

DOC18/367139

File No: 0955-2017

Entity: Wollongong Coal Limited (ACN 111 244 896), and
Wongawilli Coal Pty Ltd (ACN 111 928 762)

Issue: Whether to accept an enforceable undertaking in relation to
contraventions and alleged contraventions of the Mining Act.

Decision maker: Lee Shearer
Deputy Secretary, Resources Regulator
Coordinator General for the Central Coast

Section 378ZFB decision

As authorised by section 378ZFB of the *Mining Act 1992*, and in accordance with the authority delegated to me by the Secretary of the Department of Planning and Environment, I, Lee Shearer, Deputy Secretary of the Resources Regulator and Coordinator General for the Central Coast, have decided to **accept** the enforceable undertaking given jointly by Wollongong Coal Limited and Wongawilli Coal Pty Ltd, as attached to this decision.

Reasons for decision

Legislation

1. Section 378ZFB of the Mining Act 1992 (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 of the Act 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. Section 378ZFC of the Act provides that 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.
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.

Background

6. Wollongong Coal Limited is the holder of mining titles CCL 745 (1973), ML 1575 (1992) and MPL 271 (1973). Wollongong Coal Limited is the owner of the Russell Vale Colliery. Wongawilli Coal Pty Ltd is a wholly owned subsidiary of Wollongong Coal Limited and is the holder of mining titles CCL 766 (1973), ML 1565 (1992) and ML 1596 (1992) (Authorisations). Wongawilli Coal Pty Ltd is the operator of the Wongawilli Colliery.
7. Wollongong Coal Limited and Wongawilli Coal Pty Ltd have made a number of late payments with respect to annual rental fees and administrative levies (Authorisation Fees) payable under Part 14A of the Mining Act in relation to the Authorisations.
8. In June 2017, the Resources Regulator commenced prosecution proceedings in the Downing Centre Local Court against Wollongong Coal Limited and Wongawilli Coal Pty Ltd for a failure to pay annual rental fees and administrative levies under section 292C(3) of the Mining Act.
9. On 8 November 2017, Wollongong Coal Limited and Wongawilli Coal Pty Ltd were convicted and fined a total of \$11,000 and ordered to pay the Regulator's costs of \$28,755. Both companies appealed the decision to the District Court of New South Wales. These proceedings are currently listed before the District Court.
10. In March 2018, the Regulator issued further court attendance notices to Wollongong Coal Limited and Wongawilli Coal Pty Ltd for alleged failures to pay annual rental fees and administrative levies between September and November 2017. These proceedings are currently listed before the Downing Centre Local Court.
11. A breach of section 292C of the Mining Act carries a maximum penalty of \$11,000 for a corporation and \$5,500 for a natural person.
12. A delegate of the Secretary has also been considering whether to suspend operations at Wollongong Coal Limited and Wongawilli Coal Pty Ltd over concerns about the ongoing financial capacity and ability to meet compliance and payment obligations under the Act.
13. In this respect, on 2 February 2018 both companies were invited to 'show cause' as to why mining operations should not be suspended until the following steps had been undertaken:
 - a. *Commission a suitably qualified person to conduct an external review of both companies systems and processes for meeting its compliance obligations under the Act. The review is to specifically consider and identify any time that both companies had failed to meet its obligations under section 292C of the Act since 1 January 2014, and the apparent causal factors for the non-compliance and make recommendations for improvement.*
 - b. *Commission a suitably qualified person to undertake an external review of both companies current and ongoing financial capacity. The review must be carried out by a qualified party that is independent to the company the company's normal accountants.*
 - c. *Submission of a detailed report, to the satisfaction of the Secretary, that details:*
 - i. *key findings and responses to any issues and recommendations arising from the reviews undertaken at the above points (including copies of both reports)*
 - ii. *likely financial and other compliance obligations arising for the 2018 calendar year; and*
 - iii. *systems and processes in place to ensure future and ongoing compliance with such obligations.*

Proposed undertaking

14. On 5 June 2018, Wollongong Coal Limited and Wongawilli Coal Pty Ltd jointly submitted an enforceable undertaking proposal to the Secretary. Consistent with the Enforceable Undertaking Guidelines the proposal was developed using the pre-proposal advisory services offered by the Resources Regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
15. In summary, the joint Wollongong Coal Limited and Wongawilli Coal Pty Ltd undertaking proposes to:
 - a) Engage an independent person to conduct a review of Wollongong Coal Limited and Wongawilli Coal Pty Ltd systems and processes for meeting their obligations and payments required under the Mining Act
 - b) Provide a report on recommendations and actions of the systems review to the Regulator
 - c) Conduct an independent review and audit of the financial capacity of Wollongong Coal Limited and Wongawilli Coal Pty Ltd
 - d) Provide an audit report setting out the review findings and recommendations to the Regulator
 - e) Provide refresher training to all relevant Wollongong Coal Limited and Wongawilli Coal Pty Ltd administrative staff concerning compliance obligations under the Mining Act
 - f) Pay the Authorisation Fees for 2018 within one month of acceptance of the undertaking
 - g) Pay the fees for 2019 to 2022 for each Authorisation 12 months in advance of each due date
 - h) Provide two bank guarantees each of \$150,000 (\$300,000 in total) as an assurance of the future payment of Authorisation Fees
 - i) Pay an additional penalty of 15% of the payment due if any payments are made between 1 and 30 days late
 - j) Pay an annual donation of \$5,000 each (\$10,000 total) to a local charity or community group by 30 June each year until 1 January 2023
 - k) Pay the Regulator's investigation and legal costs of \$24,350
 - l) Lease Wollongong Coal Limited property to Little School Preschool Inc for \$1 per annum (reduced from \$26,000 per annum) for at least until 1 January 2023
 - m) Withdraw Wollongong Coal Limited and Wongawilli Coal Pty Ltd appeals in the District Court upon acceptance of the undertaking
 - n) Report to the Regulator on the progress of the undertaking.

Considerations and findings

16. While the Act does not set out a threshold test for the acceptance or rejection of a proposal for an enforceable undertaking, the Secretary has approved guidelines under section 378ZFB of the Act for this purpose.
17. The guidelines provide that enforceable undertakings should be designed to deliver tangible benefits to the industry and community, and that these initiatives should seek to

resolve both the behaviour of concern that led to the alleged contravention and seek to rectify the consequences of that behaviour.

18. The guidelines further set out a number of considerations for determining whether to accept an enforceable undertaking. These include the nature of the alleged contravention, potential impacts on any worker, the industry, the community or the environment, and the compliance history of the companies.
19. While I note that Wollongong Coal Limited and Wongawilli Coal Pty Ltd each have an unfavourable compliance history, I accept that the undertaking and the commitments therein provide mechanisms to ensure the future payment of Authorisation Fees. I also note the severe penalties for a failure to comply with an undertaking.
20. The 12-month advance payment on authorisation fees for the next 5 years, underpinned by the provision of bank guarantees valued at \$300,000, provide significant remedial measures which will ensure future compliance.
21. Therefore in relation to the specific undertakings proffered jointly and severally by Wollongong Coal Limited and Wongawilli Coal Pty Ltd, I am satisfied that these commitments adequately resolve the behaviour of concern or appropriately seek to rectify the consequences of the behaviour.
22. There is a strong expectation that companies such as Wollongong Coal Limited and Wongawilli Coal Pty Ltd are aware of their obligations under the Act and have systems in place to ensure compliance. I am satisfied the independent reviews will assist the Regulator to monitor and enforce future compliance. I also note that these reviews are based on the similar terms and criteria sought by the Regulator in its 'show cause' notice regarding a proposal to suspend operations at both companies.
23. I note the agreed terms proposed jointly by Wollongong Coal Limited and Wongawilli Coal Pty Ltd are estimated to cost \$204,345 over the life of the undertaking, excluding the required fees payable in respect to the Authorisations for the years 2018 to 2022 and the \$300,000 in bank guarantees. In this respect the undertaking will deliver tangible benefits to the community.
24. Wollongong Coal Limited and Wongawilli Coal Pty Ltd will each donate \$5,000 (\$10,000 total) to a local charity or community group by 30 June each year until 1 January 2023. This will amount to a minimum of \$50,000 donated during the term of the undertaking.
25. Wollongong Coal Limited will also lease a property to a local preschool at a reduced rent of \$1 per annum, down from \$26,000 per annum. This amounts to a financial contribution to the community of \$129,995 during the term of the undertaking.
26. Wollongong Coal Limited and Wongawilli Coal Pty Ltd have undertaken to pay the Regulator's investigation and legal costs of \$24,350. Further, within seven days of acceptance of the undertaking, Wollongong Coal Limited and Wongawilli Coal Pty Ltd will withdraw their appeals in the District Court of New South Wales in respect to their November 2017 convictions.
27. 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 contraventions.
28. The acceptance of the undertaking will ensure that the Regulator does not incur further costs in relation to the matter, particularly with regard to investigation and legal costs, which may never fully be recouped through prosecution action alone.
29. Having regard to the above, I am satisfied that the undertaking proffered in this instance appropriately reflects the alleged contraventions and directly addresses the behaviour and concerns of the alleged contraventions.

30. Further, I am satisfied that the undertaking will deliver better compliance outcomes, and general and specific deterrence, than other compliance action. In this regard I note that the failure to comply with this undertaking attracts a maximum penalty of \$1.1 million, and is regarded as one of the most serious breaches under the Act - compared with a maximum penalty of \$11,000 that can be applied for the late payment of authorisation fees.
31. Accordingly, I have determined to accept the enforceable undertaking proposed jointly and severally by Wollongong Coal Limited and Wongawilli Coal Pty Ltd.
32. In accordance with the Act, the current prosecution proceedings against Wollongong Coal Limited and Wongawilli Coal Pty Ltd in respect to the March 2018 court attendance notices will be discontinued as soon as possible. In addition, the Regulator will not take any further action in relation to its 'show cause' notice of 2 February 2018.

Date of decision:

7 June 2018



Lee Shearer

Deputy Secretary Resources Regulator
Coordinator General for the Central Coast
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.