



PUB18/61

- Entity:** Department of Finance, Services and Innovation
ABN 81 913 830 179
- Issue:** Acceptance of an enforceable (WHS) undertaking in relation to an alleged contravention of the WHS Act.
- Legislation:** *Work Health and Safety Act 2011* Part 11
- Decision maker:** Carolyn McNally
Secretary of the Department of Planning and Environment

Section 216 decision

As authorised by section 216 of the *Work Health and Safety Act 2011* (WHS Act), I, Carolyn McNally, Secretary of the Department of Planning and Environment (the **regulator**), have decided to **accept** the WHS undertaking given by Department of Finance, Services and Innovation, as attached to this decision.

The undertaking takes effect and is in force immediately upon Department of Finance, Services and Innovation being notified of this decision.

Reasons for decision

Legislation

1. Section 216 of the WHS Act provides that:
 - a) 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 the WHS Act.
 - b) 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.
 - c) The regulator must issue, and make public, general guidelines for or in relation to the acceptance of enforceable undertakings under the WHS Act.
2. Section 217 of the WHS Act provides that:

The regulator is required to give the person seeking to make an enforceable undertaking written notice of the regulator's decision to accept or reject the enforceable undertaking and the reasons for the decision. The regulator is also required to publish any decision to accept an enforceable undertaking.
3. Section 222 provides that no proceedings for a contravention or alleged contravention of the WHS Act may be brought against a person if a WHS undertaking is in effect, or has

been completely discharged, in relation to that contravention. If proceedings have already been commenced when the regulator accepts a WHS undertaking, then the regulator must take all reasonable steps to have the proceedings discontinued as soon as possible.

4. In exercising functions under the WHS Act, the Secretary must have regard to the objects set out in section 3 of the WHS Act.
5. The maximum penalty for failing to comply with a WHS undertaking is \$250,000 in the case of a corporation, and \$50,000 in the case of an individual. Failure to comply with an undertaking may result in prosecution action being taken.

Background

6. The Department of Finance, Services and Innovation is a service provider and regulator. The department supports sustainable government finances, major public works and maintenance programs, government procurement, information and communications technology, corporate and shared services, consumer protection, administration of state taxation and revenue collection, and NSW land and property administration.
7. The department comprises of a number of divisions and business units, including Heritage Stoneworks.
8. Heritage Stoneworks is responsible for the project delivery and management of the Minister for Finance, Services and Innovation's Stone Program and other heritage projects for government client agencies.
9. Heritage Stoneworks is located at 92 Burrows Road, Alexandria NSW 2015.
10. The Department of Planning and Environment's Resources Regulator has a Memorandum of Understanding (MOU) with SafeWork NSW which enables the referral of work health and safety matters for independent investigation where the usual regulator has perceived or real conflict of interest.
11. Two incidents at Heritage Stoneworks were referred to the Resources Regulator under the MOU with SafeWork NSW on 3 February 2017.
12. The first referral related to the exposure of workers to hazardous crystalline silica dust levels at Heritage Stoneworks on 23 November 2016 and 13 December 2016.
13. The second related to an incident where a worker suffered a fractured skull while operating a pedestrian forklift at Heritage Stoneworks on 31 January 2017.
14. In accordance with the MOU, the Resources Regulator conducted investigations into the incidents.
15. The investigations were conducted under the WHS Act and examined the cause and circumstances of each incident.
16. The investigations found sufficient evidence to allege contraventions of section 32 of the WHS Act for a failure to comply with a health and duty under section 19 of the Act.

17. The maximum penalty for this offence under section 32 of the WHS Act committed by a body corporate is \$1,500,000.

Proposed undertaking

18. On 16 January 2018, the Department of Finance, Services and Innovation submitted a signed WHS undertaking to the Resources Regulator. In summary, the WHS undertaking:
- a) Provides \$498,500 to develop and deliver strategies that will improve health and safety at the workplace and across the broader stonemasonry industry by:
 - i. publishing information about the undertaking
 - ii. producing educational videos on airborne crystalline silica and lifting practices
 - iii. producing an education campaign for the stonemasonry industry
 - iv. supplying specific information and materials on airborne crystalline silica and lifting practices to stonemasonry students at TAFE NSW
 - v. providing additional resources for lift management and dust suppression at the workplace.
 - b) Provides a commitment that the behaviour that lead to the alleged contravention has ceased and an assurance that steps have been taken to prevent a recurrence of the incidents.
 - c) Commits to disseminate information about the undertaking to workers, health and safety representatives, and other relevant stakeholders.
 - d) Commits to pay the regulator the sum of \$8,500 to cover the costs associated with monitoring compliance with the undertaking.

Considerations and findings

19. I note Department of Finance, Services and Innovation acknowledges the alleged contraventions.
20. I note the Department of Finance, Services and Innovation has implemented measures to prevent the recurrence of the circumstances or behaviour that gave rise to the alleged contraventions.
21. I note the Resources Regulator has recovered its investigation costs of \$50,513.23 under the terms of the MOU. This takes the total value of the undertaking to over \$549,000.
22. I note the acceptance of the undertaking will ensure that no further costs are incurred in relation to the matter, particularly in relation to investigation and legal costs, which may never fully be recouped through prosecution action.
23. In note the undertaking commits to fund and undertake strategies to improve workplace health and safety, and to impart valuable skills and knowledge upon stonemasonry students to enable a successful, safe and healthy transfer into the industry.

24. I considered the financial commitments set out in the undertaking to be significant, and be more likely to achieve a better compliance outcome than pursuing prosecution action alone.

Conclusion

25. I am satisfied that the proposed undertaking meets the requirements of the WHS Act and the Enforceable Undertakings Guidelines.

26. 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 safety and wellbeing in the next generation of stonemasons.

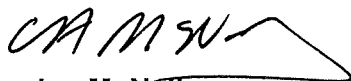
27. I am satisfied the terms of the undertaking will achieve better compliance outcomes than prosecution action alone, and will provide similar specific and general deterrence to successful legal proceedings.

28. I am satisfied that the initiatives proposed by Department of Finance, Services and Innovation resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.

29. Accordingly, I have determined to accept the WHS undertaking given by Department of Finance, Services and Innovation.

Date of decision:

6.2.18



Carolyn McNally

Secretary

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.