DECISION

Fair Work Act 2009
s.526—Stand down

Association of Professional Engineers, Scientists and Managers Australia (Collieries' Staff Division) T/A Collieries' Staff and Officials Association
v
Wollongong Resources Pty Ltd
(C2024/404)

DEPUTY PRESIDENT EASTON SYDNEY, 28 NOVEMBER 2024

Application to deal with a dispute involving stand down – Fair Work Act 2009, Part 3-5 – black coal mining – stoppage of work caused by prohibition notice issued by government regulator – judicial power – claim for wages due or claim for monetary order to resolve a dispute – stoppage of work – no useful work to do – real or substantive cause of the stoppage of work – can the employer be reasonably held responsible for the stoppage – work health and safety – cooperation with government regulator – reasonable steps to prevent the stoppage.

Application to deal with a dispute involving stand down – Fair Work Act 2009, Part 3-5 – black coal mining – stoppage of work caused by prohibition notice issued by government regulator – judicial power – claim for wages due or claim for monetary order to resolve a dispute – stoppage of work – no useful work to do – real or substantive cause of the stoppage of work – can the employer be reasonably held responsible for the stoppage – work health and safety – cooperation with government regulator – reasonable steps to prevent the stoppage.

[1] Wollongong Resources is the owner and was the operator of Russell Vale Colliery, a coal mine in Corrimal, New South Wales. On 18 January 2024 an inspector of the NSW Government Resources Regulator issued a Prohibition Notice to Wollongong Resources. The Notice effectively stopped work at the mine by prohibiting the cutting/production of coal until certain conditions were met.

[2] Wollongong Resources stood down employees because of the Prohibition Notice, relying on s.524(1)(c) of the *Fair Work Act 2009* (Cth) (**FW Act**). The Association of Professional Engineers, Scientists and Managers Australia (Collieries' Staff Division) (**APESMA**) disputed Wollongong Resources' right to stand down employees without pay. APESMA asked to the Fair Work Commission to deal with the dispute under s.526 of the FW Act.

[3] In February 2024 Wollongong Resources decided not to resume production at all. Some staff who were stood down without pay at this time were immediately made redundant and other staff resumed paid duties connected with the decommissioning of equipment for a time before they too were made redundant.

[4] The residual dispute between APESMA and Wollongong Resources relates to the whether s.524 of the FW Act allowed Wollongong Resources to stand down APESMA's members without pay for approximately one month. This dispute primarily, but not exclusively, turns on whether Wollongong Resources can reasonably be held responsible for the cause of the stoppage of work (per s.524(1)(c)).

Background: The mine

[5] Russell Vale Colliery produced a high-quality hard coking coal used for the production of steel and other metallurgical purposes. Mining operations at Russell Vale Colliery commenced in 1887 and in January 2024 it was one of the oldest operating coal mines in Australia. Wollongong Resources has been 100% owned by Jindal Steel & Power Limited since 2014. Jindal Steel & Power Limited is one of the largest steel producers in India.

[6] Wollongong Resources employed a number of persons to operate and maintain their mining operations. Employees who were employed in a supervisory, professional, administrative, clerical or technical capacity are collectively and commonly referred to as 'Staff'. APESMA is entitled by its rules to represent the interests of its members engaged as Staff by Wollongong Resources

Background: The Fifth Frictional Event and the Final Prohibition Notice

[7] On 5 January 2024 there was a frictional ignition event at the Russell Vale Colliery. A frictional ignition event occurs when heat caused by friction between two materials rubbing against each other, or caused by one object striking another, ignites a fuel. Frictional ignition events most commonly arise in underground coal mining when heat is generated by steel striking rock or stone ignites methane. Frictional ignition is a common and well-known hazard in the underground coal mining industry. Wollongong Resources said it is not a risk that is novel or unique to the Russell Vale Colliery.

[8] The frictional ignition event on 5 January 2024 was the fifth frictional ignition event at the Russell Vale Colliery in an 18-month period. I will refer to this event throughout this decision as the **Fifth Ignition Event**.

[9] On 6 January 2024 the NSW Government Resources Regulator (**the Regulator**) issued a Prohibition Notice under s.195 of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) in relation to the Fifth Ignition Event. The stated grounds for issuing the notice included:

> "… At approximately 15:15pm on Friday 5th January 2024, an ignition of methane occurred at the 7 Cut-Through 'C' to 'D' Heading face in Place change 22 panel. The ignition constitutes a loss of control of a safe work environment. The cause/s of the ignition are not fully understood at this time. I have formed the opinion that any recurrence of the circumstances that led to this ignition, without additional control, could lead to another ignition which could involve a serious risk to persons."

[10] The notice issued on 6 January 2024 did not prevent the rest of the mine from continuing to operate. This notice only prohibited "the Cutting/Production of coal in Place Change panel 22 at Russell Vale Colliery."

[11] Over the next two weeks Wollongong Resources met with the Regulator and exchanged information by email.

[12] On 16 January 2024 Wollongong Resources made a company-wide announcement that it was restructuring. Wollongong Resources said it had decided at this time to reduce its workforce by around 50%. On 18 January 2024 some employees received written notice that Wollongong Resources was considering making their position redundant.

[13] On 18 January 2024 the Regulator issued a new and more significant Prohibition Notice regarding the same frictional ignition event (**the Final Prohibition Notice**). The effect of this notice was that coal production could not continue at Russell Vale Colliery while the notice applied.

[14] The Final Prohibition Notice was issued by Inspector Anthony Margetts using powers available to him under s.50 of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW). The Final Prohibition Notice referred to five frictional ignition incidents at the colliery over the previous 18 months. The stated grounds for issuing the Final Prohibition Notice were as follows:

> "I am a government official under the WHS(M&PS) Act and I issue this notice because I believe that an activity may occur at the workplace that, if it occurs, could involve a serious risk to the health and safety of a person. (WHS(M&PS) Act section 50(2)(b))
>
> Basis for belief: I believe that cutting of coal (the activity) may occur at a workplace (the Russell Vale Colliery) that, if it occurs, could involve a serious risk to the health or safety of a person, specifically, the risk of serious injury or death of a worker at the Russell Vale Colliery as a result of a frictional ignition event, having regard to the following matters:
>
> a) Frictional ignition events in an underground coal mine typically involve a frictional hot spot or spark that ignites a flammable concentration of methane. They can result in a fire or explosion. This risk is well known.
> b) There has been a total of five frictional ignition events at the Russell Vale Colliery reported to the Resources Regulator since July 2022, with four events occurring since April 2023, the latest frictional ignition event occurring on 5 January 2024.
> c) An assessment of each frictional ignition event has identified a range of different causal factors, with the most recent frictional ignition event on 5 January 2024 having additional causal factors not previously identified as causal factors in previous events.
> d) Existing controls have proven ineffective in eliminating or otherwise minimising the occurrence of frictional ignition events at the Russell Vale Colliery.
> e) The number of frictional ignition events and their different causal factors causes me to believe that the mine operator has not, or may not have, identified and implemented all reasonably practicable controls to eliminate or otherwise minimise the occurrence of a frictional ignition event."

[15] The directions to Wollongong Resources in the Final Prohibition Notice were:

> "The mine operator engage an independent, suitably qualified, experienced and competent person to, in consultation with the mine operator:
>
> 1. Identify all reasonably practicable control measures that may be implemented at the Russell Vale Colliery to eliminate, or otherwise minimise, the occurrence of a frictional ignition event and the risks to health and safety as a result of any frictional ignition event;
> 2. For each control measure identified in direction 1, identify all potential failure modes and any reasonably practicable control measures that may be implemented to address those potential failures;
> 3. Develop a process to verify that the identified control measures in directions 1 and 2 above are in place and effective;
> 4. Complete a first pass of the verification process in direction 3; and
> 5. Establish a system to ensure ongoing verification occurs as per direction 3.
>
> The prohibition of activity described in this notice remains in force until an inspector is satisfied that the matters that give or will give rise to a serious risk to the health or safety of a person have been remedied."

[16] On 19 January 2024 Wollongong Resources stood down 177 employees because of the Final Prohibition Notice, relying upon s.524(1)(c) of the FW Act.

[17] On the same day APESMA wrote to Wollongong Resources seeking information about the shut down and about the newly announced redundancy program. Wollongong Resources replied by letter on the same day, providing answers to most of APESMA's questions.

Background: Stay application

[18] APESMA referred a dispute about the shut down to the Commission on 23 January 2024.

[19] On 31 January 2024 Wollongong Resources applied for an internal review of the decision of Inspector Margetts and applied to the Regulator for a stay of the Final Prohibition Notice. The Regulator did not agree to stay the Final Prohibition Notice.

[20] Wollongong Resources applied to the Commission for an order that the stand-down dispute proceedings be stayed pending the outcome of an internal review of the Final Prohibition Notice by the Resources Regulator under s.224 of the WHS Act and, if relevant, the external review of the notice in the Industrial Relations Commission of New South Wales under s229 of the WHS Act. Wollongong Resources' stay application was heard on 1 February 2024. I did not grant the Stay application (see *APEMSA v Wollongong Resources* [2024] FWC 280), primarily because:

(a) the stand down dispute proceedings in the Commission were commenced first;
(b) APESMA had a prima facie right to have its application tried in the ordinary course;
(c) Wollongong Resources carried the burden of showing that a stay is just and convenient;
(d) Wollongong Resources had not established that granting a stay was in the interests of justice overall;

(e) there was a possibility that the FWC and the IRCNSW might draw inconsistent conclusions about overlapping matters however that possibility was somewhat remote because of Wollongong Resources' parallel steps to have the Final Prohibition Notice lifted;
(f) there was a significant disadvantage to APESMA's members if the determination of the stand down dispute is delayed because they were stood down without pay and generally had limited reserves of leave from which to draw; and
(g) the disadvantages to Wollongong Resources if a stay was not granted were not significant because a stay would only delay the Commission hearing and preparations for that hearing. Pressing on with the arbitration of the stand down dispute was not likely to result in wasted preparation or resources because it seemed highly likely that the Commission would have to arbitrate the dispute regardless of the outcome of the review processes.

APESMA's evidence: Tom Edwards

[21] Mr Tom Edwards is a Senior Organiser employed by APESMA. Mr Edwards' evidence included the following:

(a) he is a Senior Organiser in the Collieries Staff Division. The membership in this division is primarily comprised of employees engaged in supervisory, professional, administrative, clerical and technical occupations within black coal mines;
(b) he spoke to Mr Pawley, CEO of Wollongong Resources on 19 January 2024 about the Final Prohibition Notice and the resulting shutdown;
(c) he met with Mr Pawley and others on 22 January 2024 and was told that Wollongong Resources expected the shutdown to last three to five weeks;
(d) in a different conversation Mr Pawley was pessimistic about the review of the Final Prohibition Notice;
(e) the shutdown caused significant financial and personal stress to APESMA's members;
(f) some members had only a small amount of annual leave accrued when the shutdown commenced. 114 affected employees had less than 7 weeks' annual leave, 121 affected employees had less than 9 weeks' annual leave and 122 affected employees had less than 11 weeks' annual leave;
(g) many members had advised that it was not practically feasible to obtain alternative employment during the stand down; and
(h) members had expressed concerns regarding the safety of the site if production was to resume.

[22] Mr Edwards was not required for cross-examination.

APESMA's evidence: Daniel Stewart

[23] Mr Daniel Stewart provided two witness statements in the proceedings. Mr Stewart's evidence included the following:

(a) he was first employed as a Deputy at the Russell Vale Colliery in 2011;
(b) Mr Stewart's statutory functions as a Deputy included identification and mitigation of risks and hazards, ensuring compliance with the mine's safety management system, investigating and reporting on incidents and ensuring that work is safely carried out;
(c) boreholes are created by drilling into a gas seam. Drill stubs are set up for this purpose and a gas drainage drill rig does the drilling. A pipe goes into the hole and is grouted in;

(d) he performed daily inspections and took gas flow readings every two weeks. These readings were predominantly taken by a garbage bag gas flow inspection. The garbage bag test involves holding a garbage bag over a borehole and opening the ball valve on the standpipe to observe how many seconds the garbage bag took to inflate;
(e) when taking gas flow readings Mr Stewart listed each gas hole number and respective flow as well as daily water trap inspections;
(f) in his view the garbage bag test was primitive and inaccurate. He said the test gives an indication but is not exact;
(g) the Russell Vale Colliery did not operate a drainage plant. Instead the gas flowed out naturally. Brattice was used for ventilation in some parts of the mine but he thought that brattice was not the most efficient ventilation; and
(h) he thought that there should have been a gas drainage plant in place and that other measures should have been implemented to improve ventilation.

[24] In cross-examination Mr Stewart gave the following evidence:
(a) he had worked at other mines as a Deputy before working for Wollongong Resources at the Russell Vale Colliery;
(b) he does not have any post-secondary qualifications in mining;
(c) he raised a complaint about garbage bag testing to his supervisor but was told "that's what we are using";
(d) he had made "off-the-cuff" comments to supervisors that the Russell Vale Colliery should have a gas drainage plant;
(e) a gas drainage plant would "suck the flow... out of the mine" and would require a completely new facility to be built;
(f) he had not ever enquired as to the costs of building such a plant or of the regulatory approvals required; and
(g) he had raised with supervisors his belief that the brattice for ventilation is not the most efficient ventilation system.

APESMA's evidence: Cheyne Nisbet

[25] Mr Cheyne Nisbet gave evidence for APESMA. Mr Nisbet's evidence included the following:
(a) he had been employed at the Russell Vale Colliery since 2021 as a Deputy;
(b) he has held qualifications to work as a Deputy since 2012 and has worked in the coal mining industry since 2005;
(c) the frictional ignition event on 5 January 2024 occurred when a pressurised borehole was intersected, meaning that equipment mined through a borehole that was emanating methane gas;
(d) boreholes are long small holes that are drilled into the coal seam to allow for gas to drain through the return airway;
(e) the borehole that was intersected was 300m to 400m long;
(f) if a borehole is to be intersected, the flow rates of that borehole will be in the Permit To Mine, which is essentially a risk assessment document that shows the area of the panel that is proposed to be mined. The Permit To Mine is signed off by senior management including the Mine Manager, Geotech and mine surveyors;
(g) the intersected borehole was listed as having no flow on the Permit To Mine;
(h) he thought that using garbage bag tests is fundamentally problematic to test flow rates of boreholes and prone to inaccuracy;

(i) he thought that garbage bag tests have many modes of failures;
(j) he disputed some of Mr Vatovec's evidence about measures taken after the Fifth Ignition Event on 5 January 2024;
(k) he did not think that ventilation was adequately managed at the Russell Vale Colliery or that the boreholes were properly mapped; and
(l) he thought that there was useful work for the workforce, or at least part of the workforce, during the entirety of the stand down. Mr Nisbet thought that useful work could be performed on strata advices and clean up and maintenance work.

[26] When cross-examined Mr Nisbet gave evidence that:
(a) he has a Certificate IV in underground mining and has completed other training to be a Deputy;
(b) he had not been appointed as a Health and Safety Representative at Russell Vale Colliery nor had he stood for appointment or election;
(c) he was aware of the avenues available to him to raise any WHS concerns he might have;
(d) he was familiar with the safe work procedure for mining across boreholes and has been trained on bagging boreholes;
(e) the Permit To Mine document is discussed at the commencement of every shift;
(f) at the commencement of each shift Deputies and staff were made aware of the possibility of intercepting particular boreholes;
(g) the Permit To Mine document gave Deputies a guide as to whether they should be hosing or bagging boreholes;
(h) the boreholes at Russell Vale Colliery generally did not flow at more than 75 litres per second; and
(i) he complained about the garbage bag method to Jono Caunt, who was an undermanager. His complaint was about the accuracy of the measurements obtained by this method.

Wollongong Resources' evidence: William Vatovec

[27] Mr William Vatovec was the General Manager of Operations and Mining Engineering Manager at the Russell Vale Colliery. Mr Vatovec was responsible for overseeing all operational requirements. When the mine was operating, Mr Vatovec was employed to ensure that Wollongong Resources produced and sold 600,000 tonnes of coal per annum to the export market.

[28] Mr Vatovec has a Master of Science (Honours) in Total Quality Management, a Master of Business Administration, a First-Class Mine Manager Certificate of Competency as a Mining Engineer Manager and a Practising Certificate as a Mining Engineer Manager of Underground Coal Mines.

[29] As the Mining Engineer Manager Mr Vatovec was required to ensure that the mine complied with NSW WHS legislation. He was responsible for developing, supervising, monitoring and reviewing the mining engineering standards and procedures, and was also responsible for developing principal hazard management plans. The *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022* directly imposed obligations on Mr Vatovec.

[30] Mr Vatovec's evidence regarding Wollongong Resources' safety systems included:

(a) under the NSW Safety Legislation mine operators have a duty to identify hazards and manage risks to control health and safety;
(b) Mr Vatovec considered the Russell Vale Colliery to have a robust safety management system in place to comply with its legislative obligations;
(c) Wollongong Resources had a comprehensive work health and safety framework embodied primarily in the Wollongong Resources Safety Management System, as documented in the Safety Management System Plan;
(d) there was a verification process to control critical risks such as frictional ignitions. As part of the verification process certain audits were conducted daily and weekly to ensure compliance against specific management plans and safe work procedures;
(e) there was approximately 56 separate plan documents, policies, procedures and the like in the Safety Management System Plan;
(f) Wollongong Resources consulted with its workforce in the development of the Safety Management System Plan; and
(g) there were critical controls in place including a Frictional Ignition Management Plan, a Frictional Ignition Control Plan, a Frictional Ignition Trigger Action Response Plan, a Frictional Ignition Risk Assessment and an Outburst Principal Hazard Management Plan.

[31] Mr Vatovec said that frictional ignition events are a common and well-known hazard in the underground coal mining industry. He said that these events are not a novel or unique risk specific to Wollongong Resources' operations. There were five frictional ignition events that preceded the Final Prohibition Notice issued on 18 January 2024. Mr Vatovec's evidence about these events can be summarised as follows:

(a) **First event – 21 July 2022 – inadequate ventilation allowed a gas layering to occur.** Gas layering is essentially the buildup of methane gas which emanates naturally from mining coal in underground mines. When there is inadequate ventilation methane can build up and create a methane gas layer. On this occasion the gas layering was essentially caused by the inadequate ventilation at the working coalface;
(b) **Second event – 25 April 2023 - a drill bit ignited gas from a drillhole.** A fracture of the roof of the mine caused a localised release of concentrated gas. A heated drill bit ignited the pocket of gas;
(c) **Third event – 27 May 2023 – borehole intersection and ignition of gas.** Multiple operator and system errors led to a frictional ignition event. A continuous miner was detecting high levels of gas while cutting. The operator of the continuous miner disregarded the alarms and did not cease mining as required. The Deputy in charge of the panel was required to be present at the coalface because the area had been declared a precautionary zone, but was not present;
(d) **Fourth event – 12 September 2023 – ignition of gas riser.** This ignition event occurred when mining through a particularly hard portion of the coalface. Because of several factors the [additional] ventilation was not adequate to disburse a buildup of dust and gas. An ignition of gas ensued due to the restrictions on positive airflow on the floor breaking releasing gas while a sparking occurred; and
(e) **Fifth event – 5 January 2024 - intersection of borehole and ignition of gas.** This final frictional ignition event occurred when a continuous miner intersected a branch of a gas borehole that was pressurised by a gas bag. Pyrites and hard coal were present in

the face causing sparking. The Deputy and the crew did not know that the particular borehole was pressurised. On this occasion the deputy was present at the mine face and the ventilation was adequate.

[32] The Regulator was notified after each ignition event. 13 Prohibition notices and improvement notices were issued by the Regulator in response to these five frictional events. Save for the Final Prohibition Notice issued on 18 January 2024, Wollongong Resources has complied with every notice issued and each notice has been lifted by the Regulator.

[33] Mr Vatovec said that between the third event and the fifth event there was significant action taken by Wollongong Resources and significant interaction between Wollongong Resources and the Regulator, including:

(a) on 22 June 2023 the Regulator issued a comprehensive request for documents. Wollongong Resources complied with the request on 15 September 2023. The documents included a list of, and copies of Wollongong Resources' entire safety management system, as well as additional documents relating to frictional ignition events;
(b) Wollongong Resources complied with each improvement notice relating to each frictional ignition event;
(c) the Regulator was satisfied with the action taken by Wollongong Resources in response to each improvement notice;
(d) in June 2023 Wollongong Resources undertook a further review of the adequacy of the Frictional Ignition Management Plan including a peer review;
(e) Wollongong Resources engaged third-party experts (a work health and safety consultant, a ventilation engineer consultant and a mining and ventilation engineer consultant) to advise generally on the day-to-day operations of the mine and to specifically assist in reviewing systems and developing updated controls, including a detailed gas reservoir model;
(f) Wollongong Resources employed a specialised Gas Drainage Superintendent who was responsible for fulfilling the mine's Ventilation Officer role and assisting the development of the documented gas drainage strategy;
(g) Wollongong Resources provided further education and training to its employees; and
(h) Wollongong Resources conducted a peer review of frictional ignition incidents and controls with colleagues from the nearby South32 Dendrobium underground coal mine.

[34] Wollongong Resources liaised regularly with the Regulator. The Regulator reviewed documents provided by Wollongong Resources and was satisfied that the controls to eliminate or mitigate the risk of frictional ignition events were satisfactory.

[35] After the fourth event the Regulator commissioned an independent review of the four prior frictional ignition events. This review was carried out by Palaris Australia, a mining advisory consultancy with over 20 years' experience. On 12 October 2023 Polaris provided its report. The report contained nine recommendations. Wollongong Resources accepted every recommendation.

[36] The first four recommendations were implemented in a relatively short period. Wollongong Resources estimated that the last five recommendations would take up to six months to implement and wrote to the Regulator explaining its timeframes. Wollongong

Resources did not receive a response from the Regulator, which it assumed to mean that the Regulator was satisfied with its response and timeframes. Mr Vatovec said that Wollongong Resources was on track to implement these recommendations when the Fifth Ignition Event occurred.

[37] Mr Vatovec described the interactions with the Regulator and the steps taken by Wollongong Resources after the Fifth Ignition Event:

(a) the Regulator was notified immediately after the Fifth Ignition Event. An inspector attended the mine on 6 January 2024;

(b) a Prohibition Notice was issued preventing mining operations in the area of the mine in which the ignition event occurred;

(c) there were numerous phone calls and emails between 7 January 2024 and 11 January 2024;

(d) Mr Vatovec met with the Regulator again on 12 January 2024. The Regulator provided a debrief setting out their key concerns and preliminary findings about the Fifth Ignition Event on 5 January 2024. The inspectors raised specific improvements identified to be necessary to lift the Prohibition Notice issued on 6 January 2024. Mr Vatovec said "at no time did [the inspectors] indicate any further actions that the Resource Regulator would take, such as issuing further, broader Prohibition Notices". In fact, Mr Vatovec said, he was told by an inspector that if Wollongong Resources successfully addressed each of the items identified at the meeting on 12 January 2024, then the Prohibition Notice was on track to be lifted;

(e) the Final Prohibition Notice was issued without any further incident occurring. Mr Vatovec was very surprised because he had not ever known of a Prohibition Notice replacing a prior notice that was still in the process of being complied with. Mr Vatovec said about this:

> "In particular, I was surprised that the 18 January Prohibition Notice was issued before Wollongong Resources had an opportunity to complete the steps the Resources Regulator proposed we take in response to the 5 January 2024 frictional ignition incident and the 6 January Prohibition Notice, in circumstances where the 6 January Prohibition notice did not identify any directions or recommendations to comply with the notice."

(f) Wollongong Resources engaged two independent experts to meet the requirements of the 18 January 2024 Final Prohibition Notice. Wollongong Resources had already engaged a gas and ventilation expert;

(g) on 31 January 2024 Wollongong Resources filed an application for an internal review of the Final Prohibition Notice. One of the claimed grounds for review was that the inspector's conclusion that the Fifth Ignition Event involved "additional causal factors not previously identified" was factually incorrect. Mr Vatovec holds the view that there was sufficient similarity between the third event and the fifth event, and that therefore there was no material new causal factor associated with the Fifth Ignition Event; and

(h) on 9 February 2024 Wollongong Resources was advised that its internal review application was not successful.

[38] Mr Vatovec said that on 5 February 2024 employees were advised that a decision had been made to close down the Russell Vale Colliery. On 15 February 2024 many employees were sent a letter giving notice of termination for redundancy.

[39] In response to the evidence led by APESMA, Mr Vatovec made the following points:

(a) garbage bag testing is used simply to detect if there is any gas flow in a borehole and, to a lesser extent, to detect if such flow is at a dangerous rate. It is not necessary to determine actual flow rate with precision;
(b) the flow rate in boreholes at the Russell Vale Colliery is quite low compared to other mines, such as Appin and Dendrobium;
(c) the suggestion that Wollongong Resources should implement a gas drainage plant is fanciful, impractical and financially unviable;
(d) alternative work preparing strata advices was not useful work in the sense that there were no areas of specific concern at the time and "we had a comprehensive assessment on all strata conditions and we have the necessary resources to deal with all of those specific issues"; and
(e) alternative work in cleanup and maintenance was similarly not useful work for deputies because Wollongong Resources had sufficient labour in place to undertake those activities.

[40] Under cross-examination Mr Vatovec's evidence included:

(a) five frictional events in an 18-month period was a high amount in a short period of time, and was an unacceptable amount;
(b) a frictional ignition event is not likely to lead to a catastrophic event because there is no risk of a catastrophic explosion. There were significant safety factors built into the levels of incombustibles in the mine and so the risk of a propagation of an explosion is very remote;
(c) the controls of Russell Vale Colliery could be improved and fixing some of those issues would make frictional ignition events less likely in the future;
(d) boreholes are assessed as part of the Permit To Mine process – there is a standard procedure that the Deputy must follow;
(e) borehole intersection notices are issued for high-risk intersections. There was no borehole intersection notice issued for the relevant borehole at which the Fifth Ignition Event occurred because that borehole was thought to be dead (as confirmed by the latest available data);
(f) it is the responsibility of the Deputy to correctly treat a borehole after it has been intersected. The investigation after the Fifth Ignition Event had found that there was an incorrect treatment by one of the Deputies in the bagging of a hole that caused the pressurisation of the hole; and
(g) there's a distinct difference between the flow rate at Appin and the flow rate at Russell Vale. Technically they are two different seams. The Bulli seam is much more permeable and has high flow rates. So the use of flow meters is a better control at Bulli, compared to the lower flow rates and lower permeability at Russell Vale. At Russell Vale it is more important to identify that there is a flow then it is to measure with accuracy the rate of flow.

Wollongong Resources' evidence: Greg Pawley

[41] Mr Greg Pawley prepared two witness statements and was not required for cross-examination. Mr Pawley refuted Mr Edwards' account of a conversation on 30 January 2024 (see [21] above) and says that he told Mr Edwards "We have 14 days from the date of the notice to submit the review. It's with the lawyers and I expect that it will go in tomorrow. I don't expect that will materially change the immediate position we are in."

[42] In his second statement Mr Pawley gave evidence about the closure of the mine, that some employees were made redundant and that other employees were recalled to duty for the retrieval of assets and/or subsequent mine rehabilitation work.

APESMA's submissions

[43] APESMA argued that the stoppage was one for which Wollongong Resources can be reasonably be held responsible and further, in the alternative, employees were able to be usefully employed during the stoppage.

[44] In its initial submission APESMA asked the Commission to:

(a) find that the purported stand down of employees by Wollongong Resources is not compliant with s.524;
(b) order that any employees still stood down (to the extent that any employees are stood down) are permitted to return to work; and
(c) order that Wollongong Resources make a monetary payment to each individual employee affected by the stand down to resolve the stand down dispute.

[45] APESMA sought an order in the following form:

> "The FWC, having considered what is a fair outcome between the parties and other issues relevant to the industrial merits of the matter (including expressing its opinion that the stand down was not authorised by s.524) should determine the quantum of the monetary order to be no less than the amount that Wollongong Resources would have paid each individual employee for the period that the employer stood them down from their employment."

[46] In relation to the Commission's power to make the orders sought, APESMA submitted that:

(a) the Commission cannot make a binding declaration as to the legality of the stand down pursuant to s.524;
(b) Wollongong Resources' submission that making the orders it sought would be an impermissible exercise of judicial power is not correct;
(c) the Commission is empowered to make a finding and express its opinion on whether the stand down is compliant with s.524 (relying on *Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015 (at [26]; (2021) 304 IR 1 at 26 (**Carter)**);
(d) the Commission can make compensatory monetary orders to employees who have been stood down with reference to their lost wages (relying on *Carter* at [17]);
(e) the Commission can make orders recrediting annual leave (relying on the Explanatory Memorandum for the *Fair Work Bill 2008* and *Carter* at [16]-[17]); and
(f) the payment of disputed wages can be premised on a finding of industrial fairness rather than a breach of an obligation to pay wages.

[47] APESMA submitted that the matters of fairness between the parties that the Commission should take into account are:

(a) the Commission is entitled to refer to the wages that would have been earned by each employee as a reference point for any such order so long as fairness remains the paramount consideration;
(b) as a matter of fairness, the monetary order could exceed the wages withheld from the employees;
(c) the circumstances of the case favour the making of an order of a monetary payment to the employees that is no less than the sum of the wages they would have earned had the stand down not occurred;
(d) employees have suffered financial loss in the form of lost wages and having to use leave entitlements that would otherwise have been payable on termination;
(e) the relative scarcity of alternative employers in the coal mining industry meant that employees who were stood down would have had to relocate to another region to find alternative employment during the stand down period;
(f) the stoppage is not only one for which Wollongong Resources is responsible, but one of which it has had significant notice. The previous four frictional ignition events placed Wollongong Resources on notice and "fairness should dictate that the employee should not wear a discount in any monetary order given that [Wollongong Resources] has failed to implement controls in circumstances where the same life-threatening issue has re-occurred on five occasions"; and
(g) Wollongong Resources has a "dismissive attitude towards the potentially catastrophic outcomes [of a frictional ignition event]."

[48] APESMA said that the onus rested with Wollongong Resources to establish that the stand down meets the requirements of s.524 (relying on *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 3)* [2020] FCA 1428 at [16]-[17], (2020) 299 IR 100 (**Qantas No 3**) and in order to be successful, Wollongong Resources is required to establish that it cannot be held reasonably responsible for the stoppage of work at Russell Vale Colliery. It is not for APESMA to demonstrate that Wollongong Resources can be held reasonably responsible for the stoppage of work.

[49] APESMA submitted that the relevant inquiry is not directed solely to whether an employer caused or contributed to a stoppage of work but is more directed to whether the employer could "reasonably" have prevented the stoppage (relying on *Qantas No 3* at [22]). In this regard APESMA submitted:

(a) Wollongong Resources must adduce evidence to satisfy the Commission of the related inquiries that Wollongong Resources did not cause the stoppage or that a reasonable employer in the position of Wollongong Resources could not have reasonably prevented the issuance of the Prohibition Notice;
(b) the case law is clear that it is not an enquiry directed solely at the last link in the causal chain; and
(c) the question of responsibility and whether a stoppage was a natural and probable consequence of the employer's conduct is essentially a question of fact.

[50] On the facts of this matter APESMA submitted:

(a) the stoppage of work was the result of the 18 January Final Prohibition Notice;
(b) the Regulator squarely blames the conduct of Wollongong Resources for the issuance of the notice and concluded that existing controls have been ineffective in eliminating or minimising frictional ignition events;
(c) the Commission should not go behind the decision of the industry safety regulator to find that its assessment of the causes of the Fifth Ignition Event were wrong;
(d) Wollongong Resources was aware of or ought to have been aware of the deficiencies in its systems;
(e) the assessment report undertaken after the Fifth Ignition Event but before the Final Prohibition Notice notes several common controls at mine places that are not in place at Russell Vale colliery;
(f) employees of the mine have identified various controls and processes in place at the mine that were ineffective, risky or below industry standards and made complaints to management regarding these matters (referring to the conversations that Mr Nisbet and Mr Stewart had with their respective supervisors);
(g) not all of the recommendations of the Palaris Report had been implemented;
(h) Wollongong Resources' own experts have identified deficiencies in Wollongong Resources' controls; and
(i) Wollongong Resources runs a high-risk operation.

[51] In relation to whether Wollongong Resources can be "reasonably" responsible APESMA submitted:

(a) the Commission must consider more than the facts that were known to Wollongong Resources, and must consider what Wollongong Resources ought to have known and what Wollongong Resources could have reasonably prevented (relying on *Vehicle Builders Employees' Federation of Australia v Ford Motor Co. of Australia Pty Ltd* (1962) 3 FLR 198);
(b) the reports and materials generated after the Final Prohibition Notice reveal what Wollongong Resources ought to have known and the steps it could have reasonably taken prior to the stoppage;
(c) it cannot be contested that Wollongong Resources failed to implement all available controls against frictional ignition events and that its systems could be improved;
(d) the Regulator had ample grounds to understand the ineffective controls at Russell Vale Colliery; and
(e) the recommendations, investigations and advice received after the Final Prohibition Notice confirms that Wollongong Resources either did not have all reasonably practicable controls in place or that the controls it did have in place could be improved to prevent further frictional ignition events.

[52] APESMA also submitted that there was useful work for employees to do, relying upon:

(a) the evidence of Mr Nisbet that strata advices had been issued by the geotechnical officer that identified parts of strata that required secondary or additional support;
(b) the evidence of Mr Nisbet that there was a lot of cleanup and maintenance work that could be done; and

(c) the fact that on 15 February 2024 for Wollongong Resources lifted the stand down and called approximately 60 employees back to work to retrieve equipment from underground.

Wollongong Resources' submissions

[53] Wollongong Resources submitted that it cannot reasonably be held responsible for the stoppage of work because:

(a) the direct cause of the stoppage of work was the Final Prohibition Notice;
(b) the Final Prohibition Notice required an expert review of safety controls in relation to frictional ignition events despite both Wollongong Resources and the Regulator engaging experts in response to other frictional ignition events and despite Wollongong Resources accepting recommendations made by these experts;
(c) Wollongong Resources endorsed all of the recommendations of the Palaris Report (being a report commissioned by the Regulator), and was in the process of implementing all of the recommendations;
(d) the Commission should guard against "hindsight illusion" (see *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94 at [83]). The Commission should assess whether the Company can reasonably be held responsible for the stoppage of work having regard to the circumstances on 18 January 2024, not having regard to the actions taken following the incident to ensure compliance with the Prohibition Notice;
(e) the Commission's assessment should be based on the information available to Wollongong Resources the time of the stoppage, rather than assessed with the benefit of hindsight;
(f) the Final Prohibition Notice does not include any actual safety breaches or require any specific safety measures to be taken;
(g) the Regulator's decision to issue the Final Prohibition Notice was the supervening event that caused the stoppage of work. In the absence of this, there would have been no stoppage of work;
(h) in respect of the four preceding frictional ignition events Wollongong Resources received a substantial number of statutory notices from the Regulator and each notice was complied with to the satisfaction of the Regulator;
(i) as part of its compliance with statutory notices issued by the Regulator, Wollongong Resources made substantial changes to its safety systems that were presented to the Regulator as part of the process to have the statutory notices 'closed out' or complied with.

[54] Wollongong Resources relied upon several external, independent reviews of its safety systems:

(a) in May 2023 Wollongong Resources engaged in a peer review of the adequacy of its Frictional Ignition Management Plan;
(b) Wollongong Resources engaged with external third-party experts including WHS and ventilation engineering consultants; and
(c) the Palaris Report was commissioned and its recommendations were adopted.

[55] The Final Prohibition Notice was issued against the background of the events described above. Wollongong Resources submitted that it could not reasonably be held responsible for the fact that the Regulator decided to issue the Final Prohibition Notice in the circumstances. Wollongong Resources cannot be held responsible for the intervening actions of a third-party

(relying upon *Construction, Forestry, Maritime, Mining and Energy Union v DP World Sydney Limited* [2020] FWC 4623).

[56] Wollongong Resources argued that APESMA sought a determination of legal rights and obligations by reference to past events, rather than sought a determination of a legal question as a step along the way to resolving determining a broader dispute. As such APESMA was said to be asking the Commission to exercise a judicial power that it does not have.

[57] Wollongong Resources relied on the following passage in *R v Gough; Ex Parte Key Meats Pty Ltd* (1982) 148 CLR 582 at 587 (per Gibbs CJ):

> "… it appears that the union brought the matter before the Commission in an attempt to secure payment by [the employer] to the employees who had been stood down. However, the Commission had no jurisdiction to determine the legal rights of the employees who had been stood down or to enforce the rights given by the award … It would not have been legitimate to call a compulsory conference in an attempt to persuade [the employer] to make the payment sought by the union."

[58] Wollongong Resources submitted that the Commission cannot issue a declaration or make a binding determination of right, nor can the Commission order the payment of wages (relying on *Porter v Recoveries and Reconstruction (Aust) Pty Ltd* [2020] FWC 6938 at [24]-[25]).

Stand down provisions – History and General Principles

[59] Section 524 of the FW Act is in the following terms:

> **"524 Employer may stand down employees in certain circumstances**
>
> (1) An employer may, under0 this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
>
> (a) industrial action (other than industrial action organised or engaged in by the employer);
>
> (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
>
> (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
>
> (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
>
> (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period."

[60] Sections 526 and 527 confer upon the Commission the jurisdiction to deal with a dispute about the operation of the stand-down provisions, including making orders by way of arbitration:

"526 FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part.

(2) The FWC may deal with the dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute only on application by any of the following:

(a) an employee who has been, or is going to be, stood down under subsection 524(1) (or purportedly under subsection 524(1));

(b) an employee in relation to whom the following requirements are satisfied:

(i) the employee has made a request to take leave to avoid being stood down under subsection 524(1) (or purportedly under subsection 524(1));

(ii) the employee's employer has authorised the leave;

(c) an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (a) or (b);

(d) an inspector.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

> **527 Contravening an FWC order dealing with a dispute about the operation of this Part**
>
> A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.
>
> Note: This section is a civil remedy provision (see Part 4-1)."

[61] Stand down provisions were introduced into awards in the 1920s to temper the effects of changing from daily to weekly hiring (see *Food Preservers Union of Australia v J Ambrose Ltd & Ors* (1976) 182 CAR 391). Ordinarily employees on weekly hire are entitled to a full week's pay. Exceptions might apply, for example if an employee takes authorised unpaid leave. But otherwise employers are ordinarily required to provide either a full week's paid work or a full week's pay.

[62] Statutory stand down provisions first appeared in 2006. In *The Peninsula School v Independent Education Union of Australia* [2021] FWCFB 844 at [30], (2021) 305 IR 139 at 148-9 the Full Bench described the historical industrial context of the statutory provisions:

> "The form in which s 524(1) of the FW Act is drafted has a long industrial history. Award clauses in similar form have appeared in federal awards since the earliest days of industrial arbitration. In 1924, the High Court in *Pickard v John Heine & Sons Pty Ltd* considered the meaning of an award clause which provided that the requirement for employment to be terminated only by a week's notice did not affect, relevantly, "...*the right of management... to deduct payment for any day the employee cannot usefully be employed because of any strike by the Union or any other union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent.*" There was further evolution of the wording of provisions of this nature in federal awards and, by 1952, the most common form of the clause, as expressed in clause 19(b) of the *Metal Trades Award*, was that the employer had the right "...*to deduct payment for any day the employee cannot usefully be employed because of any strike or through any breakdown of machinery or any stoppage of work by any cause which the employer cannot reasonably be held responsible*". This later became a stand-alone clause under the heading "*Standing Down Employees*" (see clause 4.6 of the *Metal, Engineering and Associated Industries Award 1998*). In 2006, the *Workplace Relations Act 1996* was amended (by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*) to provide for a statutory right for employers to stand down employees. Paragraphs 691A(1)(a) and (b) of the *Workplace Relations Act*, which were introduced by the amendment, were to the same effect as the current s 524(1). The context provided by this industrial history, including decisions concerning the proper interpretation and application of the previous award and statutory provisions, informs the proper construction of s 524(1)."
>
> [Footnotes omitted]

[63] In *Qantas No 3* at [18] Justice Flick recited some of the history of the content of stand down provisions in awards:

> "Stand down provisions, as with other provisions (for example) providing for the termination of employment, have a long history. Initially some provisions were drafted which confined the ability of an employer to stand down employees to specified circumstances. But one instance is provided by the early decision in *Pickard v John Heine & Son Limited* [1924] HCA 38; (1924) 35 CLR 1 ("*Pickard*"). The stand down provision in that case was drafted in terms which entitled "*management ... to deduct payment for any day the employee cannot be usefully employed because of any strike by the union or any other Union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent...*". The employer had there decided that there was no work for an employee on Anzac Day because employees working under State awards on that day would be entitled to double pay and "*that would have been unprofitable*": (1924) 35 CLR at 5 per Isaacs ACJ. The phrase there employed in the stand down provision, "*any such cause*", was construed by the Acting Chief Justice as referring to "*causes*" of the kind previously mentioned such that it referred to "*any cause similar to or of the same nature as the breakdown of machinery*": (1924) 35 CLR at 9 per Isaacs ACJ. Starke J construed the clause differently to Isaacs ACJ. But nothing for present purposes turns upon the differences in construction. Of importance is the notion of construing a clause according to its terms. Although not a transition in drafting style which assumes any immediate relevance to the present proceeding, it may be noted that by the mid-1940s awards were shifting from authority to deduct wages for "*assigned causes*" and extending to "*any stoppage of work by any cause for which the employer cannot reasonably be held responsible*": *The Millers and Mill Employees Award 1937* [1946] CthArbRp 209; (1946) 56 CAR 622."
>
> [Footnotes omitted]

[64] The policy reasons for stand down provisions have been variously described and include providing a degree of protection to employees from possible redundancy by providing a temporary and less severe alternative, and to provide "financial relief" to an employer from paying wages in circumstances where, through no fault of its own, the employer has no work that the employees can usefully perform (see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Qantas Airways Ltd* [2020] FCA 656 at [18], (2020) 295 IR 225 at 229).

[65] It is helpful to identify and list the key principles so that one can see the context within which each element is ordinarily considered:

(a) as a matter of general principle, a permanent or weekly employee who presents for work is entitled to be paid irrespective of whether the employer has work for the employee to do[1];

(b) the term 'stand down' presupposes that the employee would have an obligation to present as ready for work but for the stand down[2];

(c) the ability to stand down a weekly employee without pay is a qualification to the principle that an employee who is ready and willing to work is entitled to be paid even though there is no work to do[3];

(d) the expression 'stand down' is ordinarily understood as placing an employee in a position in which their rights and duties as an employee, and the rights and duties of the employer in relation to them, are suspended for the time being.[4] Section 524 does not suspend or purport to end the employment relationship[5];

(e) there is no implied common law right to stand down an employee without pay in circumstances where there is no work the employee can usefully perform. In some instances express terms in a contract can allow for an employee to be unilaterally stood down[6]. Stand down provisions in statutes or industrial instruments only relieve the employer of the obligation to provide a full week's pay if the necessary conditions in the stand down provision are met;

(f) whether an employee "cannot be usefully employed" is a matter to be assessed from the perspective of the employer[7];

(g) a cessation of work rather than a mere reduction in the amount of available work will constitute a "stoppage of work"[8];

(h) whether an employee cannot be usefully employed is a question of fact. The economic consequences to the employer may be relevant. Questions of fact and degree will always be involved in determining whether an employee cannot be usefully employed or whether they can be usefully employed but it is not convenient to the employer to employ them[9];

(i) it may be that some employees cannot be usefully employed even though other employees are engaged in useful work[10];

(j) although an employer may have regard to its own economic interests, an employer cannot invoke stand down provisions because it is "uneconomic" to employ its workers in a particular way or invoke the provisions to promote financial gain[11];

(k) if there is a stoppage of work there are two further and separate questions to be addressed: (1) the cause of the stoppage of work and (2) whether the employer could be held reasonably responsible for the stoppage or could have reasonably prevented the stoppage[12];

(l) there must be a direct causal connection between the breakdown of the machinery or equipment and/or the stoppage of work, and the absence of useful work for the employee who is stood down[13];

(m) to focus only on the immediate or direct cause of the stoppage could give the provisions an arbitrary operation that could ignore the real, substantial or effective cause of the stoppage of work. Depending on how the provisions are applied, limiting the inquiry

to the immediate or direct cause could fail to give effect to the notions of 'reasonable' responsibility or 'reasonable' preventability[14];

(n) questions of reasonableness are to be determined by reference to the conduct of a reasonable employer/person in the same circumstances[15];

(o) the Commission's inquiries are not directed solely towards whether an employer caused or contributed to the stoppage of work, but are more directed to whether the employer could "reasonably" have prevented the stoppage[16];

(p) the Commission can deal with disputes about the operation of the stand down provisions in the FW Act by way of conciliation and arbitration. In dealing with disputes the Commission can consider fairness between the parties concerned[17];

(q) the Commission may make an order requiring the payment of a monetary amount in the exercise of its arbitral power to resolve a dispute, but does not have judicial power to determine or enforce existing legal rights[18]; and

(r) the Commission does not have jurisdiction to determine applications that are no more than claims about existing rights.

[66] I will explore some of these principles in greater detail below as required.

Stand down disputes: looking forwards and/or backwards

[67] The scope of the Commission's powers under s.526 are easy to identify in relation to continuing stand down situations. To the extent that a dispute might arise about some or all the elements of s.524, the Commission's role in dealing with such live disputes in a manner that is quick, informal and avoids unnecessary technicalities (per s.577(1)(b)) by conciliation or arbitration (per s.595) seems clear as is the kinds of orders that could be made.

[68] When dealing with disputes about continuing stand downs the Commission can make orders using the arbitration powers under s.595. Quite logically, s.527 makes a contravention of an "FWC order dealing with a dispute about the operation of this Part" enforceable as a civil remedy provision.

[69] In *Australian Municipal, Administrative, Clerical and Services Union v Helloworld Travel Limited, Viva Holidays II Limited* [2021] FWC 6535 at [45] (**Helloworld**) Deputy President Colman opined that stand down provisions in the FW Act are *substantially concerned* with current availability of work. The Deputy President suggested that payment during a stand down is simply a consequence of the application of s.524 rather than a matter for debate or dispute:

> "In my view, the operation of Part 3-5 is substantially concerned with the current availability of work and whether a stand down should commence or continue. In this regard, I note that those who have standing to bring a dispute to the Commission under s 526 include an employee who '*has been, or is going to be*' stood down, and an employee who '*has made a request to take leave*' to avoid being stood down (see s 526(3)). Such employees may wish to seek to persuade the Commission that there is or

> will be no stoppage of work, or that there is or will be useful work for them to perform, and that the Commission should make an order requiring the employer to allow them to work. It seems to me on the other hand that payment is simply a consequence of the application of s 524. If the conditions in s 524(1) are met, the employer is not required to make payments to employees (s 524(3)). If the conditions are not met, the employer must meet its payment obligations under the contract of employment and any applicable industrial instrument."

[70] The scope of the Commission's powers under s.526 are less easy to identify after a stand down has concluded, primarily because any ongoing dispute is necessarily about past events.

[71] In *Helloworld* Deputy President Colman expressed doubt that a dispute about the operation of Part 3-5 could extend beyond the conclusion of a stand down but recognised the contrary Full Bench authority (at [47] referring to *Carter*). In his view "a framework that is concerned with the Commission's resolution of disputes about present stand downs rather than ones that have concluded would make sense, because the Commission's role is not to adjudicate the rights and wrongs of the past" (at [46]-[47]).

[72] In this context it is readily understandable that workers have no standing to make an application under s.526 after their employment has ended (see *Carter* at [32] referring to *Schell v Ensign Australia Pty Ltd* [2015] FWC 8825 and *Isturiz-Moron v Northside Community Service Ltd* [2016] FWC 4649).

[73] If a concluded stand down was authorised by s.524 then no wages are due because of the absolute effect of s.524(3). Although the employer is "not required" to make payments to employees for the period, the employer is not prevented by s.524(3) from paying employees for some or all the period.

[74] As Deputy President Colman found in *Helloworld* at [66]-[68], there is no residual role for the Commission to consider the fairness of a stand down once the Commission is satisfied that the requirements of s.524 have been met. The Deputy President's reasoning is compelling:

> **"**[68] In my opinion, the ASU's alternative contention usefully prompts one to reflect upon the framework that the Parliament could have enacted but did not enact. Part 3-5 could have reposed in the Commission a broad discretion to determine whether a stand down was unfair *having regard* to the matters in s 524 and other considerations referrable to fairness, and if the stand down was unfair, to issue remedial orders including compensation. Such a provision could have addressed the significance of any compensation ordered by the Commission for future proceedings brought by employees to recover unpaid wages in a court, so as to avoid confusion, overlap and unfairness. Instead, s 526 simply authorises the Commission to deal with a dispute about the operation of Part 3-5, a Part which authorises employers to stand down employees and not to pay them in very specific circumstances.
>
> [69] The ASU's alternative submission in respect of compensation was that, if the Commission concluded that the employees had been lawfully but unfairly stood down, it should order compensation to be paid to employees in amounts proportionate to the work that they would have done had the work been fairly allocated between all

> employees. I have rejected the ASU's contention that the Commission has a residual discretion to consider the fairness of stand downs that meet the requirements of s 524. But in any event, no compensation could be ordered in such cases, because s 524(3) plainly states that if an employer stands down an employee during a period under s 524(1), *'the employer is not required to make payments to the employee for that period'* ..."

[75] If any period of a stand down was not authorised by s.524 then in most instances the employer is not relieved of the obligation to pay affected employees for that relevant period. However, the Full Bench in *Carter* concluded at [31] that "an approach whereby a dispute concerning a stand down is resolved by the making of a compensatory order *consequential upon the formation of the opinion by the member that the stand down was not authorised by s 524(1)* … would in our view be available as a matter of power under s 526."

[76] The Full Bench in *Carter* also made it clear that the Commission does not have any judicial power to make a monetary order in grant of a claim for an entitlement to wages said to be owing under an award or contract of employment (at [27]). Much depends, the Full Bench said, on the nature of the dispute and whether the dispute involves no more than a claim for a legal entitlement to wages consequent upon a conclusion that the stand down was not authorised by s.524 (at [33]).

Stand down disputes in the Commission, onus and evidentiary burden

[77] There is one further procedural matter of general application to note: the court authorities consistently refer to the employer carrying the onus of proof to establish that the relevant stand down provisions apply, including that employers carry the onus of establishing that they could not reasonably be held responsible for the stoppage of work. For example, in *Qantas (No 3)* at [16]-[17] Justice Flick said:

> "At a very general level, it should be noted at the outset that stand down provisions serve two purposes – one purpose being to provide "*financial relief*" to an employer from paying wages in circumstances where, through no fault of its own, the employer has no work that the employees can usefully perform; the other purpose is to protect the employees from what would otherwise flow from the termination of their services: *Qantas (No 1)* [2020] FCA 656 at [18], [2020] FCA 656; (2020) 295 IR 225 at 229.
>
> Not surprisingly, the onus rests on the employer to establish that it brings itself within the power to invoke such provisions: *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358 at 363-367 per Morling J ("Townsend")."

[78] In *Helloworld* Deputy President Colman made the following observations about onus, distinguishing between enforcement proceedings in a Court and dispute proceedings in the Commission (at [54]):

> "The ASU contended that the companies bore the onus of proving that they had met the requirements of s 524. Certainly in an application made in a court for wages due under a contract of employment or an industrial instrument, the employer would need to establish that the statutory justification for not paying those wages in s 524(3) was

engaged. In an application made under s 526 of the Act however, the Commission's task is to *'deal with the dispute'*. This requires the Commission to form a view about whether it considers that the stand down meets the requirements of s 524. Where the Commission has decided to arbitrate a dispute, it must make factual findings as to whether the circumstances are present or not, based on the evidence and submissions presented to the Commission."

[79] In *Teterin v Resource Pacific Pty Ltd* (2014) 244 IR 252, [2104] FWCFB 4125 the Full Bench explored the notion of 'onus of proof' in proceedings in the Commission. The Full Bench distinguished between a legal onus and an evidentiary onus, particularly for a statutory tribunal that is requited to be "satisfied" about exercising a discretion and linked the evidentiary onus to the party bearing the risk of failure. The Full Bench said at [25]-[27]:

> "In considering the appellants' submissions concerning onus, it is important to distinguish between a legal onus and an evidentiary onus. A legal onus, or burden of persuasion, "is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved" to the requisite standard of proof, with such a party bearing the risk of non-persuasion as to the fact in issue. The limited role of the legal onus in court proceedings is explained in Cross on Evidence in the following way:
>
> > Burdens of persuasion affect the outcomes only of cases in which the trier of fact thinks the plaintiff's and the defendant's positions equi probable. Burdens of persuasion are, in other words, tie-breakers. If the trier of fact, having heard all the evidence, comes to a definite conclusion, there is no occasion to invoke a burden of persuasion.
>
> The evidentiary onus was described by the High Court in *Sidhu v Van Dyke* "in its strict legal connotation" as being "the burden of adducing or pointing to sufficient evidence to raise an issue for determination by the court". It has also been referred to as the burden of adducing evidence.
>
> In most of the decisions relied upon by the appellants to support the proposition that in the case of jurisdictional objections based on s 389 it will be the respondent who bears the onus, it is apparent that an evidentiary onus was being referred to…"
>
> [Footnotes omitted]

[80] For the most part, where the Commission is dealing with a dispute about stand down provisions, the employer will carry the evidentiary burden of adducing or pointing to evidence from which the Commission can be satisfied that the employer can be held reasonably responsible for the stoppage, because it bears the risk of failure on that matter.

[81] Given the terms of s.526(4) it may be that employee parties to stand down disputes carry the evidentiary burden of adducing or pointing to evidence sufficient to raise matters of fairness or unfairness that support the making of dispute orders, because they bear the risk of failure on such matters.

Stand down provisions and judicial power

[82] Wollongong Resources submitted that APESMA had asked the Commission to exercise judicial power, which it cannot do. The Commission does not have judicial power and therefore the Commission cannot make binding declarations about existing legal rights. The Commission can, and in some cases must, form an opinion about existing legal rights as an intermediate step in the process of regulating the future rights of the parties.

[83] The Full Bench in *Carter* at [16] acknowledged that the Commission does not have the power to declare a particular stand down to be null and void or otherwise unlawful. The Full Bench said:

> "[17] However, that is not the end of the matter. Section 526 of the FW Act authorises the Commission to deal with disputes about the operation of the stand down regime in Pt 3-5 of the FW Act, including by arbitration. The purpose of this conferral of power is, it can readily be inferred, for the Commission to resolve such disputes. Although it is not directly stated what remedies or relief the Commission may grant in the exercise of its arbitral power, s 527 makes it apparent that the Commission is empowered to make orders binding on the parties to the dispute which are enforceable in a relevant court. The paramount consideration which the Commission must take into account in deciding whether to make any such order and, if so, the terms of such order, is "*fairness between the parties concerned*" (s 526(4)).
>
> [18] There is nothing in the text of Pt 3-5 of the FW Act which precludes the making of a monetary order. We note that in other provisions of the FW Act conferring arbitral power, where it is intended that the Commission's power to make orders is not to include monetary orders or certain types of monetary order, this is expressly stated (see, for example, s 392(4) and s 789FF(1)). The explanatory memorandum for the *Fair Work Bill 2008* makes it clear that the Commission is empowered under s 526 to make monetary orders …
>
> [19] We consider that the above extract confirms what we regard to be the ordinary meaning of s 526, namely that the Commission may, taking into account fairness between the parties concerned, make an order requiring the payment of a monetary amount in the exercise of its arbitral power to resolve a dispute concerning the operation of Pt 3-5.
>
> [20] There can sometimes be a fairly fine line between the impermissible exercise of judicial power by an arbitral tribunal and the proper exercise of arbitral power. The High Court decision in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* is an example of this. In that matter …
>
> …
>
> [25] The majority and minority judgments in *Re Cram* make it clear that a determination by an arbitral tribunal requiring one party to a dispute to pay a monetary amount to another does not necessarily involve an impermissible exercise of judicial power. It is necessary to examine closely the nature of the claim for payment advanced by the successful party and the submissions made in support of that claim, and the tribunal's reasoning in its decision, in order to identify the basis upon which the tribunal acted.
>
> [26] It should be emphasised that there was no difference of opinion in the Court in *Re Cram* concerning the capacity of a tribunal to express its opinion about relevant issues of legal entitlement in the course of the proper discharge of arbitral functions…

[27] Applying the principles stated in Re Cram to the Commission's functions under s 526, it seems to us that while the Commission cannot make a monetary order in grant of a claim for an entitlement to wages said to be owing under an award or a contract of employment, the Commission is empowered to make a monetary order to resolve a stand down dispute based on its consideration of what is a fair outcome between the parties and other issues relevant to the industrial merits of the matters and, in doing so, is entitled to take into account whether, in its opinion, the stand down was authorised by s 524(1)."

…

[33] In this appeal, it is necessary to determine whether the Deputy President was correct in characterising the case advanced by Mr Carter as, relevantly, involving no more than a claim for a legal entitlement to wages consequent upon a conclusion that his stand down was not authorised by s 524(1)…"

[84] In *Helloworld* at [58]-[61] Deputy President Colman added to the Full Bench's analysis in *Carter*:

"[58] The creation of a genuine new right to compensation that is referrable to the Commission's assessment of fairness would not entail the exercise of judicial power. I agree with the observation of the Full Bench in *Carter* at [20] that, in some case, there can be a fine line between the purported exercise of judicial power and the proper exercise of arbitral power. Nevertheless, it is a line that exists as a matter of objective reality. In my view, the ASU's claim for compensation for economic loss is on the wrong side of that line.

…

[60] The ASU submitted, in reliance on *Carter*, that because the primary orders it sought entailed the creation of new rights for the twelve employees by reference to what had occurred in the past and taking into account all of the relevant circumstances including fairness as between the parties, an order for compensation would be a valid exercise of arbitral power under s 526. However, the principal circumstance upon which the ASU relied in support of its claim for a new right to compensation was the alleged fact that the requirements of s 524 had not been met. The orders for compensation sought by the union would reflect the wages to which the employees were said to be entitled as a matter of law, because the employer's right not to pay those wages under s 524(3) had not been engaged. In my opinion, the ASU's application for orders that employees be paid compensation for actual economic loss during the stand downs **is a claim for wages due**. The ASU also referred to other considerations that it said bore out unfairness in the manner in which the companies had treated the employees, but this does not alter the character of the remedy that the union asks the Commission to grant.

[61] **A claim for payment of wages due to an employee is a claim for the enforcement of existing legal rights**. To grant such a claim requires the exercise of judicial power, which, at the federal level, is vested exclusively in Chapter III courts (see s 71 of the Constitution, and *Re Cram*, above, at 148). In *Re Ranger Uranium Mines*

> *Pty Ltd; Ex Parte Federated Miscellaneous Workers' Union of Australia* [1987] HCA 63; (1987) 163 CLR 656, the High Court stated, at 665, that a function may be considered judicial or administrative according to the manner in which it is exercised (hence the occasional 'fine line' referred to in *Carter*), and that a determination of matters in issue would be a judicial function *'if its object is the ascertainment of legal rights and obligations'*, but that *'if its object is to ascertain what rights and obligations should exist'*, it is an arbitral power (at 666). In the present case, the ASU asks the Commission to grant employees their unpaid wages through **the artificial device of a right to compensation of the same amount**. The *object* of such an order would be to quantify and order payment of employees' existing right to wages."
>
> [Emphasis added].

Can the Commission determine APESMA's claim?

[85] As the Full Bench in *Carter* made clear, it is important to determine the nature of the case advanced and whether it involves no more than a claim for a legal entitlement to wages consequent upon a conclusion that a stand down was not authorised by s 524(1).

[86] In its final written submissions APESMA said:

> "In our respectful submission, having regard to the factors identified above and the paramount consideration of fairness between the parties, a compensatory order should be made to employees which is no less than wages for the stand down period. Whilst the loss of income is a relevant factor to this submission, it is not the only factor as has previously been identified in previous submissions.
>
> The factors include:
> a. The stand down was not authorised by s.524 in the opinion of the FWC.
> b. In light of the lengthy history of frictional ignition events, the abundance of controls available to the Respondent, the dilatory nature in which the Respondent has addressed those controls and its reticence to now admit any failures in its controls, that this is a situation in which the Respondent should bear a greater ownership of the responsibility for the stoppage. In essence, the conduct of the Respondent is sufficiently egregious that matters of fairness would weigh in favour of the Applicant.
> c. Additionally, employees have suffered financial loss in the form of lost wages and utilisation of leave that would otherwise have been payable on termination.
> d. Employees have cancelled holidays because they cannot afford them given their loss of income, the uncertainty regarding their position and because they had to use that leave during the stand down.
> e. The vast majority of workers did not have sufficient leave to cover the stand down period.
> f. Given the relative scarcity of alternative employers in the coal mining industry, employees will likely need to relocate with their families to a different region, either in regional New South Wales or Queensland.
> g. The unlawful stand down has caused significant stress and anxiety to workers in circumstances where there has been no certainty as to when they will next be paid if at all and whether they will be forced to move to be able to sustain their families.

> These non-exhaustive factors contribute to the overall quantum of the compensatory order sought by the Applicant. It is not the value of the lost wages alone.
>
> …
>
> The FWC is not required to, nor should it, wilfully ignore the lost wages as a result of an impugned stand down. Such an approach would not be in accordance with the requirement of fairness in s.526 and the approach endorsed by the Full Bench in Carter. Instead, wages is one component relevant to the FWC's consideration of fairness. Whilst the Applicant may submit in this particular matter that factors relevant to fairness would mind the FWC to make a compensatory order of the value of the lost wages, it is entirely open to the FWC to determine the quantum of any such order based upon the evidence of fairness before it."

[87] In an earlier written submission APESMA sought the following order, which APESMA confessed "appropriates the language used in *Carter*":

> "The FWC, having considered what is a fair outcome between the parties and other issues relevant to the industrial merits of the matter (including expressing its opinion that the stand down was not authorised by s.524) should determine the quantum of the monetary order to be no less than the amount that the Respondent would have paid each individual employee for the period that the employer stood them down from their employment."

[88] APESMA has consistently sought an order for full payment to each employee for the whole period over which they were stood down, and consistently maintained that the stand down was not authorised by s.524. Wollongong Resources consistently complained that APESMA was impermissibly seeking a binding determination of legal rights and obligations by reference to past facts. Moreso Wollongong Resources said that APESMA was not seeking a determination of this legal question as a step along the way to determining a broader dispute – but that the application of s.524 was the whole dispute.

[89] It is very important to recognise that APESMA referred the dispute to the Commission very quickly after the stand down was announced and long before the stand down had concluded. Throughout the whole of the dispute APESMA has maintained that s.524 had not been engaged and, understandably, agitated for full payment of lost income to its affect members.

[90] In the period before the stand down concluded APESMA and Wollongong Resources were in dispute about matters with prospective consequences. In this period APESMA's claims involved more than a claim for a legal entitlement to wages consequent upon a conclusion that the stand down was not authorised by s 524(1).

[91] The dispute continued beyond the cessation of the stand down and, of course, necessarily became a dispute about past events.

[92] I accept that there is a fine line between APESMA's claim that wages are due, which cannot be divorced from APESMA's claim that s.524 was not engaged, and APESMA's claim that the Commission should resolve the dispute by making a monetary order. I also accept that many of the matters of fairness relied upon by APESMA are, in truth, consequences of the operation of s.524 that APESMA claims to be unfair.

[93] However in making a broad assessment of the nature of APESMA's claim, I am satisfied that it was a claim that it was entitled to properly advance on behalf of its members, even after the stand down concluded. APESMA's claim did not rely on "the artificial device of a right to compensation of the same amount" in the same way that Deputy President Colman characterised the ASU's claim in *Helloworld*.

[94] In my view it is important to recognise that the dispute dealt with by the Commission in *Helloworld* was of a very different nature to the present dispute. As the Deputy President remarked, albeit in obiter, at [64]-[65]:

> "…the ASU's application under s 526 was not made until 1 October 2021, some seventeen months after the first stand downs commenced … had an application under s 526 been made soon after the first stand down commenced in March 2020, the Commission could have sought to resolve a dispute over the application of Part 3-5 at a much earlier stage, and, had the ASU's arguments prevailed, the Commission could have ordered the return to work of relevant employees, thereby avoiding or reducing the alleged losses and any associated need to order compensation … Instead, an application brought seventeen months after the stand downs commenced and determined after the stand downs had ended could only hope to achieve payment for employees, but not work for the benefit of the employer."

[95] Even though the stand down did not completely end in *Helloworld* until six weeks after the dispute was referred to the Commission (see *Helloworld* at [10]), it can be readily seen that the nature of the dispute was principally a claim for a legal entitlement.

The elements of section 524

[96] As the authorities make clear, the Commission can form an opinion about the operation of s.524 in a particular dispute. The Full Bench in *The Peninsula School v Independent Education Union of Australia* [2021] FWCFB 844 at [31]-[32], (2021) 305 IR 139 at 149 provided the following helpful scaffold for considering the conditions that must be satisfied to engage s.524:

> "In order for a stand down of an employee to be authorised by s 524(1), two conditions must be satisfied:
> (1) the employee cannot be usefully employed during the period of the stand down; and
> (2) this must be because of one of the circumstances in paragraphs (a), (b) or (c) of s 524(1).
>
> Where s 524(1)(c) is the relevant circumstance relied upon, two elements must be satisfied:
> (a) there must have been a stoppage of work; and
> (b) the employer cannot reasonably be held responsible for the stoppage."

[97] The Full Bench also suggested at [33] that:

> "an assessment of whether a particular employee may be stood down pursuant to s 524(1), the logical process of analysis is to begin with the question of whether the employee can usefully be employed over the relevant period. If the employee can be usefully employed, the stand down will not be authorised by s 524(1) and no further inquiry as to causation is needed."

Could any of the employees be usefully employed?

[98] Whether an employee "cannot be usefully employed" is a matter assessed from the perspective of the employer (see *Construction, Forestry, Maritime, Mining and Energy Union v Ta Ann Tasmania Pty Ltd* [2019] FWCFB 5300 at [18] citing *Townsend v General Motors-Holden's Ltd* [1983] FCA 204, 4 IR 358 at 367- 370). In *Townsend* Justice Morling contrasted circumstances where it might be *convenient* to the employer to stand down employees with circumstances where an employee cannot be usefully employed. The distinction, his Honour said, is a question of fact. If the employer has acted upon proper principles and in good faith then the Court or tribunal is not to go through the evidence with a fine-tooth comb applying a standard of perfection.

[99] APESMA submitted that there was useful work for employees to do including work on strata advices as well as cleanup and maintenance work.

[100] Mr Vatovec's evidence was that 177 employees were stood down on 19 January 2024. He said that work preparing strata advices was not useful work in the sense that there were no areas of specific concern at the time, that Wollongong Resources had a comprehensive assessment on all strata conditions and had the necessary resources to deal with all those specific issues. Mr Vatovec also explained that cleanup and maintenance work was not available for Deputies and that Wollongong Resources had sufficient labour in place to undertake those duties without calling upon the deputies.

[101] I am not satisfied that engaging staff employed in a supervisory, professional, administrative, clerical or technical capacity to perform these ancillary functions would be to Wollongong Resources' economic advantage. Given the large number of employees who were stood down, and the relatively small number of tasks that APESMA claimed could have been assigned, this aspect of the claim does not require further analysis. I am satisfied for the purposes of s.524 that there was a period in which employees at the Russell Vale Colliery could not be usefully employed.

The cause of the stoppage of work

[102] There is no doubt that the Final Prohibition Notice was the immediate cause of the stoppage of work. In this matter it is somewhat obvious that one must look past the immediate cause of the stoppage to consider the real or substantive causes of the stoppage.

[103] Inspector Margetts issued the Final Prohibition Notice after forming the requisite belief under s.50 of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW) (**WHS MPS Act**). Section 50 of the WHS MPS Act supplements the powers available to inspectors under s.195 of the WHS Act. Sections 50 and 195 are reproduced in full as an annexure to this

decision. The following extract from the Regulator's internal review decision helpfully explains the difference between s.50 of the WHS MPS Act and s.195 of the WHS Act:

> "10. Section 50 of the WHS MPS Act relevantly sets out that a government official may decide to issue a notice under section 195 if the government official believes that an activity may occur at a workplace that, if it occurs, could involves a serious risk to the health or safety of a person. The words "believes" and "could" are a difference to the construction of section 195(1)(b) which refers to a "reasonable belief" and an occurrence that "will" involve a serious risk to health or safety of a person. Additionally, the circumstances under section 195(1)(b) are further limited to require that the risk to the person must emanate from "an immediate or imminent exposure to a hazard"; such a limitation is not present in section 50(2)(b) of the WHSMPS Act. The government official does not have to identify a belief that a provision of the WHS Laws is being or is likely to be, contravened by the identified activity in the notice."
>
> [Footnotes omitted]

[104] In other words, under s.50 of the WHS MPS Act inspectors have the authority and discretion to issue a prohibition notice requiring mining activity to cease, even if there is no immediate or imminent exposure to a hazard. Given the lower threshold set under the WHSMPS Act, and the five ignition events in the previous 18 months, it is no surprise that Wollongong Resources' internal review was not successful.

[105] In the Final Prohibition Notice Inspector Margetts recorded his view that ongoing mining activity could involve a serious risk to the health or safety of a person, specifically, the risk of serious injury or death of a worker at the Russell Vale Colliery as a result of a frictional ignition event. Most of the Final Prohibition Notice is reproduced at [14] and [15] above. The Inspector listed the matters to which he had regard, including:

> "c) An assessment of each frictional ignition event has identified a range of different causal factors, with the most recent frictional ignition event on 5 January 2024 having additional causal factors not previously identified as causal factors in previous events.
>
> d) Existing controls have proven ineffective in eliminating or otherwise minimising the occurrence of frictional ignition events at the Russell Vale Colliery.
>
> e) The number of frictional ignition events and their different causal factors causes me to believe that the mine operator has not, or may not have, identified and implemented all reasonably practicable controls to eliminate or otherwise minimise the occurrence of a frictional ignition event."

[106] The Inspector was not called to give evidence. As can be seen from the factors listed above, Inspector Margetts considered in some way Wollongong Resources' safety systems, control measures, responses to earlier frictional ignition events and Wollongong Resources' attempts to identify and implement risk control measures that would eliminate or control the occurrence of frictional ignition events.

[107] For present purposes, Wollongong Resources' systems and responses can be seen to be part of the sequence of events that ultimately led to the issuing of the notice and the stoppage of work (per *Qantas No 3* at [19]). As is clear from the text of the Notice however, no single

event or factor caused the inspector to issue the notice or singularly caused the stoppage of work.

Can the Respondent reasonably be held responsible for the stoppage?

[108] The crucial question in this case is whether Wollongong Resources can reasonably be held responsible for the stoppage of work or, to describe the test slightly differently, whether Wollongong Resources could reasonably have prevented the stoppage. The answer to this question depends on an assessment of the conduct of a hypothetical reasonable employer and/or the steps a reasonable employer might be expected to take in the circumstances. As the Full Court said in *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2022] FCAFC 50, at [61], [119] and [137], (2022) 314 IR 231 at 253:

> "Counsel for Qantas and Jetstar accepted that it is difficult to argue that the airlines were not "at some level ... within the chain of causation". It seems to me, as it did to the primary judge, that the decisions of the respective airlines may be seen as the immediate cause of the stoppage of work. However, the question then is one of reasonable responsibility or reasonable preventability. As the primary judge said … questions of reasonableness are to be determined "by reference to the steps which a 'reasonable man might be expected to employ in the circumstances"".

[109] APESMA argued that Wollongong Resources was not sufficiently diligent or proactive about safety matters, that it had failed to implement controls in circumstances where the same "life-threatening" issue had reoccurred on five occasions and that Wollongong Resources maintained a dismissive attitude towards the potentially catastrophic outcomes of a frictional ignition event.

[110] For the reasons that follow I am satisfied that Wollongong Resources acted reasonably, took the steps a reasonable employer might be expected to take in the circumstances, and therefore cannot reasonably be held responsible for the issuing of the Final Prohibition Notice and the resultant stoppage of work.

[111] The first thing to recognise is that frictional ignition events are a common and well-known hazard in the underground coal mining industry. Such events are not a novel or unique risk specific to Wollongong Resources' operations however, as Mr Vatovec accepted in cross-examination, five frictional events in an 18-month period was an unacceptably high number in a short period of time.

[112] Mr Vatovec holds the most formal qualifications of all the witnesses. When initially asked in cross-examination whether a frictional ignition event at Russell Vale Colliery could lead to a catastrophic explosion he said there was no such risk. Later he agreed that there was a remote risk but was emphatic that such an explosion would not occur.

[113] Inspector Margetts' belief on 18 January 2024 that mining activities "could involve a serious risk to the health or safety of a person, specifically, the risk of serious injury or death of a worker at the Russell Vale Colliery as a result of a frictional ignition event" must be literally correct. However the risk referred to by the Inspector in the Final Prohibition Notice was not a new risk, was not a previously unidentified risk and was undoubtedly a risk that Wollongong Resources had attempted to minimise by way of various control measures. Obviously the risk

had not been eliminated, but nobody suggested that Wollongong Resources' inability to eliminate (as opposed to minimise) this risk was unreasonable.

[114] APESMA's witnesses criticised Wollongong Resources' use of the garbage bag gas flow inspections (see paragraphs [23]-[25] above). The test is as rudimentary as the name suggests. I accept the evidence of Mr Vatovec that these tests are fit for purpose insofar as they are primarily used to identify gas flow. The precise rate of flow is not critical in the context in which the tests are performed. I am fortified in this view by the fact that the Regulator does not appear to have taken issue with the use of these tests.

[115] I have already summarised Mr Vatovec's evidence of the five frictional ignition events (see [31] above) and note that each event was followed by at least one Prohibition Notice from the Regulator. Mr Vatovec's evidence concerning Wollongong Resources' interactions and cooperation with the Regulator is summarised at [34]-[37] above. There is no suggestion that Wollongong Resources' interactions or cooperation with the Regulator were improper or inadequate or, more relevantly, that Wollongong Resources' dealings with the Regulator were such that Wollongong Resources could reasonably be held responsible for the Regulator's decision to issue the Final Prohibition Notice.

[116] On 18 January 2024 Inspector Margetts 'believed' that Wollongong Resources:

> "[had] not, or may not have, identified and implemented all reasonably practicable controls" and in the Final Prohibition Notice he directed Wollongong Resources to "engage an independent, suitably qualified, experienced and competent person to … identify all reasonably practicable control measures that may be implemented at the Russell Vale Colliery to eliminate, or otherwise minimise, the occurrence of a frictional ignition event and the risks to health and safety as a result of any frictional ignition event."

[117] None of the earlier Prohibition Notices directed Wollongong Resources to cease operations across the whole mine. The Final Prohibition Notice was dramatically different to any other Notice in this respect. Mr Vatovec's surprise that the Final Prohibition Notice was issued while Wollongong Resources was still in the process of complying with the notice issued the day after the Fifth Ignition Event is very understandable.

[118] By the terms of the Final Prohibition Notice, the full prohibition on mining operations would only be lifted once Wollongong Resources engaged an outside person to identify all reasonably practical control measures, and after Wollongong Resources had tested and verified each identified control measure and established a system to ensure ongoing verification of those control measures.

[119] It is difficult to follow the Inspector's rationale for issuing a full prohibition.

[120] Prior to the Fifth Ignition Event Wollongong Resources had worked closely with the Regulator and the Regulator appeared to be satisfied with Wollongong Resources' responses and actions. Wollongong Resources' safety systems were comprehensive (see [30] above) and were not materially discredited in the evidence. Copies of Wollongong Resources' entire safety management system as well as additional documents relating to frictional ignition events were

provided to the Regulator in September 2023. There is no record of the Regulator requiring wholesale amendments to Wollongong Resources' safety systems.

[121] After the third frictional ignition event Wollongong Resources arranged for its Frictional Ignition Management Plan to be peer reviewed by the Mine Manager Mining Engineering, and Ventilation Officer of the nearby Dendrobium Coal Mine, and the District industry safety and health representative.

[122] More significantly, after the fourth event the Regulator commissioned an independent review of the four prior frictional ignition events. This review was carried out by Palaris Australia, a mining advisory consultancy firm. As the Executive Summary of the Palaris Report makes clear, the independent reviewers were asked to "provide recommendations guiding reduced likelihood of reoccurrence":

> "The Department of Regional NSW Resources Regulator has engaged Palaris Australia Pty Ltd (Palaris) to support an incident investigation at the Wollongong Coal's Russell Vale underground coal mine. With a recent frictional ignition event being the fourth similar event in 14 months, this review aims to understand contributing factors and provide recommendations guiding reduced likelihood of reoccurrence."

[123] The authors of the Report drew certain conclusions from their review of the previous four frictional ignition events and made recommendations to reduce the likelihood of reoccurrence.

[124] The Executive Summary includes the following:

> "Incidents reviewed as part of this investigation identified various causes of ignition and fuel with sources of accumulation of gas. The review identified recurrence of the **following contributing factors** across the incidents:
>
> - Elevated methane concentration due to a lack of gas reservoir understanding
> - Elevated methane concentration due to LTA management of boreholes
> - LTA ventilation distribution, quantity and velocity resulting in localised accumulations of gas or layering of gas
> - Increased likelihood of incendive sparking due to the geological nature of the Wongawilli Seam
> - Cut sequences and equipment design contributing to ineffective ventilation distribution
> - Ineffective water sprays systems to control incendive sparking
> - LTA Monitoring system placement and inspection arrangements and setting resulting in failure to detect accumulations of methane.
>
> The geotechnical environment arising from both geological complexity and a multi-seam mining environment increases cavity formation and should be considered as part of gas reservoir assessment.
>
> The mine has sought to broadly address these contributing factors through procedural control with revisions to Frictional Ignition TARPs, introduction of Frictional Ignition Audits, Panel Ventilation Audits and additional SWP's.

The use of procedural controls to minimise the risk of frictional ignition events to date has not resulted in an effective control."

[Emphasis added]

[125] As requested by the Regulator, the authors of the Palaris Report made the following recommendations:

> "1. Develop a gas reservoir model supported by sufficient data to inform all contributing sources of methane to the workings and to support a robust gas management strategy. This should consider a sound understanding of discrete plies of the Wongawilli seam as well as other potential contributing sources.
> 2. Develop a gas management strategy including borehole design, drainage targets, gas concentration targets, and gas drainage systems to minimise the risk of accumulation of gas and layering.
> 3. Consider impacts of local geological features and mining induced fractures associated with previous extractive workings as additional contributing sources of methane.
> 4. Undertake risk assessment informed by a sound understanding of engineering and ventilation requirements to inform both the location and concentration associated with on board gas monitoring trip points. Risk assessment should be informed by an understanding of areas of potential gas accumulation or areas of expected reduced ventilation distribution. The risk assessment should consider legislated limits for general body zones and whether these are applicable to the point of monitoring.
> 5. Review of operational risk assessment of the 12CM30 with regards to the hazard of frictional ignition, potential sources of ignition and current industry controls.
> 6. Undertake engineering design review to ensure cutter head lacing, pick selection and cutter head speed are optimised to minimise the effective energy transfer.
> 7. Undertake engineering design review to optimise location, distribution and effectiveness of water sprays as a preventative control for frictional ignition across the designed cut sequence
> 8. A review of the current Frictional Ignition management systems should be undertaken with consideration to the risks associated with incendive rock and methane gas as experienced. The mine should consider whether this is in fact principal hazard for the mine.
> 9. A review of frictional ignition hazard training relative to the systems and hazard identification should be undertaken. Multiple examples of complacency to observed sparking were identified during the review."

[126] Wollongong Resources accepted every recommendation in the Palaris Report.

[127] On 22 November 2023 Wollongong Resources sent a comprehensive response to the Regulator providing details of the work planned in relation to each recommendation, supporting evidence for the work already undertaken, and timeframes for the completion of the works that were specific to each recommendation. Wollongong Resources indicated that work in response to recommendations 1-4 would be completed between 16 October 2023 and 31 December 2023. Wollongong Resources indicated that the work in response to recommendations 5-9 would take place or be completed within either "6 months" or by "Q2 2024".

[128] Importantly, the Regulator did not raise any concerns about Wollongong Resources' response or the stated timeframes. Mr Vatovec said that Wollongong Resources was on track to implement all the recommendations when the Fifth Ignition Event occurred.

[129] The commissioning of the Palaris Report, the recommendations that came from the report and Wollongong Resources' acceptance of the recommendations of the report are significant in the sequence of events that led to the Final Prohibition Notice. In my view the directions issued in the Final Prohibition Notice are not easily distinguished from the brief given to Palaris Australia.

[130] I accept that the directions in the Final Prohibition Notice are more specific than the brief to Palaris Australia as to what Wollongong Resources was required to do. However the brief to Palaris Australia in late 2023 and the brief to the "independent, suitably qualified, experienced and competent person" in early 2024 are materially the same: to understand contributing factors and provide recommendations guiding reduced likelihood of reoccurrence of a common and well-known hazard in the underground coal mining industry. The further reviews, risk assessments and design reviews in recommendations 5 to 9 of the Palaris Report also are indistinguishable from the directions in the Final Prohibition Notice.

[131] The directions in the Final Prohibition Notice specifically required Wollongong Resources to take certain steps once it had engaged the independent, suitably qualified, experienced and competent person. It is convenient to repeat the directions:

> "The mine operator **engage an** independent, suitably qualified, experienced and competent person to, in consultation with the mine operator:
>
> 1. Identify all reasonably practicable control measures that may be implemented at the Russell Vale Colliery to eliminate, or otherwise minimise, the occurrence of a frictional ignition event and the risks to health and safety as a result of any frictional ignition event;
> 2. For each control measure identified in direction 1, **identify all potential failure modes** and **any reasonably practicable control measures** that may be implemented to address those potential failures;
> 3. **Develop a process to verify** that the identified control measures in directions 1 and 2 above are in place and effective;
> 4. **Complete a first pass** of the verification process in direction 3; and
> 5. **Establish a system** to ensure ongoing verification occurs as per direction 3.
>
> The prohibition of activity described in this notice remains in force until an inspector is satisfied that the matters that give or will give rise to a serious risk to the health or safety of a person have been remedied."
>
> [Emphasis added]

[132] That is, once the independent person identified "all" reasonably practicable control measures then Wollongong Resources was directed to identify all potential failure modes for each control measure and identify any reasonably practical control measures that may be

implemented to address those potential failures, develop a process to verify that the control measures are in place and are effective, and establish a system for ongoing verification.

[133] These specific actions do not appear to be materially different to the actions taken by Wollongong Resources in response to the Palaris Report.

[134] The Fair Work Commission cannot and should not undertake an administrative review of the Inspector's decision to issue the Final Prohibition Notice. Nor should the Fair Work Commission adjudicate on Wollongong Resources' obligations under work health and safety legislation. The precise question to be determined in this matter is whether Wollongong Resources can reasonably be held responsible for Inspector Margetts' decision to issue the Final Prohibition Notice.

[135] The Final Prohibition Notice records the inspector having regard to "the number of frictional ignition events and their different causal factors" that caused him to "believe that the mine operator has not, or may not have, identified and implemented all reasonably practicable controls to eliminate or otherwise minimise the occurrence of a frictional ignition event.":

[136] This finding is key to understanding the directions issued with the notice.

[137] Without opining on the reasonableness of the Inspector's conclusion, one possible interpretation is that after the Fifth Ignition Event the Inspector formed the view that the recommendations in the Palaris Report were inadequate. Another interpretation of the notice is that the Inspector formed the view that Wollongong Resources had not engaged enough external advisors or had not engaged the right external advisors. It should be noted again that the Regulator commissioned Palaris Australia to advise on frictional ignition events at the Russell Vale Colliery.

[138] Can it be said that Wollongong Resources acted unreasonably or failed to take the steps that a reasonable employer would have taken in the same circumstances to avoid or prevent the Final Prohibition Notice? In my view the answer is no.

[139] Wollongong Resources cooperated with the Regulator and actively engaged with Palaris Australia and the recommendations of its report. The expertise of the authors of the Palaris Report was not questioned. Given that Palaris Australia was commissioned by the Regulator, one can assume that the authors were sufficiently "independent, suitably qualified, experienced and competent" to write their report.

[140] The directions in the Final Prohibition Notice essentially required Wollongong Resources to repeat the same process with, implicitly, a *different* "independent, suitably qualified, experienced and competent" person. There is no basis to find that a reasonable employer in the same circumstances prior to the Fifth Ignition Event would have separately engaged a different external advisor (to the advisor selected by the Regulator) to essentially duplicate the process.

[141] In the circumstances Wollongong Resources cannot reasonably be held responsible for the Regulator's decision to issue the Final Prohibition Notice that required it to stop all mining activities until it had engaged another external advisor.

[142] Some witnesses called by APESMA were critical of Wollongong Resources' ventilation systems at the mine. If is fair to say that many of the frictional ignition events were linked to the ventilation of the mine.

[143] In October 2023 the Palaris Report found that "observed ventilation standards at the mine are consistent with reasonable standards applied across the industry" (page 25 of 32). Mr Duncan Chalmers, who was said to be "a gas and ventilation expert from UNSW" (see [147] below) said in a report in February 2024:

> "CONCLUSIONS
>
> - The overall ventilation quantity is adequate to ventilate the mine. It should be considered that this was the minimum quantity of air, and the mine would benefit from additional entries to increase the overall quantity to about 220m3/s or better.
> - The distribution of air to each of the working sections should provide for peaks in the operation.
> - The management of air in each of the working places within the section is the responsibility of the deputy in charge of the panel …
> - …
> - The prevalence of pyrite and dinosaur eggs in the coal seam, the ironstone band and the use of steel mesh meant that there would be a high probability that the conditions for sparks would be created.
> - The controls put in place to reduce the instances of sparking, documented in the Risk Assessment and other related documents were extensive and slight changes would help to mitigate the frequency of incendive sparks not eliminate them."

Events after 18 January 2024 – the ongoing stoppage

[144] Quite obviously the stoppage of work, for the purposes of s.524 of the FW Act, commenced when the Final Prohibition Notice was issued and Wollongong Resources stood down the relevant employees.

[145] The stoppage of work ended when Wollongong Resources announced on 15 February 2024 that the mine would not reopen. At this point most employees were no longer required to attend for work (see *CEPU v Qantas Airways Limited* [2020] FCAFC 205 at [56], (2020) 282 FCR 130). That is, s.524 of the FW Act applied to workers who were otherwise required to attend for work but for the stoppage of work because of the Final Prohibition Notice. Once Wollongong Resources announced that the mine would not be reopening, and that only some employees were required to return to the mine to close it down, most employees were made redundant and were relieved of the requirement to be ready to work.

[146] It is therefore necessary to consider whether Wollongong Resources could reasonably be held responsible for any period of the stoppage of work after the Final Prohibition Notice was issued and before closure was announced. If, for example, Wollongong Resources had been dilatory after the Notice was issued and refused or failed to take a reasonable step that would have removed the prohibition, then Wollongong Resources would probably be responsible for a period of the stoppage.

[147] Apart from taking steps to apply for an internal review of the Final Prohibition Notice, Wollongong Resources engaged two more independent experts to satisfy the requirements of the directions in the notice. Wollongong Resources engaged Mr Barry Formosa, whom Wollongong Resources described as "a safety and risk expert with significant experience in the mining sector". Wollongong Resources also engaged a "gas and ventilation expert from UNSW", Mr Duncan Chalmers – referred to above. These experts reviewed various WHS systems and made recommendations, particularly in relation to Wollongong Resources' Frictional Ignition Trigger Response Action Plan. A report was provided on 9 February 2024 however by the time these reports were sent, Wollongong Resources had already decided to close the mine.

[148] It is not necessary to describe in any detail the investigations or the advice from these experts. For present purposes it is sufficient to note that the action taken by Wollongong Resources after the Final Prohibition Notice was issued meant that they cannot reasonably be held responsible for the stoppage of work in the period prior to the announcement of the closure of the mine.

Resolution of the Stand Down Dispute

[149] In dealing with this dispute about the operation of the stand down provisions of the FW Act I have made the following findings for the reasons stated above:

(a) there was a stoppage of work between 19 January 2024 and 15 February 2024;
(b) during this period relevant employees could not usefully be employed by Wollongong Resources because of the stoppage of work;
(c) there was no useful work that the relevant employees could have performed in this period;
(d) the immediate cause of the stoppage was the issuing of the Final Prohibition Notice by the Resources Regulator on 18 January 2024;
(e) the real or substantive causes of the stoppage of work included Wollongong Resources' safety systems, control measures, responses to earlier frictional ignition events and Wollongong Resources' attempts to identify and implement risk control measures that would eliminate or control the occurrence of frictional ignition events. These matters form part of the sequence of events that ultimately led to the issuing of the notice and the stoppage of work;
(f) Wollongong Resources communicated and cooperated with the Regulator prior to the issuing of the Final Prohibition Notice;
(g) Wollongong Resources had taken reasonable steps to identify control risks to minimise the risk of frictional ignition events and to implement such risk controls;
(h) the actions Wollongong Resources was required to take to lift the prohibition on mining operations were indistinguishable from the steps already taken by Wollongong Resources in conjunction with the Regulator;
(i) there is no identified or identifiable step that a reasonable employer could or would have taken to avoid the issuing of the Final Prohibition Notice and therefore the stoppage of work; and
(j) Wollongong Resources cannot reasonably be held responsible for the stoppage of work and could not reasonably have prevented the stoppage in the circumstances.

[150] For the same reasons given by Deputy President Colman in *Helloworld* at [68]-[69] (reproduced at [74] above), I agree that there is no residual role for the Commission to consider the fairness of a stand down once the Commission is satisfied that the requirements of s.524 have been met.

[151] The application is therefore dismissed.

DEPUTY PRESIDENT

Appearances:

R Collucio and *L Jessup-Little* for the Applicant
M Seck of Counsel instructed by *A Khouri* of Minter Ellison for the Respondent

Hearing details:

2024.
Sydney
February 22, March 13.

Final written submissions:

Applicant: 13 March 2024

Printed by authority of the Commonwealth Government Printer

<PR781800>

---

[1] *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435 at 465.

[2] *CEPU v Qantas Airways Limited* [2020] FCAFC 205 at [56], (2020) 282 FCR 130.

[3] *CEPU v Qantas Airways Limited* [2020] FCAFC 205 at [53], (2020) 282 FCR 130 citing *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383.

[4] *Construction, Forestry, Maritime, Mining and Energy Union v Ta Ann Tasmania Pty Ltd* [2019] FWCFB 5300 at [12] citing *Amalgamated Engineering Union v Metal Trades Employers Association* [1945] CthArbRp 426; (1945) 55 CAR 307 at 310

[5] *CEPU v Qantas Airways Limited* [2020] FCAFC 205 at [40], (2020) 282 FCR 130 at 40.

[6] *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83 at [72], (2010) 197 IR 95 at 109.

[7] *Construction, Forestry, Maritime, Mining and Energy Union v Ta Ann Tasmania Pty Ltd* [2019] FWCFB 5300 at [18] citing *Townsend v General Motors-Holden's Ltd* [1983] FCA 204, 4 IR 358 at 367- 370.

[8] *Bristow Helicopters Australia Pty Ltd v Australian Federation of Air Pilots* [2017] FWCFB 487 at [45].

[9] *Townsend v General Motors-Holden's Ltd* [1983] FCA 204, (1983) 4 IR 358 at 370.

[10] *Marson v Coral Princess Cruises (NQ) Pty Ltd* [2020] FWC 2721 at [21], (2020) 295 IR 273 at 281.

[11] *Qantas No 3* [2020] FCA 1428 at [24], (2020) 299 IR 100 at 117.

[12] *Qantas No 3* [2020] FCA 1428 at [21], (2020) 299 IR 100 at 144-5.

[13] *Bristow Helicopters Australia v Australian Federation of Air Pilots* [2017] FWCFB 487 at [38] and [43].

[14] *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2022] FCAFC 50 at [50], [119] and [137], (2022) 291 FCR 531; (2022) 314 IR 231

[15] *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2022] FCAFC 50 at [61], [119] and [137], (2022) 291 FCR 531; (2022) 314 IR 231.

[16] *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 3)* [2020] FCA 1428 at [18]-[25], (2020) 299 IR 100.

[17] *Fair Work Act 2009* (Cth), s.526 and s.595.

[18] *Christopher Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015 at [16]-[27], [2021] 304 IR 1 at 7-11.