

# **DECISION**

*Work Health and Safety Act 2011* s.229 WHS Act - WH&S Review Authority

## **Mr Darren Delany**

 $\mathbf{v}$ 

# **Comcare, Australian Postal Corporation**

(C2024/3959)

#### DEPUTY PRESIDENT SLEVIN

SYDNEY, 13 DECEMBER 2024

Work Health and Safety Act 2011 - Application for external review - decision set aside and substitute Decision and Order made

#### Introduction

- [1] On 2 February 2024 Mr Darren Delany, a Health and Safety Representative (**HSR**) issued two Provisional Improvement Notices (**PIN**s) against his employer, Australia Postal Corporation (**APC**). The PINs were issued under s. 90 of the *Work Health and Safety Act 2011* (**WHS Act**). The PINs required APC to improve manual handling practices at the Toronto Post Office and to eliminate manual handling risks at the Kotara premises of APC's customer All Four x 4 Pty Limited (**All Four x 4**).
- [2] On 9 February 2024, APC requested the regulator, Comcare, review the two notices. An inspector was appointed by Comcare to conduct a review, a review was conducted and on 1 May 2024, Inspector Peter Bailey cancelled both PINs.
- [3] On 13 May 2024, Mr Delany asked Comcare to conduct an internal review of Inspector Bailey's decision. An internal review was conducted by Inspector Shortus. Inspector Shortus provided his decision on the internal review on 31 May 2024. The decision was to confirm Inspector Bailey's decision to cancel both PINs.
- [4] On 14 June 2024 Mr Delany filed application in this Commission seeking an external review of the internal review decision of Inspector Shortus. Mr Delany seeks that the review of Inspector Shortus be set aside and in its place a decision be made upholding the original PINs.
- [5] A conference was conducted on 26 September 2024 to hear the parties on the review. Mr Delany represented himself. Comcare was legally represented and provided submissions and a Hearing Book comprising relevant documents, including the decisions of Inspectors Bailey and Shortus and the documents referred to in their decisions. APC was legally represented and provided a witness statement of David Rea, Manager Newcastle Mail Operations. The statement provided details of certain operations and manual handling processes at APC, specifically the procedures for handling parcels when collecting parcels from All Four x 4.

- [6] Prior to the conference Mr Delany provided a statement in support of the outcome he seeks in the external review. In his statement he indicated that he did not press the review so far as it relates to the Toronto Post Office. Mr Delany said that APC has changed its practices at Toronto and has substantially reduced the manual handling risks that were the cause of his issuing that PIN.
- [7] Consequently, this review is only concerned with the PIN addressed to the manual handling practices employed when collecting parcels from All Four x 4.
- [8] All Four x 4 is an automobile spare parts retailer based in Kotara in Newcastle. It sells car parts online and uses APC to ship those parts. APC collects the parts twice a day. The collections are performed by drivers using a van.
- [9] Put briefly, Mr Delany's concern is that manual handling risks arise from van drivers having to scan and then manually load a large number of car parts from ground level into their van. Mr Delany's PIN suggested the manual handling risks should be addressed by APC ceasing to use vans to collect items from the site and to use trucks instead. This would eliminate any manual handling being carried out at Four x 4 Spares.

#### **Legislative Framework**

- [10] The following provisions of the WHS Act are relevant to the review:
  - a) Section 19(1) imposes a duty on a person conducting a business or undertaking to ensure, as far as reasonably practicable, the health and safety of workers whilst at work.
  - b) Subsections 90(1) and (2) of the WHS Act provide that a HSR can issue a PIN if a reasonable belief is held that a person is contravening or has contravened a provision of the Act and the contravention is likely to continue or be repeated. Section 93(1) provides that a PIN may include directions on measures to remedy or prevent the contravention.
  - c) Subsection 100(1) permits a person issued with a PIN to request Comcare to appoint an inspector to review a PIN. Subsections 101(1) and (2) require Comcare to ensure an inspector attends the workplace promptly and inquire into the circumstances of the PIN. Under s 102(1) the inspector must confirm, amend, or cancel the PIN.
  - d) An inspector's decision under s. 102 is a reviewable decision. A review may be sought by various persons including the HSR who issued the PIN. An application to review the inspector's review of a PIN may be made under s. 224. This is described as an internal review. The person conducting the internal review is appointed by Comcare. Pursuant to s. 226 the internal review may confirm, vary, or set aside the reviewable decision and substitute another decision.

- e) Subsection 229(1) provides for an internal review decision to be reviewed by this Commission. The review is referred to as an external review. In an external review the Commission may confirm, vary, or set aside the internal review decision and make a new decision.
- [11] I will return to the legislation in more detail later in these reasons.

#### The Nature of the Review

- [12] There are few decisions of this Commission dealing with the approach to be taken under s.229 of the WHS Act. In *Australian Postal Corporation v Comcare* [2014] FWC 3228 Commissioner Roe accepted submissions from the parties that the proceedings are to be determined by way of hearing *de novo* and the Commission's task is to reach the correct and preferable decision on the material before it. Similar submissions were made in the current proceedings.
- [13] Commissioner Roe referred to the decision of a Full Bench of the Australian Industrial Relations Commission (AIRC) in Australian National Railways Commission v Rutjens (1996) 66 IR 237 which considered a similar power to hear appeals from prohibition notices issued under the Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) (OHS Act). The Full Bench considered in detail the nature of appeals and concluded the appeal was a hearing de novo. In reaching that conclusion the Full Bench stated that the nature of any appeal must ultimately turn on the terms of the statute conferring the right of appeal. The Full Bench pointed to the nature of the decision to issue a prohibition notice and the consequences that flow from such a notice including exposure to substantial fines and limitations on the performance of specific work. The Full Bench also referred to the nature of the investigation conducted by the investigator who issued the notice, the potential for workplace circumstances to change over time, and considerations of fairness as suggesting that the appeal was a hearing de novo. The power of the AIRC to make a decision as it thought appropriate also pointed to a conclusion that the appeal was to be conducted as a hearing de novo<sup>2</sup>.
- [14] The Full Bench of the AIRC went on to note that a hearing *de novo* involved a fresh hearing with the parties entitled to begin again and adduce new evidence. It was noted that the conclusions reached by the primary decision maker would be relevant to the determination of the appeal but would not be decisive. There was no presumption that the earlier decision was correct.
- [15] As to the powers to be exercised by the AIRC on the appeal, the Full Bench referred to the following observation of the High Court in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560:

It may be remarked that the rule or principle invoked is but an expression of the natural understanding of a provision entrusting the decision of a specific matter or matters to an existing court. It is no artificial presumption. When the legislature finds that a specific question of

<sup>&</sup>lt;sup>1</sup> At 246

<sup>&</sup>lt;sup>2</sup> At 247

a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality

[16] The Full Bench concluded that the application of this presumption led to the conclusion that, as the appeal under the OHS Act was to be carried by the AIRC, it should be carried out in accordance with the powers and procedures available to that Commission under the *Industrial Relations Act 1988*.

[17] Commissioner Roe in *Australia Post v Comcare*<sup>3</sup> referred to the decision in *Rutjens* when concluding:

[47] The Full Bench of the Australian Industrial Relations Commission in *Australian National Railways Commission v Rutjens* found that the Australian Industrial Relations Commission (AIRC) was not restricted to making the order the regulator ought to have made on the evidence before it. Rather the AIRC was conducting a hearing *de novo*. The AIRC was not restricted to the facts and law which existed at the date of the original decision of the regulator. The Full Bench also decided that the provisions of the Industrial Relations Act concerning the powers and procedures of the Tribunal generally applied to an appeal or review of the decision of the regulator under the occupational health and safety legislation. I am satisfied that these principles apply under the current legislative scheme.

[18] I respectfully agree with the Commissioner's conclusion.

[19] I also note that the object of the WHS Act as stated in s. 3 includes to provide for a nationally consistent framework to secure the health and safety of workers and workplaces and meets the description of harmonised legislation, which is to say that there are comparable laws in other Australian State and Territory jurisdictions. Accordingly, some guidance may be gained from decisions of bodies conducting external reviews in those jurisdictions.

[20] Comcare's submissions referred me to decisions of the Industrial Relations Commission of New South Wales (NSWIRC) made under s229 of the *Work Health and Safety Act 2011 (NSW)* (WHS Act (NSW) which is relevantly in the same terms as s 229 of the WHS Act. The approach of the NSWIRC takes a similar approach. Reviews under s. 229 are hearings *de novo*, conducted by way of merit review to "confirm, vary or revoke" the decision being reviewed. The review must determine what is the correct or preferable decision. The NSWIRC takes the approach that it "stands in the shoes" of the decision-maker and may exercise the powers available to that decision-maker.<sup>5</sup>

<sup>&</sup>lt;sup>3</sup> Op cit

<sup>&</sup>lt;sup>4</sup> See also s. 3(1)(h)

<sup>&</sup>lt;sup>5</sup> See Sydney Trains v Safework NSW [2017] NSWIRComm 1009; Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, New South Wales Branch (on behalf of its member Mick Amarasinghe) and WorkCover Authority of New South Wales [2012] NSWIRComm 143 at [50]; NSW Rural Fire Service v SafeWork NSW [2016] NSWIRComm 4 at [70]; and Growthbuilt v SafeWork NSW [2018] NSWIRComm1002 at [34] – [36]; Transport

- [21] Section 229 of *Work Health and Safety Act 2011* (Qld) also provides for external reviews by the Queensland Industrial Relations Commission, albeit the section does not strictly follow the terms of the harmonised legislation. The QIRC also regards reviews as hearings *de novo*.<sup>6</sup>
- [22] Taking into account the above matters, I consider that the proper approach to an application under s. 229 of the WHS is to regard the review as a hearing *de novo*. This means that the Commission must consider the matter afresh, allowing the parties to present new evidence and arguments. The FWC stands in the shoes of the original decision-maker and is not restricted to the facts and law that existed at the time of the original decision. The Commission's task is to reach the correct and preferable decision based on the material before it. The Commission is to conduct the review in the same manner that it exercises its functions under the *Fair Work Act* 2009 (*Cth*) (**FW Act**). The powers available under Part 5.1 of that Act apply. In particular the obligations on the Commission in s. 577 to exercise its powers in a manner that is fair and just, quick informal and avoids unnecessary technicalities, is open and transparent, and promotes harmonious and cooperative workplace relations all apply.
- [23] In accordance with s. 229(3) of the WHS Act the Commission may confirm, vary, or set aside the internal review decision and may make a new decision in substitution for the decision set aside.

#### Consideration

- [24] It is not in contention, and I am satisfied, that the preconditions in sections 229(1) and (2) for the making of the application have been met. Both parties agree that I may confirm the decision to set aside the PIN, vary that decision, or set it aside and make a decision in substitution for the decision set aside.
- [25] In conducting the review I have taken into account the statutory scheme of the WHS Act, the circumstances giving rise to the PIN, including Mr Delany's concern that s. 19 of the WHS was being breached, the work conducted at Four x 4 Spares, the manual handling risks associated with that work, and the practicality of the proposal to minimise risks to health and safety by replacing the van service with a truck service. I note the decisions of the Inspectors to set aside Mr Delany's PIN. Those decisions are relevant but I will consider all of the circumstances afresh.

The Statutory Scheme

[26] The statutory scheme of the WHS Act is important. When exercising powers conferred by legislation the subject matter, scope and purpose of the statute is relevant<sup>7</sup>. In relation to s.

Workers' Union of Australia, New South Wales v SafeWork NSW [2022] NSWIRComm 1050 at [44] – [45]; Secretary of the Department of Education v SafeWork NSW

<sup>[2024]</sup> NSWIRComm 1042 at [21]

<sup>&</sup>lt;sup>6</sup> See Lindores Construction Logistics Pty Ltd v The Regulator under the Work Health and Safety Act 2011 [2018] QIRC 61 at [3]

<sup>&</sup>lt;sup>7</sup> See eg Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 162 CLR 24; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd [2015] FCAFC 126; 233 FCR 301

229, in particular, I consider the observation of the plurality in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 40 that where "a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard" to be apt.

[27] The main object of the WHS Act is stated in s. 3 as follows:

## 3 Object

- (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:
  - (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work; and
  - (b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety; and
  - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
  - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
  - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
  - (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and
  - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
  - (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
- (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable.
- [28] Section 19 gives effect to the object in 3(1)(a) by creating a duty of care to ensure health and safety of workers and others. It reads:

## 19 Primary duty of care

- (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
  - (a) workers engaged, or caused to be engaged by the person; and
  - (b) workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking.
- (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
- (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
  - (a) the provision and maintenance of a work environment without risks to health and safety; and
  - (b) the provision and maintenance of safe plant and structures; and
  - (c) the provision and maintenance of safe systems of work; and
  - (d) the safe use, handling and storage of plant, structures and substances; and
  - (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
  - (f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
  - (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.
- [29] This is one of a number of duties created under Part 2 of the Act. The duties imposed under the Part are to be read with s. 17 which provides:

#### 17 Management of risks

A duty imposed on a person to ensure health and safety requires the person—

- (a) to eliminate risks to health and safety, so far as is reasonably practicable, and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.
- [30] Section 18 defines the expression "reasonably practicable" in this way:

#### 18 What is "reasonably practicable" in ensuring health and safety

In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—

- (a) the likelihood of the hazard or the risk concerned occurring, and
- (b) the degree of harm that might result from the hazard or the risk, and
- (c) what the person concerned knows, or ought reasonably to know, about—
  - (i) the hazard or the risk, and
  - (ii) ways of eliminating or minimising the risk, and
- (d) the availability and suitability of ways to eliminate or minimise the risk, and

- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.
- [31] Walton J in *Saunders Civilbuild Pty Ltd v SafeWork New South Wales* [2023] NSWCCA 261 described the nature of the duty imposed by s. 19 of the WHS Act (NSW) in this way:

[157] An offence pursuant to s 32 of the WHS Act for a breach of a s 19 duty is directed to the risk to health and safety and is not dependent upon the manifestation of the risk: Director of Public Prosecutions (Vic) v Vibro-Pile (Aust) Pty Ltd (2016) 49 VR 676: [2016] VSCA 55 at [682]. As the High Court noted in Kirk at [13], it is not necessary that the worker has suffered injury or illness for there to have been a breach of the duty.

[158] A breach of s 19(1) of the WHS Act may occur in consequence of a failure to take a measure which would have managed or mitigated a risk to the health, safety and welfare of a person not in the employ of the employer, even if the measure does not entirely eliminate risks: Bulga at [118]. However, exposure to risk must be real and not theoretical.

[159] The duty created is directed to obviating risks to safety at the workplace, even absent an actual incident causing injury. The duty is both preventative and remedial in nature: *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253; [2004] NSWIRComm 297 ('Morrison') at [97(3)] and [97(4)] and *WorkCover Authority (NSW) (Inspector Legged) v Coffey Engineering Pty Ltd* (No 2) [2001] NSWIRComm 319; (2001) 110 IR 447 ('Coffey Engineering') at [16] approving *WorkCover Authority (NSW) v Police Service (NSW) (No 2)* [2001] NSWIRComm 90; (2001) 104 IR 268 at [20]; *Abigroup* at [316]. In *Bulga*, the Court of Criminal Appeal found (at [124]):

[124] The appellant contended that the requirement was to avoid exposure to risk, rather than to prevent an actual occurrence. This may be accepted, however, it does not mean that the section cannot be breached by the failure to take action to prevent a risk, to which an employee was exposed, from crystallising. To reach a contrary conclusion would be to ignore the self-evident fact that the duty will arise in circumstances where there is an exposure to a risk in respect of which preventative measures can be taken.

(see also *Hunter Quarries Pty Ltd v Morrison; Badior v Morrison* (2017) 96 NSWLR 658; [2017] NSWCCA 326 ('Hunter Quarries') at [69]).

[160] Thus, it is wrong, in considering whether a breach has occurred, to reason from the actual incident causing injury 'as such an approach may lead to a misunderstanding of the real facts on which a charge is based': *Morrison* at [97(5)].

[161] Further, the observations of the Court of Criminal Appeal in *Unity Pty Ltd v SafeWork NSW* [2018] NSWCCA 266 at [55], (Basten JA with whom Beazley P (as her Honour then was) and Wilson J agreed) are apposite in this respect (and also address the meaning of 'risk'):

[55] While prosecutions for breach of occupational safety laws are rarely, if ever, brought where there has not been a serious injury or death, the test of breach of duty nevertheless remains prospective. However, there are different levels of particularity at which risks can be assessed. Prospectively, a reasonably broad approach may be appropriate; by contrast, a retrospective analysis of the precise circumstances of an injury or fatality may lead to a narrow description of the risk which materialised. While the accident may demonstrate the existence of a risk, it may not demonstrate that the risk was prospectively foreseeable, nor that the consequences were necessarily serious; generally, the precise circumstances of the accident should not be relied on to define the risk. The word 'risk' is not defined in the Act. Risk means the mere possibility of danger and not necessarily actual danger: *Thiess Pty Ltd v Industrial Court of New South Wales* (2010) 78 NSWLR 94 at [67]; *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171. Relevant risk to the commission of a s 32 offence is the risk of death or serious injury.

[32] On the meaning of "reasonably practicable" I was taken to the following often quoted passage from the decision of the High Court of Australia in *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14; 246 CLR 92 where the plurality said at [15]:

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

[33] In *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; 205 CLR 304 Gaudron J made the following observation:

[53] The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:

- the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
- what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
- to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.

- [34] Consistent with the object in s. 3(1)(b), the legislation provides for HSR's. Part 5 of the Act provides for fair and effective workplace representation by creating the role of HSR. The Part provides, amongst other things, for the election of HSRs who are elected from work groups. HSRs powers and functions are described in s. 68 as representing workers, monitoring measures in the workplace related to work health and safety, investigating health and safety related complaints, and inquiring into any risk to health and safety. Those powers and functions are usually limited to matters that affect, or may affect, workers in the HSR's work group. A HSR is not personally liable for anything done in good faith when exercising those powers and functions.
- [35] The Part also creates obligations on persons conducting a business or undertaking to consult with HSRs on work health and safety matters, allow HSRs access to information and resources, permit HSRs to represent workers, permit HSRs to perform their functions including by allowing paid time to conduct those functions and paid time off to attend work health and safety training, and to provide other assistance to HSRs.
- PINs are dealt with in Division 7 of Part 5 of the WHS Act. They form part of the compliance regime referred to in s. 3(1)(e). The power to issue a PIN is found in s 90. The section applies if a HSR reasonably believes that a person is contravening or has contravened a provision of the Act and it is likely that the contravention will continue or be repeated. If the HSR holds the belief he or she may issue a PIN requiring the person to remedy the contravention, prevent a likely contravention occurring, or to remedy the cause of the contravention or likely contravention. Division 7 includes a number of provisions that go to the power to issue a PIN. Before issuing the PIN the HSR must consult with the person. A HSR cannot issue a PIN unless they have completed prescribed training. Nor can they issue a PIN in relation to a matter that has been the subject of an improvement notice or prohibition notice. The PIN must be in writing and state the HSR believes there is a contravention, the provision that the HSR believes has been contravened and how it has been contravened, and the day by which the person is to remedy the contravention. The PIN may include directions concerning measures to be taken to remedy the contravention. A HSR may make minor changes to a PIN or cancel the PIN. The person to whom a PIN is issued must display the PIN in a prominent place in the workplace. The PIN will not be invalid because of a formal defect. It is an offence to contravene a PIN.
- [37] Appropriate review of a decision to issue a PIN, consistent with the object in s. 3(1)(f), is found in s. 100 which provides for a right of review by an inspector. When a request is made the operation of the PIN is stayed until the inspector makes a decision. An inspector must be appointed to conduct the review as soon as practicable. The inspector is to inquire into the circumstances the subject of the PIN. Following the review, s. 102 permits the inspector to confirm the PIN, make changes to it, or cancel it. The inspector is required to provide a copy of his or her decision. Where a PIN is confirmed it is taken to be an improvement notice issued by the inspector.
- [38] Further review is provided for in Part 12 of the WHS Act. Section 223 provides for an internal review of a decision made under s 102. The internal reviewer may confirm, vary, or set aside the inspector's decision and substitute another decision. The internal reviewer may seek additional information. The review must be conducted within 14 days of the request for

review or where further information is requested within 14 days of that information being provided.

- [39] I have already dealt with the provision for external review under s. 229.
- [40] The subject-matter, scope and purpose of the provisions of the WHS Act relevant to this review are clear. The Act imposes duties to ensure health and safety of workers, and others, at workplaces. Those duties include to eliminate or minimise risks to health and safety by taking steps that are reasonably practicable. What is reasonably practicable is an evaluative judgment to be assessed by a consideration of all the facts. Worker representatives have a role to play in ensuring those duties are complied with. A HSR may issue a PIN if he or she holds a reasonable belief that health and safety duties are not being observed and may, in doing so, recommended steps for the elimination or minimising any perceived risk to health and safety. The PIN may be reviewed first by an inspector, then by Comcare, and finally by external review in this Commission. Each review is to be conducted with a view to securing the correct and preferable decision.
- [41] The nature of the external review, being by hearing *de novo*, is broad. The factors that may be considered in the exercise of the discretion are similarly broad. They must however be exercised in conformity with the subject-matter, scope and purpose of the statute. The purpose of the WHS Act is succinctly stated in s. 3(2) as being tied to the principle that so far as is reasonably practicable workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work. I am obliged to take those matters into account when making my decision.

#### The PIN

- [42] Mr Delany believed APC was contravening its duty under s19 of the WHS Act by requiring van drivers to manually handle large numbers of car parts when collecting parcels from All Four x 4. The PIN required APC to upgrade the service provided to All Four x 4 from a van service to a truck service. Doing so would eliminate the need for manual handling by APC employees at All Four x 4 premises. The inspectors who reviewed the PIN concluded that there was no relevant contravention and cancelled the PIN. In this review a question arises as to whether that that was the correct and preferable decision.
- [43] Under s.90 of the WHS Act an HSR may issue a PIN if he or she holds a reasonable belief that a person is contravening or has contravened a provision of the WHS Act and the contravention is likely to continue or be repeated.
- [44] No issue is taken with the validity of the PIN. The statutory prerequisites were all satisfied. There were two irregularities in the PIN. One was the incorrect identification of APC, which was described in the PIN as Australia Post Group. The other was the identification of the provision being contravened as s. 17 rather than s. 19. These irregularities were dealt with in the earlier decisions of the Comcare inspectors. I take the same approach and find s. 98 of the WHS Act applies such that the PIN should be regarded as properly made; which is to say the irregularities do not vitiate the PIN. It is clear from the PIN that Mr Delany held a reasonable belief that APC had contravened s19 of the WHS Act and that the contravention was likely to continue.

[45] Mr Delany's concern related to work performed at the site of one of APC's customers, All Four x 4 Spare located in Kotara in Newcastle NSW. APC collects parcels from the site twice a day on Monday to Friday using its Hunter Van Service. The parcels are collected by a driver using a van. The contravention described by Mr Delany in the PIN was:

Failure to eliminate manual handling risks. Van drivers are required to manually load a large number of car parts from a pallet at ground level into a van. The customer has space for U.L.D.s and has L.S.E. so is suitable to be serviced by Hunter Transport.

- [46] The reference to U.L.D.s is to Unit Load Devices (ULD). A ULD is a cage used to transport large quantities of parcels. In this context parcels would be loaded into the ULD by the customer and APC's workers would load the ULD onto a truck using Load Shifting Equipment (LSE) such as a pallet truck or forklift. The reference to Hunter Transport is a reference to another APC entity which provides a service of collecting large quantities of parcels packed into ULDs and other large items using trucks.
- [47] Mr Delany's PIN identified the measures he believed should be taken to prevent the contravention as:

Upgrade All Four x 4's service from Hunter Van Service to Hunter Transport.

- [48] Mr Delany seeks to have the internal review decision set aside and replaced with a decision that the PIN be confirmed. He does so based on his continued belief that APC is contravening s. 19 of the WHS Act by requiring drivers to lift a large number of parcels from ground level into a van. APC contends that there is no contravention of the WHS Act. It has assessed the hazards associated with the work, consulted about those hazards and implemented appropriate risk controls to eliminate or minimise those hazards so far as is reasonably practicable.
- [49] Returning to the statutory provisions, a PIN may only be if a HSR reasonably believes that a person is contravening a provision of the WHS Act or has contravened such a provision and is likely to continue or repeat the contravention.
- [50] APC contends that there was no contravention of the WHS Act and so no basis for the PIN.
- [51] Mr Delany's reasonable belief concerned the number of parcels being handled by van drivers when collecting from Four x 4 Spares.
- [52] The material provided in the proceedings shows Mr Delany raised his concern in a report provided to APC on 9 June 2023. The report described the issue in this way:

Product collected from Kotara All 4x4 Auto Dismantlers frequently requires lifting heavy items over 16kg. Due to the volume of product collected, two van pick-ups are scheduled per day. The customer has LSE and a designated pallet area for Post product. Providing a ULD and truck service by Hunter Transport would be safer and more efficient (which the customer already does with other courier companies). Multiple

manual handling incidents have occurred at this site. This safety concern has been raised multiple times at WCF's but was rejected by management because they did not want to give away the work.

(WCF's is Workplace Consultation Forums)

[53] Discussions with Mr Delany occurred in relation to his concern. Mr Delany received a written response to his request in an email from His Manager, Mr Aldridge, on 29 November 2023. The response was:

An additional clearance was added to a day shift duty (HV122) in order to decrease dependence and workload on the afternoon shift duty. As a result of this we are still able to delight our customer by providing the level of scanning of product that they expect and also reduce the manual handling for the person on the afternoon duty.

[54] Mr Delany responded on 6 December 2023 as follows:

In regard to your response, Kotara 'All 4x4', I believe the customer is suitable for a truck service. They have space for ULDs and have a forklift. Hunter Transport has their own scanners and are capable of scanning product. I don't believe the additional clearance was enough. The customer lodges a significant number of heavy items and the risk of lifting injuries still exist.

[55] APC provided Inspector Bailey further information. On 16 February 2024 Mr Keegan, APC's Safety Standards & Compliance Consultant, sent an email to the inspector. In that email Mr Keegan stated that an additional daily service had been added to relieve the volumes of the collection from the customer and indicated that the collections from the customer did not support a truck service. Figures were given about the average cubic metres of loads collected. Those figures suggested that collections would fill from 66 to 84% of a full ULD. Mr Keegan also pointed out that van drivers frequently complete bilateral carrying of up to 16 kg from collection points to their van and from floor to waist when collecting and placing product in vans. Mr Keegan provided a summary of the number and weight of parcels collected from Four x 4 Spares. Those figures were: 92 parcels, weighing in total 183 kgs with an average weight of 1.99 kg in October 2023, 177 parcels, weighing in total 240 kgs with an average weight of 1.36 kg in November 2023 and 160 parcels, weighing in total 204 kgs with an average weight of 1.27 kg in October 2023. These appear to be daily figures.

The Work at Four x 4 Spares

- [56] It is accepted that the drivers were required to manually handle the parcels. Mr Rea, APC's Manager Newcastle Mail Operation, in a statement provided in the review described the work performed by van drivers in this way:
  - a) individual products for transport are placed in e-parcel packaging or pre-paid express envelopes and weighed on site by All Four x 4 staff with the weight of each item displayed on a sticker that is affixed to each parcel;
  - b) the parcels are then generally placed in an Australia Post bag and/or placed on a trolley or pallet at the front of the All Four x 4 building for collection by the Van Driver- item 14 of the Court Book, at page 57, is a picture of the collection point;

- c) on arrival at the site, the parcels are individually scanned using a hand-held scanner and loaded by hand by the Van Driver from the trolley or pallet to the van;
- d) the Australia Post bags used to hold and transport the parcels are generally under 16 kilograms, but if a bag is over 16 kilograms, or is otherwise too heavy for the Van Driver, the Van Driver can lighten the bag by removing items by hand, or can get assistance from Four x 4 staff;
- e) the parcels are then transported to Mayfield West where they are unloaded by hand by the Van Driver onto a conveyor belt.
- [57] The volume of parcels being collected was evident from a spreadsheet provided by APC to Comcare which was also provided in the review. The spreadsheet records every parcel collected from All Four x 4 from the 3 October 2023 to 22 December 2023. APC relied on the data to submit that the number of heavy items, those over 16 kg, was limited. I was not provided with a full analysis of the data, which was detailed. I note however that in total 8,387 parcels were collected over the period of 11 weeks. Collections occurred Monday to Friday, giving 55 day collection days. That gives an average of around 152 parcels collected per day. Taking the number of parcels collected on three days as examples;
  - a) On 3 October 2023, 102 parcels were collected. They ranged in weight from 0.30 kg to 11.35 kg.
  - b) On 15 November 2023, 134 parcels were collected. They ranged in weight from 0.10 kg to 16.88 kg.
  - c) On 20 December 2023, 166 parcels were collected. They ranged in weight from 0.10 to 17.0 kg.
- [58] The data also showed that 16 parcels collected over this period weighed more than 16 kg. A further 99 weighed more than 10 kg.
- [59] APC provided two site assessments of the Four x 4 Spares site, one conducted in 2010 and the other in 2021. The assessment identified van pick-up as the preferred means of collecting parcels from the site.
- **[60]** The initial site assessment conducted in July 2010 identified the work as involving a daily pick of 3 to 4 bags that were filled by the customer with parcels. The assessment noted the tendency for the customer to overload the bags and the need for the driver to be prepared to "split the bag". The assessment identified van pick-up as the means of collecting parcels from the site. The need for the driver to use a hand truck or trolley was also noted. A single pick-up was to occur at 4.30 pm each day.
- **[61]** The 2021 site assessment described the products to be collected as loose parcels weighing 5 to 16 kg in 2-4 bags containing 20-30 parcels. Collection was to be by either short wheelbase or long wheelbase van. The loading method being manually by hand with the driver to use a 2-wheel trolley cart. The parcels were to be in express bags with other parcels to be collected from a pallet against a wall. The 2021 assessment stated that express bar codes were to be scanned by the driver.

Manual Handling Risks

- [62] APC accepts there are manual handling risks associated with the work at Four x 4 Spares. It contends that it is managing those risks through appropriate risk controls which eliminate or minimise the risks so far as is reasonably practicable. It relies upon its detailed manual handling policies, instructions and training provided to van drivers. APC also engage Exercise Physiologists and Exercise Scientists to assist in improving drivers' lifting techniques.
- [63] APC's training modules on manual handling were provided. They identify the various potential hazards associated with manual handling. In the training material emphasis was made on applying a simple strategy to manual handling S.M.A.R.T which stands for: Straight back, Move your feet, Always bend your hips and knees, Rotate by moving your feet, Tuck the load in. The training material identified the need for these measures to avoid risks of putting pressure on the spine, to reduce pressure on joints, to avoid twisting at the spine and knees, and to avoid strain on shoulders and arms.
- [64] A task analysis for drivers was provided. It identified frequent bilateral/unilateral lifting up to 16 kg from floor to waist, walking up to 500m over variable terrain, squatting to collect and place product in the van, and bilateral fine and gross motor upper limb manipulation as frequent tasks.
- [65] A training presentation document was also provided. It provided statistics on the incidence of manual handling related injuries. It identified that in APC's Northern Region Pickup and Delivery service (PUD) muscular stress is the biggest cause of injuries. Statistics on the number of injuries arising from bag handling, loading and unloading vans and loading and unloading ULD's were provided in the following tables.

#### Sensor Observation Data FY22-23

Work Task	Pre	Post
Bag Handling	132	81
Loading/Unloading Vans	113	75
Loading/Unloading ULD	109	48
Enter/Exiting Vehicle	50	40

#### Sensor Observation Data FY23-24

Work Task	Pre	Post
Bag Handling	106	71
Loading/Unloading Vans	108	67
Loading/Unloading ULD	76	50

[66] The purpose of the data appears to be to demonstrate how the use of correct manual handling techniques can reduce risks of injuries. It also shows that the risks associated with bag handling and loading and unloading vans, both tasks associated with the way work is carried out at Four x 4 spares, are far greater than the risks associated with the loading and unloading of ULDs. The latter being Mr Delany's suggested measure to minimise the health and safety risks at the workplace.

#### The proposal to use ULDs

- [67] Mr Delany proposed that the manual handling risks associated with the work could be avoided if APC were to require the customer to place parcels in a ULD which would be collected by a truck service rather than a van service. APC described the way work would be performed if ULD's were employed. It would involve All Four x 4 staff loading parcels into the ULD. The ULD would be then placed into a truck at Kotara using load shifting equipment such as a forklift or a hand pallet jack. Upon delivery of the ULD to APC's Mayfield West site, the ULD would be unloaded from the truck and moved using a forklift or hand pallet jack and mechanical tailgate for unloading and scanning by hand.
- [68] APC contended that the proposal would give rise to a different set of risks. Those risks included when the parcels are unloaded from UDLs at Mayfield West by hand and are scanned. That is, the requirement to handle these parcels would not be eliminated, it would just be shifted to other Australia Post workers. APC also contend that the use of a forklift at Kotara and additional forklift movements at Mayfield West give rise to additional risks.
- [69] Mr Delany refuted the suggestion of additional risk as All Four x 4 already transport goods using trucks operated by other transport companies. They are equipped to do so, there being a forklift on site. He also pointed out that currently the parcels are handled twice by PAC employees, once when scanned and loaded into the van and again at Mayfield West when the van is unloaded. He said the Mayfield West site is equipped with load shifting equipment and is organised in a manner to receive goods transported in ULD's. This is a regular part of the work performed at the site.
- [70] It appears logical that Mr Delany's proposal involves a reduction in manual handling risks. It will eliminate manual handling risks associated with the APC van drivers collecting the goods from Kotara. APC's task analysis for the site shows the work required of the van drivers involves frequent bilateral/unilateral lifting up to 16 kg from floor to waist, walking over variable terrain, squatting to collect and place product in the van, and bilateral fine and gross motor upper limb manipulation associated with performing frequent tasks. If this work was no longer required the risks eliminated includes risks of drivers putting pressure on the spine and joints, the risks of twisting the spine and joints, and risks of strain on shoulders and arms.
- [71] I reject the suggestion that All Four x 4's employees will be exposed to additional risks as they will be required to handle the parcels by placing them in the ULD. Those employees are already handling the parcels when placing them in a PC's bags or on the pallets that are currently being used. I can see no greater risk associated with All Four x 4 staff placing the parcels into a ULD.

- [72] I also reject the suggestion that APC workers will be exposed to additional risks at the Mayfield West site. It is the case that manual handling risks will arise at the Mayfield West site when unloading the ULDs, but those risks are no greater than the risks which are currently present unloading vans once they arrive at the distribution centre. It is likely that those risks are not as great given the greater accessibility to parcels in a ULD compared to a van.
- [73] I do not accept the suggestion by APC that the risks associated with the use of a forklift at the All Four x 4 site and additional forklift movements at Mayfield West outweigh the benefit of eliminating the manual handling risks at Kotara. APC's statistics indicate the number of injuries arising from bag handling, loading and unloading vans in the Northern Region PUD was far greater than loading and unloading ULD's. I accept that there is risk of injury associated with the loading of ULD's and that should this system of work be used at Kotara those risks will need to be managed but I consider that the introduction of the new system would reduce the health and safety risks overall.
- [74] I note that APC's arguments about the introduction of ULDs were accepted by the two inspectors who reviewed Mr Delany's PIN. They both concluded that there was no contravention of s. 19 of the WHS Act. These findings are relevant but not determinative. I am not persuaded by the reasons given in the decisions, and I respectfully disagree with them.

#### **Conclusion**

- [75] I agree with Mr Delany that his proposal eliminates the manual handling risks for van drivers at All Four x 4's site and would minimise the overall risks to APC's workers.
- [76] When Mr Delany issued his PIN, he did so as a health and safety representative who had been elected by his workmates to represent their interests on matters of health and safety.
- [77] Mr Delany held a reasonable belief that APC, by continuing to require van drivers to manually handle a large volume of parcels at the All Four x 4 site, was not complying with its duty in s. 19 of the WHS Act. I find that this belief was reasonably held and I share Mr Delany's belief. While there was no evidence of a manual handling injury having been sustained at the site, s. 19 is directed to the risk to health and safety and it is not necessary that a worker has suffered injury or illness for there to have been a breach of the duty. APC's breach is a consequence of a failure to take a measure which would eliminate the manual handling risk to the health, safety and welfare of the van drivers at Kotara.
- [78] I consider the duty has been breached by the failure to take action to prevent the manual handling risk, thereby creating an exposure to a risk in respect of which preventative measures could be taken. That action is to remove the need for manual handling at Kotara by using ULDs and trucks. That step is reasonably practicable. The facts are that All Four x 4 already use trucks for collections albeit by other transport companies. APC has the necessary infrastructure to supply ULDs to All Four x 4 for the parcel collection. All Four x 4 has a forklift available for use to facilitate the changed practice. APC points to the All Four x 4's insistence that the parcels be scanned at the Kotara site. I do not regard this as a factor making it not reasonably practicable for the change to be made. The parcels can be scanned at APC's Mayfield West site.
- [79] A question also arises as to whether the APC has, so far as is reasonably practicable, provided and maintained a safe working environment at the Kotara site. I accept that phrase

"reasonably practicable" means something narrower than physically possible or feasible. What is reasonably practicable is to be judged based on all the circumstances. Those circumstances are set out above and they point to it being more than just physically possible or feasible. The material and submissions advanced by APC does not suggest that using trucks rather than vans involved any prohibitive cost, time or trouble that would prevent the introduction of the measure to make the site safe by averting manual handling risks. My impression from the material provided by APC in its initial response to Mr Delany's PIN, the information provided to the Inspectors, and in the material provided in this review goes more to the change to trucks being merely an inconvenience rather than not being reasonably practicable.

[80] Having determined that I share Mr Delany's reasonable belief that the duty in s. 19 is not being complied with and that it is likely that the contravention will continue, I am of the view that it is consistent with the subject-matter, scope and purpose of WHS Act to require APC to minimise risks to health and safety at the Four x 4 Spares site and eliminate the manual handling risks associated with van pick-ups by taking the reasonably practicable step of ceasing to collect all parcels by van and instead replace the van service with a truck service. I find that the correct and preferable decision is to require APC to minimise the risks associated with the manual handling of parcels at the Four x 4 site by replacing the van service with a truck service.

#### [81] For the above reasons I decide as follows:

- a) Pursuant to section 229(3)(c) the decisions of the Inspectors Shortus and Bailey are set aside.
- b) In substitution for those decisions, I determine that APC minimise the health and safety risks associated with the collection of parcels from Four x 4 Spares 10 McDougall St Kotara, NSW by replacing the van service currently used with a truck service.
- c) To give effect to this decision APC is to liaise with Comcare to ensure any health and safety risks associated with the introduction of the truck service are minimised.
- d) All steps necessary to make the change should be completed by no later than 20 January 2025 and the new service should commence by no later than 1 February 2025.



#### **DEPUTY PRESIDENT**

Appearances:
D.Delaney for the Applicant
N.Jones for Comcare
B.Edghill for Australia Post

# Hearing details:

2024 Sydney September 26

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