

2 March 2023

Dear < >

It is a great testament to you and your daughter, xxxx, that she has been a volunteer at the “Club”¹ over the summer holidays. The regulatory system has failed her, along with the very people that it is WorkSafe’s job to protect. In this letter, I explain how bad these failures are.

My son is a pilot and it was a huge relief when he joined QANTAS having regard to its stellar safety track record. The option of joining Asian airlines with materially inferior safety records was a significant concern when he and I discussed how he could accumulate the required flight hours. Having taken all the care we could with our children up until they become independent, we expect them to work in environments where everyone who has a role in the safety infrastructure does their part. There is not a parent I know who does not think this way.

You will be shocked with these hard truths:

- The Club where she volunteered, spent a lot of the summer, and slept on many nights was at that time dreadfully non-compliant in relation to how it stored petrol which is, of course, highly flammable and required to be stored in specific ways when it is stored inside a building.
- The club relied for many years (until we got involved recently) on a compliance certifier (**Certifier X**) whose work that we have seen first-hand was, and is, routinely shoddy – good people at the Club relying on shoddy people led to the petrol storage non-compliance.
- WorkSafe has a legal responsibility to oversee compliance at the Club **and** the conduct, performance and ability of Certifier X, yet it has completely failed to do so. Based upon our recent complaints to WorkSafe, it has become apparent that WorkSafe does not properly appreciate its statutory roles and has displayed a level of incompetence when it attempts to perform them, especially in relation to Certifier X it seems.

The Club now understands what it must do to comply (it didn’t for the last five years) and it has been especially diligent in fixing the problems. Certifier X was charging the Club more than twice the fair market price for what he was doing and more than five times what we are charging². His contribution was, therefore, expensive, flawed and dangerous. The only positive contribution was to his bank account.

We have made four complaints about Certifier X to WorkSafe. WorkSafe’s responses have been odd and inconsistent with what it must do under the legislation – first, WorkSafe uses its least-qualified people to decide whether there is a material safety issue³ and mostly it gets this assessment wrong. Then it argues

¹ Because I intend publishing this letter, I shall not be more specific. The Club itself is close to blameless relying on experts and WorkSafe to perform their roles.

² We are doing all of our work at cost in recognition of the community service that the Club and others like it performs.

³ This is wrong on many levels.



that, rather than deal head-on with the complaints by investigating them⁴, it will deal with the complaints more effectively via “an audit” of the certifier. WorkSafe’s typical audits focus on the paperwork, not the core of the compliance requirements which make up the regime designed to reduce the likelihood of fires and reduce the impact of them when they occur. So an audit doesn’t get to the heart of the issue.

What WorkSafe’s data from the last two years show are that WorkSafe has not turned one complaint into an investigation⁵. I am flabbergasted at this – it would never happen in any profession that I can think of. I think you can understand why I believe WorkSafe has totally failed to perform one of its required roles.

I have collated the matters that Certifier X failed to get right at five locations we inspected in the last four months. The answer that he got just about everything wrong (shown in red) jumps out of the table below and this is a fair conclusion in my opinion. As a benchmark, at DGC, I would be disappointed if any one of our certifiers made one (only) error after inspecting 100 sites – for a capable person, all of the matters that must be verified during inspections are what we do every day.

Analysis of whether Certifier X correctly assessed the required elements before issuing a location compliance certificate in accordance with regulation 10.34						
Reg		Location 1	Location 2	Location 3	Location 4	Location 5
10.26	Notification requirements	Yellow	Yellow	Yellow	Yellow	Yellow
10.4	Location secured	Yellow	Yellow	Yellow	Yellow	Yellow
4.5	Worker training	Red	Red	Red	Red	Red
10.6	Hazardous area (10.6)	Red	Red	Red	Red	Green
10.5	Segregation (10.5)	Green	NA	NA	NA	NA
2.5 & 2.6	Signage	Red	Red	Green	NA	NA
Part 5	Emergency management	Red	Green	Green	Green	Red
10.30	Secondary containment		NA	Red	NA	NA
10.26	Site plan (10.26)	Red	Red	Red	Red	Red
Part 11 requirements						
11.20	LPG location	Red	NA	Red	NA	NA
11.29	AS 1940 cabinets	NA	Green	Red	NA	Red
11.31	Internal storeroom	NA	NA	NA	Red	NA
11.1/11.29	Workroom	Red	NA	NA	NA	NA
AS 60079	Electrical certificate	Red	NA	NA	NA	NA
Key						
	Yellow	unclear				
	Green	requirements met				
	Red	requirements not met				

⁴ Regulation 6.15 effectively requires WorkSafe to investigate complaints which manifest a material concern about the “ability or conduct” of a compliance certifier.

⁵ WorkSafe supplied these data in response to my OIA request. Not one of the 36 complaints made about the country’s “top 15” certifiers was dealt with by way of an investigation.

WorkSafe's track record in relation to this certifier is abysmal:

- WorkSafe renewed the certifier's authorisations right around the time the lack of ability that is demonstrated in our complaints was occurring. It was effectively occurring right under WorkSafe's nose, yet it was either not detected or a blind eye was turned to it. Clearly something is highly deficient with their processes, or there is wilful blindness.
- WorkSafe's audits, from others that we have seen, do not address the fundamental and simple question – does the certifier know what s/he is doing in a professional capacity? The audits focus instead on policies and procedures. Either this is exactly what has happened in relation to auditing certifier X, or there are other fundamental deficiencies.

It is inescapable, therefore, that WorkSafe has also failed the Club and your daughter. There are eerie similarities to what WorkSafe should have done in the period prior to the Whakaari Island eruption. WorkSafe did not even know there was more than one adventure tour operator operating on Whakaari; this continued for years.

WorkSafe and the Bay of Plenty have a poor association when it comes to regulatory performance and safety. The Laurenson report⁶ into the events leading up to Whakaari Island showed us that the regulator was literally fiddling while the island was getting ready to erupt – the unfortunate aspect of the prosecutions of the Whakaari Island PCBUs which are alleged to have breached their duties is that WorkSafe, itself, completely failed in the performance of its roles in the period prior to the eruption, yet its people have attracted no penalty or prosecution. Ironically, however, WorkSafe commenced prosecutions against NIWA.

Other examples in the Bay of Plenty that we have brought to WorkSafe's attention have been met with a lack of training and/or ability and further failures by WorkSafe to keep workplaces safe, even when we pinpoint the issues for them. There are several and none of them puts WorkSafe's core skills and response in a positive light. The strong recommendations in the Laurenson report have come and gone, without evident improvement, much like a fleeting summer. In fact, the problems we have seen from WorkSafe's failures are right across the board and include abysmal inspection efforts at major hazard facilities where presumably they send their best and brightest.

The role of a compliance certifier has some complexity but that is the case with most other trades and professions; most people can only survive commercially if they are good at what they do and provide a competitive service. Compliance certifiers are entrusted with a very privileged and responsible position because they are the only ones authorised to issue required compliance certificates. For this reason, they perform a pivotal, pointy-end role in relation to the more than 25,000 locations around NZ where such certifications are required by law to occur. It is WorkSafe's job to make sure they are up to par and "make the cut" (keeping with the golf analogy); the inaccurate or poor certifiers ought to be cast aside. You can see it is a regime which is ripe for abuse and one in which WorkSafe has unprecedented powers – to qualify people, audit them, investigate them and ultimately cut them.

In March 2022, WorkSafe's CEO acknowledged the skill deficiencies amongst many ageing certifiers but, just like Whakaari Island, has done nothing effective about it. Remember the Department of Labour inspected Pike River and identified the issues with egress from the mine...yet did nothing about the issues. Phil Parkes knows about the issue but what has his organisation done to fix them? The more

⁶ An excellent and insightful report by David Laurenson KC.

things change, the more they stay the same while the rhetoric changes (more spin from downtown Wellington than at the Basin reserve these days) and goalposts are moved. The Minister allegedly only wants no adverse publicity to disturb the batsmen at the crease.

A little example helps. Assume that there are two GPs operating in your suburb:

- One (Linda) has great offices, really nice people working there and places for children to play...but she has a track record of not being able to diagnose issues correctly with a history of many serious illnesses not being detected. All her processes are flawless, however, and everything looks good.
- The other (Penny) is disorganised, runs late, has antiquated systems for bookings and paperwork – she likes to keep her notes by hand – but her technical ability is unparalleled, as is her medical performance.

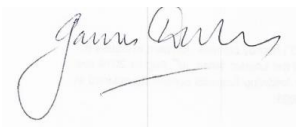
When it comes to our children’s health, the choice of GP is obvious. Word will spread and market forces (parental choices) will work in Penny’s favour over time.

When it comes to compliance certification, however, the choices made by the companies who hire them are less intuitive or they operate in reverse to our GP example. Some PCBUs care about their actual compliance which leads them to the most competent certifiers⁷; others like to simply get certificates regardless of whether they are compliant⁸. The marketplace can, therefore, reward “Penny” (from the analogy above) and punish “Linda.” This provides insights into why WorkSafe must do much better than it has been because it alone has unique power to ultimately determine the quality of the certifiers.

We want to be part of “making workplaces safer together.” The “together” part includes WorkSafe. My question is this – what would the senior team at WorkSafe do if it were their family members spending their summer sleeping at the Club with more than 500 litres of petrol stored unsafely in the basement? Would they be so seemingly indifferent to the safety of their own family members as they are to what we have seen at the Club and the other examples? This leads us to the final rhetorical question: why is it OK for the regulator to be so asleep at the wheel when it is our children who are in harm’s way?

This is why we need Wellington generally (Minister, Board, MBIE) to pay closer attention to the obvious indicators of failure.

Warm regards



⁷ Once they realise that if petrol is not stored correctly and this causes the factory to burn down, they start to make better decisions. The forces that drive most markets for services, therefore, take over.

⁸ I like to say “clown certificates” are not worth much except if you want to be part of a circus. Strangely, many PCBUs still have tickets to the circus on their walls.