WorkSafe is wrong in relation to compliance requirements for large retail shops

WorkSafe has reached an approach to interpreting regulation 11.33 (governing large retail shops) which, in Chapman Tripp's opinion, is incorrect. This has been communicated to WorkSafe but, alarmingly, it has not shown any inclination to correct its errors. We show why it must.

1. Key Points

- Regulation 11.33[1] allows retail shops in standalone buildings to hold large quantities of flammable liquids (**11.33 Quantities**).
- The controls required to exist before 11.33 Quantities may be kept in retail shops are (i) a minimum separation of 3 metres around a stand-alone building or (ii) fire-rated walls between the shop and its neighbours (**11.33(1) Requirements**).
- WorkSafe has allowed retail shops to hold 11.33 Quantities when the 11.33(1) Requirements have not been met. WorkSafe's interpretation[2] is that 11.33(1) does NOT need to be met before 11.33(2) applies (**WorkSafe's 11.33 Interpretation**).
- A Chapman Tripp opinion, commissioned by DGC, concluded that WorkSafe's 11.33 Interpretation is incorrect.
- The dangers associated with WorkSafe's incorrect approach are demonstrated by a recent fire in Takanini.
- DGC has explained to WorkSafe why DGC's interpretation is correct and WorkSafe's is incorrect. Despite this, WorkSafe has not taken any steps that we are aware of to change its approach – we argue this breaches its obligations under the WorkSafe New Zealand Act 2013.
- WorkSafe's 11.33 Interpretation has no legal effect and shops operating under the false belief that they are compliant ought to change their perspectives. The legal responsibility under the Regulations sits with the PCBU's and they are not absolved of their responsibilities by relying on incorrect interpretations made by WorkSafe. Importantly, insurers can be expected to focus on the correct approach to 11.33 if there is a fire caused by flammable liquids. DGC will assist the insurers if need be.
- More than 700 retail shops in NZ could be impacted. Neighbours of stores holding 11.33 Quantities, and insurers, should be very concerned about WorkSafe's incorrect 11.33 Interpretation.

[1] Health and Safety at Work (Hazardous Substances) Regulations 2017

[2] Derived from internal WorkSafe documents supplied under the Official Information Act 1982.

2. The Issues in a Fire –Takanini -18 May

The fire during the early hours of the morning of 18 May 2022 had five fire engines in attendance at the peak of the fire and a fireman was injured fighting the fire.

Before the fire

After the fire

The before and after photos show:

- The fire started at Papakura Engine Specialists (**PES**) and spread to Mr Money.
- There is a tilt concrete slab (fire-rated) wall between Mr Money and BNT Automotive.
- The BNT store was undamaged and opened for business on the day of the fire.
- There is both separation and a brick wall between PES and Yamaha. The Yamaha shop was largely unaffected.
- The PES and Mr Money locations were very badly damaged.

Thus, the existence of fire-rated walls and the separation distance prevented the spread of the fire (along with the efforts of FENZ – critical to their ability to contain fires is the existence of controls which provide time for FENZ to act). This demonstrates why the 11.33(1) Requirements exist.

Firefighters from around the city were called to a blaze on Walters Rd in Takanini, South Auckland, overnight. Photo / Hayden Woodward

Although BNT Automotive in Takanini is not an 11.33 compliant retail shop, the key point to note is that it was protected due to the existence of the tilt slab concrete walls. Without such walls, we assume the fire would have spread to BNT and its flammable liquids.

Fire-rated walls and separation distances are the two key controls to be satisfied before 11.33 Quantities can be held.

3. WorkSafe's View of the Requirements for Holding 11.33 Quantities

The Regulations contemplate two types of stores – those that comply with 11.33 and those that do not – these are subject to the requirements of reg 11.32 and can hold quantities which are approximately a quarter of the 11.33 Quantities.

WorkSafe has reached a conclusion that when it comes to Regulation 11.33, it is not necessary for the PCBU to satisfy 11.33(1) before it can take advantage of the 11.33 Quantities allowed by 11.33(2).

Thus, for example, had a hardware shop been operating in the space occupied by Mr Money, according to WorkSafe, the store could have had lawfully stored inside more than 9,000 litres in total of flammable liquids. If "money" burns as it did, we can imagine what the total impact would have been with 9,000 litres of flammable liquids ready to explode and burn. The explosion could have been huge because, in addition to the flammable liquids, retail hardware shops normally hold large quantities of other hazardous substances capable of exploding.

We have no doubt the correct approach to 11.33 requires a store to first comply with reg 11.33(1) before it can hold the aggregate quantities of flammable liquids allowed by 11.33(2).

We can also demonstrate the correct approach by considering the BNT store shown in the photos above. BNT Automotive is clearly not in a stand-alone building[3] and could only meet the requirements of 11.33(1) if the wall between it and Mr Money (and also its neighbour on the other side) were 240/240/240 fire-rated. We can see from the aftermath of the fire that the fire-rated wall did exactly what fire-rated walls do – prevent the fire reaching the other side and allowing FENZ to intervene. This demonstrates the safety precautions that are built into the Regulations.

Fire-rated walls protect neighbours:

- Any fire which started at BNT Automotive would be unlikely to spread to Mr Money, before there was a chance for it to be controlled
- Any fire which happened to start at Mr Money's neighbour would be highly unlikely to reach BNT.

We can also see that the twin effects of the brick wall at Yamaha and the separation distance between its store and PET also prevented the spread of fire to Yamaha. A three-metre separation distance is one of the other requirements in 11.33(1).

These same concepts (as important controls) are recurring themes in the Hazardous Substances Regulations and they are obviously considered to be of considerable importance (and sensibly so) when a hardware shop holds 9,000 litres of flammable liquids.

Now consider whether any of us would want our loved ones to be in the Mr Money shop at any time when its neighbour (our hypothetical hardware shop) holds 9000 litres of flammable liquids. The probabilities of adverse event may be low but the consequences are extremely high.

4. Background to Why DGC obtained a legal opinion from Chapman Tripp

DGC has many disciplined, skilled compliance certifiers with diverse qualifications, including law degrees. We are confident that we can correctly marry the legal requirements with the daily situations arising in workplaces that we audit. We have endeavoured to assist and co-operate with WorkSafe as the chronology shows:

- **November 2020 -** we became aware that WorkSafe had allowed one large retail shop to be certified to hold 11.33 Quantities when it did not meet the 11.33(1) Requirements.
- **December 2020 –** we brought the issue to WorkSafe's attention.
- **May 2021 –** WorkSafe met to consider the technical/ interpretation questions arising in relation to 11.33 and reached its conclusion but did not communicate the reasons for its interpretation to us.
- **July 2021 –** we wrote to WorkSafe providing our detailed technical analysis of the application of reg 11.33 to the store in question. No response was received in relation to the technical issues.
- **Second half 2021 –** we asked several times for an explanation of the reasons for WorkSafe's conclusion. Nothing substantive was provided to us.
- **Second half 2021 –** we made applications under the Official Information Act for WorkSafe's analyses of the issues and the explanations for its conclusions. We were initially denied

[3] This is following the requirements listed in 11.33(1).

access. We also formally requested a public explanation for WorkSafe's views regarding its 11.33 Interpretation – nothing was provided to us.

- **January 2022 –** we contested WorkSafe's refusal to provide us with the information.
- **February 2022 –** we were provided with the information requested under OIA.
- **February 2022 –** after we read the basis upon which WorkSafe had arrived at its conclusion, we wrote to WorkSafe explaining why it was wrong.
- **February 2022 –** WorkSafe consulted with industry certifier bodies and used this as one of the reasons for why it was comfortable with its interpretation of 11.33 and the conclusions it had reached. The evidence that we have showed a totally lame effort which included asking the certifier who had made the original error at the store referred to above whether he had any difficulties applying 11.33.
- **February 2022 –** WorkSafe informed us that it intended releasing a policy statement in relation to 11.33. We urged WorkSafe not to, reiterating that its interpretation was wrong.
- **February/ March 2022 –** We commissioned and received the Chapman Tripp opinion.
- **April 2022 –** We offered to share the Chapman Tripp opinion with WorkSafe but could not accommodate WorkSafe's requirements for the extensive circulation of it.

We have decided to publish this memorandum because we believe WorkSafe needs to perform considerably better to meet the standards required in the WorkSafe New Zealand Act 2013, including its function "*to engage in, promote, and co-ordinate the sharing of information with other agencies and interested persons that contribute to work health and safety*."[4]

We have complained formally about how WorkSafe handled this issue. Mr Tim Smith, barrister, has been commissioned to review WorkSafe's processes. We ask for public dissemination of Mr Smith's report when it is complete.

5. Chapman Tripp opinion

We asked Chapman Tripp to opine on whether WorkSafe's approach to reg 11.33 was correct. The reasons provided for why WorkSafe's approach was incorrect are set out on the next page.

Chapman Tripp is one of NZ's premier law firms and Garth Galloway is a highly respected practitioner in the area. The opinion carries considerable weight.

[4] Section 10(i) WorkSafe New Zealand Act 2013.

Our opinion

16 We consider that WorkSafe's interpretation is incorrect for the following reasons.

17 First, reg 11.33(1) describes the criteria for "*a building*" to which "*this regulation*" to applies. Reg 11.33(2) then refers to "*the building*". The use of "*the*" as opposed to "*a*" in reg 11.33(2) indicates that it is referring to the building with the characteristics described in reg 11.33(1).

18 Second, the only way reg 11.33(1) has any effect is if it is seen as setting the criteria for a building to which reg 11.33(2) can then apply. If the reg 11.33(1) criteria could be overridden if a building which complied only with reg 11.33(2)(a) to (d), then reg 11.33(1) would be entirely redundant. It can be presumed that reg 11.33(1) was not intended to be redundant.

19 Third, "*protected place*" is a defined term and, as noted above, the Regulations commonly specify greater separation distances in respect of these places compared to public places. The words "*separation distance within and from the building may be zero*" in reg 11.33(2) are generic whereas regs 11.33(1)(d) specifically provides for a separation distance for protected places. A presumption of interpretation is that the use of specific words prevails over the general words.

20 Fourth, reg 11.33(2) is expressed as being "*[d]espite this subpart*". "*Subpart*" is clearly a reference to Subpart 2, which elsewhere sets out various separation requirements.[5] The words "*[d]espite this subpart*" seem to be intended to clarify that the separation requirements elsewhere expressed in Subpart 2 (other than in reg 11.33(1)) do not apply if the requirements of reg 11.33 are met.

21 Fifth, the words "*[d]espite this subpart*" can be contrasted with "*[d]espite subclause (x)*", which is used throughout the Regulations where one clause of a regulation does not apply to a matter specified in another subclause of the same regulation.[6] In our view, if the intention was for reg 11.33(2) to negate the criteria in reg 11.33(1), the appropriate choice of words would have been "*despite subclause (1)*" (or something similar).