

FILE NO: 0579-2015

ENTITY: KEPCO Bylong Australia Pty Limited
ACN 075 361 769

AUTHORISATIONS: Mining Act 1992 – 342 & 287

ISSUE: Whether to accept an enforceable undertaking in in relation to an alleged contravention under the Act .

LEGISLATION: *Mining Act 1992 - Part 17A, Division 4B*

DECISION MAKER: Simon A Y Smith
Secretary of the Department of Industry

SECTION 378ZFB DECISION

As authorised by Section 378ZFB of the *Mining Act 1992*, I, Simon Smith, Secretary, Department of Industry, have decided to **accept** the enforceable undertaking given by KEPCO Bylong Australia Pty Limited, as annexed to this decision.

The undertaking takes effect and is in force immediately upon KEPCO 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 this 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 that decision and reasons.
 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. KEPCO Bylong Australia Pty Limited (ACN 075 361 769) is the holder of Authorisation 342 and Authorisation 287 granted under the Mining Act.
7. KEPCO Bylong is the proponent of the Bylong Coal Project, which comprises of the proposed development of an open cut and underground coal mine, including associated infrastructure). KEPCO engaged WorleyParsons Services Pty Limited (ACN 001 279 812) to manage activities under the Project on its behalf.
8. On 7 and 8 May 2015, WorleyParsons submitted a Surface Disturbance Notice Application to the Department in relation to proposed exploration activities associated with A342.
9. The Application was accompanied by a number of attachments including a document titled "Proposed Drill Holes on the Property 'Oakdale'". This document comprised six photographs that were not photographs of the proposed locations of the six exploration boreholes on the Oakdale Property.
10. On 22 June 2015, the Department was advised that the photographs provided in the Application were not taken on the Oakdale Property and did not show the proposed

locations of the proposed boreholes on the Oakdale Property. The Department subsequently undertook an investigation into the matter.

11. On 11 March 2016 the Department commenced prosecution action against KEPCO Bylong alleging that the information provided in connection with the Application was false or misleading in a material particular in contravention of section 378C of the Act. At the time of alleged offence the maximum penalty under section 378C was \$55,000.

Proposed undertaking

12. On a 20 June 2016 a signed proposal by KEPCO Bylong for an enforceable undertaking was received by the Department. Consistent with the *Enforceable Undertaking Guidelines* the proposal was developed using the pre-proposal advisory services offered by the Department which provided 'without prejudice' feedback on the proposed terms of the undertaking.

13. In summary, KEPCO Bylong gives an undertaking to do the following:

- a) Review and update its existing controls for all documents intended to be submitted to the Department (within 3 months). At a minimum this will include;
 - i. existing contractor monitoring and assurance processes, including to make provision for periodic audits of contractor performance; and
 - ii. document control procedures, including its risk-based authorities matrix to ensure that all Mining Act Documents are:
 - appropriately reviewed and approved by KEPCO Bylong prior to being finalised and submitted or released, and
 - where appropriate, for key technical Mining Act Documents, reviewed by a technical review committee.
- b) Provide refresher training to KEPCO Bylong staff on its obligations under the Mining Act (within 3 months).
- c) Submit a report to the Department confirming completion of the above items (within 4 months).
- d) Pay the Department's investigation costs of \$12,000 and legal costs of \$20,000.
- e) Reimburse the Department's costs in monitoring compliance with the undertaking (to a maximum of \$2,000).

Considerations and findings

14. While under the Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note that KEPCO Bylong acknowledges that it did not sufficiently supervise WorleyParsons in relation to the preparation and submission of the Application to ensure that all information submitted was wholly true and correct.
15. KEPCO Bylong, as the holder of the Authorisation, has a legal obligation to ensure the accuracy of information supplied to the Department which cannot be abrogated or

delegated a third party. Further, the alleged provision of information that is false or misleading is at the more serious end of the scale.

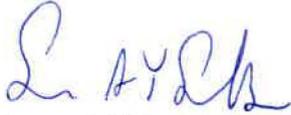
16. However, I note that KEPCO Bylong has no adverse compliance history under the Act and that the alleged material was compiled and submitted by WorleyParsons. I am therefore of the view that KEPCO Bylong's culpability in the matter is at the lower end of the scale.
17. KEPCO Bylong has proposed a number of quality control measures with the aim of ensuring that there is no recurrence of the circumstances giving rise to alleged offending conduct.
18. In this respect, KEPCO Bylong's undertaking to review and update its controls for ensuring the accuracy of documents provided to the Department, together with the refresher training to staff on KEPCO Bylong's legal obligations under the Act, would appear to directly address the behaviour subject of the allegations and provide appropriate controls to prevent future contraventions.
19. KEPCO Bylong has also offered to pay the Department's costs in the amount of \$32,000 and ongoing costs in relation monitoring compliance with the undertaking. This is an appropriate undertaking that will ensure that the Department, and ultimately the taxpayer, does not bear undue financial costs as a result of its actions in investigating and pursuing the alleged contravention.
20. The acceptance of an undertaking will ensure that the Department does not incur further costs in relation to the matter, which particularly in relation to investigation costs, can never fully be recouped through prosecution action.
21. I am also of the view that the quantum to be paid by KEPCO Bylong is likely to be at the upper end of any penalty that would be imposed by a court if it was successfully prosecuted, and as such will have the same deterrent effect.

Conclusion

22. I am satisfied that the proposed undertaking meets the requirements of the Act and the Guidelines.
23. I am of the view that the proposed undertaking will deliver benefits to industry and the community by further strengthening the integrity and transparency of information submitted in connection with mining operations in NSW.
24. 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.

25. I am satisfied that the initiatives proposed by KEPCO Bylong resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
26. Accordingly, I have determined to accept the enforceable undertaking proposed by KEPCO Bylong. In accordance with the Act, the Department will discontinue the current proceedings against KEPCO Bylong as soon as possible.

Date of decision: 5/8/16



Simon A Y Smith
Secretary
Department of Industry

NOTES

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