

WHS undertaking varied by Sibelco Australia Limited

Entity	Sibelco Australia Limited (ACN 000 971 844)
Issue	Application to vary a WHS undertaking made by Sibelco Australia Limited
Legislation	Part 11 of the <i>Work Health and Safety Act 2011</i>
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Regional NSW

Section 221 agreement

Pursuant to section 221 of the *Work Health and Safety Act 2011* (**WHS Act**), I, Anthony Keon, having a delegated authority from the Secretary of Regional NSW (**the regulator**), **give written agreement** to the varying of the WHS undertaking made by Sibelco Australia Limited (**Sibelco**) as follows:

- An additional donation of \$80,000 to the Hunter Brain Injury Service Centre (HBISC) to cover a shortfall in the minimum spend committed to under the WHS undertaking.
- An extension until 31 January 2021 to complete the WHS undertaking.

In accordance with section 221(3) of the WHS Act, the notice of variation of the WHS undertaking will be published on the regulator's website.

Reasons for agreement

Legislation

1. The Secretary of the Department of Regional NSW (**Secretary**) is the regulator for the purposes of the WHS Act. The Secretary has delegated the function under section 221 of the WHS Act to the Executive Director, Resources Regulator.¹
2. Section 221 of the WHS Act relevantly states:
221 Withdrawal or variation of WHS undertaking
 - (1) *A person who has made a WHS undertaking may at any time, with the written agreement of the regulator:*
 - (a) *withdraw the undertaking, or*
 - (b) *vary the undertaking.*
 - (2) *However, the provisions of the undertaking cannot be varied to provide for a different alleged contravention of the Act.*
 - (3) *The regulator must publish, on the regulator's website, notice of the withdrawal or variation of a WHS undertaking.*
3. The Secretary has issued, and published on the Resources Regulator's website, guidelines relevant to the varying of WHS undertakings (**Guidelines**), as required by section 230(4) of the WHS Act.

¹ *Work Health and Safety Act 2011*, sch 2 cl 1(1)(b) and *Work Health and Safety (Mines and Petroleum Sites) Act 2013*, s 5(1).

Background

1. Sibelco processes and supplies raw materials for manufacturing and primary industries in Australia, New Zealand, and Asia.
2. Sibelco is the mine operator of the Salt Ash Sand Plant, which is located at Salt Ash, about 20 kilometres north of Newcastle, NSW. The Salt Ash Sand Plant processes raw sand and produces silica sands for glass making and other purposes that are mined from nearby sand pits.
3. On 1 February 2016 an employee of Sibelco fell 2.7 metres from the off-driver's side platform of an articulated dump truck (ADT). The ADT was located on a low loader road transport truck and was being prepared to be reversed from the low loader the Salt Ash Sand Plant. The worker suffered serious injuries.
4. The undertaking given by Sibelco was accepted by the delegate of the Secretary on 14 November 2018.

Reasons for variation

5. Sibelco provided a final report on the WHS undertaking and the project outcomes. The report identified a shortfall in the minimum spend of \$78,839.80.
6. The report stated that the primary reasons for the shortfall were:
 - i. missing records of payment as a result of the divestment of Sibelco's Australian sites over the last 24 months and subsequent personnel leaving the business
 - ii. the restrictions brought about by Covid-19 reduced the actual spend on industry seminars with the final seminars moved to online only or cancelled completely.
7. Sibelco has proposed an additional donation of \$80,000 to HBISC to make up the shortfall in the minimum spend committed to under the WHS undertaking.

Conclusion

8. I am satisfied that Sibelco has made reasonable efforts to comply with the WHS undertaking and the compliance timeframes set out in the WHS undertaking accepted on 14 November 2018.
9. I particularly note that Sibelco has delivered all the required projects under the undertaking, and it is only in relation to the minimum expenditure that it has fallen short.
10. In this regard, I am satisfied that the restrictions brought about by Covid-19 had an impact on the actual spend on industry seminars, and further Sibelco has only tried to claim expenses for which it is able to evidence through records, rather than trying to estimate the likely actual spend.
11. I further note that Sibelco, rather than seeking to have the undertaking amended to finalise on completion of the projects (with an underspend), has instead proactively offered to donate the value of the minimum expenditure shortfall to the HBISC.
12. This approach is commendable as it ensures the greatest value and impact is achieved under the undertaking, rather than creating an environment where expenses are potentially arbitrarily accrued to meet a nominal value of minimum expenditure.

13. In this instance, Sibelco has been able to deliver on the originally agreed projects for below anticipated cost and is now able to provide an additional worthwhile initiative.
14. In this respect the donation to HBISC will go towards renovation work that will improve the clinical areas at the facility, and I am satisfied that this will provide a clear benefit to the community.
15. Finally, I am satisfied that the varying of the undertaking meets the requirements of the WHS Act and the Enforceable Undertakings Guidelines.
16. Accordingly, I have determined to agree to vary the WHS undertaking made by Sibelco as proposed.

Date of decision: **12 January 2021**



Anthony Keon
Executive Director
Resources Regulator
Regional NSW

NOTE In accordance with section 221 of the Work Health and Safety Act 2011 this notice will be published on the regulator's website.

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