



DOC19/366407

SUSPENSION NOTICE

FILE NO: NCN0006177

TITLEHOLDER: Young Mining Company Pty Ltd
(ACN 004 301 508)

AUTHORISATION: Consolidated Mining Lease 15 (Act 1992)

LEGISLATION: Section 240AA of the *Mining Act 1992*

DECISION-MAKER: Anthony Keon
Executive Director
NSW Resources Regulator

SECTION 240AA DIRECTION

As authorised by Section 240AA of the Mining Act 1992 (**Act**), I Anthony Keon, having delegated authority from the Secretary of the Department of Planning, Industry and Environment (**department**), direct Young Mining Company Pty Ltd (ACN 004 301 508) (**Young Mining**) to:

“Suspend all operations on Consolidated Mining Lease 15 (Act 1992), with the exception of those activities required to maintain a safe workplace or to undertake environmental rehabilitation of the consolidated mining lease.”

This direction takes effect and is in force seven (7) days from Young Mining being notified of this decision, being **8 August 2019**. The direction remains in force until the suspension notice is revoked or varied by written notice of the Secretary or delegate.

REASONS FOR DECISION

Legislation

1. Section 240AA(1) of the Act provides that the Secretary may, by written notice (a **suspension notice**), direct a responsible person to suspend (for such period as is specified in the direction or until further notice) all, or any specified, operations under an authorisation or suspend any activity approval relating to the operations if the Secretary considers that:
 - a. circumstances exist that could constitute a ground for cancellation of the authorisation under section 125(1)(b)-(g), 203(1)(b)-(e) or (h) or 233(1)(b)-(d), or
 - b. circumstances exist that could constitute a ground for cancellation of the authorisation under section 125(1)(h), 203(1)(i) or 233(1)(f), in relation to a breach of a direction under section 240 only.
2. Section 240AA(2) of the Act provides that before giving a suspension notice, the Secretary is to:
 - a. cause written notice of the proposed suspension notice and the grounds for it to be served on the holder of the authorisation;
 - b. give the holder a reasonable opportunity to make representations with respect to the proposed suspension notice; and
 - c. take any such representations into consideration.
3. Section 125(1) of the Act sets out a number of grounds for cancellation which can be relied upon when issuing a suspension notice. These include if the decision-maker is satisfied that:
 - a. Section 125(1)(b) – the holder of the authority has contravened a provision of the Act or the regulations (whether or not the holder is prosecuted or convicted of any offence arising from the contravention), and
 - b. Section 125(1)(c) – a person has contravened a condition of the authority (whether or not the person is prosecuted or convicted of any offence arising from the contravention).
4. Section 363(2) of the Act provides that the Secretary may delegate any function under the Act to any person, except this power of delegation or any function delegated to the Secretary by the Minister. The Secretary has delegated the functions to suspend all, or any specified, operations under an authorisation or suspend any activity approval relating to the operations under section 240AA of the Act to the Executive Director of the NSW Resources Regulator.

Background

5. Consolidated Mining Lease 15 (Act 1992) (**CML 15**) was granted to Young Mining on 27 June 2000 (expiring on 29 May 2006) for the purpose of prospecting and mining of chromite, dolomite and magnesite. CML15 consolidated the following leases held by Young Mining:

Private Lands Lease 460 (Act 1924)	Private Lands Lease 706 (Act 1924)
Private Lands Lease 752 (Act 1924)	Private Lands Lease 821 (Act 1924)
Private Lands Lease 827 (Act 1924)	Private Lands Lease 1122 (Act 1924)
Private Lands Lease 1189 (Act 1924)	Mining Lease 993 (Act 1973)
Mining Lease 1054 (Act 1973)	Mining Lease 1109 (Act 1973)
Mining Lease 1425 (Act 1992)	

6. CML 15 is located at Thuddungra, about 30km West-North-West of Young, New South Wales.
7. An application for renewal was received on 27 May 2005 and on 30 April 2008, CML 15 was renewed until 29 August 2012.
8. An application for renewal 29 August 2011 and on 4 August 2017, CML 15 was renewed until 29 August 2033.
9. A security deposit condition was imposed on CML 15 when the authority was first granted and continues to have effect.
10. The current security deposit held by the department is \$1,103,000.
11. On 28 September 2018, the regulator wrote to Young Mining to advise that an assessment of the security deposit required under CML 15 had been made and the assessed deposit was determined to be \$1,897,000.
12. On 15 November 2018, an application for a review of the assessed security deposit for CML 15 (**Minister's review**) was submitted by Young Mining.
13. On 11 January 2019, the regulator wrote to Young Mining to advise that a Minister's review had been carried out under section 261BE of the Act, and that this review determined to amend the Secretary's assessment of the security deposit required for CML 15 to \$1,787,641 (**Reviewed Security Deposit Amount**).
14. On 15 January 2019, the Division of Resources and Geoscience (**DRG**) wrote to Young Mining confirming the outcome of the Minister's review; and on 30 January 2019, DRG again wrote to Young Mining to confirm that the due date for the lodgement of the increased security deposit was due no later than noon on 26 February 2019.
15. In a letter dated 6 February 2019, Mr Chandru Appar, Acting Consul General, Consulate General of India wrote to the Hon. Anthony Roberts MP, the then Minister for Planning, Minister for Housing and Special Minister for State and the Hon Niall Mark Blair MLC, the then Minister for Primary Industry, Minister for Regional Water and

Minister for Trade and Industry, on behalf of Causmag Ore Company, concerning the increase in security deposit.

16. On 28 February 2019, the Hon. Don Harwin MLC, the then Minister for Resources, the Minister for Energy and Utilities and the Minister for the Arts wrote to Mr Chandru Appar, Acting Counsel General, Consulate General of India, on behalf of Causmag Ore Company Proprietary Limited, advising that if Young Mining was unable to pay the security deposit, it could make a request to DRG for a payment plan. An extension of two weeks until 12 March 2019, was also granted for Young Mining to either make the payment or seek a payment plan.
17. On 3 July 2019, I wrote to Young Mining providing a further opportunity for payment of the outstanding security deposit and for the making of any further submissions by 10 July 2019. On 5 July 2019, Young Mining requested an extension until 24 July 2019 to provide a response, which was granted. On 23 July 2019, Young Mining provided a response.
18. To date, the Reviewed Security Deposit Amount has not been lodged with the department, nor has a request been made by Young Mining for a payment plan.

Representations

19. On 9 April 2019, I wrote to Young Mining in accordance with section 240AA(2) of the Act, inviting it to provide a submission in response to my proposed decision to suspend CML 15. Any submissions were due by no later than 5.00pm 30 April 2019.

Submission One

20. On 18 April 2019, the regulator received a submission from Mr John Mahony of Mahony Law on behalf of Young Mining in response my proposed decision to suspend CML 15.
21. Mr Mahony stated that the security deposit currently held by the department was sufficient to pay for all rehabilitation if such rehabilitation was carried out immediately; accordingly, there is no risk to the environment or the state.
22. Mr Mahony acknowledged that Young Mining had received information from the Consulate General of India, on 5 March 2019, that the payment date had been extended until 12 March 2019; however, no correspondence was directly received from the department until 13 March 2019 and Young Mining was not directly advised that a payment plan was an option. It was submitted that the implication that Young Mining did not meet the deadline for payment of the increased security deposit or avail itself of a payment plan by 12 March 2019 was false and misleading.
23. Mr Mahony submitted that the issue of a notice of intention to suspend was unreasonable for the following reasons:
 - a. Young Mining was taking a variety of steps to work with the department to determine the correct amount for the security and the notice was premature;
 - b. "the Department's calculations of the required Security Deposit amount was blatantly incorrect";

- c. A suspension notice would result in the closure of Young Mining's business "if not permanently, then for a significant period of time". This would not only put in jeopardy the livelihood of 40 employees but would also significantly adversely affect the general economy of the City of Young and would harm the general economy of the state;
 - d. The issue of the notice of intention to suspend was unnecessary, as the risk to the State, the local community and the environment from the possibility of Young Mining failing to carry out necessary rehabilitation and there being inadequate security to guarantee such works was non-existent;
 - e. The issue of the notice of intention to suspend was an example of bad faith on behalf of the department
24. The submission requested that Young Mining be given 21 days' notice, should any action be taken, so that an injunction could be sought.

Proposed Injunction Application

25. On 24 April 2019 Mr Mahony wrote to me on behalf of Young Mining, indicating Young Mining's intention to seek an injunction.
26. As a result, a commitment has been made on behalf of the regulator, that should a suspension notice be issued, it will not take effect until seven (7) days after the suspension notice is given.

Submission Two

27. On 30 April 2019, the regulator received a second submission from Mr Mahony on behalf of Young Mining.
28. In summary, Mr Mahony submitted that:
- a. The assessment process relied upon in the Minister's review of the security deposit "has gone seriously awry, to the point where the Secretary should, of his own initiative, make a fresh determination of the assessed security deposit", and as set out in submission one, summarised above, "there is a basis for challenging the lawfulness of each of the conclusions".
 - b. The quote obtained from by Cooper Civil & Crushing and provided to the regulator on 13 March 2019 indicated that rehabilitation costs (both inside and outside CML 15) were below that required by the Reviewed Security Deposit Amount. On this basis the Reviewed Security Deposit amount is not appropriate and the Secretary should have regard to the most up-to-date information. Further, the Secretary should revisit the initial assessment, or postpone the issue of any notice of suspension as the provision for future rehabilitation is fully served by the security deposit currently held.
 - c. Young Mining has conducted its operations on the basis that the areas identified in the Minister's reasons were at all times included within CML15;

- d. Young Mining maintains that the stockpiles of material containing magnesite were inaptly categorised as “waste”, stating that they have value and will be removed in the course of normal mining operations. Further, Young Mining is in the process of acquiring equipment to process the ore more efficiently to produce less volume of waste material.
- e. The Secretary should exercise the power to make a fresh assessment of the security deposit on the Secretary’s own initiative, in particular because the actual estimated costs of rehabilitation (according to the figures from Cooper Civil & Crushing) remain below the Reviewed Security Deposit Amount.
- f. It was noted that the department has undertaken to give at least seven (7) days’ notice if it forms an intention to suspend CML 15, however 14 days’ notice was sought to allow Young Mining to challenge any decision in the Supreme Court of NSW.

Submission Three

29. On 3 July 2019, I wrote to Young Mining in response to the submissions received [submissions one and two] and provided a copy of the letter sent to the Acting Counsel General of the Indian Consulate General on 28 February 2019. In this letter Young Mining was given a further opportunity to pay the amount required by the Reviewed Security Deposit Amount or make any further submission by 10 July 2019. In addition, I advised Young Mining that the quote from Cooper Civil & Crushing provided on 13 March 2019 had been considered and that it had been decided that the Reviewed Security Deposit Amount was reasonable and would not be varied.
30. On 5 July 2019 Young Mining made a written request for an extension of a further 14 days to reply.
31. The regulator responded by email on 10 July 2019 granting an extension to make submissions until 5pm on 24 July 2019. In this email, a further request was made that Young Mining “immediately meet its compliance obligations by paying the required security deposit”.
32. On 23 July 2019, the regulator received a third submission from Mr Mahony on behalf of Young Mining.
33. In this response, Mr Mahony submitted, in summary, that:
 - a. Young Mining continues to rely on the submissions already made [submissions one and two] concerning the assessment of the security deposit and does not seek to make additional submissions regarding the fair and proper assessment of the security deposit;
 - b. Young Mining does not dispute its obligation to provide any additional security deposit “properly and fairly determined by the Department” and has made an application to its bank for additional funding, which is still under consideration;
 - c. Young Mining’s concern is that “the Department has not properly and fairly determined the amount of the increased Security Deposit sought”;
 - d. The department has disregarded the NSW South Wales Model Litigant Policy;

- e. Young Mining intends to commence proceedings seeking to restrain any notice of suspension that is issued, but would prefer to mediate the dispute;
- f. Young Mining is in the process of acquiring a photometric ore sorter, which will allow larger production of 99% and higher purity magnesite, including from the magnesite stockpiles which the department has characterised as waste.
- g. Young Mining has been seeking finance in a very difficult economic climate to be able to meet a requirement to pay the properly determined amount, but its inquiries so far indicated this would take some time to organise.

Considerations

34. I have carefully considered the evidence before me. In doing so I have given due regard to the following:
- a. Section 261B of the Act, which provides the mechanism by which a security deposit condition may be imposed on an authorisation or varied.
 - b. CML 15 is subject to a current security deposit condition, with \$1,103,000 currently being held by the department;
 - c. On 28 September 2017, an assessment of the security deposit for CML 15 was conducted by a delegate of the Secretary and the assessed deposit was determined to be \$1,897,000.
 - d. Young Mining was notified of this determination and sought a Minister's review under section 261BE of the Act.
 - e. A Minister's review was conducted which determined to amend the Secretary's assessment for CML 15 to \$1,787,641 (being the Reviewed Security Deposit Amount). Young Mining was notified of this determination.
 - f. Young Mining was subsequently notified on 30 January 2019 that lodgement of the increased security deposit amount was due no later than noon on 26 February 2019.
 - g. In response to enquiries made by the Acting Counsel General, Consulate General of India, on 28 February 2019, the then Minister granted an extension of two weeks, until 12 March 2019, to make this payment or request a payment plan. Young Mining was not directly notified of this.
 - h. The additional time afforded to Young Mining (by the letter of 3 July 2019 and subsequent extension of time to respond) to make payment and further submissions in response to the representations made in submission one.
 - i. Young Mining has not lodged the amount required by the increase of the security deposit or requested a payment plan.
35. I have also closely considered all representations made by Mr Mahony on behalf of Young Mining, including submissions one, two and three referred to above, the quote

from Cooper Civil & Crushing provided on 13 March 2019 and Young Mining's contentions that:

- a. The current security deposit held by the department is sufficient.
 - b. The department's calculations of the increased amount of the security deposit are 'blatantly incorrect', the process 'has gone seriously awry' and the additional security deposit has not been 'properly and fairly determined' for the reasons set out in Young Mining's submissions.
 - c. The categorisation of the stockpiles of material containing magnesite as waste was in error.
 - d. The quote from Cooper Civil & Crushing provided on 13 March 2019 provides the actual estimated costs of rehabilitation.
 - e. The failure to directly notify Young Mining of the two-week extension granted in the letter of 28 February 2019 and of the opportunity to request a payment plan
 - f. A suspension notice would result in the closure of Young Mining's business which would affect its 40 employees and the City of Young.
36. Considering the failure to notify Young Mining of the two-week extension granted in the letter of 28 February 2019, as a matter of procedural fairness I decided to afford Young Mining an additional three weeks to pay the outstanding security deposit or make any further submissions.
37. I have considered the department's calculations of the increased amount of the security deposit in response to the representations made on behalf of Young Mining and the cost estimates included in the quote from Cooper Civil & Crushing provided on 13 March 2019. Having taken into consideration what Young Mining estimates would be the costs of rehabilitation, as reflected in the Cooper Civil & Crushing quote, I am satisfied that the assessed security deposit of \$1,787,641 determined following the Minister's review was determined in accordance with the department's rehabilitation cost estimation tool and the Rehabilitation Cost Estimate Guidelines (ESG1), and that the assessed deposit is an accurate representation of the Government's full costs in undertaking rehabilitation of the area the subject of the security deposit condition in the event of default by Young Mining.
38. I am not persuaded that any improper process has been followed for determining the amount of the security deposit or that the department has acted in bad faith.
39. I have considered Young Mining's submission that the stockpiles were inaptly categorised as waste and have value. I am not persuaded by this argument and I am of the view that the sale of stockpile materials is not to be factored into the Rehabilitation Cost Estimate (**RCE**) calculations. The RCE assumes the worst-case cost of rehabilitation to the Government and the realisation of a higher stockpile value is not relevant to the RCE calculations.
40. I note Young Mining's submission that the suspension of CML 15 would result in the closure of the business may affect the 40 employees and the City of Young. However,

having regard to the seriousness of the offending and the environmental risk, I am not persuaded that this should prevent me from suspending CML 15.

41. After careful consideration, I am satisfied that Young Mining has failed to lodge the additional security or request a payment plan by the due date, a breach of CML 15's security condition.
42. As such, I am satisfied that Young Mining has contravened a condition of authorisation, also an offence under section 378D(1) of the Act 'Contravention of condition of authorisation – offence by holder'.
43. Contravening a provision of the Act or a condition of the authorisation constitutes grounds for the decision-maker to cancel an authorisation, pursuant to section 125(1)(b) and 125(1)(c) of the Act.

Conclusion

44. Based on the material before me, I am satisfied that circumstances exist that constitute grounds for cancellation of CML 15 under section 125(1)(b) and 125(1)(c) of the Act.
45. In making my decision I have given due regard to the objects of the Act, which require the payment of security to provide for the rehabilitation of mine sites (section 3A(e) of the Act) and the need to ensure the effective rehabilitation of disturbed land and water (section 3A(f) of the Act). Security is a fundamental element in ensuring the effective rehabilitation of mining leases and provides a safeguard should lease holders default on their obligations.
46. Further, I believe that the amount of security currently outstanding (approximately 38% of the current assessed deposit) presents a significant environmental risk should Young Mining default on its rehabilitation obligations or continue to operate and potentially increase the disturbance footprint.
47. Having regard to all the matters set out above, I am satisfied that the above grounds warrant the suspension of all operations under CML 15, with the exception of those activities required to maintain a safe workplace or to undertake environmental rehabilitation of the consolidated mining lease.
48. The direction remains in force until the suspension notice is revoked or varied by written notice of the Secretary or delegate.
49. I am satisfied that the requirements of section 240AA(2) of the Act to notify Young Mining in writing of the proposed suspension notice have been adhered to. Young Mining was afforded reasonable opportunity to make representations and these representations have been considered in making my decision.
50. Based on the regulator's compliance with the requirements of section 240AA(2) of the Act and the additional time provided to Young Mining in July 2019 to make payment or provide further submissions, I believe that Young Mining has been afforded procedural fairness in respect of my decision to issue a suspension notice.
51. Accordingly, I have determined to issue this suspension notice under section 240AA(1) of the Act.

52. In making this decision, I have given due consideration to the impact the suspension notice will have on Young Mining, its employees and the local community. In this instance I have determined that the suspension notice takes effect at least seven (7) days from Young Mining being notified of this decision, being 8 August 2019 to allow Young Mining enough time to either make payment or to make appropriate arrangements with its operations and workforce.
53. Consideration will be given to revoking the suspension notice once Young Mining has lodged the full increase in security for CML 15 in the manner approved by the department.

Date of decision: **31 July 2019**



Anthony Keon
Executive Director
NSW Resources Regulator

Note: In accordance with its Public Comment Policy, a copy of this decision will be published on the NSW Resources Regulator's website: resourcesregulator.nsw.gov.au

WARNING AND INFORMATION ABOUT THIS NOTICE

- It is an offence under section 240C of the *Mining Act 1992* to fail to comply with this direction.
- The maximum penalty for this offence is, for a corporation, \$1,100,000 and a further \$110,000 for each day the offence continues, and, for a natural person, \$220,000 and a further \$22,000 for each day the offence continues.
- An offence against section 240C may attract executive liability against a director of the corporation, or an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation – section 378F of the *Mining Act 1992*.
- If you fail to take the measures specified above, the Minister may take any action necessary to give effect to the direction including authorising another person to take those measures and recover the costs and expenses so incurred from you, or applying to the Land and Environment Court for an injunction directing you to comply with this direction – section 241 of the *Mining Act 1992*.
- The serving of this direction and the matters required of you pursuant to this direction in no way preclude, hinder or otherwise restrain the Department of Planning and Environment from taking further action against you including by commencing legal proceedings.
- This notice issued under section 240AA of the *Mining Act 1992*.
- The words and expressions used in this direction have the same meaning as they have in the *Mining Act 1992*.