

WHS undertaking given by Mt Arthur Coal Pty Limited accepted

Entity	Mt Arthur Coal Pty Limited (ACN 000 181 902)
Issue	Whether to accept or reject a WHS undertaking given by Mt Arthur Coal Pty Limited
Legislation	Part 11 of the <i>Work Health and Safety Act 2011</i>
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Department of Planning, Industry and Environment

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 the Department of Planning, Industry and Environment (**the regulator**), **accept** the WHS undertaking given by Mt Arthur Coal Pty Limited (**MACPL**) that is attached to this decision.

For the purposes of section 218 of the WHS Act, I **determine** that the WHS undertaking will take effect when MACPL is first notified of my decision to accept the WHS undertaking.

Reasons for decision

Legislation

1. The Secretary of the Department of Planning, Industry and Environment (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 216-218 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.*
- (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.*

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).

Reasons for 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.

3. The Secretary has issued, and published on the Resources Regulator's website, Enforceable Undertaking Guidelines (Guidelines) relevant to the acceptance of WHS undertakings as required by section 230(4) of the WHS Act, (www.resourcesregulator.nsw.gov.au/__data/assets/pdf_file/0010/539326/Enforceable-Undertaking-Guidelines.pdf).

Background

4. MACPL is the mine operator of the Mt Arthur Mine (**the mine**) located about five kilometres southwest of Muswellbrook NSW. It is a large open cut mine that uses a strip-mining method to remove overburden and coal by shovel and excavators. Haul trucks transport coal to onsite processing and transport facilities. The mine is operated 24 hours a day, seven days a week. The mine produces coal for domestic and international energy sector customers.
5. On 10 August 2017, a 29-year-old contract worker suffered serious burns to his face, neck, torso and arms when a fire started while he was refuelling a diesel-powered tyre handler at the mine's heavy vehicle refuelling facility.
6. The refuelling hoses at the refuelling facility were fitted with quick connect (dry break) couplings, but the tyre handler's fuel tank was not.
7. The worker attached a free flow adapter nozzle to an 800 litre per minute refuelling hose and placed it in the filling neck of the tyre handler's fuel tank.
8. When diesel began to flow, the absence of the quick connect coupling caused the adapter to eject from the filling neck under high pressure causing diesel to flow onto the tyre handler and surrounding area.
9. Diesel entered the tyre handler's engine bay and ignited on a hot engine surface in the vicinity of its turbocharger. The flame extended out towards the worker, igniting his clothing, head, arms and body.
10. The injured worker sustained burns to 8% of his body. These injuries required extensive treatment including skin grafts.
11. The incident was investigated by the NSW Resources Regulator.
12. In October 2018, the regulator published its investigation findings on its web site at https://www.resourcesregulator.nsw.gov.au/__data/assets/pdf_file/0009/835389/DOC18-696448-Investigation-report-Mt-Arthur.pdf.
13. At that time, the regulator also published an animation about the incident to share investigation learnings with the mining industry at <https://www.resourcesregulator.nsw.gov.au/compliance-and-enforcement/investigation-reports/learning-from-investigations>.

Proceedings for alleged contravention

14. The regulator alleges that the mine operator, MACPL, failed to comply with its health and safety duty under section 19(1) of the WHS Act to ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by MACPL, while they were at work in the business or undertaking. The regulator further alleges that the failure exposed a worker to a risk of death or serious injury.
15. Subject to section 222(1) of the WHS Act, no proceedings for an alleged contravention of the WHS Act may be brought against MACPL if a WHS undertaking is in effect in relation to that contravention or alleged contravention.

WHS undertaking given by MACPL

16. On 25 July 2019, MACPL submitted a signed WHS undertaking to the regulator.
17. Consistent with the Guidelines the proposal was developed using the pre-proposal advisory services offered by the regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
18. In summary, the WHS undertaking imposes an obligation on MACPL to:
 - Publish a public notice in the Newcastle Herald and Muswellbrook Chronicle about the terms of the Enforceable Undertaking. The notices will provide the community with information about the effect of the WHS undertaking and will provide a general deterrent to others with similar responsibilities under the WHS Act.
 - Disseminate information about the undertaking to MACPL staff, workers and contractors. This will ensure that MACPL staff, workers and contractors are aware of the WHS undertaking and the deliverables specified in the undertaking.
 - Reimburse the regulator's costs associated with investigation, legal costs, administration costs and monitoring costs of \$77,750.
 - Implement engineering upgrades to MACPL's heavy vehicle refuelling facility and other diesel distribution facilities at the mine to improve the safety of workers and reduce the likelihood of a similar incident occurring in the future at a cost of \$793,000.
 - Consult with the Muswellbrook division of the NSW Rural Fire Service to support the division's initiatives and donate \$200,000 towards the implementation of the service's initiatives (\$210,000 total spend).
 - Conduct an industry seminar to share MACPL's learnings on effective contractor management at a cost of \$10,000.
 - Commit to a total minimum spend of \$1,090,750 in meeting the terms of the undertaking.
 - Complete the undertaking within 24 months.

Considerations and findings

19. I am satisfied that the undertaking given by MACPL meets the requirements of the WHS Act and Guidelines.
20. While under the WHS Act the giving of an enforceable undertaking does not constitute an admission of guilt, MACPL has demonstrated appropriate contrition by acknowledging that its

alleged failure to meet a health and safety duty exposed a worker to a risk of death or serious injury.

21. There is a strong community expectation that companies such as MACPL are aware of their obligations under the WHS Act and have systems in place to ensure compliance.
22. The actions taken by MACPL in response to the incident and attitude toward compliance are appropriate factors to take into account when considering an undertaking.
23. While MACPL was not the direct employer of the injured worker, it still had a significant duty of care - one that was not abrogated by the use of a contractor.
24. In this respect, I am satisfied that the undertaking proffered by MACPL adequately reflects the seriousness of these obligations, and is significant, particularly in terms of monetary value, with the total cost of the terms of the undertaking expected to exceed \$1.09 million.
25. I note that this is in addition to the estimated \$960,000 MACPL submits that it has spent in implementing rectification works to minimise the recurrence of the circumstances and behaviors that gave rise to the alleged offence.
26. In this regard, I note that the cost of the undertaking is over double the recent penalty imposed on Perilya Broken Hill Limited which was fined \$500,000 after a court found that it had failed in its duties, and those failures exposed a worker to serious injury or death.
27. I am also satisfied that the engineering solutions proposed under the undertaking are in addition to the significant remediation measures already implemented, and that these engineering controls go beyond the minimum compliance requirements and remediation efforts expected of MACPL in addressing the behavior that led to the alleged contravention.
28. The workforce at MACPL will directly benefit as a result of the undertaking from enhanced civil, electrical, mechanical and engineering upgrades to the mine's refuelling facilities.
29. The \$200,000 donation to the Rural Fire Service will also provide a direct and tangible benefit to the community by providing valuable support and funding towards vital firefighting services in the region.
30. Further, the Shared Learnings initiative will provide broader benefits to the mining industry by sharing best practice contractor management learnings.
31. Finally, 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 not be fully recouped through prosecution action.
32. Having regard to the above, I am satisfied that the WHS undertaking will provide far greater benefits to the workforce, industry and community than any other enforcement response; and the specified strategies are significant and are likely to achieve a better compliance outcome than prosecution action.
33. The strategies proposed in the undertaking go well beyond compliance and reinforce the prevention of incidents of this nature. Such strategies could not be achieved through prosecution action alone.
34. MACPL has no prior convictions under the WHS Act and I am of the view that the total value of the undertaking far exceeds the likely penalty that would be imposed by a court following successful prosecution action.

WHS undertaking



Reasons for decision

35. The total monetary value of the undertaking and the requirement to publish the undertaking and this decision is likely to provide similar specific and general deterrence to successful legal proceedings.
36. I am satisfied that the initiatives given by MACPL in the undertaking resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
37. Accordingly, I have determined to accept the WHS undertaking given by MACPL.

Date of decision: **02 August 2019**

A handwritten signature in black ink, appearing to read 'Anthony Keon', with a horizontal line extending to the right.

Anthony Keon

Executive Director

Resources Regulator

Department of Planning, Industry and Environment

NOTE

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

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