

27 October 2022

Mr Ross Wilson  
Chair  
WorkSafe New Zealand

By email

**An open letter in relation to WorkSafe's lack of progress in relation to notifications of refusals to issue certificates (Notifications) by compliance certifiers**

You will recall perhaps that, after raising the issue of Notifications with WorkSafe's executive several times in early 2021, I wrote a lengthy letter to you in June 2021 dealing with this and other failures by WorkSafe. In that letter, I argued, based upon the facts, that WorkSafe was contributing to New Zealand's deteriorating workplace safety statistics.

New data on Notifications show that WorkSafe continues to operate in a state of paralysis or blind indifference while, as you and I are acutely aware, NZ's safety statistics have done as I predicted – they have further deteriorated. This is an extraordinary failure in the experiment that has been WorkSafe New Zealand under your chairmanship.

The data supplied by WorkSafe under the OIA is attached. After stripping out the compliance certifiers employed by DGC, the industry data tell us:

**The industry (ex DGC) rate of Notifications is 1 Notification for approximately every 400 inspections. Some are at 1 per 1500 inspections or none whatsoever.**

DGC's Notification rate is about 40 times that of the other compliance certifiers. I can assure you that every one of our certifiers follows the law and does everything reasonably, lawfully possible to assist PCBU's to achieve compliance and to avoid the legal requirement for a Notification to be made. On a practical level, I repeat my earlier allegation referenced in the Smith Report regarding the root causes of the problems.

We believe that the data reveal that the largest compliance certification firm in the country made only two Notifications at a rate of 1 per 1500 inspections (rounded), or two only in total. This is an obvious place to start the enquiry described overleaf.

On a micro level, the performance by individual certifiers suggests a total disregard for the law and, by extension, complete disdain (or is it worse) for the preparedness of WorkSafe to enforce it. There are, for example, two certifiers working for the same firm who have made exactly zero Notifications.

It is WorkSafe's own data that tell us that deaths from long-term disease which originate from harmful exposure to poisons in the workplace are three times that of the national road toll. This is an area that should be at the top of WorkSafe's priorities, yet it is obviously not.

If it is robbed of the steady stream of non-compliance issues from the compliance certifiers, who are in an economic sense part of WorkSafe's specialist enforcement arm, then WorkSafe will do a worse job of dealing with the workplaces that present the risk that today employ tomorrow's worker tragedies. WorkSafe has many powerful tools to demand that compliance certifiers comply with the law, yet for reasons that I plan on bringing now to the attention of the Ombudsman after non-responses from the executive, WorkSafe has not availed itself of them. The results of its indifference show up in the attached data.

The data are now worse than they were in 2020. In the interim WorkSafe has received and published the findings of the Smith Report (prepared by Mr Tim Smith, barrister) at no doubt material cost to the taxpayers of NZ, which broadly confirmed our allegation that the low Notification rates were a function of certifiers deliberately breaching the rules.

After receiving the Smith Report in October 2021, then releasing it on 31 March 2022, WorkSafe committed to implementing the report's recommendations. From what I have observed, WorkSafe's progress since has been pathetic and, of course, totally ineffective. We see this in the data summarised above and attached.

There is a growing body of evidence which supports my original thesis that WorkSafe is contributing to the deteriorating safety statistics – we have read different strands of the same storyline in successive independent reviews by David Laurenson QC (into the events leading up to Whakaari Island), the Smith Report and the Sage Bush report.

There are multiple levels of failure by WorkSafe which culminate in the disgrace that the Notifications data show. I can document many but I do not wish to divert your attention away from the chronic failure by WorkSafe that is surely evident to all – it is so bad that there have to be multiple levels of failure by WorkSafe in any event.

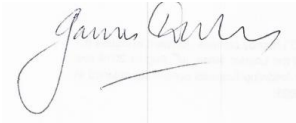
WorkSafe operates with a studious lack of accountability. Most of its public releases start with an assertion that it is an “insights-driven regulator” when it is, on the evidence, not.

Rather than simply invite another predictable and vacuous Wellington press release, I put forward below a plan which I believe WorkSafe should follow to make immediate progress on the issues:

1. Engage Tim Smith in an independent capacity to oversee an amnesty and audit of major certifiers
2. Invite certifiers to participate in a certifier amnesty programme between now and Christmas (own up to the failures, accept diluted penalties or suffer the consequences if adverse findings are made below)
3. Select at least 5 of the top 15 recalcitrant certifiers for “50 file reviews” to scrutinise the accuracy and lawfulness of the work done by them
4. Tim Smith to oversee the audit outcomes and the penalties to be applied which exist currently in Part 6 of the Regulations (to overcome the deficiencies in the group charged with doing this currently)
5. Make the process entirely transparent with full public announcements following the amnesty process and the audit processes.

WorkSafe's Chief Executive has publicly stated concerns about the "skill deficiencies" amongst an ageing, and by implication incompetent, fleet of certifiers, yet he has not addressed it. It is surely time for the obvious deficiencies to be removed from his direct control.

Yours faithfully

A handwritten signature in black ink, appearing to read 'James Dunphy', is written over a light grey grid background.

James Dunphy  
Managing Director

Reference: 220866

**Appendix One – Number of Certificates issued and Notifications of Refusal to Issue a Compliance Certificate by Certifier for the period 1 October 2021 to 30<sup>th</sup> September 2022**

Certifier	Number of certificates Issued	Number of notification of refusal to issue a compliance certificate
Certifier 1	1019	12
Certifier 2	658	50
Certifier 3	0	0
Certifier 4	30	0
Certifier 5	143	37
Certifier 6	66	0
Certifier 7	0	0
Certifier 8	0	0
Certifier 9	548	2
Certifier 10	237	0
Certifier 11	0	0
Certifier 12	63	0
Certifier 13	91	0
Certifier 14	6	0
Certifier 15	0	0
Certifier 16	51	0
Certifier 17	684	0
Certifier 18	0	0
Certifier 19	4	0
Certifier 20	0	0
Certifier 21	0	0
Certifier 22	6	0

**WORKSAFE**  
 Mahi Haumarū Aotearoa

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Reference: 220866

Certifier	Number of certificates Issued	Number of notification of refusal to issue a compliance certificate
Certifier 23	185	0
Certifier 24	173	0
Certifier 25	780	0
Certifier 26	50	0
Certifier 27	35	0
Certifier 28	2	4
Certifier 29	3	0
Certifier 30	146	0
Certifier 31	48	0
Certifier 32	135	0
Certifier 33	0	0
Certifier 34	74	0
Certifier 35	62	0
Certifier 36	2	0
Certifier 37	646	0
Certifier 38	0	0
Certifier 39	498	0
Certifier 40	0	0
Certifier 41	162	0
Certifier 42	49	2
Certifier 43	474	48
Certifier 44	105	3
Certifier 45	0	0
Certifier 46	245	4

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Certifier	Number of certificates Issued	Number of notification of refusal to issue a compliance certificate
Certifier 47	278	2
Certifier 48	8	0
Certifier 49	118	0
Certifier 50	1	0
Certifier 51	26	1
Certifier 52	392	1
Certifier 53	967	0
Certifier 54	45	0
Certifier 55	342	0
Certifier 56	49	8
Certifier 57	511	0
Certifier 58	0	0
Certifier 59	22	0
Certifier 60	21	3
Certifier 61	304	0
Certifier 62	0	0
Certifier 63	83	0
Certifier 64	0	0
Certifier 65	49	0
Certifier 66	655	1
Certifier 67	607	0
Certifier 68	4	1
Certifier 69	9	0
Certifier 70	2	0

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Certifier	Number of certificates Issued	Number of notification of refusal to issue a compliance certificate
Certifier 71	23	0
Certifier 72	0	0
Certifier 73	1563	2
Certifier 74	118	4
Certifier 75	457	0
Certifier 76	193	0
Certifier 77	286	2
Certifier 78	0	0
Certifier 79	0	0
Certifier 80	649	2
Certifier 81	414	0
Certifier 82	134	0
Certifier 83	334	2
Certifier 84	32	0
Certifier 85	32	2
Certifier 86	0	0
Certifier 87	86	0
Certifier 88	208	63
Certifier 89	47	0
Certifier 90	17	0
Certifier 91	486	94
Certifier 92	0	0
Certifier 93	3	0
Certifier 94	0	0

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Certifier	Number of certificates Issued	Number of notification of refusal to issue a compliance certificate
Certifier 95	580	0
Certifier 96	253	0

Source: WorkSafe New Zealand: Guardian and Register of Compliance Certificates

