QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Seymour Whyte Constructions Pty Ltd v the Regulator under the Work Health and Safety Act 2011* [2024] QIRC 085
PARTIES:	**Seymour Whyte Constructions Pty Ltd** (Applicant) v **The Regulator under the Work Health and Safety Act 2011** (Respondent)
CASE NOS:	WHS/2021/124 WHS/2021/135 WHS/2021/136 WHS/2021/144
PROCEEDING:	Application for external review
DELIVERED ON:	19 April 2024
HEARING DATES:	19-21 September 2022 20 December 2022
MEMBER:	O'Connor VP
HEARD AT:	Brisbane

ORDER:

1. **In respect of WHS/2021/124 the Review Decision be set aside, and the Improvement Notice be withdrawn *ab initio*.**

2. **In respect of WHS/2021/135 the Review Decision be set aside and the Improvement Notice be withdrawn *ab***

***initio*.**

3. **In respect of WHS/2021/136 the Review Decision be set aside, and the Improvement Notice be withdrawn *ab initio*.**

4. **In respect of WHS/2021/144 the Review Decision be set aside, and the Prohibition Notice be withdrawn *ab initio*.**

CATCHWORDS: INDUSTRIAL LAW - WORK HEALTH AND SAFETY - EXTERNAL REVIEW - IMPROVEMENT NOTICE - PROHIBITION NOTICE - where applications for external review - where applicant was issued three improvement notices and one prohibition notice - where parties agreed matters be heard together - where applicant seeks all notices be set aside - whether inspectors held a reasonable belief there was a contravention when issuing each of the improvement notices and the prohibition notice - whether inspectors formed a reasonable belief an activity was occurring at a workplace or may occur involving a serious risk to the health or safety of a person - whether grounds existed for the issue of the prohibition notice - whether improvement notices contained content required in s 192 of the *Work Health and Safety Act* 2011 - whether prohibition notice contained content required in s 196 of the *Work Health and Safety Act* 2011 - whether review decisions should be set aside - whether improvement notices and prohibition notice should be withdrawn

LEGISLATION: *Work Health and Safety Act* 2011 (Qld) s 3, s 19, s 191, s 192, s 195, s 196, s 197, s 208, s 229, s 229E, s 229D
*Building and Construction Industry Improvement Act (*Cth*)* 2005, s 36

Building and Construction Industry Security of Payment Act 1999 (NSW), s 17
City of Brisbane Town Planning Act 1964-1969
Corporations Act 2001 (Cth), s 1322

Work Health and Safety Bill 2011

CASES:

Adams v Lambert (2006) 228 CLR 409
Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation (1985) 1 NSWLR 561
Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union (2009) 189 IR 165
Baiada Poultry Pty Ltd v The Queen (2012) 246 CLR 92
Blomfield v Bechtel Construction (Australia Pty Ltd) [2012] FCA 1494
Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors [2021] QIRC 356
Chase Oyster Bar v Hamo Industries (2010) 78 NSWSLR 393; [2010] NSWCA 190
Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd (2005) 194 FLR 322; (2005) 55 ACSR 185
Currie v Dempsey (1967) 69 SR (NSW) 116
De Tournouer v Chief Executive, Department of Environment & Resource Management [2011] 1 Qd R 200
Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Others [2020] QIRC 188
George v Rocket (1990) 170 CLR 104
GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011 [2021] QIRC 306
Growthbuilt Pty Ltd v SafeWork NSW [2018] NSWIRComm 1002
Lindores Construction Logistics Pty Ltd v The Regulator under the Work Health and Safety Act 2011 [2018] QIRC 061

Multiplex Constructions Pty Ltd v The Regulator under the Work Health and Safety Act 2011 (No.2) [2019] QIRC 133
Project Blue Sky Inc & Ors v Australian Broadcasting Authority (1998) 194 CLR 355
SafeWork NSW v Saunders Civilbuild Pty Ltd [2021] NSWDC 605
Scurr v Brisbane City Council (1973) 133 CLR 242

APPEARANCES: Mr A.E. Smith, Counsel instructed by Minter Ellison for the Applicant.

Mr T.E. Spence, Counsel directly instructed by the Regulator for the Respondent.

Reasons for Decision

[1] Seymour Whyte Constructions ('the Applicant') operates a construction business with various projects throughout Australia.

[2] It is not in dispute that the Applicant was appointed principal contractor for two packages of work as part of an upgrade of the M1 - Pacific Highway. Those packages of work were known as the Varsity Lakes to Burleigh Package (VL2B) and the Palm Beach to Tugun Package (PB2T).

[3] This decision relates to four separate applications, joined by the consent of the parties allowing for the matters to be heard together.[1] Three of the applications seek review of the Improvement Notices, and the final application seeks review of a Prohibition Notice. The applications are set out consecutively.

[4] Each Improvement Notice relates to work being conducted on the Pacific Motorway M1 Upgrade project, either at the Varsity Lakes to Burleigh Project site or the Palm Beach to Tugun Project site. The Prohibition Notice relates to the barrier exclusion at the Varsity Lakes to Burleigh Project.

[5] The Applicant seeks orders under s 229E(1)(c) of the *Work Health and Safety Act* 2011 ('the WHS Act') that the Review Decisions be set aside and substituted with decisions to withdraw the Improvement Notices and the Prohibition Notice.

The Applications

[1] Correspondence from the Applicant dated 5 August 2021 and from the Respondent dated 6 August 2021.

[6] The orders are sought by the Applicant on the following grounds:

(a) Ground 1: In respect of each of the notices issued, the relevant inspector did not have the requisite belief, upon which the exercise of the power is conditioned.

(b) Ground 2: Improvement Notice 12020833 (Pre-Start Notice), Improvement Notice 12015028 (VMP Notice) and Prohibition Notice P1026523 (Deflection Zone Notice) do not specify the minimum content required by the WHS Act.

[7] The Applicant does not press Ground 3 (Requirements for compliance not readily ascertainable) in respect of Improvement Notice I2020833, Improvement Notice I2020840 and Improvement Notice I2015028.

Statutory Provisions

[8] Section 191 of the WHS Act states an Improvement Notice may be issued if an inspector reasonably believes there has been a contravention.

[9] Section 191 states as follows:

191 Issue of improvement notices

(1) This section applies if an inspector reasonably believes that a person -
(a) is contravening a provision of this Act; or
(b) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.

(2) The inspector may issue an improvement notice requiring the person to -
(a) remedy the contravention; or
(b) prevent a likely contravention from occurring; or
(c) remedy the things or operations causing the contravention or likely contravention.

[10] Section 192(1) of the WHS Act provides that an improvement notice must state the following:

192 Contents of improvement notices

(1) An improvement notice must state -

(a) that the inspector believes the person -
(i) is contravening a provision of this Act; or

(ii) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated; and

(b) the provision the inspector believes is being, or has been, contravened; and

(c) briefly, how the provision is being, or has been, contravened; and

(d) the day by which the person is required to remedy the contravention or likely contravention.

[11] Section 195 of the WHS Act sets out what a prohibition notice must state:

195 Power to issue prohibition notice

(1) This section applies if an inspector reasonably believes that -

(a) an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or
(b) an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

(2) The inspector may give a person who has control over the activity a direction prohibiting the carrying on of the activity, or the carrying on of the activity in a stated way, until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

(3) The direction may be given orally, but must be confirmed by written notice (a prohibition notice) issued to the person as soon as practicable.

[12] Section 196 of the WHS Act sets out the conditions which must exist prior to the issuing of a prohibition notice.

196 Contents of prohibition notice

(1) A prohibition notice must state -

(a) that the inspector believes that grounds for the issue of the prohibition notice exist and the basis for that belief; and
(b) briefly, the activity that the inspector believes involves or will involve the risk and the matters that give or will give rise to the risk; and
(c) the provision of this Act that the inspector believes is being, or is likely to be, contravened by that activity.

(2) A prohibition notice may include directions on the measures to be taken to remedy the risk, activities or matters to which the notice relates, or the contravention or likely contravention mentioned in subsection (1)(c).

(3) Without limiting section 195, a prohibition notice that prohibits the carrying on of an activity in a stated way may do so by specifying 1 or more of the following -

(a) a workplace, or part of a workplace, at which the activity is not to be carried out;
(b) anything that is not to be used in connection with the activity;
(c) any procedure that is not to be followed in connection with the activity.

[13] Section 197 provides that a person must comply with the prohibition notice. Section 197 provides:

197 Compliance with prohibition notice

The person to whom a direction is given under section 195(2) or a prohibition notice is issued must comply with the direction or notice.
Maximum penalty - 1,000 penalty units.

[14] The review under s 229 of the WHS Act is to be dealt with by the Queensland Industrial Relations Commission ('the Commission') considering all the evidence before it. Section 229(1) of the WHS Act states:

> **229 Application for external review**
>
> (1) An eligible person may apply to the external review body for a review (an external review) of -
> (a) a reviewable decision made by the regulator; or
> (b) a decision made, or taken to have been made, on an internal review.

[15] The powers of the Commission in determining the matter are detailed at s 229E of the WHS Act as follows:

> **229E Powers of commission on application**
>
> (1) In deciding an application for a review, the commission may -
> (a) confirm the decision; or
> (b) vary the decision; or
> (c) set aside the decision and make a decision in substitution for it; or
> (d) set aside the decision and return the issue to the decision-maker with directions the commission considers appropriate.
>
> (2) If the commission acts under subsection (1)(b) or (c), the decision is taken, for this Act (other than this part), to be that of the person whose decision was the subject of the application.

Nature of Review

[16] Section 229D of the WHS Act provides that a review is to be dealt with by way of re-hearing, unaffected by the decision.[2]

[17] The nature of a review under s 229D of the WHS Act was considered in *Lindores Construction Logistics Pty Ltd v The Regulator under the Work Health and Safety Act* 2011[3] where the Commission concluded:

> [3] A review under s 229D of the Act is to be dealt with by the Commission "by way of rehearing, unaffected by the decision." In dealing with a similar expression in s 246 of the *Coal Mining Safety and Health Act* 1999, Martin J observed that the expression "by way of rehearing, unaffected by the decision" involved a certain clumsiness of expression. Martin J wrote:
>
> > The language used in s 246 is inconsistent. For an "appeal by way of rehearing" to be successful it ordinarily requires that the original decision-maker be shown to have erred in law or fact. But this section says that the appeal is to be "unaffected by the chief inspector's review decision" which would seem to be inconsistent with the ordinary understanding of an appeal by way of rehearing.

[2] Section 229D (2) of the WHS Act.
[3] [2018] QIRC 061.

His Honour went on to observe:

> In other words, section 246 uses a form of words which is more clearly understood as an appeal de novo. An appeal de novo involves a rehearing of the evidence by the appellate court. It is analogous to a new trial.

[4] In *De Tournouer v Chief Executive, Department of Environment & Resource Management,*[4] Fraser JA addressed the meaning to be given to the same expression:

> Section 880(2) provides that such an appeal is "by way of rehearing, unaffected by the reviewer's decision." Section 882(1) conferred extensive powers upon the Land Court including, in s 882(1)(e), a power to set aside the review decision and substitute it with a decision that the court considered appropriate. In summary, the Land Court was empowered to exercise afresh the statutory power to grant or refuse to grant a water licence on the applicant's application.[5]

Onus of Proof

[18] Sections 191 and 195 of the WHS Act are conditioned on the inspector having a reasonable belief.

[19] The phrase 'reasonable belief' is not defined in the WHS Act. However, reference is made to the approach taken by the High Court in *George v Rocket*[6] as to what amounts to a 'reasonable belief'. In *George v Rockett*, the High Court observed:

> [8] When a statute prescribes that there must be "reasonable grounds" for a state of mind - including suspicion and belief - it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v. Anderson* … That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers... Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist …
>
> It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind.[7] (References and citations omitted)

[20] A reasonable belief requires the existence of facts which are sufficient to induce the belief in a reasonable person.

[21] In determining whether there is a reasonable suspicion, one must consider whether the person who holds the suspicion has based it on facts and whether those facts could ground a suspicion of contravention in a reasonable person.

---

[4] [2011] 1 Qd R 200.
[5] *De Tournouer v Chief Executive, Department of Environment & Resource Management* [2011] 1 Qd R 200, [8].
[6] (1990) 170 CLR 104.
[7] Ibid.

[22] In reliance on *GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011*,[8] it was contended by the Respondent that in an external review conducted pursuant to s 229D of the WHS Act, it is the Applicant who bears the onus to demonstrate why the Improvement Notices and the Prohibition Notice should be set aside.

[23] In *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Others,*[9] it was argued by the parties that the onus rests with the other party to establish whether there was (or was not) a reasonable suspicion for the purpose of s 117 of the WHS Act. Hartigan IC (as her Honour then was) wrote:

> [99] The respondents submitted that Enco bears the onus of establishing that the permit holders did not have a reasonable suspicion, on the basis that Enco is the only party seeking orders.
>
> [100] In the alternative, Enco contends that the onus to prove whether the permit holders held a reasonable suspicion, lies with the permit holder. In support of its position, Enco relied on the Explanatory Notes to the Workplace Health and Safety Bill 2011, which identifies that there is an intention that the permit holder be required to prove the suspicion is reasonable, in the following circumstances:
>
> > Subclause 117(2) requires the WHS permit holder to reasonably suspect before entering the workplace that the contravention has occurred or is occurring. If this suspicion is disputed by another party, the onus is on the WHS permit holder to prove that the suspicion is reasonable.
>
> [101] Further, Enco submits that as the permit holders were the only persons with the ability to know and prove the facts, they bear the onus of establishing a reasonable suspicion.
>
> [102] It appears, by reference to the Explanatory Notes, that it was parliament's intent that the onus rests with the permit holders to establish reasonable suspicion, if the suspicion is disputed by another party. That intention is consistent with the relevant authorities, in so far as the party who has the ability to know and prove the facts bears the onus of establishing them. Here, it is the permit holders who have the ability to prove the basis of the reasonable suspicion.
>
> [103] Accordingly, it is for the permit holders to discharge the onus to establish that they held a reasonable suspicion, in circumstances where that suspicion is disputed by Enco.[10] (citations omitted)

[24] In *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation,*[11] Hunt J held that:

> ... where the facts are peculiarly within the knowledge of one party, that all evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted: *Blatch v Archer* (1774) 1 Cowp· 63 at 65, 6698 ER 969 at 970; Stephen's Digest of the Law of Evidence, 12th ed, article 104; *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367 at 405; *Morgan v Babcock and Wilcox Ltd* (1929) 43 CLR 163 at 1 78;

---

[8] [2021] QIRC 306.
[9] [2020] QIRC 188.
[10] *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Others* [2020] QIRC 188.
[11] (1985) 1 NSWLR 561, (*Apollo*).

> *Ex parte Ferguson; Re Alexander* (1944) 45 SR (NSW) 64 at 7062 WN 15; *Hampton Court Ltd v Crooks; R v Guiren* (1962) 79 WN (NSW) 811 at 813.[12]

[25] *Apollo* is authority for the proposition that the party who has the ability to know and prove the facts bears the onus of establishing them. Here, it is the permit holders who have the ability to prove the basis of the reasonable belief.

[26] A distinction needs to be drawn between the legal burden and the evidentiary burden. In *Currie v Dempsey*,[13] Walsh JA explained:

> In *Purkess v. Crittenden*, [1966] A.L.R. 98; 114 C.L.R. 164, at pp. 167-8, it was said that the proposition there quoted from Phipson on Evidence, 10th ed., para. 92, has been frequently acknowledged. The proposition was that the expression "the burden of proof", as applied to judicial proceedings, "has two distinct and frequently confused meanings: (1) the burden of proof as a matter of law and pleading - the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of introducing evidence". The author went on to say, and this also was approved in the case last cited, that the burden of proof in the first sense is always stable, but the burden of proof in the second sense may shift constantly. In my opinion, the burden of proof in the first sense lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g. if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has."[14]

[27] The onus rests with the permit holders to establish reasonable belief. The facts leading to the formation of a reasonable belief are within the knowledge of the inspectors who issued the relevant notices. It is only the relevant Inspector who is in a position to give evidence on the facts giving rise to their purported reasonable belief leading them to issue the notices.

Ground 1: In respect of each of the Notices issued, the relevant inspector did not have the requisite belief, upon which the exercise of the power is conditioned.

WHS/2021/124 - Improvement Notice I2020833 (Pre-Start Notice)

[28] On 12 April 2021 at 11:28am, Inspector Anzac Te Oka attended at the Applicant's construction site at 27 Alex Fisher Drive, Burleigh Heads. Inspector Te Oka attended the site with another Inspector, Simon McLennan.

[29] Inspector Te Oka gave evidence that the reason for visiting the site that day was due to notification by Mr Dean Rielly a representative of the Construction, Forestry, Mining & Energy Industrial Union of Employees, Queensland ('the CFMEU') alerting the Respondent of alleged breaches of the WHS Act.[15]

---

[12] (1985) 1 NSWLR 561.
[13] (1967) 69 SR (NSW) 116.
[14] Ibid.
[15] TR3-15, L42-TR3-16, L3.

[30] Upon arrival at the site, Inspector Te Oka recorded in his notebook that he met with Mr Rielly.[16]

[31] Together with Inspector McLennan, Inspector Te Oka attended a meeting on site with Mr Dean Rielly and representatives of the Applicant; Mr Kevin Robinson (Safety Manager); Mr Nick Osborne (Superintendent); and Mr David Bicknell (Project Manager). The meeting was electronically recorded.[17]

[32] During the meeting, the Inspector discussed issues relating to five mobile plant as set out below:

> 1 x Complant owned roller operated by Protech Labour Hire to the Applicant;
> 2 x 14-ton Excavators owned and operated by sub-contractor Cooper Civil;
> 1 x Rubber Tyre Excavator owned and operated by sub-contractor Hazell Brothers; and
> 1 x 35-ton Excavator owned and operated by Sniffers.[18]

[33] The Improvement Notice I2020833[19] issued on 12 April 2021 identified a breach of s 19(3)(c) of the WHS Act.

[34] The contravention is said to have arisen by reason of the following:

> Conversations with relevant persons confirm you have failed to ensure the provision and maintenance of a safe system of work. Pre starts for powered mobile plant were not completed or not completed correctly. The checks were not completed correctly.[20]

[35] The Improvement Notice was issued due to an alleged failure by the Applicant to complete the required "pre-start" meeting for powered mobile plant equipment. An application for internal review was filed with the Respondent a few days later, and subsequently confirmed by the Respondent on 13 May 2021.

[36] The Respondent argues that the Inspector's belief concerning the contravention by the Applicant of s 19(3)(c) WHS Act was reasonable in the circumstances where the Inspector determined that the Applicant had failed to have a proactive approach to safety issues; and/or failed to recognise and plan for "the inevitability of human error ranging from inadvertence, inattention or haste through to foolish disregard of personal safety and deliberate non-compliance with safe systems of work'.[21]

[37] Contrary to the Applicant's contentions, the Respondent submits that Inspector Te Oka made reasonable enquiries of the Applicant's representatives to test the validity of the assumptions underpinning his beliefs of the risk posed to health and safety.

---

[16] Exhibit 28.
[17] Exhibit 5, 6 and 7.
[18] Respondent's outline of closing argument filed 5 December 2022, [54].
[19] Exhibit 1.
[20] Ibid.
[21] Respondent's preliminary outline of argument filed 25 March 2022, [62].

[38] The Applicant's assertion that the "Inspector chose to base his analysis on a conversation with a CFMEU official, and on a cursory review of some relevant documents" is said by the Respondent to be baseless and not supported by the video footage recorded by the Applicant.

[39] In examination-in-chief, Inspector Te Oka was asked:

> But how could you form a reasonable belief if you'd not actually inspected the machines?---Because it was about the prestarts for the machines. It wasn't necessarily about the machines. I didn't need to inspect the machines, I needed to inspect how they were actually doing that. And that was done through conversation, through looking at their documentation as well. I saw photographs of some prestart checks that Mr Rielly took.
>
> Yes?---I wasn't even really concerned about that. Because Kevin Robinson and Nick Osborne, I think his name is, both agreed with Mr Rielly that some of those checks were not conducted properly. And when I went through all five of the pieces of plant that Mr Rielly spoke about - - -
>
> Yes?--- - - - we discussed each one in detail.
>
> Yes?--- And there was no argument from site management that at least three if those were non-compliant.[22]

[40] During cross-examination the following exchange took place:

> Yes. And section 19 subsection (3)(c), that was the only section of the Act that your turned your mind to; is that right?---Yes.
>
> All right. Now, you don't identify a hazard in the notice, do you?---No.
>
> And you don't identify a risk in the notice, do you?---That's right.
>
> And you don't identify a person who was exposed to a risk, do you?---That's right.
>
> And you didn't identify any reasonably practicable step that you thought that Seymour Whyte needed to take that they hadn't taken. You didn't identify that in the notice, did you?---That's right. All right. So then in the meeting that you had with my client at the end, you told them you were going to issue a notice. Do you recall that?---Yes.
>
> And when you said that, did you say everything you felt you needed to say?---Yes.
>
> All right. So again, at that time, section 19 subsection (3)(c) of the *Work Health and Safety Act* was the only provision you'd ever turned your mind to?---Yes, that's right.
>
> All right. And in the notice - sorry - in the - in that conversation, you didn't identify a hazard then either, did you?---Sorry, what was that, again?
>
> You didn't identify, when you were talking about what the notice was going to be, you didn't identify a hazard with them, did you?---No.
>
> No. And you didn't identify a risk either, did you?---No.
>
> You didn't identify a person who was exposed to a risk, did you? And you didn't identify a reasonably practicable step that you felt needed to be taken. Do you accept that?---Yes.

---

[22] TR3-12, LL31-46.

> All right. Now, at any time up until the point at which you issued a notice, section 19 subsection (3)(c) of the Work Health and Safety was the only provision you'd turned your mind to. Do you accept that?---Yes.
>
> And you accept that at no point did you identify a hazard?---That's right.
>
> And at no point did you identify a risk?---That's right. I accept that.
> And you didn't identify a person who you felt was exposed to a risk - potentially exposed to a risk?---That's right.
>
> You accept that. And you didn't identify any reasonable - reasonably practicable step which you thought needed to be taken?---That's right.
>
> So you didn't identify a contravention of the Act, did you?---No.
>
> Sorry? No?---As in, no, I don't agree with you.
> Okay. So you don't accept that proposition?---I don't accept it.
>
> But you accepted all the other propositions about - - -?---Yes.
>
> - - - what you'd identified?---Yes.[23]

[41] Inspector Te Oka accepted that he did not identify a hazard or a risk; a person exposed to a risk; or any reasonably practicable step he considered should have been taken by the Applicant which had not been taken.[24]

[42] Moreover, Inspector Te Oka accepted that:

(a) Mr Robinson advised him that the Applicant has a KPI requirement to perform inspections in relation to the completion of pre-starts;
(b) he did not immediately ask Mr Robinson any questions in relation to the performance of these inspections;
(c) he did not review the pre-start records for the relevant plant or any records of KPI inspections;
(d) at no relevant time did he suggest to Mr Robinson that he did not accept the evidence Mr Robinson provided to him regarding the KPI Inspections; and
(e) his written notes do not record any instance of him asking Mr Robinson to provide any documents in relation to the KPI requirement to perform inspections.

[43] Mr Robinson told the Commission that the Applicant's pre-start process must be completed by all plant operators. Furthermore, as part of the compulsory site induction all workers who perform work in a construction role are informed that they are required to conduct pre-starts on their plant.[25]

[44] The evidence was that the Applicant had established processes to monitor whether subcontractor employees had completed pre-starts.[26]

---

[23] TR3-46, L18-TR3-47, L27.
[24] TR3-47, LL9-17.
[25] TR1-46, LL1-14.
[26] TR1-45, LL32-40.

[45] The Respondent submits that in circumstances where the matters raised by Mr Rielly and the Inspector were not challenged or contradicted by the Applicant's representatives, it was reasonable for Inspector Te Oka to rely on the uncontradicted information as basis for forming his belief.

[46] However, the Applicant argued that Mr Robinson's evidence was to the effect that the Inspectors 'scared' him and he was not aware that he had any avenue of response to their commentary.[27] Mr Robinson said:

> I didn't actually dispute them, because I treat them as the experts, and I don't actually - I don't know what my level of retort is.[28]
>
> I don't have the - it's not my obligation to tell the inspectors how to do their job.[29]

[47] In cross-examination, Mr Robinson was asked:

> You accepted that you gave some evidence that you were scared of the inspectors. Do you remember that?---Yes, yes.
>
> What impact does that have on your willingness to speak up in a meeting like this?---I I view the inspectors as being the experts and the enforcers of the legislation, so they work in that all the time. And I don't work in the legislation all the time, I work in the systems. And so I rely on the inspectors to be the experts, and that when - when they're telling me and I don't have the book there to be able to look at the different clauses and whatnot they're talking about. I'm taking them on their word as the experts and the enforcers of the legislation.[30]

[48] Whilst I do not accept the submission that Mr Robinson was 'scared' of the Inspectors, I do accept that he may not have seen any utility in making a comment after being told by Inspector Te Oka that he was going to issue the notice.

[49] Mr Robinson informed Inspector Te Oka that the Applicant had a weekly KPI inspection process in respect of the completion of pre-starts.[31] Inspector Te Oka did not make any inquiry in respect of those inspections,[32] nor did he ask Mr Robinson to inspect the pre-start records.[33]

[50] What is evident from Exhibit 10 is that the Weekly OHS Inspection 53404 and Weekly OHS Inspection 54262 revealed a problem with respect to pre-starts on 17 July 2020 and 20 August 2020. Steps were taken to correct the omission.

[51] Mr Robinson gave the following evidence:

---

[27] TR1-74, LL38-43.
[28] TR1-77, LL25-26.
[29] TR1-78, LL39-40.
[30] TR1-90, LL4-13.
[31] TR1-55, L39.
[32] TR3-36, LL40-44; TR3-37, L35.
[33] TR3-45, LL34-39.

> MR SPENCE: Mr Robinson, what made you give that response?---It was proactive and it was measurable, and we would gain a lot out of it.
>
> And it would improve safety?---We're always looking to improve safety.
> And that was about, wasn't it, ensuring that the matters that had been raised during the meeting about the safe systems of work were addressed in the future; correct?---Ongoing.
>
> And it's also the case, isn't it, that the inspector explained the basis on when he was going to issue the notice; correct?---Yes.[34]
>
> …
>
> If I can get you to go back to the improvement notice, which is exhibit 1. You've indicated on that notice that it's a contravention of 19(3)(c) of the *Work Health and Safety Act*. Can you tell me this. Based on the information that you had received at the meeting, why did you believe Seymour White [sic] were contravening section 19(3)(c) of the *Work Health and Safety Act*?---
>
> Because they're the principal contractor. Even though not all but some of these people who are out there working were subcontractors, the principal contractor was the person in control of the worksite. They require all of those subcontractors to work to their system of work. So that's - that's why I was looking at this notice for the principal contractor who was also the person in control of the workplace.
>
> Yes?---They had the overarching duty, as I said, on the - the video. And it wasn't - it wasn't something they were directly involved in. This is something that they just failed to manage with their subcontractors.[35]

[52] The Respondent contends the evidence supports a conclusion that the Inspector formed a reasonable belief the Applicant was not managing the completion of pre-start safety checklists such that the Applicant was not maintaining a safe system of work, therefore contravening s 19(3)(c) of the WHS Act.

[53] I accept that in forming his belief in respect of issuing the notice, the Inspector relied solely on s19(3)(c) of the WHS Act.

[54] As expressed in *George v Rockett*,[36] in determining whether there is a reasonable suspicion, one must consider whether the person who holds the suspicion has based it on facts and whether those facts could ground a suspicion of contravention in a reasonable person. The test of "reasonable belief" is an objective one.

[55] Section 19 of the WHS Act requires the issuer of an Improvement Notice to be satisfied that a worker or other person is not exposed to a risk to their health and safety;[37] that the exposure arose out of the conduct of the business or undertaking;[38] there was a step

---

[34] TR1-81, L46-TR1-82, L8.
[35] TR3-13, LL31-44.
[36] (1990) 170 CLR 104.
[37] Section 19(1) and (2), WHS Act.
[38] Ibid.

that the business or undertaking could have taken to eliminate or minimise the person's exposure to the risk;[39] and that the step was reasonably practicable to take.[40]

[56] In his evidence, Inspector Te Oka accepted that at no point did he identify[41] a hazard or a risk; a person exposed to a risk; or any reasonably practicable step he considered should have been taken by the Applicant which had not been taken.

[57] The Improvement Notice does not identify what the risk was which was said to arise, nor any reasonably practicable measure which could have been taken to eliminate or minimise the risk. The Improvement Notice did not identify how the provision was being contravened.

[58] I cannot be satisfied on the evidence before the Commission that the permit holders could have held the belief necessary to issue the notice.

[59] Accordingly, the Review Decision ought to be set aside and the Improvement Notice withdrawn *ab initio.*

WHS/2021/135 - Improvement Notice - I2020840 (Access Road)

[60] It is contended by the Respondent that the Inspector formed a reasonable belief that the Applicant was not maintaining a safe system of work by allowing pedestrians to move about the access road on a regular basis despite site management stating that workers were only allowed to cross the access road in light vehicles.

[61] Improvement Notice I2020840[42] was issued by Inspector Te Oka alleging that the Applicant was contravening s 19(3)(c) of the WHS Act. The alleged contravention was particularised as follows:

> Inspector TE OKA observed workers walking across access road between site office/facilities and earthworks. Road is approximately four meters wide. Inspector TE OKA also observed light vehicles using the road. There is no marked delineation or signage. TE OKA requested documented procedures for delineation of persons from mobile plant at the access road and none were available. Discussions with multiple workers also confirmed workers walk the access road on a regular basis. Site management informed TE OKA that workers are only allowed to cross the access road in light vehicles. You have failed to maintain a safe system of work that allows persons to move about the access road without risk to their health and safety. Workers are at risk of serious injury from collision with vehicles.[43]

[62] The Respondent submits that it was, in the circumstances, reasonable for the Inspector to form a belief regarding the Applicant's contravention of s 19(3)(c) of the WHS Act. This was so having regard to the fact that the Applicant had failed to have a proactive

[39] Section 17, WHS Act.
[40] Section 18, WHS Act.
[41] TR3-46, L21-TR3-47, L19.
[42] Exhibit 2.
[43] Ibid.

approach to safety issues; and/or failed to recognise and plan for "the inevitability of human error ranging from inadvertence, inattention or haste through to foolish disregard of personal safety and deliberate non-compliance with safe systems of work".[44]

[63] In cross-examination, Inspector Te Oka was asked:

> MR SMITH: All right. I'll just ask you to familiarise yourself with that again, and I'll just ask you a couple of questions about it. So you've had a look at that? All right. Now, when you issued that notice, section 19(3)(c) was the only section of the Act you had in mind, wasn't it? All right.
>
> …
>
> MR SMITH: All right. And where you say workers are at risk of serious injury from collision of vehicles - - -?---Yes.
>
> - - - you accept that that was a low risk, don't you?---Yes.
>
> All right. Now - - -?---That's why it was just an improvement notice.
> …
>
> All right. Now, what you suggested should occur was there should be some delineation between vehicles and people. Do you accept that?---Yes.
>
> And that could've been done by some flags and bollards. Is that what you're saying?---No.
>
> No. All right?---Not on this road. It's too narrow.
>
> All right. So what do you say had to be done?---An administrative control, such as only one on - on the road at a time, either pedestrians or light vehicles, and that would - - -
>
> All right?---Adequate space between the two, and it would have to be controlled.
>
> All right. So all the controls that I talked about that were in place already - they were all administrative controls as well, weren't they?---Yes. Yes, only - yeah.
>
> So - - -?---Yeah.
>
> I - sorry, I apologise. The high-vis PPE, of course?---PPE. Look - - -
>
> Yeah?--- - - - there - there is some engineering with the bollard, but that's only to keep people off the very edge.
>
> Yep. So all you're saying is, "They've already got all these administrative controls.
> Let's add another administrative control"?---No.
>
> Well, what you said - having some - having a rule that only a vehicle or a person could be on there, that's an administrative control, isn't it?---Yes.
> Okay. And that's the only control you suggested, isn't it?---Yes.

[44] Respondent's amended outline of argument filed 28 April 2022, [106].

> So the only control you suggested was another administrative control. You accept that?---Well, no.
>
> What other control - - -?---Well, no, no, sorry. Sorry. I do accept that they have to have an administrative control, but I don't accept that I was the one who suggested that control.
>
> They presented a document to me that had the control hand-written over a photograph that was produced that morning, by their admission. So my problem was that they were not enforcing that control. That's why I wrote the notice.[45]

[64] The Applicant submits that steps had already been taken to minimise the risk so far as is reasonably practicable by engineering controls (the design of the road) and a host of other safety procedures about speed and direction of travel.

[65] The evidence before the Commission was that the road was approximately 10 metres in length, flat, with good visibility and no blind corners; had a speed limit of 10 km per hour, with no suggestion that the speed limit was not followed; and workers were required to wear high visibility clothing.[46]

[66] Notwithstanding the particulars in the notice, the Inspector accepted that the level of risk was low. Inspector Te Oka's evidence was as follows:

> All right. So in any event, whether it was used by light vehicles or heavy vehicles, you'd accept that it'd be unlikely that anyone would be struck by a vehicle under those traffic conditions. You accept that?---Yes, if everyone obeyed the conditions. Hundred per cent, yes.[47]

[67] The Applicant contends that the imposition of further controls was not reasonably practicable. In support of that contention, the Applicant relies on the decision of the High Court in *Baiada Poultry Pty Ltd v The Queen*[48] a decision cited with approval by this Commission in *Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors.*[49] In *Baiada Poultry,* the High Court said:

> [15] All elements of the statutory description of the duty were important. The words "so far as is reasonably practicable" direct attention to the extent of the duty. The words "reasonably practicable" indicate that the duty does not require an employer to take every possible step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment.[50]

[68] In *SafeWork NSW v Saunders Civilbuild Pty Ltd*,[51] Scotting DCJ wrote:

---

[45] TR3-51, L19-TR3-52, L32.
[46] TR3-48, L31-TR3-49, L22.
[47] TR3-50, LL13-16.
[48] (2012) 246 CLR 92, (*Baiada Poultry*).
[49] [2021] QIRC 356.
[50] (2012) 246 CLR 92.
[51] [2021] NSWDC 605, (*Saunders*).

[108] A duty imposed to ensure health and safety requires the person to eliminate risks to health and safety so far as that is reasonably practicable, and if that cannot be done, to minimise those risks so far as is reasonably practicable: s 17 of the Act. The risk should be identified with sufficient precision to determine if it was reasonably practicable to eliminate it or minimise it.

[109] "Reasonably practicable" is defined in s 18 of the Act. The court must take into account and weigh up all relevant matters including:

(a) the likelihood of the risk concerned occurring, and
(b) the degree of harm that might result from the risk, and
(c) what the defendant knows or ought reasonably to know about;
    (i) the risk, and
    (ii) ways of eliminating or minimising the risk, and
(d) the availability and suitability of ways to eliminate or minimise the risk, and
(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with either of those options, including whether the cost is grossly disproportionate to the risk.

[110] The state of knowledge applied to the definition of practicable is objective. It is that possessed by persons generally who are engaged in the relevant field of activity, and should not be assessed by reference to the actual knowledge of a specific defendant in particular circumstances: *Laing O'Rourke (BMC) Pty Ltd v Kirwin* [2011] WASCA 117 at [33].

[111] The reasonably practicable requirement applies to matters which are within the power of the defendant to control, supervise and manage: *Slivak v Lurgi (Aust) Pty Ltd* (2001) 205 CLR 304 at [37] (Gleeson CJ, Gummow and Hayne JJ).

…

[113] The s 19 duty requires knowledge of the risk emanating from the activities of the defendant: *Slivak*. Foreseeability of the risk to persons from the activity is an element of this question of knowledge. It would not generally be practicable to take measures to guard against a risk to safety that was not reasonably foreseeable: *Genner Constructions Pty Ltd v WorkCover Authority of New South Wales* [2001] NSWIRComm 267 at [68].

[114] The statutory duty is not limited to simply preventing foreseeable risks of injury. The duty is to protect against all risks, if that is reasonably practicable. Reasonably practicable means something narrower than physically possible or feasible: *Slivak* at [53] (Gaudron J).

[115] The words "reasonably practicable" indicate that the duty does not require a duty holder to take every possible step that could be taken. The steps to be taken in performance of the duty are those that are reasonably practicable for the duty holder to achieve the provision and maintenance of a safe working environment. Bare demonstration that a step might have had some effect on the safety of a working environment does not, without more. demonstrate a breach of the duty: *Baiada Poultry Pty Ltd v R* (2012) 246 CLR 92 at [15], [33] and [38) (French CJ, Gummow, Hayne and Grennan JJ).[52]

[52] *SafeWork NSW v Saunders Civilbuild Pty Ltd* [2021] NSWDC 605.

[69] It is submitted by the Applicant that as of 20 April 2020 it had implemented and maintained for the site a Safe Operating Procedure for Traffic Management (SWC-SOP-013)[53] and the Safe Work Method Statement (SWMS) 002: General On Site Labour Tasks for PB2T (SWMS-002).[54] The Applicant further argues that the SWMS-009: General Earthworks for PB2T (SWMS-009)[55] and the controls contained within that document were also in operation at the PB2T site on 20 April 2021. The control measures contained in that document included:

(a) plant selected for the work must be fit for purpose and able to operate without placing people or other objects at risk of being struck;

(b) appropriately trained spotters must be assigned to guide machinery where interfacing work groups or other objects are present in the immediate work area of the mobile plant;

(c) mobile plant operators must stop immediately if they lost sight of a worker on the ground where they are operating;

(d) delineated work areas and access pathways to be established in the work area to separate workers from operating plant wherever possible; and

(e) authorised safety spotter in place having visual on the service location and operator at all times.[56]

[70] The evidence, which was not challenged by the Respondent suggests that the Applicant had taken all reasonable steps for the provision and maintenance of safe systems of work.

[71] In *Saunders*,[57] Scotting DCJ wrote:

> [121] Where an employer is found to have laid down a safe and proper practice and there is no evidence that the employer failed to use due diligence to see that the practice was observed, then a casual failure by inferior employees, even if of supervisory rank, to observe that practice on a particular occasion will not render the employer criminally liable for a failure to ensure safety: *Collins v State Rail Authority of New South Wales* (1986) 5 NSWLR 209 at 215E.
>
> [122] The question of what is reasonably practicable is also a question of fact, determined by the circumstances of each case. The fact that an employee has carried out work carelessly or omitted to take a precaution does not preclude the employer from establishing that everything that was reasonably practicable in the employer's undertaking to ensure that

[53] Exhibit 23.
[54] Exhibit 24.
[55] Exhibit 25.
[56] Exhibit 18, p 6.
[57] *SafeWork NSW v Saunders Civilbuild Pty Ltd* [2021] NSWDC 605.

> persons were not exposed to risks to their health and safety had been done: *R v Nelson Group Services (Maintenance) Ltd* [1998] 4 All ER 332 at 351e-f.[58]

[72] I accept that the only further control which was suggested by the Inspector was an administrative control, namely, a rule that only persons or vehicles could be on that section of road at the time.[59]

[73] There was a broad range of control measures in place. An additional administrative control was unnecessary. The steps to be taken in the discharge of the duty under the WHS Act are those that are reasonably practicable for the Applicant to achieve the provision and maintenance of a safe working environment. The suggestion that some other step might have had some effect on the safety of a working environment does not, without more, demonstrate a breach of the duty imposed under the WHS Act.

[74] The evidence before the Commission suggested that it was unlikely that anyone would be struck by a vehicle under the traffic conditions which prevailed at the time of the issuing of the notice. In those circumstances, it is difficult to accept the basis upon which it is asserted that was a reasonably practicable step which was available for the Applicant to take which was not taken.

[75] The permit holders have not, on the evidence before the Commission discharged the onus that the notice should have been issued.

[76] Consequently, for the reasons set out I consider that the Review Decision should be set aside, and the Improvement Notice withdrawn *ab initio*.

WHS/2021/136 - Improvement Notice I2015028 (Vehicle Management Plan)

[77] At approximately 10:55 am on 20 April 2021, Inspector Travis Dungey attended the Applicant's construction site located at M1 Palm Beach to Tugan, Rees Court - compound gate NB3, Palm Beach.

[78] Inspector Dungey attended the site as a consequence of a complaint from Mr Rielly. In attendance with Inspector Dungey was Inspector Te Oka.

[79] Inspector Dungey is said to have observed workers walking across this area, which was part of the access road between the site office/facilities and earthworks and that light vehicles were also using the road.

[80] The Applicant maintained a Vehicle Management Plan (VMP) applied to its work as Principal Contractor with respect to the construction of the M1 upgrade for the PB2T site.[60]

---

[58] Ibid.
[59] TR3-52, LL1-23.
[60] TR1-31, LL30-36; TR2-3, LL30-32, LL44-47; TR2-17, LL24-26; Exhibit 15.

[81] The VMP, which is given to all site attendees, provides information about how to access the site, and includes basic information regarding speed limits, the gate number, the UHF number and a relevant contact.[61] It was the evidence that workers are informed of changes to the VMP during the pre-start meetings and updated copies of the VMP are posted to a notice board.[62]

[82] Improvement Notice I2015028[63] was issued by Inspector Dungey alleging that the Applicant was contravening section 19(3)(c) of the WHS Act. The alleged contravention was particularised as follows:

> While on site I observed and photographed also (sic) conversations with representatives of the PC confirmed a Vehicle management plan in place for the site is the one used. I showed this plan to the traffic controller in charge of vehicle movement into the site on gate nb3 conversations (sic) with him indicated that he had not seen that vehicle management plan. conversation (sic) with the PC representatives indicated no safe system of work is in place to make sure workers are aware of the movements of vehicles and understand how that applies to there (sic) working area, not having a safe system of works in place could put workers at risk as a result.[64]

[83] Both Inspector Dungey and Inspector Te Oka attended at the site. They identified themselves to Mr Reid by stating that they were Inspectors from Work Health and Safety Queensland, and told him that they were there to ask questions about the VMP.[65]

[84] The VMP applied to the Applicant's work as Principal Contractor with respect to the construction of the M1 upgrade for the PB2T site. Moreover, the Applicant submits that the VMP, is given to all site attendees, provides information about how to access the site, and includes basic information regarding speed limits, the gate number, the UHF number and a relevant contact. Workers are informed of changes to the VMP during the pre-start meetings and updated copies of the VMP are posted to a notice board.

[85] Mr Landon gave evidence that:

(a) upon entry to site, drivers pull over and telephone a representative of the Applicant who asks the driver what they are doing, where they are going and arrange for a worker to meet them;[66]

(b) if a driver attends the gate and requires directions, they would contact him or the leading hand;[67] and

---

[61] TR1-31, LL30-36; TR2-3, LL30-32, LL44-47; TR2-17, LL24-26; Exhibit 15.
[62] TR2-3, LL37-43; TR2-51, LL30-35.
[63] Exhibit 3.
[64] Ibid.
[65] Respondent's amended preliminary outline of argument filed 28 April 2022, [78].
[66] TR1-21, LL1-5.
[67] TR1-21, LL1-2.

(c) the VMP was only amended for major changes, such as when doing traffic switches or putting in gates.[68]

[86] Mr Corga was the Applicant's Site Superintendent. His responsibilities included the day-to-day operations of the site, safety, programming, planning, dealing with the community and stakeholders. He said that people entering the site are provided with a copy of the VMP. The VMP is not a static document but is updated as circumstances change on site. If the VMP is modified it is presented at pre-starts, toolbox meetings and is displayed on-site.[69]

[87] At the time of the pre-start discussion on 20 April 2021, no changes had been introduced to the VMP. Draft written amendments to the VMP were made by Mr Landon and Mr Miles following the pre-start meeting of 20 April 2021.[70]

[88] In his evidence Mr Corga said that he did not recall signing the version of the VMP which contained the handwritten amendments[71] and that any updated VMP would not be implemented until it had been approved and signed. The copy of the VMP given by Mr Corga to the Inspectors was said to be under revision.

[89] What is submitted by the Applicant is that the VMP relied upon by Inspector Dungey was a draft document which was not in force. In relying on the document, the Inspector had made a false assumption as to the VMP's currency.

[90] During cross-examination, Inspector Dungey was shown his contemporaneous note in his official notebook[72] and asked:

> Now, can I take you to the second page and about a third of the way down that page it where you start dealing with this issue?---Mmm.
>
> And you say:
>
> > *Conversation to Bart Corga was superintendent and Joel was site supervisor.*
>
> Can you see that?---Yep.
>
> …indicates that VMP is the current VMP. ?---Mmm.
>
> Now, can I suggest to you that you didn't actually directly ask them whether that was the current VMP?---No, I did. That's what I asked him. And what you actually did, can I suggest, is based off the conversation you had, you just formed your own views of the current VMP?---No, because that's what I have to do, is ask questions and that was directed at them personally.

---

[68] TR1-27, LL8-9.
[69] TR2-3, LL39-42.
[70] TR2-19, LL16-17; TR2-23, LL20-22.
[71] TR2-7, LL19-24; Exhibit 15.
[72] Exhibit 29.

> All right. Now, when you were on site - sorry. You gave some evidence a little bit earlier in response to some questions that Mr Spence asked, that Mr Rielly saw that the changes were going on. Are you certain you weren't confused that it was Mr Rielly that told you that and not Mr Corga or Mr Langdon?---No, because I asked them.[73]

[91] It is asserted by the Applicant that the evidence of Inspector Dungey is inconsistent with the evidence of both Mr Corga and Mr Landon about the status of the VMP. Further, it is submitted that it is inconsistent with the manner in which the document was marked-up.[74]

[92] However, the evidence of Mr Blake Miles, the Respondent's Senior Project Engineer suggests that the VMP provided to the Inspectors was indeed the current VMP for the site. His evidence was as follows:

> And can I get you to go down to the heading Live Traffic/Changes to VMP, Access, Gates. Do you see that?---Yes.
> All right. And that says:
>
> Traffic controller on gates.
> ?---Yes.
>
> All right. So it's the case, isn't it, that this pre-start doesn't indicate any of the changes that you had made to that VMP on the 20th of April; correct?---Correct.
>
> And those changes weren't discussed at the pre-start; correct?---No, I don't believe that's correct.
> Right. So what is it that you don't believe is correct?---That the changes to the VMP weren't discussed at pre-start.
> So they were discussed?---Yes.
>
> Okay. And who discussed those? ---From my recollection, it was Joel, the foreman.
>
> Okay. And did Joel tell people that these were then going to be the current changes onsite?---I wouldn't - I can't recall the specifics, but yes, the indication would be they were the changes that he was discussing.
>
> **Right. And that this was now - exhibit 13. Can I just get you to pick that up? It's your recollection that exhibit 13 was then, with your changes on it, the current VMP for the site on that date; correct?---Yes**.[75] (Emphasis added)

[93] Mr Reid was employed by Evolution Traffic Management. The Applicant said that Mr Reid had been engaged for the purpose of acting as a gatekeeper to deal with an issue regarding representatives of the CFMEU entering the site without permission. It was never expressly stated to either Inspector Dungey or Inspector Te Oka the limited terms of engagement of Mr Reid. That is, he was engaged for the sole purpose of ensuring that representatives of the CFMEU did not enter the site without permission.[76]

---

[73] TR3-69, LL22-46.
[74] Applicant's closing submissions filed 14 November 2022, [84].
[75] TR2-22, L42-TR2-23, LL23.
[76] Applicant's closing submissions filed 14 November 2022, [94], [95].

[94] Both Inspector Dungey and Inspector Te Oka showed Mr Reid the VMP that they had been given. Mr Reid informed them that he had not seen that VMP. He had apparently seen another version of the VMP but not the version shown to him by the Inspectors.

[95] Inspector Dungey's contemporaneous note as recorded in his official notebook[77] supports the view that the VMP provided was the current VMP. Indeed, the clear evidence of Mr Miles, the Respondent's Senior Project Engineer was that the VMP was the current VMP for the site.

[96] It was never suggested to Inspector Dungey by either Mr Corga or Mr Landon that the version of the VMP supplied to the Inspector was under revision. Rather, what is submitted by the Applicant is that it was plainly obvious that the document was not in force. The Applicant submits that "[t]he most likely explanation for that is that Mr Dungey made an incorrect assumption about that document, or asked an unclear question."[78]

[97] I do not accept the argument that the VMP shown to Mr Reid was not the current VMP. An inquiry was made of both Mr Corga and Mr Langdon as to whether the VMP was current for the site. I find it difficult to understand why an unapproved VMP would be provided to Inspectors Dungey and Te Oka.

[98] What is argued by the Respondent is that the Applicant was required to have a structured and systematic approach to ensure that persons could move about the project site without risk to their health and safety, and it was clear on 20 April 2021 that whatever system was in place, the Applicant failed to ensure that it was followed.[79]

[99] It is well accepted that a VMP is designed to identify hazards and risks and provide a summary of the current controls to eliminate and/or reduce them as far as reasonably practical. It was clear from the evidence that the plan was provided to all site attendees and formed the basis of discussion at pre-starts. The VMP applied to all vehicles on site regardless of the use of vehicles including company owned, contractor vehicles and personal vehicles. For a VMP to be successful, everyone on site, whether they are operating a vehicle or mobile plant or are a pedestrian, should comply with the traffic management requirements at all times.

[100] Whilst I accept that the VMP shown to Mr Reid was the current plan, it does not assist the Respondent's contention that the notice issued by the Inspector could be regarded as valid.

[101] Notwithstanding the description contained in the Improvement Notice, I accept that there was a VMP for the site which amongst other things provided information about how to access the site, and included basic information regarding speed limits, the gate

---

[77] Exhibit 26.
[78] Applicant's closing submissions filed 14 November 2022, [98].
[79] Applicant's closing submissions in reply filed 12 December 2022, [23]-[25].

number, the UHF number, and a relevant contact. I also accept that a procedure was in place to inform workers of changes to the VMP during the pre-start meetings and updated copies of the VMP are posted on a notice board.

[102] Mr Reid had seen a version of the VMP, but had not seen the 'updated version which had yet to be approved and rolled out'.[80]

[103] Inspector Dungey accepted that he did not ask any workers, other than Mr Reid, Mr Corga and Mr Landon, about the VMP. In light of that, it is hard to accept how it could be concluded that 'no safe system of work is in place to make sure workers are aware of the movements of vehicles and understood how that applies to their working area, not having a safe system of works in place could put workers at risk as a result'.[81] It appears to me that such a conclusion is contrary to the evidence. Had reasonable inquires been made the need to issue the Improvement Notice may have been averted.

[104] Like the Pre-Start Notice, I accept the Improvement Notice lacked sufficient particulars to comply with the requirements of section 192(1)(c) of the WHS Act. The notice did not provide a brief description of how the WHS Act is being or has been contravened. That is the case whether or not s 19(3)(c) of the WHS Act imposed a duty on the Applicant.

[105] The wording used by Inspector Dungey under the heading 'Directions (if any) as to the measures to be taken to remedy or prevent the contravention or likely contravention' rather unhelpfully recites the general statutory obligation placed on a PCBU under s 19(1) and s 19(2) of the WHS Act.

[106] I am not satisfied that the permit holder has discharged its onus of establishing that the notice ought to have been issued.

[107] For the reasons advanced, I am of the view that the Review Decision should be set aside, and the Improvement Notice be withdrawn *ab initio*.

WHS/2021/144 - Prohibition Notice (Deflexion Zone Notice)

[108] The Prohibition Notice (P1026523)[82] was issued by Inspector Neale Garaty. It specified that the Applicant was contravening s 19(1) of the WHS Act, and not s 19(3)(c) as set out in the Applicant's submissions.[83]

[109] The Prohibition Notice was issued in reliance on the first limb of s 195(1) of the WHS Act, namely, that an activity is occurring at a workplace that involves or will involve

---

[80] TR3-63, LL17-33.
[81] Exhibit 3.
[82] Exhibit 4.
[83] Application WHS/2021/144 filed 2 July 2021, Annexure A, [3].

serious risk to the health and safety of a person emanating from an immediate or imminent exposure to a hazard.

[110] Section 195(1) of the WHS Act gives an inspector the power to issue a prohibition notice in circumstances where the inspector has a reasonable belief that:

(a) an activity **is** occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or

(b) an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

[111] Central to the work of s 195 of the WHS Act is the identification of the activity being conducted by the business or undertaking.

[112] The purpose for issuing a prohibition notice is aimed at addressing a particular *activity* as envisaged by s 195(1)(b).

[113] Moreover, a prohibition notice's purpose is to stop or prevent an activity at a workplace or modify the way the activity is carried out.[84] It is a measure founded on an inspector's evaluation of risk based on information available at a particular point in time. The objectives of a prohibition notice are remedial and preventative.

[114] The focus of the prohibition notice ought to be on the need to achieve the objective of stopping an activity that the inspector believes involves or will involve a risk and the matters that give or will give rise to the risk. It follows therefore that the nature of the activity to be prohibited needs to be identified with some degree of particularity.[85]

[115] The Prohibition Notice issued by Inspector Garaty alleged the Applicant was contravening s 19(1) of the WHS Act. Inspector Garaty identified what founded his reasonable belief that an activity may occur that involved a serious risk to health or safety. Under the heading "Basis for inspector's belief", Inspector Garaty wrote:

> [W]orkers (sic) and plant are required to work near temporary safety barriers, plant implements and workers are required to be used or walk (sic) alongside barriers. no (sic) Clearly (sic) marled (sic) exclusion zones have been established and a 500mm exclusion zone has been maintained behind precast barriers at all times, as stated in SWMS 004 work on or near roads, some areas adjacent to the edge of the barriers have no exclusion zones and other section (sic) are not 500mm from the barriers. it (sic) would appear that prcedure004 (sic) work on or near roads has not been enforced.[86]

[116] The Prohibition Notice states:

---

[84] Explanatory Notes, Work Health and Safety Bill 2011(Qld) 92.
[85] *Multiplex Constructions Pty Ltd v The Regulator under the Work Health and Safety Act 2011* (No.2) [2019] QIRC 133.
[86] Exhibit 4.

> I direct the person with control over the following activity to stop the activity of: Allow workers and plant to work close proximity to temporary safety barriers that do not comply with safe work method statement (SWMS) 004 work on or near roads.
>
> until an inspector is satisfied that the matters that give rise to the risk have been remedied.[87]

[117] The mandatory direction given by Inspector Garaty was expressed as follows:

> [C]omply with own procedure 004 work on or near roads.[88]

[118] For the reasons which follow, the non-compliance with SWMS-004 is not, in my view, a basis for concluding that an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

[119] It is not in contention that the Applicant had SWMS-004[89] which outlines risk assessments and control measures for traffic management.[90]

[120] Inspector Garaty issued the Prohibition Notice because SWMS-004 was not being followed:

> And what you said was there will be a notice, "Your own procedures told you that you've got to have it. It's not there"?---Words to that effect, yeah.
>
> And when you issued that verbal notice, those were the reasons that you gave for issuing the notice?---Yep.
>
> And there weren't any other reasons that you gave for issuing the notice, were there?---No.[91]

[121] The evidence of Inspector Garaty was as follows:

> Yes?--- - - - so there was no misunderstanding of what I was asking for - asking them to do because it's no good people being in different wavelengths or whichever. So I was making it very clear. No one was to go down next to those barriers without the delineation in place.
>
> Yes. And you say in that that you were going to send the notices through that night?---Correct.
>
> And - - -?---I went straight back home - - -
>
> Yep?--- - - - wrote the notices, sent them through.
> All right. And exhibit 4 is one of those notices that you sent - - -?---That's correct.
>
> - - - that night. Now, can you tell me this. What made Seymour Whyte's failure to comply with SWMS 004 a serious risk to health and safety of workers on that site?---Well, there - there's an evident risk of workers being injured by the deflection of these concrete barriers. If a car strikes them - and I have seen these concrete barriers actually on their side for a kilometre - - -

---

[87] Ibid.
[88] Exhibit 4.
[89] Exhibit 21.
[90] TR1-58, LL15-17.
[91] TR3-107, LL14-21.

> Yes?--- - - - after they've been struck. With this particular issue, if there's no delineation there, and people get up onto - close to these barriers, they may be struck, and there could be an injury - - -
>
> All right. So - - -?--- - - - or worse.
>
> How were workers immediately or imminently exposed to a hazard because of Seymour Whyte's failure to comply with SWMS 004?---Because they didn't have those procedures in place, and they didn't have their delineation in place, if a car or truck strikes those barriers, it - they - they could be injured as a result of it.
>
> All right. So what made that a contravention of section 19(1) of the *Work Health and Safety Act*?--- Because they've failed to ensure the health and safety of the workers.[92]

[122] The Respondent argues that the failure to maintain appropriate exclusion zones as specified in the Applicant's SWMS could potentially have catastrophic consequences for workers performing civil construction work beside the M1 highway.

[123] The Applicant contends that the Prohibition Notice is invalid because Inspector Garaty cannot have held a reasonable belief that an activity is occurring at the workplace which exposed a person to a serious risk emanating from an imminent or immediate hazard, in circumstances where he did not observe anyone being exposed to the hazard or any evidence that any person had been exposed to the hazard and did not undertake reasonable inquiries to determine whether this was the case.[93]

[124] It is further submitted by the Applicant that the Prohibition Notice is also invalid because it does not particularise the activity said to be occurring, which exposed a person to a serious risk to their safety and health.[94]

[125] The Prohibition Notice asserts that the Inspector held a belief that work is occurring which places a person at a serious risk from an imminent or immediate exposure to a hazard, however the evidence before the Commission demonstrates that there was no one at such a risk when the notice was issued. In cross-examination, Inspector Garaty was asked:

> All right. Now, during the course of your time on site leading up to the issuing of this notice, you didn't see any person within 500 millimetres of the precast concrete barriers, did you?---1 don't believe so.[95]

[126] In cross-examination, the following further exchange took place:

> Yep. And you also accept, at the time at which you issued notice - the notice, there was no work being conducted with any real - within any real proximity of those barriers, was there?---Yeah, but it doesn't matter.

---

[92] TR3-92, LL4-37.
[93] Applicant's closing submissions filed 14 November 2022, C.5.
[94] Ibid, C.6
[95] TR3-95, LL1-3.

> Okay. I'm not asking you whether it matters or not. Just focus on the question.
>
> The time that you issued the notice, no one was conducting any work with any close proximity to that- those barriers, here they?---When I wrote the notice, no, there wasn't.
>
> No. And when you issued it verbally, there wasn't either, was there?---There was no one at risk at that time, but that doesn't matter.
> So you accept there was no one at risk at that time?---Procedures weren't being followed by the company in relation to their own identification of a hazard.
>
> Okay. But you accept no one was at risk at that time. Do you accept that?---They could be at some point.
> No, no. Do you accept- just listen to the question. Do you accept that no one was at risk at that - - -?---No.
>
> time? You don't accept that?---No, because somebody could walk down there - - -
>
> But there wasn't anyone there?--- - - - while we're not there. While - while I'm not there, somebody could walk down there, and there was no procedures in place to prevent them going there.
>
> Okay. If no one is, in fact, there, no one's at risk, are they?---lf no one's there, but there is nothing to stop them from going there.[96]

[127] Inspector Garaty did not identify any imminency or the immediacy of the risk; identify a hazard; identify a risk; or identify a reasonably practicable step which the Applicant should have taken to minimise any risk.

[128] In cross-examination, Inspector Garaty accepted that if a worker was not within the 500mm exclusion zone they may still be at risk, but that risk would not be immediate or imminent.[97]

[129] Inspector Garaty did not observe any person or work activity in close proximity to the concrete barriers at the time.[98]

[130] It was the evidence of Mr Robinson that the only occasion in which he had witnessed work being performed within 500mm of the barriers was in circumstances "… if the traffic was shut down or the traffic was rediverted, then there would be - they would be able to work within that 500 mils [sic] of that barrier".[99] Apart from when traffic had been shut down and diverted he had not seen anyone working within 500mm of the barriers.[100]

[131] There was evidence before the Commission, in particular the video footage, which showed items within proximity to the concrete barriers. In respect of these items, the

---

[96] TR3-96, LL1-29.
[97] TR3-100, LL39-40.
[98] TR3-95, LL5-9 and TR3-96, LL1-8.
[99] TR1-57, LL27-29.
[100] TR1-57, LL31-33.

evidence of Mr Dennison-Young, Safety Manager was that due to their significant weight these items could only be moved by the use of plant and not by individual workers.[101]

[132] Inspector Garaty accepted that he did not observe any person or work activity in close proximity to the concrete barriers at the time;[102] he did not ask any person whether they knew what the controls were;[103] nor did he ask any person how far away they usually were from the concrete barriers.[104]

[133] The Applicant submits that the evidence before the Commission is such that Inspector Garaty could not have held the necessary belief that there was a serious risk to safety and health arising from an imminent or immediate exposure to a hazard. As such, the notice is invalid and should be set aside.

[134] There was no serious risk to health and safety emanating from an immediate or imminent exposure to a hazard.

[135] In the Federal Court in *Blomfield v Bechtel Construction (Australia Pty Ltd)*,[105] Logan J considered the construction of s 84 of the WHS Act (which is in materially identical terms to s 195 of the WHS Act), and this could be found in the judgment of Gilmour J in *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union*.[106] The decision considered the meaning of "imminent" in the context of s 36(1)(g)(i) of the *Building and Construction Industry Improvement Act (*Cth*)* 2005.

> [114] The word "imminent", in this context, means "likely to occur at any moment": Macquarie Dictionary Online 2009. The concept of imminence describes the risk to the employees' health or safety. Accordingly, the probability of risk eventuating such that the employee is likely to be harmed or placed in an unsafe position requires to be considered.[107]

[136] Immediate is defined in the Macquarie Dictionary as: "occurring or accomplished without delay; instant" or "pertaining to the present time or moment".[108]

[137] With respect to the identified risk the Inspector must consider the risk to be serious and be associated with an immediate or imminent exposure to a hazard. If the risk ceases to be a serious risk or if there is no immediate or imminent exposure, then the Inspector ought not issue the Prohibition Notice.

[138] Some basis is required to reach a conclusion that the work actually being done, or contemplated, involved persons going into the relevant zones and in fact being exposed

---

[101] TR2-37, LL1-9.
[102] TR3-95, LL5-9 and TR3-96, LL1-8.
[103] TT3-100, L44.
[104] TR3-100, L46.
[105] [2012] FCA 1494.
[106] (2009) 189 IR 165.
[107] Ibid.
[108] The Macquarie Dictionary, 6th Edition.

to a risk. A failure to adhere to requirements in a SWMS is not a sufficient ground to establish the existence of a serious risk arising from an immediate or imminent exposure to a hazard.

[139] In my view, Inspector Garaty could not have formed the reasonable belief that there was a serious risk, nor was there an immediate or imminent exposure to a risk. The notice is invalid and accordingly must be set aside.

[140] Inspector Garaty accepted that he must exercise his statutory powers to issue prohibition and improvement notices only after a proper investigation.[109] However, the Applicant contends that Inspector Garaty failed to make reasonable inquiries.

[141] In *Growthbuilt Pty Ltd v SafeWork NSW,*[110] Chief Commissioner Kite held:

> I have referred, in these reasons, to additional inquiries the Inspector may have undertaken. I do not intend by those comments to suggest that the Inspector was required to conduct a full investigation. That would be contrary to the authorities such as *George v Rockett, Halley v Kershaw* and *Essential Energy*. The Inspector was not required to satisfy himself to the level of proof of a breach of the Act. Prohibition Notices are intended to prevent potential breaches so that is beyond what is required of him.
>
> An inspector is however required to balance the objective information available to him, and is obliged to make reasonable inquiries. If he had attempted to make contact with the engineer and not been able to speak with him, for example, that would provide a different factual matrix than making no attempt to clarify any concerns about an expert engineer's opinion that contradicted his view. A similar point may be made about failing to raise with Mr Radopolous the allegation made by Ace or why the excavator was still in the excavation. The Inspector is not bound by the responses but must take them into account in forming his view.
>
> A reasonable and balanced approach does not allow an inspector to make assumptions and act on them without, at least, attempting to test, in a timely and practical manner, the validity of those assumptions.[111]

[142] The evidence does not reveal that Inspector Garaty made any inquiry about:

(a) the nature of the work activities which were occurring (if any) in close proximity to the concrete barriers at the relevant time;[112]

(b) whether those work activities required, or could have foreseeably resulted in, workers being in close proximity to the concrete barriers;[113] and

(c) what other control measures may have been in operation to address the risk of workers being hit by the concrete barriers.[114]

---

[109] TR3-93, LL12-17.
[110] [2018] NSWIRComm 1002.
[111] Ibid, [94]-[96].
[112] TR3-96, LL5-11.
[113] TR3-97, LL1-35.
[114] TR3-92, LL18-37.

[143] As the evidence disclosed, the Applicant had a further risk assessment measure for the site in the form of Task Hazard Review Cards.[115]

[144] Mr Bruce Denison-Young, the Applicant's Project Safety Manager gave evidence in respect of the operation of the Task Hazard Review Cards:

> All right. Now, what's the process on site if there's an inconsistency between a safe work method statement and a Task Hazard Review Card?---Okay. The crews stop work. Once they've assessed that there's - there needs to be a change, and this comes under change management, which is one of our processes - they stop work, they go to the supervisor and the associated crews, they talk about the - the issue at hand and they develop a - a way of doing the work safely, yeah, if you like.[116]

[145] The workers on site had signed on to a Task Hazard Review Card which provided that they maintain a distance of 1,000mm from the barriers. This additional control measure was not identified by the Inspector because adequate inquiries were not made.

[146] When the evidence is considered as a whole, there is no objective basis to support a reasonable belief for the purposes of s 195 of the WHS Act.

[147] For the reasons outlined above, the Review Decision ought to be set aside and substituted for a decision to withdraw the Prohibition Notice *ab initio*.

Ground 2: Improvement Notice I2020833 (Pre-Start Notice), Improvement Notice I2015028 (VMP Notice) and Prohibition Notice P1026523 (Prohibition Notice) do not specify the minimum content required by the WHS Act.

Requirements of an Improvement Notice

[148] The power to issue an improvement notice under s 191(1) of the WHS Act is conditional upon the inspector holding a reasonable belief that a person is contravening a provision of the WHS Act or has contravened a provision of the WHS Act in circumstances where it is likely the contravention will be repeated.

[149] Section 192(1) of the WHS Act provides that an improvement notice must state:

(a) that the Inspector believes a person is contravening, or has contravened, a provision of the WHS Act in circumstances that make it likely that the contravention will continue or be repeated;

(b) the provision the Inspector believes is being, or has been, contravened;

(c) briefly, how the provision is being, or has been, contravened; and

---

[115] Exhibit 22.
[116] TR2-37, LL40-45.

(d) the day by which the person is required to remedy the contravention or likely contravention.

[150] An improvement notice may include directions as to the measures the person must take to remedy the contravention (or prevent the likely contravention), or the matters or activities causing the contravention (or likely contravention).

[151] The words of s 192(1) of the WHS Act are written in an imperative manner: "An improvement notice must state".

[152] In *Chase Oyster Bar v Hamo Industries*,[117] the words of s 17 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) were in issue. Section 17(2) commenced with these words: "[a]n adjudication application to which subsection (1)(b) applies cannot be made unless: …".

[153] Spigelman CJ in considering the meaning to be given to those words referred to the High Court's decision in *Project Blue Sky*[118] and said:

> [40] The first textual indicator that is always of significance is the mode of expression of the element directly in issue. Substantial, indeed often, but not always, determinative, weight must be given to language which is in mandatory form. See, for example:
>
> > *David Grant v Westpac* supra esp at 276-277, where the formulation was "may only". *City of Enfield* supra at [6], [28] and [32]-[33], where the formulation was "must not be granted".
> > *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* at [68], [136], [173] and [206], where the language "must give" was described as "imperative".
>
> [41] The element under consideration in the present case - "cannot be made unless" - has a similar mandatory import. To adapt the words of Gummow J in *David Grant v Westpac* at 277:
>
> > ' ... it is impossible to identify the function or utility of the words - "cannot be made" - if (they do) not mean what (they) say.'[119] (citations omitted)

[154] In *Scurr v Brisbane City Council*[120] the matter in issue was whether an advertisement had complied with the requirements of the *City of Brisbane Town Planning Act* 1964-1969 in giving notice of the application. The advertisement did not precisely identify the site of the proposed building and it contained a minor misprint. Stephen J, with whose decision the other members of the court agreed, said:

> [24] I doubt, however, whether, in the present case, a distinction of any substance exists between a mandatory and a directory interpretation of the requirement that the public notice contain particulars of the application. It is well established that a directory

[117] (2010) 78 NSWSLR 393; [2010] NSWCA 190.
[118] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355.
[119] *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWSLR 393; [2010] NSWCA 190.
[120] (1973) 133 CLR 242.

> interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirement; *Cullimore v. Lyme Regis Corporation* provides a modern instance of this. When the requirement is that "particulars of the application" should be given by public advertisement and when once it is accepted that there must be an advertisement which gives some such particulars, it is difficult to discern any distinction between a strict observance of this requirement, such as a mandatory interpretation would call for, and the substantial observance of it, as called for by a directory interpretation. The situation is quite different from that encountered when some formality of time or procedure has been neglected, or when some question of waiver arises, as it did in *Edward Ramia Ltd. v. African Woods Ltd.* … . That which the statute calls for is not compliance with precise and detailed formalities, some of which might be omitted without affecting substantial compliance; substantial compliance can in this case only be achieved by giving adequate particulars and strict compliance calls for no more than the giving of those same adequate particulars. The particulars of the advertisement will either be sufficient to effect the legislative purpose of giving notice to the public of the application or, if not, will not amount even to a substantial compliance with the statute. I have found the particulars in the present instance to be inadequate and, whether as a result of a mandatory interpretation or of a directory one, the outcome will be the same; the council, or its delegate, here proceeded to a determination of the application without either strict or substantial compliance with relevant statutory requirements and the formation of its proposal to grant the application has thereby been vitiated."[121] (emphasis added, citations omitted)

[155] The words of s 192 of the WHS Act are of a similar nature - "An improvement notice must state …".

[156] The words are designed to provide a person with notice of how a provision is being, or has been, contravened with the aim of remedying a contravention of the WHS Act or to prevent a contravention in circumstances that make it likely of re-occurring. In addition, it provides the person with a reasonable opportunity to respond to the information contained in the written notice. As is noted in Statutory Interpretation in Australia,[122] "a failure to comply with those requirements will usually be interpreted as producing an invalid result".

[157] However, s 208 of the WHS Act provides some relief from the strict mandatory requirements of ss 192 and 195. It states that a formal irregularity or defect in a notice does not render the notice invalid unless the defect or variance will result in substantial injustice.

> **208 Formal irregularities or defects in notice**
>
> A notice is not invalid only because of -
>
> (a) a formal defect or irregularity in the notice unless the defect or irregularity causes or is likely to cause substantial injustice; or
>
> (b) a failure to use the correct name of the person to whom the notice is issued if the notice sufficiently identifies the person and is issued or given to the person under section 209.

---

[121] *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 255-256.
[122] Pearce and Geddes, 8th Edition, 2014 at 11.24.

[158] What constitutes a formal defect or irregularity was considered by the High Court in *Adams v Lambert*,[123] albeit in a different statutory context. The Court said:

> [24] … What is excluded from the section is a defect or irregularity of such a nature that, reading s 306 in the context of the whole Act, it is not "a formal defect or an irregularity". What kind, or degree, of defect is to be regarded as having such a nature?
>
> [25] In some cases the answer to that question may be easy. In others, a difficult question of judgment may be involved. The matter for judgment was identified by this Court in *Kleinwort Benson Australia Ltd v Crowl*. In that case, the majority contrasted the concept of a formal defect or irregularity with a defect or irregularity that renders a bankruptcy notice a nullity that cannot be saved by s 306. To describe a defect as merely formal, or to describe a notice as a nullity, is, of course, to state a conclusion, rather than the reason for reaching that conclusion. Even so, it is necessary to identify the question that arises for judgment. The majority, referring to *James v Federal Commissioner of Taxation*, and *Pillai v Comptroller of Income Tax*, summarised the exclusionary aspect of the meaning of "a formal defect or an irregularity" by saying:
>
> > "The authorities show that a bankruptcy notice is a nullity if it fails to meet a requirement made essential by the Act, or if it could reasonably mislead a debtor as to what is necessary to comply with the notice."
>
> [26] The question of construction raised by the words "a formal defect or an irregularity" is one to be decided by reading s 306 in the context of the whole Act, informed by the general purpose of the legislation, and the particular purpose of the provisions relating to bankruptcy notices. It is similar to the question that, in former times, would be explained by asking whether a statutory requirement was mandatory or directory. In *Project Blue Sky Inc v Australian Broadcasting Authority* it was said: "A better test … is to ask whether it was a purpose of the legislation that an act done in breach of [a] provision should be invalid … In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute". [Footnotes omitted.]
>
> …
>
> [28] The other exclusionary aspect of the expression "a formal defect or an irregularity" in s 306 was said to consist in a failure to meet a requirement made essential by the Act. Here again, the word "essential", in its application in a particular case, involves a conclusion. If a requirement is made essential by the Act, then a failure to meet that requirement is not a formal defect or an irregularity within the meaning of s 306. Whether a requirement is made essential is to be decided by a process of statutory construction undertaken in the manner described above. The majority in Lewis regarded the error in that case as involving a failure to meet a requirement made essential by the Act.[124]

[159] The legislative purpose of those requirements is clear, they are to inform a person of the inspector's belief, and the grounds for it, so the person can remedy the contravention. It is necessary to do so because contraventions of the WHS Act are not always immediately obvious and are matters about which reasonable minds might differ.

---

[123] *Adams v Lambert* (2006) 228 CLR 409.
[124] *Adams v Lambert* (2006) 228 CLR 409.

[160] Thus, to be able to comply with the improvement notice it is necessary for the prescribed material to be provided in the notice. It is also necessary to enable the process of review under Part 12 of the WHS Act. Such an interpretation is consistent with the objectives of the WHS Act, which include:

(a) protecting workers against harm to their health and safety by the minimisation of risk;[125]

(b) promoting the provision of advice;[126]

(c) securing compliance with the WHS Act;[127]

(d) ensuring appropriate scrutiny and review of actions by persons exercising powers and performing functions under the WHS Act;[128] and

(e) providing a framework for continuous improvement.[129]

[161] Palmer J in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd*[130] was called upon to consider s 1322(2) of the *Corporations Act* 2001 (Cth) which provides, in general terms, that a proceeding under that Act will not be invalidated because of any procedural irregularity in the absence of substantial injustice that cannot otherwise be remedied. His Honour's approach to s 1322 was as follows:

> [103] In the light of this observation and of the decisions in *Industrial Equity, ANZ Nominees, Scullion and Link Agricultural*, I think that the following general propositions may be formulated for the purposes of the application of CA s 1322:
>
> - what is a "procedural irregularity" will be ascertained by first determining what is "the thing to be done" which the procedure is to regulate;
>
> - if there is an irregularity which changes the substance of "the thing to be done", the irregularity will be substantive;
>
> - if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.[131]

[162] The three Improvement Notices, in my view, fail to meet the requirements essential under the WHS Act. The Improvement Notices do not comply with the statutory direction contained in s 192 of the WHS Act.

---

[125] Section 3(1)(a) of the WHS Act.
[126] Section 3(1)(d) of the WHS Act.
[127] Section 3(1)(e) of the WHS Act.
[128] Section 3(1)(f) of the WHS Act.
[129] Section 3(1)(g) of the WHS Act.
[130] (2005) 194 FLR 322; (2005) 55 ACSR 185.
[131] *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 194 FLR 322; (2005) 55 ACSR 185.

[163] It cannot be said that the defects in the Improvement Notices can be properly characterised as a procedural irregularity or a formal defect. Because a decision made without complying with the mandatory requirements outlined above is invalid, it is beyond the reach of s 208 of the WHS Act. They must therefore be set aside.

Requirements of a Prohibition Notice

[164] In addition to the requirements of s 195, s 196 of the WHS Act imposes specific content requirements for the Prohibition Notice. Relevantly here, those requirements are that:

> (a) that the inspector believes that grounds for the issue of the prohibition notice exist and the basis for that belief; and
>
> (b) briefly, the activity that the inspector believes involves or will involve the risk and the matters that give or will give rise to the risk; and
>
> (c) the provision of this Act that the inspector believes is being, or is likely to be, contravened by that activity.

[165] The Prohibition Notice relies on the first limb of s 195(1) namely, 'an activity is occurring at a workplace that involves or will involve a serious risk to the health and safety of a person emanating from an immediate or imminent exposure to a hazard'.

[166] In issuing the Prohibition Notice, the Inspector identified the *activity* as the failure to comply with the SWMS-004 by allowing workers and plant to work in close proximity to temporary safety barriers.

[167] The reasonable belief required under s 195 of the WHS Act is a jurisdictional requirement.

[168] As identified elsewhere in these reasons, the Inspector failed to identify a serious risk arising from an immediate or imminent exposure to a hazard. As the evidence before the Commission disclosed, there was no immediate or imminent exposure to a hazard.

[169] Again, for the reasons expressed in respect of s 192 of the WHS Act, a Prohibition Notice which does not comply with the statutory provisions is invalid. Equally, s 208 of the WHS Act would not provide any relief from the strict mandatory requirements of s 195 of the WHS Act.

[170] The Prohibition Notice does not specify the minimum content required in s 196 of the WHS Act. Accordingly, the notice is invalid and ought to be withdrawn.

Section 19(3) of the WHS Act

[171] Each of the Improvement Notices suggests that s 19(3)(c) of the WHS Act is being contravened. That is the only section mentioned in each Improvement Notice. Indeed,

the evidence of Inspector Te Oka[132] and Inspector Dungey[133] is that reliance was placed on s 19(3)(c) when issuing the Access Road Notice and the VMP Notice.

[172] What is contended by the Applicant is that s 19(3)(c) of the WHS Act does not impose a duty on either Seymour Whyte or anyone else. Section 19(3) of the WHS Act is a definitional section. As such, the inspector could never have formed the belief that the WHS Act was being contravened, regardless of the circumstances.[134]

[173] Consequently, each of the improvement notices are invalid as a matter of law. In support of that contention, the Applicant makes reference to the Explanatory Memorandum to the Work Health and Safety Bill 2011 which relevantly states:

> Subclause 19(2) extends whom the primary duty of care is owed to beyond the PCBU's workers to cover all other persons affected by the carrying out of work. It requires PCBUs to ensure, so far as is reasonably practicable, that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking.
>
> This wording is different to that used in subclause 19(1). Unlike the duty owed to workers in subclause 19(1), the duty owed to others is not expressed as a positive duty, as it only requires that persons other than workers 'not [be] put at risk'. However, the general aim of both subclauses 19(1) and (2) is preventative and both require the primary duty of care to be discharged by managing risks (see clause 17).
>
> Specific elements of the primary duty Subclause 19(3) outlines the key things a person must do in order to satisfy the primary duty of care. The list does not limit the scope of the duties in subclauses 19(1) and (2). PCBUs must comply with the primary duty by ensuring, so far as is reasonably practicable, the provision of the specific matters listed in the subclause, or that the relevant steps are taken. This means that compliance activities can be undertaken by someone else, but the PCBU must actively verify that the necessary steps have been taken to meet the duty.[135]

[174] The primary duty set out in ss 19(1) and (2) of the WHS Act is informed by the measures contained in s 19(3) of the WHS Act. In other words, s 19(3) of the WHS Act sets out specific measures that a PCBU is required to take to satisfy the primary duty of care. The specific measures contained in s 19(3) are within the scope of the general duties owed under ss 19(1) and 19(2) of the WHS Act and s 19(3) does not limit those general duties.

[175] Each of the Improvement Notices rely on s 19(3) of the WHS Act as the basis of the contravention. In their evidence Inspectors Te Oka and Dungey relied on that section as the basis to issue the Improvement Notices.

[176] I accept the argument that s 19(3)(c) of the WHS Act does not impose a duty on the Respondent. As has been set out elsewhere, the specific measures contained in s 19(3)

---

[132] TR3-46, LL18-19; TR3-51, LL21-28.
[133] TR3-78, L45-TR3-79, L4.
[134] Applicant's closing submissions filed 14 November 2022, [138].
[135] Explanatory Memorandum - Model Work Health and Safety Bill, clause 683.

are within the scope of the general duties as expressed in ss 19(1) and 19(2) of the WHS Act. Having formed that view, it must follow that the three Improvements Notices are invalid.

[177] I make the following orders:

1. In respect of WHS/2021/124 the Review Decision be set aside, and the Improvement Notice be withdrawn *ab initio*.

2. In respect of WHS/2021/135 the Review Decision be set aside, and the Improvement Notice be withdrawn *ab initio*.

3. In respect of WHS/2021/136 the Review Decision be set aside, and the Improvement Notice be withdrawn *ab initio*.

4. In respect of WHS/2021/144 the Review Decision be set aside, and the Prohibition Notice be withdrawn *ab initio*.