

13 May 2024

**How confident are you that you really comply with regulatory requirements? If you can't recover from a negligent compliance certifier, how would this change your decision about the certifier you select? WorkSafe has purported to quietly redefine the requirements for AS 1940 cabinets, further complicating the chances of insurance recovery. It is time to control your destiny, rather than hope that someone will carry the can after losses have been sustained.**

**PCBUs are strongly encouraged to pay special attention to whether they actually comply with regulatory requirements, especially in light of three recent events that (i) reduce the likelihood of recovering damages from compliance certifiers and (ii) increase the probability of prosecution by WorkSafe.**

DGC prides itself on the rigour with which it assesses compliance with regulatory requirements. Our certification should give you confidence **and** the opportunity to discuss any issues you are concerned about. Many other certifiers issue certificates of compliance which are not only worthless, but they hide the risks that the PCBU would likely want to have the opportunity to address.

**Concern #1 for PCBUs – The Court of Appeal's decision last month in Tasman District Council<sup>1</sup> has created a precedent that means you face serious challenges suing your compliance certifier for losses that you think he has caused or contributed to.**

The Court of Appeal decided that even though the Tasman District Council had negligently issued a certificate of compliance for a new swimming pool, and then conducted further inspections negligently, it was NOT LIABLE to the owner of the property.

The facts that were in evidence in Tasman District Council will be highly analogous to the annual occurrence of compliance certifiers issuing hazardous substances compliance certificates **negligently**. For example, assume:

- A PCBU is relying on the expert opinion of the compliance certifier (in a legal sense, you believe there is a duty owed by the certifier to you);
- Through his own lack of knowledge or his desire to issue a certificate to you when he shouldn't, he performs his role negligently by not applying the requirements which he is obliged to verify (negligence is established);
- An adverse event occurs and you suffer loss because of the failure of one of the matters that the certifier erred with (an argument for causation of the loss exists); and
- The most recent inspection was last year (so your claim for loss ought not be time-barred).

Assume there is a fire in the PCBU's external storage building which was situated much closer to the factory (protected place) than it was required to be by the Regulations. But for the proximity of the

<sup>1</sup> <https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZCA-133.pdf>

storage building to the factory, the insurance assessor forms the view that the fire would not have spread to the factory. Your insurer declines your claim. You consult your lawyer about suing your compliance certifier.

What you will likely hear from your lawyer based upon the decision in **Tasman District Council** is that you have two major problems:

- The role that a compliance certifier is required to perform is not to protect your economic interests but to protect workers and other people at the workplace. That is the reason for his inspection. This follows the reasoning of the Court of Appeal that the purpose of swimming pool inspections is to protect children from drowning in swimming pools – a subtle but critical difference which narrowed the scope of the duty owed by the Council.
- Even though the compliance certifier could have alerted you to the proximity problem, if he was not involved in designing your location, he would inevitably argue through his lawyers (or more probably those appointed by his insurer) that his actions did not cause the non-compliance and, by definition, did not cause the loss the PCBU sustained. A second fatal blow to recovery.

**Our view at DGC is that more than half of what other compliance certifiers certify as compliant does not meet the regulatory requirements.** We are decisively different in the rigour we bring to every audit. We believe PCBUs share the same objective as we have to identify non-compliance before it becomes a problem. We leave open the question whether a court might elect to broaden the duty of the compliance certifier when there is an element of mal-feasance and not just negligence on his part.

If you can't sue your compliance certifier, does that change your perspective about whether to use the only ISO 9001 and 17020 certifier (**DGC**) in the country? Call us. You won't regret it.

**Concern #2 – Last month WorkSafe published a paper on AS 1940 storage cabinets which has made WorkSafe your insurer's best friend, to your detriment.**

Last month, WorkSafe very quietly placed in the public domain via publication on its website its attached guidance document – WKS 8: "Clarification on construction requirements of flammable liquid cabinets". It has some clarification, but some ground-breaking and highly problematic additional requirements that should be causing everyone to pay close attention to what happened by stroke of WorkSafe's pen.

**Although DGC disputes the accuracy of the "clarification" document, WorkSafe has described requirements which probably none of the AS 1940 cabinets in use today in workplaces in NZ meet. If no "AS 1940 cabinet" is compliant, there are serious implications.**

Many workplaces use AS 1940 cabinets to store many multiples of the 250 litres maximum of flammable liquids that each cabinet can hold. Now assume there's a fire which is contributed to by the failure of at least one AS 1940 cabinet, leading to an acceleration in the intensity of the fire. What might have been contained within one part of the workshop had the cabinet not failed, has led to the entire building burning down.

You have a compliance certificate issued by a compliance certifier and you have documented procedures which, you believe, proves your compliance. Now assume that your insurer uses the WorkSafe document as proof that your cabinet did not meet regulatory requirements and denies the majority of your claim for loss. The insurer's lawyers will know that it will be hard for a court to not have regard for WorkSafe's clarification document which is available publicly today!

A small PCBU is never going to be able to make litigation against its insurer economic to pursue with such a major obstacle if the spread of fire was related to the failure of the AS 1940 cabinet.

**DGC's view is that more than 75% of the AS 1940 cabinets in use today do not meet the standards defined in AS 1940 (the exact requirements as opposed to the WorkSafe extreme view).**

We say, therefore, that PCBUs with non-compliant cabinets are running a significant risk that they believe they have fully mitigated. Some PCBUs (and these will be other than DGC clients) might want to argue that the fault lies with their compliance certifiers. This takes us back to the problem in #1 above.

Just as the PCBU ought to have a claim in contract against the supplier of the AS 1940 cabinet, you can expect such a claim to be disputed and, we suspect, be passed onto the supplier's insurer and its lawyers.

If you are not a DGC client who believes that all is well with a yellow structure that may well not be compliant with AS 1940, call us and we will conduct a rigorous review. We will plot a course that will avert you from a potential nasty surprise. Your best place to be is to prove your compliance which will, in turn, reduce your risk of loss.

**Concern #3 – What does the decision to prosecute the board of trustees of Whangarei High School suggest in terms of a shift in mindset at WorkSafe? This has to be a worrying sign for businesses.**

Although we are appalled that WorkSafe decided last week to prosecute the school board at **Whangarei High School** which was presumably fully staffed with volunteer parents doing their best, the questions that need to be contemplated are these:

- Is this a deliberate shift under a new government with a new CEO and a newly-reconfigured WorkSafe to become more active with prosecutions?
- Was the Whangarei prosecution a one-off to show that WorkSafe is doing something at least following the disastrous Whakaari prosecutions – a way to slightly stem a spring tide of negativity about its performance?

Part of the answer to these questions may lie in the appointment of Rob Pope as Head of WorkSafe's Inspectorate. An ex-detective, we expect that he will be more oriented towards prosecutions than the failed approach of kindness towards failing PCBUs exhibited through the last six years.

If WorkSafe will prosecute the board at Whangarei Boys High, why wouldn't WorkSafe prosecute businesses? We advocate not giving them a chance to do so by getting your compliance house in order.

#### **#4 A message to WorkSafe**

You have much work to do in relation to your statutory roles – protecting PCBUs from incompetent compliance certifiers and engaging with stakeholders about your errors in WKS-8 – before you should consider getting tough on PCBUs. At what point should you be responsible for your failures?