

## Producer statements and liability: The Court of Appeal provides critical clarification on the scope of liability under section 40 of the Building Act 2004

**In *Solicitor General's Reference (No 1 of 2022)* the Court of Appeal has confirmed that professionals who issue producer statements for non-compliant work may face significant consequences. The decision underscores the importance of compliance and accountability in the building industry, reaffirming that the issuing of a producer statement is not merely an administrative task but a serious professional responsibility with legal ramifications.**

The Building Act 2004 (**Act**) does not make provision for the use of producer statements (unlike its predecessor the Building Act 1991), however, producer statements are commonly used to advise building consent authorities about construction work that has been carried out in the course of implementing building consents. Producer statements issued by a suitably qualified person may be accepted by building consent authorities as demonstrating that the work has been carried out in accordance with the building consent and the building code.

### Facts of the case

The underlying case is *Cancian v Tauranga City Council*. In this case, the Tauranga City Council alleged that five defendants, including Mr Cameron and The Engineer Limited (**TEL**), a company of which Mr Cameron was the sole director, had carried out non-compliant building work.

Mr Cameron was an engineer who issued producer statements on behalf of TEL in connection with a residential subdivision near Tauranga. His role involved on-site construction monitoring, physical investigations and testing, and the provision of instructions or directions to building contractors in respect of the next stages in construction. Both the Council and WorkSafe became aware of issues concerning the quality of the work being carried out, and ultimately a number of the homes were declared to be either dangerous or affected buildings. The Council laid charges under s40 of the Act, and both Mr Cameron and TEL were convicted in the District Court on six charges of carrying out non-compliant building work contrary to s40 of the Act. Mr Cameron and TEL successfully appealed the District Court decision, with the High Court quashing the convictions and finding that the issuing of producer statements in relation to non-compliant building work does not give rise to liability under s40 of the Act. A question of law was then referred by the Solicitor General to the Court of Appeal. It was asked: *Was the Court correct to find that the issue of producer statements (following or as a result of construction monitoring) in relation to non-compliant building work does not give rise to liability under s40 of the Building Act 2004?*

### Section 40 of the Act

Section 40 of the Building Act 2004 provides:

#### Building Work not to be carried out without consent

- 1) A person must not carry out any building work except in accordance with a building consent.
- 2) A person commits an offence if the person fails to comply with this section.
- 3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

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### Court of Appeal's ruling

The Court of Appeal rejected the High Court's reasoning, finding that the issue of producer statements in relation to non-compliant building work is capable of giving rise to liability under s40 of the Act. The Court of Appeal held that the definition of "building work" is broad enough to cover producer statements, despite the fact that the Act does not formally provide for producer statements. While producer statements are not statutory documents, it is a standard industry document with well understood content and purpose, intended to contain reasonable statements of professional opinion that the building works to which they relate have been completed in accordance with the building consent and building code.

The court observed that a producer statement is procured by the builder for the purpose of assuring a council that the work has been carried out by the builder in accordance with the requirements of the building consent and building code. Requiring such statements to be accurately made is consistent with the purpose of the Act, which is to promote the accountability of the owner and builder for the work that is done. It also assists the building consent authority to carry out its responsibilities as the regulator. The potential for liability under s40 in respect of producer statements wrongly issued promotes accountability of all those who need to ensure that building work is compliant. The definition of "building work" under the Act also includes certain types of design work, so liability under s40 could extend to other types of producer statement (i.e. PS1 design, PS2 design review, as well as PS3 construction).

### Implications for the industry

Producer statements are likely to continue to have a role in establishing building compliance going forward, so parties issuing them need to understand the legal ramifications of providing them. Professionals need to take care when undertaking design review and construction monitoring, and further scrutiny may well lead to increased costs.

The prospect of liability is likely to cause concern among the construction industry, and parties issuing producer statements may need greater levels of insurance in place to minimize risk. This may in turn result in increased market costs if parties are seeking to pass the cost of increased insurance premiums onto consumers.

### Want to know more?

If you have any questions about producer statements or the Building Act 2004, please contact our specialist [litigation team](#).