

## Decision to reject enforceable undertaking given by Narrabri Coal Pty Ltd and Narrabri Coal Operations Pty Ltd.

Entity	<b>Narrabri Coal Pty Ltd</b> (ACN 107 813 963) <b>Narrabri Coal Operations Pty Ltd</b> (ACN 129 850 139)
Issue	Whether to accept or reject a Mining Act undertaking given by Narrabri Coal Pty Ltd and Narrabri Coal Operations Pty Ltd.
Legislation	Part 17A, Division 4B of the <i>Mining Act 1992</i>
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Department of Regional NSW

### Section 378ZFB decision

As authorised by section 378ZFB of the *Mining Act 1992*, and as a delegate of the Secretary of the Department of Regional NSW, I, Anthony Keon, Executive Director, NSW Resources Regulator, have decided to **reject** the enforceable undertaking given by Narrabri Coal Pty Ltd and Narrabri Coal Operations Pty Ltd, as attached to this decision.

### Reasons for decision

#### Legislation

1. Section 378ZFB of the Mining Act 1992 (**Act**) provides that:
  - a) The Secretary of the Department of Regional NSW (**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 contraventions or alleged contraventions to which the undertaking relates.
  - c) The Secretary must issue, and make public, general guidelines for or in relation to the acceptance of an enforceable undertaking under this Act.

2. The Secretary is required, under section 378ZFC of the Act, 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. Further, the Secretary must publish, and make public, notice of a decision to accept an enforceable undertaking and the reasons for that decision.
3. In exercising functions under the Act, the Secretary must have regard to the 'Objects' set out in section 3A of the Act.
4. The Secretary has issued, and published on the Regulator's website [www.resourcesregulator.nsw.gov.au](http://www.resourcesregulator.nsw.gov.au), guidelines relevant to the acceptance of Mining Act enforceable undertakings ([Guidelines](#)) as required by section 378ZFB(3) of the Mining Act:

## Background

5. Exploration Licence 6243 (Act 1992) (**EL 6243**) was first granted on 21 May 2004 for the purpose of prospecting for 'Group Nine' minerals.
6. EL 6243 is located about 24 km north-west of Boggabri.
7. EL6243 extends across land owned by the State of NSW (Crown Lands) under the control and management of Forestry Corporation of NSW (FCNSW) to its west and freehold land owned by Narrabri Coal and other licence holders to its east.
8. On 18 January 2010, EL 6243 was transferred to the licence holders.
9. EL 6243 was last renewed on 18 February 2015 until 20 May 2019. A renewal application has been lodged with the Mining Exploration and Geoscience Division and is currently pending determination. Under section 117 of the Act the authority continues to have effect until the application for renewal is finally disposed of.
10. EL 6243 is currently subject to the Exploration Licence Conditions (Coal) 2012. Condition 2 and 3 (Prospecting operations requiring further approval) which state:
  - “2. The licence holder must obtain the Minister's written approval prior to carrying out any of the following prospecting operations on the exploration licence area:
    - a) Category 2 prospecting operations; and
    - b) Category 3 prospecting operations.”
  - ...
  - “3. The licence holder must comply with the conditions of an approval under condition 2 when carrying out those prospecting operations”.
11. The introduction of Clause 161 of Schedule 6 of the Act removes the categories of prospecting operations and requires compliance with Section 23A of the Act.
12. Section 23A of the Act states:
  - “(1) An exploration licence is subject to a statutory condition that the holder of the licence must not carry out an assessable prospecting operation on land over which

*the licence is granted unless an activity approval has been obtained for the carrying out of the assessable prospecting operation in relation to that land and is in force” ...*

*“(7) For the purposes of this Act, it is a statutory condition of an exploration licence that the holder must comply with any activity approval granted to the holder and in force.”*

5. The Narrabri Coal Mine is located approximately 21km SSE of Narrabri and is authorised to undertake mining activities under Mining Lease 1609 (Act 1992) (**ML 1609**).
6. ML 1609 was first granted on 18 January 2008 and expires on 18 January 2029.
7. Narrabri Coal Pty Ltd (**NCPL**) is one of six titleholders for both EL 6243 and ML 1609 and holds a 70% interest, with the remaining 30% distributed amongst the remaining 5 titleholders.
8. Narrabri Coal Operations Pty Ltd (**NCO**) has been engaged by the titleholders to have possession and control of ML 1609 and EL 6243 and is the operator of the Narrabri Coal Mine.
9. On 18 June 2019, Inspectors from the NSW Resources Regulator (Regulator) conducted an inspection of EL 6243.
10. This inspection identified that three access tracks had been constructed in contravention of an activity approval granted on 15 November 2018 and were not in accordance with the Narrabri South Exploration Program 2018-2019. This included the access track to the exploration bore site E307, the access track to the exploration bore site E309, and the access track between exploration bore sites E318 and E319. In addition, Inspectors also observed that where the tracks had been constructed there were several felled hollow-bearing trees.
11. On 20 August 2018, prior to granting this activity approval, the Regulator wrote to NCPL advising that, amongst other things, the proposed access track between E318 and E319 was to be removed from the Review of Environmental Factors (**REF**) associated with the application to conduct exploration activities.
12. A subsequent investigation by the Regulator identified the following alleged contraventions:

Allegation #	Title	Involved parties	Allegation
1	EL 6243	NCPL and NCO	An access track was cleared between drill pads E318 and E319 in contravention of the approved Review of Environmental Factors dated October 2018 (2018 REF)
2	EL 6243	NCPL and NCO	An access track was cleared for access to drill pad E307 in a location different to that approved under the 2018 REF
3	EL 6243	NCPL and NCO	An access track was cleared for access to drill pad E309 in a location different to that approved under the 2018 REF
4	EL 6243	NCPL and NCO	That two bore holes have been drilled on drill pad E259 in a manner inconsistent with the Review of Environmental Factors dated 13 September 2016 (2016 REF) and in contravention of the activity approval granted on 19 September 2016 (2016 Activity Approval).
5	EL 6243	NCPL and NCO	That an open borehole at drill pad E259 was left in an unsafe manner by leaving the borehole with only a star picket across the exposed hole.
6	EL 6243	NCPL and NCO	Drill pad E266 not rehabilitated in accordance with the 2016 REF and in contravention of the 2016 Activity Approval
7	EL 6243	NCPL and NCO	That exploration activities have been conducted in a manner inconsistent with the 2016 REF and in contravention of the 2016 Activity Approval. Borehole E291, also identified as NC798, was drilled at E775757.5 N6615271 when the approved location is E774544 N6615479
8	EL 6243	NCPL and NCO	That exploration activities have been conducted in a manner inconsistent with the 2016 REF and in contravention of the 2016 Activity Approval. Borehole E292, also identified as NC799, was drilled at E775810 N6614783 when the approved location is E774544 N6615032
9	EL 6243	NCPL and NCO	A site rehabilitation plan was not prepared as required by the 2018 REF and in accordance with the 2018 Activity Approval.
10	ML 1609	NCPL	That borehole NC619C was drilled in 2015 and had not been sealed and secured in accordance with the relevant guidelines.

13. Summons have been filed in the Land and Environment Court against NCPL and NCO in relation to these allegations. These matters have been listed for mention on 11 December 2020.
14. The Regulator has issued official cautions to the remaining titleholders (as minority shareholders) for the alleged contraventions.

## Terms of the proposed undertaking

15. On 30 October 2020, NCPL and NCO submitted an undertaking signed on 29 October 2020, for the consideration of the Secretary. Consistent with the Guidelines, the proposal was developed using the pre-proposal advisory service offered by the Regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
16. In summary, the NCPL and NCO undertaking proposes to:
  - a. Publish within 30 days of acceptance of the undertaking, a public notice in the Northern Daily Leader and Sydney Morning Herald acknowledging the undertaking and provide a copy to the Regulator within 14 days of the publication.
  - b. Within 30 days of acceptance of the undertaking issue written communication to all Whitehaven Coal workers Australia-wide about the undertaking and the initiatives, display a summary of the undertaking on all mine, mine officer and contractor notice boards at the mine for a period of 30 days, and provide evidence of the communications to the Regulator within 14 days.
  - c. Review the implementation and progress of the undertaking each month at the Site Leadership Team meeting throughout the life of the undertaking and provide the Regulator with minutes of the meetings.
  - d. Deliver an integrated remote sensing Geographic Information System (**GIS**) at the site to provide enhanced spatial data management and analytical capability in relation to environmental management and rehabilitation performance, training for staff and purchase of specialised equipment (training \$30,000, consultant's costs \$19,000 and equipment \$40,000).
  - e. Provide the NSW Mineral's Council \$50,000 to fund further guidance on leading practice in exploration. The final scope of the guidance will be determined by an Industry Working Group which will include a representative of NCPL/NCO.
  - f. Contribute \$150,000 to the Gunnedah Shire Council to assist with the Gunnedah Koala Park's operational costs once it has been established. Should the park not proceed within 12 months of acceptance of the undertaking, the funds will be available for the Gunnedah Shire Council to use on other environmental projects at its discretion.
  - g. Contribute \$50,000 to the Australian Wildlife Conservancy in support of its Endangered Mammal Reintroduction Program in the Pilliga State Forrest.

- h. Pay the Regulator's recoverable costs associated with investigating the alleged contraventions in the amount of \$203,500.

17. The total cost of the undertaking is \$542,500.00

## Considerations and findings

- 18. I note that since the Regulator's inspection and enforcement actions, NCPL and NCO have taken a range of steps to remedy the alleged offending behavior.
- 19. In particular, NCPL and NCO have made a range of organisational changes that have seen the implementation of a new leadership structure and environmental staff included on the company's leadership team. A new environmental compliance officer role has been created in addition to enhanced environmental training for all mine personnel.
- 20. Further, the licence holders have complied with the terms of the suspension notice in full including commissioning an independent audit and implementing a compliance management system in addition to rehabilitating the affected sites at a cost of \$37,650.
- 21. While these changes are acknowledged, in my view such governance arrangements should have been in place prior to the alleged contraventions taking place given the size and scale of the operations.
- 22. NSW has a strong regulatory framework to ensure the environmental impacts of mining and exploration activities are appropriately managed. Appropriate company resources need to be applied to monitor and ensure compliance with the Act and regulations.
- 23. In relation to the alleged clearing of the access tracks in the Pilliga State Forrest, I have concerns that there was significant environmental harm involving the clearing of vegetation and the felling of 13 hollow bearing trees. This harm may take many years, if not decades to recover. An aggravating factor I have also taken into account is the clearing of the 800m long 5m wide track between drill pads E318 and E319 after clear communication from the Regulator that this track was excluded from the 2018 REF.
- 24. Accordingly, I find the offending behaviour to be significant and at the higher end of the scale, and demonstrative of a comprehensive failure to meet fundamental regulatory obligations in relation to the approvals (and restrictions) obtained.
- 25. Therefore, there is a strong need for specific and general deterrence. In this respect, I am not satisfied that proposed undertaking will deliver such deterrence. Nor am I satisfied as to the merits of certain projects put forward under the undertaking proposal.
- 26. In this regard, I am concerned that the proposed establishment of a GIS system does not go beyond what is expected of a sophisticated mining operation. The use and deployment of modern technology such as GIS to track mining operations and rehabilitation progress is already in use at many large mining operations and GIS reporting will be a key requirement of the Regulator's proposed reforms to the rehabilitation framework.

27. I have further concerns about the payment of \$50,000 to the NSW Minerals Council to develop exploration guidance material for the mining industry. While I consider project concept to be worthwhile and will benefit the broader industry, I am concerned that the only enforceable deliverable in the undertaking is the payment of the monies with the final deliverable resting with the Minerals Council.
28. There is no specific detail or performance criteria provided in the undertaking (other than the formation of a working group) that can be monitored to ensure compliance and the delivery of a tangible product. I am further of the view that the community would be rightly concerned with a project that involves payment to an industry advocacy group.
29. Similarly, I am concerned that the payment of \$150,000 to the Gunnedah Shire Council lacks sufficient detail to ensure that tangible benefits are delivered to the community and the environment should the Koala Park not eventuate. In this regard, other than the payment of the monies to the Council there is no specific detail or performance criteria concerning how the monies will be spent on specific environmental projects.
30. For the balance of the proposed initiatives, I am largely satisfied as to their merits and that they would deliver tangible benefits to industry and the community. However, having regard to the collective merits of all the initiatives, I am not satisfied that the acceptance of the undertaking will result in a better outcome than continuing with the current prosecution proceedings.
31. In this respect, I note that NCPL has been charged with 10 offences and NCO has been charged with 9 offences before the NSW Land and Environment Court, with each offence carrying a maximum penalty of \$1.1 million dollars.
32. Accordingly, I have determined to **reject** the enforceable undertaking given jointly and severally by NCPL and NCO.

Date of decision: **3 December 2020**



Anthony Keon  
**Executive Director**  
**Resources Regulator**  
**Department of Regional NSW**

## NOTE

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