s criticisms of how the industry has been allowed to operate with:
  - failures by WorkSafe to understand or correctly apply the Regulations. This is the most problematic failure given the role WorkSafe is required to perform and because it surely sets the expected standards for industry to follow;
  - large numbers of non-compliant LPG locations, most of which will have been erected by the LPG suppliers, and then supplied when there are clear ongoing breaches of section 42 HSWA (which takes us back to WorkSafe’s failures);
  - poor training and knowledge of the rules by compliance certifiers in relation to whom WorkSafe decides their qualifications to perform their roles and supervises their performance;
  - confusion regarding which entity is the PCBU with management or control over the LPG location and, therefore, the legal responsibility for compliance;
  - suspect practices when it comes to ensuring that compliance certificates are in place before LPG supply occurs; and
  - astonishingly feeble enforcement generally by WorkSafe, especially when it comes to LPG suppliers.
3. I believe most market participants focus on the wrong priorities, rather than squaring up to their legal obligations. In the discussion that follows, readers are invited to consider the chaos caused by the lack of responsibility and unreasonable/ false reliance evident throughout the chain: the LPG customer knows nothing about the rules, the LPG supplier establishes the LPG locations, a certifier certifies one of 10 locations, the LPG supplier takes the compliance certificate as a golden ticket to supply as much LPG as possible to the customer, and WorkSafe asks only (and not always) whether there is a compliance certificate (a bit like the golden ticket for Charlie at the chocolate factory). There is a marked absence of due diligence, due care or adequate enforcement.
4. The LPG industry is only one of the many ways in which WorkSafe’s poor performance across the board is indicative of the broader problem with its execution of its core roles. Minister, it is not the law but the organisation that is the issue.

## LPG overview – large market, highly explosive and flammable commodity at more than 1000 locations

5. Annual sales of LPG in NZ are ~400 million litres. The gases that are liquefied are propane and butane. The gases are highly flammable and stored under pressure (liquefied) making the stored LPG both explosive and flammable.
6. There are four major LPG suppliers which represent more than 95% of the total market which is ~\$600 million using the retail sale value for the commodity. One of the major suppliers uses franchisees in many parts of the country.
7. The LPG might be stored at customers' workplaces in large tanks (up to 50,000 kilograms or nearly 100,000 litres) or in cylinders ranging in size from BBQ cylinders (generally 9kg filled or smaller), to forklift cylinders (generally 15kg), or other cylinders ranging from 45-222 kg (weight when filled). In business settings, the LPG is generally connected to other devices which burn the gas for cooking or heating.
8. LPG suppliers frequently construct storage locations for LPG at their customers' locations which they retain title to. Further, the LPG supply agreement with the customer (and the understanding among market participants) makes the customer obligated to only purchase LPG from the one supplier. At locations where the LPG is supplied via *in situ* filling from an LPG tanker, the customer has virtually nothing to do with the LPG. Many locations are, therefore, owned by an LPG supplier (it retains title) which also manages the LPG location in terms of maintenance of equipment and it also deals with all aspects of supply. This has important consequences in terms of whether it is the LPG supplier or its customer which has "management or control" of the storage location and therefore the PCBU with legal responsibilities pursuant to the Health and Safety at Work (Hazardous Substances) Regulations 2017 (**Regulations**). This is discussed further below.
9. The Regulations impose specific requirements for the safe storage and use of LPG which reflect its poisonous/ toxic properties, and its highly flammable and explosive properties. The harm that can eventuate from these risks is demonstrated by the incidents which have caused serious injury or death:
  - LPG is dangerous to inhale - [Coroner's warning after lpg 'huffing' death | Otago Daily Times Online News \(odt.co.nz\)](#)
  - The gases from burning LPG are dangerous - ['The grief envelops you' - Shower death mum speaks out \(newstalkzb.co.nz\)](#)
  - Concentrated vapour inside is highly flammable and explosive - [Union questions health and safety procedures after Auckland wharf explosion - NZ Herald.](#)
  - From last weekend [Gas complaints made months before explosion destroyed a townhouse \(msn.com\)](#) (this was mostly like methane rather than LPG), a repeat of NZ's version of this danger even though Christchurch's reticulated supply is LPG - [Christchurch gas explosion: Negligent tradesman stung \\$212,000 - NZ Herald](#)
10. It is dangerous to cook on a barbeque inside one's house. Had, for example, Hawkins had its time over, I assume they would not have allowed the BBQ to be used inside at its Wynyard building site. In that case, the LPG was stored in a shipping container and used by workers to cook breakfast. WorkSafe's investigation concluded that, after arriving at work and entering

the shipping container, one of the four men smelled the LPG and “jokingly” pondered if he could light the vapour with his cigarette lighter which is exactly what he did. The concentration of vapour was so great there was a fireball-style explosion, and all his fellow workers were very seriously burned. The lesson learned in a very unfortunate way was the dangers of LPG when the propane and butane vapour is present in sufficient concentration to be ignited.

**Figure 1 – Examples of carnage when LPG explodes (Wynyard Quarter, left, and at Whalan, Sydney, Australia, right)**



11. If the Chief Executive of WorkSafe’s nephew were working inside a shopping mall where there is 90kg of LPG is stored right in the middle of the mall and plumbed into a fast-food outlet, would he be concerned or blasé about the unlawful storage? The question is rhetorical, however WorkSafe’s failure to be proactive on such issues repeatedly is shocking. The law is practical and easy to understand; it is the execution/administration of it by WorkSafe that is problematic. Why are the Chief executive’s family members more important than yours or mine?

## **LPG in the 2017 Regulations and in the Health and Safety at Work Act 2015**

Key points:

- Specific LPG Controls for all LPG locations
- Obligations on the PCBU “with management or control” of the LPG location
- This ought to be principally the LPG supplier in most cases (not the customer)
- LPG suppliers have additional obligations as product suppliers under s 42 HSWA
- WorkSafe appears complicit in not requiring these rules to be complied with. Why?

12. There are specific safety controls applicable to LPG that are obligatory – the controls relate to proximate entrances into buildings, openings into drains, the protection of the LPG location from fire (through fire-resisting or fire-resistant walls) and, importantly, the prohibition on sources of ignition inside the hazardous area for the location. If we use the Hawkins/ Wynyard example, because the LPG was leaking or the valve was left on, the entirety of the

inside of the shipping container became an area where the flammable gas would be sufficiently concentrated to become flammable with a spark. I refer to these rules as LPG Controls. They are obligatory, regardless of whether or not a compliance certifier is involved.

13. The prohibition on there being sources of ignition inside the hazardous area, the rules prohibit the danger which is obvious from the photo below with the flame of the califont right next to the valve of the LPG cylinder and the power point also circled in the photo.

**Figure 2 – Sources of Ignition (x2) next to LPG Cylinder Valves<sup>1</sup>**



14. As a clue to what will follow in subsequent sections, WorkSafe was sent this photo in a report captioned “LPG from hell” and it has done nothing about it, or the issues I was pleading with them to focus on. Why would the LPG supplier have practices that are so lax that the drivers fill these cylinders every delivery when there are obviously sources of ignition inside the hazardous area?
15. I always consider compliance and health and safety in a very personal way. Would the Chief Executive of WorkSafe want his family sleeping in the accommodation that is right behind this LPG location, or indeed at any one of the other dozen accommodation units at this property which all have the same compliance failures? I wouldn’t. I assume, if he understands the issues, he wouldn’t either. Why then does he allow the organisation to be so ineffective when it comes to “my and your” families especially when, wrapped up in the legal roles of WorkSafe is its role as the Energy Safety Regulator?
16. Part 11 of the Regulations defines the physical controls for LPG locations, while the obligation to manage the hazardous area (and exclude sources of ignition) arises from reg 10.6 (in Part 10). Part 11 is divided into two main parts – when the PCBU has a “hazardous substance location” (HSL) and when the PCBU has LPG, but the quantities are less than those that create an obligation to establish a HSL.
17. It is important to emphasise that LPG Controls apply whether there is, or is not, a HSL. Thus, even if the location in Figure 2 were the only location at the workplace, the PCBU has failed

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<sup>1</sup> For the advanced readers, the cylinders in Figure 2 are filled in-situ.

to manage the hazardous area. If, to keep this simple, a further 45kg cylinder were added at this location, it would be an HSL, it would require certification, but it would still breach reg 10.6 and, therefore, could not be issued with a LCC.

## Who has “management or control”? The market has this wrong generally

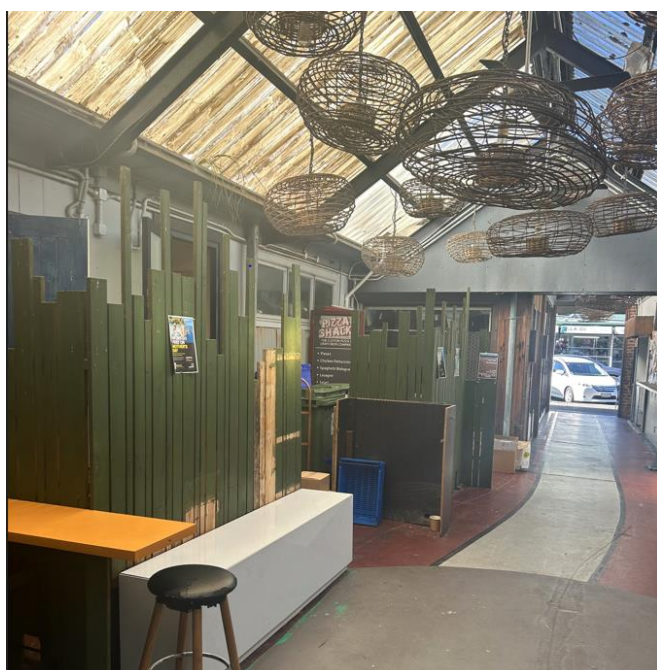
18. One of the most basic and pivotal concepts in HSWA and the Regulations is the concept of “management or control.” This determines who has the primary legal duty of compliance. This is the case when it comes to an LPG location and this is why this issue was introduced in the first section.
19. If you were managing an LPG supply company, or you were working at WorkSafe, you would absolutely need to know whether it is the LPG supplier or the LPG customer who has management or control over the LPG location. In relation to LPG, I believe WorkSafe has generally arrived at the wrong answer and the LPG suppliers invariably purport to leave this onus with the customer when in fact they are the PCBU.
20. Is it the business owner or is this obligation that of the LPG supplier by virtue of the supplier’s “management and control” of the LPG location? Is the LPG supplier obliged to obtain an LCC or is it the PCBU? That the LPG is situated in the PCBU’s workplace cannot determine the answer. Although the LPG suppliers’ collective approaches have been to place the certification obligation on its customers, the answer to the question must be one of fact determined on a case-by-case basis. I believe WorkSafe has accepted the theory that the PCBU with “management or control” of LPG locations is always the customer, but this cannot be right. **Insurers should also focus on this issue because the LPG suppliers include some financially robust entities which may very well be culpable for the causation of damage from LPG incidents. Their liability for the loss caused, for example, to the LPG customer’s neighbour’s property could have been caused by the LPG suppliers design of the location and the supplier’s failure to comply with the PCBU’s obligations under the Regulations<sup>2</sup>.**
21. One consequence arising from whether the PCBU has a HSL or does not is the requirement to obtain a location compliance certificate (LCC) from a compliance certifier (or **certifier**). If the PCBU requires an LCC, it is unlawful for the LPG supplier to supply LPG to the customer without it.
22. The same rule applies also to petroleum tanks and other tanks which require stationary container system (SCS) certification – certification is required before a supplier of a hazardous substance is lawfully allowed to supply, for example, petrol to a petrol tank. Petroleum tanks that are situated at customers’ workplaces that are owned by the petroleum companies are invariably certified (SCS) in the name of the petroleum company owners. Thus, in the petroleum industry, we have an analogous scenario, but with a different substance and a different approach to certification.

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<sup>2</sup> In the compelling rationale of Judge Evangelos Thomas, if the Buttles had a workplace on Whakaari Island (both the thrill and the risk), then the LPG suppliers will often be the PCBU when it comes to many LPG locations at workplaces. I suspect they are meeting their obligations as poorly as the PCBU in the Whakaari case.

23. Another regulatory provision is relevant to what follows. Reg 11.42 overrides both reg 11.6 and 11.20 when LPG is stored or used “indoors.” Generally, this will be indoors, or inside buildings. The Hawkins Wynyard LPG was stored and used indoors, for example. When 11.42 applies, the quantity of LPG that may be indoors depends upon the type of building and whether it is an “area of regular habitation.” Relevant to what follows, a covered shopping mall is “indoors” and the mall is a place of regular habitation with the result that the maximum quantity of LPG that can be stored or used therein is 10 kg per 100 m<sup>2</sup> in cylinders having a maximum size of 10kg. The LPG stored in the wooden cabinets in the centre of the photo in Figure 3 consists of two 45kg cylinders in breach of reg 11.42.

**Figure 3 – LPG location “indoors” - at the Selwyn Mall, Paihia**



24. For the LPG to still be in the Selwyn Mall on 4 June 2024, the following has occurred:

- Someone installed it there (presumably the LPG supplier).
- An LPG supplier is supplying the location regularly (why do they not know or follow the rules?).
- The brand owner has been alerted generally to the problem but has not dealt with it (so how defective is the basic knowledge and/or internal controls?).
- WorkSafe has been alerted but has done nothing.

This leads us back to the question for the CEO of WorkSafe – why is your organisation so poorly managed that it cannot deal with relatively simple issues such as this? He is but one of the persons in the chain that have led to this type of failure.

## **Section 42 HSWA**

25. The LPG supplier has additional responsibilities pursuant to section 42 HSWA. LPG is a substance and, therefore, the LPG supplier “must, so far as is reasonably practicable, ensure that the substance is without risks to the health and safety of persons.” An LPG supplier which supplies LPG when the LPG Controls are not compliant must have liability under

section 42. It will also frequently have duties under s 43. Regardless, therefore, of the debate about whether the LPG supplier is also the PCBU controlling and managing the LPG location, WorkSafe has the power to issue infringement notices, improvement notices and prohibition notices.

26. If we take the photo in Figure 3, for example, the LPG location is not certified, it is clearly “indoors” with the quantity exceeding the quantity and cylinder size permitted by reg 11.42 and is supplied with cylinders marked with the logo of one of the industry big four suppliers. Details of WorkSafe’s remarkable inability to deal with this are discussed later in this paper. Perhaps also surprisingly, the “one of the big four LPG suppliers” evidently has so little control or information about what its franchisees do with its dangerous product that it has been unable to deal with the issue despite being given a heads-up about the breach.
27. WorkSafe surely must have considered what I allege is widespread breach of the rules by LPG suppliers, including in ways that present danger to persons at customers’ workplaces, yet there is nothing to suggest that it has taken any steps to require the LPG suppliers to comply. This the first clue about the cosy relationship that exists between WorkSafe and the LPG industry which is working to the detriment of the very reason that WorkSafe exists.

### **Hazardous Substance Location – Why does it matter?**

28. In terms of the duties on PCBUs and LPG suppliers, the LPG controls for non-HSLs (reg 11.6) are largely repeated in reg 11.20 for HSLs. The obligation to manage the hazardous area remains the same, whether there is a HSL or not.
29. PCBUs are obliged to obtain an LCC for an HSL and LPG supply is unlawful without this. Therefore, one significant difference is the requirement for a compliance certifier to inspect and verify that LPG Controls and other documentary requirements are compliant. This ought to provide some assurance that the location is safe.
30. Assume that a poorly-trained WorkSafe inspector visits an accommodation complex which has an LPG location at each of its 10 accommodation chalets. The inspector is presented with a compliance certificate for 180 kg, ticks the box and moves on. The compliance certifier hasn’t checked the chalet locations, it is also unlikely the proprietor has and, in this scenario, nor has WorkSafe. There is also a huge clue that ought to be hiding in plain sight for the WorkSafe inspector because the location ought to have included with it a compliant site plan which must show the 10 90kg LPG locations as well as the largest one...unless, of course, all parties have stepped right past that obligation too.
31. As explained in the next section, there are many examples of workplaces that are certified for less than a fraction of the LPG that is supplied because, for example, a compliance certifier has certified 180 kg out of a total of say 1080 kg on site. Some certifiers will have only inspected the one 180 kg location, and none of the other ten 90 kg locations. Thus, certificates issued by these certifiers will show 180 kg and the LPG supplier will supply more than a tonne of LPG on each delivery.
32. Before analysing why this scenario is wrong as a matter of law, whatever has happened in terms of certification, the obligations in regulations 11.20 and 11.6 (the LPG Controls) remain, yet the LPG Controls may never be checked by someone competent to do so. Given



this scenario is relatively common, one would expect due care to be taken by the LPG suppliers and appropriate supervision and adequate inspections to be undertaken by WorkSafe. WorkSafe's role ought to be relatively straightforward because there are four companies accounting for more than 95% of the LPG market. A handful of infringement notices and a promise of more ought to engender a national focus by the LPG suppliers. *How many LPG suppliers supplying LPG to uncertified locations have dossiers which provide proof of their due diligence in relation to the compliance of these locations with the Regulations? Why not given they are likely both the PCBU with direct responsibility and the supplier with duties under s 42 HSWA?*<sup>3</sup>

33. The LPG suppliers are all “for profit” businesses. The language that is the most compelling for such entities is the language of financial penalty and the existence or removal of the legal right to operate. I believe that WorkSafe could take swift actions that would result in the “for profit” enterprises rectifying their non-compliance within a calendar quarter. Those interested in these enterprises’ “social contract” can make their own assessments about the degree of breach in that regard from the examples in the rest of this paper.

### **Regulation 10.3 of the Hazardous Substances Regulations – When must a PCBU establish a hazardous substance location?**

34. One of the relatively unique aspects of the Regulations is the role of compliance certifiers who are authorised to issue compliance certificates. Certification is required for particular types of assets generally based upon a metric of size or quantity and for locations based upon quantities controlled by the PCBU. Thus, for example, a PCBU must obtain a LCC if the quantity of LPG exceeds 100kg.
35. The compliance certifier (authorised by, and ultimately whose activities are fully overseen by, WorkSafe) must verify that specific criteria are met before a certificate can be lawfully issued. For example, at LPG locations, the certifier must verify that the LPG Controls are met, in addition to other documentary and safety requirements. In essence, therefore, the Regulations create an important compliance role for the certifiers to perform and it is apparent that such roles are well aligned with the purpose of HSWA.
36. Without forgetting that the compliance certificate is solely a method for confirming that the location complies (and is, in this sense, simply a further layer of protection for the legal obligations of the PCBU and the supplier), in practice the existence of an LCC has tended to take on the supernatural properties of “Charlie’s golden ticket.” Golden tickets are worth having and, therefore, it is essential to know when one is obligatory. The answer to this is found in regulation 10.3 of the Regulations.
37. Regulation 10.3 is a key provision dealing with controls for class 2, 3 and 4 substances. It is absolutely pivotal. It provides:
- (1) “A PCBU with management or control of a class 2, 3, or 4 substance must ensure that the substance is held at a hazardous substance location or at a transit depot if the quantity*

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<sup>3</sup> My guess is that in the entire country, there would be fewer than a dozen LPG due diligence files completed by, or on behalf of, the LPG suppliers.

*exceeds that specified in table 4 in Schedule 9 for the substance for more than <24 hours>.”*

38. It is helpful to examine the application of reg 10.3 by reference to the accommodation location discussed in the prior section and to assume further that it has only 10 x 90 kg LPG locations at the accommodation chalets spread out over the property. Does reg 10.3 mandate that the PCBU establish a hazardous substance location? Clearly the quantity under his control is 900kg which is greater than the 100kg referenced in table 4 in Schedule 9. The plain and simple interpretation leads to only one answer – yes! I refer to this as the “plain and simple approach.”
39. The more surprising answer is the one that WorkSafe and the LPG industry generally have taken – surprising until you consider that certification could be an undesirable inconvenience for the profit machines. That interpretation focuses on the reference to “hazardous substance location” , a defined term in regulation 3, which refers also to table 4 in Schedule 9. Their approach then works along the narrow path that because no LPG location is >100kg, then there is no HSL. We could call this the “narrow approach.”
40. If generous, one could say there is some ambiguity in the interpretation of reg 10.3 arising from the circularity in the use of the phrase hazardous substance location. When ambiguity arises, the conventional way to resolve which approach is correct is to consider the purpose of the legislation which is provided in section 3 HSWA:
- “to provide for a balanced framework to secure the health and safety of workers and workplaces... regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks.”
41. Is this purpose achieved by the plain and simple approach or the narrow approach? When we consider the examples of harm and the types of risks that even 9kg LPG cylinders pose, the answer is obvious. Assuming compliance certifiers are diligent and careful<sup>4</sup>, there is a higher probability of compliance if all LPG locations at the workplace are hazardous substance locations required to be inspected and certified as compliant via the LCC. The LCC would show 10 x 90 kg LPG locations, noting where each is and also cross-referenced to the site plan.
42. It would be obtuse if a PCBU were able to circumvent parts of the regulations by dividing up quantities of any substances (including LPG) and holding smaller quantities at separate locations so that he could have 900 kg of LPG on-site and avoid some of the LPG Controls. The clear logic of Judge Evangelos Thomas helps one understand that provisions must be applied with the purpose of the legislation to the fore.
43. There are additional indicators that the plain and simple approach is the correct one. Regulation 10.26 provides a PCBU with the flexibility to establish “one or more” HSLs as she chooses. This fits with the 10 x 90kg locations. Site plans for the workplace must show all hazardous areas and, therefore, the 10 x 90 kg locations must be on the site plan.

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<sup>4</sup> This is a large but separate issue which I have addressed elsewhere on DGC’s website.

44. The perversity of the narrow approach is that the accommodation location owner will send a certificate for 180 kg to the LPG supplier who will then fill up 11 locations regularly for total supply of more than 1,000 kg of LPG. There is something entirely counter-intuitive about this.

### **WorkSafe's approach to regulation 10.3 is wrong**

45. I have raised these 10.3 issues with the person whom most people regarded as the most competent at WorkSafe in relation to the Regulations generally<sup>5</sup>. His answer was that WorkSafe had *never considered the issue* and, therefore, WorkSafe did not have a position on the interpretation question.

46. What WorkSafe wrote in response is also not entirely true because what I have seen in practice is that WorkSafe follows the narrow interpretation, especially in the Inspectorate. One such example arose last month. DGC's certifier followed the company policy which is the plain and simple approach, the PCBU was denied a certificate, and the LPG supplier was unwilling to supply. Because, at this point, the sole legal path for LPG supply to continue required an improvement notice, I encouraged the PCBU to contact WorkSafe<sup>6</sup>. Following the inspector's involvement, his only proposed solution was for a compliance certificate to be issued for the one large location. He was obviously comfortable with supply being made to every LPG location on-site despite the more than a dozen compliance failures. My conclusion was that the inspector was seeking a *Charlie & The Chocolate Factory golden ticket* from a certifier<sup>7</sup>. The involvement of WorkSafe's inspectorate led to the following key decisions, made with the endorsement of WorkSafe:

- the 'very many' locations were downsized so that no single location had quantity of more than 90 kg;
- the 'very many' compliance issues were not addressed; and
- the LPG supplier recommenced supply of more than 400 kg of LPG each fortnight.

47. This reflects WorkSafe's position and that of the LPG suppliers nationally. Simon Buckland was included on the correspondence with the Inspectorate and, therefore, we can conclude that he explicitly or implicitly endorsed the approach

48. Similar scenarios to the one described above play out regularly. At a location in the North Island (the *Flam-buoyant Motel*), we watched from the sidelines as one certifier's report on an LPG location identified more than a dozen compliance failures at two locations which had previously been issued with a compliance certificate (by certifier D). This led to a refusal to issue and a risk of non-supply (this was obviously not the supplier in the King Country!). Once, however, the quantities at each location had been reduced below 100kg, supply recommenced. I very much doubt that the LPG supplier asked what the non-compliance issues were, indicative of a cavalier attitude to duties under HSWA. The one suggestion from the LPG supplier was that ventilation holes be drilled (electric drill) in the LPG cage<sup>8</sup>!

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<sup>5</sup> Simon Buckland.

<sup>6</sup> I copied Simon Buckland as well so that he could see the Inspectorate in action (and so I could prove my point that WorkSafe did have a position on reg 10.3 impliedly, if not explicitly).

<sup>7</sup> We could say with confidence that many certifiers in the South Island would have happily done this. This was my next best solution for the customer – to go certificate shopping.

<sup>8</sup> Umm...electric drill being used inside a hazardous area!

49. Had the LPG supplier investigated, it ought to have discovered among many issues that there were sources of ignition inside the hazardous area at the Flam-buoyant Motel which, by all accounts, had been there “forever.” I made a complaint to WorkSafe about Certifier D<sup>9</sup> and noted that the other certifier’s list of more than a dozen compliance failures was available for WorkSafe. WorkSafe has not even acknowledged receipt of the complaint.<sup>10</sup>
50. In effect, as these examples show, the regulator responsible for enforcing the law encourages breaches of it. It shows little interest in investigating what it ought to. Given that many of the sites discussed in this paper have been the same for a very long time, what is it exactly that the Inspectorate does?
51. I have no doubt, therefore that WorkSafe tacitly accepts that compliance certifiers can avoid inspecting the sub 100kg locations (implicitly because WorkSafe follows the narrow approach) with the result that non-compliant locations such as shown in figure 4 are not dealt with as part of the certification process.

**Figure 4– 90kg location not inspected by a certifier when certifying a >400 kg location at the same workplace**



52. At the workplace where the photo in Figure 4 was taken, the certifier evidently did not regard it as its obligation to include on the site plan the hazardous areas for this 90 kg location, nor the five others like it on the site<sup>11</sup>. This leads on to another very compelling argument in favour of the plain and simple approach when considering what reg 10.3 requires. Reg 10.34(1)(j) requires the PCBU to obtain a LCC for a hazardous substance

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<sup>9</sup> D is one of the “Teflon certifiers”, a specially protected species in its policing of certifiers.

<sup>10</sup> In another chapter of WorkSafe failures, I will show WorkSafe manipulates its management of complaints received to protect the “Teflon certifiers.”

<sup>11</sup> This is obviously wrong. The inspection occurred after WorkSafe’s 2023 seminar on site plans, so one has to wonder why WorkSafe claims that it has “drawn a line in the sand” but then does nothing to require that those on the wrong side of the line amend their ways.

location certifying that “the requirements of Part 11 are complied with.” This phrase clearly has broad import, and it is not limited to the HSL listed on the certificate<sup>12</sup>. As compared to other paragraphs in reg 10.34(1), paragraph (j) differs from those which are narrowed to the HSL being certified. The most obvious explanation of what reg10.34(1)(j) refers to are locations such as the one shown in Figure 4.

53. When we contemplate the possible culprits in relation to the set-up in Figure 4, and we don't know in which order things were done, we have the electrician, the gas fitter, the LPG supplier, the compliance certifier and the operator at this accommodation location. The LPG supplier has, of course, made several hundred deliveries of an explosive gas to a location which is right next to two sources primed to ignite it. The supplier's breach of common sense and section 42 HSWA is undeniable, yet never prosecuted. Why?
54. Regulation 10.3 also applies to class 3 (and 4) locations which are even more numerous than LPG locations. How can WorkSafe not have focused on the most fundamental gateway provision (reg 10.3) in the Regulations in order to understand how exactly they ought to be administering the Regulations?

### **If WorkSafe hasn't properly considered the impact of reg 10.3, how is passing applicants who applied to become authorised compliance certifiers?**

55. If the examiner doesn't know the rules, how confident can NZ be that the applicants to become compliance certifiers have the required level of technical ability when it comes to the Regulations? This is a question that should be asked of Angela Jones who has been in charge of this group within WorkSafe for the last four years.
56. Given that there are three of four different approaches taken by various certifiers to what they believe they must consider before certifying a multi-location LPG workplace, it stands to reason that WorkSafe has not challenged the differing approaches. Most examiners have a marking guide to evaluate examination papers handed in by students. How does WorkSafe do it?
57. Apparently, late last year WorkSafe undertook a review of compliance at more than a hundred LPG locations around the country. Because the site inspections were done by WorkSafe's inspectorate, it is highly probable that the Inspectorate missed what they always walk right past. If you want to choose a mighty stallion to ride, you don't go out and lasso the slowest and smallest horse. How was the exercise scoped to avoid Fifty Shades of Failure?

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<sup>12</sup> Only when following the narrow approach does a certifier list only the >100kg LPG locations on the LCC.

### Suggestions for Worksafe

- Put to one side the organisation's failure to get on top of these issues seven years ago when the Regulations were passed
- Instruct competent lawyers to provide you a legal opinion on the correct application of regulation 10.3 (opinion due by 20 June)
- Schedule an open discussion with all key market participants once you have a decent legal opinion
- Re-evaluate how workplaces with LPG locations (for starters) are to be established, inspected and certified
- Allow the LPG suppliers no more than three months to ensure that all locations they supply comply with their obligations under s 42 HSWA and the Regulations. This should start now because the legal duties apply TODAY and the breaches are evident TODAY
- Get LPG compliance ro where it ought to be by 30 September 2024

Why would Worksafe not follow the Handfroth "quick and decisive approach" taken in relation to the Genesis hazardous area issue in relation to which a decision was made within days? Is a different course taken when the approach could be considered misaligned with the corporate profits for the LPG suppliers?

If you were the Chair or Chief Executive of Worksafe, would you advocate some leadership by Worksafe or would you be content with the same passive failures that we've seen many times before?

## Vast areas where compliance certificates appear to be optional, not that this is lawful

58. Because DGC has access to skills in relation to LPG locations that go well beyond the narrow issues compliance certifiers are required to inspect<sup>13</sup>, we were truly shocked to find LPG locations in the King Country where there was virtually no evidence of compliance whatsoever, despite the locations being owned and operated by large businesses. At one, in particular, we found:

- more than 600kg of LPG supplied regularly;
- no evidence of compliance certification for an extended period;
- a 10 year-old electric vapouriser, for which there was no current record of inspection by an electrical inspector, and which appeared to have never been serviced;
- non-compliant gas fittings;
- several sources of ignition inside the hazardous area, including mains boxes and air conditioning units; and

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<sup>13</sup> This is via our affiliated entity, Kineta Consultants Limited.

- a heavily flawed inspection by another compliance certifier.
59. Our further investigations revealed that one of the LPG operators (including to the location referred to in the preceding paragraph) was a franchisee using the brand of one of the big four LPG suppliers. It appeared that the operator's book of customers was made up of customers without LCCs (making the supply of LPG unlawful) and this had been going on for more than four years. There is also no evidence of WorkSafe paying any attention, or being unaware of the flagrant breaches throughout the entire province. WorkSafe showed little interest either, after I brought this failure to their attention. What exactly were the priorities of the Inspectorate responsible for inspecting locations in this province? What exactly did the records of their inspections show?
60. A certifier operating on NZ's "mainland" assures me that there is a widespread practice of franchisees of at least one LPG company having, shall we say, a loose approach to requiring LCCs to be on file before LPG supply is provided. WorkSafe will surely have a view on this, one would hope. Or maybe WorkSafe won't know what it doesn't know and has never figured out how to find out? The franchisee in the King Country is affiliated with the same LPG company that has the alleged same problem on the mainland. There are, therefore, serious issues for the brand owner about the apparent lack of any due diligence when it comes to the compliance activities of its franchisees. The brand owner's CEO assured me that they take "health and safety seriously." They could perhaps act in ways that are consistent with this. His brand is also associated with Selwyn Mall LPG supply shown in Figure 3.
61. The power point and the proximate water heater shown in Figure 4 had evidently been in place at this location for a very long time. What, one wonders, has WorkSafe been doing? Why hasn't the LPG supplier identified the issue and ceased supplying to it until the sources of ignition had been removed from the hazardous area? I suspect the owner of the location had simply relied upon the combination of the LPG supplier and the certifier. Even putting to one side the narrow vs plain and simple interpretation of reg 10.3 and the reliance on someone who hasn't even inspected the sub 100kg locations is totally negligent, there is a breach of reg 10.6 (sources of ignition inside hazardous areas) and the exact combination of hazards that everyone needs to prevent turning into a lethal explosion.

### **Genesis Energy and hazardous areas – insights into how WorkSafe operates (poorly)**

62. Genesis Energy Limited is 50% owned by the NZ government. It is the most significant participant in the LPG market by virtue of its (i) 50% ownership of the Kupe gas field which produces large quantities of LPG annually and (ii) its natural gas and LPG offtake agreements with the other Kupe field owners which result in Genesis buying all (or almost all) the natural gas (methane) and LPG produced out of the Kupe well. In addition, Genesis has an approximate 24% share of the downstream LPG wholesale and retail markets.
63. In 2022, it was brought to our attention that Genesis had two different views regarding the applicable hazardous area for LPG cylinders filled in-situ (LPG mini tanker connects directly to the cylinders and fills from the LPG tanker, rather than exchanging the cylinders). As explained to me, Genesis' internal North Island view was that the applicable hazardous area was 3.5 metres (per AS 60079). The South Island view was that the hazardous area was 1.5

metres, apparently because of HSNOCOP 38 which stipulated that when the cylinders used exclusively AFL (auto fill) valves, then this was the hazardous area. There were two obvious problems with the “South Island view” – (i) HSNOCOP 38 no longer applied and (ii) Genesis’ cylinders always had had both an ullage valve and an AFL – thus, its cylinders never met the precise requirements that were prerequisites before the smaller hazardous area defined by HSNOCOP 38 could be adopted.

64. In addition to the issues arising from the presence of both an ullage valve and an AFL on every Genesis cylinder, I was told<sup>14</sup> that the AFL valves did not work reliably (with a failure rate of ~40%) and, further, it was much preferred by the Genesis drivers to use the ullage valves to fill cylinders. Ullage valves operate by spitting LPG horizontally from this valve once the safe-fill level has been reached.
65. Genesis clearly had many LPG installations where the hazardous area of 3.5 metres was not free of sources of ignition. I assume this would have been very costly to rectify (we are back to the “who is the PCBU” issue given Genesis retained title to its LPG locations set up on customer premises). The summary version of what happened next was:
- WorkSafe was made aware of the issue;
  - Genesis sought the advice of an electrical inspector who refused to provide a blanket sign-off for 1.5 metre hazardous areas that Genesis wanted;
  - Genesis commissioned a piece of work to be prepared which advocated a 1.5 metre hazardous area (note the opinion was paid for by Genesis); and
  - this opinion was provided to WorkSafe.
66. The principal decision-maker at WorkSafe on this issue was Darren Handfroth whom I doubt has any real expertise in relation to AS 60079 and LPG hazardous areas.
67. WorkSafe has generally taken years to resolve technical issues. In subsequent chapters, we will discuss the close to four years it has taken WorkSafe to understand, seek external views and then pontificate on what will be done about the retail stores/ 11.33 issue that arose in 2020 – unresolved in June 2024. Simpler topics like the requirements for AS 1940 cabinets took more than two years to evolve from a written WorkSafe view that an AS 1940 cabinet is simply a PCBU responsibility<sup>15</sup> to a draft discussion document (November 2022) to a finalised explanatory paper (published in April 2024). This week WorkSafe finally published a clarification of what the law requires in relation to tank wagon prime movers. This was another issue that I told them they were wrong about in 2022 that took more than two years to work its way through the WorkSafe system. In short, every material issue that has arisen in the last five years has taken WorkSafe a very long time to make progress on at and there is almost always consultation.
68. This practice of lengthy reviews by WorkSafe was not repeated when it came to Darren Handfroth and his consideration of an external opinion that Genesis paid for. Within a matter of days, he had stamped WorkSafe’s endorsement on the paid consultant’s view, without any evidence whatsoever of any internal processes<sup>16</sup>. There was no discussion with the rest of

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<sup>14</sup> From someone inside Genesis who was familiar with all these issues.

<sup>15</sup> Catalijne Pille at WorkSafe in one of the most hopelessly wrong things that I have read that WorkSafe wrote.

<sup>16</sup> I sought evidence of internal processes via OIA. There was nothing!



the LPG industry or other affected parties (for example, compliance certifiers). What Handforth achieved was a simple solution for Genesis and a state of even greater confusion in the industry. Why?

69. This example highlights several issues and weaknesses:

- Genesis must have had several hundred non-compliant LPG locations, especially in the South Island. The issues that Genesis and WorkSafe eventually woke up to were catalysed by DGC, not by Genesis or WorkSafe.
- Genesis was not fined or prosecuted for its transgressions. Why not?
- One fellow in a middle management position at WorkSafe evidently felt he had the authority to accept a paid opinion from a retained consultant and to determine the outcome of a significant, industry-wide issue.
- What does this say about the leadership of the senior management group at WorkSafe? Did they even know about Handforth's vast exercise of discretion that he ought not to have had?
- Where was the evidence of any consideration by WorkSafe or Genesis of "providing workers and others at workplaces the highest levels of protection"?
- Is this a precedent that, if you don't like the way the law applies to you as a large company, you pay a consultant for a view and then you cuddle up to the benign regulator?
- Is this not a significant example of how WorkSafe has become the ally of the powerful corporates and not the ally of the endangered worker?

### **Other examples provide insights into the dearth of skills in the Inspectorate**

70. There is always some levity in my weeks provided by feedback regarding what WorkSafe's inspectors do and don't do. Last week, a product seller told me about three sites in Auckland where the inspector had required LPG signage to be erected, but had not done anything in relation to the PCBU's failure to have location compliance certificates for the LPG<sup>17</sup>. I don't think our organisation would keep someone employed who didn't know, or chose to ignore the rule, after two weeks that signage is required at >250 kg of LPG and an LCC is required for >100kg. if the former is required, so is the latter. I suspect that last week's training point at WorkSafe was restricted to LPG signage<sup>18</sup>. My criticism here is of WorkSafe's management – it is unfair to ask anyone to do a job for which they have not received adequate training and, if you set people up for negative experiences, you can expect the exact plummeting worker satisfaction levels that WorkSafe has experienced. If the inspector in this case didn't know the trigger level for an LCC, what confidence could one have that s/he/they were able to assess all the LPG Controls?

71. In other HSNO classes (class 3), my direct experiences last year included the following:

- assisting a customer in relation to an improvement notice requiring class 3 signage - his quantities of class 3 were below the quantity that triggered the obligation for signage;

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<sup>17</sup> Supplied by one of the big four LPG companies, but not the one with multiple locations shown in figures throughout this paper.

<sup>18</sup> The broader issue is the very poor training of the Inspectorate generally.

- assisting another customer to explain why an improvement notice was wrongly issued for an external (type B storage) location for 250 litres of class 3. The inspector had issued an improvement notice requiring that the class 3's be stored inside the workshop in an AS 1940 cabinet. There was no failure (external class B storage was entirely lawful) and the suggested solution was more dangerous; and
- arranging certification for a company that had had a visit from an Inspector who walked right past the class 3 storage location with ~2000 litres of class 3 which was located in front of the factory with its signage for flammable liquids in place...without asking about the certificate that the PCBU did not have.

72. These are but a handful of several hundred poor calls or errors by the Inspectorate, not to mention most of what is never adequately inspected. I empathise with, and never criticise, these people directly<sup>19</sup>. But enough is enough and management at WorkSafe – Steve Haszard and Kane Patena - have a serious case to answer regarding just how the Inspectorate could be so poorly trained. It is not just the rank and file either. One of our certifiers and I were left bemused at the appallingly poor “advice” given by one of WorkSafe’s senior Inspectorate employees<sup>20</sup> at a very complex specialty manufacturing business in East Auckland – it was just so wrong in most every way. The fact pattern there fitted the fact pattern at lots of other locations we have seen – the site had been issued with a certificate previously<sup>21</sup>, could never ever have had a reg 11.33 shop and almost nothing happening inside complied with Part 11.<sup>22</sup>

73. After being sent the photo in Figure 3 – LPG inside the Selwyn Mall in Paihia, I took the prudent and responsible course of notifying WorkSafe through its online notifications portal and I explained the reason that the LPG could not be there (reg 11.42). I received a call back the next day. I explained the issue. I was issued with a case number. I watched what happened at the location – no change. I followed up two weeks later when the LPG had not been removed. Since then, nothing has happened and, I highly suspect, never will. WorkSafe has, once again, shown no real interest in a compliance issue that should be able to be addressed with a couple of phone calls. It surely cannot be so busy that there is not one person in a several-hundred-person strong Inspectorate who can call the LPG supplier. Or is it a case of WorkSafe not wanting to upset any LPG supplier? Since when did a regulator whose goal is to make workplaces safer become too worried about disturbing the profit machines of the LPG suppliers?<sup>23</sup>

74. I also alerted the large LPG company whose cylinders were inside the mall where they couldn't be. That LPG company has also not caused the cylinders to be removed. Of course,

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<sup>19</sup> At times, I speak to them to get perspectives on how well they have been trained. The gem from two weeks ago was that someone following up on Notifications of refusal to issue certificates had no access to the register of compliance certificates which explains why she was asking about something that WorkSafe’s own information showed had been resolved several weeks prior.

<sup>20</sup> His initials are the same as the first two in my full name.

<sup>21</sup> By the certifier I call the “1500 runner.”

<sup>22</sup> More than 10 items of failure on the notifications of refusal. This site was one of the 31 complaints I made about the certifier, none of which were included in WorkSafe’s register of complaints about certifiers for 2023. This will be discussed more fully in another chapter.

<sup>23</sup> I appreciate that NZ now has a Minister of WorkSafe whose focus is on red tape and, by inference, the profit streams of large companies. But she cannot govern by fiat – she must first change the law.

I didn't make it easy for the LPG company because, after all, it should have some controls over where it or its franchisee's LPG cylinders are placed. One would have thought a simple memo to franchisees about it being unlawful to place 45kg LPG cylinders in shopping malls would have been a prudent step. Did they do this? WorkSafe should ask those executives for an explanation too<sup>24</sup>, especially having regard to section 42 HSWA.

## **Insights from what WorkSafe does and does not do in relation to some compliance certifiers**

75. The main theses developed in this paper are that:

- The LPG suppliers have been shown to be deficient in relation to their obligations to “take all reasonably practicable steps” to ensure that LPG locations are correctly and safely set up;
- WorkSafe's inspectorate has been highly ineffective;
- WorkSafe's head office has appeased the LPG suppliers; and
- The compliance certificate obtained from a compliance certificate is as powerful for many as Charlie's golden ticket into the chocolate factory.

76. If LCCs have a “golden hue” one would hope that WorkSafe takes complaints about certifiers' ineptitude seriously and strives to ensure that the incompetent certifiers are weeded out of the regime. WorkSafe's prior Chief Executive publicly noted<sup>25</sup> the “skill deficiencies” amongst this aging cohort of people, but did not very much about it.

77. Supervision/policing of certifiers is also a role that WorkSafe must perform pursuant to the Regulations. One of the key provisions is regulation 6.15 which empowers WorkSafe to investigate complaints about certifiers.

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<sup>25</sup> Before the parliamentary select committee in 2022 although he used the term “test certifiers” which was outdated 5 years prior.

Figure 5 – 66kg LPG location with “high voltage wires” inside the hazardous area



78. The photographs in Figure 5, which also show the annotations made during our inspection of the location, show an electrical junction box marked “High Voltage Wires” inside the hazardous area. What was inside the junction box is also shown.

79. The skilled readers will have noted that there is both a design issue with the concrete block enclosure – it ought to have been built to a height of at least 0.5 metres above the height of the LPG valves – and the proximity of the source of ignition. The careful reader will also have noted the issue with the signage.

80. Andrew Smith<sup>26</sup> at WorkSafe concluded that there was no “safety issue” and, on this basis declined to commence an investigation into the compliance certifier. Before debating his qualification to make that assessment, I very much doubt that any person who has been impacted by an LPG explosion would agree with him. I certainly don’t. Just how bad does the certification have to be before action is taken against the certifier/ issuer of “golden tickets”?

81. Amongst the 100 complaints that I made in 2023 about poor certification by certifiers, 25 arose from LPG certification by one compliance certifier. This fellow is the “John Walker of Certifiers” based upon the more than 1500 days since his authorisation as a certifier was current without the notation of ‘*Authorisation continues in force whilst the renewal application is in process*’ – that is more than 50 times longer than the period provided in the

<sup>26</sup> See article ‘Alas Smith and Nicholls’ for an analysis of other files Mr Smith has handled poorly. [WorkSafe Issues | DGC Website \(dgcompliance.co.nz\)](https://www.dgcompliance.co.nz/worksafe-issues/)

Regulations for such decisions to be made<sup>27</sup>. WorkSafe literally turned a blind eye to every one of my complaints, including by not even recording them in its register of complaints about certifiers<sup>28</sup>. More will be detailed about this scandalous effort by WorkSafe in subsequent chapters, each of which will show how poor WorkSafe's day-to-day performance of its roles is.

## **Recurring Behaviour - WorkSafe's roles and what was discovered about its performance in the lead-up to Whakaari Island**

82. WorkSafe has multiple roles that ought to make it a highly effective regulator and administrator when it comes to LPG

- It is the Energy Safety Regulator.
- It has the power to inspect any LPG location at any time.
- It produces educational information (about LPG, compliance and safety).
- It can enforce compliance with the Regulations through warnings, improvement notices, fines, enforcement notices and prohibition notices.
- It has regular interaction with the LPG industry body (formerly LPGA but now Gas NZ") presumably to discuss industry safety and compliance issues.
- It determines which applicants are authorised as compliance certifiers, it can investigate complaints about certifiers, modify their authorisations, or remove them entirely.

83. The disturbing precedent is WorkSafe's similar roles in relation to the adventure tour operators operating on Whakaari Island. David Laurenson KC's review provided insights into the non-feasance of WorkSafe in the events leading up to the 2019 eruption and tragic loss of lives. MBIE's summary of the findings of David Laurenson KC was:

- "WorkSafe did not take appropriate steps in carrying out its regulatory functions to ensure that White Island Tours was audited by an auditor that had the appropriate experience and qualifications.
- "WorkSafe did not take appropriate steps to monitor and enforce compliance with the registration requirement in respect of the unregistered operators carrying out activities on Whakaari/White Island.
- "WorkSafe had been aware since at least July 2014 that potentially there were unregistered operators carrying out activities on Whakaari/White Island. However, by November 2019 WorkSafe had not yet referred this matter to its inspectorate to consider enforcement. The review considered the delays both unacceptable and not able to be justified in the circumstances."

84. These failures were reminiscent of the Commission of Inquiry's findings in relation to the Pike River tragedy: aware of the issues and a failure to take adequate steps to address an

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<sup>27</sup> It has become commonplace for WorkSafe to take years to make decisions on applications for new authorisations or the renewal of existing ones, however WorkSafe has made exceptions for applicants that it wants to push up the priority list. After promising to do better with the time taken for such applications, Angela Jones has moved on from her role with a massive deterioration in the time it has taken for some applications to be processed.

<sup>28</sup> The complaints were made in a letter to Steve Haszard, responded to by Dr Catherine Gardner. Thus, there is no doubt that the complaints were both received and summarily dismissed.

identified risk. How is what is happening with LPG non-compliance right under WorkSafe's gaze and different?

85. In many aspects of the hazardous substances regime, I believe WorkSafe caves in to industry pressure, compromising safety when doing so, and otherwise fails to perform its core roles adequately. How else can WorkSafe's failure to understand regulation 10.3 be explained?

**New Zealand deserves better than this. This paper on what has been happening in the LPG industry is part only of the wide-ranging failures by WorkSafe.**

