

WorkSafe is wrong in relation to “protected places”

1. Key Points

WorkSafe is not applying the law; instead it is permitting workplaces to have large tanks of dangerous chemicals close to workers in places that are prohibited by the Regulations. Its policy statement and approach must be urgently changed.

- The concept of “protected place” is a very important one in the Regulations; in short, places where people work or assemble are “protected” by requiring that hazardous substances be kept at a ‘separation distance’ away. Separation distance between people and substances is one of the most critical safety controls used extensively in the Regulations. Highly dangerous situations can arise if, for example, fire spreads from within a workplace to a tank containing flammable and/or toxic chemicals – if this occurs, a worker’s training will not keep them safe but her separation from the tank might.
- The Regulations have an explicit definition of what constitutes a “protected place” – at workplaces protected places include buildings in which workers are “regularly employed.”
- WorkSafe’s policy document dated March 2022 entitled “What we mean by protected place and public place” (**Policy Statement**) purports wrongly to introduce new concepts into the definition of “protected place,” in particular, by broadening the types of places which are not to be regarded as protected places. The effect purports to eliminate large areas of buildings where workers are in danger.
- Because of the widespread use of the essential concept of **protected places** in the Regulations, WorkSafe’s policy has extensive impact and purports to make critical changes without due regard for what the law requires.
- In other specific instances, using flawed reasoning, WorkSafe has deemed as compliant highly non-compliant tanks containing some of the most hazardous substances used in the workplace. It has done this by coming up with a contorted interpretation of simple legislation. These precedents are alarming.
- We are extremely surprised that a regulator with the responsibility for enforcement of good regulations is acting *ultra vires* and diluting the obvious safety features that government has specifically required in the legislation. WorkSafe’s reason for being is defined as “securing the health and safety of workers and workplaces” not diluting sound law.
- DGC has been asked for a legal explanation of how the Policy Statement and precedents are permitted by the legislation, but WorkSafe has provided none.

2. Definition of Protected Place

Regulation 3 of the Health and Safety at Work (Hazardous Substances) Regulations 2017 defines protected place as:

protected place—(a) includes—

(i) a dwelling, residential building, place of worship, public building, school or college, hospital, childcare facility, or theatre, or any building or open area in which persons are accustomed to assemble in large numbers, whether within or outside the property boundary of a place where a hazardous substance location is situated:

(ii) any factory, workshop, office, store, warehouse, shop, or building where persons are regularly employed, whether within or outside the property boundary of a place where a hazardous substance location is situated:

(iii) a ship lying at permanent berthing facilities

(iv) a public railway; but

(b) does not include a small office or other small building associated with a place where storage, handling, use, manufacture, or disposal of a class 2, 3, 4, 5, 6, or 8 substance is a major function.

WorkSafe’s Policy Statement

The Policy Statement is available on WorkSafe’s website. The key issue relates to how WorkSafe interprets (b) above:

A PROTECTED PLACE NOT INCLUDE	WHAT WE MEAN BY THIS ELEMENT
a small office or other small building associated with a place where the storage, handling, use, manufacture, or disposal of a class 2, 3, 4, 5, 6, or 8 substances is a major function	A small office or other small building can refer to a stand-alone structure or be part of a larger structure. ‘[A]ssociated with’ means that the small office or other small building has a relationship with the place where the storage, handling, use, manufacture, or disposal of those classes of substances is a major function. The small office or other small building doesn’t need to be used for these purposes.

If a place meets this description, it is **not** a protected place.

The difference between DGC’s approach and WorkSafe’s is demonstrated by using the example in the diagram on the following page which shows:

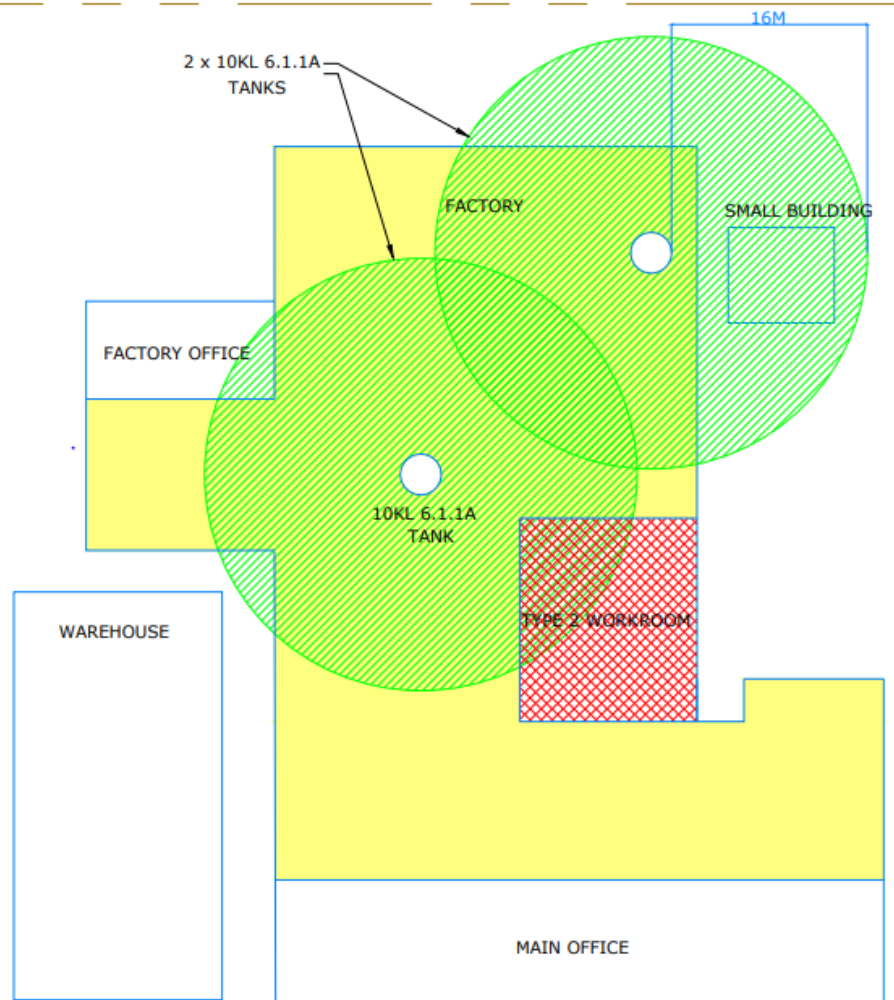
- two tanks holding 10,000 litres of class 6.1.1A (white dots),
- the separation distances mandated by the Regulations (in green),
- a type 2 workroom where work related to the substances may be performed,
- two offices,
- a warehouse and
- a small building.

Only the small building and a larger warehouse are outside the factory (the interior of which is in yellow).

The key questions are:

- (i) are the tanks allowed to be inside the factory? This is answered by
- (ii) what areas are protected places?

We say the factory is a protected place. WorkSafe says that there is some type of exclusion zone within the factory, or the factory itself, is somehow not a protected place.



It is evident from the subparagraphs of the definition in (a) of protected place that different types of places are described. For present purposes, we can focus on (ii) which deals with traditional workplaces. All the places listed from “factory, workshop, office, store, warehouse, shop” are types of buildings and the catch-all category of “or building” reinforces this.

In diagram A, we have shown the inside of the factory by shading it in yellow. Attached to the factory is the small factory office and outside the building housing the factory is a small building and a larger warehouse where the finished goods are stored. Outside the factory and the warehouse buildings are open areas where goods are moved, for example, on forklifts.

Because a factory is specifically listed in (a)(ii) and in our example it is where workers work (“regularly employed”), it is a protected place unless it is specifically excluded. It is not - this is the end of the argument. However, we analyse the WorkSafe view to show its further flaws.

The area of contention is what is caught by the exclusion in (b) of the definition – “a small office or other small building associated with a place where storage, handling, use, manufacture, or disposal of a class 2, 3, 4, 5, 6, or 8 substance is a major function.”

Although there might be debate about how small an office has to be before it is “small,” in relation to the other areas at the workplace in our diagram, the issue is what is covered by the remaining parts of the clause; in particular: *the “other small building” which is associated with the factory.*

The first and obvious point is that for a part of the workplace to fall within (b) it must be a building. The

phrase “other small building” makes this certain.

Association is a broad concept but must exist for clause (b) to apply – in our example, the small building (self-serving example, yes, but it is small), whereas the warehouse where finished goods are stored after the manufacturing process (even if the finished goods are not hazardous) involving hazardous substances is associated but it is not small. A small building located close by, even on the same site, occupied by a completely separate business, would not be associated with the factory and, thus, clause (b) would not apply.

There is no basis for the factory itself to not be a protected place for many reasons –

- the factory is the building in which the manufacturing activities are conducted;
- it is specifically defined as a protected place in clause (a) (ii);
- there is no provision to exclude it; and
- the factory is not the “other building” but the main building.

WorkSafe has reached a different conclusion in analogous situation – in effect, saying that the factory is not a protected place - and this is what its Policy Statement also implies.

The subtlety of the error in the Policy Statement is found in the new concept WorkSafe has introduced which is “or be part of a larger structure” which it then uses as a basis to exclude some parts of the factory (in our example) itself, apparently relying upon (b) of the definition. This nuance (although apparently benign) is wrong and has massive implications as we have seen in some of the decisions WorkSafe has made in major workplaces using highly toxic substances.

WorkSafe’s approach fails what Australians call the “pub test” – if you asked the patrons at the local pub, would they say it makes sense to have toxic chemicals inside a factory where their mates work? The answer is entirely predictable¹. The test of common sense aligns with exactly what the Regulations very deliberately prohibit.

We have no doubt that WorkSafe’s approach is wrong. The drafting and intent of clause (b) of the definition is clear and creates no ambiguity. In any event, our “pub test” aligns with what is good policy for keeping workers safe.

3. WorkSafe’s position on a specific example we were involved in earlier this year

WorkSafe became involved with “Company X” from 2020 through until earlier this year. WorkSafe’s first position was that a tank containing toxic (class 6) chemicals could not be inside the factory because the required separation distance to a protected place could not be complied with. The discussion moved to discussing applications for an exemption from the Regulations before the view emerged from WorkSafe that no exemption was required because the requirements of the Regulations were, in fact, met. We disagreed. We asked WorkSafe for a clear explanation including by reference to applying the definition of protected place to the factory at Company X. After more than five weeks of asking for a clear statement, WorkSafe wrote to us on 22 March 2022¹ as follows:

*“The separation distance does extend /encroach upon the factory floor area where dry goods/non-hazardous materials are held and workers move within. However, we do **not** consider this factory floor area to be a protected place. All staff who may at any given time be present in the area have a direct role in the operation of the factory and are associated with the class 6.1 tanks and the production of xxxxx² treatment chemicals using the hazardous substances held in those tanks.”*

¹ Daren Handforth email dated 22 March 2022

² The description has been omitted to protect client confidentiality

This explanation conflated erroneously concepts which are irrelevant to the definition of protected place:

- the training of workers in the hazardous substances; and
- changing the concept of “association” from association between buildings to linking the training of workers to the tanks where the hazardous substances were stored.

When we asked for how this approach bore any resemblance to the definition of protected place, there was no answer. More than eight weeks later, there still has not been any. We are left confused and concerned because there simply is no reasonable interpretation such as that advocated by WorkSafe.

We say with confidence this approach by WorkSafe was, and is, flawed.

- The training of workers is irrelevant for the purposes of the definition of protected place.
- A contiguous space inside the factory cannot meet the key elements in (b) – there has to be another small building– and there is absolutely no basis for the factory itself to not be a protected place.

4. A slippery slope

The separation of (i) places where people work or otherwise assemble in large numbers from (ii) places where there are large quantities of hazardous substances is used extensively throughout the Regulations; indeed, the Regulations are designed, firstly, to keep workers safe at work (aligned with HSWA) and, secondly, to keep others safely away from hazards.

If WorkSafe follows its new Policy Statement, it will be purporting to usher in a totally new way of defining what is a protected place. It has no power to do this because it has no power to change the Regulations. A policy statement that purports to change the law is void. Purporting is the key word – if WorkSafe has no power to change the law, the most it can do is purport to do so.

The manner in which separation distances are used to protect workers at work (in their protected places) is clear in the law and also very sound policy.

Separation can mitigate the risk of fire going from a place where people work to a major hazard/ hazardous substances location, or vice versa. The required separation distances are highly prescriptive and positively correlated with quantities of hazardous substances. If fire breaks out, separation is an important way of mitigating the risk of harm.

Worker training is an entirely different concept designed to keep workers safe more generally. Training requirements are also correlated with the degree of hazard when workers are working with the most toxic hazardous substances. It is wrong to conflate protected places and worker training as WorkSafe has done. If parliament has legislated for specific exceptions only from the definition of “protected place” it is not open to WorkSafe to attempt to change that law.

Can you imagine the reaction of a mother whose son is killed in an explosion of a caustic soda tank inside a factory when told:

- The tank was not allowed by law to be where it was
- WorkSafe approved it.

We can imagine exactly how she would react. We cannot understand why her son is being allowed by WorkSafe to be placed in unnecessary danger.

5. An example of the importance of separation distances from protected places – the fire in Bangladesh

Shipping containers are commonly used at workplaces for storage of flammable liquids, in particular. If, for example, 20,000 litres of flammable liquids in package sizes greater than 60 litres are stored therein, the required separation distance from the shipping container to “protected places” is 20 metres.

On the night of 5 June 2022, a fire inside shipping containers at a shipping container park in Bangladesh killed at least 49 people. The proximity of people to hazardous locations is dangerous and this is what the twin concepts of “protected places” and “separation distances” mitigate. If, as WorkSafe has done, the concept of protected place is severely diluted, the risk of serious harm to workers has been materially increased.

Why would WorkSafe, the regulator whose name suggests exactly what its role is, deny workers inside factories in New Zealand the protections that the law requires to keep them away from the types of infernos that engulfed the facility in Bangladesh? This is something we invite WorkSafe to explain.

At least 49 killed and hundreds injured in Bangladesh depot fire

Huge blaze breaks out at container storage facility 40km from country's main sea port, Chittagong, with toll expected to rise further



📷 Firefighters carry a victim from the burning depot in Sitakunda, southern Bangladesh.
Photograph: AFP/Getty Images

At least 49 people died and hundreds have been injured after a fire tore through a shipping container depot in **Bangladesh**, sparking a huge chemical explosion that engulfed many of those who had rushed to the scene to help. The death toll is expected to rise.

6. WorkSafe must retract the Policy Statement and commit to properly apply the definition of “protected place”

There is no other reasonable, lawful approach other than for WorkSafe to retract its recent approach to the issue of protected places. Significant safety aspects which are well (and sensibly) protected in the legislation must be defended and not waived by WorkSafe. This must be done urgently before we have the next workplace widow.

ⁱ It may very well be “mate, you’re off your rocker.”