

File no:	PUB17/506
Entity:	Coal & Allied (NSW) Pty Limited, ACN 075 612 216
Issue:	Whether to accept an enforceable (WHS) undertaking in relation to an alleged contravention of the WHS Act.
Legislation:	<i>Work Health and Safety Act 2011 Part 11</i>
Decision maker:	Lee Shearer, Coordinator General Central Coast Coordination and Resources Regulation Division

SECTION 216 DECISION TO ACCEPT WHS UNDERTAKING

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 Coal & Allied (NSW) Pty Limited, as attached to this decision.

The undertaking takes effect and is in force immediately upon Coal & Allied (NSW) Pty Limited 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 Secretary must have regard to the objects set out in section 10 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 Act to another person. The Secretary has delegated the function to accept a WHS undertaking under section 216 of the Act to the Coordinator General.

Background

7. Coal & Allied (NSW) Pty Limited (formerly Rio Tinto Coal (NSW) Pty Limited) is the mine operator of the Mount Thorley Warkworth Mine, a large open cut coal operation about 15 kilometres south-west of Singleton, NSW.
8. On 2 October 2014, a worker was ejected from the access ladder on the Caterpillar 16M Grader at the Mount Thorley Warkworth Mine. The worker was standing on the access ladder of the grader to clean the outside glass of the cabin window. The ladder rose inadvertently when the cabin door was closed. The worker fell from the ladder about 1.5 metres to the ground and suffered very serious injuries.
9. The investigation by the regulator found sufficient evidence to support a prima facie case and the elements of an offence under section 32 for failure of the section 19 duty of a person conducting a business or undertaking of the WHS Act.
10. On 4 October 2016, the regulator commenced prosecution action against Rio Tinto Coal (NSW) Pty Limited alleging that the mine operator contravened section 32 of the WHS Act. At the time of the alleged contravention the maximum penalty for this offence committed by a body corporate was \$1,500,000.

Proposed undertaking

11. On 18 October 2017 Coal & Allied (NSW) Pty Limited 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.
12. In summary, the WHS undertaking proposes to:
 - a) Ensure that the behaviour that lead to the alleged contravention has ceased and will take, so far as is reasonably practicable, steps to prevent recurrence of the incident.

- b) Commits to take steps in order to comply with their obligations under the WHS Act and *Work Health and Safety (Mines and Petroleum Sites) Act 2013*.
- c) Disseminate information about the undertaking to the workers, safety and health representatives, and other relevant stakeholders.
- d) Pay the regulator's costs of \$122,500 incurred during the investigation of the incident.
- e) Pay the regulator's legal costs of \$201,000 incurred during the investigation and litigation.
- f) Pay the regulator the sum of \$8,500 to cover costs associated with monitoring the undertaking.
- g) Provide \$345,000 to develop and deliver a safety project that is targeted at young people of school leaving age that has the capacity to improve industry performance in the longer term that includes:
 - i. design and develop a pilot educational program incorporating a short film using virtual reality and mobile app
 - ii. deliver the pilot program to two local schools during the second semester of 2018
 - iii. an independent review to assess the effectiveness and outcomes of the pilot program and findings made available to stakeholders
 - iv. seek broader industry interest and funding to create a long term education program
 - v. submit the project for approval to be presented at the annual NSW Minerals Council HSEC Conference
 - vi. publish all available project resources on their website and film productions on YouTube for public use
 - vii. deliver a final report on the undertaking and outcomes to the regulator.

Considerations and findings

13. While under the WHS Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note Coal & Allied (NSW) Pty Limited acknowledges the allegations put forward by the regulator that it failed to comply with a health and safety duty under sections 32 and 19 of the WHS Act and that the failure exposed a worker to a risk of death or serious injury.
14. Coal & Allied (NSW) Pty Limited is the mine operator of Coal & Allied's two large open cut coal operations in NSW. There is a strong expectation that large companies such as Coal & Allied (NSW) Pty Limited are aware of their obligations under the WHS Act and have systems in place to ensure compliance.
15. Coal & Allied (NSW) Pty Limited has implemented a number of measures to minimise the recurrence of the circumstances or behaviour that gave rise to the alleged offending

conduct. In particular I note that Coal & Allied (NSW) Pty Limited estimates that it has already spend in excess of \$500,000 on such rectifications works.

16. The agreed terms proposed by Coal & Allied (NSW) Pty Limited as part of the WHS undertaking are estimated to cost over \$677,000, including the funding and delivery of a safety project with a minimum spend of \$345,000. Notably this expenditure is in addition to the rectification works already carried out.
17. Included in the enforceable terms, Coal & Allied (NSW) Pty Limited has agreed to pay the regulator's costs of \$332,000 to cover the investigation, legal expenses and compliance monitoring. This is an appropriate undertaking that will ensure that the regulator does not bear undue financial costs as a result of its actions in investigating and pursuing the alleged contravention.
18. The acceptance of an undertaking will also 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.
19. Coal & Allied (NSW) Pty Limited's commitment to fund and undertake a project working with young people of school leaving age in order to impart valuable skills to them to enable a successful, safe and healthy transfer into industries such as mining, construction, engineering and manufacturing and other financial commitments is considered significant, and is likely to achieve a better compliance outcome than pursuing prosecution action alone.
20. I particularly note that Coal & Allied (NSW) Pty Limited will seek approval to present the project at the annual NSW Minerals Council HSEC conference and will publish project resources on its website and film production materials on video sharing platforms such as YouTube, furthering the project's reach and impact.
21. Importantly, the pilot project will be subject to an independent review and evaluation and those findings will be shared with all stakeholders with a final report on outcomes provided to the regulator. Following that review and any required changes, Coal & Allied (NSW) Pty Limited will seek broader industry interest and funding from community funds to move the project to a long term, sustainable model. This has the real potential to create considerable, and broad, industry reach by focusing on the next generation of workers in the mining and other high risk industries.

Conclusion

22. I am satisfied that the proposed undertaking meets the requirements of the WHS Act and the Enforceable undertakings guidelines.
23. I note that Coal & Allied (NSW) Pty Limited have already implemented a number of measures to minimise the recurrence of the circumstances or behaviours that gave rise to incident, and that the proposed undertaking provides a suitable and appropriate alternative to pursuing prosecution action.
24. I am of the view that the proposed undertaking will deliver future and long term benefits to workers, the industry and community through increasing awareness of safety and

wellbeing in the next generation of young school leavers at the time of transitioning into the workforce.

25. Further, the terms of the undertaking, and 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.
26. I am satisfied that the initiatives proposed by Coal & Allied (NSW) Pty Limited resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
27. Accordingly, I have determined to accept the WHS undertaking given by Coal & Allied (NSW) Pty Limited. In accordance with the WHS Act the regulator will discontinue the current proceedings against Coal & Allied (NSW) Pty Limited as soon as practicable.

Date of decision: 20 October 2017



Lee Shearer

Coordinator General

Central Coast Coordination and Resources Regulation Division

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.

