



## **Industrial Relations Commission New South Wales**

**Case Name:** **Kovic v SafeWork NSW**

**Medium Neutral Citation:** [2019] NSWIRComm 1040

**Hearing Date(s):** 8 March, 13 May 2019

**Date of Orders:** 21 June 2019

**Date of Decision:** 21 June 2019

**Before:** Murphy C

**Decision:** (1) The decision of the SafeWork inspector made on or about 18 May 2018 to cancel the Provisional Improvement Notice issued by Mr Kovic to the Department of Family and Community Services on 16 November 2017 is revoked.

(2) The decision of SafeWork’s internal reviewer made on or about 15 June 2018 confirming the decision of the inspector to cancel the Provisional Improvement Notice is revoked.

**Catchwords:** Work Health and Safety – application for external review – Provisional Improvement Notice issued by Health and Safety Representative – request to SafeWork to appoint an inspector to review the notice not made within seven days after the notice was issued – decision of inspector to cancel notice – internal review upheld the decision of the inspector – whether the decision by the inspector to cancel the notice was invalid

**Legislation Cited:** Commonwealth Conciliation and Arbitration Act 1904-1948  
Industrial Relations Act 1996  
Work Health and Safety Act 2011

**Cases Cited:** Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1  
Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338

Project Blue Sky Inc v Australian Broadcasting  
Authority (1998) 194 CLR 355  
R v Wallis; Ex parte Employers Association of Wool  
Selling Brokers (1949) 78 CLR 529  
Secretary, Department of Social Security v Alvaro  
(1994) 50 FCR 213

Category: Principal judgment

Parties: Frank Kovic (Applicant)  
SafeWork NSW (Respondent)  
Department of Family and Community Services  
(Intervenor)

Representation: Counsel:  
Ms L Saunders (Applicant)  
Mr C McGee (Respondent)  
Mr K Brotherson (Intervenor)

Solicitors:  
Ms A McRobert, Haywards Solicitors (Applicant)

File Number: 2018/00201267

## DECISION

- 1 The Commission has before it an application by Frank Kovic made pursuant to section 229 of the *Work Health and Safety Act 2011* (“WHS Act”) for an external review of a decision by Michael Duncan, a SafeWork NSW Inspector, to cancel a Provisional Improvement Notice (“PIN”) issued by Mr Kovic in his capacity as a Health and Safety Representative (“HSR”) to the Department of Family and Community Services (“FACS”) pursuant to section 90 of the WHS Act.
- 2 The PIN was issued by Mr Kovic on 16 November 2017. The PIN required that FACS comply with the directions set out therein by 31 January 2018. By way of email and letter dated 18 May 2018 addressed to Jill Herberte, Executive District Director, Illawarra Shoalhaven and Southern NSW Districts, FACS, and copied to Mr Kovic, Mr Duncan advised of his decision to cancel the PIN pursuant to subsection 102(1) of the WHS Act.
- 3 On 30 May 2018, Mr Kovic applied pursuant to section 224 of the WHS Act for an internal review by SafeWork of Mr Duncan’s decision to cancel the PIN. By letter dated 15 June 2018, Jim Allison, Manager, Governance and Appeals Unit, SafeWork, advised Mr Kovic that the internal reviewer had confirmed the decision of Mr Duncan to cancel the PIN.
- 4 On 29 June 2018, the application for an external review, which is currently before the Commission, was filed in the Office of the Industrial Registrar. Directions were made for the filing and serving of evidence and outlines of submissions by the parties and the intervenor, FACS, and the application was ultimately listed for hearing before me on 8 March 2019.
- 5 At the commencement of the hearing, Ms Saunders, counsel for Mr Kovic, raised a jurisdictional issue which had only come to her attention that morning. It was submitted that section 100 of the WHS Act “gives a person who a PIN is issued to the ability to request that SafeWork appoint an inspector within seven days. On the material that’s both in evidence and that’s

been produced, it appears that did not happen until well after – that request was not made by FACS until well after the expiry of that period, which has the following consequences. The inspector could not have been appointed. The decision could not have been validly made. The only decision that could properly have been made on internal review is to revoke it and the only thing that can be done here is to revoke it”.

- 6 Following that submission, Mr McGee, counsel for SafeWork, supported by Mr Brotherson, counsel for FACS, applied for an adjournment of the proceedings to allow time to deal with the jurisdictional issue raised by Ms Saunders on behalf of Mr Kovic.
- 7 I made directions for the filing and serving of submissions going to the jurisdictional objection raised by Mr Kovic and listed that matter for hearing before me on 13 May 2019.

### **The legislative scheme**

- 8 Relevant provisions of the WHS Act are set out below:

#### **80 Parties to an issue**

(1) In this Division, ***parties***, in relation to an issue, means the following:

(a) the person conducting the business or undertaking or the person’s representative,

(b) if the issue involves more than one business or undertaking, the person conducting each business or undertaking or the person’s representative,

(c) if the worker or workers affected by the issue are in a work group, the health and safety representative for that work group or his or her representative,

(d) if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative.

(2) A person conducting a business or undertaking must ensure that the person’s representative (if any) for the purposes of this Division:

(a) is not a health and safety representative, and

(b) has an appropriate level of seniority, and is sufficiently competent, to act as the person's representative.

## **81 Resolution of health and safety issues**

(1) This section applies if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussion between the parties to the issue.

(2) The parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed in the regulations.

(3) A representative of a party to an issue may enter the workplace for the purpose of attending discussions with a view to resolving the issue.

## **82 Referral of issue to regulator for resolution by inspector**

(1) This section applies if an issue has not been resolved after reasonable efforts have been made to achieve an effective resolution of the issue.

(2) A party to the issue may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the issue.

(3) A request to the regulator under this section does not prevent:

(a) a worker from exercising the right under Division 6 of this Part to cease work, or

(b) a health and safety representative from issuing a provisional improvement notice or a direction under Division 6 of this Part to cease work.

(4) On attending a workplace under this section, an inspector may exercise any of the inspector's compliance powers under this Act in relation to the workplace.

## **90 Provisional improvement notices**

(1) This section applies if a health and safety representative reasonably believes that a person:

(a) is contravening a provision of this Act, or

(b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated.

(2) The health and safety representative may issue a provisional 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.

(3) However, the health and safety representative must not issue a provisional improvement notice to a person unless he or she has first consulted the person.

(4) A health and safety representative cannot issue a provisional improvement notice unless the representative has:

- (a) completed initial training prescribed by the regulations referred to in section 72 (1) (b), or
- (b) previously completed that training when acting as a health and safety representative for another work group, or
- (c) completed training equivalent to that training under a corresponding WHS law.

(5) A health and safety representative cannot issue a provisional improvement notice in relation to a matter if an inspector has already issued (or decided not to issue) an improvement notice or prohibition notice in relation to the same matter.

## **92 Contents of provisional improvement notice**

A provisional improvement notice must state:

- (a) that the health and safety representative believes the person:
  - (i) is contravening a provision of this Act, or
  - (ii) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated, and
- (b) the provision the representative believes is being, or has been, contravened, and
- (c) briefly, how the provision is being, or has been contravened, and
- (d) the day, at least 8 days after the notice is issued, by which the person is required to remedy the contravention or likely contravention.

## **100 Request for review of provisional improvement notice**

(1) Within 7 days after a provisional improvement notice is issued to a person:

- (a) the person to whom it was issued, or

(b) if the person is a worker, the person conducting the business or undertaking at the workplace at which the worker carries out work, may ask the regulator to appoint an inspector to review the notice.

(2) If a request is made under subsection (1), the operation of the provisional improvement notice is stayed until the inspector makes a decision on the review.

#### **101 Regulator to appoint inspector to review notice**

(1) The regulator must ensure that an inspector attends the workplace as soon as practicable after a request is made under section 100.

(2) The inspector must review the provisional improvement notice and inquire into the circumstances that are the subject of the provisional improvement notice.

(3) An inspector may review a provisional improvement notice even if the period for compliance with the notice has expired.

#### **102 Decision of inspector on review of provisional improvement notice**

(1) After reviewing the provisional improvement notice, the inspector must:

(a) confirm the provisional improvement notice, or

(b) confirm the provisional improvement notice with changes, or

(c) cancel the provisional improvement notice.

(2) The inspector must give a copy of his or her decision to:

(a) the applicant for the review of the provisional improvement notice, and

(b) the health and safety representative who issued the notice.

(3) A provisional improvement notice that is confirmed (with or without changes) by an inspector is taken to be an improvement notice issued by the inspector under this Act.

#### **160 Functions and powers of inspectors**

An inspector has the following functions and powers under this Act:

(a) to provide information and advice about compliance with this Act,

(b) to assist in the resolution of:

(i) work health and safety issues at workplaces, and

(ii) issues related to access to a workplace by an assistant to a health and safety representative, and

(iii) issues related to the exercise or purported exercise of a right of entry under Part 7,

(c) to review disputed provisional improvement notices,

(d) to require compliance with this Act through the issuing of notices,

(e) to investigate contraventions of this Act and assist in the prosecution of offences,

(f) to attend coronial inquests in relation to work-related deaths and examine witnesses.

**223 Which decisions are reviewable**

(1) The following table sets out:

(a) decisions made under this Act that are reviewable in accordance with this Part (reviewable decisions), and

(b) who is eligible to apply for review of a reviewable decision (the eligible person).

.....

**4 Section 102 (decision on review of provisional improvement notice)**

(1) The person to whom the provisional improvement notice was issued.

(2) The health and safety representative who issued the provisional improvement notice.

(3) A worker whose interests are affected by the decision.

(4) A health and safety representative who represents a worker whose interests are affected by the decision.

(5) A person conducting a business or undertaking whose interests are affected by the decision.

**224 Application for internal review**

(1) An eligible person in relation to a reviewable decision, other than a decision made by the regulator or a delegate of the regulator, may apply to the regulator for review (an internal review) of the decision within:

(a) the prescribed time after the day on which the decision first came to the eligible person's notice, or

(b) such longer period as the regulator allows.

(2) The application must be made in the manner and form required by the regulator.

(3) For the purposes of this section, the prescribed time is:

(a) in the case of a decision to issue an improvement notice the period specified in the notice for compliance with the notice or 14 days, whichever is the lesser, and

(b) in any other case, 14 days.

## **226 Decision of internal reviewer**

(1) The internal reviewer must review the reviewable decision and make a decision as soon as is reasonably practicable and within 14 days after the application for internal review is received.

(2) The decision may be:

(a) to confirm or vary the reviewable decision, or

(b) to set aside the reviewable decision and substitute another decision that the internal reviewer considers appropriate.

(3) If the internal reviewer seeks further information from the applicant, the 14-day period ceases to run until the applicant provides the information to the internal reviewer.

(4) The applicant must provide the further information within the time (being not less than 7 days) specified by the internal reviewer in the request for information.

(5) If the applicant does not provide the further information within the required time, the decision is taken to have been confirmed by the internal reviewer at the end of that time.

(6) If the reviewable decision is not varied or set aside within the 14-day period, the decision is taken to have been confirmed by the internal reviewer.

## **229 Application for external review**

(1) An eligible person may apply to the Industrial Relations Commission for 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.

(2) The application must be made:

(a) if the decision was to forfeit a thing (including a document), within 28 days after the day on which the decision first came to the applicant's notice, or

(b) in the case of any other decision, within 14 days after the day on which the decision first came to the applicant's notice, or

(c) if the regulator is required by the Industrial Relations Commission to give the eligible person a statement of reasons, within 14 days after the day on which the statement is provided.

(3) The Industrial Relations Commission may stay the operation of a decision that is the subject of an external review pending a decision on the review.

(4) The Industrial Relations Commission may, on an external review, confirm, vary or revoke the decision concerned.

## **Factual background**

9 The PIN issued by Mr Kovic on 16 November 2017 contained the following:

PCBU has failed to have adequate workplace systems to identify, manage and prevent vicarious trauma and secondary trauma, which is recognised as an inherent risk for child protection workers.

PCBU has no safe system of work for preventing vicarious trauma and secondary trauma.

PCBU has no safe system of work for identifying and managing cases of vicarious trauma and secondary trauma.

PCBU has no review process in place to ensure current systems and procedures for preventing and responding to workplace vicarious trauma and secondary trauma are effective and kept up to date.

.....

\* PCBU must ensure so far as is reasonably practicable the health and safety of workers by consulting with workers to develop and implement a safe system of work for:

- preventing vicarious trauma and secondary trauma

- identifying and managing vicarious trauma and secondary trauma

- review and revision of the organisation's systems of work for preventing and responding to the incidence of workplace vicarious trauma and secondary trauma.

- PCBU, to consult as per S.4 and S.70 with the PSA and staff, to establish a process to determine fair, safe and achievable workloads for caseworkers, taking into account the complex nature of child protection work.

10 In addition, annexed to the PIN was a detailed list of what were said to be contraventions of the WHS Act and directions to FACS to resolve those contraventions. As previously stated, the date for compliance with the PIN was 31 January 2018.

11 On becoming aware of the PIN on the afternoon of 16 November 2017, Nathan Kennedy, Senior Human Resources Representative, WSW Advisory at FACS, had a discussion with Catherine Carvolth, Director, Employee Relations, Safety and Wellbeing, FACS, following which Mr Kennedy made contact with Paul Covi and Ian Shepherd, both SafeWork inspectors. In an email to Mr Covi sent by Mr Kennedy at 1:11pm that day, Mr Kennedy stated:

I am wondering whether someone would be able to return my call on (02) 6057 0485 to discuss the above WHS Provisional Improvement Notice that has recently been issued by one of our HSRs?

I have some concerns about the process under which this PIN was issued and the content of the PIN.

12 Mr Covi responded by email to Mr Kennedy approximately one hour later in the following terms:

As discussed, I'm in the field dealing with matters and advise as follows.

If you want to dispute the PIN call 131050 - our call centre - and the matter would be allocated to a local Inspector to resolve. I note Coniston is in the Wollongong area

PINS being disputed are covered in the WHS legislation and are resolved by Inspector intervention in the first instance.

13 In a subsequent email sent to Mr Shepherd at 4:37pm on 16 November 2017, Mr Kennedy set out a number of concerns about the PIN as follows:

Hi Ian,

Thanks for your call this afternoon.

As discussed, concerns that we have around the PIN include:

- What was the consultation process undertaken by the HSR for the resolution of issues with management as per our Issue Resolution Procedure

- Has there been a comprehensive Risk Assessment completed by the HSR? If so, who were the key stakeholders involved in addressing the issues, what were the specific risks identified, controls, gaps, actions identified, etc (i.e. as per our Risk Management Procedure and Risk Assessment Tool Instruction and Implementation Guideline)

- Was there a specific incident or hazard that triggered off this PIN? (as per our Worker Hazard-Incident Management and Injury Notification Procedure) If so, please provide more details so that we can investigate steps taken as a result of incident.

- What data/ reports/ incidents are being used to validate that this is a local, regional or state issue?

- In order for FACS to adequately respond we need to be clear about what the specific contravention or breach of the Act is (for each contravention).

Further to this, the PIN seems to cover off other issues unrelated to vicarious trauma.

Currently FACS has four overarching WHS policies, over 100 procedures, guidelines, factsheets and other tools that outline the WHS and injury management requirements for all workers across FACS to ensure safety in our workplaces.

We would welcome the opportunity to discuss in further detail via teleconference if suitable.

- 14 There then followed some internal email communications between FACS managers which included the following sent by Mr Kennedy to Ms Carvolth on 22 November 2017:

Yep... no problems at all. In regards to the PIN notice on the notice board.. I have spoken briefly to Safe Work NSW however they have hand balled the issue to another Safe Work NSW Inspector (I suspect being more senior)... in the interim I think we need to:

1) let Frank know that we are disputing the PIN through SafeWork NSW

2) I have no problem with the PIN being displayed on the local notice board however we can beside it indicate that it is under review or dispute with Safe Work NSW

3) if your not happy with recommendation 2, then I am sure that I will have an answer by Friday by Safe Work NSW on this issue as I am awaiting a call on the issue from there Inspector

15 An internal SafeWork document entitled “WSMS RFS Report – 1-381178” was created by Mr Shepherd on 16 November 2017. “WSMS” stands for “Workplace Safety Management System” and “RFS” stands for “Request For Service”. The report contained the following entries:

RFS Type: Statutory Requests

RFS Sub Type Issues Resolution – s82

.....

Category: 2 – High

.....

Hazard Coding

Category	Description
Statutory requests	Provisional Improvement
	Notice review

.....

Description of Issue:

This matter is between Family and Community Services (FACS) & its Wollongong area HSR Frank Kovic. The RFS was by FACS, seeking guidance only on the PIN issued on them by Frank Kovic.

.....

Further information:

This issue relates to a PIN issued by a HSR, Frank Kovic. The PCBU is seeking advice from SafeWork NSW as to the validity of the PIN.

16 In a SafeWork document entitled “Operating Protocol – SafeWork NSW Response Categorisation” it was indicated that “CATEGORY 2 HIGH Operations Inspector action within 3 days of the event being notified” was appropriate with respect to a number of “Requests requiring Statutory Response” including:

1. Referral of an event to SafeWork NSW for resolution by an Inspector (Part 5 consultation, representation and participation – s82).

.....

4. Request for review of provisional improvement notice (PIN) (Part 5 consultation, representation and participation – s100).

17 Karen Coulson, the SafeWork Inspector who triaged the request from FACS on 17 November 2016, gave evidence that she categorised the matter as a category “2” and a “Statutory Request Section 82 Issue Resolution”. She further stated as follows:

8. As part of the National Framework a Hazard Code dropped down list known as “The event classification schema interpretive guide” is present in the WSMS system with approximately two hundred categories and subcategories from which the triaging Inspector can select. The “*Statutory Request*” category contains nine subcategories and from those I selected the subcategory of “*Provisional Improvement Notice Review*”...

9. At approximately 9:22am on 17 November 2017 I then allocated the matter to Inspector Anthony Nicholson as he was the Portfolio Manager for FACS.

18 Anthony Nicholson, SafeWork NSW Manager and the allocated Portfolio Manager for FACS, was notified of the WSMS RFS Report via email from Mr Shepherd. Mr Nicholson gave evidence that he interpreted the request from FACS as a statutory request for review of the PIN. He also stated that the WSMS had been coded with a priority level of “2” indicating high priority and requiring issue resolution. In his experience, had the request from FACS been one of seeking assistance or advice on the PIN, the matter would have been allocated a lower priority level of “3”. The matter was ultimately allocated to Mr Duncan.

19 Ms Carvolth gave the following evidence:

#### **The PIN**

45. On 16 November 2017, Ms Jill Herberte, the Executive Director, Illawarra Shoalhaven and Southern Districts of FACS provided me with a copy of the PIN that Mr Kovic had issued earlier that day to Ms Kim McMullan, Director Community Services for Illawarra Shoalhaven and Southern Districts...

46. The receipt of a PIN is regarded by FACS as a significant event. No other PINs had been issued to FACS whilst I have been in the role.

47. During the course of 16 November 2017, I liaised with Mr Kennedy regarding the PIN and sought his assistance in responding to the notice.

48. The PIN addressed a wide-range of issues, including inadequate policies, vicarious trauma, workload and change management, performance indicators, performance management, and the State WHS Committee. The contraventions lacked detail, including dates, times, details of incidents or the

content of any reviews or investigations. The various issues raised were not clearly inter-related, but seemingly an overall collection of concerns, challenges and issues.

49. These matters made the PIN both difficult to understand, and also to determine a response.

50. A further issue was that whilst Mr Kovic was the HSR for the Wollongong CSC, the PIN appeared to raise a number of state-wide issues, such as his claims about performance indicators and the State WHS Committee as well as approach to vicarious trauma. I was unclear as to whether Mr Kovic was authorised as a HSR to require action on state-wide issues.

51. In light of the concerns with the PIN, I asked Mr Kennedy to refer our concerns to SafeWork NSW and seek its guidance as to what should be done.

52. As part of determining a response, FACS also took steps to arrange a meeting with Mr Kovic to attempt to better understand the alleged contraventions.

53. I am informed that a meeting was conducted on 1 December 2017 by teleconference, and involved 3 representatives of FACS, Mr Kennedy, Tammy Miles and Sam Bridgeford, together with Mr Kovic and Mr McMenamin, and PSA officials, Ian Tuit and Shay Deguara.

54. I am advised by Mr Kennedy that it was agreed at that meeting that the PSA would provide further information relevant to the PIN to identify specific concerns as to vicarious trauma. However, I am not aware that any such information was provided.

55. After further consideration, including discussion with Ms Herberte, it was decided that FACS would exercise its right under s100 of the *Work Health and Safe Act 2011* (WHS Act), to have the PIN reviewed by a SafeWork NSW Inspector.

56. Ms Herberte sent a letter dated 20 December 2017 to Mr Michael Duncan, Manager SafeWork NSW at Wollongong setting out the position of FACS in response to the alleged contraventions in the PIN. Mr Kennedy and I had primary responsibility for preparing that letter. The substance of the FACS letter of 20 December 2017 continues to be the response of FACS to the PIN...

- 20 On 20 December 2017, Ms Herberte wrote to Mr Duncan and put the position of FACS in relation to each of the eight alleged contravention of the WHS Act set out in the PIN. The letter concluded as follows:

### **Summary**

The alleged contraventions raised by Mr Kovic fail to identify the risk that is said to arise with vicarious or secondary vicarious trauma. Nor has it been established whether Mr Kovic has consulted in accordance with Section 90(3)

of the Work Health Safety Act 2011 (NSW). Accordingly the eight contraventions as raised should be cancelled.

21 Ms Carvolth's witness statement continued as follows:

57. In a letter dated 21 February 2018, Mr Stewart Little, the General Secretary of the PSA, wrote to FACS regarding the PIN, including a concern there had not been a substantive response to the PIN and that vicarious trauma was a state-wide issue that had not been raised at the State WHS Committee on 8 February 2018...

58. Having regard to the PIN and the letter from Mr Little, it appeared to me likely that Mr Kovic was supporting a state-wide PSA approach by issuing the PIN rather than any particular issue at Wollongong CSC.

59. In terms of the overall approach to an issue such as vicarious trauma, solutions and/or strategies are required at a State level with flexibility and capacity for appropriate local level interventions.

60. FACS responded to the PSA letter by letter dated 5 April 2018. This further response confirmed the additional budgetary allocation received by FACS for wellbeing strategies, and measures to address wellbeing. The letter also expressed disappointment that the PSA had placed a ban on their members participating in the psychological job task analysis by the Centre of Corporate Health. The letter was signed by Mr John Hubby, Deputy Secretary, Corporate Services of FACS, however Mr Kennedy and I had primary responsibility for its preparation...

61. In late February 2018 FACS (Mr Kennedy) was informed verbally by SafeWork that the PIN was to be cancelled. It is understood that during February and March 2018, SafeWork attempted to contact Mr Kovic, but he was on leave and did not return to work until 3 April 2018.

62. On 18 May 2018 SafeWork NSW, by letter to Ms Herberte, formally advised of cancellation of the PIN...

63. The SafeWork letter properly identified that the PIN covered multiple issues, some local but others state-wide, and appropriately proposed that for the state-wide issues, including vicarious trauma, that *"the [SafeWork] Portfolio Manager will shortly arrange and chair a meeting in Sydney, where it is expected that parties involved in this matter to date will attend and participate to resolve those outstanding WHS matters raised in the PIN."*

64. Despite the approach proposed by SafeWork in its letter of 18 May 2018 and before the proposed meeting was held, on 30 May 2018 Mr Kovic made an application for internal review of the cancellation of the PIN pursuant to s224 of the WHS Act.

65. By letter dated 15 June 2018, SafeWork formally informed Ms Herberte that the decision of SafeWork in relation to Mr Kovic's application for an internal review was to confirm the cancellation of the PIN. This letter did however again note that *"SafeWork NSW will be addressing both at a local and state level the specific matters raised by the HSR"...*

66. FACS was comfortable with the approach proposed by SafeWork.

22 In a further witness statement by Ms Carvolth, she stated:

4. For the avoidance of doubt matters addressed at paragraphs [47] to [51] (inclusive) of my previous statement all relate to events which took place on 16 November 2017.

5. Upon reading the PIN on 16 November 2017 a number of concerns became immediately apparent to me. These included that it did not provide specific issues which could be responded to, failed to provide details and raised State-wide issues rather than local ones. It was obvious to me at that point in time that we would be challenging the PIN. At 12.46pm I sent an email to Jill Herberte, Executive Director, Illawarra Shoalhaven and Southern Districts of FACS stating my concerns.

6. On 16 November 2017 I instructed Nathan Kennedy, Senior HR Officer, WSW Advisory at FACS to contact SafeWork NSW ("**SafeWork**") to challenge the PIN and also seek guidance as to how to deal with the situation. Mr Kennedy was the usual contact point for SafeWork, and I regularly requested updates from Mr Kennedy, and provided input in relation to his communications in relation to this issue.

7. Although the PIN was being disputed by FACS, we were trying to work with Mr Kovic at the same time to identify his concerns to see if we could resolve any legitimate issues raised.

8. As detailed in my statement dated 3 December 2018, I had a number of discussions with other internal FACS stakeholders on 16 November 2017 and the days that followed to discuss the PIN. The key concern raised with me was that the content of the PIN was confusing and unclear in that it neither clearly enunciated the alleged contravention nor specified actions.

9. There was also an issue which arose on 21 November 2017 in which Mr Kovic wanted the PIN to be displayed on the noticeboard in FACS' Coniston office, which had to be dealt with. I requested that Nathan Kennedy seek SafeWork's advice to approach this issue given that the PIN was in dispute.

10. As noted at paragraph [56] of my previous statement, Mr Kennedy and I were primarily responsible for preparing the letter sent from Ms Herberte to Mr Duncan dated 20 December 2017... It is stated in the letter that "FACS sought further advice from SafeWork NSW on 22 November 2017 as to how to proceed noting it was unclear as to whether disputed PINS should be displayed."

11. The letter of 20 December 2017 did not initiate FACS disputing the PIN. The PIN had been in dispute from the time it was issued, but as it remained unresolved it was considered appropriate to formalise the history of the matter and provide in writing the more detailed position of FACS to each of the apparent issues.

12. Paragraph [55] of my previous statement needs to be understood in the context described above. What I was referring to there was that the review which had already been initiated would now clearly require direct intervention by a SafeWork Inspector rather than the more informal efforts (including as described at [53] and [54] of my previous statement) to resolve the dispute about the PIN than had occurred to that time.

23 During cross-examination by Ms Saunders, counsel for Mr Kovic, Ms Carvolth was shown the email from Mr Kennedy to Mr Shepherd sent at 4:37pm on 16 November 2017 which is set out at [13] above. The following exchange then occurred:

Q. That email doesn't say the word "dispute"?

A. No, it does not.

Q. It doesn't say the word "review"?

A. No it does not.

Q. It sets out a list of questions that you have?

A. Yes.

Q. Questions really for Mr Kovic, you wanted a better understanding of what the PIN was about.

A. Yes we did.

Q. At this point, FACS hadn't decided what its response to the PIN was going to be?

A. Well, we were seeking the guidance of SafeWork. My hope was that we could have found a way to resolve it from a SafeWork point of view informally, but my - the request that had been made to me by the District Director was that the PIN was in dispute.

Q. FACS had not at this point decided what its final response to the PIN was going to be, had it?

A. Well, that's a difficult question to answer. It - the PIN - our position was that the PIN was in dispute, because the District Director had given me authorisation to proceed on that basis. It was then what SafeWork would decide to do with that, and we were seeking their support and guidance. It really is a matter for them, the regulator, to tell us what they were going to do with it.

Q. The first thing - the regulator didn't take any immediate steps, did they?

A. My understanding is they did set up a meeting, and we were supportive of finding a way to potentially - I thought there were a whole range of options,

including Mr Kovic amending the PIN on some, with some support from SafeWork, and then we could proceed with something that we could action.

## **Submissions of the parties and intervenor**

### Mr Kovic

24 The following submissions were put on behalf of Mr Kovic:

#### **INTRODUCTION**

1. These are Mr Frank Kovic's submissions in respect of the jurisdictional issue. In short, Mr Kovic contends that:

a. on the evidence before the Commission, the Department of Family and Community Services ("FACS") request for SafeWork to appoint an inspector to review the Provisional Improvement Notice ("PIN") was made outside the time limit prescribed by s.100 of the *Work Health and Safety Act 2011* (NSW) ("WHS Act").;

b. the initial review was conducted, and the decision to cancel the PIN was made, outside of power;

c. as such, the only decision available on internal review was to revoke the decision to cancel the PIN, and in finding otherwise it exceeded its jurisdiction; and

d. accordingly, the external review must be upheld and the decision quashed.

#### **THE STATUTORY FRAMEWORK**

2. The process for reviewing a PIN is set out at Division 7 of Part 5 of the WHS Act;

3. Section 100 relevantly provides:

*(1) Within 7 days after a provisional improvement notice is issued to a person:*

*(a) the person to whom it was issued...*

*may ask the regulator to appoint an inspector to review the notice.*

4. Once the request is made, s.101 comes into operation. This section relevantly provides:

*101 Regulator to appoint inspector to review notice*

*(1) The regulator must ensure that an inspector attends the workplace as soon as practicable after a request is made under section 100.*

*(2) The inspector must review the provisional improvement notice and inquire into the circumstances that are the subject of the provisional improvement notice.*

*(3) An inspector may review a provisional improvement notice even if the period for compliance with the notice has expired.*

5. The role of the inspector is set out at s.102:

*(1) After reviewing the provisional improvement notice, the inspector must:*

*(a) confirm the provisional improvement notice, or*

*(b) confirm the provisional improvement notice with changes, or*

*(c) cancel the provisional improvement notice.*

*(2) The inspector must give a copy of his or her decision to:*

*(a) the applicant for the review of the provisional improvement notice, and*

*(b) the health and safety representative who issued the notice.*

6. The inspector's decision on review is a reviewable decision within the meaning of s.223.

7. There is no specific form in which a s.100 request may be made. However, it must be a request for 'review' within the meaning of Division 7: that is, a process whereby the PIN will be considered and redetermined in a binding manner (subject to further review) by a third party. Mere enquiries or the solicitation of advice will be insufficient.

8. Further, the request must be made by the persons specified in s.100. A request is an intentional act: the person must make a deliberate decision to submit the PIN to SafeWork for review.

9. The WHS Act does not provide SafeWork with a general right to review PINs; the only way that this power is enlivened is via a valid request under s.100. That request must be made within the 7 day period specified within that section; there is no discretion or other power to extend time.

10. In other words, the existence of a validly made request is a jurisdictional prerequisite. If a request does not satisfy the above criteria - including, relevantly to this matter, if it is made late - no decision can be validly made. If such a decision is nevertheless purportedly made, the only answer on review - internal or external - is to quash it.

11. These limitations are unsurprising when considered in light of the scheme of the WHS Act. PINs are presumptively valid and HSRs are presumptively entitled to expect compliance with them. Safety matters are properly addressed promptly; while it is appropriate that a window to seek review is available, it is similarly appropriate that this window be limited.

## THE FACTS

12. SafeWork's evidence does not clearly identify when the initial request for review was received. However, on a review of FACS and SafeWork's material, and the summonsed documents, the following emerges:

Date	Event	Reference
16 Nov 17	Mr Kovic issues the PIN.	Kovic, Annexure X
	FACS writes to SafeWork to 'discuss' the PIN.	McRobert, Annexure A. See also Davidson p.15.
	SafeWork notes a Request for Service for ' <i>advice only</i> '.	McRobert, Annexure B. See also Duncan at [4].
23 Nov 17	7 day deadline expires	s.100, WHS Act
1 Dec 17	Teleconference between Kovic, FACS and PSA to discuss the PIN.	Carvolth at [53]
2-19 Dec 17 (unspecified)	FACS undertakes ' <i>further consideration, including discussion with Ms Herberte</i> ' and decides to ' <i>exercise its right under s. 100 of the [WHS ACT]... to have the PIN reviewed by a SafeWork NSW Inspector.</i> '	Carvolth at [55]
21 Dec 17	FACS writes to SafeWork setting out its position.	Carvolth at [56] See also Duncan at [5].

## CONCLUSIONS

13. The conclusion that no valid (i.e. in time) request for review was made by FACS is inescapable in light of the timeline set out above, and in particular Ms Carvolth's express evidence in respect of FACS' decision making process. This delay is consistent with, and to some extent explains, the significant period between Mr Kovic issuing the PIN and SafeWork contacting him in respect of the review.

14. Accordingly, Mr Kovic seeks the following orders:

- a. the external review is upheld;
- b. the decision made on internal review is revoked; and
- c. the decision to revoke the PIN issued 16 November 2017 by Frank Kovic, HSR, to FACS, is revoked.

## SafeWork

- 25 The following submissions were put on behalf of SafeWork (references to evidence omitted):

### **INTRODUCTION**

1. These submissions respond to the Applicant's contention that the NSW Industrial Relations Commission (**IRC**) does not have jurisdiction to conduct an external review under s 229 of the *Work Health and Safety Act 2011* (**WHS Act**) of the internal review decision of SafeWork NSW to confirm the cancellation of the Provisional Improvement Notice, issued by the Applicant, upon the Department of Family and Community Services (**FACS**) on 16 November 2017 (**PIN**).

2. The Respondent understands that the basis of such a contention is that the relevant request by the person to whom the PIN was issued, FACS, to the Regulator to appoint an inspector to review the notice, was purportedly not made within 7 days of the PIN being issued to FACS.

3. The Respondent understands that it is further contended by the Applicant that, in circumstances where the request for the Regulator to appoint an inspector to review the PIN was not made within 7 days, the inspector did not have a power to make one of the decisions pursuant to section 102 of the WHS Act.

4. The Applicant then further contends that as such, the only decision available on internal review was to revoke the decision to cancel the PIN, and in finding otherwise it exceeded the jurisdiction.

5. The Applicant contends that accordingly, the external review must be upheld and the decision quashed.

6. The Respondent notes at the outset that if, as is contended by the Applicant that the Inspector did not have a power to make one of the decisions pursuant to section 102 of the WHS Act, then the consequence would not be, as contended by the Applicant, that the 'only decision available on internal review was to revoke the decision to cancel the PIN'. Arguably, the consequence would in fact be that there was no power on the part of the Regulator to conduct an internal review pursuant to section 226 of the WHS Act of the purported decision made by the Inspector pursuant to section 102 WHS Act.

7. The Respondent notes that the corollary of such a conclusion would be that the IRC has no power to conduct an external review pursuant to section 229 of the WHS Act of the purported internal review decision.

### **FACTUAL BACKGROUND**

8. On 16 November 2017, the Applicant issued the PIN upon FACS.

9. On 16 November 2017, Nathan Kennedy, a representative of FACS, contacted Assistant State Inspector, Paul Covi - Metro North Operations, SafeWork NSW by email in respect to the PIN issued by the Applicant... Inspector Covi acted as a point of contact for SafeWork NSW with FACS.

10. It is apparent from the header and content of that email that the contact related to an issue in dispute between a HSR and FACS as a PCBU, in respect to the issuing of the PIN.

11. On 16 November 2017, Assistant State Inspector Covi responded by email to Mr Kennedy, to the following effect:

*'If you want to dispute the PIN call 131050 - our call centre - and the matter would be allocated to a local Inspector to resolve. I note Conniston is in the Wollongong area  
PINS being disputed are covered in the WHS legislation and are resolved by Inspector intervention in the first instance.'*...

12. It is apparent that upon receipt of that advice from Inspector Covi, Mr Kennedy contacted the SafeWork NSW Customer Service Centre...

13. On 16 November 2017, Senior SafeWork NSW Inspector Ian Shepherd received a call from a representative of FACS which had been referred to him from the SafeWork NSW Customer Service Centre...

14. On 16 November 2017, Inspector Shepherd entered an "Initial Data Entry Report" relating to a 'Request For Service' (**RFS**) from FACS into SafeWork NSW's electronic Workplace Safety Management System (**WSMS**)...

15. Once Inspector Shepherd had completed the Initial Data Entry Report... the matter was then automatically forwarded to the SafeWork NSW Customer Service Contact Centre Triage Team via the WSMS system. This Initial Data Entry Report became the initial basis for the subsequent file 'WSMS RFS Report -1-131178' (**WSMS Report**).

16. On 17 November 2017, Inspector Karen Coulson was the Triage Duty Inspector allocated for the Response Co-Ordination and Enforceable Undertakings Team's (**REU Team**) Emergency Phone Line and Email...

17. On 17 November 2017, Inspector Coulson accessed the WSMS Request For Service Entry relating to the FACS request relating to the PIN (**RFS Entry**) as part of the triaging process...

18. As part of the triaging process a Hazard Category was required to be determined in relation to the RFS under the National Work Health and Safety process known as the "*Harmonised Framework for a Common Approach to Work Health and Safety Regulator Event Triaging*" (**National Framework**)...

19. As part of the National Framework a Hazard Code a 'drop down list' known as '*The event classification schema interpretive guide*' was present in the WSMS system with approximately two hundred categories and subcategories from which the triaging Inspector could select...

20. Based on her reading of the description provided in the RFS Entry report, Inspector Coulson categorized the matter as a category "2" and a 'Statutory Request Section 82 Issue Resolution'. The '*Statutory Request*' category contained nine subcategories and from those Inspector Coulson selected the subcategory of '*Provisional Improvement Notice Review*'...

21. On 17 November 2017, Inspector Coulson then allocated the matter to Inspector Anthony Nicholson, as he was the Portfolio Manager for FACS...

22. On 17 November 2017, Inspector Nicholson received the WSMS RFS Report from Inspector Coulson, relating to PIN issued upon FACS by the Applicant... Inspector Nicholson had received notice of the WSMS RFS Report via email from Inspector Shepherd the day prior on 16 November 2017...

23. Inspector Nicholson referred the matter to the Wollongong inspectorate on the basis the matter had be triaged as a statutory request under section 82 of the Act, which section then involved the Regulator appointing an inspector to assist in resolving the issue...

24. SafeWork NSW appointed Inspector Duncan to review the PIN and inquire into the circumstances that were the subject of the PIN.

25. In the period from on or about 17 November 2017 to 18 May 2018, Inspector Duncan inquired into the circumstances that were the subject to the PIN and reviewed the PIN.

26. On 18 May 2018, Inspector Duncan exercised his powers as an Inspector under section 102 of the WHS Act and decided to cancel the PIN...

#### **POWER OF INSPECTOR DUNCAN TO CANCEL THE PIN**

27. It is open on the material before the Commission to find that Inspector Duncan validly exercised his powers to cancel the PIN under section 102 of the WHS Act. Such a finding is open on two bases.

28. First, that a request for a review of a PIN was relevantly made by FACS to SafeWork NSW within 7 days of the PIN being issued by the Applicant on 16 November 2017.

29. Secondly, that if the Request for Service made by FACS was a request under s.82 of the WHS Act, the Inspector so appointed by SafeWork NSW, as the Regulator, was entitled to exercise any of the inspector's compliance powers under the WHS Act, including a power pursuant to s.102 of the WHS Act in relation to a PIN.

30. In respect to the first basis, there is evidence upon which it is open for the Commission to find that SafeWork NSW regarded the Request for Service made by FACS on 16 November 2017 to represent a request that it appoint an inspector to review the PIN.

31. The WSMS Report noted that the RFS type was 'Statutory Requests', and the RFS sub type was 'Issue Resolution - s82'.

32. It can be inferred from this that SafeWork NSW understood at the initial stage that FACS were seeking the appointment of an inspector by the regulator to assist in resolving the dispute relating to the issuance of the PIN.

33. The WSMS Report noted at 'Triage Status' that the matter required an 'Inspector Response'. This section of the report was created on 17 November 2017.

34. The WSMS Report noted under the heading 'Hazard Coding' that the 'Category' was 'statutory requests' and that the 'Description' was 'Provisional Improvement Notice review'. It can be inferred from this material recorded in the WSMS Report that at the time that entry was made SafeWork NSW understood that FACS had requested the Regulator to appoint an inspector to review the PIN.

35. Inspector Nicholson took the step to refer to the matter to an Inspector as he interpreted the request from FACS as a statutory request for review of the PIN. He formed this opinion based upon the fact that the WSMS Report had been coded with a priority level of "2" indicating high priority and requiring issue resolution, and that in his experience, had the request from FACS been one of seeking assistance or advice on the PIN, the matter would have been allocated a lower priority level of "3"...

36. Inspector Duncan was appointed by Inspector Nicholson based upon that view, and consistent with the provisions of s.101(1) of the WHS Act.

37. Section 100(1) of the WHS Act is crafted broadly in relation to what the person to whom the PIN was issued may ask the regulator to do, namely to appoint an inspector to review the notice. It is arguable that the concept of reviewing the notice would include the seeking of advice as to the validity of the PIN.

38. The steps that the inspector is required to undertake is to review the PIN and inquire into the circumstances that are the subject of the PIN (s.101(2)).

39. It is apparent that Inspector Duncan, consistent with the provisions of s101(2), inquired into the circumstances that were the subject of the improvement notice and reviewed the PIN.

40. It is important to note that s.101(3) permits the inspector to review the PIN even if the period for compliance with the notice has expired. Therefore, the fact that any period specified for compliance with the PIN as required by section 92(d) of the WHS Act had expired did not preclude the Inspector cancelling the PIN.

41. In relation to the second basis it is necessary to have regard to the scheme of the WHS Act in Part 5, Consultation, Representation and Participation.

42. The powers in relation to the role and functions of health and safety representatives (**HSRs**) and their power to issue a PIN is contained in Part 5 of the WHS Act.

43. Section 90 of the WHS Act, which provides that a HSR may issue a PIN, is contained in Division 7 of Part 5.

44. Division 5 of Part 5 contains provisions dealing with 'Issue Resolution', including issues relating to disputes between a HSR and a person conducting business or undertaking (**PCBU**).

45. Section 82 of the WHS Act, which is contained within Division 5 of Part 5, provides for the referral of issues to the Regulator for resolution by an inspector. Section 82(2) provides that the Regulator may appoint an inspector to attend the workplace and to assist in resolving the issue. Section 82(4) provides that an inspector may exercise any of the inspector's compliance powers under the WHS Act in relation to the workplace.

46. 'Compliance Powers' is defined in section 4 as meaning 'the functions and powers conferred on the inspector under this Act'.

47. The functions and powers of an inspector under the WHS Act are found in Part 9 - 'Securing Compliance'. Division 2 of Part 9 specifies the particular functions and powers of an inspector. These powers includes a power pursuant to section 160(c) to review disputed provisional improvement notices.

48. Therefore, an inspector appointed by the Regulator pursuant to section 82(2) to assist in resolving an issue, may as part of their functions in reviewing the issue, exercise their power under s102 to review a disputed PIN, and make a decision pursuant to s101(1)(a) to (c) of the WHS Act to confirm, confirm with changes or cancel the PIN.

49. There is no time limitation specified in section 82 on when an inspector can exercise a power in section 160(c) of the WHS Act.

50. Therefore, having conducted the review of the PIN as part of the resolution of the issues raised by FACS in relation to the PIN, Inspector Duncan was empowered to exercise his powers pursuant to s.102(c) to cancel the PIN.

51. The decision of Inspector Duncan to cancel the PIN was a reviewable decision pursuant to section 223(1) of the WHS Act.

52. Pursuant to s 224(1) of the WHS Act, a person who is an, 'eligible person in relation to a reviewable decision' may apply to the regulator for review of that decision subject to prescribed time frames.

53. The Applicant was an eligible person in relation to a reviewable decision (section 223(1) Item 4 of the WHS Act).

54. On 30 May 2018, the Governance & Appeals Unit of SafeWork NSW received an application for Internal Review by the Applicant.

55. Section 226(2) of the WHS Act provides the power for the internal reviewer to review the reviewable decision and make a decision to do one of the following:

- (a) confirm or vary the reviewable decision (s 226)(2)(a); or

(b) set aside the reviewable decision and substitute another decision that the internal reviewer considers appropriate (s 226(2){b).

56. The Internal Review Decision dated 14 June 2018 was made in accordance with section 226(2)(a) of the WHS Act.

57. Pursuant to s 229(1) of the WHS Act an eligible person may apply to the IRC for review (**External Review**) of a reviewable decision made by the regulator or a decision made, or taken to have been made, on an internal review. The Applicant was an eligible person in relation to an External Review.

58. It is therefore open for the Commission to find that on either of the two alternate basis set out above, that it relevantly has jurisdiction to undertake the External Review sought by the Applicant.

59. If the Commission were to conclude that no relevant application to review the PIN was made by FACS within the seven day period prescribed by section 100 of the WHS Act, and that Inspector Duncan was not otherwise empowered to cancel the PIN pursuant to sections 82 and 102 of the WHS Act, then it would be open to find that the decision to cancel the PIN by Inspector Duncan was made outside of power.

60. In those circumstances it is arguable that, as there was no valid decision to cancel the PIN, there was no reviewable decision pursuant to section 223(1) of the WHS Act, and an internal review could not take place. The Internal Review would therefore have been conducted without power and the Internal Review decision would be a nullity.

61. The effect of such a position would be that there is no reviewable decision for the purposes of section 229 of the WHS Act, and the Commission would not have any power to conduct an external review.

62. Accordingly, the Commission could not make the order sought by the Applicant, namely that the external review be upheld and the internal review decision quashed.

63. The appropriate course of action in those circumstances would be for the Commission to decline to hear and determine the Application for External Review on the basis that it lacks jurisdiction to deal with the matter.

## **CONCLUSION**

64. It is open on the material before the Commission to find that Inspector Duncan validly exercised his powers to cancel the PIN under section 102 of the WHS Act, on the basis that there is material upon which it could be concluded that a request for a review of a PIN was relevantly made by FACS to SafeWork NSW within 7 days of the PIN being issued by the Applicant on 16 November 2017. In the alternative on the basis that Inspector Duncan was appointed under s.82 of the WHS Act to assist in the resolution in respect to the issuing of the PIN, and as part of the issue resolution process was entitled to exercise his compliance powers pursuant to s.102 of the WHS Act to cancel the PIN.

65. The Commission would in those circumstances have jurisdiction to deal with the External Review Application.

66. If the Commission concludes that Inspector Duncan did not have a power to cancel the PIN, then it should decline to consider the application currently before it on the basis that it has no jurisdiction to hear and determine the matter.

## FACS

26 The following submissions were put on behalf of FACS (references to evidence omitted):

1. Mr Kovic in his submissions filed on 5 April 2019 seeks to explain the issue of jurisdiction raised on his behalf for the first time shortly before the originally scheduled hearing of his application for external review on 8 March 2019. In brief, Mr Kovic argues that the request by the Department of Family and Community Services (**FACS**) for SafeWork NSW (**SafeWork**) to appoint an Inspector to review the Provisional Improvement Notice he issued on 16 November 2017 (**PIN**) was made outside the timeframe provided for by s 100(1) of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**).

2. Mr Kovic argues that steps taken thereafter by the Inspector and the Internal Reviewer are therefore invalid, apparently based on the assumption that their respective powers to review PINs (or later decisions relating to PINs) are confined by a "*jurisdictional prerequisite*" that the initial request for review can only be validly made within a 7 day timeframe. Mr Kovic submits that in the circumstances, the "*external review must be upheld and the decision quashed*".

3. The jurisdictional argument made by Mr Kovic is however fundamentally flawed - on the facts, a request for a review was made by FACS within the 7 day timeframe, but even if not, the PIN was still able to be validly reviewed and cancelled by the Inspector, and capable of being subject to review. However, the relief now sought by Mr Kovic is not available from the Commission in an application for external review under s229 of the WHS Act.

### **JURISDICTIONAL MATTERS**

4. The way in which Mr Kovic has framed this new argument is purportedly simple, but in reality is confused. Aside from the facts not supporting his central argument, it appears to conflate administrative law principles with the function of the Commission under s 229 of the WHS Act.

5. An external review pursuant to s 229 is a hearing *de novo* on the merits with a view to arriving at a final and correct result (see *NSW Rural Fire Service v SafeWork NSW* [2016] NSWIRComm 4 at [70]).

6. The Commission does not however have jurisdiction to quash decisions or make declarations as to the legality of administrative decisions pursuant to s 69 or s 75 of the *Supreme Court Act 1970*. If Mr Kovic seeks orders of this

type he must bring judicial review proceedings in a court of competent jurisdiction. Absent an order from such a court, Mr Kovic cannot invoke illegality or jurisdictional error to somehow invalidate a decision made by the Inspector or subsequently on internal review, SafeWork.

7. As was noted by Justice Wilcox in *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd* (1987) 17 FCR 26 at 33:

*Although this was not so clear in earlier times, it is now accepted that, however apparent the defect may be, an administrative decision remains good in law unless and until it is declared to be invalid by a court of competent jurisdiction.*

8. Whilst the majority of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11 softened this approach, particularly in the context of decision makers remaking a previous decision where there are clear examples of jurisdictional error, the assumption of validity is the starting point.

9. In addition, there is no basis to limit or fetter the decision making power of SafeWork or the Commission as appears to be suggested by Mr Kovic.

10. In any event, as will be seen by proper consideration of all relevant material, it is clear that a request under s 100 WHS Act was in fact made by FACS within the 7 day time frame, and the review process was accordingly embarked upon by SafeWork. However, irrespective of that, the decision made by the Inspector to cancel the PIN, and the subsequent decision of the Internal Reviewer to confirm the cancellation of the PIN, would still have been made with authority.

11. It is also of note that Mr Kovic's argument is inconsistent with the Commission's duty to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s163(1)(c) of the *Industrial Relations Act 1996*).

## **A SECTION 100 REQUEST FOR REVIEW**

12. What it means to ask for a Regulator to be appointed or the term "review" is not defined in the WHS Act. The definition of the word "review" in the Macquarie Dictionary (7th edition), relevantly is "a viewing again: a second or repeated view of something", "a viewing of the past; contemplation or consideration of past events, circumstances or facts" or "law: to re-examine judicially".

13. Having regard to the plain meaning of the word, "review" in the current context (i.e. sections 100-102 of the WHS Act) simply means to reconsider or re-examine. It is evident that FACS had immediate concerns about the PIN, and asked WorkSafe to review the PIN within a matter of hours of it being issued.

14. The PIN was issued by Mr Kovic on 16 November 2017. It required compliance by 31 January 2018. At 12:46pm on 16 November 2017, the day the PIN was issued, Ms Carvolth, Director Employee Relations, Safety and Wellbeing at FACS, wrote to Ms Herbert, Executive Director, Illawarra Shoalhaven and Southern Districts of FACS stating that:

*The PIN fails to specify issues that can be responded to, fails to provide details and raises Statewide issues rather than local matters. **We will get in contact with SafeWork NSW with a view to challenging the PIN...** [emphasis added]*

15. At 1:11pm on 16 November 2017 Mr Kennedy, the Senior Human Resources Representative, WSW Advisory at FACS, in accordance with instructions from Ms Carvolth, sent an email to Paul Covi, Assistant State Inspector at SafeWork stating:

*Hi Paul,*

*I tried calling earlier however note that you are currently unavailable.*

*I am wondering whether someone would be able to return my call ... to discuss the above WHS Provisional Improvement Notice that has been issued by one of our HSRs?*

*I have some concerns about the process under which this PIN was issued and the content of the PIN.*

16. The word "discuss" has now been latched onto by Mr Kovic to suggest that a request by FACS for review did not occur at this stage. However, as the evidence demonstrates, the exchanges on 16 November 2017 between FACS and SafeWork (and also within SafeWork) continued, leaving no doubt on the issue that the PIN was in dispute and a review sought. Mr Covi responded to Mr Kennedy with the following at 2.15pm on 16 November 2017:

*As discussed, I'm in the field dealing with matters and advise as follows.*

*If you want to dispute the PIN call 131050 - our call centre - and the matter would be allocated to a local Inspector to resolve. I note Conniston is in the Wollongong area.*

17. At 2.19pm on 16 November 2017 Mr Kennedy responded to Mr Covi as follows:

*Appreciate the quick response and helpful advice.*

*I have since had a discussion with Ian Shepherd who will be allocating it to one of your Wollongong Managers.*

18. There can therefore be no controversy that FACS had requested a review of the PIN as provided for in the WHS Act by at the latest, 2:19pm on the day it was issued. The further evidence is that at 3:53pm on 16 November 2017 Mr Shepherd sent an email to Anthony Nicholson, Manager Safety Management Auditing for SafeWork, stating:

*As discussed, I will put this matter onto WSMS now, request that the matter be forwarded to you for action/allocation, and then advise requestor that this is what I have done. Thanks again for your help.*

19. Mr Kennedy sent an email to Mr Shepherd at 4:37pm on 16 November 2017 outlining in dot-point form some particular concerns that FACS had with the PIN. Mr Shepherd responded to Mr Kennedy at 4:46pm on 16 November 2017, noting that he had included the issues raised in the request for service, and advised that the SafeWork reference number for the matter was 1-381178.

20. The SafeWork WSMS RFS Report... records that the report from FACS was received by phone on 16 November 2017 (the day the PIN was issued). The allocated SafeWork officer was Inspector Duncan.

21. Critically in the WSMS RFS Report, under "*Hazard Coding*" the request by FACS is categorised as "*Statutory Requests*", and the description "*Provisional Improvement Notice review*". The reference number (1-381178) matches the number stated in Mr Shepherd's email to Mr Kennedy at 4:46pm on 16 November 2017.

22. Ms Coulson, the SafeWork Triage Duty Inspector, who dealt with the request for service and completed the WSMS RFS Report, confirms in her statement of 17 April 2019 that she assessed the category and description of the FACS request for the purposes of the WSMS RFS Report on the material available. It must therefore be accepted that SafeWork understood that the PIN was in dispute and a request for a review of the PIN had been made (well within 7 days of its issue), and proceeded to deal with the matter accordingly.

23. Ms Herbert's letter on behalf of FACS dated 20 December 2017 to Mr Duncan, Manager SafeWork NSW at Wollongong..., was no more than a recounting of the history of the matter, and more written detailed responses to the purported contraventions stated in the PIN in circumstances where steps to that point had not resolved the matter.

24. The PIN was ultimately cancelled by the Inspector pursuant to s 102(2) of the WHS Act on 18 May 2018. This decision was affirmed by SafeWork on internal review on 15 June 2018.

25. In light of the above, the claim now made by Mr Kovic that FACS failed to seek a review in accordance with s 100 of the WHS Act is simply not sustainable. It was clear from 16 November 2017 that FACS disputed the PIN by, by communicating its concerns to SafeWork, which received the information as a request for review, and embarked upon the review process accordingly.

26. Irrespective, the argument that the Inspector and/or SafeWork on Internal Review would have acted without power, even if a review of the PIN in accordance with s100 of the WHS Act was not requested within the 7 days, cannot be accepted. The legislation does not operate to fetter their discretion in that way.

## **THE EFFECT OF PURPORTED NON-COMPLIANCE**

27. Even if there had been non-compliance with s 100 of the WHS Act as alleged by Mr Kovic, it does not necessarily follow that the steps and the decisions made by the Inspector and/or Internal Reviewer are a nullity. For instance, in *Kim v Minister for Immigration and Citizenship* (2008) 167 FCR 578, the Migration Review Tribunal was held to have had both jurisdiction to

review, and power to affirm, a decision of the delegate of the Minister which was invalidly made under s 116 of the *Migration Act 1958* (Cth).

28. Justice Gyles' comments at p. 586 of *Kim* are particularly pertinent here:

*In my opinion, the first ground [that the court below had erred in finding the Tribunal had jurisdiction to affirm an invalid decision] is misconceived as a basis for attacking the decision of the Tribunal, even if it be correct as an abstract proposition. The sole function of the Tribunal is to provide a review of the relevant decision, not to decide collateral questions of the lawfulness or validity of the decision being reviewed. The Tribunal did what it was asked to do by the appellant. It reviewed the decision on the merits and affirmed it on the merits...*

29. Similarly, here it was not the function of the Inspector or the Internal Reviewer, nor indeed is it now the Commission's function, to decide collateral questions of the lawfulness of the decision being reviewed. The task at hand is a review on the merits of the impugned decision.

30. Further, non-compliance with a statutory provision may not render an act unlawful. For example, in *Australian Broadcasting Corp v Redmore Pty Ltd* (1989) 166 CLR 454, the High Court found that the Australian Broadcasting Corporation did not act unlawfully in entering into a contract in excess of \$500,000 without approval of the Minister, despite being in contravention of the *Australian Broadcasting Corporation Act 1983* (Cth).

31. The approach outlined above is logical given that judicial review remedies are discretionary. Even where there has been non-compliance with a statutory provision, regard must be had to what Parliament intended as the consequences having regard to the history and purpose of the legislation (*Accident Compensation Commission v Murphy* [1988] VR 444 at 447).

32. The consequences, if any, that flow from jurisdictional error depend upon whether there can be discerned a legislative purpose to invalidate any act which fails to comply with the condition. In discerning the relevant purpose, regard must be had to the language of the statute, its subject matter and objects and the consequences for the parties of holding void every act done in breach of the condition (*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 388-389).

33. The authorities emphasise the importance of identifying the correct forum with respect to any argument about jurisdiction. Even if Mr Kovic is correct that there has been an error (which is not conceded), it does not automatically follow that invalidity, or in fact any consequence would flow from it. It is submitted that in the present case it would not.

## **FRAMEWORK**

34. To understand the legislature's intention with respect to sections 100-102 of the WHS Act, and what should occur in the context of contravention, it is helpful to examine the contents of other similar provisions within the WHS Act, as well as the role of Inspectors and Internal Reviewers and any apparent limitations on their powers.

35. Section 81 of the WHS Act provides for a flexible, non-prescriptive means for the resolution of health and safety issues, and simply states that "*[t]he parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed in the regulations*".

36. Section 82 of the WHS Act provides that in the event that an issue is not resolved after reasonable efforts, a party to the issue may ask the Regulator to appoint an Inspector to attend the workplace to assist in resolving the issue. There is no prescription as to the form the request should take, and an Inspector can "*exercise any of the inspector's compliance powers under this Act...*" (s82(4)).

37. Part 9, Division 1 of the WHS Act deals with the appointment of Inspectors to secure compliance with its directions. Section 160 deals with the functions and powers of Inspectors, which includes to review disputed PINs. It is important to note that there is no fettering of an Inspector's powers, with the exception of those specified in the instrument of the Inspector's appointment (s 161).

38. The Regulator's more general powers under the WHS Act are found in Part 8, are extensive and provide a great degree of discretion. Section 153(1) provides that "*[s]ubject to this Act, the regulator has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions*".

39. Section 100 of the WHS Act, Request for review of provisional improvement notice provides that:

*(1) Within 7 days after a provisional improvement notice is issued to a person:*

*(a) the person to whom it was issued; or*

*(b) if the person is a worker, the person conducting the business or undertaking at the workplace at which the worker carries out work;*

*may ask the regulator to appoint an inspector to review the notice.*

*(2) If a request is made under subsection (1), the operation of the provisional improvement notice is stayed until the inspector makes a decision on the review.*

40. Section 101(1) provides that the Inspector must attend the workplace as soon as practicable once the request has been made. Section 101(2) permits an Inspector to review the PIN "*even if the period of compliance with the notice has expired*".

41. Section 102(1) gives the Inspector broad powers to confirm a PIN in its current form, confirm it with changes or cancel the notice.

42. Section 102(3) provides that a PIN that is confirmed by the Inspector (with or without changes) is taken to be an Improvement Notice issued by the Inspector under the Act. In other words, it supersedes the original PIN issued

by the Health and Safety Representative and replaces it with an Improvement Notice under s 191 of the WHS Act. It must follow that when this occurs the original PIN no longer has any work to do. Similarly, it is submitted, once the PIN is cancelled (as occurred here) it no longer has any legal effect.

43. The language of the above sections of the WHS Act indicates that the legislature did not intend harsh and uncompromising consequences to attach to the 7 day period referred to in s 100. There is an absence of language typically used to make that timeframe absolute.

44. This construction is reinforced by the fact that s 224 of the WHS Act provides that an eligible person in relation to a reviewable decision may apply to the Regulator for internal review of the decision within the prescribed time or "*such longer period as the regulator allows*" (s 224(1)(b)). This provision plainly gives the Regulator unfettered discretion to extend time for whatever period it considers appropriate for a decision on internal review. Noting the broad discretion under s 224(1)(b), it would be inconsistent to infer that Parliament intended to fetter powers under s100 as is contended by Mr Kovic.

45. The First Reading Speech and Second Reading Speech for what ultimately became the WHS Act reveals a Government committed to "*harmonious workplaces built on good communication and consultation*" between employers and employees.

46. The Hon. Greg Pearce (Minister for Finance and Services, and Minister for the Illawarra) in the Second Reading Speech noted:

*The Work Health and Safety Bill 2011 provides for the election of health and safety representatives. When appropriately trained, health and safety representatives will be able to take action for the health and safety of those around them by issuing provisional improvement notices. Provisional improvement notices will be required to be confirmed by the regulator to ensure greater accountability and oversight.*

47. Nowhere in the First or Second Reading Speeches can an intention be found to place limits on the Regulator's capacity to review PINs, rather there was an emphasis on the importance of the Regulator's role in confirming them to ensure greater accountability and oversight.

48. The argument by Mr Kovic disregards the provisions of the WHS Act other than s100 which can result in the cancellation of a PIN (for example, sections 81, 82 and 160). Even if Ms Herbert's letter of 20 December 2017 is taken as the start of FACS seeking a review of the PIN (which it should not be), it must at the least be accepted as a request under s82 of the WHS Act, and with the Inspector acting accordingly and within power from that point.

49. The Internal Reviewer then has broad powers to confirm or vary a reviewable decision, or set aside a reviewable decision and substitute another decision that the Internal Reviewer considers appropriate (s 226).

50. Similarly, the Commission has power under s 229 of the WHS Act to confirm an impugned decision, vary a decision or set aside a decision and make a decision in substitution for the decision set aside.

## CONCLUSION

51. For the reasons outlined it should be accepted that the request by FACS for review of the PIN was made by FACS on 16 November 2017 and within the timeframe prescribed by s 100 of the WHS Act. On the day the PIN was issued, FACS contacted SafeWork, made it clear that it disputed the PIN and outlined the basis of that dispute. The complaint was received by SafeWork as a request for review under s100 of the WHS Act, and actioned as such.

52. However, even if the timeframe argument of Mr Kovic is accepted (which it should not be), then having regard to all of the terms of the WHS Act, the Inspector and subsequently on internal review, the Regulator still acted within the terms of their power.

53. Further, and in any event, Mr Kovic has failed to demonstrate how any such failure (if found to exist) is sufficient to distract from the Commission's task of deciding his application for external review on the substantial merits of the case without regard to technicalities or legal forms. If Mr Kovic does not wish to proceed with his application for external review, but desires to continue to challenge the cancellation of the PIN on a jurisdictional basis, then he should discontinue these proceedings and pursue that in the appropriate forum.

### Mr Kovic in reply

27 The following submissions in reply were put on behalf of Mr Kovic:

1. These are Mr Kovic's submissions in reply in respect of the jurisdictional issue.

#### **SafeWork**

2. At [6]-[7], SafeWork contend that the consequence of the inspector's decision being made outside of power would be to deprive the Commission of the jurisdiction to review it (in that there would be no '*decision*' within the meaning of s.223).

3. This is incorrect. The Commission's jurisdiction is enlivened by the fact of a *purported* decision. While the inspector's decision is, on Mr Kovic's case, a nullity, it nevertheless continues to exist as a thing in fact which is capable of being reviewed: see, e.g. *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307; *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213. However, absent a finding that the jurisdictional fact of a valid request existed, the only decision that can correctly on review be made is to revoke the initial decision.

4. At [45]-[48], SafeWork contend that the WHS Act gives Inspectors a standing power to review disputed PINs. This is said to arise from s.160(c).

5. Section 160 describes the '*functions and powers*' of Inspectors in general terms, being a summary of the functions and powers '*under this act*'. Each power or function is subject to the specific terms of the act: *Refrigerated*

*Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (1980) 29 ALR 333 at 347.

6. As such, while s.160(c) describes one such function as being '*to review disputed provisional improvement notice*', this power is in fact conferred by and subject to the terms of s.100. Accordingly it arises only where a valid request has been made.

## **FACS**

7. Even on the finessed evidence of Ms Carvolth, it is apparent that FACS:

- a. initially sought advice only from SafeWork, with an intention of attempting to resolve the matter informally;
- b. decided to seek, and sought, '*direct intervention*' - i.e. the actual appointment of an inspector- after 1 December 2017.

8. This is consistent with the contemporaneous records prepared by SafeWork, and its conduct. It seems unlikely that, had a request of such obvious significance and urgency actually been made, SafeWork would have sat on its hands for months. The Commission would more easily infer from the absence of any action to review the PIN until January 2018 that FACS' request was not in fact made until much later - particularly given that this is consistent with Ms Carvolth's evidence.

9. Fundamentally, it is not open to a PCBU to 'reserve its rights' in respect of a PIN, leaving the matter in abeyance for months. The legislation correctly prescribes some urgency: this requirement for both persons affected and the regulator to act with promptitude is necessary to maintain the presumptive validity of PINs, and ensure compliance.

10. As to the effect of this failure, FACS's submissions similarly misunderstand the consequences of invalidity of an initial decision. As set out above, if the reviewing tribunal determines that an initial decision maker acted outside power in making a decision:

- a. the decision remains a thing in fact, capable of being reviewed;
- b. the only correct decision that may be made is to revoke the initial decision (or in other words, set it aside for lack of jurisdiction).

11. While in some circumstances the reviewing tribunal can make a new decision after setting aside the original decision on illegality or invalidity grounds (see, e.g. *Re Baran* (1988) 19 ALD 379), this is subject to the absence of any jurisdictional constraint: *Re SLE Medical Pty Ltd* (1988) 19 ALD 215. Here, the absence of a valid request for review is an insurmountable obstacle.

12. As to FACS' general submission that SafeWork has have some general power to review and cancel PINs for any reason and at any time, this finds no support in the text of the Act. The motherhood statements made in the first and second reading speeches do not assist. In any event, there are sound policy reasons why limitations should be imposed on the review of PINs: if it

were otherwise, this would undermine the requirement for compliance and create significant safety risks.

## Determination

- 28 FACS has submitted that this Commission “does not... have jurisdiction to quash decisions or make declarations as to the legality of administrative decisions pursuant to s 69 or s 75 of the *Supreme Court Act 1970*” (paragraphs 6-8 at [26] above). There can be no doubt that this submission is correct. However, that is not what the Commission is being asked to do in this application for external review which has been brought pursuant section 229 of the WHS Act. The Commission is being asked by Mr Kovic to revoke the decision of the inspector, Mr Duncan, to cancel the PIN. Subsection 229(4) empowers the Commission to do that.
- 29 The basis upon which Mr Kovic seeks this relief is that the inspector was not authorised the cancel the PIN pursuant to section 102 of the WHS Act, as he purported to do, because FACS had not asked SafeWork to appoint an inspector to review the PIN within seven days of it being issued, as is required by section 100.
- 30 With respect to this issue, it is my opinion that the Commission is not being asked to grant some form of declaratory relief. The Commission is, however, being asked to determine a “question concerning the interpretation, application or operation” of certain provisions of the WHS Act for the purpose of exercising its functions with respect to this application for external review. Section 175 of the *Industrial Relations Act 1996* confers jurisdiction on the Commission to do precisely that.
- 31 There is no prescribed form for a person conducting a business or undertaking (“PCBU”), such as FACS, to ask SafeWork to appoint an inspector to review a PIN. Nevertheless, in my opinion, the communications from Mr Kennedy to SafeWork on 16 November 2017 cannot on any view be construed as constituting such a request (see [11]-[13] above). These communications, in reality, are no more than a request to discuss “concerns that we have around the PIN”.

- 32 The internal communications between officers of FACS which then occurred, including the email from Mr Kennedy to Ms Carvolth on 22 November 2017 reproduced at [14] above, which included a reference to letting Mr Kovic know “that we are disputing the PIN through SafeWork NSW”, cannot retrospectively reframe the communications between FACS and SafeWork, which occurred on 16 November, as a request to SafeWork to appoint an inspector to review the PIN.
- 33 SafeWork’s internal records of the approach from FACS are equivocal on the issue of whether or not FACS asked SafeWork to appoint an inspector to review the notice. The WSMS RFS Report, part of which is reproduced at [15] above, classifies the approach from FACS as “RFS Type: Statutory Requests. RFS Sub Type Issues Resolution – s82”. Section 82 of the WHS Act provides for a party to a work health and safety issue to ask SafeWork to appoint an inspector “to assist in resolving the issue”. This classification appears to be consistent with the approach from FACS.
- 34 From the “Statutory requests” nine subcategories, Ms Coulson selected “Provisional Improvement Notice review”. However, further on in the report there is reference to FACS “seeking guidance only on the PIN issued on them by Frank Kovic” and to the “PCBU... seeking advice from SafeWork NSW as to the validity of the PIN” (see [15] above). Again, these entries are consistent with the communications from FACS to SafeWork (see [11]-[13] above).
- 35 The approach from FACS was assigned “Category: 2 – High” in the WSMS RFS Report. Mr Nicholson gave evidence that the WSMS had been coded with a priority level “2” indicating high priority and requiring issue resolution as opposed to a priority level “3” which would be allocated to a request seeking assistance or advice. According to SafeWork’s “Operating Protocol – Response Categorisation” document, which was annexed to Ms Coulson’s witness statement, “CATEGORY 2 HIGH” is allocated to a request to SafeWork to appoint an inspector to attend a workplace to assist in resolving an issue (ss 82(2)) as well as to a request to appoint an inspector to review a PIN (ss 100(1)). The operating protocol also states that a “CATEGORY 2

HIGH” request requires that “Inspector action is to occur within 3 working days of the event being notified to SafeWork NSW”. That did not happen.

36 In any event, the categorisation by SafeWork of the approach from FACS to SafeWork is not determinative of the issue as to whether or not that approach was to “ask the regulator appoint an inspector to review the notice” (ss 100(1) WHS Act).

37 On 20 December 2017 Ms Herberte wrote to Mr Duncan (see [20] above). On the evidence before the Commission, this was the first communication from FACS which could be construed as a request for review of the PIN.

38 There was no contact between Mr Duncan and Mr Kovic until 23 January 2018 when Mr Kovic telephoned Mr Duncan and asked if he could attend the workplace which he did on 31 January. There were further communications between Mr Duncan, FACS and Mr Kovic and, ultimately, by letter dated 18 May 2018 to Ms Herberte, Mr Duncan confirmed that he had reviewed the PIN and, in accordance with subsection 102(1) of the WHS Act, cancelled it. Mr Duncan’s letter began as follows:

This letter is in response to a “Request for Service” from Family and Community Services (FACS) dated 16 November 2017, where SafeWork NSW was asked to discuss the Provisional Improvement Notice (PIN) issued to FACS by employee Frank Kovic whilst exercising his position as Health & Safety Representative (HSR) for the Wollongong Area workgroup.

39 On the evidence before the Commission, no request was made by FACS for SafeWork to appoint an inspector to review the PIN within seven days after it was issued by Mr Kovic, as is required by section 100 of the WHS Act. It follows that Mr Duncan lacked the power to review and cancel the PIN pursuant to section 102, as he purported to do on or around 18 May 2018.

40 I reject the submission put on behalf of SafeWork to the effect that, if the decision of Mr Duncan to cancel the PIN was invalid, it follows that there was no reviewable decision pursuant to subsection 223(1) of the WHS Act which could be the subject of an application for internal review pursuant to section

224 or the subject of an application to this Commission for external review pursuant to section 229 of the WHS Act. In doing so, I rely on the authorities cited by Ms Saunders, namely *Secretary, Department of Social Security v Alvaro* [(1994) 50 FCR 213] and *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [(1979) 41 FLR 338]. The effect of these authorities is that a “decision” made by a decision-maker pursuant to a statutory scheme is a decision which is capable of being the subject of administrative review even in circumstances where the decision was made without power or was otherwise invalid.

- 41 An alternate submission put by Safework and FACS was to the effect that, following the issuing of the PIN by Mr Kovic on 16 November 2017, FACS referred an issue to SafeWork for resolution by an inspector pursuant to section 82 of the WHS Act. FACS submitted:

Even if Ms Herberte’s letter of 20 December 2017 is taken as the start of FACS seeking a review of the PIN (which it should not be), it must at the least be accepted as a request under s82 of the WHS Act, and with the Inspector acting accordingly and within power from that point.

- 42 Unlike section 100, there is no specified timeframe in section 82 within which a referral must be made. Subsection 82(4) states: “On attending a workplace under this section, an inspector may exercise any of the inspector’s compliance powers under this Act in relation to the workplace”. The term “compliance powers” is defined in section 4 to mean “the functions and powers conferred on an inspector under this Act”. Section 160 sets out the functions and powers of inspectors, which include the power “to review disputed provisional improvement notices” (ss 160(c)).

- 43 The effect of this submission is that, even if the inspector lacked the power to cancel the PIN pursuant to subsection 102(1)(c) because of the requirement in subsection 100(1) that the request to SafeWork to appoint an inspector to review the PIN must be made within seven days after it was issued, the combination of sections 82 and 160 nevertheless empowered Mr Duncan to cancel the PIN on 18 May 2018 in response to a request from FACs made on

20 December 2017. For the reasons set out below, this submission must be rejected.

- 44 Section 160 of the WHS Act is a general statement of the functions and powers of inspectors. Section 82 falls within Division 5 of Part 5 of the WHS Act which deals with resolution of health and safety issues which issues can clearly extend beyond the review of a PIN.
- 45 On the other hand, section 100 falls within Division 7 of Part 5 of the WHS Act which deals specifically with PINs issued by HSRs (as opposed to improvement or prohibition notices issued by inspectors under the provisions of Part 10 of the WHS Act).
- 46 To accept that a PIN issued by a HSR, as occurred in this case, may be cancelled pursuant to the general “issue resolution” powers conferred on an inspector by section 82, would be to entirely defeat and render otiose the requirement that a request be made to SafeWork to appoint an inspector to review the PIN within seven days after it was issued, pursuant to subsection 100(1) of the WHS Act.
- 47 In *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* [(1932) 47 CLR 1] Gavan Duffy CJ and Dixon J stated (at 7):

When the Legislature explicitly give a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

- 48 In *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* [(1949) 78 CLR 529] Dixon J, in relation certain provisions of the *Commonwealth Conciliation and Arbitration Act 1904-1948*, stated (at 550);

But upon some matters the Act does speak with more particularity. If it confers a specific power with respect to a limited subject or specifies a manner of dealing with it or otherwise provides what the duty or authority of the arbitrator shall be, then upon ordinary principles of interpretation the

provision in which that is done should be treated as the source of his authority over the matter, notwithstanding that otherwise the same or a wider power over the same matter might have been implied in or covered by the general authority given by s. 38. This accords with the general principles of interpretation embodied in the maxim *expressum facit cessare tacitum* and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.

- 49 Lastly, an interpretation of the WHS Act which would have the effect of rendering the seven day time limitation in subsection 100(1) of the WHS Act otiose, would be contrary to the principle that all words in a statute are to be given some meaning and effect, as stated in the following passage from *Project Blue Sky Inc v Australian Broadcasting Authority* [(1998) 194 CLR 355] at [71] per McHugh, Gummow, Kirby and Hayne JJ (footnotes omitted):

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was “a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.

- 50 The passages from the authorities set out above describe the orthodox approach to statutory interpretation. An interpretation of the provisions of the WHS Act which would render the seven day time limitation in subsection 100(1) entirely ineffective, as the alternate submission put by SafeWork and FACS would, runs contrary to this orthodox approach and must be rejected.
- 51 It is the determination of the Commission that the cancellation of the PIN by Mr Duncan on 18 May 2018 was invalid because FACS had not asked SafeWork to appoint an inspector to review the PIN within seven days after it was issued by Mr Kovic on 16 November 2017, as is required by subsection 100(1) of the WHS Act.
- 52 There is force in the submission put on behalf of Mr Kovic to the effect that PCBUs, such as FACS, are required by subsection 100(1) to act promptly in response to the issue of a PIN (see paragraphs 7-11 at [24] and paragraphs 7-9 at [27] above). In this case, the failure by FACS to ask SafeWork to

appoint an inspector to review the PIN within seven days of it being issued is the basis for the Commission's decision to revoke the decision of Mr Duncan to cancel the PIN.

53 Mr Kovic's application for external review is upheld and the decision of Mr Duncan made on or about 18 May 2018 to cancel the PIN is revoked. It follows that the decision of the internal reviewer to uphold the decision of Mr Duncan is also revoked.

54 It is unlikely that this decision will have any practical adverse consequences for FACS. The date for compliance with the PIN, 31 January 2018, has long passed. To the extent that it may be argued that FACS was in breach of the requirements set out in the PIN, it is unlikely that it will be prosecuted by SafeWork for such alleged breach or breaches given SafeWork's general approach to the PIN.

## **Orders**

55 I make the following orders:

- (1) The decision of the SafeWork inspector made on or about 18 May 2018 to cancel the Provisional Improvement Notice issued by Mr Kovic to the Department of Family and Community Services on 16 November 2017 is revoked.
- (2) The decision of SafeWork's internal reviewer made on or about 15 June 2018 confirming the decision of the inspector to cancel the Provisional Improvement Notice is revoked.

**John Murphy**

**Commissioner**

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