



# PRACTICE ALERT

2 December 2024

## An important message about potential criminal liability under the Building Act for inaccurate PS4 producer statements

This practice alert explains the recent Court of Appeal judgment regarding PS4 Producer Statements, the background to the case, the legal and practical implications, and the benefits of statutory liability insurance.

### Summary

Engineers issuing PS4 – Construction Review Producer Statements have received a sharp reminder from the Court of Appeal that they are documents of legal significance and care needs to be taken when issuing them and undertaking all related review work.

In a recently released judgment,<sup>1</sup> the Court has confirmed that issuing a PS4 Producer Statement (PS4) in relation to non-compliant building work<sup>2</sup> is itself capable of giving rise to criminal liability for the issuing engineer under the Building Act 2004 (the Act).

In reaching its decision, the Court ruled that the provision of a PS4 amounts to “building work” under the Act which can itself breach the Act when it contains a statement of opinion that the construction work was building consent/code compliant when that was not the case and there were not reasonable grounds for the statement. Such an incorrect statement of compliance would amount to building work not carried out in accordance with the building consent in breach of s40 of the Act.

While the decision has expanded the potential liability of engineers for PS4s beyond civil liability claims and disciplinary proceedings, it seems unlikely it will lead to a marked increase in Building Consent Authority (BCA) prosecutions. This is because the prosecution cases which lay behind the Court’s decision involved serious failures by engineers, the Court noted the higher criminal burden of proof needing to be met for a successful prosecution, and BCAs would risk collapsing a non-mandatory scheme operating to their and the public’s considerable benefit if prosecutions were not reserved for reprehensibly serious failures.

On the other hand, the significance of the decision should not be underestimated. Despite PS4s not being statutory documents<sup>3</sup>, their legal significance to New Zealand building law has been confirmed as indicated by engineers now facing potential criminal liability in relation to them. The development reflects the Court’s confirmation that construction

<sup>1</sup> *Solicitor-General’s Reference (No 1 of 2022)* [2024] NZCA 514 (11 October 2024).

<sup>2</sup> The term used in the judgment for “building work carried out except in accordance with a building consent”, in breach of s40(1) of the Act.

<sup>3</sup> In contrast to having been statutorily recognised (and defined) in the Building Act 1991

monitoring and PS4s have important, well recognised roles in assisting the determination of building work compliance by all parties with compliance obligations under the Act.

At a practical level, the decision has highlighted the need for engineers to take care in carrying out their construction monitoring role and in ensuring PS4s are accurate in relation to the matters being “certified”<sup>4</sup>, while keeping good records evidencing the monitoring work undertaken and the reasonable grounds for the PS4 professional opinion.

## Background

### Solicitor-General’s request for interpretation ruling

The Court of Appeal’s decision followed a request by the Solicitor-General for a clarification under the Criminal Procedure Act 2011 on whether “*the issue of producer statements (following or as a result of construction monitoring) in relation to non-compliant building work*” can give rise to liability under s40 of the Building Act.

Section 40 states:

40 Building work not to be carried out without consent<sup>5</sup>

- (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 is committed.

The ruling was sought because of conflicting High Court decisions on whether issuing a PS4 in relation to completed building work amounted to “building work” as defined in the Act. The ruling was also sought to clarify whether, if it was “building work”, the issuing of one in relation to non-compliant work by a builder could itself be building work other than in accordance with a building consent.

### Bella Vista development prosecution

The interpretation request arose from the Tauranga City Council’s prosecution of engineer Bruce Cameron and his company The Engineer Ltd (TEL) who issued PS4s in connection with a residential building development in Tauranga by Bella Vista Homes Ltd (Bella Vista). Mr Cameron’s role involved on-site construction monitoring (including related instructions/directions to builders), physical investigations and testing, and providing PS4s.

Bella Vista obtained building consents from the Council. During the construction stage, the Council and WorkSafe became aware of significant issues concerning the quality of the work and site safety. This led to them closing down the development in 2017 with widespread media coverage of the event.

In 2020 Mr Cameron and his company (amongst others) were convicted in the District Court for carrying out non-compliant building work in breach of s40 of the Act. The basis for the prosecution was that they had provided the Council with PS4s confirming compliant building work when they inaccurately reflected the work carried out.

On appeal, the High Court overturned the convictions.<sup>6</sup> In doing so, the Court followed a 2021 High Court decision in doubting that the provision of a PS4 was “building work” under the Act,<sup>7</sup> and in finding that in any event s40’s second limb requirement – that the work was carried out other than in accordance with a building consent – was not met in the circumstances of the case.

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<sup>4</sup> The word used by the Court at [70] of the judgment.

<sup>5</sup> The heading to s40 has since been amended to “Buildings not to be constructed, altered, demolished, or removed without consent”.

<sup>6</sup> *Cancian v Tauranga City Council* [2022] NZHC 556, Lang J.

<sup>7</sup> *Andrew Melvin King-Turner Ltd v Tasman District Council* [2021] NZHC 343, Ellis J. In doubting that the provision of a PS4 was “building work” under the Act, Lang J preferred the reasoning in *Andrew Melvin King-Turner Ltd* to the reasoning in *Kwak v Park* [2016] NZHC 530.

In relation to the first limb, the High Court noted that producer statements have no official status under the Act, and considered only the owner, builder and the BCA were entities responsible under the Act for ensuring building consent compliance. In relation to the second limb, the Court said that as the Bella Vista building consents contained no reference to producer statements, Mr Cameron/TEL's PS4s could not amount to non-compliant building work. This was because the building consents contained no standards or requirements needing to be complied with in relation to information to be provided or the inspections preceding the provision of any producer statement.

## Court of Appeal decision

The Court of Appeal noted that while PS4s are not now statutory documents, unlike their position under the repealed Building Act 1991, they continue to be commonly used...

*"...to advise building consent authorities about construction work that has been carried out in the course of implementing building consents. Their provision by suitably qualified persons may be accepted by building consent authorities as an accurate representation of work that has been carried out and as giving a reasonable assurance the work has been carried out in accordance with the building consent and building code. This process enables building consent authorities to reduce the cost and delays that would be incurred if they carried out their regulatory functions under the Act using only their own employees".*

The Court concluded, after considering the text of s40 in light of its context and the Act's purpose, that issuing PS4s in relation to non-compliant building work can give rise to liability under s40 of the Act. The following is a summary of its analysis.

### Is issuing a PS4 building work?

The Court noted that the definition of "building work" under the Act is broad and captures any work "for or in connection with the construction of a building". Noting also that the definition of building work includes "sitework", it held that work performed on site to assess compliance in order to issue a PS4 falls within the definition of sitework as it is "work on a building site associated with the construction of a building".

The Court found that although a PS4 is not a statutory document, it is a standard, formal document endorsed by the professional association of its author, with well understood content and purpose, intended to contain a reasonable statement of professional opinion that the building works to which it relates have been completed in accordance with the building consent and building code.

The Court held that the work necessary to issue a PS4 and the related work carried out on site to assess compliance fall within the ambit of the Act's definition of building work.

### Can issuing an inaccurate PS4 amount to non-compliant building work?

The Court of Appeal disagreed with the High Court's finding that because there was no reference in the relevant Bella Vista building consents to producer statements, Mr Cameron/TEL could not issue a producer statement that breached the building consent given the absence of standards or information requirements.

The Court said the High Court's position was incorrect because the building consent did incorporate documents requiring "Engineers Report PS4 Structure". But the Court went on to say that even if that were not the case, there was non-compliance with the building consent:

*"We do not see the absence of standards or information requirements in the building consent itself as decisive. Producer statements have a standard form, which makes plain what their essential contents are to be. There is no doubt about what the statement is required to say, or as to the standards or requirements to be met. And the standard of inspection to be met can fairly be described as the standard necessary to establish reasonable grounds for belief in the assertions made in the statement. The statement comes from a person professionally qualified to make it, who makes the statement intending it to be relied on".*

*"...Here, the producer statements breached the requirements of the Act by wrongly stating work had been carried out in conformity with the requirements of the building consent and building code when that was not the case."*

#### Does imposing liability for an inaccurate PS4 accord with the purposes of the Act?

The Court considered that holding authors of PS4s accountable under s40 accords with the Act's purposes. Requiring PS4s to be accurate furthers the statutory purpose of promoting the accountability of the owner, builder and BCA for building work done. It does this by assisting each of them to meet their responsibilities for ensuring building work achieves compliance with the building consent and building code, thereby promoting public safety and wellbeing.

#### Some pertinent concluding Court of Appeal comments

The Court rejected an argument that the issuing of a PS4 was "design work" and not "building work" in terms of the Act. It commented that the Act's description of a designer and a designer's duties in s14D was essentially prospective - the duty being to ensure plans of proposed work, if followed, will result in a complying building. The Court viewed this as *"essentially different from the work involved in issuing a [PS4] producer statement, which relates to the work that is being done on site to implement the design"*.

The Court accepted there was force in the argument that the outcome of its interpretation will criminalise the giving of an opinion in the context of a statutory offence provision which creates strict liability.<sup>8</sup> However, the Court stated that a PS4 is more than an opinion because it reflects the work the author has carried out to be able to express the opinion, and confirms the author has reasonable grounds for belief in compliance. Also, the higher criminal standard of proof will apply, so the author will not be criminally liable *"unless it is established beyond all reasonable doubt that the matters certified in the statement are incorrect"*. In the case of Mr Cameron/TEL, the District Court was readily able to conclude beyond reasonable doubt that the PS4s were wrong.<sup>9</sup>

## **Implications from Court of Appeal's decision**

#### Legal implications

- Despite PS4s not being statutory documents, their legal significance to New Zealand building law has been confirmed as indicated by engineers now facing potential criminal liability in relation to them. The development reflects the Court's confirmation that construction monitoring and PS4s have important, well recognised roles in assisting building work compliance by all parties with obligations under the Act to ensure compliance.
- There is no apparent difference between the elements needed for establishing criminal liability or civil liability for an inaccurate PS4, other than the criminal burden of proof being higher. The Court accepted that PS4s were statements of professional opinion but, consistent with the common law position, held that they involved representations of fact that the work required by the engaged CM level of construction monitoring or other services referred to in the PS4 had been carried out, and that the author had reasonable grounds for believing the building work covered by the PS4 complied with the building consent and building code.
- While the prosecution case against Mr Cameron/TEL accepted the appropriateness of the engagement contract's CM levels of construction monitoring, a low and seriously inappropriate CM level for a building project will likely create a compliance issue with the BCA if it results in a significantly defective building being completed.

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<sup>8</sup> Strict liability means it is not necessary to prove that the defendant intended to commit the offence. Statutory defences are limited to: urgent, reasonable work to protect life or property; and events relating to the prosecution being beyond the defendant's control and not reasonably foreseen or provided against (including natural disasters, mechanical failure or sabotage).

<sup>9</sup> Four PS4s wrongly stated there were reasonable grounds for block-foundation work being compliant following CM3 construction monitoring, and two PS4s wrongly stated there were reasonable grounds (including from ground investigations) for ground-bearing capacity being compliant following CM2 construction monitoring.

- Unlike the civil liability position,<sup>10</sup> both the person signing a PS4 (whether a Director/Principal or lower level employee) and the Construction Review Firm on whose behalf the signing is done can face criminal liability for an inaccurate PS4.
- The Court of Appeal decision concerns PS4s. Based on the Court's comments mentioned earlier on the difference between design work and building work and that a PS4 relates to work done on site to implement a design, it seems doubtful that potential criminality will be extended judicially to the issuing of an inaccurate PS1 - Design or PS2 - Design Review.<sup>11</sup>
- Because of the higher burden of proof required to establish criminal liability, it seems likely that BCA prosecutions will be reserved for serious PS4 failures by engineers such as occurred in the two prosecutions<sup>12 13</sup> which led to the High Court cases behind the Court of Appeal's decision. Another factor is that BCAs would risk collapsing a non-mandatory scheme operating to their and the public's considerable benefit if prosecutions were not reserved for reprehensibly serious failures.

### Practical implications

- The decision has highlighted the need for engineers to be thorough and vigilant when doing construction monitoring and to keep good records of their monitoring work particularly at key stages. Good records are needed for evidence of the monitoring work done and of the reasonable grounds for the PS4 professional opinion.
- The decision has also highlighted the need for care in completing PS4s to ensure:
  - they are accurate in relation to the matters being stated, with any assumptions, qualifications or exclusions expressly included; and
  - any documents incorporated by reference into the PS4 are attached or properly identified by their description.
- At a more practical level, the decision has reinforced the benefit of having good policies and procedures in relation to construction monitoring and PS4s. Here are some important aspects to note:
  - Ensure the scope of work for the construction monitoring phase has been clearly agreed as part of the contracted scope of work with the client, including agreeing on an adequate CM level of attendance. Avoid being pressured into limited construction monitoring engagements.
  - Don't agree to provide a modified version of the ENZ/ACE PS4.<sup>14</sup> The standard form has been carefully worded to constitute a statement of professional opinion so that the civil liability being assumed in relation to the PS4 is insurable. The standard wording is also important in setting the limits of the obligations being assumed and so has relevance as well to any potential criminal liability.
  - Allow sufficient time and remuneration under your contract to complete the construction monitoring phase thoroughly to the CM level agreed.
  - Ensure the agreed CM level is correctly recorded in the PS1.

<sup>10</sup> The statements in the PS4 that the author is signing on behalf of the Construction Review Firm and that liability under the PS4 "accrues to the Construction Review Firm only" can limit an author's personal civil liability, but not any criminal liability for a s40 breach.

<sup>11</sup> But will likely be extended to the issuing of an inaccurate PS3 - Construction.

<sup>12</sup> Mr Cameron/TEL's failures included approving inadequate footings and construction of a substantial retaining wall without doing an inspection. The District Court described the failures as being at a high degree, indicative of a casual approach to professional obligations and while not deliberate were highly negligent.

<sup>13</sup> *Andrew Melvin King-Turner Ltd v Tasman District Council* (fn 7 above). The engineer effectively certified he had sighted the building consent and stated he believed on reasonable grounds the work covered by the PS4 was consent compliant when no building consent existed.

<sup>14</sup> without obtaining prior legal advice.

- Obtain a copy of the Building Consent prior to commencing construction monitoring.
- If construction monitoring attendances are delegated by the PS4 author to other personnel, ensure they are well briefed and have the commensurate skill/experience to do the job, especially when subcontracting the construction monitoring to other parties.
- When subcontracting the construction monitoring, some initial supervision of the monitoring engineer is required by providing a clear brief, especially regarding the monitoring frequency, key stages and critical items. Some follow-up supervision is also required (review of inspection reports, images, a site visit) to ensure the brief is being followed.
- Take time on site to inspect works properly. Don't be led or pressured by the contractor to rush inspections, and be judicious when relying on contractor photos, videos etc.
- Before issuing the PS4 be disciplined around obtaining all compliance statements, contractor PS3s, proprietary design PS4s, contractor QA records, material certificates etc which combine as part of the basis for the considered opinion "on reasonable grounds".
- Don't be bullied into issuing a PS4 due to programme pressures or code compliance deadlines. Don't issue the PS4 until satisfied all the work covered by it is satisfactorily complete.
- The PS4 should clearly identify the monitoring work done and not done:
  - If something hasn't been witnessed – state this.
  - If information from others has been relied on – state this.
  - If something has been assumed – state this.
- If there is insufficient room on the PS4 form for all conditions needing to be stated, write them in a separate document, refer to the document in the PS4, and attach the document to the PS4.
- Ensure the Building Consent number and any amendment numbers are recorded on the PS4.

## Statutory liability insurance

As engineers can now face criminal liability for PS4s, there is increased benefit for engineers in having statutory liability insurance as part of their firm's insurance portfolio.

Statutory Liability insurance includes cover for fines, penalties and defence costs relating to an unintentional breach or alleged breach of the Building Act,<sup>15</sup> and usually also provides cover for defence costs relating to a BCA investigation. While the fines for breaching s40 have tended to be moderate,<sup>16</sup> they can be expected to increase, and the defence costs relating to a prosecution will almost invariably be substantial.

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<sup>15</sup> Subject to the policy's indemnity limits and terms.

<sup>16</sup> The Court adopts a multi-factor approach when determining the appropriate level of a fine based on guidelines and principles from previous cases. Among the factors is some recognition that a criminal conviction will cause reputational damage to a business and in all likelihood some adverse financial consequences.