

3rd February 2019

Michael Stiassny
Chairman
New Zealand Transport Agency
Victoria Arcade
50 Victoria Street
Wellington

Cc: Mark Ratcliffe
Interim Chief Executive
New Zealand Transport Agency
Victoria Arcade
50 Victoria Street
Wellington

Dear Mr Stiassny,

RE: TOWBAR CERTIFICATION REVOCATION

Introduction

- 1 We write on behalf of a consortium of towbar manufacturers to explain the widespread hardship and disruption caused by the New Zealand Transport Agency's ("NZTA") decision, retrospectively, to revoke the certifications provided to over 1,400 towbars. Between us, we manufactured approximately 1,000 of these towbars.
- 2 As you will be aware, all these certifications were given by the NZTA-appointed engineer, Mr Patrick Chu. Mr Chu was only engaged by us for his services because of his appointment by NZTA, and his appearance on NZTA's list of qualified towbar certification providers¹. NZTA has now said that all customers who relied on its appointment and advertisement of Mr Chu as a qualified certifier must pay the cost of NZTA's wrongful certification of Mr Chu.²
- 3 We find NZTA's response unacceptable, for the reasons we explain below. As a result, we have taken legal advice, which informs this letter.

Executive Summary

- 4 NZTA appointed, reappointed and recommended Mr Chu as a heavy vehicle towbar certifier. It did so **5 times** during an 11 year period. NZTA then revoked towbar certifications conducted by Mr Chu on the last business day before Christmas 2018.
- 5 NZTA now says that vehicle owners must obtain and pay for the re-certification of their towbars – using certifiers on the same lists on which NZTA used to advertise Mr Chu. Many of our customers have asked us how they can rely on NZTA's list of certifiers when the last time they did, NZTA simply revoked the certification and forced them to cover the costs.

¹ For the issue of LT400 compliance certificates.

² "Why is the Transport Agency not paying for recertifications by Patrick Chu when it paid for those by Peter Wastney?", in the section entitled "Regulatory compliance review questions and answers", NZTA website, January 2019.

- 6 Many of our customers have also asked us, as the manufacturers, to cover the cost of a re-certification. Some of them are confused and think there is a problem with their towbar. This is damaging our reputations as businesses, and eroding the goodwill we have with our customers. They are our customers, and we depend, for our survival, on their goodwill.
- 7 Mr Chu cannot cover the cost of our customers' re-certifications: his insurance has an excess of \$5,000 and his insurer will treat each customer's claim separately. No claim will exceed the excess, and so none of our customers will get money from Mr Chu.
- 8 Our businesses cannot afford to fund the cost of our customers' re-certifications. Each of our businesses has manufactured hundreds of tow bars that Mr Chu certified. Each towbar costs hundreds, if not a thousand dollars to certify and if we are forced to cover the costs of re-certifications our businesses will quite simply not survive.
- 9 NZTA should pay for the costs of re-certifications. As manufacturers of towbars we relied on NZTA's approval of Mr Chu as a towbar certifier, as did our customers. Now, our customers are demanding an explanation about why we used Mr Chu as a certifier and are asking what we are going to do about their obligation to obtain re-certification.
- 10 NZTA funded the costs of re-certifications in recent cases indistinguishable from this case. They must treat our customers fairly and cover the costs of the towbar re-certifications, given Mr Chu was not properly regulated by NZTA.

NZTA's Responsibilities and Obligations

- 11 NZTA's main objective is to "undertake its functions in a way that contributes to an effective, efficient, and safe land transport system in the public interest".³ We note that a way in which NZTA is empowered to contribute to this objective is through the "monitor and review [of] the performance of a vehicle inspector".⁴
- 12 We are not aware that NZTA exercised any monitoring or review of Mr Chu in recent years. Instead, on the occasions we list in paragraph 22 below, NZTA simply reappointed him as an inspector and stated to all vehicle owners that his certifications could be relied on. If NZTA had conducted a genuine oversight role, it would have detected the problems it had with Mr Chu much earlier, and the number of certifications it revoked would have been much lower. Instead, it failed to carry out its statutory functions and after 11 years of Mr Chu as a towbar certifier, it has invalidated over 1,400 of his inspections. If it had acted sooner, our businesses would not be in this position.
- 13 NZTA's revocation of Mr Chu's towbar inspections spanning a number of years also suggests that Mr Chu should not have been continually reappointed as a towbar certifier. If NZTA was performing its role competently, why did it reappoint him 5 times over 11 years?
- 14 Alternatively, if NZTA was right to appoint and reappoint Mr Chu on 5 occasions, then why have his towbar inspections – covering the period of those appointments – been retrospectively invalidated?

³ Section 94, Land Transport management Act 2003.

⁴ Section 3.1(1), Land Transport Rule: Vehicle Standards Compliance 2002.

- 15 With respect, we do not understand why NZTA repeatedly reappointed Mr Chu when NZTA now says that towbar inspections he provided at that time were unsafe and unlawful. If NZTA has so drastically changed its position on the nature of what Mr Chu was doing, how could we – or our customers – properly identify what he was doing at the time? If we could not, then how is it fair that we, rather than the specialist regulator, bear the cost of re-certifications?
- 16 NZTA has itself recently admitted that its regulatory practices have “failed” and that they “have to do better”.⁵ More specifically, NZTA admitted that it “has not devoted enough attention or resource to ensuring compliance”.⁶
- 17 With respect, that is exactly what has occurred here. NZTA reappointed Mr Chu multiple times over an 11 year period. It now says that towbar inspections Mr Chu provided during that period were unlawful. It announced this on the last business day before Christmas, and it has refused to fund any of the costs people incurred in reliance on its word.
- 18 Mr Haszard has stated that “The Transport Agency is working hard to put things right”.⁷ Its actions in the Dargaville Diesel Specialists (“**DDS**”) case and in Mr Wastney’s case were steps in that direction.
- 19 However, there are 1,400 people who for years relied on the repeated appointments and statements by NZTA about Mr Chu. Without NZTA’s statements and actions no one would have engaged him. They did and they are now out of pocket. The only proper response is to recognise that people relied on NZTA and to pay for their re-certification costs, as NZTA has done in similar situations.

History

- 20 Mr Chu was an engineer at the company Transport & Structure Limited (“**T&S**”).
- 21 As you will be aware, at the time that NZTA suspended Mr Chu’s licence as a Heavy Vehicle Specialist Certifier (“**HVSC**”) in October 2018 he was a certified provider of Heavy Vehicle Specialist Inspection and Certification services under s 2.2(1)(i) of the Land Transport Rule: Vehicle Standards Compliance 2002.
- 22 NZTA first appointed Mr Chu as an HVSC under s 2.2(1)(i) on 27 July 2007. NZTA reappointed him to that category of inspections on 5 occasions. That is, NZTA saw fit to reappoint Mr Chu as a heavy vehicle specialist inspector over a period of 11 years to conduct the same functions from which they have now revoked his certification. The dates for NZTA’s re-certification of Mr Chu were:
 - 24 February 2012
 - 24 July 2012
 - 22 February 2013
 - 21 August 2013
 - 21 February 2018.

⁵ “NZTA reviewing regulatory compliance and getting tough on enforcement”, NZTA Website, 15 October 2018.

⁶ As above.

⁷ “Meredith Connell completes review of most urgent NZTA files”, NZTA website, 29 November 2018.

- 23 We have seen no evidence that Mr Chu altered his method of towbar certification during this period, such as would justify NZTA's decisions to continually reappoint Mr Chu, and then to revoke his towbar certifications on 21 December 2018.
- 24 We are not aware that NZTA carried out any oversight of Mr Chu over this period. However, we infer that either NZTA audited Mr Chu and found no cause for concern, or NZTA did not audit Mr Chu, in derogation from its obligation to contribute to a safe land transport system under the Land Transport Management Act 2003.⁸
- 25 In either event, towbar manufacturers and vehicle owners who relied on the accuracy of NZTA's appointment cannot be expected to discern problems with Mr Chu's certifications, if NZTA did not discover any problems itself.

Widespread Hardship and Disruption

- 26 Since NZTA's decision on 21 December 2018, we have been inundated with inquiries and complaints from vehicle owners for whom we manufactured towbars and whose certifications were provided by Mr Chu.
- 27 There are two main ways in which NZTA's decision has caused real hardship to our customers, and as a result, to us. The first is the disruption, expense and stress caused by people's inability to use their towbars. The second is the cost of re-certification and the damage to the reputations of our businesses.

Disruption, expense and stress

- 28 After appointing and reappointing Mr Chu for over 11 years, NZTA revoked his towbar certifications with immediate effect on the last business day before Christmas. Many vehicle owners had already gone on holiday, towing trailers, caravans or boats across the country, and a good distance away from their homes. Others were no doubt planning to leave on holiday and to use their towbars, when NZTA announced the invalidity of their certification.
- 29 In practice, NZTA advised that vehicle owners "must not tow anything until the tow bar has been re-certified".⁹ This included those who had already towed trailers, caravans or boats to a holiday destination.¹⁰
- 30 Many of our customers depend on their towbar for their livelihoods. NZTA's decision to revoke past towbar certifications – during a shortage of other towbar certifiers – has forced many to lose business and the ability to provide for their families, or to break the law and continue to use their towbars. Vehicle owners should not have to face these invidious choices.
- 31 Our customers have described to us the enormous business disruption that NZTA's decision has caused. We detail a small fragment of the distress NZTA's decision has caused, and append the letters we have received to this letter.

⁸ Section 94.

⁹ "Safety Alert: Tow Bars Certified by Patrick Chu (Transport & Structure Limited)", NZTA website, December 2018.

¹⁰ "I am already on holiday, can I still tow using my trailer home?", on "Safety alert questions and answers: Heavy Vehicle Certifications by Patrick Chu (Transport & Structure Ltd)", NZTA website, December 2018.

- 32 Small businesses have been especially hard-hit. Trudi McHale wrote to us to say that her business has only one tow vehicle which they use to tow diggers, bobcats and a Scissorlift. She says that she has had to turn down business as a result.
- 33 Graham Skinner of Quattra Mechanical Limited states that his business risks 'serious damage', given his trucks cannot be used for their intended purpose. Further, the recall has meant a deficit in qualified engineers to provide certifications, compounding the cost on business of NZTA's decision.
- 34 Paul Davies runs an owner-operator drain laying business, Drainedge Limited. In his words: "I rely on my towbar to tow my digger which is imperative to my work. I am now unable to fulfil my work requirements...I have no other vehicle."
- 35 Alan Tian of Ad Hoc Rental Limited says that his bus rental company was unable to use 9 of its buses to tow shuttle-trailers. As he put it "during the Christmas period...where do I go to find an engineer?"
- 36 These excerpts provide a snapshot of the correspondence we continue to receive from former clients who are out of pocket and stressed at the ongoing disruption caused by NZTA's decision. Some have taken it out on us, and expect us to solve the problem of an expensive re-certification.

Expense of Re-certifications

- 37 NZTA advised one of our members on 14 January 2019 that "any liability for the costs involved in the recertification of towbars originally certified by Patrick Chu would be a civil matter between the customer, Patrick Chu and yourselves".¹¹ We are reliably advised that Mr Chu's professional indemnity insurance has an excess of \$5,000 and that his insurer will treat each claim against him in isolation, such that no individual claim would meet the excess threshold. This makes the problem of cost more acute and requires that NZTA steps in to assist those put out of pocket.
- 38 The businesses we represent are simply unable to cover the costs of our customers' re-certifications. As you are aware, each certification costs hundreds of dollars. If each of the companies in our consortium is required to fund re-certifications of those of the roughly 1,000 towbars it manufactured, the cost *to each business* is easily in the hundreds of thousands of dollars, if not higher. None of our businesses is designed to bear such a heavy burden, especially in so short a time period. In addition, the serious deficit of heavy vehicle specialist certifiers in the current market is likely to mean that certifiers increase prices. We cannot bear this cost.
- 39 As you will appreciate from the letters we attach and from which we quoted, most of our customers will struggle to pay for their re-certifications too. Many are small businesses who have already been left underpaid while their vehicles have been idle since NZTA's decision. They can ill afford the hundreds of dollars for a new certification.
- 40 We are therefore left in an impossible position. Either we cover the costs of some of our customers' re-certifications and run the real risk (for all of us) of bankruptcy, or we refuse to cover the costs and watch our customers' goodwill erode. As we were the people who referred our customers to Patrick Chu, naturally they ask for our help when Mr Chu cannot help them.

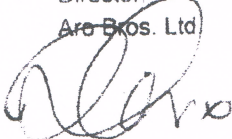
¹¹ Email of Dan Thomson (NZTA) to Ian Crump (Acker Bilt), on 14 January 2019.

Compensating a Lack of Oversight

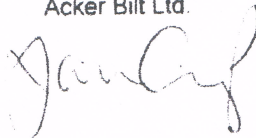
- 41 We also cannot find a relevant point of distinction between this situation – where 1,400 people relied on incorrect NZTA appointments – and those of Peter Wastney and the Warrants of Fitness issued by DDS. Yet in both of the latter cases NZTA has agreed to fund the remedial costs.
- 42 As Meredith Connell Managing Partner Mr Steve Haszard said: "We're reminding people again that the recheck costs [of wrongfully issued WOFs] will be met by the Transport Agency".¹² We understand that a similar number of people are affected here as in the DDS case, and just as customers of DDS relied on the validity of NZTA's appointment of DDS as a WOF provider, so we and our customers relied on Mr Chu's appointment.
- 43 NZTA initially stated that the payments made in Mr Wastney's case and in DDS's case were 'voluntary' and were not intended to set a precedent. Even if that was NZTA's intention, as a public body NZTA must comply with the precepts of fairness, the most fundamental of which is to treat like cases alike. As we have said, there is no relevant factual difference between this case, DDS and Mr Wastney. As a result, there is no justification for covering the owners' costs in those cases but not in this case.
- 44 We cannot see how requiring our customers (and us) to bear the re-certification cost contributes to a fair or efficient system of public transport. As we have said, the burden of covering these costs in hundreds of cases poses a critical threat to our businesses. It cannot be efficient to land transport for NZTA to refuse to cover the costs of its own negligence, when that risks bankrupting multiple companies in the same industry. This is not only unfair; it is not linked to NZTA's statutory functions.

Yours sincerely,

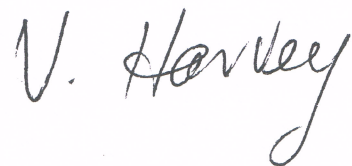
Shirley Aro,
Director,
Aro Bros. Ltd.



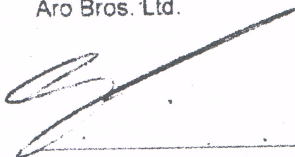
Ian Crump,
Director,
Acker Bilt Ltd.



Vince Harvey,
Director,
Counties Commercial Ltd.



Alex Puri
Director,
Aro Bros. Ltd.



Jeremy Moore,
Director,
Acker Bilt Ltd.



¹² "NZTA urging owners to get their vehicles rechecked", NZTA Website, 25 January 2019.