

Decision to reject a WHS undertaking given by Maules Creek Coal Pty Ltd

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| Entity | Maules Creek Coal Pty Ltd (ACN 140 533 875) |
| Issue | Whether to accept or reject a WHS undertaking given by Maules Creek Coal Pty Ltd |
| Legislation | Part 11 of the <i>Work Health and Safety Act 2011</i> |
| Decision maker | Anthony Keon Executive Director, NSW Resources Regulator Regional NSW |

Section 216 decision

Under section 216 of the *Work Health and Safety Act 2011*, I, Anthony Keon, having a delegated authority from the Secretary of Regional NSW, have decided to **reject** the WHS undertaking given by Maules Creek Coal Pty Ltd that is attached to this decision.

Reasons for decision

Legislation

1. The Secretary of Regional NSW (Secretary) is the '**regulator**' for the purposes of the *Work Health and Safety Act 2011* (**WHS Act**). The Secretary has delegated the function under section 216 of the WHS Act to the Executive Director, Resources Regulator.¹
2. Sections 216-217 (inclusive) 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 *Work Health and Safety Act 2011*, sch 2 cl 1(1)(b) and *Work Health and Safety (Mines and Petroleum Sites) Act 2013*, s 5(1).

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.*

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](#)), as required by section 230(4) of the WHS Act.

Background

4. Maules Creek Coal Mine is operated by Maules Creek Coal Pty Ltd (**MCCPL**) and is located near Boggabri, NSW. The mine is a workplace within the meaning of section 8 of the WHS Act.
5. Just before 8am on 21 April 2018, a Caterpillar 773 service truck and a fully loaded Hitachi EH5000 haul truck collided at a major four-way intersection on the mine haul road. At the time of the incident, the service truck was travelling east. The haul truck was travelling north.
6. The intersection road signs were changed during the day shift on the day prior to the incident. The change was to allow haul trucks to drive straight through the intersection from the mine's production area. To give effect to this change, the intersection's stop signs were relocated to the eastern haul road, requiring traffic travelling east and west to stop and give way to other traffic.
7. The change to the intersection road signs was not communicated to all workers.
8. The haul truck driver was aware of the change to the intersection signs as he had driven through the intersection earlier in the morning on the day of the incident. He understood that he had right of way.
9. The 100 tonne service truck collided with the side of the 500 tonne haul truck, resulting in catastrophic damage to the service truck and injuries to the service truck driver.
10. An [investigation information release](#) was released in May 2018, and a [final investigation report](#) and [video animation](#) into the incident in August 2019.
11. On 18 December 2019, the regulator commenced prosecution proceedings in the District Court in relation to the above event, alleging that MCCPL had contravened section 32 of the *Work*

Health and Safety Act 2011, by failing to comply with a health and safety duty under section 19 of the Act (Category 2).

WHS undertaking given by Maules Creek Coal Pty Ltd

12. On 17 January 2020, MCCPL submitted a signed WHS undertaking to the regulator.

Consistent with the Enforceable Undertaking Guidelines the undertaking was developed using the pre-proposal advisory services offered by the regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.

13. In summary, the WHS undertaking given would impose obligations on MCCPL to:

- a. commit that the behaviour that lead 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 Northern Daily Leader and the Sydney Morning Herald.
- c. disseminate information about the undertaking to Maules Creek Coal workers.
- d. reimburse the regulator's costs associated with the investigation, legal advice and administration of \$100,499 and with monitoring of the undertaking, a total cost of \$110,499.
- e. purchase four solar powered trailer mounted variable message signs to be used as message boards around the mine to convey messages to workers on changes to roads and intersections. Minimum spend \$100,000.
- f. employ a newly created graduate safety officer role for a period of two years with a focus on the assessment and management of operational risks. Minimum spend \$76,400.
- g. develop a mentoring program to support the progression of its indigenous employees to management roles within Maules Creek Coal. Minimum spend \$100,000.
- h. develop a three-minute educational video (in consultation with the regulator) on the importance of communicating major changes in roads and intersections at mines. The video will be presented at a major mining conference, made available on Whitehaven Coal's website, presented to all workers at Maules Creek Coal and provided to the regulator to use. Minimum spend \$45,000.
- i. provide \$20,000 to the local SES to purchase life-saving equipment.
- j. provide \$80,000 to Boggabri Hospital to purchase or upgrade emergency equipment.

Consideration and findings

14. The risk of interactions between vehicles at NSW mine sites is well known, and the NSW mining industry has experienced numerous incidents of this type that have resulted in serious injuries and death.
15. The issue attracts specific focus from the regulator as part of its planned inspection and assessment activity and a significant number of publications and resources have been published on the topic.
16. In relation to the subject incident, the maximum reasonable consequence for such an event could easily have been a fatality. Notably the regulator's investigation found that the MCCPL:
 - a. did not risk assess the change to the intersection signs
 - b. did not consult with workers about the proposed changes
 - c. did not clearly communicate the intersection change to all road users.
17. I further note that since the end of 2015, a total of 44 WHS Act improvement and prohibition notices were issued to MCCPL, with a significant number of these relating to mobile plant and vehicle interactions.
18. Having regard to the above, I am of the view that the alleged failures are towards the middle and upper end of seriousness. Therefore, there is a strong need for specific and general deterrence.
19. While I note that the total value of the undertaking is commensurate with the regulator's accepted undertakings for similar alleged contraventions, I am not satisfied as to the merits of certain projects put forward under the WHS undertaking proposal.
20. The strategies of a WHS 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 the size of MCCPL.
21. Further, any safety initiatives should align with the legislative requirements to manage risks. That is, if it is not reasonably practicable for MCCPL to eliminate risks to health and safety then they must be managed in accordance with the hierarchy of control measures.
22. In this respect, the purchase of four solar powered trailer mounted variable message signs to be used as message boards around the mine is an administrative control measure and should accompany other higher order control measures, not substitute them.

23. I further note that this type of control formed one of the recommendations by the regulator in its investigation report into the incident, so it would be expected that the operator should be considering its implementation regardless of any WHS undertaking proposal.
24. While the graduate safety officer role is commendable and much needed at Maules Creek Mine, there is no information provided that verifies the role will be in addition to, or go beyond, MCCPL's already existing graduate program.
25. Finally, I do not believe that the proposed three-minute educational video on the importance of communicating major changes in roads and intersections at mines would deliver lessons to workers and the industry beyond what is already communicated in the regulator's truck collision animation published since 27 August 2019.
26. The balance of the projects under the WHS undertaking proposal have merit. However, having regard to the concerns identified with the project proposed above, I am not satisfied that overall the acceptance of the WHS undertaking will result in a better outcome than the continued prosecution of the matter.
27. Accordingly, I have decided to reject the WHS undertaking proposal.

Date of decision: **28 April 2020**



Anthony Keon
Executive Director
Resources Regulator
Regional NSW

NOTE

In accordance with the NSW Resources Regulator's Enforceable Undertakings Guidelines this decision will be published on the regulator's website.