

WHS undertaking given by Clarence Coal Pty Limited accepted

Entity	Clarence Coal Pty Limited (ACN 083 465 212)
Issue	Whether to accept or reject a WHS undertaking given by Clarence Coal Pty Limited
Legislation	Part 11 of the Work Health and Safety Act 2011
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Regional NSW

Section 216 and 218 decisions

Pursuant to section 216 of the *Work Health and Safety Act 2011* (**WHS Act**), I, Anthony Keon, having a delegated authority from the Secretary of Regional NSW, have determined to **accept** the WHS undertaking given by Clarence Coal Pty Limited (**Clarence Coal**) that is attached to this decision.

For the purposes of section 218 of the WHS Act, I determine that the WHS undertaking is enforceable from when Clarence Coal is first notified of my decision to accept that WHS undertaking.

Reasons for decision

Legislation

1. The Secretary of Regional NSW (Secretary) is the '**regulator**' for the purposes of the WHS Act. The Secretary has delegated the function under section 216 of the WHS Act to the Executive Director, Resources Regulator.¹
2. Sections 216-219 (inclusive), 222(1) and 230(4)(b) of the WHS Act relevantly state:

216 Regulator may accept WHS undertakings

- (1) *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 this Act.*
- (2) *A WHS undertaking cannot be accepted for a contravention or alleged contravention that is a Category 1 offence.*

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).

- (3) *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.*

217 Notice of decision and reasons for decision

- (1) *The regulator must give the person seeking to make a WHS undertaking written notice of the regulator's decision to accept or reject the WHS undertaking and of the reasons for the decision.*
- (2) *The regulator must publish, on the regulator's website, notice of a decision to accept a WHS undertaking and the reasons for that decision.*

218 When a WHS undertaking is enforceable

A WHS undertaking takes effect and becomes enforceable when the regulator's decision to accept the undertaking is given to the person who made the undertaking or at any later date specified by the regulator.

219 Compliance with WHS undertaking

A person must not contravene a WHS undertaking made by that person that is in effect.

Maximum penalty: ...

- (b) *in the case of a body corporate—\$250,000.*

222 Proceeding for alleged contravention

- (3) *The regulator may accept a WHS undertaking in relation to a contravention or alleged contravention before proceedings in relation to that contravention have been finalised.*

230 Prosecutions

- (4) *The regulator must issue, and publish on the regulator's website, general guidelines for or in relation to...*
- (b) *the acceptance of WHS undertakings under this Act.*

3. The Secretary has issued, and published on the Resources Regulator's website, guidelines relevant to the acceptance of WHS undertakings ([Guidelines](#)) as required by section 230(4) of the WHS Act.

Background

4. Clarence Coal (the mine) is operated by Clarence Coal Pty Ltd (the person conducting the business or undertaking – PCBU) and is located approximately 15km east of Lithgow. The mine is a workplace within the meaning of section 8 of the WHS Act.
5. On 4 July 2018, two workers were working underground in the 806A panel 'G' heading. Worker 1 was tasked to operate the continuous miner (CM) and worker 2 was tasked as a cable hand. Both workers were employed on a full-time basis by the mine.
6. On arriving at the incident site, worker 2 barred down what he believed to be two packers

(vertical coal structures). The packers were located at the incident site location, which was not supported by either mesh or bolts.

7. After assisting another worker with an unrelated task, worker 1 started operating the CM, when a large amount of material, comprising coal and mudstone, collapsed from the rib and cornice.
8. The material struck the two workers. Worker 1 was pinned by a large piece of coal weighing about 750kg. Both workers received injuries and required hospitalisation.
9. The incident was investigated by the Resources Regulator.
10. An [Investigation Information Release](#) regarding the incident was published by the regulator on 20 July 2018.
11. Clarence Coal has one prior work health and safety conviction under s 8(1) of the *Occupational Health and Safety Act 2000 (NSW)* for an incident that occurred on 12 July 2004

Investigation for alleged contravention

12. The Resources Regulator's Major Safety Investigations Unit investigated the incident. The investigation was conducted under work health and safety laws and examined the cause and circumstances of the incident. Information obtained during the investigation suggests that contraventions of the *Work Health and Safety Act 2011 (WHS Act)* may have been committed by Clarence Coal.

Rejection of previous undertaking given by Clarence Coal

13. On 31 January 2020, Clarence Coal submitted a signed WHS undertaking to the regulator. The Regulator rejected the undertaking and published its reasons for the [decision](#) on its website.

WHS undertaking given by Clarence Coal

14. On 29 April 2020, Clarence Coal submitted a further signed WHS undertaking to the regulator. Consistent with the Guidelines the undertaking was developed using the pre-proposal advisory services offered by the regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
15. In summary, the WHS undertaking will impose an obligation on Clarence Coal to:
 - a. commit that the behaviour that led 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 Lithgow Mercury and the Sydney Morning Herald
 - c. disseminate information about the undertaking to Clarence Coal workers

- d. reimburse the regulator's costs associated with the investigation, legal advice and administration of \$81,717 and with monitoring of the undertaking, a total cost of \$91,717
- e. deliver the Mindful Safety Worker Program (MSW Program) to its workforce, and report on the veracity and success of the program, at a total cost of \$61,000
- f. work with Coal Services to develop a bespoke Virtual Reality "Free Roam" Strata Hazard Training Program (VRFR). The VRFR will be shared with industry. The total cost of the VRFR Program is \$76,400. Develop a video of the training at a cost of \$8,000
- g. undertake a trial of DSI Silcrete in consultation with the Australian Coal Association Research Program. The total cost of the trial is \$100,000
- h. engage the University of Queensland to undertake an ergonomic assessment of roof and rib bolting processes used at the Mine to identify areas of improvement. The results of the assessment and any improvement opportunities will be made available to share at NSW coal mining industry seminars. The total cost of the ergonomics assessment is \$50,825
- i. develop of a short animation video presentation of the incident and safety lessons learnt, in consultation with the regulator, at a cost of \$12,000
- j. provide a donation of \$125,000 to the Lithgow Community Hospital that will enable it to increase availability of the therapy pool by improving the pump and filter systems and purchase new hydro-therapy exercise equipment
- k. commit to a total minimum spend of \$524,942
- l. complete the undertaking on or before 18 months from acceptance by the regulator.

Considerations and findings

- 16. I am satisfied that the undertaking given by Clarence Coal meets the requirements of the WHS Act and Guidelines.
- 17. While under the WHS Act the giving of an undertaking does not constitute an admission of guilt, Clarence Coal has acknowledged that the regulator alleges a contravention of its health and safety duty and regrets the incident occurred.
- 18. There is a strong community expectation that companies such as Clarence Coal are aware of its obligations under the WHS Act and have systems in place to ensure compliance.

19. The regulator has carefully considered this matter and determined that the nature of the alleged contravention and the actions taken by Clarence Coal in response to the incident are assessed as being appropriate for consideration of an undertaking.
20. Clarence Coal has implemented measures to minimise the recurrence of the circumstances and behaviour that gave rise to the alleged offences.
21. The subject WHS undertaking, if accepted, will require Clarence Coal to incur costs of at least \$524,942, including the funding and delivery of safety and community projects at a minimum cost of \$433,225.
22. The acceptance of an undertaking will ensure that the regulator does not incur further costs in relation to the matter, particularly in relation to investigation and legal costs, which may never fully be recouped through prosecution action.
23. The commitment by Clarence Coal to fund and undertake the specified strategies and initiatives is considered significant and I am now satisfied that they are likely to achieve a better compliance outcome than pursuing prosecution action alone.
24. The VRFR Program is clearly innovative and has the potential to deliver clear and tangible benefits, beyond what would ordinarily be expected, to both the mine's workforce and the broader industry. It will enable workers to develop their ability to apply TARPS and safety procedures in a practical manner.
25. Also, sharing of the VRFR Program with industry will be a new benchmark in interactive training.
26. The trial of DSI Silcrete in consultation with the Australian Coal Association Research Program is innovative and although it is not a new product, I can see the value in the trial. Aside from its potential to lower the risks associated with mechanically supporting ribs, it may also reduce the risk of fire and improve visibility in underground mines.
27. The short animation video presentation of the incident and safety lessons learnt will be an educational tool for workers and industry. The ability for workers to visualise safety incidents may permit a deeper understanding about the importance of effective risk management.
28. The \$125,000 donation to Lithgow Community Hospital is a significant contribution to the local community. It will provide a direct and tangible benefit to community members by increasing the availability of the therapy pool through pump and filter improvements and the provision of hydro-therapy equipment.

29. I previously noted that the Mindful Safety Worker Program is commendable and of clear benefit to building the safety culture at the mine but queried whether it sufficiently went beyond what would ordinarily be expected of a sophisticated operator.
30. Clarence Coal have now provided additional information to show that they already undertake a number of activities to reinforce safety culture and wellbeing (such as the engagement of Ethos Health and the Mental Health Movement in addition to more traditional activities such as HSEC meetings and SLAMS). In this respect I am satisfied that the Program is in addition to these measures and what would ordinarily be expected.
31. Accordingly, having considered the collective benefits of the undertaking in its entirety, I am satisfied that it will provide greater benefits to the workforce, industry and community than any other enforcement response would deliver.
32. I am satisfied that the requirement under the WHS Act to publish the undertaking and this decision, is likely to achieve better compliance outcomes than prosecution action alone and will provide similar specific and general deterrence to successful legal proceedings.
33. I am also satisfied that the initiatives given by Clarence Coal in the undertaking resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
34. Accordingly, I have determined to accept the WHS undertaking given by Clarence Coal Pty Limited.

Date of decision: **07 May 2020**



Anthony Keon
**Executive Director
Resources Regulator
Regional NSW**

NOTE: In accordance with section 217 of the *Work Health and Safety Act 2011* this decision will be published on the regulator's website.