

WHS undertaking varied by Otraco International Pty Ltd

Entity	Otraco International Pty Ltd (ACN 008 809 265)
Issue	Application to vary a WHS undertaking made by Otraco International Pty Ltd
Legislation	Part 11 of the <i>Work Health and Safety Act 2011</i>
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Department of Regional NSW

Section 221 agreement

Pursuant to section 221 of the *Work Health and Safety Act 2011* (**WHS Act**), I, Anthony Keon, having a delegated authority from the Secretary of the Department of Regional NSW (**the regulator**), **give written agreement** to the varying of the WHS undertaking made by Otraco International Pty Ltd (**Otraco**) as follows:

- All compliance timeframes as set out in section 2.4 on page 12 of the WHS undertaking (and previously varied by written agreement on 22 January 2020) are suspended for the period from 21 March 2020 until a date determined by the Regulator. The PCBU will be notified by the Regulator no less than 28 days in advance of any determined date.
- The PCBU will provide quarterly updates to the Regulator on its ability to recommence implementation of the terms of the undertaking, with the first report due by 1 July 2020.

All other terms and commitments within the WHS undertaking remain in force.

In accordance with section 221(3) of the WHS Act, the notice of variation of the WHS undertaking will be published on the regulator's website.

Reasons for agreement

Legislation

1. The Secretary of the Department of Regional NSW (**Secretary**) is the regulator for the purposes of the WHS Act. The Secretary has delegated the function under section 221 of the WHS Act to the Executive Director, Resources Regulator.¹
2. Section 221 of the WHS Act relevantly states:

221 Withdrawal or variation of WHS undertaking

- (1) *A person who has made a WHS undertaking may at any time, with the written agreement of the regulator:*
 - (a) *withdraw the undertaking, or*
 - (b) *vary the undertaking.*
- (2) *However, the provisions of the undertaking cannot be varied to provide for a different alleged contravention of the Act.*
- (3) *The regulator must publish, on the regulator's website, notice of the withdrawal or variation of a WHS undertaking.*

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).

3. The Secretary has issued, and published on the Resources Regulator's website, guidelines relevant to the varying of WHS undertakings (**Guidelines**), as required by section 230(4) of the WHS Act.

Background

4. Mt Arthur Coal Pty Limited (**MACPL**) is the mine operator of the Mt Arthur Mine (**the mine**) located about five kilometres southwest of Muswellbrook NSW.
5. Otraco is contracted to MACPL to provide onsite tyre management services for the mine's fleet of light and heavy vehicles.
6. On 10 August 2017, a worker employed by Otraco received serious burn injuries after a fire started when refueling a diesel-powered tyre handler at the mines heavy vehicle refueling facility (fuel farm). The fuel ignition also set the tyre handler on fire.

WHS undertaking

7. On 31 July 2019, Otraco submitted a signed WHS undertaking to the regulator.
8. The undertaking given by Otraco was accepted by the delegate of the Secretary on 16 September 2019.
9. Enforceable term No.3 required Otraco to develop a best practice video training package to enhance the current unit of competency for the use of earthmoving and off-the-road tyre handlers and to provide internships for two recent graduates from a NSW university to oversee the development of the video training package.
10. Attachment 1 of the undertaking, which forms part of the 'Part B' enforceable terms required recruitment of the interns within two months of the acceptance of the WHS undertaking, being 16 November 2019.
11. Otraco did not meet the timeframe for its commitment under the enforceable undertaking to recruit two graduates from a NSW university, an enforceable term of the undertaking due by 16 November 2019.
12. Otraco provided a reasonable explanation for not meeting the timeframe for recruitment of two graduates from a NSW university.
13. On 19 December 2019, Otraco applied to vary the undertaking.
14. On 22 January 2020 a Notice of Variation was agreed to by a delegate of the Secretary. The compliance timeframes were extended to allow Otraco to recruit two interns.
15. Otraco has recruited two interns however the restrictions put in place by the Government in response to the Covid-19 pandemic, in conjunction with Otraco's commitment to the health and safety of its workers and other persons, has made it impractical to continue with the Video Training Package and Internships at this time.

Reasons for variation

16. Relevant State Governments have closed their borders, with a requirement to isolate for 14 days if you choose to travel interstate.
17. The Engineering and HSE Interns are based in NSW, with the relevant sites they were to be working at in WA and Qld (and would be subject to 14-day quarantine).
18. All relevant mine sites have cancelled any workers/visitors travelling to site, unless defined as business critical.

19. Internally, Downer Mining (parent company of Otraco) has cancelled any non-critical business travel and closed relevant offices.

Conclusion

20. I am satisfied that Otraco made reasonable efforts to comply with the WHS undertaking and the compliance timeframes set out in the Notice of Variation dated 22 January 2020.
21. In view of the restrictions put in place by the Government in response to the Covid-19 pandemic and Otraco's commitment to the health and safety of its workers and other persons, I am satisfied that Otraco cannot meet the compliance dates in relation to the Video Training Package and Internships at this time, for reasons beyond Otraco's control.
22. I am satisfied that the varying of the undertaking meets the requirements of the WHS Act and the Enforceable Undertakings Guidelines.
23. Accordingly, I have determined to agree to vary the WHS undertaking made by Otraco as detailed above.

Date of decision: **23 April 2020**



Anthony Keon
Executive Director
Resources Regulator
Department of Regional NSW

NOTE In accordance with section 221 of the Work Health and Safety Act 2011 this notice will be published on the regulator's website.

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