

File No: 0369-2016

Entity: Bloomfield Collieries Pty Ltd, ACN 000 106 972

Issue: Whether to accept an enforceable undertaking in relation to an alleged contravention of the Act.

Legislation: *Mining Act 1992* – Part 17A, Division 4B

Decision maker: Carolyn McNally
Secretary of the Department of Planning and Environment

Section 378ZFB decision

As authorised by section 378ZFB of the *Mining Act 1992*, I, Carolyn McNally, Secretary of the Department of Planning and Environment, have decided to **accept** the enforceable undertaking given by Bloomfield Collieries Pty Ltd, as attached to this decision.

The undertaking takes effect and is in force immediately upon Bloomfield Collieries Pty Ltd being notified of this decision.

Reasons for decision

Legislation

1. Section 378ZFB of the Act provides that:
 - a) The Secretary may accept a written undertaking (***an enforceable undertaking***) given by a person in connection with a matter relating to a contravention or alleged contravention by the person of the Act.
 - b) The giving of an enforceable 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 Secretary must issue, and make public, general guidelines for or in relation to the acceptance of enforceable undertakings under this Act.
2. Section 378ZFH provides that no proceedings for a contravention or alleged contravention of the Act may be brought against a person if an enforceable undertaking is in effect, or has been completely discharged, in relation to that contravention. If proceedings have already been commenced when the Secretary accepts an enforceable undertaking, then the Secretary must take all reasonable steps to have the proceedings discontinued as soon as possible.
3. The Secretary is required to give the person seeking to make an enforceable undertaking written notice of the Secretary's decision to accept or reject the enforceable

undertaking and the reasons for the decision. The Secretary is also required to publish any decision to accept an enforceable undertaking.

4. In exercising functions under the Act, the Secretary must have regard to the objects set out in section 3A of the Act.
5. The maximum penalty for failing to comply with an enforceable undertaking is \$1.1 million in the case of a corporation, and \$220,000 in the case of a natural person. Failure to comply with an undertaking may also result in prosecution action being taken in relation to the original alleged offence.

Background

6. Bloomfield Collieries Pty Ltd ("Bloomfield") (ACN 000 106 972) is the holder of Coal Lease (CL) 352 and Mining Lease (ML) 1432 known as Rix's Creek Coal Mine, an open cut coal mine approximately 5 kilometres northwest of Singleton NSW.
7. Rix's Creek Coal Mine operates pursuant to the development consent DA No. 49/94 (the Development Consent), granted by the Minister of Urban Affairs and Planning on 16 October 1995.
8. On 14 June 2016 NSW Department of Planning and Environment (the Department) raised concerns with the NSW Resources Regulator (the Regulator) that Rix's Creek Coal Mine may be operating outside of the approved mining area.
9. A review of the 2013 Mining Operations Plan (MOP) provided by Bloomfield showed a MOP boundary which appeared outside of the development consent area. Bloomfield allege they relied on its interpretation of the Development Consent when lodging the required MOP under CL352 and ML1432.
10. Bloomfield and the Department have differed in their interpretations of the development consent, with the Department forming the view that Bloomfield has conducted mining operations at the Rix's Creek Coal Mine outside of the approved consent. I note that the Department is taking separate compliance action in respect of this breach.
11. The investigation by the Regulator alleges that a number of MOP's submitted for open cut mining operations do not have the required development consent, and also alleges that the information that has been included in the MOP's have purported to describe mining operations and surface disturbance other than that was presented in the Development Consent. The Regulator alleges that this conduct was a breach of section 378C of the *Mining Act 1992* (the Act) 'Providing false and misleading information'.
12. On 13 June 2017 the Regulator commenced prosecution action against Bloomfield alleging that the information provided in the MOP's was false and misleading in a material particular in contravention of section 378C of the Act. At the time of the alleged offence the maximum penalty for this offence was \$55,000.

Proposed undertaking

13. On 19 June 2017 Bloomfield submitted a signed enforceable undertaking proposal to the Regulator. Consistent with the Enforceable Undertaking Guidelines the proposal was developed using the pre-proposal advisory services offered by the Regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
14. In summary, the Bloomfield undertaking proposes to:
 - a) Cease any activity that contravenes section 378C of the Act.
 - b) Ensure that information lodged with the Department in MOP's, proposed MOP's and proposed amended MOP's from time to time will be thoroughly checked for consistency with any applicable Development Consent.
 - c) Pay the Regulator's costs of \$10,000 incurred during the investigation and review of the undertaking.
 - d) Pay the Regulator's legal costs of \$5,575 incurred during the investigation.
 - e) Pay the Regulator the sum of \$2,000 to cover costs associated with monitoring the undertaking.
 - f) Pay the above costs and fees within 30 days of being issued with an invoice from the Regulator.
 - g) Provide \$25,000 to an indigenous program run by Associate Professor Kym Rae for testing kidney health in Gomerai Gaaynggai Indigenous Mothers and Babies for Early Intervention.
 - h) Provide \$25,000 to Singleton Council and/or a local land care group for Hunter River improvement works.
 - i) Carry out training of all key management of its NSW operations which hold a mining lease in respect of the operation and compliance with conditions of mining leases and development consents.
 - j) Undertake an independent audit of all NSW operations operated by Bloomfield (or any of its related bodies corporate) to ensure compliance with authorisation conditions or mining leases and development consents.
 - k) Update its induction process to include a section on compliance with planning approvals.

Considerations and findings

15. While under the Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note Bloomfield Collieries Pty Ltd acknowledges the allegations put forward by the Regulator that it provided false and misleading information in Mining Operations Plans and that such conduct was in breach of the Act.
16. Bloomfield, together with its related entities, are titleholders at a number of large open cut coal mines in NSW. There is a strong expectation that large companies such as Bloomfield are aware of its obligations under the Act and have systems in place to ensure compliance.
17. I further note that Bloomfield has not previously been the subject of any escalated enforcement action from the Regulator under the Act, with only administrative non-

compliance recorded against it. Taking into account the size of the Bloomfield Group I would consider the compliance history in this context to be good.

18. Bloomfield has proposed to implement a number of measures to minimise the recurrence of the circumstances or behaviour that gave rise to the alleged offending conduct.
19. In this regard, Bloomfield's undertaking to implement internal compliance training, staff induction training and carry out independent audits of its operations to ensure compliance with the Act and Development Consents directly addresses the behaviour that is the subject of the allegations and provides appropriate controls to prevent future possible contraventions. In particular, the independent audit will provide the Regulator and community confidence that all Bloomfield operations are operating in complete compliance with the Act.
20. The agreed terms proposed by Bloomfield, including the \$50,000 donations, together with the costs associated with the audits and training are estimated to cost over \$85,000.
21. Bloomfield has also undertaken to pay the Regulator's costs of \$17,575 to cover investigation and monitoring. This is an appropriate undertaking that will ensure that the Regulator, and ultimately the taxpayer, does not bear undue financial costs as a result of its actions in investigating and pursuing the alleged contravention.
22. The acceptance of an undertaking will 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.
23. I also note that the conduct and actions subject to this undertaking are central to allegations under planning laws, and are likely to be subject to further compliance action by the Department. In this respect the acceptance of this undertaking has been viewed as part of a broader and more holistic compliance response to the alleged conduct.
24. Having regard to the compliance history of Bloomfield, the circumstances and proposed terms within this undertaking and the further enforcement action being considered by the Department I am of the view that the terms offered in this undertaking are appropriate.
25. Bloomfield's commitment to undertake training, auditing and other financial commitments is considered significant, and is likely to achieve a better compliance outcome than pursuing prosecution action alone.
26. Further, the quantum of around \$102,575 to be paid by Bloomfield significantly exceeds the maximum penalty available to be imposed by a court if successfully prosecuted (which was \$55,000 at the time of the offending), which is likely to create a greater deterrent effect than prosecution action.

Conclusion

28. I am satisfied that the proposed undertaking meets the requirements of the Act and the Guidelines.

29. I am of the view that the proposed undertaking will deliver tangible benefits to industry and community by strengthening the integrity and transparency of information submitted in connection with mining operations in NSW and provide training to staff within the Bloomfield Group. The undertaking also provides financial benefits to community and research groups.
30. Further, the terms of the undertaking, and the requirement under the Act to publish the undertaking and this decision, is likely to achieve better compliance outcomes than prosecution action alone, and will provide similar specific and general deterrence to successful legal proceedings.
31. I am satisfied that the initiatives proposed by Bloomfield resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
32. Accordingly, I have determined to accept the enforceable undertaking proposed by Bloomfield Collieries Pty Ltd. In accordance with the Act the Regulator will discontinue the current proceedings against Bloomfield as soon as practicable.

Date of decision: 23 June 2017



Carolyn McNally
Secretary
Department of Planning and Environment

NOTE: In accordance with section 378ZFC of the *Mining Act 1992* this decision will be published on the regulator's website.