



OUT18/121

FILE NO: RRAR-2017/00016

TITLEHOLDER: Mr. Noel Charles Masen

AUTHORISATION: Mining Lease No. 613 (Act 1973) – ML613 (1973)

LEGISLATION: Section 125 of the *Mining Act 1992*

DECISION-MAKER: Anthony Keon
Chief Compliance Officer
NSW Resources Regulator

SECTION 125 DECISION TO CANCEL AUTHORITY

As authorised by Section 125 of the Mining Act 1992 (“the Act”), I Anthony Keon, having delegated authority from the Minister, have decided to **cancel authorisation Mining Lease No. 613 (Act 1973)** (“the Authority”).

The decision takes effect immediately upon Mr. Noel Charles Masen (“the titleholder”) being notified of the decision.

REASONS FOR DECISION

Legislation

1. Section 125 of the Act provides that the decision-maker may cancel an authority as to the whole or any part of the land to which it relates if satisfied that one or more specified grounds have been met.
2. Section 125(1) sets out the grounds for cancellation of an authority, which includes if the decision-maker is satisfied that:
 - a. 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), or
 - b. 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), or
 - c. the holder of the authority has failed to use the land the subject of the authority in good faith for the purposes for which the authority has been granted, or has used the land for a purpose other than that for which the authority has been granted, or

- d. there has been a contravention of a direction under section 240 or 240AA.
3. Section 126 of the Act provides that the decision-maker must not cancel an authority unless the holder of the authority has been given at least 28 days in which to make representations with respect to the proposed cancellation, and any such representations have been taken into considerations.
4. Section 363 of the Act provides that the Minister may delegate any functions conferred under the Act to another person; and the Minister has delegated the functions to cancel an authority under section 125 of the Act to the Chief Compliance Officer of the NSW Resources Regulator ("the Regulator").

Background

5. The Authority was first granted to the titleholder on 31 May 1978 for prospecting and mining for brick clay and clay shale. The lease was due to expire on 30 May 1999.
6. Upon application for renewal, and in accordance with section 117 of the Act, the Authority continued to have effect beyond the expiry date, until the application for renewal was dealt with.
7. On 17 May 2007, the Authority was renewed until 30 May 2020.
8. The Authority is located 32 kilometres south-west of Grafton in the Parish of Nymboida in the Clarence Valley Local Government Area. The land is owned by the state of NSW.

Grounds for Cancellation

9. I have reviewed the Authority within the context of Part 7 'Renewal, transfer and cancellation of authorities' Division 3 'Cancellation of authorities' of the Act and I am satisfied that the following grounds for cancellation exist.
10. **Ground 1** is based upon section 125(b) of the Act, in which the titleholder has contravened section 378D of the Act 'Contravention of condition of authorisation – offence by holder'.
11. Ground 1 alleges that the titleholder failed to provide a Mining Operations Plan ("MOP") in accordance with Condition 2 'Mining, Rehabilitation, Environmental Management Process (MREMP) Mining Operations Plan (MOP)'.
12. **Ground 2** is based upon section 125(b) of the Act, in which the titleholder has contravened section 378D of the Act 'Contravention of condition of authorisation – offence by holder'.
13. Ground 2 alleges that the titleholder failed to provide Annual Environmental Management Reports ("AEMR") in accordance with Condition 3 'Annual Environmental Management Report (AEMR)'.
14. **Ground 3** is based upon section 125(b) of the Act, in which the titleholder has contravened section 378D of the Act 'Contravention of condition of authorisation – offence by holder'.

15. Ground 3 alleges that the titleholder failed to ensure that at least 3 competent people are efficiently employed in accordance with condition 5 'Working Requirements'.
16. **Ground 4** is based upon section 125(b) of the Act, in which the titleholder has contravened section 378D of the Act 'Contravention of condition of authorisation – offence by holder'.
17. Ground 4 alleges that the titleholder failed to rehabilitate in accordance with condition 13(a).
18. **Ground 5** is based upon section 125(b) of the Act, in which the titleholder has contravened section 378D of the Act 'Contravention of condition of authorisation – offence by holder'.
19. Ground 5 alleges that the titleholder suspended mining operations without written consent of the decision-maker, a condition of authorisation under clause 7A of Schedule 1B of the Act.
20. **Ground 6** is based upon section 125(b) of the Act, in which the titleholder has contravened section 240C of the Act 'Breach of direction or notice'.
21. Ground 6 alleges that the titleholder failed to comply with a direction issued under section 240(1)(a) of the Act on 3 February 2017, by the Division of Resources and Geoscience (DRG), to comply with condition 2 and submit a MOP and Rehabilitation Cost Estimate ("RCE") by the due date.
22. **Ground 7** is based upon section 125(b) of the Act, in which the titleholder has contravened section 163C of the Act 'Reports'.
23. Ground 7 alleges that the titleholder failed to prepare and lodge an annual report (formerly known as an annual exploration report) within one calendar month of the grant anniversary date, being 30 June 2017, in accordance with clause 59 of the *Mining Regulation 2016* ("the Regulation").
24. **Ground 8** is based upon section 125(b) of the Act, in which the titleholder has contravened section 292C of the Act 'Fees payable in respect of authorisation'.
25. Ground 8 alleges that the titleholder failed to pay invoice No. 1040343 in the amount of \$464.45 for the annual rental fee and administrative levy by the due date, being 13 July 2017. Payment was made on 21 July 2017.
26. **Ground 9** is based upon section 125(b) of the Act, in which the titleholder has contravened section 5 of the Act 'Mining or prospecting without authorisation'.
27. Ground 9 alleges that illegal mining disturbance was identified outside of the mining lease boundary.
28. **Ground 10** is based upon section 125(c) of the Act, in which a person has contravened a condition of the Authority, being condition 2 'Mining, Rehabilitation, Environmental Management Process (MREMP) Mining Operations Plan (MOP)'.
29. The information relied upon for Ground 10 is the same as Ground 1.

30. **Ground 11** is based upon section 125(c) of the Act, in which a person has contravened a condition of the Authority, being condition 3 'Annual Environmental Management Reports (AEMR).
31. The information relied upon for Ground 11 is the same as Ground 2.
32. **Ground 12** is based upon section 125(c) of the Act, in which a person has contravened a condition of the Authority, being condition 5 'Working Requirements'.
33. The information relied upon for Ground 12 is the same as Ground 3.
34. **Ground 13** is based upon section 125(c) of the Act, in which a person has contravened a condition of the Authority, being condition 13(a).
35. The information relied upon for Ground 13 is the same as Ground 4.
36. **Ground 14** is based upon section 125(c) of the Act, in which a person has contravened a condition of the Authority, being the condition of authorisation imposed under clause 7A(1) of Schedule 1B of the Act.
37. The information relied upon for Ground 14 is the same as Ground 5.
38. **Ground 15** is based upon section 125(g) of the Act, in which the titleholder has failed to use the land the subject of the Authority in good faith for the purposes for which the authority has been granted.
39. Ground 15 alleges that in suspending mining operations without written consent of the decision-maker, the titleholder has failed to use the land the subject of the Authority in good faith for the purposes for which the Authority has been granted.
40. **Ground 16** is based upon section 125(h) of the Act, in which there has been a contravention of a direction under section 240 of the Act.
41. The information relied upon for Ground 16 is the same as Ground 6.

Representations

42. On 14 December 2017, I wrote to the titleholder inviting him to provide a submission in response to my proposed decision to cancel the Authority by no later than 5pm on 19 January 2017. My decision was based on the before mentioned grounds for cancellation (Ground 1 to 16 inclusive).
43. This letter was also forwarded to the titleholder's son, Mr. Rodney James Masen ("Mr. Rodney Masen"), as a representative of the titleholder.
44. Of note, Mr. Rodney Masen has been the Production Manager for South Grafton Brick Works and Nymboida Clay Pit as of 7 October 2005, with the Nymboida Clay Pit operating on the Authority.
45. I have been informed that on 20 December 2017 Mr. Rodney Masen spoke with Mr. Paul Drohan, Manager Compliance Projects, Resources Regulator at which time he advised that [REDACTED]
[REDACTED] he has been appointed power of attorney for the titleholder.

46. Following this conversation, email correspondence was sent to Mr. Rodney Masen on 20 December 2017 confirming that submissions were due by no later than 5pm on 19 January 2018, not 2017 as originally indicated in the letter.
47. On 5 January 2018 Mr. Rodney Masen replied to the email correspondence sent on 20 December 2018 with the following:

“Sorry Paul, I do not want to lodge a submission re: cancel mining lease ML613. Please find attachment of Power of Attorney”
48. Attached to this email correspondence was a certified copy of an appointment of attorney by the titleholder, dated 4 August 2015, appointing Mr. Rodney Masen and Mr. Stephen John Masen as his attorneys.
49. No further representations were received by the Regulator.

Considerations and findings

50. I acknowledge that the titleholder’s health is ailing and that Mr. Rodney Masen is acting as the titleholder’s attorney when, on 5 January 2018, he declined to lodge a submission in response to my letter to the titleholder, dated 14 November 2017.
51. After careful consideration, I am satisfied that the before mentioned grounds (Grounds 1 to 16 inclusive) stand. This decision is founded solely on the information set out below.

Grounds 1 & 10

52. Condition 2, which was imposed on the Authority on 17 May 2007, at the time of renewal, states that mining operations, including mining purposes, must be conducted in accordance with a MOP satisfactory to the Director-General, now Secretary of the Department of Planning and Environment (“the Department”).
53. On 7 September 2015, the then Division of Resources and Geoscience, previously known as the Division of Resources and Energy (“DRG”), wrote to the titleholder to remind him of his obligation to hold a current approved MOP, with a requirement made for the titleholder to submit a MOP for approval on or before 19 October 2015.
54. On 26 October 2015 DRG again wrote to the titleholder requesting a MOP within 28 Days.
55. On 3 February 2017, a notice pursuant to section 240 of the Act was issued by DRG, directing the titleholder to comply with Condition 2 and submit a MOP and RCE by 3 March 2017.
56. On 14 February 2017, an email was sent by DRG to Mr. Rodney Masen containing guidance material and template documents to assist in the submission of the MOP.
57. On 27 February 2017, an email was sent by Mr. Rodney Masen to DRG requesting an extension. An extension until 24 March 2017 was granted by DRG on 28 February 2017.
58. A MOP was received by DRG on 29 March 2017; however, this MOP was not approved.

59. No further MOP has been received by DRG.
60. This matter was referred to the Regulator for investigation; and on 31 May 2017, Mr. Rodney Masen was interviewed at which time he made certain admissions that a MOP had never been lodged prior to 2017. Departmental records support this position.
61. This matter was finalised by the Regulator on 22 August 2017 with penalty notice No. 3149085428 issued against the titleholder in the amount of \$1,250 for a contravening condition 2, an offence under section 378D of the Act.

Grounds 2 & 11

62. Condition 3, which was imposed on the Authority on 17 May 2007, at the time of renewal, states that within 12 months of the commencement of mining operations and thereafter annually or, at such other times as may be allowed by the Director-General, now secretary of the Department, the lease holder must lodge an Annual Environmental Management Report ("AEMR").
63. In 2017, a review of Departmental records by DRG found that a number of AEMR's had not been lodged for the Authority.
64. The matter was finalised by DRG on 15 February 2017 with an official caution issued against the titleholder for a contravention of condition 3, an offence under section 378D of the Act.

Grounds 3 & 12

65. Condition 5, which was imposed on the Authority on 17 May 2007, at the time of renewal, states that the lease holder must ensure that at least 3 competent people are efficiently employed on the lease area on each week day except Sunday or any week day that is a public holiday, or expend on operations carried out in the course of prospecting or mining the lease area, an amount of not less than \$21,000 per annum whilst the lease is in force.
66. A site inspection conducted by DRG on 3 February 2015 found that no mining was currently being undertaken.
67. A further inspection conducted by the Regulator on 30 May 2017 again observed no mining on the lease.
68. Mr. Rodney Masen was interviewed by the Regulator on 31 May 2017 at which time he made certain admissions that only 1 full time person was ever employed and that no mining had occurred since 2013.
69. The matter was finalised by the Regulator on 22 August 2017 with an official caution issued against the titleholder for a contravention of condition 5, an offence under section 378D of the Act.

Grounds 4 & 13

70. Condition 13(a), which was imposed on the Authority on 17 May 2007, at the time of renewal, states that land disturbed must be rehabilitated to a stable and permanent form suitable for a subsequent land use acceptable to the Director-General, now

Secretary of the Department, and in accordance with the MOP so that there is no adverse environmental effect outside the disturbed area and that the land is properly drained and protected from soil erosion.

71. The site inspection conducted by the Regulator on 30 May 2017 noted several environmental concerns, in particular:
 - a. two sediment/water management dams about 200 metres to the north, off the northern most boundary of the title;
 - b. evidence of water migrating in a northerly direction through the lowest point with turbid water being discharged off the site towards Armidale Road
 - c. overland flows, rilling and other general erosion occurring over the site
 - d. erosion and exposure of the working face
 - e. 2-3 hectares of area to the western side was highly disturbed, devoid of vegetation and vastly disparate from the adjacent indicative landform
72. Mr. Rodney Masen was interviewed by the Regulator on 31 May 2017 at which time made certain admissions that the vegetation was sparse, to the extent that "a rabbit has to take a packed lunch".
73. The matter was finalised by the Regulator on 22 August 2017 with an official caution issued against the titleholder for a contravention of condition 13(a), an offence under section 378D of the Act.

Grounds 5 & 14

74. Revenue NSW records show that the last royalty payment made for the Authority was for the period 1 July 2010 to 30 June 2011 in the amount of \$343. All subsequent returns reflect no mineral extraction or royalty payments payable to the state.
75. On 3 February 2015, a site inspection by DRG Inspectors found that no mining was currently being undertaken.
76. A further inspection conducted by Inspectors with the Regulator on 30 May 2017 again observed no mining on the lease.
77. In a record of interview conducted on 31 May 2017, Mr. Rodney Masen informed Inspectors with the Regulator that no mining had occurred since 2013. Mr. Rodney Masen went on to state that he wants to "get rid of it" and "rehabilitate and relinquish it".
78. No formal application has been made to suspend mining operations pursuant to clause 7A of Schedule 1B of the Act.

Grounds 6 & 16

79. On 3 February 2017, a notice pursuant to section 240 of the Act was issued by DRG, directing the titleholder to comply with Condition 2 and submit a MOP and RCE by 3 March 2017.
80. On 14 February 2017, an email was sent by DRG to Mr. Rodney Masen containing guidance material and template documents to assist in the submission of the MOP.
81. On 27 February 2017, an email was sent by Mr. Rodney Masen to DRG requesting an extension. An extension until 24 March 2017 was granted by DRG on 28 February 2017.

82. A MOP was received by DRG on 29 March 2017; however, this MOP was not approved.
83. No further MOP has been received by DRG.
84. This matter was referred to the Regulator for investigation; and was finalised on 22 August 2017 with penalty notice No. 3149085437 issued against the titleholder in the amount of \$2,500 for failing to comply with a direction or notice, an offence under section 240C of the Act.

Grounds 7

85. The titleholder is required to lodge an annual report (formerly known as an annual exploration report) within one calendar month of the grant of the anniversary date, being 30 June.
86. DRG records indicated that the titleholder has never lodged an annual report within the required timeframe.
87. This matter was referred to the Regulator for investigation; and on 2 August 2017, the Regulator issued a warning letter giving the titleholder until 30 August 2017 to lodge the report.
88. An attempt was made to lodge an annual report on 14 August 2017; however, this report was not submitted correctly.
89. This matter was finalised by the Regulator on 8 November 2017 with penalty notice No. 3149610476 issued against the titleholder in the amount of \$1,250 for failing to lodge an annual report as prescribed by clause 59 of the Regulation, an offence under section 163C(3) of the Act.

Ground 8

90. On 13 July 2017 invoice No. 1040343 was raised against the titleholder for the annual rental fee and administrative levy in the amount of \$464.45, with a due date being 13 July 2017.
91. As payment was not made until 21 July 2017 the matter was referred to the Regulator for investigation; and on 23 August 2017, a late payment letter was sent seeking comment.
92. An email response was subsequently received from Mr. Rodney Masen explaining the late payment.
93. The matter was finalised by the Regulator 26 October 2017 with an official caution issued against the titleholder for an offence under 292C(3) of the Act.

Ground 9

94. Mining was approved for the Authority on 31 May 1978, with the mining lease area defined by plan D1425.
95. A site inspection by the Department of Primary Industries (DPI) on 24 August 2004 identified illegal mining disturbance outside of the mining lease boundary.

96. DPI wrote to the titleholder on 3 September 2004 concerning the inspection conducted on 24 August 2004. In this letter, the DPI flagged the illegal mining and in doing so, sought corrective action being the submission of a plan to rehabilitate all areas disturbed outside the lease and progressive rehabilitation on the lease.
97. A site inspection conducted by the Regulator on 30 May 2017 confirmed the existence of illegal mining disturbance outside of the mining lease boundary.
98. Mr. Rodney Masen made admissions to a significant proportion of mining and mining related activities occurring off title in an interview conducted by the Regulator on 31 May 2017.
99. Of note, no formal regulatory action has yet been commenced under section 5 of the Act in relation to this contravention.

Ground 15

100. Revenue NSW records show that the last royalty payment made for the Authority was for the period 1 July 2010 to 30 June 2011 in the amount of \$343. All subsequent returns reflect no mineral extraction or royalty payments payable to the state.
101. On 3 February 2015, a site inspection by DRG Inspectors found that no mining was currently being undertaken.
102. A further inspection conducted by Inspectors with the Regulator on 30 May 2017 again observed no mining on the lease.
103. In a record of interview conducted on 31 May 2017, Mr. Rodney Masen informed Inspectors with the Regulator that no mining had occurred since 2013. Mr. Rodney Masen went on to state that he wants to "get rid of it" and "rehabilitate and relinquish it".
104. No formal application has been made to suspend mining operations pursuant to clause 7A of Schedule 1B of the Act.
105. No request has been lodged with the Secretary seeking to cancel the Authority pursuant to section 125(1)(a) of the Act.

Conclusion

106. I am satisfied the requirements of section 126(1) and (2) of the Act have been adhered to. Both the titleholder, and Mr. Rodney Masen, as a representative of the titleholder, were notified of my proposed decision to cancel the Authority on 14 December 2017.
107. The titleholder was afforded a period of greater than 28 days, being until 5pm on 19 January 2018, in which to respond to my proposed decision to cancel the Authority; and on 5 January 2018 Mr. Rodney Mason wrote to the Regulator advising that he did not want to lodge a submission. No further representations were received.
108. Based on the Department's compliance with the requirements of section 126(1) and (2) of the Act, I believe that the titleholder has been afforded procedural fairness in respect of my decision to cancel the Authority.

109. In making this decision I gave due regard to the significant number of contraventions of both conditions of the Authority and various provisions of the Act over a period of years. I believe this demonstrates a comprehensive failure to observe fundamental regulatory obligations and an inability to implement adequate management and compliance practices.
110. In addition, while I accept that some mining operations may be suspended due to operational and financial constraints, it is evident from the information before me that the titleholder suspended mining operations several years ago, without consent, and has no intention to recommence operations.
111. I also note that the actions by the titleholder in suspending operations has been further compounded by failing to lodge MOPs, AEMRs and Annual Reports, documents which are relied upon by the Department to establish and evaluate resource levels, mining activity and rehabilitation requirements.
112. In addition, when considering whether the land has been used in good faith I have given due regard to the objects of the Act set out in section 3A of the Act when considering whether the actions of the titleholder in suspending operations were appropriate. Of note, sub-sections (b) and (d) proclaims the Government's commitment to fostering the social and economic benefits to the state of NSW from the efficient development of mineral resources and ensuring an appropriate return to the state from these mineral resources.
113. Based on the material before me, I am satisfied that the titleholder:
- a. Has contravened the following sections of the Act, which provides grounds for cancellation of the Authority under section 125(1)(b) of the Act.
 - i. Section 378D of the Act 'Contravention of conditions for authorisation – offence by holder' – Grounds 1, 2, 3, 4, 5
 - ii. Section 240C of the Act 'Breach of direction or notice' – Ground 6
 - iii. Section 163C of the Act 'Reports' – Ground 7
 - iv. Section 292C of the Act 'Fees payable in respect of authorisation' – Ground 8
 - v. Section 5 of the Act 'Mining or prospecting without authorisation' – Ground 9
 - b. Has contravened the following conditions of authority which provides grounds for cancellation of the Authority under section 125(1)(c) of the Act:
 - i. condition 2 'Mining, Rehabilitation, Environmental Management Process (MREMP) Mining Operations Plan (MOP)' contained in the Instrument of Renewal, dated 17 May 2007 – Ground 10
 - ii. condition 3 'Annual Environmental Management Reports (AEMR)' contained in the Instrument of Renewal, dated 17 May 2007 – Ground 11
 - iii. condition 5 'Working Requirements' contained in the Instrument of Renewal, dated 17 May 2007 – Ground 12

- iv. condition 13(a) contained in the Instrument of Renewal, dated 17 May 2007 – Ground 13
 - v. condition of authorisation set out in clause 7A of Schedule 1B of the Act – Ground 14
 - c. Has failed to use the land the subject of the Authority in good faith for the purposes for which the Authority has been granted, which provides grounds for cancellation of the Authority under section 125(1)(g) of the Act – Ground 15.
 - d. Has contravened a direction under section 240 of the Act, which provides grounds for cancellation of the Authority under section 125(1)(h) of the Act – Ground 16.
114. I am further satisfied that the above grounds warrant the cancellation of the Authority.
115. Accordingly, I have determined to cancel authorisation ML1616 under sections 125(1)(b), 125(1)(c), 125(1)(h) and 125(1)(g) of the Act.
116. The decision to cancel authorisation ML616 is effective immediately upon the titleholder being notified of the decision.
117. I note that the cancellation of the Authority also in no way precludes the Department of Planning and Environment from taking any other action against the titleholder in respect of the Authority, including the commencement of legal proceedings and the fulfilment of rehabilitation obligations.

Date of decision: 25th January 2018



Anthony Keon
Chief Compliance Officer
NSW Resources Regulator

RIGHT OF APPEAL

Should you be aggrieved by this decision, you may appeal to the Land and Environment Court against the decision. Such appeal must be made within 14 days of the date of the notification of this decision, or within such further period as the Land and Environment Court may allow.