



Australian Government

Comcare

## REASONS FOR DECISION

### APPLICATION FOR INTERNAL REVIEW OF INSPECTOR DEVENY'S DECISION UNDER SECTION 102 OF THE WORK HEALTH AND SAFETY ACT 2011 (CTH) (WHS ACT) TO CANCEL A PROVISIONAL IMPROVEMENT NOTICE.

#### INTERNAL REVIEW DECISION

**Comcare reference:** IR 02/2022-23

**Internal reviewer:** Tyrone Smithers

**Date of decision:** 23 December 2022

**Nature of review:** Internal Review of Inspector Deveny's decision under section 102 of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) to cancel a Provisional Improvement Notice.

#### REVIEWABLE DECISION

**Decision:** Cancellation of a Provisional Improvement Notice

**Comcare Reference:** MC000027854

**Date of decision:** 07 November 2022

**Decision maker:** Inspector Deveny

#### INTERNAL REVIEWER'S DECISION

1. Having conducted this internal review, I have made the decision under subsections 226(1) and 226(2) of the WHS Act to confirm the decision of Inspector Deveny to cancel the Provisional Improvement notice (**PIN**). My reasons for this decision are set out below.

#### REVIEWABLE DECISION

2. The decision under review is a decision of Inspector Deveny to cancel a PIN under section 102 of the WHS Act on 07 November 2022.

3. This internal review was conducted under Part 12 of the WHS Act following a request made by John Miller (HSR) for a review of the decision.
4. The internal reviewer may decide to:
  - a. confirm or vary the reviewable decision; or
  - b. set aside the reviewable decision and substitute another decision that the internal reviewer considers appropriate.<sup>1</sup>

## **JURISDICTION**

5. I am satisfied the application is valid and capable of internal review because:
  - a. the decision of Inspector Deveny to cancel a PIN is a reviewable decision under item 12, section 223 of the WHS Act;
  - b. John Miller is the Health and Safety Representative who issued the PIN and is therefore an eligible person within the meaning of section 223 of the WHS Act;
  - c. the application is in the manner and form prescribed by Comcare; and
  - d. the application for review was made on 22 November 2022 which is within the 14 day prescribed time after the decision came to the applicant's notice.
6. Under section 226 of the WHS Act I must review the reviewable decision and make a decision as soon as is reasonably practicable and within 14 days after the application for internal review is received.

## **MATERIAL EXAMINED DURING THE INTERNAL REVIEW**

7. In reaching my decision, I considered the following material and information:
  - a. The application for review and submissions received on 22 November 2022.
  - b. The Provisional Improvement Notice issued on 18 July 2022.
  - c. The decision by Inspector Deveny on 07 November 2022 to cancel the PIN.

Information supplied to me from the applicant:

- a. Previous information supplied to Inspector Deveny by the applicant.
- b. Email response from the applicant to the internal reviewer provided on 20 December 2022, including attachments and links.
- d. Email response from the applicant dated 21 December 2022.
- e. Further email response from the applicant dated 22 December 2022.

Information supplied to me from the ATO:

- a. Report prepared for Comcare – 01 December 2022.
- b. ATO Working from Home Policy – 16 December 2021.
- c. ATO Covid-19 Roadmap – 24 March 2022.

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<sup>1</sup> Subsection 226(2) of the WHS Act

## OFFICIAL

- d. All staff emails containing information and instruction on policies and procedures pertaining to issues raised in PIN - 03 & 29 March 2022.
- e. "At Risk" consideration document.
- f. Minutes from NHSC meetings – 15 February 2022, 18 March 2022.
- g. How to set up a working at home arrangement policy – 04 April 2022.
- h. Risk assessment and Treatment Plan – Working in the Office – 07 April 2022.
- i. Risk assessments – At risk employees.
- j. Working from home arrangement example email.
- k. COVID-19 Extenuating Circumstances Map.
- l. Flexible working arrangements overview – 26 May 2022.
- m. Reasonable Adjustment Document – 25 March 2022.
- n. Temporary discretion to approve additional work from home – All staff email – 21 July 2022.
- o. All staff email – COVID-19 – latest advice "if you are in a higher risk category you will need to identify yourself to your manager and discuss work from home options" – 06 April 2020.
- p. Contact tracing policy – 11 April 2022.
- q. ATO COVID-19 Pulse Survey Email – 03 June 2022.
- r. Melbourne WHS Site Plan – COVIDSafe return to the workplace document – 13 May 2021.
- s. COVID-19 positive cases on site webpage – 30 June 2022.
- t. Information regarding vaccinations, testing, isolating and travelling – 24 March 2022.
- u. Rapid Antigen Testing Procedural Guide.
- v. ATO Enterprise Agreement – 03 August 2017.
- w. Medical Practitioner short form.
- x. APSC circular 2020/9: Returning to Usual Workplaces – Last updated 14 January 2022.
- y. Risk Assessment – Working from Home – 07 April 2022.
- z. A guide to returning to the office – 23 March 2022.
- aa. All staff email – Our COVID-19 – safe workplace transition plan – 05 June 2020.
- bb. Docklands' site – quarterly site health and safety committee minutes – 01 June 2022.
- cc. New COVID-19 management framework – 09 December 2022.
- dd. COVID-19 personal risk assessment and management plan – 09 December 2022.

Other information I have relied upon to make my decision:

- a. Victorian Health Department website, pandemic order register. [Pandemic Order Register | health.vic.gov.au](https://www.health.vic.gov.au/pandemic-order-register).
- b. Vaccination Numbers and Statistics. [Vaccination numbers and statistics | Australian Government Department of Health and Aged Care](https://www.health.gov.au/vaccination-numbers-and-statistics)
- c. National COVID-19 Community Protection Framework for a COVIDSafe Australia. [National COVID-19 Community Protection Framework for a COVIDSafe Australia \(health.gov.au\)](https://www.health.gov.au/national-covid-19-community-protection-framework-for-a-covid-safe-australia).
- d. Advice for groups at greater risk. [Advice for groups at greater risk | Australian Government Department of Health and Aged Care](https://www.health.gov.au/advice-for-groups-at-greater-risk).  
Risk factors for more serious illness. [Risk factors for more serious illness | Australian Government Department of Health and Aged Care](https://www.health.gov.au/risk-factors-for-more-serious-illness).

- e. Getting help for long covid. [Getting help for Long COVID \(health.gov.au\)](https://www.health.gov.au).
- f. Antivirals and other medicines. [Antivirals and other medicines | Coronavirus Victoria. COVID-19 Oral Treatments \(health.gov.au\)](https://www.health.gov.au).

## **BACKGROUND**

- 8. On 18 July 2022, John Miller, the health and safety representative (HSR) for the Law Design and Practice Group at the Docklands site issued a Provisional Improvement Notice (PIN) to the Australian Taxation Office (ATO).
- 9. The PIN alleges that the ATO has contravened and continues to contravene section 19 of the WHS Act, whilst there are high levels of COVID-19 Community transmission by:
  - a. failing to ensure the ATO undertakes an appropriate risk assessment to weigh up and take account of:
    - the risks to vulnerable workers if they contract COVID-19 in the workplace,
    - the degree of harm vulnerable workers may suffer from contracting COVID-19 in the workplace,
    - suitable ways of eliminating or minimising the risks of vulnerable workers contracting COVID-19 in the workplace, and
    - whether the cost of eliminating or minimising the risk to vulnerable employees is grossly disproportionate to the cost of the risk to these employees;
  - b. putting the health and safety of vulnerable workers at risk by requiring vulnerable workers to attend the Docklands site to carry out their work without taking all reasonably practicable measures to ensure their health and safety at work;
  - c. failing to provide a work environment that minimises the risk of vulnerable workers contracting COVID-19 by not allowing vulnerable workers the choice to work at home for 100% of their working hours; and
  - d. failing to provide information, instructions, and advice to vulnerable workers who attend the Docklands site who may have come into proximity with a positive COVID-19 person.
- 10. On 18 July 2022, the ATO requested a review of the PIN under section 100 of the WHS Act. Comcare (the regulator) appointed Inspector Philip Deveny, to review the PIN and issue a decision.
- 11. On 07 November 2022, Inspector Deveny made a decision under section 102 of the WHS Act to cancel the PIN. John Miller was advised via email of the decision to cancel the PIN on the 08 November 2022.

12. On 22 November 2022, John Miller made an application under section 224 of the WHS Act for an internal review of Inspector Deveny's decision (the application). I am an internal reviewer appointed under section 225 of the WHS Act.
13. In conducting this review, I requested further information from John Miller on 30 November 2022. In accordance with subsection 226(3) of the WHS Act, requesting further information from John Miller paused the 14-day period prescribed by the WHS Act for making my decision. John Miller provided me with the requested information on 20 December 2022. As such, the time frame for me to make my decision was extended until 26 December 2022.

## **APPLICANT'S SUBMISSIONS**

14. In a document accompanying the application form, the applicant sets out the reasons why he seeks an internal review. Those reasons were provided under the following sub-headings:
  - a. The relevant duty holder.
  - b. The cancellation of the March 2022 PIN.
  - c. Confirmed workplace transmissions.
  - d. Controls and short-term arrangements.
  - e. The risks to vulnerable workers.
  - f. New Covid 19 Management Framework.
  - g. Risk Assessments.
  - h. The extenuating circumstances application process.

## **DISCUSSION**

15. I have considered the validity of the PIN and I am satisfied that:
  - a. the HSR had undertaken the required HSR training in order to be able to issue PINs.
16. I have considered the PIN on its own merits. I do not believe the alleged contravention has been properly set out and it fails to detail and give specific examples/evidence as to how the ATO has contravened section 19 of the WHS Act at the Docklands site. In requesting further information, the applicant has been given the opportunity to substantiate his reasonable belief for the notice and corroborate the supplied submissions.

I note the caveat that underpins the entire notice is when there are high levels of COVID-19 community transmission.

After reviewing the Victorian Governments current COVID-19 measures there has been no action to move to a scaled-up tier 1 or 2 strategy for increased community transmission as referenced in the National COVID-19 Community Protection Framework. That indicates the current levels of community transmission in Victoria fall in line with the base level strategy.
17. I have considered the applicant's submissions and the further information supplied and offer the following conclusion to each topic:
  - a. *The relevant duty holder*, this does not affect the validity of the PIN and as such was not a consideration in my decision.

- b. *The cancellation of the March 2022 PIN*, this is of no relevance to the July 2022 PIN. The July 2022 PIN was considered on its own merits and as such the cancellation of the March 2022 PIN was not looked at when determining my decision.
- c. *Confirmed workplace transmission*, I was advised that the ATO can provide records to support this submission, although no evidence was offered by the applicant to back up this submission. While staff may be attending the Docklands site while unknowingly positive to COVID-19 it is difficult to make a conclusion either way about workplace transmission.

However, the measures implemented by the ATO at the Docklands site detailed in the ATO COVID-19 roadmap, COVIDSafe Plan and Melbourne WHS Site Plan – COVIDSafe return to the workplace and the risk assessments that were conducted are in my view reasonably practicable to eliminate or minimise risks to health and safety for all workers.

- d. *Controls and short-term arrangements*, I accept that COVID-19 is a biological hazard and suitable ventilation in office settings is important and recommended across the board as a suitable control measure. The information that has been supplied to me by the ATO in the COVIDSafe plan for the Melbourne site details actions including that air conditioning is placed on its standard operation to enhance the air flow of fresh air. The ATO have also detailed that the air flow is checked regularly, and the air filters are now changed every year (even though they are designed to last 2-3 years).

I further note that when there has been 'high levels' of community transmission all workers have been allowed to work from home 100% of the time. Risk assessments were raised in this point as well but will be covered in paragraph 18(g).

- e. *The risks to vulnerable workers*, the alleged contraventions are not properly made out in the PIN and examples/evidence of contraventions are not provided as to how the PCBU has contravened section 19 of the WHS Act to support the PIN.

The example of the Queensland Governments Amber Alert is not relevant for the Docklands site in Victoria. While recently there has been a general increase in Covid-19 cases in Victoria (the last week however has seen an 11% decrease in cases), all Public Safety Orders have now been revoked. This backs up Inspector Deveny's statement that Public Health Orders are declining.

In looking at Post COVID-19 condition (long covid), it is important to understand what it is. I have referred to [Getting help for Long COVID \(health.gov.au\)](https://www.health.gov.au/long-covid) to gain an understanding on long covid. Long covid is not contagious and is the body responding beyond the initial illness. Government and health authorities recommend the best way to protect against COVID-19 is to get vaccinated, wear a face mask where needed, stay in well-ventilated spaces, and maintain a physical distance of 1.5m, all of which the ATO have supported and/or implemented at the Docklands site.

The ATO has advised me if a worker is suffering from long covid it is dealt with under the Extenuating Circumstances process and the Reasonable Adjustment guidelines. There has been no evidence supplied that indicates an instance of a worker suffering from long covid being unable to access Extenuating Circumstances. The main issue at the present time appears to be the lack of available appointments at long covid clinics, something that the ATO has no control over.

On the information before me I believe the ATO at the Docklands site has in place suitable measures in their COVIDSafe plan including practising physical distancing, wearing a face mask, practising good hygiene, keeping records and acting quickly if workers become unwell, avoiding interactions in enclosed spaces and creating workforce bubbles.

The ATO has advised the percentage of workers over the age of 70 employed at the Docklands site is 0.27%. As noted by Inspector Deveny and acknowledged by the applicant, when there was increased community transmission of COVID-19 in July 2022 the ATO specifically contacted all workers aged over 70 to ascertain their individual situation and determine reasonable adjustments.

These are all relevant factors in considering what is reasonably practicable.

- f. *New Covid 19 Management Framework*, the ATO implemented the new framework on 09 December 2022. The framework sets out three guiding principles for managing the impacts of COVID-19 in the future:
- 1. We provide a safe and healthy workplace, informed by the latest health and regulator guidance, to assist staff manage the risks associated with COVID-19.*
  - 2. We support those at greatest risk of severe illness to take additional personal precautions when needed.*
  - 3. We are ready to respond proportionately to changes in the environment and the circumstances at the time.*

The reasonably practicable and implemented measures that underpin the document include:

- supporting staff to get vaccinated and maintain vaccinated status
- requiring positive or symptomatic people not to attend the office
- getting tested and reporting positive COVID-19 test results
- practising good hygiene including using the additional cleaning products and hand sanitiser available onsite
- supporting the choice to wear a mask in the office
- supporting physical distancing, where possible, and providing choice and other protections to keep people safe where distancing isn't practicable
- training staff with the safe and secure e-learning module
- maintaining and monitoring of indoor air quality in ATO sites
- undertaking regular and thorough cleaning
- implementing site-specific adjustments to address unique environmental factors where appropriate

- staying informed using the myATO COVID-19 resource centre

*And*

- supporting those at greatest risk of serious illness from COVID-19 to stay safe via personal risk assessment and management plans, including temporary adjustments to working arrangements activated in line with relevant Department of Health frameworks.

After reviewing this document, I am confident it conforms with the National COVID-19 Community Protection Framework for a COVIDSafe Australia. Again, Queensland is of little relevance to the Docklands site.

- g. *Risk Assessments*, the ATO completes risk assessments for workers that identify themselves as vulnerable. This process is well communicated to all staff and is suitable for the confidentiality and privacy of vulnerable workers. It also allays potential discrimination concerns of the ATO approaching workers it may consider vulnerable. An individualised approach rather than a blanket risk assessment for vulnerable worker groups, in my opinion, provides a higher-level of protection to these workers and any potential personalised needs they may require. I have not seen actual evidence that risk assessments are not occurring, rather an assumption has been made that when someone makes an Extenuating Circumstances application, a risk assessment may not be undertaken.
- h. *The Extenuating Circumstances application process*, as detailed in the submissions this does not apply to the ATO Docklands work group as all applications have been supported. After reviewing the information that was supplied, while there were high levels of community transmission the ATO approved work from home 100% of the time. In many of the cases that are being presented to the Fair Work Commission, the ATO is still approving work from home measures until such time as it has considered the health assessment. The ATO is entitled to obtain a second Doctors opinion which may go against the original treating Doctors recommendations. As such I place little weight on this submission.

18. I have considered the information supplied by the ATO and note the following:

- a. Various documents and information were supplied by the ATO. I have reviewed and looked at the documents listed above.
- b. As a PCBU the ATO has a primary duty of care to all workers to provide a safe workplace, so far as is reasonably practicable. The PCBU implemented measures for all workers at the Docklands site. Of the documents supplied I have given the most weight in my decision to:
  - Report prepared for Comcare.
  - ATO Covid-19 Roadmap.
  - Melbourne WHS Site Plan – COVIDSafe return to the workplace document.



- Temporary discretion to approve additional work from home – All staff email.
- All staff email – COVID-19 – latest advice “if you are in a higher risk category you will need to identify yourself to your manager and discuss work from home options”.
- COVID-19 Extenuating Circumstances Map.
- Reasonable Adjustment Document.
- Risk assessment and Treatment Plan – Working in the Office.
- Risk assessments – At risk employees & COVID-19 personal risk assessment and management plan.
- New COVID-19 management framework.

However, all the documents that have been supplied offer valuable information and insight to the management of COVID-19 by the ATO at the Docklands site.

- c. The documents are in line with Government Directions and Frameworks. This includes supporting workers at higher risk and providing options for them to work from home at times of high community transmission of COVID-19.
  - d. As previously detailed the measures the ATO has implemented at the Docklands site are reasonably practicable to eliminate or minimise risks to the health and safety for all workers.
19. Further to this, I have considered the reasoning of Inspector Deveny in making his original decision and I note the following:
- a. I gave no weight to the information around the previous PIN issued in March 2022 in coming to my decision.
  - b. As detailed in paragraph 17(c) I find that it is difficult to make a conclusion either way regarding workplace transmission of COVID-19 at the Docklands site.
  - c. I am satisfied that communication between the ATO and its workers is clear and regular.
  - d. I have seen evidence that the ATO gave all workers the option to work from home when community transmission increased in July 2022.
  - e. I have now confirmed the new management framework was implemented on 09 December 2022 as detailed in paragraph 18(f).
  - f. I am satisfied that the ATO has suitable contact tracing arrangements in place.
  - g. Vulnerable workers identifying themselves as potentially vulnerable is the logical process as detailed in paragraph 18(g).
  - h. I am satisfied that clear information, instruction and advice is available and provided to workers regarding contact tracing procedures.

20. I have also had regard to relevant government health advice and publications regarding COVID-19 and offer the following relevant observations:

a. **Vulnerable person definition**, as per the National COVID-19 Community Protection Framework for a COVIDSafe Australia, Individuals at Higher risk are listed as follows:

- Individuals Over 70 years old.
- COVID-19 at-risk medical conditions:
  - *blood cancer (such as leukaemia, lymphoma or myelodysplastic syndrome)*
  - *non-haematological cancer (diagnosed in the past 5 years)*
  - *childhood cancer*
  - *chronic inflammatory condition requiring medical treatment*
  - *primary or acquired immunodeficiency*
  - *chronic renal (kidney) failure*
  - *chronic lung disease*
  - *heart disease (coronary heart disease or failure)*
  - *diabetes*
  - *chronic liver disease*
  - *neurological conditions such as stroke or dementia*
  - *severe mental health condition*
  - *severe obesity (BMI ≥ 40 kg/m<sup>2</sup>)*
  - *poorly controlled blood pressure*
- Immunocompromised:
  - *immune suppressive therapy*
  - *chemotherapy*
  - *radiotherapy*
  - *immunotherapy*
  - *targeted anti-cancer therapy*
  - *bone marrow transplant.*

Safe Work Australia and The Australian Health Protection Principal Committee (AHPPC) still lists the people that are at greater risk of more serious illness with COVID-19 to be:

- Aboriginal and Torres Strait Islander people 50 years and older with one or more chronic medical conditions
- People 65 years and older with one or more chronic medical conditions
- People 70 years and older, and
- People with compromised immune systems

I submit in the absence of an actual vulnerable person (worker) definition relating to COVID-19, that the above examples are more acceptable. The definition offered by the applicant in the PIN issued on 18 July 2022 is not consistent with the above definitions.

- b. **Vaccination information**, being vaccinated reduces the risk of getting infected. If you do get infected, being vaccinated reduces the risk of:
- developing severe illness
  - hospitalisation
  - death.

**If you are unvaccinated, you are at greatest risk of severe illness from COVID-19.**

As per the Victorian Governments COVID-19 website the current level of community cover is 94.8% of 12+ eligible Victorians second dose and 70.3% of 16+ eligible Victorians third dose. This level of community protection provides the best cover to Individuals (workers) at Higher Risk. The ATO supports staff to get vaccinated and maintain vaccinated status which offers the greatest level of cover to all workers.

- c. **Current Public Safety Orders**, in Victoria there are currently no Public Safety Orders in place relating to COVID-19.
- d. **National Framework**, the National Framework details base level and scaled up strategies in dealing with outbreaks and/or high community prevalence of COVID-19 cases. The Tier 1 measures suitable for the Business Sector may include mask wearing for staff, maximise activity in outdoor/well ventilated areas & support for cases, close contacts and vulnerable staff to work from home, if possible.

What the ATO has previously done is in line with this framework as evidenced by allowing staff the option to work from home 100% of the time for 6 weeks during the July 2022 outbreak. Further, the new management framework that was implemented by the ATO on 09 December 2022 conforms to the National Framework.

- e. **Antivirals and other medicines**, now available and accessible for people with a high risk of getting very sick with COVID-19 and help them stay well. There are medicines to:
- treat COVID-19 symptoms if you get infected
  - reduce your chances of getting COVID-19

COVID-19 medicines do not replace vaccination.

Only people most likely to need hospital care can get COVID-19 medicines. This includes people who:

- are aged 70 and over
- are aged 50 and over with certain health conditions (or 30 if they're Aboriginal or Torres Strait Islander)
- have a weakened immune system, disability or are born with heart disease.

Some of these medicines are called 'oral treatments' or 'antivirals'. Clinical trials have demonstrated that these treatments significantly reduce the risk of severe

disease, hospitalisation or death, when a course is started within 5 days of symptom onset in adults with mild to moderate COVID-19 at high risk of progression to severe disease.

21. Accordingly, I have not seen evidence to substantiate, and cannot form a reasonable belief, that the ATO has contravened or continues to contravene section 19 of the WHS Act. On the evidence and information before me, I believe the ATO has taken steps that are reasonably practicable to protect all workers, including vulnerable workers, from the risks of COVID-19 while at work. At times of high community transmission of COVID-19, such as the July 2022 outbreak, the ATO permitted all workers to work from home 100% of the time. I have also not seen any evidence to suggest that the ATO will not allow vulnerable workers to work from home 100% of the time in the future if there are high levels of COVID-19 community transmission again.

I acknowledge that Flexible working arrangements are available to all workers as per the enterprise agreement.

Further, there seems to be some confusion in what the applicant is actually trying to achieve with the PIN. From the submissions and further information received it appears the applicant would like all vulnerable workers to work from home 100% of the time regardless of community transmission levels.

## **DECISION**

22. The applicant seeks that Inspector Deveny's decision to cancel the PIN is overturned. The object of the internal review is to ensure the correct or preferable decision is made in the circumstances.
23. On the information before me, and for the reasons set out above, I am satisfied that the correct or preferable decision is to confirm the decision of Inspector Deveny to cancel the Provisional Improvement notice.
24. In making this decision I have considered all relevant information including the views of Inspector Deveny.
25. This decision does not preclude or limit the ability for Comcare to make further enquiries into the health and safety of workers in a business or undertaking, nor does it detract from the ATO's ongoing duty to ensure, so far as is reasonably practicable, the provision and maintenance of a work environment that is safe and without risks to health and safety.



Tyrone Smithers

Internal Reviewer appointed under section 225 of the *Work Health and Safety Act 2011* (Cth)  
National Operations and Oversight