

Decision to accept or reject a WHS undertaking given by Winder Controls Australia Pty Ltd

Entity	Winder Controls Australia Pty Ltd (ACN 147 395 364)
Issue	Whether to accept or reject a WHS undertaking given by Winder Controls Australia Pty Ltd
Legislation	Part 11 of the <i>Work Health and Safety Act 2011</i>
Decision maker	Peter Day Executive Director, NSW Resources Regulator Regional NSW

Section 216 decision

Under section 216 of the *Work Health and Safety Act 2011*, I, Peter Day, having a delegated authority from the Secretary of Regional NSW, have decided to **accept** the WHS undertaking given by Winder Controls Australia Pty Ltd that is attached to this decision.

Reasons for decision

Legislation

- Section 216 of the WHS Act provides that:
 - The regulator may accept a written undertaking (a WHS undertaking) given by a person in connection with a matter relating to a contravention or alleged contravention by the person of the WHS Act.
 - A WHS undertaking cannot be accepted for a contravention or alleged contravention that is a Category 1 offence.
 - The giving of a WHS undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates.
- Section 217 requires the regulator to give the person seeking to make an enforceable undertaking written notice of the regulator's decision to accept or reject the enforceable undertaking and the reasons for the decision. The regulator will also publish on its website any WHS undertaking and decision to accept or reject an enforceable undertaking.
- Section 222 provides that no proceedings for a contravention or alleged contravention of the WHS Act may be brought against a person if a WHS undertaking is in effect, or has been completely discharged, in relation to that contravention. If proceedings have already been

commenced when the regulator accepts a WHS undertaking, then the regulator must take all reasonable steps to have the proceedings discontinued as soon as possible.

4. The maximum penalty for failing to comply with a WHS undertaking is \$297,010 in the case of a corporation. Failure to comply with an undertaking may also result in prosecution action being taken in relation to the original alleged offence.
5. The regulator may delegate any functions conferred under the WHS Act to another person. The Secretary of Regional NSW is the 'regulator' for the purposes of the WHS Act and has delegated the function to accept or reject a WHS undertaking under section 216 of the WHS Act to the Executive Director, Resources Regulator.
6. The regulator has issued, and published on the Resources Regulator's website, [guidelines](#) relevant to the acceptance of WHS undertakings as required by section 230 of the WHS Act.

Background

1. On 6 October 2020 at the Appin East Mine, during the removal of the winder rope from the drift winder as part of an equipment upgrade project, the head sheave pulley wheel, weighing several tonnes, dislodged from its support frame and fell approximately 13 metres to the ground below.
2. At the time, a contract worker was positioned on the ground level, within a taped off, restricted access area directly below the pulley wheel. The worker had to move in order to avoid being struck by the falling object. No injuries resulted from the incident.
3. The mine is an underground coal mine that produces coking coal. Endeavour Coal Pty Limited is the mine operator of the Appin Colliery.
4. At the time of the incident, Endeavour Coal had engaged a principal contractor, Winder Controls Australia Pty Limited (WCA), to undertake the drift winder upgrade project.
5. WCA was a person conducting a business or undertaking (PCBU) at the coal mining workplace.

WHS undertaking given by Winder Controls Pty Ltd

6. On 19 January 2022, WCA submitted a WHS undertaking proposal to the regulator. Consistent with the [guidelines](#) the undertaking was developed using the pre-proposal advisory service offered by the regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
7. In summary, the WHS undertaking proposed will impose obligations on WCA to:
 - a. Commit that the behaviour that lead to the alleged contravention has ceased and provide an assurance that steps have been taken to prevent a recurrence of the incident
 - b. Publish a public notice in the Illawarra Mercury and Sydney Morning Herald
 - c. Disseminate information about the undertaking to all workers

Reasons for decision

- d. Reimburse the regulators' costs incurred during the investigation including investigative, legal, animation development and monitoring costs of the undertaking. A total cost of **\$53,626**
- e. Develop the "Rope Handling Informative" Program (Rope Handling Program), which will improve the industry knowledge related to rope handling with the aim of preventing similar incidents from occurring. Minimum spend **\$60,000**
- f. Deliver the Rope Handling Program to industry through the regulator's Mechanical Engineering, Electrical Engineering and Mine Managers Seminars in 2022 and 2023 (three seminars each year). Minimum spend **\$30,000**
- g. Engage a suitably trained and qualified industry expert to develop a Mental Awareness Generic Induction Module for delivery in both surface and underground generic inductions. Minimum spend **\$65,000**
- h. Make a donation of **\$10,000** to the Black Dog Institute of Australia
- i. Develop a seminar on safe access to shafts tailored to opal mining and present in two opal mining regions of NSW. Minimum spend **\$35,000**
- j. Complete the undertaking on or before 24 months from acceptance of the undertaking by the regulator, with a total minimum spend of **\$253,626**

Consideration and findings

- 8. The guidelines require that the effectiveness and appropriateness of a WHS undertaking as a regulatory outcome be considered by reference to the nature of the alleged contravention, impacts of the alleged contravention on any worker, the industry or the community and the compliance history of the company involved.
- 9. The effectiveness and appropriateness of a WHS undertaking as a regulatory outcome compared with other available enforcement measures, including prosecution, is an important consideration when deciding if a WHS undertaking should be accepted.
- 10. No physical injuries arose from the incident, however, members of the work crew were exposed to risks to their safety during the rope removal.
- 11. The offence is objectively serious but, by way of balance, the failings that arose were not of a systemic nature in that it was the first time the method had been applied by WCA after a risk assessment had been completed, workshop testing undertaken and procedures developed.
- 12. In the circumstances of this case, the undertaking satisfactorily reflects the objective seriousness of the alleged WHS offence and brings with it both general and specific deterrence commensurate with that which prosecution proceedings would.
- 13. WCA does not have any prior convictions under work health and safety legislation nor has it been subject of any other enforcement action administered by the regulator such as an official caution, improvement notice, prohibition notice, penalty notice or WHS undertaking.
- 14. The entering into a WHS undertaking by WCA will provide a level of specific deterrence and the requirement under the WHS Act to publish the WHS undertaking, if accepted, will provide a level of general deterrence more broadly across the mining industry.

Reasons for decision

15. The projects provided by the WHS undertaking are commendable having regard to the tangible benefits delivered to workers, industry and the community and deliver benefits beyond mere compliance with the WHS Act.
16. Accordingly, I have decided to **accept** the WHS undertaking proposal.

Date of decision: **07 February 2022**



Peter Day
Executive Director
Resources Regulator
Regional NSW

NOTE

In accordance with the NSW Resources Regulator's Enforceable Undertakings Guidelines this decision will be published on the regulator's website.

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