

## AS 1940 cabinets

### ***An example of WorkSafe's failure to publish accurate technical documents, to communicate appropriately, and to administer basic rules to effect change in serial non-compliance***

#### **Introduction**

Cabinets which store flammable liquids inside buildings must meet specific requirements. In essence, the reason the Regulations<sup>1</sup> allow AS 1940 cabinets to be used as storage locations inside buildings is because of the fire protection that comes from the required structural features which are expected to provide 30-60 minutes of resistance before fire will cause a failure of the cabinet. In that time, people inside the building will have had an opportunity to exit.

Specific requirements from the standard commonly referred to as 'AS 1940' are incorporated into the Regulations through the explicit provisions in both regulation 11.11 and regulation 11.29 (**Cabinet Requirements**). The Cabinet Requirements have never been hard to locate (once you have bought the Australian standard AS 1940), nor have they been difficult to understand or apply.

It is common for AS 1940 cabinets to be "hazardous substances locations" in relation to which a location compliance certificate is required. Certifiers inspecting AS 1940 cabinets as a precursor to certification must verify that the Cabinet Requirements are met. This is obligatory by virtue of regulation 10.34. This has been so at least since the 2017 Regulations were introduced.

#### **Widespread failure over many years**

Prior to 2022, we observed several issues in relation to WorkSafe's knowledge regarding, and its approach to enforcement of, the Cabinet Requirements for what are commonly referred to as an "AS 1940 cabinets." For example, in WorkSafe's Inspectorate, knowledge was, at best, patchy and the inconsistency (and defective practices) were pervasive. Mostly, from what we observed, the Inspectorate was oriented towards "blessing" almost any cabinet that presented as being potentially manufactured to meet the Cabinet Requirements. The skills displayed by the Inspectorate were, by and large, poor, reflecting a lack of training at a minimum. Indeed, we observed that some of WorkSafe's most senior people were also more inclined to express opinions that cabinets were "OK" rather than apply the Cabinet Requirements, when really they ought to have known much better.

Overall, compliance in relation to AS 1940 cabinets has been poor. Our estimate of the number of cabinets in use in workplaces in 2021 was a number in excess of 80,000<sup>2</sup>. Our 2021 estimates of how many were compliant have been significantly revised after thousands more inspections by our team. We doubt that, in 2021, any more than 10% of cabinets which were being used to store class 3 liquids, in particular, met the Cabinet Requirements. As of today, we estimate that less than 25% of the installed base of cabinets meet the Cabinet Requirements. **That is approximately 60,000 non-compliant cabinets on those approximations.**

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<sup>1</sup> References to Regulations throughout are to the Health and Safety at Work (Hazardous Substances (Regulations 2107 (**Regulations**)).

<sup>2</sup> Calculated based upon the known quantity supplied by one supplier and extrapolating this to estimate the total market using market share information.

WorkSafe has many tools to enforce compliance with everything in the Regulations. Among those tools are the various disciplinary actions that exist in Part 6 of the Regulations when it comes to compliance certifiers. It is surely reasonable for this group (certifiers) to be held strictly to what it is that they must verify before certifying AS 1940 cabinets as hazardous substances' locations. It is trite to observe (but we will anyway) that to be able to do this, WorkSafe needs to understand the requirements and the obligations that certifiers have.

In our 2022 publication on AS 1940 cabinets, ([04aa4a\\_3d3b7a0367d8403d8349473b35ff8f0e.pdf](#) ([dgcompliance.co.nz](#))) we quoted from a response received from Catalijne Pille, the then acting head of the Regulatory Assurance Group. She wrote in response to a complaint that we had made:

“The obligation to ensure that cabinets are constructed and installed in accordance with the relevant regulations, **rests with the PCBU** with the management of control of the hazardous substance(s). This includes storage cabinets as mentioned in your correspondence. (refer to the duties set out at Regulations 11.11 and 11.29).” (emphasis added by DGC)

The law has not changed since then and, if one compares WorkSafe's 2024 technical bulletin, we see it contradicts the position described by Ms Pille whose position was that the certifier was not obliged to verify the construction features of the cabinets. Thus, we have a specific example of how it was WorkSafe that was not correctly applying the rules. By contrast, WorkSafe's 2024 technical bulletin states:

“If a hazardous substance location has been established and requires certification, then a compliance certifier should assess the marking on the cabinet and whether the cabinet has been constructed to section 4.9.2 of AS 1940. This should include assessing whether the cabinet has been properly maintained and that it continues to comply with the relevant requirements of the standard.

“A compliance certifier should not assume compliance of the cabinet. For example, they may wish to check that the self-closing doors do close in the right order and catch correctly. A certifier may also require a PCBU to provide evidence that the cabinet construction complies with the relevant requirements.”

If we were to ask the next business owner who owned one of the 60,000 non-compliant cabinets after a fire inside his building whether he wished he had been told about the issues, we are confident that he would want to know. Giving people bad news (your cabinet is a dud) is more often than not valuable to know so that they can make decisions about how they act upon it. If a PCBU wants to play roulette with the value of his insurance claim, so be it. He can eschew “red tape” and pay the price, especially when the insurance lawyers put the WorkSafe AS 1940 technical bulletin before the court.

## WorkSafe technical bulletins

In November 2022, WorkSafe published a draft technical bulletin on AS 1940 cabinets. In short, the document reiterated the Cabinet Requirements – this was not surprising – the requirements had not changed for a long time. Sixteen months after this, in March 2024, WorkSafe published its final technical bulletin.

Several aspects are worth noting:

- The technical bulletin which affects tens of thousands of PCBUs was **only published on WorkSafe’s website**. We are not aware of any effort by WorkSafe to distribute the bulletin or its findings more broadly than this.
- Within weeks of the publication, DGC informed senior people at WorkSafe that the technical bulletin **purported to introduce new requirements** - WorkSafe does not have the authority to do this, despite the perception that readers would take from the technical bulletin – that all elements had the force of law. We also informed WorkSafe that we sought and obtained confirmatory external legal advice regarding our position (which we have received). Nothing has happened since that we are aware of which would suggest that WorkSafe has paid any attention to our concerns, or the concern that it ought to have about the accuracy of its “technical policy.”
- WorkSafe has not made any attempts to bring its position on AS 1940 cabinets into any discussion forums, including with compliance certifiers or cabinet manufacturers. Relying solely upon one’s website to communicate important information is strange, we believe – it smacks of not having the conviction to make the technical bulletin a living, working and enforced position. Most curiously, there was no mention of it in its first Hazardous Substances Update in a very long time and AS 1940 cabinets which was published on 11 September 2024.
- Confusion is reigning supreme with one senior WorkSafe person referring to the technical bulletin as a “collection of opinions” and another referring to it as the law. If WorkSafe can’t get a consistent position, how does it expect market participants to do so?
- We very much doubt, based upon what we continue to see from WorkSafe’s inspectorate, that it has made any diligent efforts to train its Inspectorate.

In short, we have an answer to a problem created by WorkSafe written into a technical bulletin that WorkSafe itself is confused about that has not had any airtime despite it impacting an installed base of more than 80,000 cabinets. Here is an opportunity for a wannabe red tape slashing Minister to stop the red tape being created inside her own portfolio entity.

### Technical failures and other things WorkSafe has not done

This is one of several occasions that we have noted technical failures in WorkSafe’s hazardous substances publications. Based upon her title and the description of her role, we suspect the person who has overall responsibility for technical bulletins is Tracey Conlon<sup>3</sup>. Perhaps the best example of a flawed technical bulletin was the bulletin which purported to completely redefine what was not a protected place when it came to toxic and corrosive tanks inside factories. After we explained on our website the defects in WorkSafe’s approach, the bulletin was removed. Our article that preceded its removal can be found here [\\_04aa4a\\_7d15a042cf2e4b2bb3f06beaf541753f.pdf \(dgcompliance.co.nz\)](#).

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<sup>3</sup> Conlon’s biography reads as follows from the WorkSafe website: “Tracey joined WorkSafe in 2014 as a member of the Legal team. Subsequently, she was WorkSafe’s Chief Legal Advisor for four years before moving into transformation and operational leadership roles. Tracey’s substantive role is Head of Regulatory Services within the Operations Group, where she is responsible for a range of operational enabling and frontline delivery teams, **including notifications and guidance.**” (emphasis added)

We are not aware of WorkSafe taking any of the reasonable steps it ought to have to correct its position with PCBUs directly impacted by the rules and acting in reliance upon WorkSafe's incorrect guidance.

In 2024, we published on DGC's website further commentary on AS 1940 cabinets and queried why WorkSafe had provided insurers with potential ways to deny hard-working PCBUs from claims including by setting a higher standard for the Cabinet Requirements than were contained in the Regulations. We continue to ask this question.

We are not aware of any attempts by WorkSafe to fully engage in relation to the Cabinet Requirements with cabinet manufacturers or resellers; some of the manufacturers/ resellers have significant contingent liabilities (arising under contract, the Sale of Goods Act and/or Fair Trading Act, or all three) for defective cabinets that they may have sold. As important stakeholders in relation to the topic, one would reasonably have expected WorkSafe to have discussed the issues in some detail with the manufacturers and resellers. Further, in order to protect innocent buyers from buying non-compliant cabinets, one would reasonably have expected WorkSafe to have put the suppliers on notice and issued infringement notices and fines to some of them. We are not aware that any of these steps has occurred.

#### **WorkSafe data for the first six months of 2024**

Were WorkSafe's Technical Bulletin having any material impact on certifiers' assessments of "AS 1940 cabinets" we would expect WorkSafe to have received:

- many more notifications of refusals to issue compliance certificates; and
- many more explicit references to "AS 1940 cabinets" in the reasons why certifiers were not issuing full compliance certificates.

WorkSafe's data, obtained pursuant to our OIA request, show that these outcomes have not resulted. Therefore, it is reasonable to assume that certifiers are continuing to certify "storage" in cabinets that do not meet the Cabinet Requirements. This is exactly what we observe during inspections when we follow other certifiers – most non-compliant cabinets do not have the required structural features, likely never did, and almost certainly never will. We can thus see no evidence of any actions that WorkSafe has been prepared to take in relation to compliance certifiers who are required to verify that each cabinet meets the Cabinet Requirements before being certified as compliant.

A proactive regulator would have done something about the deplorable understanding and compliance which has, and continues to exist, in the market which has contributed to our estimate of more than 60,000 non-compliant cabinets. For example, WorkSafe could have held an instructional seminar in which it could have drawn a line a sand, just as it did in relation to site plans in late 2023<sup>i</sup> that has produced meaningful outcomes. It still could do this, of course.

A regulator that was an effective communicator would have let relevant PCBUs know, at least, that it had published a technical bulletin that would make it easy for insurers to deny PCBU claims for losses when there were concerns about the performance of AS 1940 cabinets.

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<sup>i</sup> WorkSafe reports that in the first six months of calendar 2024, the number of conditional certificates issued that had conditions related to site plans was 741. Thus, we see that actions beyond quiet publications on its website can produce change.