



DGC RESPONSE TO THE SAGEBUSH REPORT

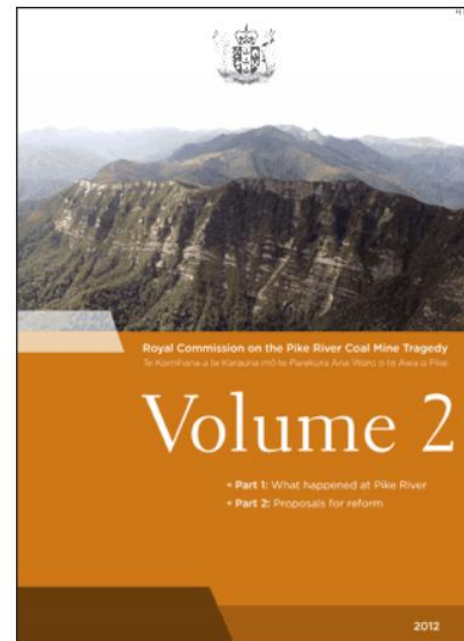
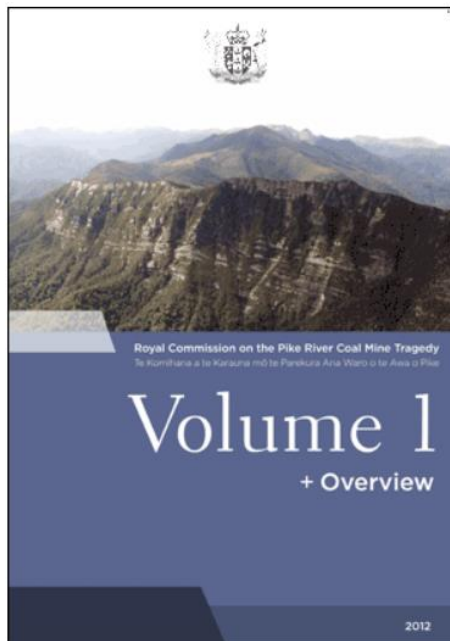
ABSTRACT

Far from being the modern, effective regulator it aspires to be, WorkSafe's execution continues to be poor with archaic systems, untrained people, and low productivity which is contributing to its negligible impact on workplace deaths and injuries. Changing the goalposts measuring WorkSafe's (in)efficacy will further conceal WorkSafe's underperformance.

The picture can't be displayed.

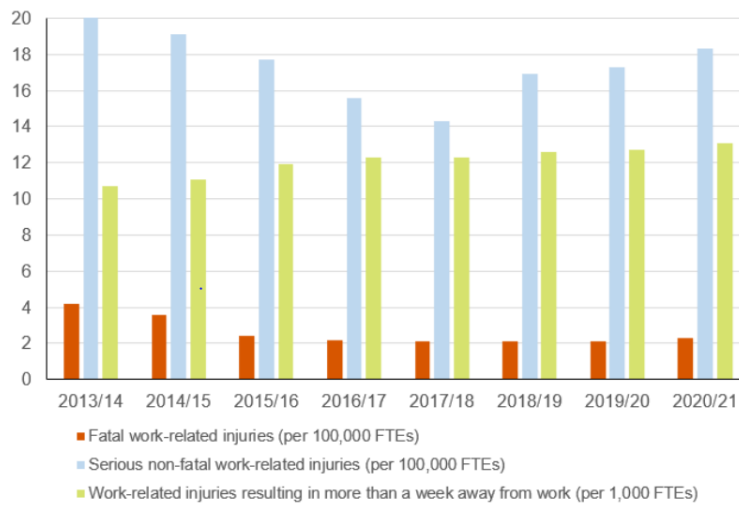
Dangerous Goods Compliance Limited responds to the SageBush report adding its perspectives on WorkSafe's performance in our specialist area of hazardous substances.

1. Any discussion of NZ's health and safety performance, including WorkSafe's performance, needs to start with an acknowledgment that we are nearly 12 years on from the Pike River disaster and nearly 9 years on from the WorkSafe New Zealand Act 2013.
 - a. PCBUs who still have not got the message about health and safety in the workplace have been deliberately ignorant or deliberately non-compliant. Such companies deserve the fines and prosecutions listed in the Regulations – Parliament's clear intent is that non-compliance will be prosecuted, not tolerated.
 - b. WorkSafe's orientation is to be the "good cop" and does not punish material or flagrant non-compliance even though acting decisively when there is non-compliance could prevent the next looming deaths and disasters.
 - c. WorkSafe's long list of types of "interventions" is simply not working.
 - d. It is nearly a decade since the Royal Commission's report, yet we can recognize the same problems today, including in the behaviour of the regulator.



2. NZ's statistics show deterioration in workplace health and safety. WorkSafe has failed to meet its targets for improvement. We must remember also that the predecessor to WorkSafe was the EPA (and many people at WorkSafe came from the EPA).

Performance against the three key Health and Safety System Targets⁵³ are summarised below:



- a. WorkSafe and its predecessor have had a decade to make a difference, yet the trends have been adverse for four years now.
 - b. The inescapable conclusion is that WorkSafe is failing workers. Worse, there are no signs that WorkSafe is improving. WorkSafe is its own best example for the failing PCBUs.
3. **Deaths from disease associated with hazardous substances (health) are more than 10x deaths from workplace accidents. The death rate from insidious diseases originating in poisons entering the body in workplaces, is about 2.5 times NZ’s road toll death rate annually¹. Despite this, there is no evidence that hazardous substances compliance is prioritized by WorkSafe.**
- a. Deaths from workplace accidents have averaged around 65 for the last few years
 - b. WorkSafe’s updated data from its website is copied below: it says it all “a worker is 15 times more likely to die from a work-related disease than a workplace accident.”

WorkSafe has revised its work-related health estimates.

- Work-related health deaths are estimated at **750-900** a year.
- There are an estimated **5,000-6,000** hospitalisations each year due to work-related ill-health.
- A worker is **15** times more likely to die from a work-related disease than from a workplace accident.

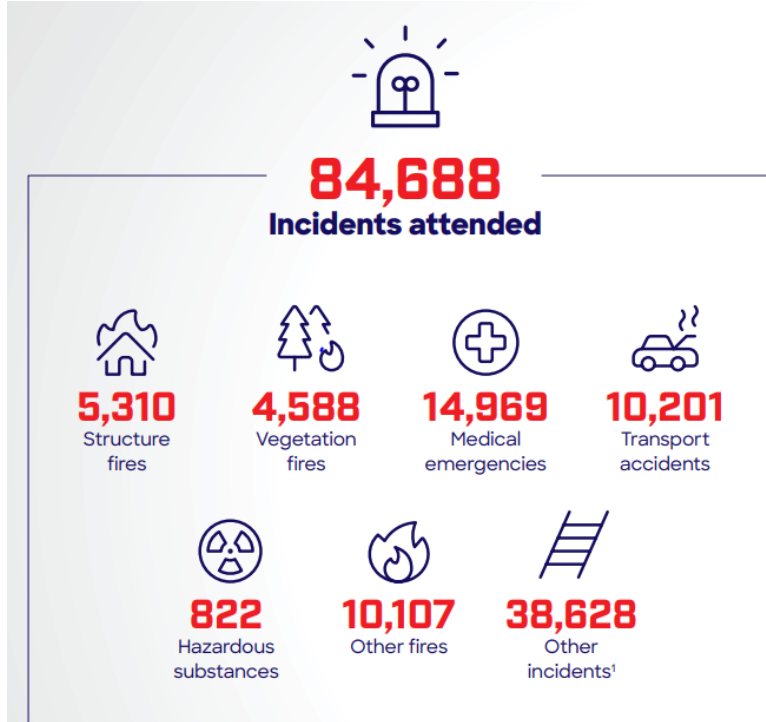
These estimates are used to compare between illness caused by long-term exposure to hazards, and illness caused by acute injury. WorkSafe has recently reviewed the estimates to take into account new international research and other information to inform decisions to improve worker health.

- c. Of some concern is that an independent review can be conducted into WorkSafe’s performance without any input from hazardous substances professionals (like us) – everyone is missing the principal cause of death despite it being published by WorkSafe itself.
- d. Ignition of methane in the Pike River mine was the most probable cause of the explosion – it was a catastrophe sourced to naturally-occurring hazardous substances. Canaries in

¹ This is WorkSafe’s own data relying on research and some estimates.

mines alert operators to the presence of methane –one of the oldest alert mechanisms. WorkSafe is aware of the hazardous substance dangers and is ignoring the “canaries.”

4. **FENZ reports more than 800 incidents annually that are associated with hazardous substances. Property damage caused by hazardous substances is also high.**



5. **The ICI chemical fire in 1984 (and the Commission of Inquiry that followed) highlighted the dangers of hazardous substances and the risks for fire fighters attending chemical fires without adequate information and taking adequate safety precautions. This is where 2020’s technology solutions can be invaluable, but WorkSafe is still 20 years out of date. The duty of care issue looms large.**
- Our concern is that our regulators’ responses to disasters (ICI and then Pike River) are too ineffective and have not attempted to put critical information about hazardous substances on the phones and other devices of firefighters driving to fires.
 - The failure to put information in the hands of FENZ raises serious issues about who is failing in the duty of care owed to firefighters. Just as there are such issues in relation to Whakaari Island, when is it WorkSafe itself that has failed in its duties and to whom should the Crown be liable?
 - Consider that we have electronic data in relation to every one of our clients’ sites and we have technology partners that could place this same information about hazardous substances’ types, quantities and storage locations on the phones of firefighters who are driving to a fire. Why is it that it is easier for a firefighter to order a pizza by phone on the way home than to find out about the risks that lie ahead in the dash to a fire?
 - For WorkSafe’s discussions of its technology focus, we see nothing that is what we would expect from a modern, efficient regulator.

6. There are easily-identifiable, high-risk workplaces using hazardous substances. We must remember the people, the lives lost and their loved ones. Failure in workplace health and safety always has a human face and leaves a trail of misery.

- a. We were appalled at the tragic case of Ryan Mead (pictured below with his family) who died after inhaling solvent while laying carpet using glue in an inadequately-ventilated room. Deanna Trevarthen (pictured below) died in 2016 from mesothelioma, a disease she was exposed to by hugging her father in his asbestos-laden work clothes. This is why WorkSafe's failures are also so tragic. What about the thousands of workers who are being poisoned at work every day in the many ways that poisons can enter the body?



- b. We always personalize the question to test the adequacy of plans and responsibility. Would Phil Parkes allow a family member to work in a high-risk hazardous substances business chosen at random? I wouldn't because I know how low the bar is.
- c. Consider the thousands of workers ingesting poison this week and next, while an ineffective regulator does nothing to stop it. Continuation of the exposures to the poisons will make them the next death statistics.

7. Equally obvious are leading indicators of compliance/ non-compliance with hazardous substances; not one of these leading indicators is a focus for, or is ever reported by, WorkSafe.

- a. Poisons enter the body in various ways. Personal protective equipment (PPE) is the barrier to stop that occurring. What are WorkSafe's statistics for compliance by PCBU's especially those operating in medium or higher risk workplaces (where the next 750-900 workers are being poisoned)?
- b. Methyl bromide is a nerve agent used widely at New Zealand ports to fumigate logs. It is highly toxic and banned from use overseas. Where is the information on concentrations and impact on workers and port neighbours? Would any of us at DGC wish to live near a NZ port? No! And for good reason.

8. The law related to storage and use of hazardous substances establishes a robust and prudent regime (Hazardous Substances Law). Specific legislation, coupled with the overarching duties in HSWA create a sound framework to derisk circumstances which can lead to adverse incidents associated with hazardous substances.

- a. Hazardous Substances Law is extensive. Despite its complexity, we have little difficulty explaining all relevant elements to our clients. We assess more than 2,000 locations or

assets annually. The law is well written with recurring principles in relation to how places and people are to be kept safe and the effects of storing and using hazardous substances are to be mitigated.

- b. We have confidence that more than 90% of our clients have a sound understanding of Hazardous Substances Law and they take ownership of their compliance with it.

9. WorkSafe’s aspiration to be a modern, *insights-driven regulator* is far removed from its reality, relying on pen and pencil reports compiled by poorly-trained inspectors which leads to a dearth of valuable data from the frontline of inspections; further, there are no leading indicators to suggest WorkSafe has the ability to execute its role in a materially better way.

- a. WorkSafe frequently uses the phrase “modern, insights-driven regulator.” It has been used by a regulatory body in Queensland, Australia which has explained what the phrase means as follows:

“In order to meet the community’s expectations and the Queensland Government’s requirements to preserve the integrity and probity of the building and construction sector, there is a need for the QBCC to be “ahead of the disruption curve” as much as possible, which can only be achieved if it is a regulator that is informed through relevant intelligence and insights.”

- b. The obvious way to capture valuable data is to have a well-trained, productive inspectorate conducting detailed evaluations of compliance recorded using electronic tools which, for example, aggregate the recurring failures by NZ workplaces. Identification of leading indicators of accidents and injuries could then be distilled into “insights” paving the way for WorkSafe to be effective in the prevention of accidents.
- c. There are three problems based upon the reality of how we have seen WorkSafe in action in our specialist segment: (i) the inspectorate is poorly trained and most have superficial knowledge only (ii) the “tools of trade” are literally a notebook and a pen, no electronic inspection or assessment templates and (iii) their inspection rates (PCBU inspections) are far too few and far too sporadic. This cannot be yielding a flow of quality information and assessments of candidates for prosecution.
- d. WorkSafe surely knows this, so how does management explain the gap between what is professes to be doing and what it actually is doing?

10. WorkSafe’s activity levels reflect appalling productivity. We doubt the problem is in the absolute numbers of employees (and what we believe is very high average pay) but in more basic elements of productivity.

- a. For illustrative purposes, we assume there are approximately 125,000 workplaces in NZ that fall into the workplaces of interest to WorkSafe.
- b. WorkSafe has 671 employees, 356 of whom work in the “Inspectorate.” Let’s assume that only 300 of them are trained and ready to perform full workdays as “inspectors” or equivalent.
- c. WorkSafe completed only 14,121 assessments in 2020/21. The number in 2020/21 was not materially different from prior years. If we divide 14,121 by 300 inspectors, the answer is 47 per year or, on average, less than one per work week. This is a staggeringly low number.

- d. The median rate of inspections per year for compliance certifiers operating as sole traders is around 500, or ten per week with the added complexities of not having the geographic concentrations that WorkSafe has. WorkSafe’s productivity is well less than 10% of a good industry benchmark.
- e. At 400 per year, WorkSafe would be expected to complete 120,000 inspections per year, or nearly 100% of the “target market.”
- f. The low incidence of WorkSafe’s inspections ties in with the anecdotal feedback we receive from the field. The further problem is the lack of training in the inspectorate with the result that, when they get there, they don’t know what to do.

11. Despite the adverse trends in statistics, WorkSafe clearly favours “enforcement actions” (chat) over “enforcement actions (fines and penalties) and the latter are declining as noted by SageBush.

The published activity measures indicate that there have been significant changes over the three years from 2016/17 to 2018/19⁵⁶ - Regulatory Activities increased by 3%, Enforcement Activities by 197% and Enforcement Actions by 6% as summarised below:

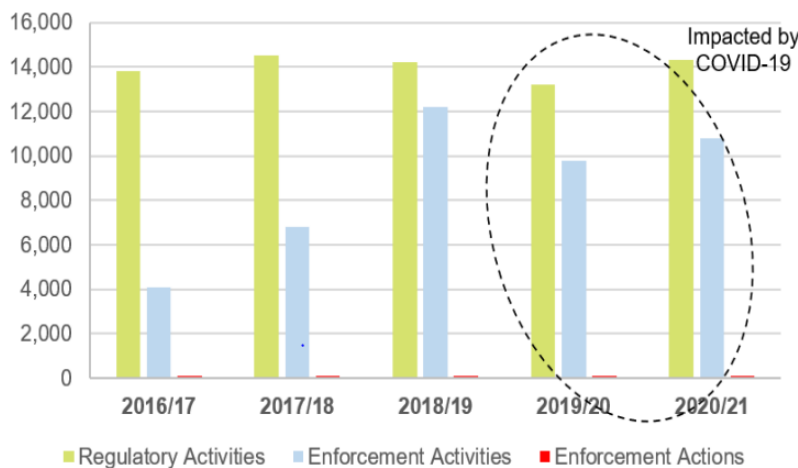


Figure 2: Activity levels 2016/17 to 2020/21 ⁵⁷

The consolidated figures hide a number of underlying changes. For example, the apparent stability of Regulatory Activity volumes over the first three years reflects the large number of Assessments and hides significant decreases in Investigations and Audits. In order to unpack

12. Poorly-trained inspectorate operating with low productivity must be contributing to the low “enforcement measures” and “enforcement actions” WorkSafe reports (as noted by SageBush).

- a. If less than 10% of the “target market” is inspected in any year and the inspections are conducted by people with inadequate training, most non-compliance is not being detected and the impact of deterrence (arising from WorkSafe enforcement activity) is inevitably diminished.
- b. The powerful combination is the old-fashioned “boots on the ground” worn by people skilled in 2022 technology. WorkSafe has the opposite – old-fashioned technology and few boot-steps.

13. WorkSafe has had considerable difficulty understanding and applying Hazardous Substances Law correctly. This is a critical weakness which undermines its ability to perform its legislative functions.

- a. Our months are filled with instances of WorkSafe causing negative effects in relation to PCBU's compliance with Hazardous Substances Law through incorrect interpretations of it, lack of knowledge and/or some evident desire to not upset the PCBU.
- b. We are experts and professionals. Why would WorkSafe's people disagree with us without consulting us when they visit locations that we have certified?
- c. We have published on our website detailed explanations of how WorkSafe is wrong in relation to some very important aspects of Hazardous Substances Law – (i) protected places (ii) hazardous areas (iii) large format retail shops and (iv) AS 1940 cabinets. There are more: (v) site plans and (vi) worker training (vii) hazardous areas and (viii) requirements for certification of tank wagons.
- d. Thus, from what we observe, more than five years on from the enactment of the Hazardous Substances Regulations 2017, WorkSafe does not understand many basic elements a head office. The prospects that WorkSafe can correctly train its inspectorate are bleak.

14. On the front lines of auditing compliance with Hazardous Substances Law are compliance certifiers whom WorkSafe has observed are "ageing with significant skill gaps." They audit more than 20,000 workplaces or other assets annually. Despite identifying these concerns several years ago, it has taken no adequate action to require certifiers to address their skill deficiencies.

- a. Our experience aligns with WorkSafe's public comments on this topic. At WorkSafe's requests we have brought instances of certifier ineptitude to their notice, but, without fail, we have not seen WorkSafe take any material action.
- b. Notwithstanding the importance of the quality of compliance certifiers, WorkSafe's timelines on some activities are as follows:
 - i. Certifier A has had the status of his application for reauthorization "pending" for more than two years – this is outrageous. He is either competent or not and it doesn't take any longer than three months to figure this out.
 - ii. Complaints about Certifiers B and C have now taken more than 12 months without resolution. Our benchmark at DGC for internal audits of files is that more than five can be done in detail in a day.
 - iii. We have alleged deliberate bias by WorkSafe in relation to how it treats particular certifiers. We have made this allegation based upon the significant discrepancies in how WorkSafe has dealt with various complaints.
- c. WorkSafe's response has been to spend several hundred thousand dollars with Massey University to develop courses that the ageing certifiers with skill gaps are not enrolled in.

15. WorkSafe's inspectorate is insufficiently trained or knowledgeable about Hazardous Substances Law and this has been a major problem for years. Despite the promise of "digital transformation" the inspectorate is using pencils and paper.

- a. We have many examples of WorkSafe's inspectorate undermining the correct conclusions of our compliance certifiers, yet most in the inspectorate have received adequate training in the topic.
- b. WorkSafe inspectors have admitted to us that they have not had the training and it is frustrating for them – they are asked to do a job that they cannot do with confidence. We argue this is a form of mistreatment of any employer's workers and this is what WorkSafe (itself responsible for WorkSafe bullying etc) is doing.
- c. If WorkSafe's people have not been trained, how are they expected to either educate or suggest prosecutions of PCBUs?
- d. One of our clients reported back to us recently attaching this message from WorkSafe in relation to what is a very basic compliance issue (related to AS 1940 cabinets)

"I apologise for any inconvenience; unfortunately WorkSafe has a newly established team in the High Hazards Unit and has been in the process of working out who is to follow up issues such as this one. I can pass on the information I have to the other team and I'll advise the <NZ city> Inspectors that they should not follow up location compliance certificate issues at the <NZ city> <PCBU name> in the meantime.

- e. The installed base of AS 1940 cabinets is likely more than 25,000, so it is a significant compliance issue. WorkSafe is in a state of chaos and paralysis on basic issues.

16. WorkSafe's active steps to not apply Hazardous Substances Law correctly is leading to competitive advantages for those PCBUs which WorkSafe is permitting to operate outside the law. The non-systematic nature of its enforcement activities exacerbates this.

- a. Take the case of a retail store which does not meet the requirements of regulation 11.33 but holds 9,000 litres of flammable liquids while its competitor holds the 1500 litres or so that is lawful (regulation 11.32).
- b. PCBUs taking their compliance obligations seriously speak of WorkSafe driving right past their competitors and showing little interest in their non-compliance.

17. WorkSafe is blurring the roles of educator and policeman and it doesn't work.

- a. There is a role for documents providing general guidance about the law to PCBU's, however WorkSafe blurs the role that its inspectorate is performing with its complicated "tree of potential responses."
- b. As noted above, PCBUs who are still not compliant with the law 12 years after Pike River have chosen to be ignorant. Why should taxpayers pay for these PCBUs to be educated by government officials?
- c. A better model for WorkSafe will be to follow the successful approach of the Commerce Commission. Compliance with the law ought to be left to companies, just like they do with issues arising under the Commerce Act or the Income Tax Act.

18. WorkSafe is creating considerable problems because of its erroneous application of law. Companies have dilemmas – observe WorkSafe policies which are wrong or follow the law. Insurance risk, for one, will follow the law not an incorrect WorkSafe policy.

- a. We have many instances of WorkSafe providing advice to PCBUs which is wrong including in relation to extremely important compliance matters. Rather than address their errors when we point them out, WorkSafe does not do so, choosing instead to suggest to a PCBU that it finds a different compliance certifier to issue a certificate based upon WorkSafe's interpretation.
- b. Our most sophisticated clients recognize that WorkSafe (I) is not an authority they can rely upon and (ii) it is their legal obligation to comply with the law, not WorkSafe's non-binding and erroneous interpretation of it.
- c. WorkSafe's policy on protected places is an example of this. Our explanation of why WorkSafe is wrong and the significant of this issue is on our website at [WorkSafe Issues | DGC Website \(dgcompliance.co.nz\)](https://www.dgcompliance.co.nz/WorkSafe-Issues/). WorkSafe has removed its flawed policy statement but has not fixed the guidance given to PCBUs – the problems have remained unresolved for most of 2022.

19. WorkSafe is not qualified to provide or influence companies' comprehensive health and safety plans and it should not be attempting to do so. If its least qualified employees are doing this, they are taking PCBUs away from the first essential in this area which is taking ownership of the topic.

- a. Health and safety plans are specific to individual companies. Building a plan and discussing the issues and actions with workers is part of the process of building the necessary cultures that will set the company up for full integration of the principles into the business. WorkSafe has almost nothing to contribute to this process. For one, its people are not qualified to provide such assistance.
- b. There are three major components to daily effective health and safety: (i) an effective plan, (ii) compliance with the plan and (iii) checks that compliance is occurring.
- c. Why WorkSafe has such tolerance for companies putting workers in harms' way, when the basics of health and safety are absent, is shocking.
- d. We have many excellent examples of companies going from the basement of health and safety to the penthouse. Many report improved business performance and employee engagement. All we did is show the people in charge of health and safety what their legal obligations were.

20. The lack of response to the recommendations in the Smith Report is indicative of the malaise at WorkSafe.

- a. Tim Smith's report was completed in October 2021. The Chief Executive of WorkSafe told the Parliamentary Select Committee in March 2022 the report was still undergoing "peer review" yet the report's final date was October 2021.
- b. On 31 March when it released the Smith Report, it wrote:

“As an insights-driven regulator, we will draw on the findings and recommendations from both reports to ensure the system supports healthy and safe work and that our regulatory approach continuously improves to meet this challenge. A range of work is underway to support this, and we look forward to making progress on all the recommendations.

Ultimately this will help us improve the compliance certification regime, ensure healthier and safer work at sites that store, use, manufacture and transport hazardous substances, and reduce the potential for serious harms.

We will progressively implement the recommendations through existing work programmes and one-off actions. We plan to work closely with stakeholders on the improvements and will keep them and the wider sector informed as these are carried out.”

- c. DGC is one of the largest firms of compliance certifiers in New Zealand. We have heard virtually nothing from WorkSafe since.
- d. Notifications provide the flow of workplaces that are not compliant. Certifiers have been deliberately breaking the law by not notifying, yet WorkSafe has done nothing to change the failures, nor dig into the deep-seated problems which it is aware of. If there are
 - i. “significant skill gaps in an ageing fleet of certifiers” (translated as many who don’t know what they are doing)
 - ii. a dearth of notifications still seven months after the Smith Report was published (or inversely, 90% of certifiers are coming up with 99-100% pass rates from inspections)why is WorkSafe so unwilling to dig into the underlying causes?
- e. To help WorkSafe if it ever decides that 750-1000 deaths annually are worth taking seriously, there are five obvious causes, as we pointed out to the Chair of WorkSafe in June 2021):
 - i. Certifiers are insufficiently skilled
 - ii. Certifiers repeat the same errors year after year
 - iii. Certifiers are under pressure from their corporate clients to deliver certificates 100% of the time
 - iv. Some certifiers conduct “toot and wave” inspections² referring to how long they spend on inspections. One, for example, has a certificate production rate which is three times that of the industry median despite operating with archaic systems that should prevent him from exceeding the industry median
 - v. WorkSafe turns a blind eye to all these issues.

21. WorkSafe has low productivity and high pay. These factors have not been considered in the review into whether WorkSafe is under-resourced and/or under-funded?

- a. More than 40% of WorkSafe’s employees earn more than \$100,000 per year.
- b. Despite this, as noted above, the inspectorate’s productivity is less than 10% of the benchmark in the private sector.

² This phrase was coined by an expert and diligent certifier while acting as an independent expert.

22. We pride ourselves on our ability to read and understand all types of documents. The bombastic³ paragraph from WorkSafe in the front of the SageBush review and WorkSafe's moves to change the targets it has been unable to meet says it all for us.

WorkSafe takes an outcomes oriented, really responsive approach to guide decision-making and regulatory activity

Two fundamental aspects define WorkSafe's orientation as workplace health and safety regulator in fulfilling its mandate under the WorkSafe New Zealand Act 2013. The first is an outcomes approach, where outcomes and impacts are the key drivers for regulatory activity and resource allocation. The second is the adoption of a stance as a really responsive regulator, where regulatory responses augment the traditional 'toolkit' of compliance and enforcement interventions and respond to factors in addition to the behaviour of regulated parties, such as the institutional environment and wider system performance.

- Phil Parkes blames a growing economy for the increase in workplace harm. The chart on page two above shows that WorkSafe reports its statistics on a "per 100,000 FTE basis."
- Where we do agree with Mr Parkes is that NZ's health and safety performance is lagging the rest of the developed world.
- Rather than draft poor prose, WorkSafe needs to be totally reset. The new Chair is facing some major challenges.

³ In addition, the paragraph shows WorkSafe has no understanding of when to hyphenate the tautologous compound adjectives that they are so enamoured with.