

8 February 2023

Mr Darren Handforth
Head of High Hazards, Energy and Public Safety
Operations Group
WorkSafe New Zealand

By email

Dear Mr Handforth

WorkSafe's 2020 policy document entitled "Certification of locations holding toxic and corrosive substances" (2020 6&8 Policy)

1. I write to express my concern that the 2020 6&8 Policy is materially inconsistent with the Health and Safety at Work (Hazardous Substances) Regulations 2017 (**Regulations**). In this letter, I explain the bases for my view, including by analysing the opposite view (which might be advanced to support the 6&8 Policy) that is not all developed in WorkSafe's policy document.
2. The correct position in relation to class 6's & 8's is of paramount importance having regard to their extensive presence in workplaces and the high risks associated with them. It is trite to say that WorkSafe has no power to amend the law. Whilst its 2020 6&8 Policy cannot have had this effect *de jure*, it has very much had such an effect *de facto* because PCBUs and most certifiers are following the statement of policy. PCBUs and compliance certifiers deserve to have certainty about the correct legal position which will only occur if the policy document is modified.
3. WorkSafe's 2020 6&8 Policy purports to explain when a hazardous substance location (**HSL**) exists in class 6&8 substances. I say the error is WorkSafe's statement that only substances which are "in storage" are to be taken into account, with the effect that "substances which are in use" are excluded. WorkSafe will understand the huge impact this has in excluding large quantities of class 6&8 from the controls (including obtaining compliance certificates) required by the Regulations.
4. For convenience, I have attached the essential paragraphs from the policy document. There are several reasons that underpin my conclusion regarding the correct legal requirements of regulation 13.34 which is that all such substances which are present must be taken into account when determining whether there exists a HSL.

My Rationale Following Orthodox Statutory Interpretation Techniques

A: The words in regulation 13.34 are unambiguous and clearly do not draw a distinction between substances in storage vs in use.

5. Regulation 13.34(2) states:

“A PCBU with control or management of a place within a workplace where 1 or more of the substances are present must establish in that place 1 or more hazardous substance locations where such substances are to be situated if—

(a) the substances are to be present for a period exceeding—

(i) 2 hours, in the case of a substance subject to the tracking requirements of Part 19;

(ii) 24 hours, in the case of a substance that is not subject to the tracking requirements of Part 19; and

(b) the substances are to be present in amounts exceeding the quantities specified for the relevant classifications in regulation 13.38.”

6. This regulation follows the formulation found elsewhere in the Regulations for other classes when determining whether the PCBU is required to establish a hazardous substance location. Preceding the concepts of time in a) and quantity in b), the requirement that the substance be simply “present” is the broadest concept used in the Regulations. Thus, when there are present quantities in excess of the thresholds for the required minimum time, the PCBU must establish one or more hazardous substance locations (HSL). Once these elements exist, a HSL must be established.
7. There is no doubt that a substance that is “in use” which is under the control of the PCBU must be included in the calculation of quantity because if it is “in use” it must also be “present.” There is no ordinary construction of the words which leads to ambiguity or a different conclusion.

B: Concepts of “storage” “use” and “in use” are deployed frequently in the Regulations and, therefore, parliament has drawn clear distinctions among the ways in which substances may be present.

8. Because of the deliberate insertion of the concepts listed above in other places in the Regulations, it is notable that no exceptions have been expressly listed in reg 13.34(2).
9. I note that reg 13.34(1) “applies to 1 or more of the following substances” which are then listed. It does not have qualifying words such as stored as in, for example, “ applies to 1 or more of the following substances stored at a workplace.”

C: Adopting “a construction which best achieves the purpose of the statute as a whole” and then arguing on this basis for the exclusion of 6&8 substances which are “in use” is not persuasive that WorkSafe’s Policy Statement is correct

10. A potential counter argument could have the following elements:

- a) The italicised heading that precedes reg 13.34 uses the word “storage.”
- b) The High Court of Australia in the Queen vs A2 adopted such a broad construction of the statute in question in that case.
- c) The purposes of HSWA and the Regulations are to regulate and require certification for how hazardous substances are stored rather than used.

11. These arguments are very weak because:

- a) Quoting Clayton Utz’s article referenced below ¹ “where multiple constructions are available, the heading of a provision is a legitimate tool for determining the meaning of a provision consistent with the purpose of the statute.” However, in the present case, there are not multiple constructions that are available in relation to the plain words of 13.34 as explained above.
- b) In the Regulations, explicit distinctions are drawn between “in use” and “in storage.” Equally the Regulations use broad concepts (“present”) more frequently and thus parliament’s explicit objectives are evident from such choices.
- c) The heading of reg 13.34 is “Duty of PCBU to establish hazardous substance location where certain class 6 or 8 substances **present**.” (emphasis added). Thus, any weight to the counter argument emanating from the italicised word “storage” in the heading that precedes 13.34 is more than negated by the use of the word “present” in the heading and the absence of the word “storage.”
- d) The very strong purpose of the Regulations is for (i) controls to apply when hazardous substances are present in quantity for time and (ii) compliance with controls to be inspected and, if appropriate, certified by a compliance certifier. Thus, a broad approach which considers the mischief at which the regulations are directed more properly lands on the side of controls and certification requirements, not fewer controls and less certification.

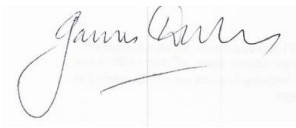
12. There are other more detailed confirmations that are available in other provisions of the Regulations. Thus, I have reached a confident view that WorkSafe’s Policy document misstates the law.

¹ [Administrative law updater: Can the heading of a statutory provision be used to help interpret the text? - Knowledge - Clayton Utz](#)

Next Steps

13. I would welcome the opportunity to engage with WorkSafe, including its legal advisors, in relation to next steps and I ask for a response and discussion within a week from the date of this letter. I hope that we might agree a process that will result in a definitive legal opinion and a prompt explanation of the correct position which will minimise the disruption for the market.
14. At DGC, I will institute our standard processes for addressing technical questions. Decisions of our Technical Committee set requirements for signing certifiers to follow. Based upon the position I have reached, I expect that our approach will align with the precise requirements of regulation 13.34 as explained above – all certifiers (not just DGC's) must follow the law. When we reach a researched conclusion which differs from a WorkSafe view as appears likely in this case, we follow our conclusion (which in almost every occasion has been proven to be correct).

Sincerely

A handwritten signature in black ink, appearing to read 'James Dunphy', is written over a light grey grid background.

James Dunphy
Managing Director
Dangerous Goods Compliance Limited

WorkSafe's view

Do you need to meet HSL requirements?

If you hold liquid or solid class 6.1A, 6.1B, 6.1C, 8.2A and 8.2B hazardous substances:

- in quantities that exceed the threshold amounts in Table 1, and
- store them for longer than 2 or 24 hours (depending on the substance), and
- the substances are in storage

then you will need to meet the HSL requirements.

WHAT IS NOT IN STORAGE?

You do not need to meet the HSL requirements and obtain a location compliance certificate if the substances are not in storage.

A substance is not in storage when it is in a:

- container that is supplying a process, either continuously or intermittently, and is either manually controlled or controlled by the process (for example a tank connected to a processing vat)
- container that is for use in the processing area (for example for cleaning), or
- process container such as a mixing container.