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File No: 0953 – 2017 & 0164 – 2018

Entity: The Austral Brick Co Pty Ltd (ACN 000 005 550)

Issue: Whether to accept an enforceable undertaking in relation to 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, Resources Regulator and Coordinator General for the Central Coast, have decided to **accept** the enforceable undertaking given by The Austral Brick Co Pty Ltd, as attached to this decision.

Reasons for decision

Legislation

1. Section 378ZFG 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 undertaking 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. 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 reason 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.
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. On 3 March 2003, ownership of the Bunnygalore Quarry (Lot 2 Property) transferred to The Austral Brick Co Pty Ltd who continued to operate a clay/shale quarry until 7 February 2018.
7. On 12 September 2017, a Mining (Mineral Owner) Lease Application was lodged with respect to the Lot 2 Property, M(MO)LA 28. There was no prior mining authority in place for the Lot 2 Property.
8. On 27 February 2018, The Austral Brick Co Pty Ltd self-reported a similar non-compliance at the Bowral Quarry (Bowral Quarry Extension).
9. On or around March 2001, The Austral Brick Co Pty Ltd purchased the Bowral Quarry Extension and continued to mine the quarry until 31 January 2018 for structural shale. There was no prior mining authority in place for the Bowral Quarry Extension.
10. On 20 April 2018, a Mining (Mineral Owner) Lease Application was lodged over the Bowral Quarry Extension, M(MO)LA 29 which is awaiting determination.
11. On 4 May 2018, The Austral Brick Co Pty Ltd was granted a Mining (Mineral Owner) Lease, M(MO)L8 in respect of M(MO)LA 28
12. A subsequent investigation by the NSW Resources Regulator found sufficient evidence to alleged that The Austral Brick Co Pty Ltd had conducted mining operations without authorisation at both the Lot 2 Property and the Bowral Quarry Extension in contravention of section 5 of the Act.

Proposed undertaking

13. On 3 September 2018, The Austral Brick Co Pty Ltd submitted an enforceable undertaking proposal to the Regulator. Consistent with the Enforceable Undertaking Guidelines the proposal was developed using the pre-proposal advisory services offered by the Regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
14. In summary, The Austral Brick Co Pty Ltd undertakes to:
 - (a) Cease any activity at the Lot 2 Property and the Bowral Quarry Extension that is not in compliance with section 5 of the Act,
 - (b) Conduct training of all key management of its NSW operations with respect of the operation and compliance with conditions of mining leases (minimum cost: \$10,000),
 - (c) Develop material to include in inductions for new staff who will have management responsibilities in respect of NSW operations that have an authorisation under the Act that apply to them (minimum cost: \$5,000),
 - (d) Commission a suitably qualified independent auditor to carry out an independent audit of identified NSW operations to ensure compliance against the conditions of any authorisations under the Act (minimum cost: \$35,000),
 - (e) Donate \$50,000 to Wingecarribee Shire Council for the restoration of the Bong Bong Common,

- (f) Pay the Regulator a total agreed amount of \$51,960 (excluding GST) for alleged mining undertaken on the Lot 2 Property and Bowral Quarry Extension as itemised below:
 - i. \$20,760 (excluding GST) for administration levies
 - ii. \$1,200 (excluding GST) for rental fees
 - iii. \$30,000 (excluding GST) for royalties.
- (g) Pay the Regulator's investigations costs of \$12,500 (excluding GST) incurred during the course of the investigation,
- (h) Pay the Regulator's compliance monitoring costs of \$3,000 (excluding GST) incurred in the course of monitoring compliance with this undertaking.
- (i) Report to the Regulator on the status of the undertaking on a quarterly basis until completed.

Considerations and findings

- 15. While under the Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note that The Austral Brick Co Pty Ltd acknowledges the allegation that it has carried out illegal mining operations in breach of section 5 of the Act at the Lot 2 Property and the Bowral Quarry Extension.
- 16. There is a strong expectation that companies such as The Austral Brick Co Pty Ltd are aware of their statutory obligations and ensure they hold the appropriate authorisation before mining.
- 17. Of importance, I note that The Austral Brick Co Pty Ltd self-reported the incident concerning the Bowral Quarry Extension and has made applications for mining leases for both quarries, with one being granted with respect to the Lot 2 Property on 4 May 2018.
- 18. In addition, I note that The Austral Brick Co Pty Ltd immediately ceased the offending conduct at both quarries.
- 19. I also note that The Austral Brick Co Pty Ltd has committed to implement measures, to minimise the likelihood of a similar contravention from occurring in the future.
- 20. In this regard, I note that The Austral Brick Co Pty Ltd has committed a minimum of \$50,000 to train all key management of its NSW operations, develop induction material for new staff, and commission an independent audit of its NSW operations.
- 21. I also note that The Austral Brick Co Pty Ltd has agreed to pay the Regulator \$51,960 for royalties, rents and levies for the alleged mining on the Lot 2 Property and Bowral Quarry Extension.
- 22. In addition, The Austral Brick Co Pty Ltd has also agreed to pay the Regulator's investigation compliance monitoring costs totalling \$15,500.
- 23. I am satisfied that the donation of \$50,000 to the Wingecarribee Shire Council for the restoration of the Bong Bong Common will provide tangible community benefit by providing additional recreational land which is of historical interest.
- 24. I am satisfied that the quantum of \$167,460 to be paid by The Austral Brick Co Pty Ltd, having regards to the specific circumstances of this case, provides a significant deterrent effect and achieves better outcomes than prosecution alone.

25. I am also satisfied that the terms of the undertaking, and the requirement under the Act to publish the undertaking and this decision, will provide similar specific and general deterrence to prosecution proceedings.
26. Accordingly, I have determined to accept the enforceable undertaking proposed by The Austral Brick Co Pty Ltd.

Date of decision:



Lee Shearer

24.9.2018

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.