



FILE NO: 0707-2016

ENTITY: Macquarie Marble and Lime Pty Ltd

AUTHORISATION: ML1446

LEGISLATION: *Mining Act 1992* – Section 240AA

DECISION MAKER: Anthony Keon – Acting Chief Compliance Officer
As delegate of the Secretary of the Department of Industry

SECTION 240AA DETERMINATION

As authorised by section 240AA of the *Mining Act 1992*, I, Anthony Keon, having delegated authority from the Secretary administering the *Mining Act 1992*, direct Macquarie Marble and Lime Pty Ltd to:

Suspend all operations under authorisation number ML1446.

The direction takes effect on **10 April 2017** and remains in force until the suspension notice is withdrawn by written notice of the Secretary or delegate.

REASONS FOR DECISION

Legislation

1. Section 240AA of the Act provides that:
 - (1) 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),
2. The Section provides that before giving a suspension notice, the Secretary must give the holder a reasonable opportunity to make representations with respect to the proposed suspension notice.

Background

3. Macquarie Marble and Lime Pty Ltd (“**Macquarie**”) is the holder of Mining Lease 1446 (“**the authorisation**”). The authorisation permits the extraction of agricultural lime, dolomite, limestone and phosphates.
4. The authorisation was granted to an unrelated entity on 19 March 1999.
5. On 16 October 2007 the required security deposit was assessed as \$61,500. It was lodged at that time by the above unrelated entity.
6. On 5 August 2008, the authorisation was transferred to Macquarie. Macquarie was at that time owned by Iron Mountain Pty Ltd (“**Iron Mountain**”), who maintained the security of \$61,500.
7. Macquarie was later sold to its present owners. The above security of \$61,500 that was lodged by Macquarie’s previous owners was retained by the Department. The previous owners sought recovery of that amount from the Department, but this was refused.
8. Macquarie’s present owners have not lodged any security with the Department. The Department continues to hold the security of \$61,500.00 lodged by Macquarie’s previous owners.
9. On 10 November 2015, the Department of Industry issued Macquarie with a written notice in accordance with Section 261B of the Act advising that security in the amount of \$85,000 was required to be lodged in relation to authorisation ML1446, effective from 13 November 2015.

10. The notice provided that the assessed security was required to be lodged with the Department within 42 days, namely by 29 December 2015.
11. Macquarie failed to lodge the assessed security as required and the matter was eventually referred to the Resources Regulator for further regulatory action on 2 November 2016.
12. On 7 November 2016, the Resources Regulator wrote to Macquarie and advised it that a failure to lodge the assessed security is a contravention of a condition of the authorisation, which constitutes an offence under Section 378D of the Act. The correspondence indicated that the matter had been escalated, and that Macquarie had 30 days in which to lodge the assessed security or further action would be considered.
13. On 7 December 2016, Mr Jeremy Brigden, Solicitor, forwarded a letter to the Department on behalf of Macquarie. The letter explained that Macquarie had expected to receive funding from an investor, but that the investor's financier had failed to make the expected funds available. Macquarie indicated it would welcome the opportunity to enter a payment arrangement, but such an arrangement was unacceptable to the Department.
14. On 20 December 2016 the Chief Compliance Officer issued a written notice to Macquarie in accordance with Section 240AA(2) of the Act, indicating that a preliminary view had been reached that its failure to lodge the assessed security constituted a ground for the cancellation of the authorisation under section 125(1)(c), and that it was appropriate to issue a direction to suspend operations. The notice invited Macquarie to provide submissions in response.

Submissions

15. On 31 January 2017, Mr Brigden forwarded a reply to the Chief Compliance Officer's letter of 20 December 2016. In that letter, Mr Brigden stated that his client's position is as follows:
 1. *It fully intends to pay the balance of the bond, and in due course replace the entire bond;*
 2. *It has hitherto been unable to pay the bond due to financial incapacity, which my client regrets and for which my client unreservedly apologises;*

3. *Our client's ability to satisfy the requirements of the Department and the Act will be conditional upon the incoming investment foreshadowed in our letter of 7 December 2016;*
4. *Regarding the incoming investment, our client's discussions with incoming investors are at an advanced stage which, if successful, should enable the balance of the bond to be paid in full by the end of March 2017, or shortly thereafter if there are any delays in finalising the transaction.*
5. *The investor has made it clear that if cancellation or prosecution action is taken, or pending, then the funding offer will be withdrawn.*
6. *If the funding offer is withdrawn, the actions of the department will be inconsequential; our client will enter into administration or liquidation, will cease to operate, and will cease to exist. Any prosecution will be pyrrhic.*

16. Mr Brigden also submitted *inter alia* that:

- a. The department loses nothing by granting time to Macquarie to conclude its negotiations
- b. The consequences of cancellation or prosecutorial action will be contrary to the objects (a) and (e) of the Act
- c. That the submission for an extension of time may constitute a defence to prosecution under s.378E(c) of the Act
- d. The mine has just emerged from its development phase and is now at a level of sustainable production, with forward projections indicating a viable enterprise that will increase production and employment at the mine
- e. That the department consider the fate of individuals relying on the mine for their livelihood, including those who have invested in excess of \$1.5 million in personal assets for security
- f. That any action be withheld until end of March, however it is anticipated that negotiations will conclude, with funding before then
- g. For completeness, the representations of 7 December also be taken into consideration
- h. That should any adverse course of action be considered, such as suspension or prosecution, then all correspondence in relation to the matter must be submitted to the Minister for his personal attention and consideration.

17. On 16 February 2017 Mr Brigden provided further clarification of Macquarie's position, when he forwarded a letter authored by Noel Atkins of KPS Global Pty Ltd dated 15 February 2017. The letter stated,

'...we are in advanced negotiations with several investor parties to provide additional capital to the business. These negotiations remain commercially confidential.

*We expect these negotiations can be completed by **31 March 2017**, and at the latest by **30 April 2017**.'*

Considerations

18. The increased security deposit variance of \$23,500 has not been lodged in contravention of clause 75 of the conditions of the authorisation, and correspondingly Section 378D of the Act. Of particular concern is that Macquarie was required to lodge the additional security by 29 December 2015 and has been in non-compliance with the Act since that time.
19. 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 (1)(c) of the Act.
20. Any contravention of a condition of the authorisation constitutes an offence under Section 378D of the Act. The offence carries a maximum penalty of \$1,100,000 for corporations, and an additional \$110,000 for each additional day that the offence continues. This penalty demonstrates the importance that the government places on ensuring that authorisation holders comply with their conditions of title.
21. I have closely considered all of the correspondence forwarded by Mr Brigden on behalf of Macquarie. I have considered the financial difficulties experienced by Macquarie, and that any direction to suspend operations may jeopardise the viability of the mine and the employment of a number of people.
22. However, these impacts need to be finely balanced against the need to ensure compliance with the Act and the risk that non-payment of the security poses for the NSW Government.
23. Environmental rehabilitation security deposits that cover the full cost of rehabilitation are required on all mining lease authorisations. This requirement ensures that the

State does not incur financial liabilities in the event of an authorisation holder defaulting on their rehabilitation obligations.

24. While Macquarie's submits that it is close to finalising its negotiations, I note that it has had well in excess of 12 months to address its outstanding security and regain compliance. Further, there has been insufficient detail provided to give me an appropriate level of comfort that these negotiations are not only well advanced, but likely to be successfully concluded in the immediate short term. I particularly note that the submission of 31 January 2017 indicates that Macquarie expects negotiations and finance to be settled in advance of the end of March, but the submission of 16 February 2017 indicates that this could extend until the end of April 2017.
25. While the amount outstanding may be considered small in some respects, Macquarie's continued operation in non-compliance with the Act is untenable and significantly undermines the integrity of the regulatory regime. Further, there is an unacceptable risk that the community will be burdened with Macquarie's rehabilitation costs if it is permitted to continue its mining operations indefinitely.

Conclusion

26. I am satisfied that procedural fairness has been afforded to Macquarie and in accordance with section 240AA(2) of the Act notice of the proposed suspension was given to Macquarie with a reasonable opportunity to make representations in response.
27. I note the contents of the correspondence forwarded by Mr Brigden, dated 7 December 2016, 31 January 2017 and 16 February 2017. I have considered those representations, together with the Objects of the *Mining Act 1992*.
28. Having regard to the material before me, I am satisfied that circumstances exist that constitute a ground for cancellation of the authorisation under section 125(1)(C) of the Act. Accordingly, I have determined to suspend all mining operations under ML1446 from 10 April 2017.
29. The delayed effective date attempts to strike the appropriate balance between allowing Macquarie an opportunity to conclude its negotiations and secure finance, and ensuring that the company does not continue to operate in non-compliance with

the Act or expose the State to increasing rehabilitation liability created by its mining operations.

30. Consideration will be given to revoking the suspension should the required additional security deposit of \$23,500 be received and Macquarie regains compliance with the Act.
31. However, please note that should Macquarie fail to provide the required additional security in full by **31 May 2017**, consideration will be given to further enforcement action, including the cancellation of the authorisation.
32. The issue of the suspension notice also in no way precludes the Resources Regulator from taking any other action, including the commencement of legal proceedings in relation to the offence under section 378D of the Act. It should also be noted that the delayed effective date of the suspension direction is not an extension to the requirement to pay the additional security, and Macquarie continues to expose itself to additional penalties for each day the security deposit remains outstanding.
33. Accordingly, I have determined to direct Macquarie Marble and Lime Pty Ltd to suspend all operations under authorisation number ML1446, effective from 10 April 2017.

Date of decision: 17 March 2017



Anthony Keon
A/Chief Compliance Officer
Resources Regulator

WARNING AND INFORMATION ABOUT THIS NOTICE

- It is an offence under section 240C of the Mining Act 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.
- 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.
- 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 from taking further action against you including by commencing legal proceedings.
- This notice is issued under section 240AA of the Mining Act.
- The words and expressions used in this direction have the same meaning as they have in the Mining Act.