

## WHS undertaking given by Otraco International Pty Limited accepted

Entity	Otraco International Pty Limited (ACN 008 809 265)
Issue	Whether to accept or reject a WHS undertaking given by Otraco International 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 and 218 decisions

Pursuant to section 216 of the *Work Health and Safety Act 2011* (**WHS Act**), I, Anthony Keon, having a delegated authority from the Secretary of the Department of Planning, Industry and Environment (**the regulator**), **accept** the WHS undertaking given by Otraco International Pty Limited (**Otraco**) that is attached to this decision.

For the purposes of section 218 of the WHS Act, I **determine** that the WHS undertaking is enforceable from when Otraco is first notified of my decision to accept that WHS undertaking.

### Reasons for decision

#### Legislation

1. The Secretary of the Department of Planning, Industry and Environment (Secretary) is the regulator for the purposes of the WHS Act. The Secretary has delegated the function under section 216 of the WHS Act to the Executive Director, Resources Regulator.<sup>1</sup>

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.*
- (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.*

<sup>1</sup> *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).

### **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**) 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. It is a large open cut mine that uses a strip-mining method to remove overburden and coal by shovel and excavators. Haul trucks transport the overburden and coal to onsite processing and transport facilities. The mine is operated 24 hours a day, seven days a week. The mine produces coal for domestic and international energy sector customers.
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 mine's heavy vehicle refueling facility (fuel farm). The fuel ignition also set the tyre handler on fire.
7. The incident was investigated by investigators from the NSW Resources Regulator.
8. In October 2018, the regulator published its investigation findings on its web site at [https://www.resourcesregulator.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/835389/DOC18-696448-Investigation-report-Mt-Arthur.pdf](https://www.resourcesregulator.nsw.gov.au/__data/assets/pdf_file/0009/835389/DOC18-696448-Investigation-report-Mt-Arthur.pdf).
9. At that time, the regulator also published an animation about the incident to share investigation learnings with the mining industry at <https://www.resourcesregulator.nsw.gov.au/compliance-and-enforcement/investigation-reports/learning-from-investigations>.

## Proceedings for alleged contravention

10. The regulator alleges that the contractor, Otraco, being a person conducting a business or undertaking at the Mt Arthur Mine at Muswellbrook NSW, who had a health and safety duty under section 19(1) of the WHS Act to ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by Otraco and whose activities in carrying out work were influenced or directed by Otraco, while they were at work in the business or undertaking, failed to comply with that duty, and that failure exposed workers to a risk of death or serious injury, contrary to section 32 of the WHS Act.

## Reasons for decision

11. Criminal proceedings for contravening section 32 of the WHS Act for failing to comply with a duty under section 19(1) of the WHS Act in the District Court of New South Wales against Otraco were commenced on 31 July 2019.
12. 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.
13. Subject to section 222(3) of the WHS Act, 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.
14. Subject to section 222(4) of the WHS Act, 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.

## WHS undertaking given by Otraco

15. On 31 July 2019, Otraco International Pty Limited 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.
16. In summary, the WHS undertaking will impose an obligation on Otraco 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 Sydney Morning Herald, Newcastle Herald and Muswellbrook Chronicle
  - c. disseminate information about the undertaking to Otraco workers and discuss at relevant Downer and Otraco senior management and leadership forums
  - d. reimburse the regulator's costs associated with the investigation, legal advice and administration of \$59,034 and with monitoring of the undertaking and publication costs, a total cost of \$72,649
  - e. develop in consultation with the Resources Regulator and deliver a video training package that details the risks associated with use and maintenance of earthmoving and off-the-road tyre handlers (large powered mobile plant), to improve operator competence at an estimated minimum cost of \$127,000

Note: while not part of the undertaking, Otraco has committed to deliver the video training package to relevant workers in its operations across Southern Africa, Australia and Chile. Accordingly, Otraco will have the videos and supporting guide translated so all Otraco workers (including relevant contractors) can benefit from the training.

  - f. provide an internship at Otraco for two university graduates to oversee the video training package, at a cost of \$177,800
  - g. provide a final reflections report following completion of the internships to the Resources Regulator
  - h. donate \$80,000 to the Westpac Rescue Helicopter Service, Upper Hunter branch to assist the Westpac Rescue Helicopter Service provide aeromedical assistance across the Upper Hunter Valley region
  - i. commit to a total minimum spend of \$458,219
  - j. complete the undertaking on or before 14 months from acceptance by the regulator.

## Considerations and findings

17. I am satisfied that the undertaking given by Otraco meets the requirements of the WHS Act and the Enforceable Undertakings Guidelines.
18. While under the WHS Act the giving of an enforceable undertaking does not constitute an admission of guilt, Otraco has acknowledged that the regulator alleges a contravention of its health and safety duty and regrets the incident occurred.
19. I note that Otraco has already taken steps to address the issues giving rise to the incident, including undertaking a bowtie review on 'fire during re-fueling activities', placing the Wiggins free flow adaptor nozzle on the Downer Prohibited Items Register, and requiring all tyre handlers to be refueled by a low flow fuel pod system located at each tyre bay.
20. I further note that these remediation actions are in addition to the estimated \$960,000 MACPL has also spent in implementing rectification works to minimise the recurrence of the circumstances and behaviors that gave rise to the alleged offence.
21. Notably, following the incident injured the worker returned to work on alternative duties on 8 November 2017 and then to normal duties on 22 November 2017, and was consulted in relation to this WHS undertaking proposal.
22. The proposed WHS undertaking requires Otraco to incur costs of at least \$458,219 including the funding and delivery of safety and community projects at a minimum cost of \$385,570.
23. I am satisfied that the proposed strategies of an undertaking must go beyond mere compliance and provide, particularly in the workplace and industry categories, strategies that further reinforce prevention of the incident in question.
24. I am particularly of the view that the delivery of the best practice training video package will enhance operator competence for the use and maintenance of earthmoving and off-the-road tyre handlers to Otraco workers in NSW and throughout Otraco's operations.
25. Notably the video will also be made freely available to the broader industry and the regulator, which will assist in increasing the capabilities of tyre handlers across the industry and provide tangible industry benefits beyond just Otraco's operations.
26. The internship component of the vide will also assist in embedding a strong safety focus in those seeking to enter the industry and provide broader community and industry benefits by the creation of entry level opportunities for graduates.
27. The \$80,000 donation will also provide a direct and tangible benefit to the community by providing important support and funding to continue the valuable work that the Westpac Rescue Helicopter Service provides, not just to workers in the industry, but to the community and the emergency services in the region.
28. Included in the enforceable terms, Otraco has agreed to pay the regulator's costs of \$72,649 to cover the investigation, legal expenses and ongoing compliance monitoring of the terms of the undertaking. This is an appropriate undertaking that will ensure that the regulator, and ultimately the taxpayer, does not bear the undue financial costs as a result of its actions in investigating and pursuing the alleged contravention.
29. 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.
30. Finally, I am of the view that that the requirement under the WHS Act to publish the undertaking and this decision, and the requirement for Otraco's to publish a notice Sydney Morning Herald, Newcastle Herald and Muswellbrook Chronicle will provide for an appropriate level of specific and general deterrence.

## Reasons for decision

31. I note that Otraco have no prior convictions for offences under the WHS Act and I am of the view that the total value of the undertaking exceeds the likely penalty that would be imposed by a court if the matter was successfully prosecuted.
32. Having regard to the above, I am of the view that the WHS undertaking will provide far greater benefits to the workforce, industry and community than any other enforcement response. In this regard, prosecution action could not achieve the outcomes specified in the undertaking.
33. I am satisfied that the initiatives given by Otraco in the undertaking resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct. Accordingly, I have determined to accept the WHS undertaking given by Otraco International Pty Limited.
34. In accordance with the WHS Act the regulator will discontinue the current proceedings against Otraco International Pty Limited.

Date of decision: **16 September 2019**



**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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