WORKSAFE AND 11.33

Issues about WorkSafe arising from the two years of confusion it created in relation to reg 11.33

Abstract

The issues were created by WorkSafe unnecessarily and irresponsibly. There is much for the regulator to learn about its many deficiencies in ability and processes. It needs to lift its performance standards generally.

James Dunphy

1. Introduction – the regulatory regime for retail shops and the role of compliance certifiers

There are two types of retail shops under the Hazardous Substances Regulations 2017 and the industry jargon refers to the types by reference to the regulations which govern them. Smaller shops with close neighbours are invariably "11.32 shops" while larger destination hardware shops mostly meet the requirements for "11.33 shops."

11.33[1] shops are lawfully able to stock approximately four times the quantities of flammable liquids that their 11.32 counterparts can. When a retail shop meets the express requirements of regulation 11.33(1), there are obvious commercial benefits. The higher risk attracts greater controls. The original requirements to be met by what are referred to today as 11.33 stores were first embodied in a code of practice approved for New Zealand in 2010 (which is discussed below).

Compliance certifiers are the sole persons with the legal power to issue certificates of compliance to retail shops (and, of course, other PCBUs) which are required to obtain such certificates on account of the quantities of hazardous substances they have. The compliance certifier (**certifier**) can only do so when the PCBU has met all the requirements which must be evaluated, most of which are listed in regulation 10.34. Certifiers have legal responsibilities in relation to the performance of their roles and they are also subject to regulatory oversight by WorkSafe New Zealand (**WorkSafe**) which conducts regular audits of their performance and also has power to investigate the certifier when a complaint is made about a certifier's conduct or ability. Thus, there are important checks and balances designed to control risks associated with PCBUs' activities and the certification approach taken by certifiers.

The primary obligation to comply with HSWA and the Regulations resides with the PCBUs, in this case those controlling the retail shops. A certifier's role is to verify compliance with the Regulations and to either issue a certificate or decline to do so (if there is material non-compliance). Refusals to issue certificates trigger legal obligations for the certifier to notify WorkSafe which, in turn, places the regulator in a position to decide which of its investigative and enforcement actions to deploy (if any). The regime creates an environment where certifiers must observe their legal duties to follow the law irrespective of the commercial demands of their clients, the PCBUs. When there is non-compliance, there can be tension between certifier and client, however there is, in fact, only one lawful course for the certifier to follow[2], although there are various options that the PCBU could take[3]. The certifier's role is to audit, make decisions and then pass the files to WorkSafe if material non-compliance issues exist.

The starting point for a certifier auditing a retail shop is to evaluate whether it is an 11.32 or an 11.33 shop because the compliance obligations differ between the two types of stores. The certifier is obliged under the law to conduct the audit anew each time she conducts an audit precisely because changes can occur at the workplace from year to year. The certifier must be alert to both her subconscious biases and the expected desire of 11.33 shop owners, in particular, to be certified to hold the large quantities of flammable substances permitted by regulation 11.33 even after site changes have occurred. Certification is not proof of compliance but ought to be represent an honest

[1] All references to "regs" and "regulations" are to the Health and Safety at Work (Hazardous Substances) Regulations 2017

[2] Certifiers who head down the path of issuing certificates when they know there is non-compliance have no place in the regime which requires certifiers to be "fit and proper people."

[3] Addressing non-compliance is the obvious one! After that, it could apply for a formal exemption. As discussed below, the quest for second opinions has, at the end of a slippery slope, certifier shopping" to find a more malleable certificate issuer.

and diligent assessment by the certifier. Cajoling a certifier to issue a certificate, for example when the PCBU does not comply with regulatory requirements, does not mitigate in any way an underlying breach of regulations by the PCBU. WorkSafe needs to always focus on compliance with the Regulations, not just on whether there is a certificate hanging on the wall.

Of importance to this discussion is WorkSafe's role under its constituent act (the WorkSafe New Zealand Act 2013) and the health and safety legislation (HSWA and its subordinate legislation) - it is **solely an administrator of the regime**. WorkSafe's establishment and today's workplace safety laws followed the Royal Commission's seminal report into the Pike River tragedy. The act defines WorkSafe's main objective - "securing the health and safety of workers and workplaces." WorkSafe does, however, have discretion in relation to the enforcement actions it takes against recalcitrant PCBUs and certifiers. It should go without saying that WorkSafe must be fair, not capricious, in the performance of its role. It must have the independence of a judge and the passion of a fine university professor, while retaining a prudent level of independence from all those it must both educate and decide whether to prosecute. In relation to the Hazardous Substances Regulations, WorkSafe must have a high degree of knowledge in a complex topic, otherwise its ability to administer the regime competently will be severely impaired and it will not display the attributes of the erudite judge or the sage professor; if WorkSafe defaults (through, for example, lack of competence in the topic) in favour of what a compliance certifier does, a critical check on the integrity of the regulatory environment is lost. WorkSafe can also quickly stray from the confines of the careful regulator administering the law if it involves itself in undisciplined ways, for example by purporting to exercise discretions or offer opinions which are beyond its powers, especially if the opinions are compromised in some manner.

Every compliance certifier is part of a small business or otherwise trades on sole account, most having commenced their involvement as council inspectors of hazardous substances. Councils' roles were abolished around 20 years ago and the role was handed to test certifiers as they were first known. Whereas the certifiers are small operators, the PCBUs requiring their services for compliance certificates represent a cross section of New Zealand businesses, ranging from the large national firms owned by large corporates to small operators. At times, there is a material imbalance in negotiating leverage.

2. Wellington Shop – 2020 – a shop previously certified under 11.33 is deemed not to comply with 11.33

In October 2020, DGC's certifier concluded that a Wellington retail shop (**the Shop**) could not be certified as compliant with regulation 11.33. The Shop is part of a branded, national chain of stores (the head office of which is referred to herein as the **Brand Owner**). The google maps' view confirmed facts gathered during physical inspections that the Shop has a neighbour immediately next to it; further, the intervening walls were not sufficiently fire-proof[4] to meet the express requirements of reg 11.33. Because the certifier concluded the Shop did not meet the requirements of reg 11.33(1), it could not be certified as an 11.33 shop. The Brand Owner was displeased and then professed to have, first, a basis for a technical view that differed from our certifier's and then asserted it had the benefit of a "secret deal" had been done with WorkSafe which made the Shop certifiable under regulation 11.33. When we asked for proof of both claims, nothing was provided. The PCBU representative chose, however, to seek the assistance of WorkSafe.

[4] This information was also obtained. The walls are 60/60/60 rated vs the legislative requirement in reg 11.33 for the walls to be 240/240/240 rated.

I believe the facts support my view that, in early November 2020, a representative from WorkSafe was asked by the Brand Owner to attend a meeting where he provided assurance that DGC's certifier was wrong and that the Shop did, in fact, meet the requirements of reg 11.33[5]. Shortly after this meeting, DGC was fired as certifiers for all stores in the Brand Owner's national network and the Shop was certified by another certifier (Pete Roche[6]), implying via the certificate that the store had the legal right to hold the quantities of flammable liquids held in the Shop. I had no doubt at the time that certification was flawed but, due to the actions of WorkSafe over the following 20 months, this certification and compliance failure has been allowed to stand.

Nearly two years on from the events of November 2020, on 6 October 2022, WorkSafe published a document "**Technical clarification of regulation 11.33**" which essentially confirms that DGC's certifier was right in October 2020. This technical clarification represented a back flip on a position that WorkSafe adopted in 2021 which represented a material change to the application of the same (11.33) requirements which had been well understood for more than a decade, as explained below.

Our experience over the last two years, especially due to WorkSafe's errors, delays and lack of key technical skills, highlights much that needs to change at the regulator to enable it to perform its role competently.

3. History of the Shop and HSNOCOP 42

The site where the Shop is located was once truly operating from a stand-alone building which comfortably met the applicable regulatory requirements[7], however this changed with development on its neighbouring boundary around 2016. It is not uncommon for changes at neighbouring properties to cause material adverse impacts on PCBUs' abilities to comply with regulatory requirements, including regulation 11.33, due to one of the requirements for a "three metre separation" to the neighbouring shops[8]. The construction of a neighbouring store on one of its boundaries eliminated the "three-metre separation distance" around the shop that had been there previously.

Prior to 2017, the same rules we have today in regulation 11.33 were contained in HSNOCOP 42 (COP is a *code of practice*) which specified the requirements to be met before shop owners could hold the larger quantities of flammable liquids than their 11.32 cousins.

The write-up that accompanies HSNOCOP 42 (dated May 2010) explains the commercial desires of large hardware stores to hold larger quantities of flammable liquids than were permitted under the rules at that time. The requirements specified in HSNOCOP 42 are effectively replicated today in regulation 11.33 – either the store is stand-alone with three metres of separation (clear space) around it, or if there is a shared wall with the neighbour, the wall must have the highest standard of fire proofing – 240/240/240 – which essentially represents "240 minutes" of protection before the wall may lose its stability and/or pass the fire and heat to the other side. These requirements are shown in Appendix A.

HSNCOP 42 credits the organisations of several people involved in its creation; relevant to the current situation are the directors of some of the entities named in the HSNOCOP including Graham

[5] He did this without any discussion with the very senior certifier from DGC whom he knows.
[6] References to people are made because of their involvement in the formulation of the rules in 2009 which today are found in regulation 11.33. Mr Roche was one of them.
[7] For many years, HSNOCOP 42. The neighbouring site changed, however, around the time of the new Regulations.
[8] Technically the three-metre separation must be to "protected places."

Farquhar and Peter Roche.[9] Kim Comben from WorkSafe was also involved. Because they were credited with their roles in the working group that created the new rules in 2010, one can reasonably assume these three protagonists understood the rules well, yet all three would be involved in some capacity in late 2020 creating a novel application of the same mandatory elements of HSNOCOP 42 which were replaced by regulation 11.33, or otherwise reaching a decision that the Shop complied with 11.33. By my estimation, all three of the protagonists must have been involved in some capacity in relation to issuing or overseeing as regulator literally thousands of certificates issued to retail shop owners from 2010 to 2020.

An OIA response[10] revealed, through omission of the provision of any documents presumably because none existed, that no notes or other documents were created by Mr Comben during or after that meeting. The events that followed suggested that the PCBU obtained sufficient confidence from whatever was discussed during the meeting that there were no compliance issues.

4. Technical Clarification or Certifier Shopping?

As a general proposition, it is entirely reasonable for a PCBU to question any certifier's decision and it is, of course, reasonable to seek a different opinion or to challenge the technical bases for a decision provided the purpose is to seek clarification of the application of law to the facts in pursuit of the correct answer. DGC's certifiers are required to explain their decisions with specific references to regulatory requirements – the rules may be complex, but a competent certifier must know the rules as an expert. Where necessary, at DGC we seek second opinions internally and/or convene formal meetings to fully investigate any technical issues which arise. The explanations may or may not satisfy the PCBU. There are important decisions for the PCBU to make if they don't agree with or like the decision of the certifier. One choice is to shop around for someone who will issue a certificate[11].

I say WorkSafe should only involve itself with considerable caution in relation to "certifier shopping" and certification decisions generally because WorkSafe has no power to certify itself, it have the power to make binding decisions "on the fly" in the field, nor can it adjudicate on differences (because it does not have this power under the legislation). If WorkSafe is to disagree with a certifier, then to avoid any criticism of being capricious, I believe that the certifier must be informed and provided an opportunity to explain his rationale. I say, further, WorkSafe must be alert to the criticism that its people can be seen to be acting in ways which are misaligned with the regulator's role. This potential criticism becomes acute when opinions are expressed, without detailed and rigorous analysis, which contradict long-established approaches after meetings among people who have known each other professionally for an extended period. This is what appeared to happen in November 2020.

WorkSafe can also severely compromise its ability to perform one of its key regulatory roles when it gets involved in the middle of compliance and certification because it has a regulatory duty to monitor and audit the actions and competence of certifiers. Take the scenario where both a certifier and a representative of the regulator are wrong and materially so – how can the regulator take disciplinary action against the certifier for his lack of competence or diligence? It is surely challenged in this regard if it has compromised its independence and objectivity. Similarly, if it has sided with a PCBU and both have come up with the wrong view, it will have difficulty taking enforcement action

[9] The reference is to his certification company.

[10] OIA request made by me in mid-2021,described elsewhere in this paper.

[11] The ethical and legal aspects of this are important considerations for each PCBU and, as we have pointed out, the regulator if there is to be integrity in the regime.

against the PCBU. Then there are scenarios where it does both and, as we have seen in relation to regulation 11.33, a type of paralysis ensues.

5. November 2020 and the subsequent events

The Brand Owner representative convened a meeting on 2 November 2020 attended by Farquhar (who had previously certified the Shop in question for the better part of a decade) and Comben. Following this meeting:

- the Brand Owner did not re-engage with DGC on the technical issues;
- no-one from WorkSafe had any discussion with DGC's certifier about the decision reached;
- the Brand Owner terminated DGC as the certifier, writing to all its stores directing them (as PCBUs who were in fact our clients, not the Brand Owner) to do so;
- Roche certified the store; and
- I complained that Roche's certification was incorrect because the store did not meet the requirements of Regulation 11.33.

There are conflicting statements from two of the participants at the 2 November meeting, however I say there is one version only (Farquhar's) which is consistent with everything that happened following it; that:

- Farquhar advocated that the store complied with 11.33;
- Comben agreed with Farquhar;
- the PCBU agreed also; and
- nothing was put in writing before or after the meeting by Comben at least[12].

Mr Farquhar swore on oath a statement in the High Court in September 2022 in which he said:

> "*The <brand owner> arranged a meeting for 2 November 2020. I attended that meeting. I explained my reasons for why the store could be certified under Clause 11.33.* ***Mr Kim Comben from Worksafe was also present and I remember that he agreed with my decision***." (emphasis added)

And Farquhar swore further:

> "*I see that James has continued to press this issue with Worksafe up until as recently as this year. …****Worksafe's response indicate that Kim Comben agrees with my interpretation****, as does another certifier (…) who subsequently certified the store.*" (emphasis added)

In January 2021, I wrote to Dr Simon Buckland[13] from WorkSafe as follows:

[12] This statement is made because the OIA request covered any such document if one existed. Nothing was supplied by WorkSafe in response to the OIA.

[13] Dr Buckland is one of WorkSafe's consistently highly professional and capable people. My colleagues at DGC share this common view and we hold him in high esteem.

"*We now understand that around the same time as we were engaged with you Simon, WorkSafe's Kim Comben engaged in a dialogue with < Brand Owner> regarding the pertinent issues, including those raised above. He is alleged to have opined in a manner which led <Brand Owner> to conclude DGC's position was wrong….We note for the record that Mr Comben is alleged to have a close relationship with Mr Farquhar*."

In response to an OIA request made by me in mid 2021, which was met with a refusal to provide me with the relevant material for more than four months, in February 2022 I was provided internal correspondence dealing with the compliance issues regarding the Shop. The OIA response included the following email from Mr Comben to his colleagues in about May 2021 in which he refers to my letter from January 2021 from which the quote above has been taken:

"*I have to say this is the first time I have seen the letter from James Dunphy.*

"The reference to myself in the letter are <sic> once again an incorrect fabrication of what occurred and are lacking in fact. In order to set the record straight in this regard I was asked by <Brand Owner Representative> …if I would be able to attend a meeting regarding the obtaining of Location Compliance Certificates for a number of their stores. <She> then suggested Graham Farquhar should attend as the previous certifier who had issued the certificates to explain the rational <sic> for doing so."

Comben's further statements to his senior WorkSafe colleagues do not disclose that he opined as Farquhar said he did at the November meeting. He did, however, claim to be about the only person who could make the technical decisions under consideration by WorkSafe because he was directly involved in the creation of the law – the impact that this had on his colleagues is evident from the responses that followed. If he was involved as Farquhar swore in his statement quoted above, Comben did not "set the record straight" with his colleagues.

I note that in its dealings with me and my colleagues at DGC, WorkSafe always insists upon us using the "proper channels" to raise issues. Even on Mr Comben's narrow description of what the purpose of this meeting was, why was he there in the first place – a random request from a PCBU is not a proper channel.

6. WorkSafe's Processes During 2021 to resolve the complaint and the technical issues

From the date of my complaint in December 2020, it took WorkSafe approximately six months to address the issues internally after involving almost all its senior hazardous substances team. What we can say now with certainty were flawed conclusions[14] had many problematic aspects:

- There was no apparent early or substantial input from a legal expert well versed in the Regulations. If there was, the legal advice was either wrong or not followed.
- The key technical decisions were not difficult, yet WorkSafe erred.
- DGC was never invited to enage on the technical, or indeed any, matters. This can be contrasted with Comben's willingness to meet the Brand Owner and Farquhar at the drop of a hat and the many statements quoted in this paper about WorkSafe's willingness to enage on the issues with all certifiers, including DGC's.
- The technical decision on 11.33 made by WorkSafe in June 2021 was never directly

[14] Today, we have our view, the Chapman Tripp opinion and WorkSafe's technical clarification regarding 11.33, all of which are the same.

communicated by WorkSafe to DGC or me despite the fact that DGC certifies (correctly) more retail shops that any other firm of certifiers. Only after I had read the material supplied in response to the OIA request was the flawed decision obvious and was I able to point this out conclusively to WorkSafe. WorkSafe has a legislative duty to educate stakeholders; nevertheless it failed for some unexplained reason to communicate an important change in its view of 11.33.

- WorkSafe's technical decision was never formally communicated to all certifiers.

7. February 2022 - WorkSafe Responds to OIA Requests

In the OIA response, after weeks of internal WorkSafe correspondence as the team grappled with the issues I had raised, there was only one document which appeared to contain WorkSafe's determination on how 11.33 should be correctly applied. That email is reproduced in Appendix B[15]. It describes a curious approach – that, despite the clear linkage from 11.33(1) to 11.33(2), it is possible for a PCBU to take advantage of the quantities of flammable liquids permitted by 11.33(2) without first meeting the requirements of 11.33(1).

What WorkSafe apparently never considered was that its flawed application of regulation 11.33 could literally open the floodgates for nearly every retail shop in the country to hold nearly 10,000 litres of flammable liquids simply by satisfying 11.33(2). How could the regulator not have considered the breadth of its decision? Doing so would have alerted WorkSafe to its errors – the Regulations are, in fact, very well designed and comprehensive and, as such, they are excellent legislation with few flaws. Odd outcomes normally indicate the regulations have been read incorrectly or misunderstood, yet WorkSafe apparently did not pause and consider this.

Soon after receiving the OIA material, I wrote to WorkSafe to explain its errors. WorkSafe responded[16] as follows:

> "To confirm WorkSafe's position on Regulation 11.33, WorkSafe followed a robust internal consultation process with all internal stakeholders and technical experts to establish the correct interpretation **and application of 11.33 as it related to the site in question**. This process ensured all expertise and perspectives were captured to inform our decision-making. I understand the notes of the meeting at which these points of view were discussed, have been provided in response to your Official Information Act 1982 request. (emphasis added)
>
> WorkSafe is confident that we applied due process and an appropriate level of rigour in relation to establishing our regulatory position **relating to application of Reg 11.33 at the <Wellington> site. (**emphasis added**)**
>
> "WorkSafe has established that the compliance certifiers <sic>decision in relation to <the Wellington Shop> was appropriate and confirms that the application of 11.33 in this instance was correct.
>
> "WorkSafe appreciates feedback from any individual certifier who may experience challenges with the interpretation or application of the regulations. **We welcome any opportunity to clarify the regulations where they may cause confusion.** However, it is worth noting that compliance certifiers employed by DGC are the only certifiers that, to

[15] Beyond the scope of this paper are the other matters that are evident from this email which purports to be the conclusion of WorkSafe's senior hazardous substances team (i) Point 5A is flawed for three reasons (ii) WorkSafe's conclusion appears to be that the certifier made more than four material errors with his identification and certification of "hazardous substances locations" at the Shop.

[16] Letter from Darren Handforth dated 4 March 2022.

date, have raised concern with the interpretation and application of 11.33." **(**emphasis added**)**

Mr Handforth (WorkSafe) added that it had also consulted with the two certifier industry bodies:

> **"**WorkSafe has contacted the two professional member associations that represent compliance certifiers in New Zealand:
> • the Hazardous Substance Professionals New Zealand (HSPNZ); and
> • the New Zealand Institute of Hazardous Substance Management (NZIHSM).
>
> "WorkSafe can confirm that these bodies hold a consensus from their members, that they have no issue with the current drafting of regulation 11.33, or the interpretation and application of the regulation. Their views represent the position of their members who constitute approximately 75% of all the compliance certifiers authorised by WorkSafe to undertake compliance certification functions in New Zealand."

Further OIA disclosure showed how entirely inadequate the consultation with the certifier industry bodies had been. When I spoke to him, the head of one of the industry bodies said he knew virtually nothing about the regulation he was asked about and had nothing to contribute to the issue.

My further OIA requests revealed that Handforth deputised Kim Comben to make enquiries with the two industry certifier bodies. Pete Roche is one of the board members of HSPNZ. HSPNZ did not consult any of the members that I spoke to. The entire process fell well short of an adequate and considered approach designed to inform the issues.

In March 2022, DGC commissioned an independent legal opinion. Chapman Tripp concluded that WorkSafe's approach to 11.33 was incorrect and then explained how the regulation was to be applied correctly. This explanation was exactly what we had explained to WorkSafe more than four times during the prior 18 months.

DGC provided the Chapman Tripp opinion to WorkSafe. A further eight weeks passed before WorkSafe explained they were "still reading" the six-page opinion. A further 10 weeks passed.

On 6 October 2022, WorkSafe published its policy statement agreeing with the Chapman Tripp/DGC position. I say this takes us back to exactly where everyone should have been in 2020. I have no doubt that, had WorkSafe engaged with us professionally and reasonably when the issues first arose, we might well have decided then to commission the Chapman Tripp opinion and the whole issue could have been dealt with promptly and efficiently.

8. Confusion remains regarding WorkSafe's actual position

I say the documentary trail clearly shows that:

- in 2021 WorkSafe's **"**robust internal consultation process with all internal stakeholders and technical experts"[17] created a totally novel approach to 11.33 which should have been fully explored with us;
- it was DGC's intervention and the provision of the Chapman Tripp opinion which showed WorkSafe what the correct approach to 11.33 is; and
- in October 2022, WorkSafe's technical bulletin corrected its 2021 errors and changed its position to align with those it had received from DGC and Chapman Tripp.

[17] The quote is from Darren Handforth's letter quoted above.

Despite what the documentary trail shows, WorkSafe denies that it has made any u-turns or back flips on its position with regards to 11.33. It apparently claims that the one document that was supplied in response to the OIA request does not correctly represent WorkSafe's position in mid-2021.[18]

WorkSafe asserts that it is "*always willing to engage with the third party <sic>verifiers we rely upon in our regulatory system, such as compliance certifiers. In fact, we are already working with relevant compliance certifiers on the operation of Regulation 11.33 among other matters*."[19] Whilst Comben willingly engaged with Farquhar and Brand Owner in November 2020, WorkSafe terminated discussions with DGC in December 2020 without any resolution of the issues regarding the application of 11.33 to the Wellington Shop. It denied our request to re-engage on the specifics of application of the law to the Shop since publishing its technical bulletin.

Now, after arguing that there are no issues needing to be resolved, WorkSafe has convened a meeting with compliance certifiers to explore the issues arising for big-box retail shops in complying with reg 11.33 which sounds like the exact same issues we brought to WorkSafe's attention in November 2020.

9. Application of law to facts or "interpretations"

Compliance with any law requires a sound understanding of the law and an application of the law to facts. Reg 11.33 is no different. As the Chapman Tripp opinion explains, there are criteria to be met in 11.33(1) before the gateway to 11.33(2) opens. Application of the tests in 11.33(1) are entirely objective – it really comes down to (i) what is the building perimeter (ii) is there a three-metre separation distance (no protected places within it) around the building (iii) is there a wall in common with a neighbour; if there is, what is the evidence about the fire rating. This covers the components of 11.33(1). All of these are objective, factual assessments. Either the shop in question meets the criteria or it does not.

I have observed that WorkSafe is prone to deflecting itself away from the above type of disciplined analysis, including in relation to the Wellington Shop, by making statements such as the one below in the Chief Executive's letter to me:

> *"Many of your concerns are predicated on an interpretation of the regulations. It is the regulator's legislated role to provide assurance to the sector about the regulations. I am satisfied that WorkSafe's interpretations are correct. They are developed through a robust process and WorkSafe requires all compliance certifiers to follow the positions. We will continue to operate on that basis. If you wish to have a constructive discussion about this matter, we are always prepared to engage with you."*[20]

From the OIA material, it is apparent that "WorkSafe's interpretations" were not correct; also the promise that "we are always prepared to engage with you" has not occurred in relation to 11.33 and the Wellington Shop. Further, WorkSafe must require that the law be followed, not that its odd interpretations of it are. It is not about interpretation but about application of law to facts. We

[18] I sincerely hope these perspectives emanate from a speculative response internally at WorkSafe, otherwise the inevitable conclusion is that WorkSafe makes important decisions after months of deliberations without committing the final decision and the rationale therefor to writing.
[19] Chris Thornborough email dated 13 October 2022.
[20] Phil Parkes letter to me dated 16 July 2021

would ridicule a ram raider who mounted an argument that his activities were simply window-shopping even if he buttressed his argument with his *interpretation* of the relevant provisions of the Crimes Act. Credibility comes not from the owner of the interpretation but the legal robustness of her underlying methodology and skill in the law.

10. The acid test for WorkSafe lies ahead, however

As we are now almost exactly at the two-year anniversary of the Wellington Shop's certification, exactly the same issues exist today, albeit WorkSafe's position is apparently clear following publication of its "**Technical clarification of regulation 11.33.**" What the appointed certifier does and WorkSafe's mettle (and credibility) in applying the law will be very much on display when we have the outcome of the certification and we follow WorkSafe's enforcement decisions.

11. Material issues which this situation raises

These are framed as issues for WorkSafe to repond to.

Issue #1 – Why does WorkSafe <u>not</u> have proper processes to reduce the risk that its employees will opine on the law without any proper internal consultation processes

I have observed that PCBUs regard WorkSafe's oral statements about compliance matters as <u>the law</u> – it is not and this creates major issues when the oral statements are wrong[21]. WorkSafe has no power to amend or make the law. It should refrain from becoming involved in meetings where its people are asked to provide opinions without following proper and reasonable processes. To do otherwise stops PCBUs from doing what they should do – be diligent themselves in understanding the requirements to which they are subject, There are several places for them to get help. WorkSafe would be better off sticking to the sidelines and follow the approach that WorkSafe has described to me[22]:

> "Compliance certifiers are authorised by the regulator to provide a regulatory function to support the issuance of certificates of compliance. However, it is important to clarify that WorkSafe is the government's regulatory agency responsible for enforcing compliance with the regulations through various powers of inspection and enforcement levers. Therefore, WorkSafe is required, periodically, to review certifier decisions and ensure there is a consistent application of the regulations between compliance certifiers."

Issue #2 – WorkSafe should be more mindful of equal treatment for all, especially when it comes to attending meetings at the behest of PCBU's. How will WorkSafe deal with the next 1000 similar requests?

Issue #3 – Does WorkSafe have the requisiste legal skills to perform its role as regulator in relation to the Regualtions and the hazardous substances regime?

The 11.33 issues were not complex legally. Does WorkSafe have the skills to correctly deal with basic skills in interpreting statutes and regulations?

Issue #4– How can WorkSafe adequately perform its core role in overseeing the skills and performance of compliance certifiers when it does not know the law well itself?

This 11.33 issue is one of many. This is why DGC has a page on its website devoted to "WorkSafe issues." There are many examples of incorrect applications of the Regulations. One was 11.33 (now

[21] We encounter this at least monthly, frequently weekly.
[22] Letter from Darren Handforth dated 4 March 2022.

resolved in line with the DGC view) and the other major one relates to "protected places" which has resulted in WorkSafe removing its flawed policy statement.

In relation to the requirements to be met as required by the Regulations for a pre-commissioning certificate for tank wagons, WorkSafe's explanation for its failure to require compliance with the exact requirements of the law were along the lines of "well, we have been applying the law the way we think it was meant to be not the way it is."[23] This is an impossibly flawed approach – the law cannot be applied based upon what WorkSafe's executives think it should say, yet this is exactly what has been happening.

Similarly, in relation to the obvious failures by compliance certifiers to comply with their obligations to notify WorkSafe when they refuse to issue certificates of compliance (as required by Regulation 6.23). WorkSafe's 2020 explanation was "it's been a problem from the day the requirements were introduced."[24] By tolerating non-compliance, WorkSafe tacitly acquiesced in what was happening – these are not the actions of a responsible regulator.

Issue #6 - The impacts of some historical relationships between regulator and WorkSafe need to be eliminated.

There are differences between industry contacts which are constructive and those that create potential perceptions that some PCBUs have an inside track.

Issue #7 – The manner in which WorkSafe sought input from the industry certifier bodies was wholly inadequate. Why?

Internally at DGC we follow the same disciplines and procedures as a professional services firm when seeking to obtain an informed opinion from an industry expert. It requires a full description of the relevant facts and a proper definition of what the issue is, perhaps also the competing arguments for different answers to the issue. WorkSafe did nothing like this – the enquiry was akin to a casual "do you have any issues with reg 11.33?" This is not satisfactory.

Issue #8 – The Shop Owner is running an insurance risk that he probably does not realise he has, much like some of his peers elsewhere

We have seen sensible, prudent reactions from insurers when shops operate with unlawful quantities in a retail shop. One insurer's declaration that it will be "off risk" if the issues at one unrelated retail shop elsewhere in the country is likely aligned with rejection of liability if the unlawful storage of flammable liquids is a causative factor in a shop's loss in a fire.

This is where the problems caused by WorkSafe and the naïve actions of PCBUs can lead to massive adverse consequences.

The important thing for any PCBU to note is that it will not be able to sue WorkSafe if it has relied upon oral (or indeed) written opinions are proved wrong. The primary duty for compliance rests with the PCBU and the legal test for liability of a government entity are high.

James Dunphy
21 October 2022

[23] Conference call with Darren Handforth on 27 July 2022 which was taped by WorkSafe (with my consent).
[24] Meeting in Wellington with Darren Handforth in May 2021.

Extract from HSNOCOP 42

This Code only applies in the following circumstances:

1. The store is a 'Retail shop' or 'Retailer of agricultural chemicals' as defined in AS/NZS 3833:2007.

2. To areas where the public have access for the retail sale of flammable liquids; it does not apply to associated distribution or warehousing operations.

3. The retail shop or retailer of agricultural chemicals must be in a standalone building, which for the purpose of this code is a building having a minimum separation distance of 3.0 metres to any High Intensity Land Use (HILU) area external to the building.

4. Where a retail building does not meet the above minimum separation distance of 3.0 metres to any HILU area, or where there is a wall in common with another building, the wall of the retail building shall have a fire resistance rating (FRR) of at least 240/240/240. This wall shall maintain a minimum separation distance of 3 metres, this distance being measured around the wall.

Regulation 11.33

11.33 Storage of class 3.1B and 3.1C flammable liquids in retail shops

(1) This regulation applies to a building—

- (a) that is a retail shop; and
- (b) to which the public has access; and
- (c) in which flammable liquids of classes 3.1B and 3.1C that are available for retail sale are held; and
- (d) that, if it is a standalone building, is separated from any protected place that is external to the building by—
  - (i) a minimum separation distance of 3 m; or
  - (ii) a wall that has a fire-resistance rating of at least 240/240/240 minutes and maintains a minimum separation distance of 3 m (this distance being measured around the wall); and
- (e) that, if it has a wall in common with another building, the common wall has a fire-resistance rating of at least 240/240/240 minutes and maintains a minimum separation distance of 3 m (this distance being measured around the wall).

(2) Despite this subpart, the separation distance from and within the building may be zero if—

- (a) all containers of classes 3.1B and 3.1C flammable liquids are closed, except that paint may be opened briefly for tinting; and
- (b) classes 3.1B and 3.1C products are separated from—
  - (i) class 2 substances by 1.5 m:
  - (ii) an aggregate quantity of aerosols exceeding 200 L by 1.5 m:
  - (iii) class 5 substances by 3 m; and
- (c) the retail shop complies with section 3.4 (General Requirements for Retail Storage) of AS/NZS 3833:2007; and
- (d) the quantities of classes 3.1B and 3.1C flammable liquids are not more than the quantities specified in table 9 in Schedule 12.

Appendix B

From: Enda Costello
Sent: Wednesday, 9 June 2021 3:08 pm
To: Simon Buckland; Kim Comben; George Hewitt
Cc: Peter Nicholls; Angela Jones
Subject: Outcome of meeting today - 11.33 - Mitre 10 MEGA Upper Hutt
Attachments: Mitre 10 MEGA Upper Hutt - Highlighted.png

Hi all

Thank you all for making time today to discuss this issue.

This is my summation of our meeting today:

2. We also established that it does not have a wall in common with another building.
3. Because of this, Reg 11.33(1)(d) applies to this store. This means that the store is required to have a minimum separation distance of 3m from any protected place.
4. However, this separation distance has been reduced to zero by Reg 11.33(2) because the PCBU has been deemed to meet Regs 11.33(2)(a, b, c & d).
5. In addition to this, the Compliance Certifier should have included 4 separate hazardous substances locations on his certificate (as shown on attached file) –
   A. Standalone building holding Class 2,3,4,5, and 8 hazardous substances
   B. LPG cylinders and flammable liquids held in the Northern corner of the site.
   C. LPG cylinders held within the 'garden centre' and beside the café.
   D. LPG cylinders held near the South-West boundary of the site.