

Work Health and Safety Act 2012 (SA)

Part 11 Enforceable Undertaking

REASON FOR DECISION

Entity: Fitme Pty Ltd and Richard Mills
ACN: 074 670 385
Entity Address: Withheld
Date of incident: 27 November 2020

1. History of the application

- 1.1 The undertaking given by Fitme Pty Ltd / Mr Richard Mills relates to an alleged contravention (incident) that occurred at Urrbrae Agricultural High School, 505 Fullarton Road, Netherby SA 5062 (the workplace) on 27 November 2020.
- 1.2 The injured party was a customer of Fitme Pty Ltd and was present on the 27 November 2020. Fitme Pty Ltd was required to move premises and was doing so on that day. The injured party agreed to help move equipment and therefore was assisting Mr Richard Mills / Fitme Pty Ltd in a voluntary capacity and it was within that capacity, they were injured by a significant fall at the premises of Urrbrae Agricultural High School.
- 1.3 Following an investigation by SafeWork SA (SWSA) inspectors, prosecution action was commenced by the Crown Solicitors Office against Fitme Pty Ltd, who had a health and safety duty pursuant to section 19(1) of the *Work Health and Safety Act 2012 (SA)* (the WHS Act), for failing to comply, so far as reasonably practicable, with the duty contrary to section 32 of WHS Act.
- 1.4 Following significant consultation with SWSA, Fitme Pty Ltd / Richard Mills submitted a proposed EU dated 26 March 2024.
- 1.5 The assessment panel completed an evaluation of the EU and based on the amendments made the panel members recommended the EU be considered for acceptance by the delegate of the Regulator.
- 1.6 The EU dated 26 March 2024 was formally submitted to the delegate of the Regulator and this application was accepted on the 26 March 2024.

2. Legislation and Policy

- 2.1 It is alleged that Fitme Pty Ltd had a health and safety duty pursuant to section 19(1) of the WHS Act failed to comply, so far as reasonably practicable, with the duty contrary to section 32 of the WHS Act.
- 2.2 It is alleged that Richard Mills had a health and safety duty pursuant to section 28 of the Act, with the duty contrary to section 32 of the WHS Act.
- 2.3 Pursuant to section 216(1) of the WHS Act, the WHS regulator may accept a written undertaking given by a person in connection with a matter relating to a contravention.
- 2.4 Section 217(1) of the WHS Act requires that the WHS regulator must give the person seeking to make a WHS undertaking written notice of the decision to accept or reject the undertaking and the reasons for that decision.
- 2.5 Section 217(2) of the WHS Act requires that the Regulator must publish, on the Regulator's website, notice of a decision to accept a WHS undertaking and the reasons for that decision.

3. Material and evidence considered by WHS regulator

- 3.1 In deciding this matter, the assessment panel has considered the following documents:
 1. *Work Health and Safety Act 2012 (SA) & Regulations 2012.*
 2. National Compliance and Enforcement Policy (Part 7 criteria).
 3. SWSA Guidelines for the acceptance of an enforceable undertaking – dated July 2023.
 4. WHS EU application submitted by PCBU dated 26 March 2024.
 5. Complaint and Summons prepared by the Crown Solicitors Office.
 6. Brief of Evidence prepared by the Principal Investigator (SWSA).

4. Findings on material questions of fact – Regulator

- 4.1 The Guidelines for the acceptance of an enforceable undertaking dated July 2023 contains considerations which are relevant and appropriate to my decision.
- 4.2 I find the undertaking given by Fitme Pty Ltd / Richard Mills satisfies the formal requirements of the WHS Act and the policy requirements discussed above with respect to the operation of Part 11 of the WHS Act as they have been published.
- 4.3 I find the factual background to the alleged contravention is set out in section 1 of the Fitme Pty Ltd / Richard Mills undertaking.

- 4.4 I find that the procedural history relating to the undertaking is set out in paragraph 1 above.
- 4.5 The significance of the undertaking and the respective financial commitments of Fitme Pty Ltd / Richard Mills are proportionate to the objective gravity of the alleged contraventions by Fitme Pty Ltd / Richard Mills and account for the benefits that would accrue to them through avoiding prosecution. The commitments made by Fitme Pty Ltd also account for the size of the business.
- 4.6 I find that Fitme Pty Ltd / Richard Mills have acknowledged the alleged contraventions and shown regret regarding the occurrence and the consequences of the alleged contravention.
- 4.7 I find that Fitme Pty Ltd / Richard Mills, who had a health and safety duty under the WHS Act, has failed to comply, so far as reasonably practicable, with that duty contrary to section 32 of the WHS Act.
- 4.8 I acknowledge the assurance given by Fitme Pty Ltd / Richard Mills that the behaviour that led to the alleged contravention has ceased and the commitment to ensuring the ongoing effective management of risks to health and safety in the future.
- 4.9 I find the undertaking commits Fitme Pty Ltd / Richard Mills to a standard that is higher than the recognised compliance for the activity should it ever occur again and/or to activities over and beyond recognised compliance levels.
- 4.10 I find the undertaking would constitute tangible benefits for workers, industry, and the community.
- 4.11 I acknowledge that all panel members have recommended acceptance of the undertaking as an appropriate enforcement outcome in the circumstances of this case.

5. Decision

- 5.1 In making my decision, I have considered and had regard to the evidence and other material referred to in paragraph 3 above, and to the facts I have found referred to in paragraph 4 above.
- 5.2 Because the proposed undertaking given by Fitme Pty Ltd / Richard Mills meets the formal requirements of the WHS Act and policy requirements, my discretion whether to accept the undertaking under section 216(1) of the WHS Act is enlivened.
- 5.3 Based on the evidence, findings and having regard to the objects of the WHS Act, I have carefully considered this matter and I am of the opinion that the undertaking given by Fitme Pty Ltd / Richard Mills is an appropriate enforcement option in regard to this case.
- 5.4 I have concluded that an EU is the preferred enforcement option, rather than continuing with prosecution, due to the following:

- I have accepted the enforceable activities the injured person in this instance detailed in Rectifications 1.11 to the value of \$20,000, in addition \$10,000 has been set aside for financing audit recommendations stated in item 3.2.4. The total spend of the EU activities is \$39,045.00 with the aforementioned additional costs totalling \$30,000 (a \$69,045.00 commitment). financial value of the EU. The value of the may be affected due to compensation to
- I have considered the size, function, capability and resources of Richard Mills / Fitme Pty Ltd and what might be contained in a proportionate Enforceable Undertaking application.
- Upon consideration of all factors, a decision for acceptance of this EU application is warranted. I find that the WHS activities in the current application are adequately effective and show an increased understanding of WHS principles and effective implementation of WHS principles.

5.5 Under section 216(1) of the WHS Act, it is my decision to accept this Enforceable undertaking.



Brett Pfeffer

Director, Compliance and Enforcement Directorate

Delegate of the Regulator

SafeWork SA

26 March 2024