

Decision to reject WHS undertaking given by Clarence Coal Pty Limited

Entity	Clarence Coal Pty Limited (ACN 083 465 212)
Issue	Whether to accept or reject a WHS undertaking given by Clarence Coal Pty Limited
Legislation	Part 11 of the <i>Work Health and Safety Act 2011</i>
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Department of Planning, Industry and Environment

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 the Department of Planning, Industry and Environment, have decided to **reject** the WHS undertaking given by Clarence Coal Pty Limited that is attached to this decision.

Reasons for decision

Legislation

1. The Secretary of the Department of Planning, Industry and Environment (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 216-219 (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.*

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).

Reasons for decision

- (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.*

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

- (3) *The regulator may accept a WHS undertaking in relation to a contravention or alleged contravention before proceedings in relation to that contravention have been finalised.*
- (4) *If.*

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**)

(www.resourcesregulator.nsw.gov.au/__data/assets/pdf_file/0010/539326/Enforceable-Undertaking-Guidelines.pdf), as required by section 230(4) of the WHS Act.

Background

4. Clarence Coal (**the mine**) is operated by Clarence Coal Pty Ltd (the person conducting the business or undertaking – **PCBU**) and is located approximately 15km east of Lithgow. The mine is a workplace within the meaning of s. 8 of the WHS Act.
5. On 4 July 2018, two workers were working underground in the 806A panel 'G' heading. Worker 1 was tasked to operate the continuous miner (**CM**) and worker 2 was tasked as a cable hand. Both workers were employed on a full-time basis by the mine.

6. On arriving at the incident site, worker 2 barred down what he believed to be two packers (vertical coal structures). The packers were located at the incident site location, which was not supported by either mesh or bolts.
7. After assisting another worker with an unrelated task, worker 1 started operating the CM, when a large amount of material, comprising coal and mudstone, collapsed from the rib and cornice.
8. The material struck the two workers. Worker 1 was pinned by a large piece of coal weighing about 750kg. Both workers received injuries and required hospitalisation.
9. The incident was investigated by the Resources Regulator.
10. An Investigation Information Release regarding the incident was published by the regulator on 20 July 2018:
https://www.resourcesregulator.nsw.gov.au/__data/assets/pdf_file/0015/824100/IIR18-05-Falling-coal-hits-two-workers-underground.pdf

Investigation for alleged contravention

11. The Resources Regulator's Major Safety Investigations Unit investigated the incident. The investigation was conducted under the work health and safety laws and examined the cause and circumstances of the incident. Information obtained during the investigation suggests that contraventions of the *Work Health and Safety Act 2011* (WHS Act) may have been committed by the PCBU.

WHS undertaking given by Clarence Coal

12. On 31 January 2020, the PCBU 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 will impose an obligation on the PCBU 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 Lithgow Mercury and the Sydney Morning Herald.
 - c. disseminate information about the undertaking to Clarence Coal workers.
 - d. reimburse the regulator's costs associated with the investigation, legal advice and administration of \$81,717 and with monitoring of the undertaking, a total cost of \$91,717.

- e. deliver the Mindful Safety Worker Program (MSW Program) to its workforce, and report on the veracity and success of the program, at a total cost of \$61,000.
- f. work with Coal Services to develop a bespoke Virtual Reality "Free Roam" Strata Hazard Training Program (VRFR). The VRFR will be shared with industry. The total cost of the VRFR Program is \$76,400. A video of the program will also be developed to share with industry at a cost of \$8,000.
- g. undertake a benchmarking study into coal rib behaviours in relation to coal seam heights and the effectiveness of support in controlling risks to health and safety. Recommendations will be made available to the coal mining industry of NSW and findings presented at least three industry conferences/seminars. The total cost of the benchmarking study is \$110,000.
- h. engage the University of Queensland to undertake an ergonomic assessment of roof and rib bolting processes used at the Mine to identify areas of improvement. The results of the assessment and any improvement opportunities will be made available to share at NSW coal mining industry seminars. The total cost of the ergonomics assessment is \$50,825.
- i. develop of a short animation video presentation of the incident and safety lessons learnt, in consultation with the regulator, at a cost of \$12,000.
- j. provide a donation of \$115,000 to the Lithgow Community Hospital that will enable it to increase availability of the therapy pool by improving the pump and filter systems.
- k. commit to a total minimum spend of \$524,942.
- l. complete the undertaking on or before 18 months from acceptance by the regulator.

Considerations and findings

- 14. Rib failure is a well-known risk in underground coal mines and there are well known and widely available controls to deal with this risk.
- 15. The potential consequences of a 750kg block of coal falling onto workers is self-evident and the maximum reasonable consequence for such an event could easily have been a double fatality.
- 16. In this incident both workers required hospitalisation with Worker 1 sustaining fractures to his left femur, ligament damage, abrasions and soft tissue injuries to his right ankle, and abrasions and soft tissue injuries to his right arm. Worker 2 sustained abrasions and soft tissue injuries to his upper back and received treatment for a minor head injury.

17. Rib bolting and meshing is a commonplace, and arguably a standard control across most other underground coal mines.
18. I am of view such a control would have been reasonably practical for the PCBU to implement, and notably following the incident the PCBU adopted a 'systematic rib support installation in the face areas'.
19. While I note the PCBU states these rectification measures cost \$5 million to implement (to-date), and resulted in a further \$2.92m in lost productivity, for an operation the size and scale of the mine these controls, despite the cost, should have been reasonably practicable to implement.
20. 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.
21. The overall proposal put forward by the PCBU for an WHS undertaking is not without merit and I note it was developed by seeking input from the workforce.
22. Notably the total value of the various proposal under the undertaking, being \$433,225 (\$524,942 with the Regulator's costs), are likely to exceed any penalty imposed by Court, should the Regulator elect to prosecute the matter.
23. However, I have varying views as to the merits of each individual project put forward under the WHS undertaking proposal.
24. The Mindful Safety Worker Program is commendable and of clear benefit to building the safety culture at the mine, but it does not strike me as something that goes significantly beyond what would be expected of a sophisticated operator. Arguably such an initiative would be something that a leading operator would be looking to implement regardless of a WHS undertaking proposal.
25. I also view the Strata Support Ergonomic Assessment project in a similar light to the above point.
26. Further, I have not placed much weight to the Benchmarking Study into Rib Behavior in Relation to Seam Height project.
27. If it is to be accepted that the PCBU has now adopted a systematic rib support installation in the face areas, then such a study may identify areas where alternative, less stringent (including no support) controls are required. While this may make good business and economic sense, it is difficult to see how this will result in any improvements to worker safety.
28. On the other hand, I am of the view that the Virtual Reality "Free Roam" Strata Hazard Training Program and the donation to Lithgow Community Hospital have significant merit.

WHS undertaking



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Reasons for decision

29. The VR training program is clearly innovative and has the potential to deliver clear and tangible benefits, beyond what would ordinarily be expected, to both the mine's workforce and the broader industry.
30. Further the donation to Lithgow Hospital will clearly benefit the community and has a clear nexus the incident, by using the funds to improve the therapy pool.
31. However, having regard to the individual and collective merits of each of the above, I am not satisfied that overall the acceptance of the WHS undertaking will result in better outcomes than other regulatory options.
32. As stated earlier, I am of the view that the circumstances warrant strong specific and general deterrence, and on balance, I am not satisfied that the WHS undertaking as it stands will deliver that result.
33. Accordingly, I have decided to reject the WHS undertaking proposal. I note that it is open to the PCBU to submit a further proposal for consideration should they desire.

Date of decision: **24 February 2020**

A handwritten signature in blue ink, appearing to read 'Anthony Keon'.

Anthony Keon
Executive Director
Resources Regulator
Department of Planning, Industry 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.

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