



DOC18/832825

Entity: Sibelco Australia Limited (ACN 000 971 844)

Issue: Whether to accept or reject a WHS undertaking given by Sibelco Australia 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 217 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 Sibelco Australia Limited (**Sibelco**) that is attached to this decision.

For the purposes of s. 218 of the WHS Act, I **determine** that the WHS undertaking is enforceable from when Sibelco 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.
2. Sections 216-219 (inclusive), 222(4) 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

- (4) *If the regulator accepts a WHS undertaking before the proceedings are finalised, the regulator must take all reasonable steps to have the proceedings discontinued as soon as possible*

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.

Background

4. Sibelco processes and supplies raw materials for manufacturing and primary industries in Australia, New Zealand, and Asia.
5. Sibelco is the mine operator of the Salt Ash Sand Plant, which is located at Salt Ash, about 20 kilometres north of Newcastle, NSW. The Salt Ash Sand Plant processes raw sand and produces silica sands for glass making and other purposes that are mined from nearby sand pits.
6. On 1 February 2016 an employee of Sibelco fell 2.7 metres from the off-driver's side platform of an articulated dump truck (ADT). The ADT was located on a low loader road transport truck and was being prepared to be reversed from the low loader the Salt Ash Sand Plant. The worker suffered a skull fracture requiring emergency craniotomy surgery to reduce brain swelling. Injuries included a jaw fracture, a brain haemorrhage which required secondary surgery, and ongoing loss of hearing.
7. The incident was investigated by investigators from the NSW Resources Regulator.

The pending proceedings

8. On 30 January 2018, the then Director Major Investigations of the Resources Regulator commenced criminal proceedings in the District Court of NSW against Sibelco, alleging that the mine operator contravened s. 32 of the WHS Act by failing to comply with a health and safety duty imposed under s. 19 of the WHS Act.
9. The offence alleged in those proceedings is a “category 2” offence for which the maximum penalty, where committed by a body corporate, is \$1,500,000.
10. The proceedings are next before the Court for directions on 19 November 2018.

WHS undertakings given by Sibelco

11. On 17 October 2018, Sibelco Australia 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:
 - 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 \$163,252 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 the undertaking.
 - e) Provides a minimum of \$341,697.50 to undertake the following:
 - i. Develop and share an educational video on legislative requirements, safety issues and improving access systems for new and legacy articulated dump trucks with workers and the broader industry.
 - ii. Presentations about the incident, lessons learned and fall from height at five industry forums and/or seminars to further raise awareness about fall from height risks and fall protection.
 - iii. Provide and fund two internships that include work placement and research opportunities at Sibelco sites for university students studying work health and safety.
 - iv. Donate \$190,000 to the Hunter Brain Injury Service Centre for infrastructure projects and works at the centre.

- v. Engage a third party to undertake an audit of all articulate dump trucks at Sibelco mine sites in NSW against access, egress and fall prevention requirements of Mining Design Guideline MDG 15: Mobile and transportable plant for use on mines and petroleum sites. The audit will provide a report and action plan to the regulator.
- vi. 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, Sibelco has demonstrated appropriate contrition by acknowledging that its failure to meet its health and safety duty exposed a worker to a risk of death or serious injury.
14. There is a strong community expectation that companies such Sibelco are aware of their obligations under the WHS Act and have systems in place to ensure compliance.
15. Sibelco has implemented measures to minimise the recurrence of the circumstances and behaviour that gave rise to the alleged offences.
16. The subject WHS Undertaking, if accepted, will require Sibelco to incur costs of at least \$513,449.50, including the funding and delivery of safety and community projects at a minimum cost of \$341,697.50.
17. The subject WHS Undertaking, if accepted, will also require that Sibelco pay the Resources Regulator's costs of \$171,752 associated with the investigation, legal expenses and compliance monitoring. That obligation 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.
18. 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.
19. The commitment by Sibelco Australia Limited to fund and undertake the specified projects is considered significant and is likely to achieve a better compliance outcome than pursuing prosecution action alone.
20. Sibelco Australia Limited have no prior convictions for offences under the WHS Act. However, there was one previous conviction in 2003 against Sibelco Australia Limited for contravention of the *Occupational Health and Safety Act 1983* (NSW) (repealed) as a result of the fatality of at the Cressfield Bentonite Mine in 2000.

Conclusion

21. I am satisfied that the proposed undertaking meets the requirements of the WHS Act and the Enforceable Undertakings Guidelines.
22. 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 health and safety issues and provide enhanced rehabilitation services in the Hunter region to

workers and their families for traumatic brain injuries that are not currently available outside of metropolitan locations.

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 Sibelco Australia Limited 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 Sibelco Australia Limited.
26. In accordance with the WHS Act the regulator will discontinue the current proceedings against Sibelco Australia Limited as soon as practicable.

Date of decision: **14th November 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 regulator's website.