

**REVIEW OF TEMPORARY SUSPENSIONS OF COMPLIANCE
CERTIFIERS' AUTHORISATIONS BY WORKSAFE NEW ZEALAND**

REPORT

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1. INTRODUCTION

- 1.1. The Health and Safety at Work (Hazardous Substances) Regulation 2017 (the Regulations) establish a regime under which the compliance of certain people, places and plant with the Regulations must be certified. WorkSafe has the function of authorising compliance certifiers for that purpose.
- 1.2. The relevant provisions are set out in Part 6 of the Regulations, along with provisions setting out the duties of compliance certifiers and providing for investigations of certifiers. Regulation 6.16 provides WorkSafe the power to temporarily suspend the authorisation of certifiers while they are under investigation. In order to take this step, WorkSafe must be satisfied that the temporary suspension is necessary for safety. Regulation 6.17 provides that investigations of compliance certifiers should be completed within 80 working days, but that WorkSafe can extend the timeframe if necessary.
- 1.3. A number of decisions made by WorkSafe under the Regulations can be appealed to the District Court. These include final decisions to suspend or cancel the authorisation of compliance certifiers once an investigation has been completed. However, neither WorkSafe's decisions to temporarily suspend certifiers under Regulation 6.16, nor its decisions to extend the length of an investigation under Regulation 6.17, are appealable in this way.
- 1.4. On 10 March 2021, the Parliamentary Regulations Review Committee held a hearing to consider a complaint from two compliance certifiers about the Regulations. Based on its findings, the Committee recommended that consideration be given to amending the Regulations, to provide some form of independent review of:
 - Temporary suspension decisions under regulation 6.16; and
 - Decisions to extend an investigation under regulation 6.17, when this will result in the consequential extension of a temporary suspension under regulation 6.16
- 1.5. On 30 June 2021, Hon Michael Wood, Minister for Workplace Relations and Safety, responded to the Chairperson of the Regulation Review Committee and confirmed WorkSafe will commission an independent review of the process where compliance certifiers who have authorisations temporarily suspended wish to appeal or complain about that suspension.
- 1.6. With the approval of the Chief Executive, the Head of High Hazards, Energy and Public Safety commissioned an independent review of these matters.

Terms of Reference

- 1.7. The full terms of reference for this review are attached as "Appendix A" to this report. In essence, they called for two interrelated deliverables, being:
 - a) A factual narrative of the temporary suspension of compliance certifiers' authorisations from 2017; and
 - b) A report on the internal review appeal or complaints process in relation to temporary suspension of authorisations.

Investigation process

- 1.8. The investigation was primarily undertaken by reviewing a substantial amount of documentation provided to me by Worksafe and by conducting interviews with persons involved either in relation to the issues at the heart of this review or with management roles relevant to these functions. These were, in the order in which I spoke to them:
- Andrew Smith, Principal Advisor (Regulatory Assurance);
 - Peter Nicholls Principal Advisor (Regulatory Assurance);
 - Catalijne Pille, Acting National Manager – Interventions & Support
 - Lisa Nickson, Principal Legal Advisor, Corporate;
 - Simon Buckland Principal Advisor, High Hazards, Energy and Public Safety
 - Darren Handforth, Head Head of High Hazards, Energy and Public Safety
 - Simon Humphries, Acting Head of General Inspectorate.
- 1.9. I also received a helpful written statement from Lisa Rice, Senior Solicitor.
- 1.10. This review was required to be undertaken in a relatively short space of time. It was clear to me that the staff to whom I spoke were taking time away from their ordinary working commitments to assist me. I would like to express my gratitude to them for their cooperation.
- 1.11. I also received considerable assistance from Rachel Carne, who was appointed to act as Secretariat for the review. In addition, Mr Smith, referred to above, provided me with a significant amount of written material that was essential to this exercise. I was greatly assisted in this review by Mr Smith's jobsheets. These were contemporaneous records of actions taken and communications throughout investigations. I would particularly like to record my gratitude to them both for their help.
- 1.12. In order to assist in providing context for my review, I examined the written complaint to the Regulations Review Committee, lodged by ██████████ and ██████████. I considered whether or not it would be necessary to speak to ██████████ and ██████████. Having reviewed their complaint, and other written evidence received by the Regulations Review Committee, I determined that that would not be necessary for the purposes of my review.

Investigation timing

- 1.13. The investigation process, including all interviews, took place during August and September 2021.
- 1.14. The terms of reference called for me to report by 23 September 2021. This was extended by one day, to 24 September 2021, in order to allow for the provision of additional information.

2. THE COMPLIANCE CERTIFIER SYSTEM

- 2.1. On 1 December 2017, the rules around managing hazardous substances in the workplace transferred from the Hazardous Substances and New Organisms Act 1996 to the Regulations.

The relevant provisions

- 2.2. A compliance certificate is a document that confirms that an individual, site or equipment is compliant with the Regulations. The regulations provide that only authorised compliance certifiers can perform the functions of a compliance certifier.¹
- 2.3. The defining characteristic of the compliance certifier authorisation system is that it is a closed system. Persons seeking to obtain entry into the system and operate within it are required to apply to WorkSafe for approval to enter. This approval is granted by way of authorisation. Eligibility for entry into the system is governed by satisfaction of the qualifications for authorisation. In particular, WorkSafe must be satisfied that the applicant will perform the functions of a certifier “in an objective manner that promotes safety”. In addition, WorkSafe must be satisfied that the applicant is a fit and proper person.²
- 2.4. Regulation 6.15 provides for WorkSafe to investigate complaints and concerns about compliance certifiers. Importantly for the purposes of this review, while an investigation is underway, WorkSafe may suspend all or part of a compliance certifier’s authorisation. The basis for taking this action is set out in Regulation 6.16(1). This provides that WorkSafe may suspend “if it considers it necessary for safety.”³ Any temporary suspension ordered must be no longer than is reasonably necessary for WorkSafe to investigate and decide what action to take.⁴
- 2.5. In closed systems such as this, there is a distinction between action the regulator can take to enforce rules and requirements and action taken to remove or limit a latent safety risk identified within the system. The former is a backward-looking, purely disciplinary, process. An example would be prosecution. The latter is a forward-looking process that seeks to protect the integrity of the system. The true purpose of the temporary suspension power is administrative, in that it seeks to address the latent safety risk identified within the system, an “unsafe” compliance certifier, rather than to punish them or enforce standards applicable to them.
- 2.6. WorkSafe’s power to investigate must be exercised within a limited period of time, 80 working days. That is, however, subject to a significant modification in that the time limit applies unless WorkSafe decides that it needs more time to complete the investigation”.⁵ There is no express limit on the exercise of this discretion to extend the time for the

¹ Regulation 6.2

² Regulation 6.8

³ In the context of this provision, WorkSafe” is the Head of High Hazards, Energy and Public Safety. Presently that is Mr Handforth. At the time of the decisions affecting [REDACTED] and [REDACTED], that was Mr Handforth’s predecessor, Mr Hetherington.

⁴ Regulation 6.16

⁵ Regulation 6.17(1)

investigation.⁶ WorkSafe is required to notify the affected person of the extension and the reasons for it.

- 2.7. There is no limit on the time by which WorkSafe may extend the life of an investigation. There are good reasons for this. Investigations of this sort can be wide-ranging. They rely, to varying degrees, on the participation of the person being investigated. If an investigation process were subject to a “hard” limit of 80 working days, it might be open to a person being investigated to frustrate the process up to the time limit.
- 2.8. Balanced against that are the considerations associated with the individual certifier whose authorisation has been temporarily suspended. Certifiers rely on WorkSafe’s authorisations for their livelihood. This could be affected for months, while the investigation proceeds. This is said with absolutely no criticism intended of WorkSafe. An investigation might conclude that there was no basis for continued exclusion of the individual from the system. In those circumstances, the affected certifier would have limited, or more likely no, ability to obtain compensation from WorkSafe.⁷
- 2.9. At the conclusion of an investigation, WorkSafe can take a variety of actions prescribed by Regulation 6.20. These include suspending or cancelling the compliance certifier’s authorisation and varying the scope or any condition of the authorisation. Pursuant to Regulation 6.35 rights of appeal are provided in respect of certain specified decisions. These include decisions:
- To refuse to grant an authorisation;
 - To grant a limited scope of authorisation; and
 - To vary, suspend or cancel all or any part of an authorisation under regulation 6.20.
- 2.10. Importantly, the last of these only relates to a decision to suspend an authorisation following the completion of an investigation. No right of appeal is granted in respect of a decision to suspend an authorisation while an investigation is being conducted or to extend the timeframe for completing an investigation. Rights of appeal exist only as creatures of statute.⁸ If a right of appeal is not expressly granted, it is not possible to infer, or read in, such a right.

The complaint to the Regulations Review Committee

- 1.15. The Regulations Review Committee hearing considered two grounds raised by the compliance certifiers’ complaint:

⁶ Limitations on the discretion would be implied by law. For example, WorkSafe could not exercise the discretion arbitrarily or without reasonable grounds. These requirements would be enforceable by way of judicial review.

⁷ In *Attorney General v Carter*, the Court of Appeal considered a claim in negligence by subsequent purchasers of a vessel against the Ministry of Transport. The Court of Appeal considered that the statutory scheme of the Maritime Transport Act 1994 was not capable of supporting a duty of care owed by regulators to prospective purchasers in respect of their commercial decisions. The Court of Appeal judgment refers to “a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence.”

⁸ *Shotover Gorge Jetboats Limited v Jamieson* [1987] 1 NZLR 437 (CA)

- whether the power for WorkSafe to appoint their own compliance certifiers is incompatible with their role to regulate compliance certifiers.⁹
- whether the power for WorkSafe to temporarily suspend certifiers' authorisations for safety reasons while they are under investigation, along with WorkSafe's power to extend the timeframe for an investigation to be completed, makes the rights of certifiers unduly dependent on administrative decisions that are not able to be appealed.

1.1. Examples of administrative decisions in the latter ground given in the complaint are:

- Suspension during investigation;
- Provision of information during an investigation;¹⁰ and
- Time frame for completing an investigation.

2.40. The Committee found that regulations 6.16 and regulations 6.17 may meet the ground in Standing Order 327(2)(d) for being drawn to the attention of the House.¹¹ The Committee considered that WorkSafe's decisions under these regulations represent a significant interference with persons' 'rights and responsibilities', as suspension decisions determine whether compliance certifiers can conduct their business. This interference was considered substantial enough that the Committee expect legislation to provide for these decisions to be independently reviewed on their merits.

2.41. Currently, persons affected by WorkSafe decisions under regulation 6.16 and 6.17 can request WorkSafe internally review these decisions. They can also challenge the process through which a decision was reached through judicial review or complaints to the Ombudsmen.

2.42. In its essence, a complaint about a decision to temporarily suspend a compliance certifier calls for a reconsideration of the decision to impose the suspension under Regulation 6.16. Although not expressly provided for in the Regulations, such a reconsideration is as much an exercise of the discretion granted as the imposition of the suspension. It calls for an appropriately formal process in receiving, recording, determining and communicating the outcome of the complaint or request for review.

⁹ This ground, and the Committee's finding in relation to it, is not relevant to this review.

¹⁰ Although not expressly covered by the terms of reference for this review, this example is doubtful. There are legislative provisions associated with the provision of information that would be applicable to WorkSafe investigations.

¹¹ Standing order 327(2)(d) provides that regulations should not unduly make the rights of a person dependent on administrative decisions that are not able to be reviewed on their merits by an independent tribunal.

3. NARRATIVE

3.1. I was advised that, since the promulgation of the regulations in 2017, four persons have been the subject of temporary suspension. One of those individuals, [REDACTED] has been temporarily suspended on two occasions. What follows is an analysis of the key events in relation to each temporary suspension.

[REDACTED]

3.2. On 13 March 2018, WorkSafe NZ received a complaint concerning the performance of compliance certifier, [REDACTED]. The complaint related to [REDACTED] issuing of a location compliance certificate without inspecting the site or reviewing documentation pertaining to the inspection of the site, before the certificate was issued. The location compliance certificate was dated 5 February 2018. Preliminary enquiries revealed that the inspection was conducted on 6 February 2018, being the day after the certificate was issued.

3.3. WorkSafe’s Audit and Investigations team was given approval to investigate [REDACTED] on 16 March 2018. Apparently, this decision was taken by WorkSafe’s Manager Certifications, Approvals and Registrations, [REDACTED].¹² On 16 March 2018, a letter was sent to [REDACTED], suspending his authorisation, pending the outcome of the investigation. The letter was phrased as follows:

“Your previous behaviour has demonstrated to us that you cannot be relied upon to conduct yourself in a proper manner expected of a compliance certifier, therefore in accordance with regulation 6.16, WorkSafe considers it necessary for safety to suspend your authorisation as a compliance certifier during this investigation.”

3.4. I was advised by Mr Smith that there was no written record of [REDACTED] decision, independent of this letter.

3.5. On 19 March 2018 at 11.30 am, [REDACTED] wrote an email to [REDACTED], asking for his authorisations as a compliance certifier for “Approved Fillers” and “Approved Handlers” to be excluded from the scope of the temporary suspension. [REDACTED] concluded his email as follows:

[REDACTED]

and

[REDACTED]

¹² According to Mr Smith, [REDACTED] held a delegation under regulation 6.16 to temporarily suspend authorisations.

3.6. [REDACTED] responded at 1.39 pm that day, relevantly saying:

"I can confirm that the circumstances leading to the immediate suspension of all of your approvals are of such a serious nature that the outcome of the investigation may also impact on all of your approval types and not just Locations and Stationary Container Systems."

3.7. [REDACTED] responded, also later on 19 March, thanking [REDACTED] for his advice about the temporary suspension and making comment as to the substance of the investigation.

3.8. On 23 March 2018, WorkSafe NZ received a second complaint concerning the performance of [REDACTED]. This complaint alleged that [REDACTED] had not carried out the necessary due diligence when issuing a Stationary Container Test Certificate.

3.9. On 4 May 2018, WorkSafe's preliminary investigation report, covering both complaints, was sent to [REDACTED]. He was invited to make a submission by 25 May 2018. On that day, WorkSafe received a submission from [REDACTED] in relation to the preliminary investigation report. This included the following statement:

[REDACTED]

3.10. On 29 May 2018, [REDACTED] sent a letter to [REDACTED] advising him his authorisations had been cancelled. That decision related to all of [REDACTED] authorisations. I was advised by Mr Smith that there was no written record of [REDACTED] decision, other than the letter sent to [REDACTED].

Discussion

3.11. [REDACTED] requested that the temporary suspension be limited in its scope. Essentially, what [REDACTED] appears to have been saying was that the threshold for temporary suspension in Regulation 6.16 was not met in relation to some of his authorisations and that the suspension should be limited to the authorisations in which the threshold was met. That was not an unreasonable proposition to put to WorkSafe.

3.12. [REDACTED] response was effectively a statement to the effect that the outcome of the investigation would affect all of [REDACTED] approval types. The difficulty with this is that it did not address the substance of [REDACTED] request. In particular, it did not address whether the safety threshold was met for all of [REDACTED] authorisations.

3.13. It may be that [REDACTED] reference to the "circumstances leading to the immediate suspension of all of your approvals" was intended to convey the proposition that the threshold in Regulation 6.16 was met in relation to all aspects of [REDACTED] authorisation. However, if that was the case, the point was not expressed with clarity. Whether or not the outcome of the investigation would affect all of [REDACTED] approval types is something of a non-sequitur.

- 3.14. That lack of clarity could perhaps reflect the absence of any formality in the process by which the request was considered. Had ██████ taken time to consider what ██████ was asking of WorkSafe, and sought legal advice as to his decision and communication of that decision, his response might have been closer to the mark.

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- 3.15. On 31 November 2018, WorkSafe’s Audit & Investigations team received a concern from the Hazardous Substances team about compliance certifier ██████. The primary allegation was that ██████ had issued location test certificates to a service station in Wairoa when the site was non-compliant. On 8 January 2019, WorkSafe wrote to ██████ seeking information related to the allegations. A second letter, in similar terms, was sent on 17 January 2019.
- 3.16. On 28 January 2019, ██████ underwent an interview with WorkSafe investigators. This process, as well as further inquiries, resulted in a decision that the allegations should be formally investigated and that ██████ authorisation would be temporarily suspended pending the outcome of those investigations. This decision was made on 11 February 2019 by WorkSafe’s Head, High Hazards, Energy and Public Safety, Tony Hetherington.
- 3.17. That decision was communicated to ██████ by way of a letter, signed by Simon Humphries, Head of Specialist Interventions, and emailed to him on 12 February 2019.¹³ This included the following statement:

“Considering the hazardous nature of locations you are authorised to certify WorkSafe considers it necessary for safety to suspend your authorisation until the investigation is concluded.”

- 3.18. Later on 12 February 2019, ██████ texted a member of WorkSafe staff, indicating that he wished to have his name removed from the Compliance Certifiers register, referring to health issues that he was experiencing. WorkSafe took immediate steps to implement this request.¹⁴
- 3.19. On the same day, it would seem that ██████ wrote separately to the Chief Executive of WorkSafe indicating his intention to withdraw from compliance certification activities. This was responded to by Mr Hetherington. He indicated that WorkSafe intended to continue with its investigation but in deference to ██████ health issues, he would not be contacted for further information. ██████ would be advised of the outcome. In the meantime, Mr Hetherington indicated that ██████ entry on the certifier register would be adjusted to appear as “suspended”.
- 3.20. On 8 July 2019, a memorandum was completed, detailing the outcomes of the investigation and seeking the cancellation of ██████ authorisation. Mr Smith recalled sending ██████ a copy of the memorandum in draft and asking for his comments. According to Mr Smith, ██████ made no comment. A decision to cancel ██████ authorisation was made on 17 July 2019, evidenced by Mr Hetherington’s signed acceptance of the cancellation

¹³ The letter provided to me was dated 8 February 2018, but I was advised that the letter was not sent for some days after the decision. I was further told that the reference to 2018 in the date of the letter was a typographical error. Mr Humphries explained that, while he did not have a delegation authorising him to order investigations and temporary suspensions under the regulations, he had authority to write to persons on behalf of WorkSafe. With the benefit of hindsight, Mr Humphries acknowledged that it might have been helpful if he had indicated that his letter was written on behalf of the decision-maker, Mr Hetherington.

¹⁴ However, technical difficulties were apparently experienced in doing so.

recommendation. The next day, WorkSafe wrote to ██████ advising him of this decision and his appeal rights. ██████ took no such step and WorkSafe's file was closed on 10 August 2019.

Discussion

3.21. ██████ made no statement that could properly be regarded as a complaint about the temporary suspension, or a request for review. To that extent, there is nothing of relevance to be taken from his experience, beyond noting Mr Smith's advice that the investigation lasted 82 working days. Strictly, in terms of Regulation 6.17, an extension beyond the 80 working day period was required.

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3.22. On 14 October 2019, following an investigation, WorkSafe advised compliance certifier ██████, that it had decided to:

- vary ██████ authorisations to preclude the use of third party assessors in any capacity, and
- suspend her authorisations for certified handlers until she is able to demonstrate her qualifications pursuant to regulations 6.6, in relation to vertebrate toxic agents.

3.23. On 15 January 2020, WorkSafe received a further complaint about ██████. This complaint alleged that ██████ had used a third party assessor to visit an unmanned service station to gather evidence and issue a compliance certificate. If proven, this would have been contrary to the conditions of ██████ authorisations.

3.24. WorkSafe completed preliminary enquiries into this complaint and concluded that there was sufficient evidence that ██████ had used a third party assessor. The view was taken that this was evidence of wilful non-compliance with the variation of her authorisations that was imposed following the outcome of the investigation into her conduct and ability in 2019. The WorkSafe investigators considered that this brought into question the competence and conduct of ██████ as a Compliance Certifier. In this case, temporary suspension was recommended. WorkSafe's memorandum, recommending investigation and temporary suspension, is dated 27 January 2020.¹⁵ The version that I have is unsigned but includes the following for completion:

¹⁵ Mr Smith recorded in his jobsheet that he received a signed copy of the memorandum from Mr Hetherington on 30 January 2020. I was advised by Mr Smith that he believes that Mr Hetherington would have signed the memorandum and authorised the temporary suspension between 27 January (the date of the recommendatory memorandum) and 30 January.

Acting under delegated authority, and on behalf of WorkSafe New Zealand, I:

a. *Authorise an investigation into the competence and conduct as a compliance certifier of [REDACTED].*

Yes / No

b. *Suspend authorisations to issue compliance certificates.*

Yes / No

Signed

Tony Hetherington

Head,

High Hazards, Energy and Public Safety

Dated:

- 3.25. On 30 January 2020, Mr Smith contacted, a Mr Moore, who had acted as [REDACTED] lawyer on the previous investigation. Mr Smith's job sheet indicates that he inquired as to whether or not Mr Moore had instructions to act for [REDACTED] and then informed him of the investigation.
- 3.26. [REDACTED] was formally notified of the decision to investigate and the temporary suspension on 30 January 2020. The letter notifying [REDACTED] included the following statement:
- "In accordance with regulation 6.16, WorkSafe considers it necessary for safety to suspend your compliance certifier's authorisations while conducting its investigation. This means, your authorisation ceases to have effect pending the outcome of the investigation process."*
- 3.27. This letter was emailed to Mr Moore, also on 30 January 2020, as "an unsigned courtesy letter to allow him time to discuss the pending investigation with [REDACTED]". Mr Moore later emailed Mr Smith to confirm that he (Mr Moore) did have instructions to act for [REDACTED] in relation to the investigation.
- 3.28. On 11 February 2020, Mr Moore and Mr Smith spoke on the telephone. Mr Moore asked whether it might be possible for WorkSafe to lift the temporary suspension. [REDACTED]
[REDACTED]
[REDACTED]
- 3.29. On 12 February, Mr Moore and Mr Smith spoke on several occasions. Mr Moore confirmed that he had instructions to take steps to reverse WorkSafe's decision.¹⁶ Mr Smith suggested to Mr Moore that [REDACTED] should consider making a submission to WorkSafe rather than pursuing the matter through the courts. Mr Smith asked Mr Moore to email any submission that [REDACTED] wanted to make to him and indicated that he would ensure that the decision maker was made aware of the situation.
- 3.30. At 2pm that day, Mr Moore responded, indicating that he had instructions to "file proceedings to challenge the decision to temporarily suspend [REDACTED] on an urgent

¹⁶ Mr Smith's jobsheet.

basis”, but indicated that he was hopeful that this would not be necessary. He went on to make submissions on the temporary suspension. In essence, Mr Moore said that [REDACTED] believed that her use of the third party assessor in the particular circumstances was not covered by the condition. WorkSafe had been asked to confirm that, but no response had been received. On that basis, and in light of the financial harm the temporary suspension would cause [REDACTED], WorkSafe was asked to reconsider the temporary suspension.

- 3.31. Mr Smith responded at 2.21 pm that day. He indicated that he would “discuss this with some urgency with the appropriate decision maker” adding:

“I will do my best to get you a response in a timely manner.”

- 3.32. Mr Smith recorded in his jobsheet that he discussed this with his manager, Mr Hetherington. The latter “agreed in principle to lifting the suspension, however he wanted some assurance that [REDACTED] would comply with the conditions of her authorisation.” Mr Smith then emailed Mr Buckland, who was at the time, Team Leader, Hazardous Substances, and advised him of Mr Hetherington’s “in principle” position.¹⁷ He added:

“The lifting of the suspension is dependent on the terms of a formal undertaking that [REDACTED] will send to WorkSafe for consideration.”

- 3.33. Mr Smith emailed Mr Moore, saying:

“Further to our earlier discussion I have started the process to lift the suspension. There are obviously some administrative matters to cover first, however barring any unforeseen problems we should be able to sort this out very quickly. In the meantime this will give [REDACTED] some surety that the suspension issues are being addressed.”

- 3.34. [REDACTED]

- 3.35. On 14 February 2020, Mr Smith received an email from Mr Moore’s office, attaching an undertaking for WorkSafe to consider. Mr Smith responded indicating that “WorkSafe was now satisfied with the undertaking in its current form and would be happy to consider a revised version”. On 17 February, Mr Moore’s office sent Mr Smith a revised wording.

- 3.36. Mr Smith’s jobsheet records that, on 18 February 2020 at 9.01am, Mr Smith emailed Mr Buckland and asked him to lift the suspension. The jobsheet then records that Mr Smith emailed Mr Moore at 12.56 pm to notify him that the suspension had been lifted.

- 3.37. The investigation continued. Its ultimate outcome was that the allegations were found to have been established and [REDACTED] was sent a warning letter on 25 August 2020.

Discussion

- 3.38. Whether or not it was appropriate for Mr Smith to inform Mr Moore of the existence of the investigation and to send him a copy of the letter, before Mr Moore had confirmed he had instructions, is not a matter for this review. However, there may have been some privacy

¹⁷ Mr Buckland’s role included management of WorkSafe’s public-facing certifier records.

issues around this had Mr Moore not had instructions to act for [REDACTED]. What is clear is that Mr Smith was acting in a spirit of courtesy and cooperation.

- 3.39. Mr Hetherington agreed “in principle” to the lifting of [REDACTED] suspension based on a written undertaking, the terms of which had not yet been agreed. Mr Smith and others indicated that there was little chance that Mr Hetherington was not aware of, and approved, the ultimate removal of the suspension. That was on the basis that it was the subject of discussions with the legal unit and with Mr Buckland, who was responsible for the maintenance of the public facing website record of authorisations. However, beyond the removal of the temporary suspension and the fact that Mr Hetherington was the only person who had the delegated authority to take such a decision, I could find no evidence confirming that a decision was actually taken in any formal sense. There was, in particular, no evidence of analysis of the safety basis for removal of suspension.¹⁸
- 3.40. I was told that the investigation into [REDACTED] took 135 working days. There was no evidence that indicated that the requirements of Regulation 6.17(2) were complied with in [REDACTED] case. I discuss this in more detail below.

[REDACTED]

The first temporary suspension

- 3.41. In October 2018, an allegation was made to WorkSafe that compliance certifier [REDACTED] had used another person to complete the inspection of the relevant tank wagon. Following preliminary investigation, and receipt by WorkSafe of two further complaints about [REDACTED], on 14 February 2019, Mr Smith passed a memorandum to Mr Hetherington, recommending investigation and temporary suspension. Mr Smith recorded in his jobsheet that on 22 February 2019, he received authorisation to investigate. His note includes the following additional statement:

“Decision made by Tony Hetherington to partially suspend [REDACTED] authorisation for Tank Wagon-in service.”

- 3.42. On 22 February 2019, Mr Humphries wrote to [REDACTED] notifying him of the investigation and the temporary suspension.¹⁹ This letter includes the following statements in terms of the decision to temporarily suspend:

“As you may be aware, the compliance certifier regime relies on those with the necessary authorisation to use their skills, knowledge and experience to ensure that hazardous substances, storage and locations are safe to protect workers and the public.”

“Hazardous substances in tank wagons may pose a risk to drivers , cargo handlers, emergency services and the general public during their transportation. The hazardous nature of substances transported in tank wagons lead WorkSafe to consider it is necessary for safety to suspend your authorisation for ‘tank wagons in service’ until the investigation is concluded.”

¹⁸ In fairness to Mr Hetherington, such evidence may exist. I was advised that Mr Hetherington and his personal assistant have both left WorkSafe employment. In those circumstances, difficulties were experienced in accessing their email inboxes, which may have contained the relevant information.

¹⁹ For reasons that are not clear, the copy of the letter that I was provided with was dated 13 February 2018. This was a point identified by [REDACTED] lawyer in his letter of 27 February 2019.

- 3.43. On 27 February, [REDACTED] lawyer Mr Harris responded to WorkSafe's letter. Among other things, this letter included suggestions that the original report to WorkSafe may have been motivated by "malicious intent", raised issues as to the provision by WorkSafe of information prejudicial to [REDACTED], and questioned what was said to be a "lack of detail" in terms of the safety grounds for the temporary suspension. The letter strongly advocated in favour of WorkSafe agreeing to meet with [REDACTED] on an urgent basis to discuss the issues raised in the letter.
- 3.44. On 1 March 2019, Messrs Humphries and Smith met with two members of WorkSafe's Legal Group. According to Mr Smith:
- [REDACTED]
- [REDACTED]
- [REDACTED]
- 3.45. Throughout early March, Mr Harris and WorkSafe (primarily in the form of Mr Smith) communicated in relation to the provision of information supporting the decisions taken to Mr Harris and attempting to identify a date and time for a telephone conference to discuss the temporary suspension. This communication became increasingly fraught as time went on.
- 3.46. On 8 March 2019, [REDACTED] responded to WorkSafe's investigation/suspension letter. [REDACTED] indicated the view that there was no reasonable basis to believe that it was necessary to suspend his "statutory entitlements" due to a concern over safety. The letter also took issue with the fact that no meeting had taken place, the failure to provide information as well as other matters.
- 3.47. On 21 March 2019, Mr Hetherington wrote a letter to Mr Harris, which included the following :
- "[REDACTED] is suspended because he appears to have allowed a third party to certify tank wagons in his name, thereby allowing those tank wagons to remain in service without the necessary inquiries, inspections, assessments or examinations having been carried out. I am satisfied that this threatens safety."*
- 3.48. Mr Hetherington indicated that [REDACTED] suspension would remain in place until WorkSafe was "satisfied that [REDACTED] had acted appropriately in carrying out the functions of a compliance certifier". Mr Hetherington confirmed that the suspension would be reviewed at the conclusion of the investigation. He indicated that he was satisfied that the investigation was being given an appropriate level of priority.
- 3.49. On 14 April 2019, [REDACTED] wrote again to Mr Smith indicating that:
- "We do not agree that there was every any justification for a suspension on the basis of a safety concern."*
- 3.50. On 26 April 2019, [REDACTED] wrote to Mr Hetherington complaining that there had been "urgent requests for progress on the review of the suspension triggered by the apparent 'safety concern'". This letter referred to the impact of the suspension. The letter asked for an urgent response on, among other things "the full justification for your decision to suspend my Tank Wagon In-Service Certification". Mr Hetherington wrote again to [REDACTED] on 13 May 2019. This letter:
- Clarified the number of matters currently under investigation by WorkSafe;

- Confirmed that one single investigation process was in place in relation to those matters;
- Provided more information in relation to the basis for the suspension
- Indicated the expectation that WorkSafe expected to be in a position to confirm whether the suspension needed to remain in place by 17 May 2019.

3.51. Mr Hetherington added:

"I can only apologise for any confusion caused by Senior Advisor, Andrew Smith's attempt to arrange a conference call. His intention was to save you wasting your time, money and effort to talk to him about lifting the suspension when he does not have the authority to do so."

- 3.52. On 14 May 2019, Mr Smith called ██████████ to discuss his suspension at 9.34am. Although he could not be certain as to this, Mr Smith thought it likely that this call was a direct consequence of Mr Hetherington's letter to ██████████. Mr Smith's record of the call indicates that he "offered a pragmatic solution...if [WorkSafe were to be provided with] a written undertaking that third party assessors would not be used until the investigations were resolved." Mr Smith's jobsheet records that ██████████ agreed to this and asked Mr Smith to email an undertaking to ██████████ so that he "could sign it and resume tank wagon inspections". Mr Smith said that he would "arrange the undertaking and... get the suspension lifted straight away".
- 3.53. Following this call, Mr Smith called Mr Buckland at 9.51 am and asked for the temporary suspension to be lifted. Later that day, at 11.19am, Mr Smith received a copy of an email from Mr Buckland to another member of his team, asking him to lift the temporary suspension on the basis that "WorkSafe has agreed to lift the suspension".
- 3.54. On 16 May 2019, Mr Smith emailed ██████████ and advised him that the suspension had been lifted.
- 3.55. On 17 May 2019, a formal decision was made under Regulation 6.17 to extend the investigation timeframe for a further 40 working days. This was notified to ██████████ by email on that day.
- 3.56. This was followed by an unfortunate period of correspondence in which, according to Mr Smith, ██████████ reneged on his agreement to provide an undertaking. This correspondence took place between 21 May and 29 May 2019. By this stage, of course, the suspension had already been lifted. Mr Smith discussed the situation with Mr Buckland on 22 May and indicated his view "was to leave it, this deception on ██████████ part was a strong indicator of his poor conduct and his unwillingness to work with the regulator".
- 3.57. On 13 August 2019, Mr Smith emailed ██████████ to advise him that a further decision to extend the life of the investigation had been made. This extension was for a further period of 40 working days. Mr Smith advised that his draft investigation report was completed on 7 September 2019. It was arguable, he thought, that the investigation was complete at that time.
- 3.58. By this time, a number of investigations were underway in relation to ██████████. He had, by this time, engaged the firm Chen Palmer Partners as his solicitors. This led, Mr Smith said, to a "bespoke" arrangement in relation to WorkSafe's management of the various investigations. That included responses to Official Information Act requests that had been

made. A letter from Mr Hetherington, dated 25 October 2019, mapped out the process and included the following remark:

“Once we have provided the OIA material and other potentially prejudicial information, we will formally offer ██████████ a reasonable opportunity to comment on the information and to make submissions on the matters under investigation...Once we have done that, we will complete our investigation and give ██████████ a copy of the draft report and give him a reasonable opportunity to make a submission on it.”

- 3.59. Ultimately, on or about 19 August 2020, a decision was made to vary ██████████ authorisation. The following condition was imposed on his authorisation:

“██████████ must perform the functions of a compliance certifier in an objective manner that promotes safety and, in particular, may not use any third party to carry out any inquiry, inspection, assessment or examination necessary to satisfy himself that the relevant requirements for a Tank Wagon in Service certificate or a Location compliance certificate have been met.”

Discussion

- 3.60. Mr Hetherington’s letter of 21 March was clearly an attempt to clarify the basis of the temporary suspension for ██████████. However, the regulatory standard is that WorkSafe must consider temporary suspension “necessary for safety”. That is not the same thing as the existence of something that “threatens safety”. In addition, Mr Hetherington’s statement that the temporary suspension would remain in place until WorkSafe was satisfied that ██████████ had acted appropriately” appears not to reflect the terms of the Regulations.
- 3.61. Mr Smith thought that it was likely that Mr Hetherington would have approved, in principle, the offering of a lifting of the suspension on the basis of a written undertaking not to use third parties for compliance certification prior to Mr Smith’s call to ██████████ of 14 May 2019. In the absence of this, Mr Smith said that he would not have made that offer. However, there was no written record of this approval by Mr Hetherington, or of the re-consideration of the safety threshold that would have been required in order to lift the suspension.
- 3.62. Simply put, there was no evidence that Mr Hetherington considered the matter again. In particular, there was no evidence that I could find that confirmed that Mr Hetherington approved the action of lifting the suspension. I was provided with no written evidence of what Mr Buckland described in his email of 11.19 am as a decision to lift the suspension by “WorkSafe”, in the sense of a delegated decision-maker for the purposes of Regulation 6.16.
- 3.63. The exercise by which agreement to lift the suspension was reached appears to have been essentially transactional in nature. The focus of discussion was on the need for an acceptable written undertaking. I could find no evidence of a re-assessment of the safety risk, balancing the perception of the safety risk without any written undertaking against that the risk associated with any written undertaking. Of course, at the point at which the suspension was removed, the written undertaking was still necessarily hypothetical in its terms. In fact, it never eventuated. Having determined that safety necessitated the temporary suspension, and confirmed that position, WorkSafe lifted the suspension without the comfort of the written undertaking that had been the basis of its apparent change of heart on the safety issue.

- 3.64. As the extensions of the time of the investigation, the two decided upon appeared to follow the regulatory requirements.
- 3.65. Clearly, by the time of Mr Hetherington's letter of 25 October 2019, it was not envisaged that the investigation process was complete. At that point, my calculations would suggest that the second extension had expired. Whether Mr Hetherington's letter constituted a further extension, in terms of Regulation 6.17 is arguable.²⁰

The second temporary suspension

- 3.66. Following the events described above, three further complaints were made against [REDACTED]. These related to:
- a. The issuing of a compliance certificate without any inspection of the relevant site;
 - b. The issuing of two compliance certificates for one site; and
 - c. A compliance certificate issued in respect of a tank wagon-in service.
- 3.67. On 21 February 2020, Mr Hetherington made the decision to investigate these matters and to temporarily suspend [REDACTED] authorisation. [REDACTED] was notified of the decision to investigate and to suspend his authorisation by letter dated 2 March 2020. As to the temporary suspension, the letter, signed by Mr Humphries, included the following:

"As you may be aware, the compliance certifier regime relies on those with the necessary authorisation to use their skills, knowledge and experience to ensure that hazardous substances, storage and locations are safe to protect workers and the public.

Hazardous substances in tank wagons may pose a risk to drivers, cargo handlers, emergency services and the general public during their transportation. The hazardous nature of substances transported in tank wagons lead WorkSafe to consider it is necessary for safety to suspend your authorisation for 'tank wagons in service' until the investigation is concluded.

The Approved Code of Practice – Flammable liquids road tank wagons sets out WorkSafe's expectations about identifying and controlling the health and safety risks arising from the design, construction and maintenance of road tank wagons.

As you are aware WorkSafe view tank wagons transporting flammable liquids in bulk as among the most dangerous vehicles on the road, carrying loads that make them vulnerable to rollover and explosions. It is important that we have complete confidence in those involved in their certification and that good practice is followed and due diligence is exercise.

The non-compliances identified in this case give us serious cause for concern over whether you are applying the necessary level of due diligence and the implications of that for the safety of other tank wagons you might certify in future."²¹

- 3.68. [REDACTED] response was received on 31 March. It raised a number of procedural matters in relation to the suspension, arguing that it was, among other things, a breach of

²⁰ [REDACTED]

²¹ [REDACTED]

natural justice and “unlawful”. In addition, [REDACTED] complained about the failure to provide copies of prejudicial information being relied upon by WorkSafe. This can be taken as a complaint about, or a request for a review of, the temporary suspension.

3.69. This was acknowledged by Mr Smith on 1 April 2020. The text of his email reads as follows:

“This is to acknowledge the receipt of your submission. It will be forwarded to the decision maker for his consideration.”

3.70. The focus of WorkSafe’s attention for the next few months appears to have been on the substance of the investigation. In particular, an issue had arisen as to whether a prime mover could be a “tank wagon”. This, as well as process issues around the investigation’s progression, given that it had now over-lapped with the investigation that had led to the first suspension, were the focus of activity. I could find no evidence of a substantive response to the complaints about the temporary suspension.

3.71. By September 2020, the investigation was reaching its endpoint. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3.72. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3.73. On 16 September, Mr Smith sent an email to Catherine Gardner, who was by that time his manager. That email recorded Mr Smith’s view that the safety concerns that existed when the authorisation was suspended no longer existed, and his view it was appropriate for the suspension to be lifted.²² Mr Smith went on to say that, if Mr Hetherington agreed with the proposed lifting of the suspension, he (Mr Smith) would make arrangements for that to

²² Mr Humphries explained Ms Gardner’s involvement, as opposed to his, on the basis that Ms Gardner had been put in place as Mr Smith’s direct supervisor. In those circumstances, it was no longer necessary for Mr Humphries to be involved in the decision making chain, between Mr Smith and Mr Hetherington, who was the ultimate decision-maker.

happen and for [REDACTED] to be advised. Dr Gardner forwarded Mr Smith's email to Mr Hetherington, adding "given all the circumstances it would be appropriate to lift [REDACTED] suspension".

- 3.74. On 22 September 2020, Mr Hetherington wrote to [REDACTED], updating him on the investigation and the suspension, as follows:

"You have subsequently provided WorkSafe with a submission regarding this complaint, and WorkSafe has completed its investigation and is in the process of finalising its report.

While a decision has not yet been made as to the outcome of this investigation, WorkSafe is satisfied that based on the evidence it is no longer necessary for safety to suspend your 'tank wagons in service' compliance certifier authorisation.

The partial suspension of your authorisations for 'tank wagons –in service' has been lifted and the compliance certifier's register has been amended to reflect this change."

- 3.75. On 25 September 2020, [REDACTED] was sent a further letter by Mr Hetherington. This recorded WorkSafe's findings and its determination that no further action would be taken. The letter reminded [REDACTED] of WorkSafe's expectations that compliance certifiers will "undertake their role in an objective manner that promotes safety and in doing so exercise sound judgement, make appropriate compliance decisions and be able to demonstrate the rationale for those decisions to WorkSafe".

Discussion

- 3.76. Mr Smith's 1 April 2020 acknowledgment of [REDACTED] submission could not properly be said to exclude the temporary suspension, but neither could it be said expressly to refer to it. If it was acknowledged that there was a complaint, [REDACTED]
- 3.77. Mr Hetherington signed off the 22 September 2020 letter to [REDACTED], recording the lifting of the temporary suspension. This appears to have been influenced by Mr Smith and Dr Gardner's advice as to the necessity of that suspension. However, as with suspensions discussed earlier in this advice, there is no written evidence of Mr Hetherington's decision-making process. A handwritten record of his having considered the facts [REDACTED]

²³ Again, in fairness to Mr Hetherington, it is important to record that such a record may exist. However, if so, WorkSafe was not able to provide me with a copy of it.

4. THE INTERNAL REVIEW APPEAL OR COMPLAINTS PROCESS IN RELATION TO TEMPORARY SUSPENSION OF AUTHORISATIONS

The review of temporary suspensions process

- 4.1. The first point that needs to be made about “the review of temporary suspensions process” is that it has only been used on 4 occasions between 2017 and 2021.
- 4.2. On the basis of my inquiries, my sense is that there does not seem to be a “review process” in any formal sense of the term. In other words, I was not referred to any agreed or resolved methodology for responding to complaints about temporary suspensions. Rather, the exercise of receiving, recording, considering and resolving complaints about temporary suspensions appears to have been informal and organic in nature.
- 4.3. That is not to say that steps taken were not to be appropriate to the circumstances, given the absence of a formal process as noted above. It is simply that they appeared largely governed by decisions, taken at the time, as to what the appropriate next step would be. There was no over-arching policy, procedure or process to guide those involved as to how to move forward.

The receipt and recording of complaints and requests for review

- 4.4. The WorkSafe staff that I spoke to did not refer me to any particular process or policy for the receipt and/or recording of complaints or requests for review of temporary suspensions. The inference that I take from that is that there was no such process or policy. As noted, Mr Smith recorded emails and other communications that came to him in his jobsheets. That appears to have been the extent to which the recording of complaints was undertaken.
- 4.5. In ██████████ case, the request to have his suspension limited (which was effectively a request for a review of the suspension) was emailed to ██████████. That was consistent with ██████████ having been the signatory of the letter of 16 March advising him of the temporary suspension. The complaint was recorded by the receipt of the email but not in any other sense that I could discover.
- 4.6. In ██████████ case, she had previously been assisted by Mr Moore in dealings with WorkSafe. Mr Smith contacted Mr Moore and advised him of the temporary suspension. Relatively quickly, a dialogue ensued between Mr Moore and Mr Smith, on behalf of WorkSafe, in which Mr Moore indicated that he had instructions to initiate legal proceedings with a view to having the temporary suspension overturned but his client was amenable to discussing matters with WorkSafe in the hope that proceedings would not need to be issued. Again, this was communicated by email, and other than Mr Smith noting receipt of the email in his jobsheet, there did not appear to be any other recording of the complaint.
- 4.7. Similarly in relation to ██████████ first suspension, the decision led, quite quickly, to correspondence between his legal advisers and WorkSafe in relation to the decision. In relation to ██████████ second suspension, a submission was made, complaining about the decision. However, there was no evidence provided to me of any formal recording of receipt. That might reflect a natural concentration on the substance of the investigation, rather than complaints about the process. However, that might have contributed to the absence of meaningful response by WorkSafe until the point at which the investigation was nearly complete.

- 4.8. Mr Humphries advised me that Mr Smith now maintains a complaints database, which would include any complaint about, or a request for a review of, a decision to temporarily suspend a compliance certifier. Mr Smith helpfully provided me with screenshots of the database. This includes information in relation to the complainant, the investigator to whom the complaint is assigned. The last page is a “dashboard” of the database, which details workload and the disposition of files. This is sent to the Head of Specialist Interventions every week. That approach seems appropriate.

WorkSafe’s responses to those complaints and requests

- 4.9. As noted earlier, ██████████ response to ██████████ complaint was sent to him the day it was received. Whether that promptness in response served the cause of ensuring that ██████████ request for review was adequately addressed is doubtful.
- 4.10. In relation to ██████████ temporary suspension, Mr Smith provided a number of updates to Mr Moore as to progress of the proposal for resolution. Those were worded in a relatively definitive way. In light of the need for legal advice and final sign-off by senior management, these statements perhaps went further than was wise in the circumstances. Ultimately, nothing came of that, but it might have proved difficult for WorkSafe had the negotiations as to the wording of the undertaking not borne fruit. Care needed to be taken not to make any comment that might potentially have the effect of fettering the decision-maker’s power.
- 4.11. What is clear is that Mr Moore’s request for re-consideration of the temporary suspension was acted on immediately and led to an on-going and constructive dialogue between Mr Moore and WorkSafe which ultimately led to the removal of the temporary suspension. Mr Smith appropriately escalated decision-making on the written undertaking and removal of the temporary suspension to his supervisors. He sought and obtained legal advice at appropriate times. As a result, the temporary suspension was removed within weeks of the original suspension decision being made.
- 4.12. ██████████ first temporary suspension led, almost immediately, to a highly assertive response by ██████████ legal advisers. This was critical of the decision-making, and WorkSafe’s approach to the provision of supporting information. Whether those claims were correct did not form part of this review. ██████████ lawyer sought a meeting, and there was considerable correspondence and communication around the practicalities of this. This proved challenging. In their dealings, it was clear to me that WorkSafe, and Mr Smith in particular, were attempting to uphold the high standards expected of public servants.
- 4.13. In relation to ██████████ second suspension, if it was accepted that his submission was a complaint about the temporary suspension, the response to this does not appear to have been meaningfully advanced for some months, at which point the investigation was nearing its conclusion.
- 4.14. Again, WorkSafe’s responses to requests for review and/or complaints about temporary suspensions appears to have been undertaken on a relatively ad hoc basis. No criticism is intended in the use of that phrase. It is simply intended to convey that the approach was governed by individual’s judgment as to the appropriate course of action. WorkSafe staff appear to have tended to use their experience and judgment in determining the best way to proceed.

Timeframes for decision-making in relation to those complaints and requests

- 4.15. As recorded above, ██████████ responded to ██████████ request for a variation of the terms of his temporary suspension only a matter of hours after the request was made. The

response was clearly timely. However, it is not the timeliness of the response but the absence of clarity as to the evidence of substantive re-consideration that is an issue.

- 4.16. In relation to [REDACTED], the removal of the temporary suspension was only a matter of weeks from Mr Moore first raising it as a possibility.
- 4.17. As to [REDACTED], there was some delay in arranging a meeting that had been proposed by [REDACTED] lawyer. Viewed objectively, that appears to have been the result of availability issues (on both sides) and, in particular, the difficulties associated with ensuring that the correct persons at WorkSafe were going to be involved in discussions. In the end, my assessment was that the temporary suspension was removed earlier than would have been prudent.
- 4.18. As discussed above, in terms of [REDACTED] second suspension, there was no evidence of a meaningful decision on the complaint, [REDACTED]
[REDACTED]

Management oversight of complaints and requests

- 4.19. In relation to [REDACTED] request for a review of the scope of the temporary suspension, [REDACTED], who was the decision-maker, took the lead on the response to the request. To that extent, management oversight was significant. Whether or not the substantive result was correct is another matter.
- 4.20. As soon as [REDACTED] request for reconsideration of the temporary suspension was received, Mr Smith responded to indicate that he would need to speak to the decision-maker. He did so shortly after. From that point on, however, there is no record provided to me that would indicate that Mr Smith's managers had oversight of the process. It may be that they did. Mr Smith was certain that Mr Hetherington would have approved the decision to lift the suspension. That may be so, but there was nothing to record that formal decision in the material provided to me.
- 4.21. As to [REDACTED] first suspension, the complaints and/or request for reconsideration was accompanied by a request for a meeting with the decision-maker. That was on 27 February 2019. This set in train an attempt by Mr Smith to arrange a telephone conference. It is clear, from his contemporaneous records, that this involved communications with the Manager Legal Group, Ms Szeto, Mr Humphries and Mr Hetherington. Mr Smith met with Mr Humphries and Mr Hetherington on 1 March. As matters progressed, it is clear that Mr Humphries in particular was involved by Mr Smith in the communications process.
- 4.22. Mr Hetherington's letter to [REDACTED] of 13 May 2019 provided background to Mr Smith's raising the possibility of the lifting of the suspension with [REDACTED] on 14 May 2019. However, it is not clear that, from that point, there was meaningful management oversight of the process. In particular, there was no written material that I was provided with that linked Mr Hetherington with the ultimate decision to lift the temporary suspension. Again, he may have been involved, and possibly closely, but that is not apparent from the documents.
- 4.23. [REDACTED] met his second suspension with a submission that dealt with the substance of the matter being investigated and also the process by which WorkSafe reached its decision to suspend. That was on 31 March 2020. There was no written evidence of management oversight of the response to that submission, so far as it related to the temporary suspension, until the point at which Mr Hetherington wrote to [REDACTED], on 22 September 2020, to advise him that the suspension had been lifted. Again, management

oversight may have been regular. However, if that was the case, then it is not apparent that that oversight was focussed on ensuring that there was a meaningful response to the complaints about the suspension.

Processing of review requests and complaints including resourcing and the availability of appropriate support

- 4.24. Generally, it appears that the processing of review requests and complaints was subsumed into the investigation process, in the sense that Mr Smith appeared to undertake all aspects of the day to day “running” of the process. This involved acting as a conduit of information between the compliance certifier involved and the various components of WorkSafe whose involvement was required in terms of a response to the complaint.
- 4.25. Mr Smith’s primary role was to investigate the various substantive allegations. A complaint about, or a request for a review of, a temporary suspension is, in essence, an appeal against the decision taken, albeit not independent but internal to WorkSafe. The complaint created a new process. Mr Smith had a role to play in that process, but that role was more consistent with that of a witness or adviser to the decision-maker. As investigator, he had information that was relevant to the reconsideration of the decision. However, his being required to organise the process by which WorkSafe responded to the complaints added an entirely new function, essentially requiring him to act as an intermediary between the certifier and the decision-maker as to issues of process. This put Mr Smith in a difficult position.
- 4.26. When asked about the absence of any extension to the timeframe for investigation into [REDACTED], Mr Smith referred to the fact that the Regulatory Assurance team consisted only of himself and Mr Nicholls. He assured me that that would not happen now. The inference that I took from that statement was that, had there been greater resource and/or support, it was more likely that the process around extension would have been complied with.
- 4.27. Mr Smith, and the processes generally, appear to have been assisted, on numerous occasions, by legal support and advice.

Oversight of extensions

- 4.28. In relation to [REDACTED], and in relation to the second suspension of [REDACTED], the issue of extension did not arise.
- 4.29. In relation to [REDACTED], the investigation commenced on or around 30 January 2020. It concluded on or around 21 August 2020. Mr Smith calculated that the length of the investigation was 135 working days. By my reckoning, and operating on the basis that the investigation commenced on 30 January, the 80 working day period lapsed at some point near the end of May.
- 4.30. Mr Smith indicated that the investigation had only been underway approximately 30 days when New Zealand first went into Covid-19 lockdown in 2020. Mr Smith said that he had discussed the prospect that there would be a delay with Mr Moore and confirmed that in an email. Following New Zealand’s emergence from lockdown, Mr Smith was away from work for a further two months [REDACTED]. He indicated that, by the time he returned to work it was quicker to resolve the investigation than to seek an extension.
- 4.31. I sought information as to whether any of his managers had oversight of this. Mr Smith’s response suggested that resources were limited at the time and that, if there was management oversight of this issue, it too was limited. Mr Smith pointed out that the

Regulatory Assurance unit now operates in a different way, with weekly meetings to ensure that work is prioritised and weekly reports to their national manager.

- 4.32. Regulation 6.17 is clear in its terms. An investigation must be completed within 80 working days unless WorkSafe decides that it needs more time to complete the investigation. The point is that there must be a decision. I was not provided with any information that would indicate that a person holding a delegation under regulation 6.17 made any such decision. That stands to reason given Mr Smith's explanation of the position.
- 4.33. Under regulation 6.17(2), following a decision to extend, WorkSafe must notify the compliance certifier concerned and the complainant (if any) of the delay and the reasons for it. Mr Smith emailed ██████████ lawyer on 25 March 2020 as follows:
- "Thank you for your response to the questions relating to our current investigation of ██████████. She has raised a number of points that will require further clarification such as conversations with various WorkSafe staff members and email exchanges. From here I will complete a draft investigation report and sent it to you for ██████████ to make a submission. As you will appreciate we are all operating in extraordinary circumstances and I will try to have the draft report to you as quickly as possible."*
- 4.34. At the time it was sent, the investigation had not yet reached the 80 working day limit, and was some still time away from it. In those circumstances, the email could not be taken as a formal notification under regulation 6.17(2). Of course, by this stage, the temporary suspension had been lifted.
- 4.35. Ultimately however in relation to ██████████, it does not seem that WorkSafe complied with the requirements of regulation 6.17 in respect of the extension of investigation life beyond the 80 working day limit.
- 4.36. As to ██████████, Mr Smith indicated that the two investigations took, respectively, 263 days and 67 working days. Only the first, therefore, raised any issue as to the extension of the 80 working day limit.
- 4.37. Mr Smith provided me with two memoranda from him to Mr Hetherington seeking extensions. These were dated 10 May 2019 and 12 August 2019. Mr Smith confirmed that these were granted.²⁴ On 17 May 2019 and 13 August 2019, Mr Smith emailed ██████████ to advise him of the extension decisions. According to Mr Smith, in each case, ██████████ lawyer sought copies of the memorandum seeking the extension and these were provided. The management oversight of the two extensions appears to have been appropriate.
- 4.38. Whether Mr Hetherington's letter of 25 October 2019 to ChenPalmer Partners constituted a further extension, in terms of Regulation 6.17 is, as I have said, arguable.

²⁴ I was provided with the memorandum for each extension request. Each included a place for Mr Hetherington to sign the memorandum to indicate his agreement to the extension. While I was not provided with a signed copy, Mr Smith ensured me that they were, on each occasion, signed by Mr Hetherington.

Communications of decisions and rationales in respect of review/complaint outcomes

- 4.39. ██████████ request for re-consideration of the scope of his suspension was made by ██████████. I have identified issues with the rationale underlying ██████████ decision.
- 4.40. In relation to ██████████, the way in which matters proceeded, all communications were undertaken between Mr Moore and Mr Smith. There is no evidence of the decision-maker having communicated the outcome of the complaint to ██████████. That almost certainly reflects the history of the dialogue between the parties and the negotiation-style communications between the parties.
- 4.41. In terms of the ultimate decision to remove the suspension, communication of that was delegated to Mr Smith. This was communicated to ██████████ through Mr Moore. Beyond referring to the undertaking, the email sent did not provide any comment as to the basis for the decision.
- 4.42. As to ██████████, in relation to the first suspension the same observation could be made. Mr Smith was used to communicate between WorkSafe and ██████████. From the point at which Mr Hetherington gave Mr Smith his oral approval for the lifting of the suspension, based on a written undertaking (which never eventuated), there was no evidence that I could find that would objectively place Mr Hetherington in a position of making a decision as to whether the safety threshold provided for in Regulation 6.16 was still met. ██████████ was informed of the lifting of the suspension shortly after, but not of the rationale of the decision, primarily because the process of the lifting of the suspension appears to have overcome any meaningful decision-making process. That is perhaps explained by the fact that the written undertaking, the condition on which the suspension was to be lifted, never eventuated.
- 4.43. The lifting of the second ██████████ suspension was undertaken through a letter from Mr Hetherington. That letter did not disclose the rationale for the change of WorkSafe's position.

Operational practice

- 4.44. The Terms of Reference call for me to consider operational practice and its relevance to reviews and complaints about temporary suspension of compliance certifier authorisations.
- 4.45. I asked Mr Handforth, who was responsible for commissioning this review, and who drafted this component of the Terms of Reference, what he meant by "operational practice". He indicated that this was intended to refer to practice guidance and standards as to good practice for the processes being addressed. Essentially, I took this to mean something of a "roadmap" that should be applied to WorkSafe's response to requests for reviews of, or complaints about, temporary suspensions.
- 4.46. I asked a number of WorkSafe staff members about this. Beyond reference to WorkSafe's complaints procedures, no-one was able to point me to a guidance document that could be used to assist in the response to a complaint or request for review in relation to a temporary suspension. This reflects my findings, set out earlier, as to the rather ad hoc approach adopted in relation to WorkSafe's responses to the complaints registered by ██████████ ██████████ and ██████████ and by ██████████.

- 4.47. Some expressed the view that, if WorkSafe did not have in place some form of operational guidance as to the management of complaints or requests for reviews of, temporary suspensions, then that should be addressed. I would endorse that view.
- 4.48. There are numerous aspects in which guidance might be of assistance. For example, a request for re-consideration of a temporary suspension is in essence a request for the decision-maker to revisit a statutory decision, made against the threshold set out in Regulation 6.16. The request calls for the legal process of assessing the evidence against that threshold to be repeated. That does not seem to have been central to the decision-making in the four cases reviewed. A statement as to the legal nature of the process might be of assistance to those involved in order to assist the decision-maker to make the best possible decision.
- 4.49. Evidence of the decision-making process, in relation to the complaints at the centre of this review, has been relatively limited. It is difficult to have full confidence in a decision if the basis on which that decision is not made is not recorded. Guidance as to the recording of the rationale behind the outcome of any reconsideration would almost certainly assist.
- 4.50. Communications between WorkSafe and complainers has, in the past, been relatively organic and informal in nature. Guidance as to who should be communicating on behalf of WorkSafe, and how, might also prove useful in the future.

WorkSafe's new complaints and feedback process

- 4.51. The terms of reference call for me to “consider WorkSafe’s new complaints and feedback process and its suitability as a mechanism for compliance certifiers to seek a review of, or complain about, the temporary suspension of their authorisations”.
- 4.52. WorkSafe appropriately recognises that, at times people will be unhappy with the way WorkSafe has undertaken its work or want to provide suggestions and feedback on how WorkSafe could better perform its functions. As a result, WorkSafe has produced a “Feedback and complaints policy and procedure”, which is dated 16 February 2021. Broadly, it articulates process expectations around feedback and complaints received by WorkSafe. It addresses:
- The keeping of records of complaints;
 - timeframes for dealing with complaints;
 - escalation to appropriate personnel;
 - processes to be followed in dealing with the complainant;
 - investigation and information gathering; and
 - processes to be adopted if the complainant is unhappy with the resolution of a complaint.
- 4.53. On its face, the policy and procedure document appears to represent a sound over-arching approach to responding to complaints about WorkSafe performance. That said, a complaint is defined in the document as “an expression of unhappiness or concern about a particular action, service, or decision which requires a response”. Examples include dissatisfaction with the way WorkSafe has followed its policies or procedures, delays in responding and the behaviour or attitude of WorkSafe people.

- 4.54. The policy overview suggests that the focus of the policy is to capture complaints and feedback as a learning exercise to improve how WorkSafe operates. That is internally focussed. The essence of an appeal or review process is to provide a remedy to the external person affected by the relevant agency's decision.
- 4.55. It seems axiomatic that compliance certifiers whose authorisations are temporarily suspended might feel dissatisfaction with the suspension action. It might be that, in certain circumstances, the application of the procedures referred to would be consistent with the policy's expectation. That might occur, for example, in circumstances in which the compliance certifier felt that WorkSafe staff had acted in some way inappropriately or unfairly.
- 4.56. However, there are a number aspects in which the issue of temporary suspensions does not sit easily with the WorkSafe complaints and feedback policy. The policy is designed to deal with complaints and feedback. This is suited to situations in which the conduct of an individual is at the heart of the complaint. But this is not really a complaint in the sense contemplated by the policy. It is an allegation that the decision to temporarily suspend is not supported by the evidence, or is simply wrong. The certifier in question might have no cause to complain about their treatment by an individual within WorkSafe but still consider that the decision to temporarily suspend was wrong and should be overturned. The terms of the document do not clearly suggest a mechanism for reviewing the substantive evidential basis for the decision reached.
- 4.57. The second point relates to the essence of the Regulations Review Committee's point, in relation to the absence of a right of appeal against a temporary suspension. This was that there was no objective and independent methodology available to test whether or not the suspension action was warranted. In other words, there was no process testing whether the "necessary for safety" threshold was actually met in the circumstances of the individual case.
- 4.58. If a review process were to have any rigour, a number of elements would be expected. First, I think that most would expect the review to have an independent element. That does not necessarily mean independence from WorkSafe. It might be possible for WorkSafe to identify a person or persons within the organisation, equipped to consider the temporary suspension against the threshold of "necessary for safety" and reach their own conclusion. There is nothing in the complaints and feedback procedure that would appear to reflect the independence of mind necessary to provide a rigorous review system.
- 4.59. There should be certainty as to what the review process would look like and that should be capable of communication to the affected person at the outset. The current complaints and feedback policy and process is not that prescriptive.
- 4.60. Ultimately, my recommendation would be that WorkSafe implement a "bespoke" process for the receipt, processing and determination of complaints about, and requests for reviews of, temporary suspensions.

WorkSafe's methods and approach and their effectiveness

- 4.61. Each case in which a compliance certifier complains about a temporary suspension will raise different facts and issues. That is a given. What is apparent, from a review of the cases in which compliance certifiers have complained to WorkSafe about a temporary suspension in

the past, is that there has been relatively little in the way of consistency in WorkSafe's response.

- 4.62. What would appear to be another theme is a comparatively "reactive" approach to the circumstances presented. That could perhaps reflect a focus on driving the investigation to its conclusion, rather than the complaint/review process.
- 4.63. There seemed to be relatively little consideration of the fact that, in essence, what was being sought in each case was a re-determination of whether or not the safety threshold was met, such that it was appropriate, in terms of the Regulations, for the temporary suspension to remain. Certainly, there was relatively little evidence of the decision-making process in this regard. Necessarily, this leaves an absence of comfort as to whether or not the decision-making process was robust in each case.
- 4.64. The effectiveness of these approaches is necessarily difficult to classify. In some cases, the approach was effective. Mr Smith's engagement with Mr Moore on behalf of ██████████ resulted in a reasonably speedy resolution of her complaints about the temporary suspension. WorkSafe was left in a position in which it had some comfort that the issues underlying the safety concerns were dealt with while the investigation proceeded.
- 4.65. Conversely, the resolution of the first suspension of ██████████ could not have been described as effective. WorkSafe was left in a position in which it had removed the suspension without receiving the written undertaking it apparently regarded as necessary to answer its safety concerns. There remain doubts in my mind as to whether or not a formal assessment of the safety risk was ever undertaken by the decision-maker, in this case, before the suspension was removed.
- 4.66. Finally, a word about the attitudes of WorkSafe staff. It is axiomatic that the work of the regulator, particularly these days, is sometime difficult and often thankless. I did not find any evidence to suggest that those who were involved with responses to complaints or requests for reviews were anything other than courteous, cooperative and constructive in their attempts to resolve the issues facing them. That includes dealings with certifiers and their legal advisers.

5. Conclusions and recommendations

- 5.1. The regulations provide for WorkSafe to take steps that could potentially have significant ramifications for the business interests of those certifiers involved. Between 2017 and 2021, this has occurred on five occasions, in respect of four compliance certifiers. Essentially, there were four complaints registered with WorkSafe as to these decisions.
- 5.2. In its essence, a complaint about a decision to temporarily suspend a compliance certifier calls for a reconsideration of the decision to impose the suspension under Regulation 6.16. Although not expressly provided for in the Regulations, such a reconsideration is as much an exercise of the discretion granted as the original imposition of the suspension. It calls for an appropriately formal process in receiving, recording, determining and communicating the outcome of the complaint or request for review.
- 5.3. Overall, WorkSafe's responses to the four instances in which temporary suspensions led to complaints or requests for their review appeared well-intentioned and focussed on being fair and reasonable in its dealings with the compliance certifier. That is commendable in circumstances in which it was apparent that the certifiers in question, and their legal advisers, were not always disposed to adopt a constructive approach to their dealings with WorkSafe.
- 5.4. However, WorkSafe's responses also appeared relatively organic and informal in nature. At times, transactional discussions associated with the basis on which a suspension might be lifted were allowed to obscure the true nature of the exercise, which was the reversal of what was, in effect, a statutory decision. A clear, consistent process was not discernible in the responses to the various complaints.
- 5.5. The same could be said for the process associated with extensions to periods of investigation under Regulation 6.17. On occasions, circumstances appear to have been allowed to overcome the regulatory requirement to formally extend.
- 5.6. Given that the reconsideration of a temporary suspension is an action incidental to a regulatory power, I would have expected to see at least some contemporaneous record by the decision-maker as to their decision and their reasons for it. In no case could I identify such a record from the information provided to me.
- 5.7. Those spoken to expressed a preference for some form of written policy document to be prepared providing operational guidance on the appropriate process to be adopted in response to complaints. They appeared, rightly in my view, to recognise that such a policy and/or procedure would provide them with protection as they negotiate complaints/review requests in the future.

Recommendations

- 5.8. I would recommend that WorkSafe give thought to the adoption of a written procedure for responding to complaints and requests for reviews of temporary suspensions. The existing WorkSafe complaints and feedback policy and process document contains elements that would be appropriate for this procedure. However, I would not recommend that WorkSafe simply adopt that complaints and feedback process for dealing with temporary suspensions.
- 5.9. If minded to implement some form of temporary suspension specific review process, WorkSafe should consider the following:

- notifying the individual of their review rights at the time of informing them of the temporary suspension (much as WorkSafe is required to inform certifiers of their appeal rights on decisions made under Regulation 6.20);
- informing them of the method by which their request for a review should be notified to WorkSafe;
- giving them information about the process and what they could expect from it; and
- identifying who the decision maker(s) will be;

5.10. I would envisage this document would also provide guidance to the decision-makers(s) as to:

- the legal nature of the exercise they are being asked to undertake;
- the information required for the decision;
- the decision-making process; and
- communication of their decision.

Duncan Ferrier
24 September 2021