



DOC18/701535

Entity: Mangoola Coal Operations Pty Ltd, ACN 127 535 755

Issue: Whether to accept an enforceable (WHS) undertaking in relation to an alleged contravention of the WHS Act.

Legislation: *Work Health and Safety Act 2011* Part 11

Decision maker: Lee Shearer
Deputy Secretary, Resources Regulator
Coordinator General for the Central Coast

Section 216 decision

As authorised by section 216 of the *Work Health and Safety Act 2011* (WHS Act), I, Lee Shearer, having delegated authority from the Secretary of the Department of Planning and Environment (the **regulator**), have decided to **accept** the enforceable WHS undertaking given by Mangoola Coal Operations Pty Ltd, as attached to this decision.

The undertaking takes effect and is in force immediately upon Mangoola Coal Operations Pty Ltd being notified of this decision.

Reasons for decision

Legislation

1. Section 216 of the WHS Act provides that:
 - a) 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.
 - b) 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.
 - c) The regulator must issue, and make public, general guidelines for or in relation to the acceptance of enforceable undertakings under the WHS Act.

2. Section 217 of the WHS Act provides that:

The regulator is required 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 is also required to publish any decision to accept an enforceable undertaking.

3. 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. In exercising functions under the WHS Act, the regulator must have regard to the objects set out in section 3 of the WHS Act.
5. The maximum penalty for failing to comply with a WHS undertaking is \$250,000 in the case of a corporation, and \$50,000 in the case of an individual. Failure to comply with an undertaking may also result in prosecution action being taken in relation to the original alleged offence.
6. The regulator may delegate any functions conferred under the WHS Act to another person. The Secretary has delegated the function to accept a WHS undertaking under section 216 of the WHS Act to the Deputy Secretary.

Background

7. Mangoola Coal Operations Pty Ltd owns and operates the Mangoola Open Cut Mine. The coal mine is located on Wybong Road about 20 kilometres west of Muswellbrook and 10 kilometres north of Denman in the Hunter Valley region of NSW. Mangoola Open Cut produces thermal coal for both domestic and export markets.
8. On 10 October 2016 during normal mining operations, the cabin and cabin riser of a 250-tonne Liebherr R9250 excavator dislodged and tipped off the side of the excavator, with the operator still inside, coming to rest against the tracks. The worker suffered minor physical injuries and was freed from the cabin of the excavator by the mine's emergency response team. The worker has not returned to full time employment following the incident.
9. The investigation by the regulator focused on determining whether Mangoola Coal Operations, as a person conducting a business or undertaking, complied with its primary duty of care under section 19 of the WHS Act.

Proposed undertaking

10. On 24 September 2018, Mangoola Coal Operations Pty Ltd submitted a signed WHS undertaking to the regulator. Consistent with the Enforceable Undertaking 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.
11. In summary, the WHS undertaking:
 - a) Provides a commitment that the behaviour that lead to the alleged contravention has ceased and provides an assurance that steps have been taken to prevent a recurrence of the incident.
 - b) Provides a commitment to disseminate information about the undertaking to workers and other relevant stakeholders.
 - c) Provides a commitment to pay the regulator's investigation, legal and administration costs of \$85,000 incurred during the investigation and litigation process.

- d) Provides a commitment to pay the regulator the sum of \$8,500 to cover the costs associated with monitoring compliance with the undertaking.
- e) Provides \$371,210 to undertake the following:
 - i. Engage the Maintenance Technology Institute (MTI) within the Department of Mechanical Engineering at Monash University to undertake an assessment and prepare a report on the incident, including providing recommendations. The final report, including recommended strategies prepared by MTI and compliance and assurance will be made available to the regulator and the industry, and published on Mangoola Coal's website.
 - ii. Develop and share an educational video on the excavator incident and safety lessons with workers and the broader industry. The video will be made available to the regulator to share with the industry.
 - iii. Develop and implement a training program titled 'Human Factors in Maintenance'. The training will support the identification and appropriate control of core hazards and risks that workers will be exposed to in the workplace. The training will be provided to all maintenance workers and staff at Mangoola Coal, including OEM workers and staff. The course materials developed will be made available to the regulator and to industry.
 - iv. Provide funding of \$79,490 for the purchase of a modified vehicle for transport of residents of Merton Living's retirement village in Denman. The donation will provide valuable and much needed means of transport for retired people with mobility issues in Mangoola Coal's local community.
 - v. A final report on the undertaking and outcomes to the regulator.

Considerations and findings

- 12. While under the WHS Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note Mangoola Coal Operations Pty Ltd acknowledge the allegations put forward by the regulator that Mangoola Coal Operations Pty Ltd failed to comply with a health and safety duty under section 19 of the WHS Act and that the failure exposed a worker to a risk of death or serious injury.
- 13. There is a strong community expectation that companies such Mangoola Coal Operations Pty Ltd are aware of their obligations under the WHS Act and have systems in place to ensure compliance.
- 14. Mangoola Coal Operations Pty Ltd have implemented measures to minimise the recurrence of the circumstances and behaviour that gave rise to the alleged offending conduct.
- 15. The agreed terms proposed by Mangoola Coal Operations Pty Ltd, are estimated to cost \$464,710 including the funding and delivery of safety and community projects with a minimum spend of \$371,210.
- 16. Included in the enforceable terms, Mangoola Coal Operations Pty Ltd have agreed to pay the regulator's costs of \$93,500 to cover the investigation, legal expenses and compliance monitoring. This is an appropriate undertaking that will ensure that the

regulator, and ultimately the taxpayer, does not bear undue financial costs as a result of its actions in investigating and pursuing the alleged contravention.

17. 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.
18. The commitment by Mangoola Coal Operations Pty Ltd to fund and undertake the specified projects is considered significant and is likely to achieve a better compliance outcome than pursuing prosecution action alone.
19. Mangoola Coal Operations Pty Ltd have no prior convictions for offences under the WHS Act.

Conclusion

20. I am satisfied that the proposed undertaking meets the requirements of the WHS Act and the Enforceable Undertakings Guidelines.
21. I am of the view that the proposed undertaking will deliver future and long-term benefits to workers, the industry and community through increasing training and awareness of health and safety issues for workers and provide essential community transport services.
22. I am satisfied that the resources produced from the proposed undertaking will be shared with the wider industry and contribute to safety outcomes that align with the objects of the WHS Act.
23. 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.
24. I am satisfied that the initiatives proposed by Mangoola Coal Operations Pty Ltd resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
25. Accordingly, I have determined to accept the WHS undertaking given by Mangoola Coal Operations Pty Ltd.

Date of decision: 25 September 2018



Lee Shearer

Deputy Secretary, Resources Regulator
Coordinator General for the Central Coast
Department of Planning 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.