

**REVIEW OF IMPROVEMENT NOTICE
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2021 WAIRC 00135

CORAM : COMMISSIONER T B WALKINGTON

HEARD : THURSDAY, 23 JULY 2020, WEDNESDAY, 22 JULY 2020

DELIVERED : FRIDAY, 14 MAY 2021

FILE NO. : OSHT 5 OF 2019

BETWEEN : GHD PTY LIMITED
Applicant

AND

WORKSAFE WESTERN AUSTRALIA COMMISSIONER
Respondent

CatchWords : Improvement Notice - requirement for terms of notice to be certain and unambiguous - duties of a designer - obligation to provide written report to client - requirement to identify hazards and risks in written report - end product of design.

Legislation : *Mines Safety and Inspection Act 1994 (WA)*
Occupational Safety and Health Act 1984 (WA)
Occupational Safety and Health Regulations 1996 (WA)

Result : Improvement notice affirmed with modification

Representation:

Applicant : Mr A Mossop and Mr S Puxty (of counsel)

Respondent : Ms C Stamp and Ms T Hollaway (of counsel)

Cases referred to in reasons:

Alcoa of Australia Limited v Andrew Chaplyn [2019] WAIRC 00011; (2019) 99 WAIG 93

Electrical Power Transmission Pty Ltd v Robinson (1973) 2 QL 329

Slivak v Lurgi (Australia) Pty Limited [2001] HCA 6; (2001) 205 CLR 304

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* (1992) 74 WAIG 2

Reasons for Decision

- 1 This matter concerns the referral to the Occupational Safety and Health Tribunal (**Tribunal**) of an improvement notice issued to GHD Pty Ltd (**GHD**) concerning reg 3.140(2) of the *Occupational Safety and Health Regulations 1996 (WA)* (**OSH Regulations**). GHD seek an order from the Tribunal that the improvement notice be revoked. The Worksafe Western Australia Commissioner (**Worksafe Commissioner**) opposes the application and contends that the Tribunal ought to affirm the improvement notice with a modification to the date to comply with the notice.
- 2 GHD is the Australian operation of an international professional services company providing engineering design, architecture, environmental and construction consultancy services to clients.
- 3 In 2018 GHD was engaged by Civmec Holdings Pty Ltd (**CIVMEC**) to design a ship building facility at 16 Nautical Drive, Henderson. CIVMEC incorporated pre-cast concrete hollowcore panels for the flooring system of the ship assembly hall. The concrete panels measure 8.7 metres x 1.2 metres and weigh approximately 3 tonne each. The supplier of the concrete panels, BGC, was selected by CIVMEC.
- 4 CIVMEC engaged a contractor, Above All Rigging (**AAR**), to lift and install the panels into the floor. On 18 February 2019, a concrete panel fell and landed on the concrete deck, destroying the panel and damaging part of the concrete deck.
- 5 Worksafe Inspectors attended the site on the same day and following their inspection of the site, a Worksafe Inspector issued CIVMEC, AAR and GHD with Improvement Notices.
- 6 Improvement Notice 45300297 (IN 45300297) issued to GHD on 26 February 2019 states:

The Worksafe Inspector issuing the notice formed the opinion that:

 - a) The applicant is a designer at the construction site;
 - b) The applicant incorporated pre-cast concrete hollowcore plank into the building design;
 - c) The applicant provided a safety in design report to the client;
 - d) The safety in design report did not set out the hazards of the design and the measures used to reduce the risks; and
 - e) The hazard that was not included in the report is a heavy hollowcore plank falling from height whilst being lifted into position by a crane.
- 7 GHD requested the Worksafe Commissioner review the IN 45300297. On 15 May 2019, the Worksafe Commissioner notified GHD that he affirmed IN 45300297 with a modification to the date GHD was required to comply with the notice to 5:00 pm on 24 May 2019.
- 8 GHD has referred the decision of the Worksafe Commissioner to the Tribunal for a further review of IN 45300297. GHD contend that the Tribunal ought to revoke IN 45300297 because it exceeds the scope of a designer's obligations. That is, there was no justification for the issuance of the IN 45300297 or its review by the Worksafe Commissioner being affirmed on the basis that as a matter of law the alleged contravention was not within the scope of GHD's duty.
- 9 In addition, GHD contend that there were no reasonable grounds for forming an opinion that GHD was in contravention of the *Occupational Safety and Health Act 1984 (WA)* (**OSH Act**)

and submit that the design documentation appropriately identified the relevant hazards or risks associated with the design and the control or elimination of those risks during the design process.

- 10 Furthermore, GHD contends that IN 45300297 is uncertain, vague, and ambiguous for the following reasons:
- i) it failed to specify the nature of the contravention by GHD of its duty as a designer under section 23 of the Act to ensure that the design of the structure did not, as far as is practicable, expose persons properly constructing the structure to hazards (which GHD has the ability to control or eliminate);
 - ii) it failed to identify how any act or omission by GHD exposed persons to the hazard of "being hit by a falling object";
 - iii) it failed to specify how the written materials (within the meaning of regulation 3.140(2)) supplied by GHD to CIVMEC contravened the Regulations; and
 - iv) it failed to include directions as to measures to be taken to remedy any alleged contravention with sufficient clarity.
- 11 The Worksafe Commissioner maintains IN 45300297 was validly issued, that GHD failed to comply with its duty prescribed in reg 3.140 and that the IN 45300297, when read as whole, does not suffer from the defects alleged by GHD. The Worksafe Commissioner says the IN 45300297 should be affirmed with modification to allow additional time for compliance.

Questions to be Decided

- 12 I must decide whether the decision of the Worksafe Commissioner to affirm IN 45300297 should be:
- a) affirmed; or
 - b) affirmed with modification/s; or
 - c) revoked.
- 13 To make this determination I must first determine if GHD is a 'designer' within the meaning of the OSH Act and OSH Regulations and in the circumstances, I must determine whether the terms of the IN 45300297 is within the duties of a designer.
- 14 If I find GHD is a designer, and the terms of IN 45300297 are within the scope of duties of a designer I must decide whether the written report provided by GHD to its client satisfies the requirements of reg 3.140.
- 15 If I find GHD is a designer, the terms of the IN 45300297 are within the scope of duties of a designer and that the information provided by GHD did not meet the requirements of reg 3.140, I must decide whether the IN 45300297 is properly constructed as required by s 48 of the OSH Act.

Review of Improvement Notices by Occupational Safety and Health Tribunal – Principles

- 16 Section 48 of the OSH Act provides the authority for Worksafe Inspectors to issue improvement notices where she/he forms the opinion that there is a contravention of the OSH Act and reads as follows:

48. Improvement notices, issue and effect of

- (1) Where an inspector is of the opinion that any person —

- (a) is contravening any provision of this Act; or
- (b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated,

the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.

(2) An improvement notice shall —

- (a) state that the inspector is of the opinion that the person —
 - (i) is contravening a provision of this Act; or
 - (ii) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated;
 and
- (b) state reasonable grounds for forming that opinion; and
- (c) specify the provision of this Act in respect of which that opinion is held; and
- (d) specify the time before which the person is required, to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention; and
- (e) contain a brief summary of how the right to have the notice reviewed, given by sections 51 and 51A, may be exercised.

(3) A person, other than the employer, issued with an improvement notice shall forthwith give the notice, or a copy of it, to the employer, and where —

- (a) under subsection (1), an improvement notice is issued to an employer; or
- (b) under this subsection an improvement notice, or a copy thereof, is given to an employer,

the employer shall cause the notice, or a copy of it, to be displayed in a prominent place at or near any workplace affected by the notice.

(3a) A person shall not remove an improvement notice displayed under subsection (3) before the requirements of that improvement notice have been satisfied.

(3b) Subsection (3a) does not apply in respect of an improvement notice that is suspended under section 51 or 51A or that has ceased to have effect.

(3c) If an improvement notice is issued —

- (a) to a self-employed person in respect of a contravention of section 21; or
- (b) to a body corporate to which section 21B applies in respect of a contravention of that section,

the person or body shall comply with subsection (3) and (3d) as if the person or body were an employer.

(3d) If an improvement notice is modified by the Commissioner under section 51(5)(b), the employer shall cause a copy of the Commissioner's decision to be displayed with the improvement notice, or a copy of it, as required by subsection (3).

- (4) Subject to sections 51 and 51A, if a person —
 - (a) is issued with an improvement notice; and
 - (b) does not comply with the notice within the time specified in it, the person commits an offence.
- (5) A person issued with an improvement notice commits an offence if the Commissioner is not notified forthwith upon the requirements of the improvement notice being satisfied.
- (6) If a person contravenes subsection (3), (3a), (3c) or (3d), the person commits an offence.

Review by Worksafe Commissioner

- 17 Section 51 of the OSH Act provides for an improvement notice issued by a Worksafe Inspector to be referred for review by the Worksafe Commissioner. The Worksafe Commissioner may affirm the notice, affirm the notice with such modifications as seem appropriate, or cancel the notice. The Worksafe Commissioner must issue in writing a notice containing the reasons for their decision to the person that referred the matter for review.
- 18 A person, issued with such a notice, is not satisfied with the Worksafe Commissioner's decision, may refer the matter to the Tribunal for further review.

Review by Occupational Safety and Health Tribunal

- 19 In respect of the application for review of the improvement notice, 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 to the contrary made by the Tribunal.

20 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; (2008) 88 WAIG 22 [93], held that s 51A(5) of the OSH Act requires that the Tribunal inquire into the circumstances relating to the improvement notice. The Tribunal determines whether, on those facts and circumstances, the Worksafe Inspector was justified in forming the opinion she/he did as established in *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1992) 74 WAIG 2.

Occupational Safety and Health Duties of Designers

21 Section 23 of the OSH Act sets out the obligations on a person that designs the plant to be used at workplaces:

23. Duties of manufacturers etc.

- (1) A person that designs, manufactures, imports or supplies any plant for use at a workplace shall, so far as is practicable —
 - (a) ensure that the design and construction of the plant is such that persons who properly install, maintain or use the plant are not in doing so, exposed to hazards; and
 - (b) test and examine, or arrange for the testing and examination of, the plant so as to ensure that its design and construction are as mentioned in paragraph (a); and
 - (c) ensure that adequate information in respect of —
 - (i) any dangers associated with the plant; and
 - (ii) the specifications of the plant and the data obtained on the testing of the plant as mentioned in paragraph (b); and
 - (iii) the conditions necessary to ensure that persons properly using the plant are not, in so doing, exposed to hazards; and
 - (iv) the proper maintenance of the plant,

is provided when the plant is supplied and thereafter whenever requested.
- (2) A person that erects or installs any plant for use at a workplace shall, so far as is practicable, ensure that it is so erected or installed that persons who properly use the plant are not subjected to any hazard that arises from, or is increased by, the way in which the plant is erected or installed.
- (3) A person that manufactures, imports or supplies any substance for use at a workplace shall, so far as is practicable, ensure that adequate toxicological data in respect of the substance and such other data as is relevant to the safe use, handling, processing, storage, transportation and disposal of the substance is provided —
 - (a) when the substance is supplied; and
 - (b) thereafter whenever requested.
- (3a) A person that designs or constructs any building or structure, including a temporary structure, for use at a workplace shall, so far as is practicable ensure that the design and construction of the building or structure is such that —
 - (a) persons who properly construct, maintain, repair or service the building or structure; and

(b) persons who properly use the building or structure,
are not, in doing so, exposed to hazards.

- 22 The effect of these provisions is to impose duties in relation to the whole lifecycle of structures from design to supply, installation, dismantling and disposal. These duties imposed on ‘upstream duty holders’ have the objective of ensuring safety by elimination of hazards and risks during the design of new structures.
- 23 Section 60 of the OSH Act provides for Regulations necessary or convenient to give effect to the purposes of the OSH Act. The OSH Regulations prescribe minimum standards and have a general application, or define specific requirements related to a particular hazard or type of work. Part 3 of Division 12 of the OSH Regulations concern the construction or building industry.
- 24 Regulation 3.140(2) sets out the obligation of designers of work for commercial clients to give clients written reports:

3.140. Designer of work for commercial client to give client report

- (1) This regulation applies in relation to a client if the work at the construction site was, is being or is to be done for the client as part of the client’s trade or business.
- (2) The designer must give a written report to the client setting out —
- (a) the hazards —
 - (i) that the designer has identified as part of the design process; and
 - (ii) that arise from the design of the end product of the construction work; and
 - (iii) to which a person at the construction site is likely to be exposed;
 and
 - (b) the designer’s assessment of the risk of injury or harm to a person resulting from those hazards; and
 - (c) what things the designer has done to reduce those risks (for example, changes to the design, changes to construction methods); and
 - (d) which of those hazards the designer has not done anything in respect of to reduce those risks.

Penalty: the regulation 1.16 penalty.

- (3) The level of detail in the report must be appropriate for the client, the nature of the hazards and the degree of risk.
- 25 Regulation 3.140 forms part of the overall scheme and should be read together and interpreted consistently with s 23(3a) of the OSH Act to determine the scope of a designer’s duty.
- 26 Section 57 of the OSH Act provides for the development and approval of Codes of Practice for the purposes of providing practical guidance to persons that are subject to a duty under the OSH Act.
- 27 The relevant Code of Practice in this matter is the *Code of Practice on Safe Design of Buildings and Structures 2008 (COP)* approved by the relevant Minister in March 2008. The COP states that designers should provide clear, precise information suitable for people in control and users during the phases of construction and use of a building or structure.

28 The COP includes a section for designers on providing information and documentation of key information concerning hazards:

Points for designers to consider when providing information include:

- making notes on drawings, as these will be immediately available to construction workers;
- developing a register or list of significant hazards, potential risks and control measures;
- providing information on significant hazards, including:
 - hazardous substances or flammable materials included in the design;
 - heavy or awkward prefabricated elements likely to create handling risks;
 - features that create access problems;
 - temporary work required to construct or renovate the building as designed.

29 Section 57(8) of the OSH Act provides that where it is alleged that a person has contravened a provision of an OSH regulation and the COP was in effect at the time, the COP is admissible in evidence.

Is GHD the Designer?

30 The words ‘design’ and ‘designer’ are not defined in the OSH Act. Regulation 3.137 defines a designer, in relation to construction work at a construction site, as a person in charge of the, or a part of the, design of the end product of the construction work.

31 GHD submitted documentation to the Tribunal, the *GHD Standard Operating Procedure - HSE Safety in Design HSE360 (HSE360)*, that it regularly uses which describes the minimum expectations and the tools and procedures that GHD has in place to fulfil its requirements as a ‘designer’. Within the *HSE360* a designer is defined as:

A person is deemed a designer if their work involves them in:

- making decisions for incorporation into the design that may affect the health or safety of persons who construct, use or carry out other activities in relation to the asset.

32 GHD contend that the pre-cast hollowcore plank used in construction of the floor was a generic product, manufactured and supplied by another party, BGC. GHD submit that it did not design the pre-cast hollowcore plank.

33 Worksafe Commissioner say that GHD designed the flooring system and selected the plank which had specific features and that GHD in selecting the type of flooring system is the designer of part of the end product of the design.

34 I find that GHD designed the flooring system and incorporated the pre-cast hollowcore panels as a specific element of the design. GHD may have selected a different method or material or component for the flooring system. Applying GHD’s definition of a designer, it is the designer of the flooring system for this matter.

35 I find that GHD was in charge of the part of the design of the end product of the construction work being the floor of the Ship Assembly Hall and office. That is, GHD consistent with the definition in the OSH Regulations, is the designer.

Scope of Duties of a Designer - Principles

36 The duty of a designer pursuant to s 23 of the OSH Act is to ensure that the design and construction of the plant is such that persons who properly install, maintain, or use the plant are

not in doing so exposed to hazards. As held in *Electrical Power Transmission Pty Ltd v Robinson* (1973) 2 QL 329 the term ‘ensure’ means to ‘make certain’ or ‘make sure’.

- 37 In *Slivak v Lurgi (Australia) Pty Limited* [2001] HCA 6; (2001) 205 CLR 304 (*Slivak*), a case concerning the duty of a designer of a structure under s 24(2a)(a) of the *Occupational Health, Safety and Welfare Act 1986* (SA), three members of the High Court (Gleeson CJ, Gummow, Hayne) rejected the proposition that a designer of a structure owed ‘some form of non-delegable duty of care in respect of all aspects of the erection of a structure’ [36]. Where a builder departs from the design and this departure gives rise to a risk to the safety of those employed to build the structure, the designer will not be liable. The duty of a designer is limited to ‘matters which are within the power of the designer to perform or check, such as ascertaining what use the structure will be put to, what loads it will experience when being built and the nature of the location in which it is to be erected’ [37].

Scope of Duties of a Designer – Application

- 38 The Worksafe Commissioner submits that reg 3.140 is a separate and distinct duty from that set out in s 23 of the OSH Act. The Worksafe Commissioner assert that the regulation is made under s 60(5) of the OSH Act which provides that regulations may be made with respect to any matters specified in Schedule 1 of the OSH Act. The Worksafe Commissioner contends that when reg 3.140 is viewed as a separate duty stemming from Schedule 1A the general duties imposed by s 23 of the OSH Act are not relevant.
- 39 The Worksafe Commissioner contends that reg 3.140 requires a written report that sets out the hazards which arise from the design of the end product of the construction work. The designer selected the hollowcore panels and the hazard arises from the selection of this material. The written report needs to include the designer’s assessment of the risk of injury or harm resulting from the hazard.
- 40 The Worksafe Commissioner submits that GHD ought to have identified that there is a hazard that arises in the construction phase from the pre-cast hollowcore panels and that does not assert that GHD is required to address the risk nor advise on how to conduct the activity of installing the panels. The Worksafe Commissioner asserts that GHD failed its obligations under reg 3.140 as it failed to include an item specific to the pre-cast panels in the written report, the Safety in Design Risk Management Register (Register).
- 41 GHD contend that the scope of their duty as a designer is limited to matters of design and the obligation to ensure safety as far as reasonably practical applies to matters which are within the power of the designer to perform or check. GHD contend that it is not reasonably practical to expect a designer to articulate every conceivable risk to precise detail that could be experienced during the construction phase and doing so would result in a substantial increase in the volume of work required to be compliant. GHD submit that there is no utility in a designer telling a contractor specialised in an activity how to conduct that activity and assert that to find that GHD was responsible for addressing the matter would enlarge the duties of designers beyond the express terms of the legislative scheme. GHD contend that the duty of a designer is to ensure safety as far as reasonably practicable, and it applies to matters which are within the power of the designer to perform or check. GHD submit that *Slivak* supports their contentions. GHD submit that if it is found that the installation of the panels is not within the designer’s general duties then the failure to identify this hazard in the written report is not a contravention of reg 3.140.

- 42 I do not accept GHD's contention that it cannot be required to address the hazards associated with lifting and installing the hollowcore panels because Division 9, Subdivision 1 of the OSH Regulations specifically provide for matters concerning the manufacture, design, transport and erection/installation of concrete panels. The regulations cited refer to the concrete panels that are made for the purpose of being incorporated into a wall. In this matter the hollowcore panels are incorporated into the floor and not the wall and these regulations do not apply.
- 43 I find that GHD's selection of pre-cast hollowcore panels for the flooring system is a matter of design. The selection of this material gives rise to specific risks and hazards. As outlined in the COP designers should provide clear information to those in control or users at the phases of construction and use of a building or structure. Regulation 3.140 requires this information to be in the form of a written report that sets out the hazards, the designer's assessment of the risk of injury or harm resulting from these hazards, the action the designer has taken to reduce the risks and the design hazards where the designer has not taken action.
- 44 Regulation 3.140 provides for the identification of hazards which are not in the control of designers to eliminate or reduce. The regulation requires such hazards, that arise from the design, to be identified and where the designer cannot eliminate or reduce the hazard, state this to be the case.
- 45 Regulation 3.140 does not require GHD to direct or supervise the installation of the pre-cast hollowcore panels. However, it is within GHD's power to include a specific reference to the pre-cast hollowcore panels in the written report to the client, the Register, noting that this is a risk or hazard that the GHD have not taken any action to reduce.
- 46 In *Slivak* the High Court considered and affirmed the finding of the Full Court of the Supreme Court of South Australia that:
- Deciding what is reasonably practicable must involve balancing the likelihood of injury, and the severity of an injury that might ensue, against the availability of protective measures and their effectiveness and cost. The evidence in the present case is that the design was safe and there is no evidence to suggest that the fabrication work and erection work was not to be carried out by a competent contractor. In my opinion, the designer of the structure could reasonably expect that the extent which the cell floor plate overlapped the supporting structures would be checked when the plate was put in position and before it was moved. That in itself does not excuse the designer from considering the risk of injury [21].
- 47 GHD's contention that it would be unreasonable to require it to create a specific reference to the pre-cast hollowcore panels need to be weighed against the risk of serious injury or fatality of the hazard. The COP provide guidance on the information that should be included in the Register and specifically refers to significant hazards that are heavy or awkward prefabricated elements likely to create handling risks. The hollowcore panels are heavy and awkward prefabricated elements that create handling risks during the construction phase. The risk of injury arising from these elements ought to have been considered by the designer.
- 48 I find that it is within the scope of GHD's responsibility and obligation as a designer to include a specific reference to the hollowcore panels in the Register.

Requirements of the Duty to Provide Written Report – Principles

- 49 Regulation 3.140 requires a designer to provide a written report to a client that sets out the hazards the designer has identified as part of the design process, and that arise from the design of the end product of the construction work which is likely to expose a person at the construction site. The written report is to include the designer's assessment of the risk or injury or harm and

whether the designer has done anything to reduce the risks or not done anything to reduce the risks. The level of detail in the report is a result of an assessment of the client, the nature of the hazards and the degree of risk. The provisions of reg 3.140 are set out in paragraph [24].

- 50 The COP provides further guidance on the requirements of reg 3.140 to designers and the relevant sections are set out in paragraph [27] and [28] of these reasons.
- 51 Determining the level of detail required in the written report is a product of weighing the factors set out in reg 3.140.

Duty to Provide Written Report - Application

- 52 GHD provided a Register to CIVMEC on 16 January 2019.
- 53 GHD also provided Structural Notes in a cover sheet to the drawings or specifications to CIVMEC on 16 January 2019.
- 54 GHD submit that the hazard of the pre-cast hollowcore panels falling when being lifted by a crane during the construction phase is included in the written report, being the Register. GHD contend that the Register meets the requirements set out in reg 3.140. GHD asserts that the relevant hazard is identified in the Register in the following items:

Item 9 - Suspended loads for the Ship Assembly Hall noting the hazard/aspect as ‘construction crane operations for installation of larger modules’; during the operation phase; and in the section for unplanned/unwanted event, noting ‘small cranes not handling large modules safely’; and in the section for contributing factors/causes/root causes/latent causes/direct causes, noting ‘1. Heavy, awkward modules, 2. increased number of cranes on site’, and in the section for maximum foreseeable loss, noting ‘fatality’; and in the section for basis for MFL, noting ‘multiple crane operations during construction’; and in the section for source, noting ‘concept, design SID, workshop’; and in the section for new actions/further requirements noting ‘1. recommend the introduction of a site tower crane to handle larger lifts. This can be used for smaller lifts if schedule allows’ and in red ‘CIVMEC to establish erection methodology/module versus stick build’; and in the section ‘action response/hazard closure statement’, noting ‘tower cranes have been considered and will not be used. Crawler cranes will be used’.

Item 17 - Suspended loads for the Ship Assembly Hall noting the hazard/aspect as ‘cranes on different levels crossing over’; during the operation phase; and in the section for unplanned/unwanted event, noting ‘crane masts impacting with each other or structure’; and in the section for contributing factors/causes/root causes/latent causes/direct causes, noting ‘1. multiple cranes on site at one time, 2. SIMOPS, 3. crane working arcs not considered in the design’; and in the section for maximum foreseeable loss, noting ‘serious injury, equipment damage’; and in the section for basis for MFL, noting ‘congested worksite, many simultaneous activities going on’; and in the section for source, noting ‘concept, design SID, workshop’; and in the section for new actions/further requirements, noting ‘1. crane numbers can be reduced by the introduction of a site tower crane, 2. design to ensure where possible multiple cranes are not competing for space, 3. communicate the risk to the CRAW’.

Item 20 - Suspended loads for the Ship Assembly Hall noting the hazard/aspect as ‘crane working near glazing’; during the construction phase; and in the section for unplanned/unwanted event, noting ‘crane loads falling or swinging through glazing’; and in the section for contributing factors/causes/root causes/latent causes/direct causes, noting ‘glazed areas, crane work in vicinity’; and in the section for maximum foreseeable loss,

noting ‘injury from dropped glass’; and in the section for source, noting ‘concept, design SID, workshop’, and in the section for new actions/further requirements, noting ‘1. design to limit where possible the swing arc of any crane that is required to operate in the vicinity of the glazed sections’.

- 55 GHD contends that the level of detail in the Register and/or the Structural Notes was appropriate for the client. The use of hollowcore panels in flooring was not unusual and that the hazards associated with the transporting, lifting or installing are matters within the expertise and ambit of the duties of manufacturers, suppliers, installers and the principal or main contractor. GHD’s evidence is that the panels are generic in large scale commercial constructions, have been available in Australia for over 50 years and are the most common form of pre-cast floor used in Australia. GHD submit that in these circumstances a specific reference to the hazard of a falling plank during the construction or installation of the panels was not necessary nor required.
- 56 The Worksafe Commissioner contends that the suspended loads items within the Register failed to note the risk of the pre-cast hollowcore concrete plank falling when being lifted by a crane. The panels weigh about 3 tonne and the hazard of the panels falling resulting in serious injury or a fatality is a severe risk. Worksafe Commissioner submit that the hazard ought to be specifically identified in the Register noting the residual risk if the designer had not implemented any control measures.
- 57 Item 9 of the Register is concerned with the hazard resulting from small cranes not handling larger modules safely. The reference to larger modules and what these actually are is not clear. In his evidence Mr Airey considered this was a reference to steel modules.
- 58 Item 20 of the Register is a reference to cranes at different levels crossing over. It cannot be said that this item identifies the hazard of the hollowcore panels falling when being lifted by a crane.
- 59 The Register at Item 20 refers to the hazard of a load being lifted by a crane falling or winging through glazing in the Ship Assembly Hall during the operation phase of the facility. This item is not a reference to the hazard from the fall of a plank being installed in the flooring system. However, this reference does indicate that, given the consequences of the hazard, the inclusion of a hazard of a falling load from a crane during the construction phase could be included as an identified risk of similar serious consequence.
- 60 Mr Airey, was engaged by GHD to provide the Tribunal with expert evidence, described the omission of a specific reference in the Register to the lifting of pre-cast concrete panels as a hazard as surprising. Mr Airey gave evidence that he considered the omission surprising as the pre-cast panels are heavy and require very specific management to ensure safe placement.
- 61 Mr Airey produced three versions of the report and repeated this observation in each. Initially Mr Airey was not provided with the Register and his report was based on the Structural Notes. Subsequently, Mr Airey was provided with a copy of the Register. Initially Mr Airey had understood that the Register had been produced by CIVMEC and not GHD. This was not correct. Mr Airey produced a second report including a statement expressing his surprise at the omission of a specific reference to the lifting of the pre-cast hollowcore panels. Subsequently, Mr Airey was made aware that the Register was produced by GHD and provided to its client, CIVMEC.
- 62 I find that the third report is the relevant report to consider in this matter. Mr Airey’s report sets out his views on the responsibility of the manufacturer as a result of their role in designing the panels and the responsibility of the installer of the panels. Mr Airey states that the designer would review the manufacture and erection procedure of the panels to ensure the pre-cast elements would not be overstressed.

- 63 In his third report, Mr Airey retained his statement concerning the omission of any reference of the panels and added a statement to the effect that the omission (of a reference to the pre-cast hollowcore panels) was probably due to GHD's knowledge that shop drawings containing methods of handling, amongst other matters, would be provided by GHD to CIVMEC. If this was done, GHD could review the risk of lifting and placing the panels into position.
- 64 Mr Airey states that the checks conducted by GHD during the construction phase are to provide the capacity for GHD to certify that the construction achieved the intended design. GHD are not ensuring that hazards are avoided during the construction phase. Mr Airey states that the responsibility for supplying and erecting the panels is that of the supplier and CIVMEC. The IN 45300297 does not allege that GHD is responsible for the supply and erection of the panels nor does it allege that GHD has the responsibility to ensure the erection of the panels was safely conducted. The IN 45300297 is concerned with the question of whether GHD failed to include a reference to the hazards arising from the panels.
- 65 I conclude from Mr Airey's evidence that the Register ought to include a specific reference to the pre-cast hollowcore panels and the hazard arising from the installation of these panels in the flooring system.
- 66 GHD submit that the written report required in reg 3.140 is not one document and other documents such as the Structural Notes provided by GHD to CIVMEC are part of the written report. GHD contend that the Structural Notes include a reference to pre-cast concrete and the hazard of a plank falling while being lifted is identified in the document.
- 67 The Worksafe Commissioner says it is only the Register that satisfies all the requirement of reg 3.140 and that the disbursement of information concerning hazards through multiple different documents adds a level of complexity and difficulty to people engaged in downstream processes accessing the written report and informing themselves of the hazards during construction.
- 68 I find that reg 3.140 requires the one written report. The text of the regulation states 'a written report' and sets out the content of the report. The COP refers to one report, being 'this' report containing information concerning hazards and risks that a designer is required to communicate to their client along with any action taken to reduce the risk and any parts of the design where hazards have been identified but not resolved. Clear and precise information is required.
- 69 It is best practice to include hazards in documentation other than the written report. COP recommend adding a 'safe design plan' to plan sets and notes to improve communication of residual risks to people further down the lifecycle of the structure. The inclusion of safety information to documents in addition to the written report does not remove the requirement to include in the Register relevant information.

Terms of the Improvement Notice Issued by Worksafe Western Australia Commissioner

- 70 GHD submit that the terms of the IN 45300297 were uncertain, vague and ambiguous. Therefore, the IN 45300297 does not comply with the requirements of s 48 of the OSH Act.
- 71 GHD contend that the IN 45300297 fails to identify whether it was issued pursuant to s 48(1)(a) or 48(1)(b) of the OSH Act and that this failure is telling because neither provision applies. GHD further submit the notice did not sufficiently identify the alleged contravention and it did not unambiguously outline the matters that required to be remedied. GHD contend that the direction to 'ensure as the designer all aspects of reg 3.140 are raised with your client in a written report' does nothing more than simply restate the requirements of the OSH Regulation. The direction

fails to precisely identify what in particular needs to be remedied. GHD contend that the notice identified a hazard of ‘being hit by a falling object’ but it does not adequately state how any act or omission by GHD exposed persons to that hazard and GHD say the notice failed to identify with sufficient clarity the time by which the applicant was to comply. The notice requires compliance by ‘0000’ on 19 March 2019. GHD say ‘0000’ is fraught with imprecision as it may mean the start or the end of 19 March 2019 and that this uncertainty is undesirable where failure to comply by a deadline may result in a criminal offence.

- 72 The Worksafe Commissioner contends that there is no general principle that uncertainty in an executive instrument results in legal invalidity. The Worksafe Commissioner submits that the contravention is identified in the IN 45300297 as the contravention of reg 3.140(2). The Worksafe Commissioner submits there is no uncertainty of the directions when the IN 45300297 is read as a whole. The Worksafe Commissioner submits that the first part of the correction which states to ensure all aspects of reg 3.140 are raised, the particulars of the breach of reg 3.140 is to identify the hazard of being hit by a heavy hollowcore plank whilst it is being lifted at heights. This they say is the aspect that needs to be raised in the second part of the direction that states that the hazard is clearly articulated by reading the IN 45300297 as a whole. The Worksafe Commissioner submits that on any reasonable reading of the IN 45300297 all the applicant needs to do to comply with the IN 45300297 and the direction is to include in the Register an additional entry that covers a hazard of being hit by heavy hollowcore panels whilst it is being lifted at heights, its assessment of the risk of this and if it has not done anything to address this. That is, if the Tribunal was to find otherwise it submits that this does not invalidate the IN 45300297 because the directions are discretionary and can be easily excised from the notice under the Tribunal’s power to modify the notice without affecting the validity of the IN 45300297 itself.

Certainty of Terms of Notice – Principles

- 73 The Full Bench of the Western Australian Industrial Relations Commission recently considered the requirements for precision of a Prohibition Notice issued under the *Mines Safety and Inspection Act 1994* (WA) (MSI Act) in *Alcoa of Australia Limited v Andrew Chaplyn* [2019] WAIRC 00011; (2019) 99 WAIG 93 (*Alcoa*):
- 75 We agree that the words used in s 31AD and s 31AE, and the context in which they appear in the MSI Act, confer power to issue a prohibition notice that must be certain in its terms as a condition of its valid exercise.
- 76 This intention arises from the stated objects in s 3(1)(a), (b) and (c) of the MSI Act which provide (among other objects):
- (a) to promote, and secure the safety and health of persons engaged in mining operations; and
 - (b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and
 - (c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and
- 77 This intention also arises from s 31AF and the fact that a person issued with a prohibition notice commits an offence if the person does not comply with the notice, or such of the provisions of the notice as are applicable to the person (s 31AG).
- 78 The requirement to specify the matters in s 31AF(c) can only be construed in this context as a requirement to unambiguously identify and make these matters clear (see the discussion in a different statutory context in *Re Lawrence; Ex parte Goldbar Holdings Pty Ltd* (1994)

11 WAR 549, 554, 566 (Malcom CJ); applied by Allanson J in *Bio-Organics Pty Ltd v The Chief Executive Officer, Department of Water and Environment Regulation* [2018] WASC 236 [31] - [34]).

- 79 Thus, on its face a prohibition notice issued pursuant to s 31AB(b) (when read with s 31AF(c)) must unambiguously identify and make clear the mine, or the plant, mining practice or hazardous substance (that is dangerous or likely to become dangerous).
- 80 When s 31AF is read together with s 31AD and s 31AE, and within its context and legislative purpose, a prohibition notice must unambiguously identify and make clear what is to be done to remove the hazard and the requirements that are to be complied with until the inspector is satisfied the hazard or likely hazard has been removed.

Certainty of Terms - Application

- 74 I agree that the words used in s 48 of the OSH Act and the context in which they appear in the OSH Act confer power to issue an improvement notice that must be certain in its terms as a condition of its valid exercise.
- 75 This intention also arises from s 48(5) of the OSH Act an effect that a person issued with an improvement notice commits an offence if the Commissioner is not notified forthwith upon their requirements of the improvement matters being satisfied.
- 76 I find that the requirement that GHD is ‘required to remedy the above’ is a clear reference to GHD’s failure to include a reference to the risk to the hazard of the hollowcore panels falling when being lifted into position by a crane during the construction phase in the Register.
- 77 I find the direction ‘you are required to ensure all aspects of reg 3.140 are raised with your client in a written report’, ‘refer to the *Code of Practice Safe Design of Buildings and Structures 2008*’ and ‘refer to section 23(3a) of the *Occupational Health and Safety Act 1984*’ are not sufficient in that the direction ought to have included the identification of the relevant sections of the COP.
- 78 In *Alcoa* the Full Bench found the use of the words ‘might’ and ‘has been’ gave rise to ambiguity because ‘might’ raises a concept of going to a vague possibility and ‘has been’ because there ought to be an assessment of the state of the hazard at the relevant time. The person in receipt of the prohibition notice (in that matter) is entitled to know, with a high degree of specificity, what it is prohibited from doing. Similarly, in this matter GHD is entitled to know what it is required to do to remedy its failure. The requirement to remedy the omission of the reference to the hazard is clear. However, the further direction to ‘ensure all aspects of reg 3.140 are raised with your client’ is not capable of being confirmed pursuant to s 48 (5) of the OSH Act with veracity.
- 79 Worksafe Commissioner contend that any inadequacy in the directions within the IN 45300297 ought not invalidate the IN 45300297. The Worksafe Commissioner submit that the provision of directions are not mandatory and the discretionary directions may be excised from the IN 45300297 without affecting the validity of the IN 45300297.
- 80 An improvement notice ought to specify the requirements imposed upon the recipient. The IN 45300297 in this matter does fulfill this requirement in part in section 1, whereas in section 2 the directions are not sufficiently clear and unambiguous. However, this does not result in a conclusion that IN 45300297 is invalid and ought to be revoked. The IN 45300297 is able to be affirmed with a modification to remove the directions set out in section 1 and include a direction to include the hazard of hollowcore panels falling when being lifted by a crane in the Register.

- 81 I agree with GHD's submissions that the manner of the expressed time to comply in the IN 45300297 is ambiguous.
- 82 At the hearing GHD submitted that the construction project was near completion. The evidence is that the installation of the flooring and the lifting of concrete panels was completed by the middle of 2019. GHD made submissions to the effect that there may be no need to consider the issues in this matter because the IN 45300297 can no longer have practical effect.
- 83 The IN 45300297 requires GHD to remedy the omission of a reference to the hazard arising from the hollowcore panels from the Register. There is no difference in the practical effect of adding this reference to the Register at any time from the issuance of the IN 45300297, the date of the hearing some twelve months after the completion of the floor and the issuance of this decision. The addition of the reference is a retrospective activity done after the installation, or at least the commencement of the installation, of the floor. It is not disputed that a hollow core panel fell during the installation of the floor which resulted in the attendance of Worksafe inspectors at the site and subsequently the issuing of the IN 45300297.
- 84 Section 48(1)(a) of the OSH Act provides for an improvement notice to be issued where an inspector is of the opinion that any person is contravening the OSH Act and s 48(1)(b) of the OSH Act has contravened a provision of the OSH Act in circumstances that make it likely the contravention will continue and be repeated. GHD contend that IN 45300297 fails to specify under which of these provisions it was issued. I agree that the particular provision of the OSH Act is not clearly specified. In my view both sub-clauses were capable of being applicable at the time that IN 45300297 was issued. With completion of the floor, IN 45300297 may be modified to specify that it is issued pursuant to s 48(1)(b) of the OSH Act being that there has been a contravention of a provision of the OSH Act in circumstances that make it likely that the contravention will continue or be repeated.

Conclusion

- 85 For the reasons set out above I would affirm the IN 45300297 with a modification to remove the directions and add a direction to include hazards arising from the selection of the flooring system in the written report and a modification to the date for compliance to 11 June 2021.