

# WHS undertaking

## Reasons for decision

Entity	Clarence Coal Pty Limited (ACN 083 465 212)
Issue	Whether to accept or reject a WHS undertaking
Legislation	Part 11 of the <i>Work Health and Safety Act 2011</i>
Decision maker	Peter Day Executive Director, Resources Regulator Department of Primary Industries and Regional Development

### Section 216 and 218 decisions

Pursuant to section 216 of the *Work Health and Safety Act 2011*, I, Peter Day, having a delegated authority from the Secretary of the Department of Primary Industries and Regional Development, have determined to **accept** the WHS undertaking given by Clarence Coal Pty Limited that is attached to this decision.

For the purposes of section 218 of the *Work Health and Safety Act 2011* (**WHS Act**), I determine that the WHS undertaking is enforceable from when Clarence Coal Pty Limited is first notified of my decision to accept that WHS undertaking.

### Reasons for decision

#### Legislation

- Section 216 of the WHS Act provides that:
  - The Resources Regulator (**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.

2. 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 is also required to publish on its website 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 \$365,595 in the case of a corporation, and \$73,095 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 of the Department of Primary Industries and Regional Development (Secretary) is "the regulator" for the purposes of the WHS Act and has delegated the function to accept a WHS undertaking under section 216 of the WHS Act to the Executive Director, Resources Regulator.
7. The regulator has issued, and published on the regulator's website, guidelines relevant to the acceptance of WHS undertakings as required by section 230 of the WHS Act.

## Background

8. Clarence Colliery is operated by Clarence Coal Pty Limited and is located near Lithgow, NSW. The mine is a workplace within the meaning of section 8 of the WHS Act.
9. On 2 November 2021, at Clarence Colliery, two workers suffered serious injuries including multiple spinal fractures when they were struck by falling roof ply rock of about 4m<sup>2</sup> in dimension and weighing about 570kg. The roof ply rock fell from an area in-between a hydraulic breaker line roof support (BLS) and existing primary support roof bolts and mesh during pillar extraction operations.
10. An Investigation information release regarding the incident was published by the regulator in December 2021.
11. On 31 October 2023, the regulator commenced prosecution proceedings in the District Court in relation to the above event, alleging that Clarence Coal Pty Limited had contravened section 32 of the WHS Act, by failing to comply with a health and safety duty under section 19 of the Act (a Category 2 offence).

## WHS undertaking given by Clarence Coal Pty Limited

12. On 1 August 2024, Clarence Coal Pty Limited (**Clarence Coal**) submitted a signed WHS undertaking to the regulator. Consistent with the guidelines the undertaking was developed using the pre-proposal advisory service offered by the regulator which provided feedback on the proposed terms of the undertaking.

13. In summary, the WHS undertaking will impose obligations 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, the Newcastle Herald and the Sydney Morning Herald
  - c) disseminate information about the undertaking to all workers
  - d) reimburse the regulator's costs incurred including investigative, legal and monitoring costs of the undertaking, a total cost of \$290,108
  - e) engage a third-party engineering company to design, develop and prototype an innovative medical evacuation patient support apparatus capable of affixing to Clarence Coal's underground transport vehicles and reducing road vibration impact experienced by injured workers in transit to the surface. The estimated total cost of this project is \$404,100.
  - f) engage a registered training organisation, being Coal Services' Mines Rescue and Training or other approved registered training organisation, to work in conjunction with a consultancy (proposed to be Amidy Team Development) to develop and deliver a bespoke Mining Industry Safe Supervision "Best Practice" Certification Package. The estimated total cost of this initiative is \$365,000.
  - g) donate \$129,133.50 to the Rural Fire Service to purchase a Can AM Defender Max Vehicle and the appropriate modifications required to make the vehicle fit for purpose.
  - h) donate \$28,995 to the Local Emergency Management Committee (LEMC) for installation of defibrillators and provision of batteries, in twelve vehicles operated by the NSW Police Force in the Lithgow Local Government Area.
  - i) commit to a total minimum spend of **\$1,217,336.50**
  - j) complete the undertaking on or before **24 months** from acceptance by the regulator.

## Considerations and findings

14. I am satisfied that the proposed undertaking meets the requirements of the WHS Act and the guidelines. I have also had regard to the objects set out in section 3 of the WHS Act in considering this matter.
15. 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 and that workers suffered injury as a result of the incident.
16. 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.
17. The subject WHS undertaking, if accepted, will require Clarence Coal to incur costs of at least \$1,217,336.50 including the funding and delivery of safety and community projects at a minimum cost of \$927,228.50.

18. In this regard, I note that the cost of the undertaking is significantly more than the most recent penalty imposed in the District Court as a result of prosecution action by the regulator for a similar offence. In the case of McColm v Endeavour Coal Pty Limited a fine of \$300,000 was imposed.
20. In this respect, I am satisfied that the undertaking proffered by Clarence Coal adequately reflects the seriousness of the incident and the alleged offending, and is significant, particularly in terms of monetary value.
21. However, the monetary value alone is not a determinative factor. The strategies of the undertaking need to go beyond mere compliance and provide clear and tangible benefits to workers, the broader industry or the community - beyond what the regulator would ordinarily expect of an operator.
22. Clarence Coal has provided an undertaking which contains projects which I am satisfied meet those objectives.
23. The projects are of a progressive nature that represent significant value, both monetary and meaningful non-monetary benefits provided to workers, industry and community, and address gaps or current deficiencies in industry WHS risk control measures.
24. Finally, the donations of \$129,133.50 to the Rural Fire Service to purchase a Can AM Defender Max Vehicle and \$28,995 to the Local Emergency Management Committee for installation of defibrillators and the provision of batteries, in twelve vehicles operated by the NSW Police Force in the Lithgow Local Government Area, will provide tangible benefits to the broader community.
25. 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 prosecution proceedings.
26. I am of the view that the total value of the undertaking exceeds the likely penalty that would be imposed by a court following successful prosecution action.
27. I am also satisfied that the requirement under the WHS Act to publish the undertaking and this decision, will provide similar specific and general deterrence to successful legal proceedings.
28. The acceptance of an undertaking will ensure that the regulator, and ultimately the taxpayer, 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.
30. Accordingly, I have determined to accept the WHS undertaking given by Clarence Coal.

Date of decision: 7 August 2024



Peter Day

Executive Director, Resources Regulator

Department of Primary Industries and Regional Development

**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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