



DOC18/938237

Entity: Bloomfield Collieries Pty Limited (ACN 000 106 972)

Issue: Whether to accept or reject a WHS undertaking given by Bloomfield Collieries Pty Limited.

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

Decision maker: Anthony Keon
Chief Compliance Officer / Executive Director
Resources Regulator

Section 216 and 218 decisions

Pursuant to s. 216 of the *Work Health and Safety Act 2011* (**WHS Act**), I, Anthony Keon, having delegated authority from the Secretary of the Department of Planning and Environment (**the regulator**), **accept** the WHS undertaking given by Bloomfield Collieries Pty Limited (**Bloomfield**) 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 Bloomfield is first notified of my decision to accept that WHS undertaking.

Reasons for decision

Legislation

1. The Secretary of the Department of Planning (**Secretary**) is 'the regulator' for the purposes of the WHS Act¹. The Secretary has delegated the function under s. 216 of the WHS Act to the Deputy Secretary, Resources Regulator and Chief Compliance Officer.
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.*
- (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.*

¹ cl. 1(1)(b) of Schedule 2 to the WHS Act and s. 5(1) of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*.

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

- (1) *Subject to this section, no proceedings for a contravention or alleged contravention of this Act may be brought against a person if a WHS undertaking is in effect in relation to that contravention.*

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**) (https://www.resourcesandgeoscience.nsw.gov.au/_data/assets/pdf_file/0010/539326/Enforceable-Undertaking-Guidelines.pdf), as required by s. 230(4) of the WHS Act. I have had regard to those Guidelines.

Background

4. Bloomfield was the operator of Rix's Creek Mine (**Mine**) located 5 kilometres northwest of Singleton, NSW. The Mine was a workplace within the meaning of s. 8 of the WHS Act.
5. On 13 December 2016 Mr Stephen Norman, 53, was fatally injured at the mine when his head was struck by the steel tailgate of a haulage truck.
6. Mr Norman was an employee of RW & LM Simmons (Contractor), a partnership that provided transport services to Bloomfield at the mine.
7. At the time of the incident Mr Norman was attempting to climb into the trailer under the suspended tailgate in order to clean out residual material in the trailer. It is understood that he did so on the belief that Bloomfield was no longer permitting the Contractor to use the wash bay facilities at the mine.

8. The tailgate fell and Mr Norman's head was crushed between the tailgate and the rear of the trailer body, causing fatal injuries.
9. The incident was investigated by the NSW Resources Regulator. An investigation report was prepared, with an extract published on the Resources Regulator's website.
10. As a result of the investigation the Regulator has commenced proceedings against the Contractor for alleged breaches of sections 19 and 32 of the Work Health and Safety Act 2011 in relation to the incident.
11. As part of the investigation the Regulator also examined the obligations and duties of Bloomfield, both in relation to the specific incident and more generally.

Proposed undertaking

12. On 23 November 2018, Bloomfield proffered a WHS undertaking to the Secretary.
13. As part of the undertaking, Bloomfield have acknowledged that the regulator has alleged Bloomfield has contravened section 19(1) of the WHS Act in connection with the incident and has expressed remorse in relation to the incident.
14. The WHS undertaking given by Bloomfield has the following elements:
 - Bloomfield is required to publish notices, in a prescribed form, in the *Newcastle Herald* and *Singleton Argus*. Those notices set out the circumstances of the alleged offence and of the enforceable undertakings that Bloomfield is required to meet. That notice provides the public with information about the effect of the WHS undertaking and will provide a general deterrent to others with similar responsibilities under the WHS Act.
 - The additional measures that Bloomfield has implemented since the 13 December 2016 incident are set out in the WHS undertaking, which demonstrate the steps it has taken to date to prevent reoccurrence of a similar event, which relevantly include improved contractor management.
 - Bloomfield is required to disseminate information about the WHS undertaking to workers and contractors on its various sites, including displaying information on WHS noticeboards, discussion at toolbox talks with staff and contractors, and discussion at Bloomfield's senior management and leadership forums. This ensures that Bloomfield's workers and contractors are aware of the WHS undertaking, which includes ongoing commitments by Bloomfield to comply with the WHS Act and that the behaviours that led to the alleged contravention will not re-occur.
 - Total minimum estimated cost to Bloomfield of the WHS undertaking is \$507,705. This is comprised of the following:
 - Payment of **\$109,205** to the Resources Regulator, for the investigative, legal and administrative costs incurred by the Resources Regulator in respect to Bloomfield's part of the 13 December 2016 incident.
 - Payment of a further \$8,500 for the future costs that will be incurred by the Resources Regulator monitoring compliance by Bloomfield with the WHS undertaking.
 - Payment of **\$50,000** to the Hunter Medical Research Institute, to fund research into Advanced Traumatic Brain Injury Treatment. That research is focused on

prevention (public health campaign and safety strategies), improving post-hospital rehabilitation care for those that suffer traumatic brain injury, and improved/targeted in-hospital treatments. This contribution would not be an outcome that would be secured if Bloomfield is successfully prosecuted for the alleged category 3 offence under the WHS Act.

- o Delivery of the "Video Animation Initiative", which will deliver two video animations for distribution to Bloomfield's 800 employees and contractors, presenting each to at least 4 mining industry forums or events as agreed with the Resources Regulator, publication Bloomfield's website, and permitting the Resources Regulator to publish each video as it determines. One of those animations will share safety lessons from the incident. The other animation will address truck safety, to be used as an educational tool in the mining and transport industries. These animations provide important tools to provide effective means of communicating with key industry sectors about risks associated with truck operations and how to manage those risks. The total estimated cost of this Initiative is \$55,000. This outcome would not be available as an outcome of the successful prosecution of Bloomfield for the alleged category 3 offence.
- o Develop a mental health resource toolkit to assist in the management of serious or high consequence incidents in the workplace, with requirements to address issues that arise before, during and after those incidents. The toolkit will be supported by and include an engaging visual asset (such as a video) and be made available to at least 20 key Bloomfield workers, to industry groups and organisations, and to the Resources Regulator. The total estimated cost of this toolkit is **\$285,000**. This initiative would not be available as an outcome of successful prosecution of Bloomfield for an alleged category 3 offence.

Considerations and findings

15. I am satisfied that the WHS undertaking given by Bloomfield meets the requirements of the WHS Act and the Guidelines.
16. I note that the investigation by the Resources Regulator did not identify any evidence that Bloomfield had issued a directive that the wash bay could no longer be used by the Contractor to clean out trailers. Rather, the investigation found that other workers continued to use the wash bay and the facility was available to the Contractor.
17. Further, there was no direct evidence to establish that Bloomfield was aware that the Contractor had ceased using the wash bay for the purpose of cleaning of the trailers and had changed their practice.
18. Given the above evidence, it is arguable as to whether Bloomfield could have reasonably foreseen the specific risk posed by the change in practice by the Contractor, which ultimately resulted in the death of Mr Norman.
19. However, Bloomfield still had a general duty of care to its workers, and the contractor's workers (including Mr Norman), under section s. 19(1) of the WHS Act in relation to the broader risks posed by its operations.

20. In this respect the Regulator's investigation identified alleged failings of Bloomfield in relation to the implementation, supervision and enforcement of its safety management system in respect to the Contractor.
21. Further, the investigation found that there was significant uncertainty and ambiguity as to whether the Contractor was operating under its own safety management system, or that of Bloomfield's.
22. Irrespective of the ability to demonstrate a nexus between the death of Mr Norman and the Bloomfield's action (or inactions), Bloomfield still had a significant duty of care to its workers – one that could not be contracted or delegated out.
23. In this respect, I am satisfied that the undertaking proffered by Bloomfield 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 \$500,000. This is in addition to approximately \$85,000 already spent on remedial actions following the incident.
24. Of note, the costs of the proposed undertaking exceed the penalty recently imposed on Newcrest Mining Ltd, which was fined \$450,000 after a court found that it had failed in its duties, and those failings directly contributed to the death of one of its worker.
25. Further, I am of the view that the WHS undertaking will provide far greater benefits to the workforce, industry and community than any other enforcement response including criminal prosecution. In this regard, prosecution action could not achieve the outcomes specified in the undertaking, the specific terms of the undertaking have clear and tangible benefits.
26. I consider that the undertaking will increasing awareness of health and safety issues, improve contractor management, and provide tools to help protect the mental health of workers before and after a serious workplace incident. The funding of medical research into advanced traumatic brain injuries will benefit mine industry workers and the Hunter community and may potentially have a broader impact on the global medical community.
27. 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.
28. I am satisfied that the initiatives given by Bloomfield in the undertaking resolve both the behaviour of concern that led to the alleged contravention and rectify the consequences of the conduct.

29. Accordingly, I have determined to accept the WHS undertaking given by Bloomfield Collieries Pty Limited, and determine that the undertaking is enforceable from the date notice is given to Bloomfield of that decision.

Date of decision: **12 December 2018**



Anthony Keon

Chief Compliance Officer / Executive Director

Resources Regulator

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 Resources Regulator's website.