

**REVIEW OF IMPROVEMENT NOTICES
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL**

CITATION : 2020 WAIRC 00141

CORAM : COMMISSIONER T B WALKINGTON

HEARD : TUESDAY, 16 JULY 2019

DELIVERED : FRIDAY, 28 FEBRUARY 2020

FILE NO. : OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018,
OSHT 3 OF 2019

BETWEEN : HANSSEN PTY LTD
Applicant

AND

WORKSAFE WESTERN AUSTRALIA COMMISSIONER
Respondent

CatchWords : Review of Improvement Notices - application to review decision of the Worksafe Western Australia Commissioner to not grant an exemption from compliance with reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (WA) - substantial compliance - whether compliance is unnecessary - hierarchy of hazard controls

Legislation : *Industrial Relations Act 1979* (WA)
Occupational Safety and Health Act 1984 (WA)
Occupational Safety and Health Regulations 1996 (WA)

Result : In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 Improvement Notices 40500117, 42500544 and 10600595 are revoked and exemption applications dismissed.

In OSHT 3 of 2019 Improvement Notice 39800134 affirmed with modification and the Worksafe Western Australia Commissioner's decision to not grant exemption affirmed.

Representation:

Applicant : Mr J Raftos (of counsel) and with him Mr L Swanson (of counsel)

Respondent : Mr D McDonnell (of counsel)

Cases referred to in reasons:

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 254 CLR 1

Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172

Argyle Diamonds Limited v Fluor Australia Pty Ltd [2018] WASC 356

Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 44 ALR 173

Eclipse Resources Pty Ltd v The State of Western Australia (No. 4) [2016] WASC 62; (2016) 307 FLR 221

Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner [2017] WAIRC 00823; (2017) 97 WAIG 1888

Green v Mabey (Unreported, WASC, Library No 940711, 7 December 1994),

Montero v Minister for Immigration and Border Protection [2014] FCAFC 170; (2014) 229 FCR 144

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1988) 194 CLR 355

Re Asset Risk Management Ltd (1995) 59 FCR 254; (1995) 130 ALR 605

Shepherd v Murray [2000] WASCA 281; (2000) 105 IR 465

The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273; (2008) 88 WAIG 22

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1994) 74 WAIG 2

Reasons for Decision

- 1 This matter comprises four applications referred by Hanssen Pty Ltd to the Occupational Safety and Health Tribunal (**Tribunal**). Three applications were submitted in 2018 for review of improvement notices issued by Worksafe Inspectors at three different construction sites. A further application referred in 2019 concerns a review of an improvement notice issued by a Worksafe Inspector at a fourth construction site and a review of the decision by the Western Australian Worksafe Commissioner (**Worksafe Commissioner**) to decline Hanssen Pty Ltd's request to be exempted from the requirement to comply with reg 3.54 of the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**) at that site.
- 2 The first application, OSHT 2 of 2018 is a request for a review of Improvement Notice 40500117 issued to Hanssen Pty Ltd in relation to a construction site at 63 Adelaide Terrace, Perth (**Vue Notice**).
- 3 On 20 April 2018 a Worksafe Inspector issued the Vue Notice to Hanssen Pty Ltd in relation to a breach of reg 3.54(1)(b)(i) of the OSH Regulations at 63 Adelaide Terrace, Perth.
- 4 On 20 April 2018, Hanssen Pty Ltd applied to the Worksafe Commissioner for a review of the Vue Notice under s 51 of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). On 13 August 2018 the Acting Deputy Director General, under delegation of the Worksafe Commissioner, affirmed the Vue Notice.
- 5 On 16 August 2018 Hanssen Pty Ltd referred a request for a review of the Vue Notice by the Tribunal under s 51A of the OSH Act.
- 6 The second application, OSHT 3 of 2018, is a request for a review of Improvement Notice 42500544 issued to Hanssen Pty Ltd in relation to the construction site at 5 Harper Terrace, South Perth (**Reva Notice**).
- 7 On 26 July 2018 a Worksafe Inspector issued to Hanssen Pty Ltd the Reva Notice in relation to a breach of reg 3.54(1)(b)(i) of the OSH Regulations at 5 Harper Terrace, South Perth, another of Hanssen Pty Ltd's construction sites.
- 8 On 27 July 2018 Hanssen Pty Ltd applied for a review of the Reva Notice under s 51 of the OSH Act. On 13 August 2018 the Acting Deputy Director General, under delegation of the Worksafe Commissioner, affirmed the Reva Notice.
- 9 On 16 August 2018 Hanssen Pty Ltd referred a request for review of the Reva Notice to the Tribunal under s 51A of the OSH Act.
- 10 The third application, OSHT 4 of 2018, is a request for a review of Improvement Notice 10600595 issued to Hanssen Pty Ltd in relation to the construction site at 43 McGregor Road, Palmyra (**Palmyra East Notice**).
- 11 On 30 August 2018 a Worksafe Inspector issued the Palmyra East Notice to Hanssen Pty Ltd in relation to a breach of reg 3.54(1)(b)(i) of the OSH Regulations at 43 McGregor Road, Palmyra another of Hanssen Pty Ltd's construction sites.
- 12 On 31 August 2018, Hanssen Pty Ltd applied to the Worksafe Commissioner for a review of the Palmyra East Notice under s 51 of the OSH Act. On 4 October 2018 the Worksafe Commissioner affirmed the Palmyra East Notice.

- 13 On 5 October 2018, Hanssen Pty Ltd referred a request for review of the Palmyra East Notice to the Tribunal under s 51 A of the OSH Act.
- 14 On 29 October 2018 Hanssen Pty Ltd wrote to the Tribunal seeking leave to amend the notice of referral to the Tribunal in each of OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018, to add applications for exemption from the requirement to comply with reg 3.54(1)(b)(i) at the Vue, Reva and Palmyra East sites.
- 15 On 1 November 2018 the Tribunal issued an order that OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 be joined, heard and determined together. The Tribunal also granted leave to Hanssen Pty Ltd to amend its application in accordance with its request of 29 October 2018.
- 16 On 16 November 2018 Hanssen Pty Ltd filed and served an amended notice of referral for a review of the improvement notices issued at the Vue, Reva and Palmyra East sites and to the extent that the Tribunal finds Hanssen Pty Ltd is not compliant with reg 3.54(1)(b) an exemption from the requirement to comply with the regulation on the basis that there is substantial compliance or compliance is unnecessary or impracticable.
- 17 The fourth application, OSHT 3 of 2019, is a request for a review of Improvement Notice number 39800134 (**Sabina Notice**) issued in relation to a construction site at 3-5 Kintail Road, Applecross (**Sabina Site**).
- 18 On 21 February 2019 a Worksafe Inspector issued the Sabina Notice for a breach of reg 3.54(1)(b)(i) at the Sabina Site.
- 19 On 1 March 2019 Hanssen Pty Ltd applied to the Worksafe Commissioner for:
 - a) review of the Sabina Notice under s 51 of the OSH Act; or
 - b) alternatively, exemption from reg 3.54(1)(b), under reg 2.12 and 2.13.
- 20 On 13 March 2019 the Worksafe Commissioner affirmed the Sabina Notice and refused the request for exemption from compliance with the requirements of reg 3.54(1)(b).
- 21 On 19 March 2019, Hanssen Pty Ltd referred a request to the Tribunal for review of the Sabina Notice under s 51A of the OSH Act and a review of the decision of the Worksafe Commissioner to refuse an exemption under s 61A of the OSH Act.
- 22 In relation to OSHT 3 of 2019 Hanssen Pty Ltd informed the Tribunal that it no longer presses its application for the Tribunal to review the Worksafe Commissioner's decision, under s 51(1) of the OSH Act, to affirm the Sabina Notice on the grounds that it was 'impracticable' to install wire mesh in four divided penetrations because the wire mesh, even if cut away, would prevent the wall or walls from being constructed.
- 23 Hanssen Pty Ltd submits its case in OSHT 3 of 2019 is confined to an application for exemption from the requirements of compliance with reg 3.52(1)(b) on the grounds that it substantially complies with the regulations or that compliance is unnecessary. (**Exemption Application**).

Background

- 24 Hanssen Pty Ltd is a builder of multi-level apartments. Hanssen Pty Ltd constructs each level of its high-rise apartment buildings using prefabricated BubbleDeck panels, which are fabricated off-site at its Hazelmere Concrete Prefabrication yard and trucked to the construction site. The BubbleDeck is a precast concrete floor system upon which hollow plastic balls are placed within a lattice of steel.

- 25 There are holes in the concrete floors, referred to as ‘penetrations’, for services to be installed through and holes are formed at the time the concrete floor panels are landed in the process of constructing the levels of the building.
- 26 Some of the holes or penetrations are covered at the Hazelmere Concrete Prefabrication yard where the BubbleDeck and penetrations are formed and the penetration covers are affixed with standard hexagonal screws and two ProLok safety screws at the yard.
- 27 When constructing each level at the site, crane operators land individual BubbleDeck panels onto a falsework frame. While each BubbleDeck is being landed, riggers are harnessed to a BubbleDeck panel and are exposed to an open penetration formed during the process of landing the BubbleDeck panels and prior to the penetration being covered.
- 28 During the construction of levels 6 to 29 at the Sabina Site there are as many as 16 penetrations that require covers. Seven are pre-fabricated with a penetration cover before arriving at the construction site. The other nine penetrations are formed onsite when three or four BubbleDeck panels are craned and landed onto the false deck.
- 29 There are two occasions at the Sabina Site when the penetrations are not covered and there is a risk that workers will fall: firstly the ‘landing period’ when the BubbleDeck panels are being landed and secondly the ‘installation period’ when covers are removed to install services or dividing walls.
- 30 Hanssen Pty Ltd has devised a system called the Hanssen Penetration System (**HPS**) to cover the holes and manage the risks of falls through the holes when the holes are not covered.
- 31 At the landing period, the HPS prescribes the following process, as detailed in the documentation for the Sabina Site.
- once the BubbleDeck panels are craned into place and a penetration is formed between three or more panels, a rigger places an edge protection around the penetration;
 - a steel box-like structure is placed inside the newly formed penetration. The height of this box structure is the same as the height that the panel will be when the concrete is poured into the BubbleDeck on-site, and prevents the concrete from falling through the penetration when poured into the panel;
 - the ‘angles’ or ‘tags’ or ‘edges’ are then welded into place within the box-like structure and the penetration is covered with a pre-cut penetration cover (unless the angles have been pre-welded off-site);
 - the plywood penetration cover is then screwed into place with normal hex screws and two ProLok safety screws. The penetration cover is contained within the perimeter of the steel box-like and silicone is then applied to all sides of the plywood cover to fill in any gaps;
 - ‘DANGER HOLE BENEATH’ is then spray painted onto the penetration cover (if it has not been pre-sprayed onto the pre-cut cover already prefabricated offsite);
 - once the cover is secured in place it is safe to walk over;
 - if the HPS cover is installed over a larger penetration (eg. a ventilation shaft), a worker will stand underneath the penetration, above an already covered penetration, and install timber joists (to avoid any warping of the plywood cover). The plywood penetration cover is then placed onto the timber joint and angles from below the opening. If an edge protection is

yet to be installed around the penetration, the riggers working above the penetration are required to have harnesses fitted;

- concrete is then poured into the BubbleDeck panel to form the remainder of that panel. When that concrete is poured, the weight of the concrete against the walls of the shutter further secures the plywood cover by wedging it against the sides of the box-like structure.

- 32 At the Sabina Site, according to the drawings of level 15 there are nine penetrations which are to be formed and covered at the construction site. These penetrations require edge protection to be put in place, the penetration covers are fitted from underneath and the lid screwed from the top. As submitted by the respondent at this time the penetration is not secured with a cover and the edge of the panel that does not have edge protection forms a risk. Hanssen Pty Ltd say the risk of a fall is managed by the workers and the riggers, wearing harnesses that are secured to an anchor capable of withstanding a person's fall.
- 33 Hanssen Pty Ltd concedes that the HPS does not fully comply with reg 3.54(1)(b)(ii) in that it does not install wire mesh if practicable. However, Hanssen Pty Ltd say that an exemption from the regulations ought to be granted because the HPS 'substantially complies' with the regulation and utilisation of the HPS is consistent with the detailed instructions means full compliance is 'unnecessary'.
- 34 Hanssen Pty Ltd contends that the HPS system provides an equal or greater protection as it does not expose workers to an open edge during installation of services and speedwalls or risk of injury when the wire mesh is cut away. Hanssen Pty Ltd say any risks or hazards associated with not having the wire mesh under the fixed cover are addressed by alternate safety measures of the HPS.
- 35 The Worksafe Commissioner, opposes the exemption and submits that the HPS does not achieve substantial compliance with reg 3.54(1)(b) because it only complies with two of the three requirements of that regulation and the implementation of the HPS on the Sabina Site does not render compliance with the regulations unnecessary.

Evidence

- 36 The HPS was outlined in the evidence of Mr Palomar who is engaged by Hanssen Pty Ltd to provide consulting services to Hanssen Pty Ltd, prepare the documentation of the HPS for each project including the Sabina Site and is responsible for implementing the HPS for the Sabina Site. Mr Palomar included detailed instructions along with photographs of the procedures of the HPS to be undertaken on the Sabina Site.
- 37 Mr de-Vries, Director of Applecross Safety Solutions Pty Ltd, provides safety, quality and environment consulting, training and auditing services and was engaged by Hanssen Pty Ltd to give expert evidence in these matters. Mr de-Vries adopted the State Administrative Tribunal's 'A Guide for Experts Giving Evidence in the State Administrative Tribunal' in preparing his evidence.
- 38 Mr Airey, Managing Director of Airey Taylor Consulting Pty Ltd, provides design, documentation and contract administration services in structural and civil projects that vary in scale and complexities. As a forensic engineer Mr Airey provides analytical studies of structures, materials and components to clients. Mr Airey was engaged by Worksafe Commissioner to provide expert evidence in these matters. Mr Airey adopted the 'Expert witnesses in proceedings in the Federal Court of Australia' in preparing his evidence.

- 39 Mr de-Vries and Mr Airey provided a Joint Statement of Experts document which contains their assessments of particular elements of the HPS and notes whether they are in agreement or otherwise.
- 40 At times Mr de-Vries and Mr Palomar provided their views and opinions of the HPS in comparison to processes or practices they described as ‘traditional’. Each appears to use the term ‘traditional’ to equate to the requirements of the OSH Regulations for mesh and at other times this term describes their observances of practices adopted at other sites. In Mr Palomar’s case these were other sites operated by Hanssen Pty Ltd.
- 41 The Tribunal must assess whether any alternate system to that prescribed by the OSH Regulations complies with those OSH Regulations and not with practices adopted on other sites. Comparisons of the HPS as practiced on the Sabina Site with practices that are different to or less than that required by the regulations are not a relevant consideration.
- 42 Worksafe Inspector Mr Graeme White provided evidence of photographs of the 14 holes at the Sabina Site on 21 February 2019.
- 43 Mr Tony Poulton, a Worksafe Inspector, gave evidence of his inspection of Sabina Site on 21 February 2019 and the issuance of the Sabina Notice along with an affidavit describing an alternate method of construction using BubbleDeck panels that incorporates wire mesh.

Questions to be Answered

- 44 The first question to be determined is whether the improvement notices issued ought be affirmed, modified or revoked.
- 45 The second question to be determined is does the use of the HPS on the Sabina Site constitute substantial compliance with reg 3.54(1)(b) or make compliance with reg 3.54(1)(b) unnecessary.

Improvement Notices – Principles

- 46 In respect of the applications for review of the improvement notices, s 51A of the OSH Act provides:

51A. Review of notices by Tribunal

- (1) A person issued with a notice of a decision under section 51(6) may, if not satisfied with the Commissioner’s decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.
- (2) A reference under subsection (1) may be made within 7 days of the issue of the notice under section 51(6).
- (3) A review of a decision made under section 51 shall be in the nature of a rehearing.
- (4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.
- (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may –
 - (a) affirm the decision of the Commissioner; or
 - (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
 - (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,

and the notice shall have effect or, as the case may be, cease to have effect accordingly.

[(6) *deleted*]

(7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall –

- (a) in the case of an improvement notice, be suspended; and
- (b) in the case of a prohibition notice, continue, subject to any decision of the contrary made by the Tribunal.

47 The Full Bench of the Western Australian Industrial Relations Commission in *The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273 [93]; (2008) 88 WAIG 22, held that s 51A(5) of the OSH Act requires that that the Tribunal inquire into the circumstances relating to the improvement notice. Having inquired into the circumstances the Tribunal may affirm the decision of the Worksafe Commissioner, affirm the decision of the Worksafe Commissioner with such modifications as are appropriate, or revoke the decision of the Worksafe Commissioner and make such other decision with respect to the notice as seems fit.

48 Section 27(1) of the *Industrial Relations Act 1979* (WA) (**the IR Act**) provides:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
 - (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
 - and
 - (b) take evidence on oath or affirmation; and
 - (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent; and
 - (d) proceed to hear and determine the matter or any part thereof in the absence of any party thereto who has been duly summoned to appear or duly served with notice of the proceedings; and
 - (e) sit at any time and place; and
 - (f) adjourn to any time and place; and
 - [(g) *deleted*]
 - (h) direct any person, whether a witness or intending witness or not, to leave the place wherein the proceedings are being conducted; and

- (ha) determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceedings and require that the cases be presented within the respective periods; and
- (hb) require evidence or argument to be presented in writing, and decide the matters on which it will hear oral evidence or argument; and
 - (i) refer any matter to an expert and accept his report as evidence; and
 - (j) direct parties to be struck out or persons to be joined; and
 - (k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter; and
 - (l) allow the amendment of any proceedings on such terms as it thinks fit; and
- (m) correct, amend, or waive any error, defect, or irregularity whether in substance or in form; and
- (n) extend any prescribed time or any time fixed by an order of the Commission; and
- (o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings, the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing; and
- (p) enter upon any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place, or premises of any kind whatsoever, wherein or in respect of which any industry is or is reputed to be carried on, or any work is being or has been done or commenced, or any matter or thing is taking or has taken place, which is the subject of a matter before the Commission or is related thereto; and
- (q) inspect and view any work, material machinery, appliance, article, book, record, document, matter, or thing whatsoever being in any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises of a kind referred to in paragraph (p); and
- (r) question any person who may be in or upon any such manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises in respect or in relation to any such matter or thing; and
- (s) consolidate or divide proceedings relating to the same industry and all or any matters before the Commission; and
- (t) with the consent of the Chief Commissioner refer the matter or any part of the matter, including any question of interpretation of the rules of an organisation arising in the matter, to the Commission in Court Session for hearing and determination by the Commission in Court Session; and
- (u) with the consent of the Chief Commissioner refer to the Full Bench for hearing and determination by the Full Bench any question of law arising in the matter, other than a question of interpretation of the rules of an organisation; and
- (v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

- (1a) Except as otherwise provided in this Act, the Commission shall, in relation to any matter before it, conduct its proceedings in public unless the Commission, at any stage of the proceedings, is of the opinion that the objects of the Act will be better served by conducting the proceedings in private.
- (2) The powers contained in subsection (1)(p), (q) and (r) may, if the Commission so directs in any case, be exercised by an officer of the Commission or by an expert to whom any matter has been referred by the Commission.

Improvement Notices - Consideration

- 49 In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018, the sites concerned have reached the point where there are no longer any holes or openings to which reg 3.54(1)(b) applies. An affirmation of the respective Improvement Notices in these matters cannot be given effect.
- 50 In relation to the Sabina Notice, OSHT 3 of 2019, Hanssen Pty Ltd submits that it is not practicable to install wire mesh into four of the fourteen penetrations as two of the penetrations are pressurised shafts to be divided by a speedwall to create two shafts. The other two penetrations are air release shafts one of which is to be divided by a speedwall to create two shafts and the other to be divided by two speedwalls to create three shafts. The evidence in support of this contention is that of Mr Palomar's second affidavit which Hanssen Pty Ltd has not relied on.
- 51 Mr de-Vries and Mr Airey both state that it is practicable for mesh to be imbedded in penetrations that are planned to have dividing walls constructed.
- 52 At the time of the hearing Worksafe Commissioner submitted that it is not practicable to retrofit wire mesh into the penetrations referred to in the Sabina Notice as they are all within floor panels that are fully formed by concrete and retro-fitting wire mesh is not practicable and proposed that the Tribunal require Hanssen Pty Ltd to ensure it remedies any contravention of the regulations.

Improvement Notices – Conclusion

- 53 In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 an affirmation of the improvement notices cannot be given practical effect and or are hereby revoked under s.51(5)(c) of the OSH Act and the applications to exempt each matter pursuant to s 27(1)(a)(ii) of the IR Act are dismissed as further proceedings are not necessary.
- 54 At the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595, the sites were operational and the revocation of the notices as a result of the completion the construction and the passage of time should not infer that these notices were not appropriate nor justified.
- 55 In OSHT 3 of 2019 the Tribunal proposes to issue orders that:
- Affirm and modify the Sabina Notice to direct Hanssen Pty Ltd to ensure that all holes measuring more than 200mm x 200mm but less than 2 metres x 2 metres in a concrete floor at the above-mentioned workplace meet the requirements of reg 3.54(1)(b), including the requirement to, if practicable, embed wire mesh that meets the requirements of reg 3.54(2), by installing such wire mesh into the penetration prior to pouring the topping concrete in any such concrete floor within one week of the order being issued.

Exemption Application - Principles

56 In respect of the Exemption Application, s 61A of the OSH Act provides:

61A. Review of Commissioner's decisions under regulations

(1) In this section –

reviewable decision means –

- (a) a decision made under the regulations by the Commissioner himself or herself; and
- (b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,

but does not include a decision made by a person acting as a delegate of the Commissioner.

- (2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.
- (3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may –
 - (a) affirm the decision; or
 - (b) set aside the decision; or
 - (c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.
- (4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

57 In accordance with s 61A(3) of the OSH Act, the Tribunal inquires into the circumstances relevant to the decision of the Worksafe Commissioner. This involves assessing whether, on the basis of the material before the Tribunal, the Worksafe Commissioner was justified in making the decision he did. As established in *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1994) 74 WAIG 2 and *The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd*, this requires the Tribunal to investigate the circumstances giving rise to the decision and the validity of the conclusions.

58 The nature of the review under s 61A(3) of the OSH Act, is by way of a rehearing. That is, the powers of the Tribunal are exercisable without having to find error in a decision made by the respondent, and the Tribunal may have regard to material that was not before the respondent: *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 [20] and *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 [23].

59 A decision of the Worksafe Commissioner includes a decision to exempt a person or workplace from the requirements of the OSH Regulations. The authority of the Worksafe Commissioner to exempt a person or workplace is prescribed by regs 2.12 and 2.13.

60 Regulations concerning the prevention of falls are prescribed by Part 3 Division 5 of the OSH Regulations and the regulation specifically concerned with holes in floors is reg 3.54:

3.54. Holes etc. in floors, duties of employer etc. as to

- (1) A person who, at a workplace, is an employer, the main contractor, a self-employed person or a person having control of the workplace must ensure that any hole or opening (other than a lift well, stairwell or vehicle inspection pit) with dimensions of more than 200 mm x 200 mm but less than 2 metres x 2 metres or with a diameter greater than 200 mm but less than 2 metres —
- (a) in a floor, other than a concrete floor, of a building or structure at the workplace is covered with a material that is —
 - (i) strong enough to prevent persons or things entering or falling through or into the hole or opening; and
 - (ii) securely fixed to the floor;
 or
 - (b) in a concrete floor of a building or structure at the workplace —
 - (i) has, if practicable, wire mesh that meets the requirements of subregulation (2); and
 - (ii) is covered with a material that is —
 - (I) strong enough to prevent persons or things entering or falling through or into the hole or opening; and
 - (II) securely fixed to the floor.
- (2) The wire in the wire mesh referred to in subregulation (1)(b)(i) is required to —
- (a) be at least 4 mm in diameter; and
 - (b) have maximum apertures of 75 mm x 75 mm; and
 - (c) be embedded, at least 200 mm in the edges of the surrounding concrete; and
 - (d) be embedded either —
 - (i) in the upper half of the slab with a minimum concrete cover of 20 mm; or
 - (ii) in the lower half of the slab with a minimum cover of 30 mm.
- (3) A person to whom subregulation (1) applies must ensure that —
- (a) wire mesh referred to in subregulation (1)(b)(i) —
 - (i) is not used as a working platform; and
 - (ii) is only removed for the purposes of installing services in circumstances where the removal takes place immediately before the installation of a service and the only portion removed is the minimum portion required to be removed for the installation;
 and
 - (b) any cover referred to in subregulation (1)(a) or (b)(ii) —
 - (i) is marked in clearly legible lettering with the words ‘DANGER — HOLE BENEATH’; and
 - (ii) is only removed for the purposes of installing services in circumstances where the removal takes place immediately before the installation of a service.

Penalty applicable to subregulations (1) and (3): the regulation 1.16 penalty.

61 The OSH Regulations give effect to the purposes of the OSH Act as prescribed by s 60(1) of the OSH Act. The purposes of the OSH Act are set out in s 5:

5. Objects

The objects of this Act are —

- (a) to promote and secure the safety and health of persons at work;
- (b) to protect persons at work against hazards;
- (c) to assist in securing safe and hygienic work environments;
- (d) to reduce, eliminate and control the hazards to which persons are exposed at work;
- (e) to foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;
- (f) to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;
- (g) to promote education and community awareness on matters relating to occupational safety and health.

62 The High Court of Australia set out the principles to be used when interpreting the construction of statutes, legislative instruments and other documents that may have legislative or regulatory effect the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1988) 194 CLR 355 [78]:

However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction⁽⁵⁶⁾ may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

63 These principles apply to the regulations and their construction should serve the statutory purpose as established in *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 and *Eclipse Resources Pty Ltd v The State of Western Australia (No. 4)* [2016] WASC 62; (2016) 307 FLR 221

64 The Supreme Court of Western Australia has held in *Shepherd v Murray* [2000] WASCA 281; (2000) 105 IR 465 and *Green v Mabey* (Unreported, WASC, Library No 940711, 7 December 1994), that the objects of the OSH Act are to secure the safety of persons at the workplace and creates obligations on the employer to protect against risks to health and safety.

Exemption Application – ‘Substantially Complies’ - Principles

65 Regulation 2.12 provides for exemption on the basis of substantial compliance:

2.12. Exemption from regulation where substantial compliance

- (1) A person may apply to the Commissioner for a person who, or a workplace which, does not fully comply with a requirement of these regulations to be exempted from the requirement and the application is to be in an approved form.

- (2) If, on an application under subregulation (1), the Commissioner is satisfied that there is substantial compliance with the relevant requirements of these regulations then the Commissioner may exempt the person or workplace from the requirement and the exemption is to be in writing and may be made subject to such conditions as are specified by the Commissioner.
- (3) If the Commissioner imposes a condition in relation to an exemption granted under subregulation (2) then a person having the benefit of the exemption must comply with the condition.

Penalty for a person who commits the offence as an employee:
the regulation 1.15 penalty.

Penalty in any other case: the regulation 1.16 penalty.

- (4) The Commissioner may, at any time, revoke an exemption granted under subregulation (2) and the revocation takes effect on the day on which notice of the revocation posted to the person's last known address would have been delivered in the ordinary course of post.

66 The Worksafe Commissioner may exempt a person or workplace from the requirements of reg 3.54 if he is satisfied that there is 'substantial compliance'. The meaning of 'substantial compliance' is not defined in neither the regulations nor the legislation.

67 In *Re Asset Risk Management Ltd* (1995) 59 FCR 254; (1995) 130 ALR 605, the meaning of substantial compliance was considered, and the Federal Court held that it is a matter of degree and concerns the practical effect of what is done compared to the practical effect the legislature seeks to achieve (607).

68 The Federal Court considered the meaning of 'substantially' in *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 44 ALR 173 (192-193) and observed there is no precise scale by which to measure substantial and it is a matter of judgement.

69 The Federal Court in *Montero v Minister for Immigration and Border Protection* [2014] FCAFC 170; (2014) 229 FCR 144, held that substantial compliance with each and every condition of the regulations concerning the granting of a visa was required. The Court reasoned that each condition imposed serves a different purpose from each of the other conditions [32]; the construction of the regulations in question was consistent with a purposive approach to the construction of the clause [33]; and that 'each of the "conditions" was imposed by virtue of the operation of the *Migration Regulations* themselves' [39]. The Court reasoned it is not left to the minister or his delegate to determine whether or not non-compliance with one or other of the 'conditions' could be 'overlooked' or 'excused' and that each of the 'conditions' was presumably considered by the legislature to serve a separate and discrete objective [39]. The word 'substantial' simply identified the extent of the compliance; it did not affect the identification of the 'conditions' which must be complied with. The Court acknowledged that the decision maker is entrusted with the power to determine that there may not have been strict compliance with any one condition but there had nevertheless been 'substantial compliance' [39]. In the circumstances Flick J states [40]:

A contrary conclusion would place a decision maker in an invidious position. He would be forced to weigh the comparative importance of one condition with the comparative importance of other conditions. This requires value judgements about the relative importance of the objectives that those conditions are imposed to achieve...

- 70 In *Argyle Diamonds Limited v Fluor Australia Pty Ltd* [2018] WASC 356, a matter concerning substantial compliance with the requirements set out in an approved form under the *Service and Execution of Process Regulations 1993* (Cth), the Supreme Court of Western Australia held that the question of ‘substantial compliance’ is a question of fact and requires comparison between the form used and the requirements of the approved form at the time of its use and in determining the factual question of the purpose of the form, it is necessary to identify the purpose of the particular form as required by the legislature.
- 71 In *Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner* [2017] WAIRC 00823; (2017) 97 WAIG 1888 (**Concerto Case**), this Tribunal considered the question of substantial compliance. Hanssen Pty Ltd says that the Concerto Case [30] is authority for the Tribunal to find that the HPS substantially complies with the requirements of the regulations if the standard of safety of the HPS falls ‘*not far short*’ of full compliance. Worksafe Commissioner says the Tribunal held that compliance with two of three elements of reg 3.54(1)(b) in the absence of substantial compliance with the other elements of reg 3.54(1)(b) does not constitute substantial compliance. In the Concerto Case, when comparing the practical effect of the HPS with the intended practical effect of the regulations the requirements were specifically and separately considered by the Tribunal [55] to [56].

Exemption Application - Substantially Complies - Consideration

- 72 Hanssen Pty Ltd acknowledges that the HPS does not strictly comply with reg 3.54(1)(b) because it does not embed wire mesh in penetrations if practicable. However, Hanssen Pty Ltd contends that the HPS is ‘substantially compliant’ with reg 3.54(1)(b) because the practical effect, in safety terms is that it is safer or equally as safe. Hanssen Pty Ltd refers to the decision of this Tribunal constituted by Kenner SC in the Concerto Case and says that if it is found that the HPS falls ‘*not far short*’ of the standard of the safety required it substantially complies. Worksafe Commissioner say that an overall standard of safety does not establish ‘substantial compliance’ with reg 2.12.
- 73 As established in *Project Blue Sky Inc v Australian Broadcasting Authority* and *ADCO Constructions Pty Ltd v Goudappel*, reg 2.12 is to be construed by giving the words the meaning the legislature is taken to have intended them to have. The elements or requirements of the sub-regulations each serve a discrete purpose. That is, concrete floors have an additional requirement for embedding wire mesh if practicable.
- 74 As in *Argyle Diamonds Limited v Fluor Australia Pty Ltd*, the question of substantial compliance is a question of fact and requires a comparison between the requirements of the regulation and risk controls of the HPS. Similar to the reasoning in *Montero v Minister for Immigration and Border Protection*, it is not appropriate for the Tribunal to determine the weight of each of the requirements and to balance each against the other, particularly to completely excuse compliance from one element altogether. The task is to assess the HPS for an element equivalent or nearly equivalent to the requirement or purpose of wire mesh.
- 75 Hanssen Pty Ltd says the ProLok system is a secondary system equivalent to the secondary system of the wire mesh. Hanssen Pty Ltd contends that the ProLok system ensures the cover cannot be inadvertently removed and this removes the necessity to have wire mesh as a secondary protection measure. Mr de-Vries describes the use of ProLok screws to affix the cover as a ‘secondary’ system of protection ... ‘which should be considered an equivalent secondary measure to that of the traditional system – being mesh’.

- 76 There is nothing in reg 3.54 to support the notion that the requirement for mesh is ‘secondary’. The Macquarie Dictionary defines ‘secondary’ as ‘next after the first in order, place, time, importance, etc’; ‘belonging or relating to a second order, division, stage, period, rank, or the like’; ‘derived or derivative; not primary or original’; and ‘of minor importance; subordinate; auxiliary’.
- 77 Regulation 3.54(1) distinguishes between floors other than concrete [reg 2.54(1)(a)] and concrete floors [reg 3.54(1)(b)]. The floors of the Sabina Site are concrete and reg 3.54(1)(b)(i) and reg 3.54(1)(b)(ii) both apply. There are two requirements set out in the regulations. Firstly, where practicable wire mesh must be embedded. Secondly the hole is covered. The requirement for mesh is a second measure however it is not a secondary measure. The ProLok screws may provide an additional element of protection against the cover being removed inappropriately and this element may be described as a ‘secondary’ or ‘not primary or original’ measure to reg 3.54(1)(b)(ii)(II) which requires the cover to be ‘securely fixed to the floor’.
- 78 Hanssen Pty Ltd contends that the use of edge protection in the HPS results in the overall safety of the HPS being superior to that required by the regulations and means the HPS substantially complies with the regulations. The use of edge protection where there is a risk a person may fall two or more metres is mandated by reg 3.55. The use of edge protection required under reg 3.55 does not add a second measure such that a requirement under reg 3.54(1)(b)(i) can be said to substantially comply.
- 79 The purpose of the mesh is to provide a second measure to that of the cover and/or edge protection. The risk of serious injury or fatality from a fall requires a high threshold be exercised by a decision maker. The HPS does not incorporate a second measure. If one of the processes of the HPS fails, for example where a worker works near an edge without a harness and edge protection has not been installed or has been removed to install services, there is not a second measure to provide protection.
- 80 I find that ‘substantial compliance’ requires that each of the requirements of the regulations need to be substantially complied with and the HPS fails to adequately comply with the requirement of reg 3.554(1)(b)(i).

Exemption Application -Substantially Complies - Conclusion

- 81 For the reasons set out above I find that the HPS does not substantially comply with reg 3.54(1)(b)(i) and I affirm the decision of the Worksafe Commissioner.

Is Requirement of Compliance Unnecessary?

- 82 The second question to be determined is whether an exemption from the requirements of reg 34(1)(b) should be granted because compliance is unnecessary.

Exemption Application – Compliance Unnecessary – Principles

- 83 Regulation 2.13 provides for exemption on the basis that compliance is unnecessary or impracticable:

2.13. Exemption from regulation where compliance is unnecessary or impracticable

- (1) A person may apply to the Commissioner for a person or a workplace to be exempted from complying with a requirement of these regulations and the application is to be in an approved form.

- (2) If, on an application under subregulation (1), the Commissioner is satisfied that compliance with any requirement of these regulations would be unnecessary or impracticable then the Commissioner may exempt the person or workplace from the requirement and the exemption is to be in writing and may be made subject to such conditions as are specified by the Commissioner.
- (3) If the Commissioner imposes a condition in relation to an exemption granted under subregulation (2), a person having the benefit of the exemption must comply with the condition.

Penalty for a person who commits the offence as an employee:
the regulation 1.15 penalty.

Penalty in any other case: the regulation 1.16 penalty.

- (4) The Commissioner may, at any time, revoke an exemption granted under subregulation (2) and the revocation takes effect on the day on which notice of the revocation posted to the person's last known address would have been delivered in the ordinary course of post.

84 The legislation and regulations do not define 'unnecessary'. The Macquarie Dictionary defines 'unnecessary' as 'not necessary, superfluous, needless'.

85 To find that compliance with the requirements of the regulations is not necessary I must be convinced that the HPS is safer or as safe as compliance with those requirements set out in the regulation such that it is not necessary to require compliance.

86 In *Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner*, this Tribunal, Kenner SC, considered an exemption on the grounds that compliance is 'not necessary' and held that:

[60] Finally, is the ground of exemption based on necessity. The situations where there may be an exemption granted because compliance with a regulation would be unnecessary could be variable. It may be conceivable that a person with an obligation to otherwise comply, adopts an accepted, more efficient and modern system, to achieve compliance with a standard or a requirement of the Regulations, making strict compliance unnecessary, to address the specific hazard. I do not accept the WorkSafe submission that this is a matter beyond the Tribunal's jurisdiction: *ECI*.

[61] To be unnecessary, it must be established that a person seeking an exemption that the object or purpose of the regulation can be met for example, by other means which adequately take account of the relevant hazard and the risk of harm or injury. Given the requirements of reg 3.54(1)(b), the fact that the Tribunal is not satisfied that Hanssen has substantially complied with the Regulations and the continued presence on future projects of the major hazard of falls from height and the risk of serious injury, in my view, Hanssen has not been able to establish that compliance with reg 3.54(1)(b) is unnecessary

87 Worksafe Commissioner refers to the hierarchy of hazard controls and its application to the comparisons between the requirements of the OSH regulations and the HPS. Worksafe Commissioner's contention is that the hierarchy of hazard controls is a system widely accepted as best practice for minimising or eliminating exposure to hazards. The components, or types of hazard control, in the hierarchy are, in order of decreasing effectiveness:

- a. elimination - i.e. physically removing the hazard. For example, if employees are working high off the ground, the falls hazard can be eliminated by moving the item

that the employees are working on down to ground level to eliminate their need to work at height;

- b. substitution - i.e. replacing something that produces a hazard with an alternative that does not produce a hazard. For example, replacing lead-based paint with the much less toxic titanium white;
- c. engineering controls - i.e. creating a physical change to the workplace to protect workers from hazardous conditions by placing a fixed barrier between the worker and the hazard, or by removing a hazardous substance through air ventilation. For example, installing a permanent guard over a piece of plant with dangerous moving parts, or installing a fume hood to remove dangerous airborne contaminants;
- d. administrative controls - i.e. implementing changes to the way people work through procedure, training, temporary barriers, warning signs, policy, or shift designs that lessen the threat of a hazard to an individual. For example, completing road construction at night when fewer cars are on the road;
- e. Personal Protective Equipment - i.e. a final barrier of protection to workers regularly exposed to a hazard. For example, protective clothing, helmets, goggles.

Exemption Application – Compliance Unnecessary – Application

- 88 Hanssen Pty Ltd and Worksafe Commissioner agree that if the practical effect of the HPS is that it is equally safe or safer than full compliance with the requirements of the regulations then compliance with the requirement of 3.54(1)(b) is unnecessary. If the standard of safety provided by the HPS falls short then full compliance would be necessary.
- 89 Hanssen Pty Ltd says the HPS has the practical objective of the OSH Regulations and is safer than the requirements of the OSH Regulations as a result of the use of edge protection, the reduction of trip hazards as the cover is in line with the surface, the use of ProLok screws and the reduction of risks of injuries from cuts from wire mesh when it is cut away.
- 90 During the landing period, Hanssen Pty Ltd acknowledges that it is not possible to install edge protection prior to the BubbleDeck panels being craned into place. The risk of a fall at this time is managed by the anchoring the rigger to the truss that is used to lift the BubbleDeck panel off a truck to the required height. Mr Palomar gave evidence that the truss is capable of withstanding the lifting process when used as a lift point for the entire BubbleDeck and is therefore capable of withstanding the force applied as a result of a worker's fall. Worksafe Commissioner says that the photographic evidence shows the rigger is anchored to the lattice on top of the BubbleDeck panel and that Hanssen Pty Ltd has not demonstrated that the lattice is capable of withstanding the force of a person's fall. Worksafe Commissioner says Hanssen Pty Ltd has not demonstrated that the lattice complies with reg 3.53. Hanssen Pty Ltd did not provide any evidence concerning compliance with reg 3.53 which requires inspection by a competent person, and I make no finding concerning this.
- 91 During the landing period and prior to the installation of edge protection the joint statement of experts identified that there is a period in which, in addition to the riggers, other people may be working near the exposed edge. Mr de-Vries and Mr Airey also say the HPS results in there being more open edges for a worker to fall from. Mr de-Vries and Mr Airey agree that reg 3.54(1) does not address this risk and they suggest a further section ought to be adopted to address the use of pre-cast concrete flooring. Mr Poulton gave evidence that the HPS does not incorporate a formwork deck that mitigates the severity of a fall during this period.

- 92 Worksafe Commissioner refers to the hierarchy of controls and contends that the HPS is an ‘administrative’ hazard control whereas incorporating wire mesh into penetrations is an ‘engineering’ hazard control. The use of mesh is more effective because it does not rely on the behaviour of workers or their adherence to certain procedures. The Tribunal accepts the application of the Hierarchy of Control as a useful tool to evaluate the options to eliminate or reduce risk along with consideration of the level of risks. That is, higher consequence risks need to have demonstrably more reliable controls than lower consequence risk.
- 93 The HPS relies on edge protection to manage risks of falls and Mr de-Vries’ evidence is that this is satisfactory because it ensures that no person can fall through the open penetrations. The evidence of Mr de-Vries is that the edge protection adequately mitigates the risk of a fall and the application of the hierarchy of controls results in the HPS providing a higher standard of safety. Mr de Vries says the requirement for mesh is then, unnecessary. The edge protection is made up of two horizontal rails, one approximately one metre from the slab and the other approximately 400 metres from the slab. Worksafe Commissioner contends that a worker may easily remove the edge protection, to undertake a task, and an average sized adult may comfortably fit their body through the rails of the edge protection, for example to insert joists, it is easily removed. The requirement for edge protection is set out in reg 3.55 which requires edge protection to be provided and kept in place whenever there is a risk that a person could fall two or more metres from the edge of a scaffold, a fixed stair, a landing or suspended slab. It is not, therefore, an additional feature of the HPS. The installation of edge protection does not render the need for mesh to be embedded unnecessary. The additional requirement of mesh provides an additional protective measure should the edge protection measure fail.
- 94 The OSH Regulations require the cover to be securely affixed and the use of hexagonal screws and the ProLok screws, along with the procedures for removal of these screws in accordance with the HPS instructions meets this requirement of reg 3.54(1)(b)(ii). However, reg 3.54(1)(b)(i) requires a further protective measure for concrete floors and that is wire mesh. Mr de-Vries subsequently stated during his oral evidence that his view that the HPS rendered the requirement for mesh unnecessary was not on the limited basis of the ProLok system only but on the basis of the implementation of the whole system.
- 95 The classification of the requirement for mesh as an ‘engineering control’ within the hierarchy of controls as set out in [86] above is not disputed. The HPS relies on administrative controls that require workers to actively think or comply with procedures and its classification as an ‘administrative control’ is also not disputed. The HPS relies on the Prolok system being followed and temporary edge protection being placed around the penetrations. These measures are both ‘administrative controls’. Administrative controls are lower down on the hierarchy because, as acknowledged by Mr Palomar and both experts in their evidence, even the most safety conscious workers can act with due regard to their own safety.
- 96 Mr Airey’s conclusion in his report provides a good summary of the comparison between the requirements of the regulations and the HPS.

At the heart of the present provisions is an engineering solution which provides a mesh over the opening at all times, other than when the wire mesh required has been either partially or fully removed. The mesh stays in place until all arrangements for passing services through the opening are complete.

The [HPS] has a significant administrative requirement and it is vulnerable to administrative breakdown. If administration of the procedures required fail, so does the provision of safety. This is exemplified by the need to screen off the area around the lid yet to be removed. The lid could still

be removed if the screening off is not present. The requirement that the workmen removing the lid be anchored to the floor is a requirement which would require administration, whereas the present compliant requirement is essentially safe at all times until the service opening is formed through the mesh.

It is concluded that the [HPS] has a high level of administrative requirement to ensure safety is achieved and as a consequence is not directly comparable to the provision of wire mesh in the opening.

97 Mr Palomar's evidence included comprehensive and detailed instructions on implementing the HPS. Mr de-Viers evidence compares the detailed instructions with the 'traditional system' and concluded that the HPS is a superior system to that of the regulations. However, there is evidence these instructions are not always followed:

- a) there was a disagreement between the site manager and Mr Palomar about the removal of a penetration cover at the Sabina Site;
- b) Mr Airey, an expert witness, identified that at the Sabina site where the angles on which the penetration covers are welded on site the seatings are irregular and not compliant;
- c) Installation of services – on Sabina Site being done from above and not below HPS instruction is from below – Mr Airey says the Sabina Site manager said he would remove from above – Mr Airey cannot see how this can be done given the installation of services would need to happen long before they got to the top;
- d) Mr Airey states that at a visit to the Sabina Site he was advised that the usual procedure followed by workers was that joists and penetration covers were installed from above and not below as detailed in the documented instructions. Mr Airey observed that the worker tasked with removing the penetration covers informed him that he had not seen the joists secured by a fixing from below before and was unsure of how he was going to deal with that issue.

98 These examples demonstrate a significant weakness in the administration of the HPS and I am not convinced that the detailed instructions will be followed. Therefore, I am not convinced the implementation of the HPS at the Sabina Site renders compliance with reg 3.54(1)(b) unnecessary.

99 Mr de-Vries and Mr Airey agree that 'If the HPS System is administered and implemented in its entirety as per developed procedures, there is no risk to personnel'. This statement needs to be considered along with their agreed further statement 'If an administrative process fails during the HPS system, there can be potential significant risk to personnel'. Given the HPS significantly relies on administrative controls and the consequences of failure of the processes is high I am not convinced the requirement for the engineering control required in the regulations is unnecessary.

100 Hanssen Pty Ltd say the HPS is a safer system than that provided by the regulations because it results in a reduction in injuries from trips as the penetration cover is even with the floor and the absence of mesh means there is no risk of a person being cut from exposed mesh that has been cut away. The difference between the consequences of cuts and that of a fall through a hole are significant and a reduction in injuries from a trip or cut does not establish the HPS is safer than the requirement of the regulations.

Exemption Application – Compliance Unnecessary – Conclusion

101 For the reasons set out above I am not convinced that the HPS is as safe or safer than the measures required by the OSH Regulations.

Orders to be Issued

102 A Minute of Proposed orders will now issue in the following terms:

- 1) Referrals OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the OSH Act and the applications to exempt each matter are dismissed pursuant to s 27 (1)(a)(ii) of the IR Act as further proceedings are not necessary;
- 2) At the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion the construction and the passage of time should not infer that these notices were not appropriate nor justified;
- 3) The Tribunal affirms Improvement Notice 39800134 in OSHT 3 of 2019 with the following modification that Hanssen Pty Ltd is directed to ensure that all holes measuring more than 200mm x 200mm but less than 2 metres x 2 metres in a concrete floor at the above-mentioned workplace meet the requirements of reg 3.54(1)(b), including the requirement to, if practicable, embed wire mesh that meets the requirements of reg 3.54(2), by installing such wire mesh into the penetration prior to pouring the topping concrete in any such concrete floor within one week of the order being issued; and
- 4) The Tribunal affirms the Worksafe Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13.