# Decision to accept a Mining Act undertaking given by Hi-Quality Quarry (NSW) Pty Ltd.

| **Entity** | **Hi-Quality Quarry (NSW) Pty Ltd** (ACN 104 362 110) |
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| Issue | Whether to accept or reject a Mining Act undertaking given by Hi-Quality Quarry (NSW) Pty Ltd |
| Legislation | Part 17A, Division 4B of the *Mining Act 1992* |
| Decision maker | Anthony Keon<br>Executive Director, NSW Resources Regulator<br>Department of Regional NSW |

## SECTION 378ZFB DECISION

As authorised by section 378ZFB of the *Mining Act 1992* (**Act**), and in accordance with the authority delegated by the Secretary of the Department of Regional NSW (**Department**), I, Anthony Keon, Executive Director, NSW Resources Regulator (**Regulator**), have decided to **accept** the enforceable undertakings given by Hi-Quality Quarry (NSW) Pty Ltd (**HQQ**), 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 (**Secretary**) is the Regulator for the purposes of the Act. 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 and 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 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.
5. The Secretary has issued, and published on the Regulator's website 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.
6. The Secretary has delegated the functions to accept or reject an enforceable undertaking under section 378ZFB of the Act to the Executive Director of the NSW Resources Regulator.

## Background

7. HQQ operates under the "Hi-Quality Group" banner with operations located in Western Sydney, North West Melbourne, and the Canberra/Goulburn region.
8. Kemps Creek Central Shale Mine is located on the Kemps Creek Central property comprising Lot 1 DP121980 and Lot 10 DP1087346 in the Penrith Local Government Area (LGA).
9. HQQ has been the responsible entity for this site since 31 March 2006 and responsible for the mining operations at the Kemps Creek Central Shale Mine since 17 October 2012.
10. In 2020, the Regulator commenced an investigation into an alleged contravention of Section 5 of the Act by HQQ following the lodgement of Mining Lease Applications No. 572 (Act 1992) (**MLA 572**) with the Department on 27 August 2019. MLA 572 is pending determination by the Department.
11. Section 5 of the Act states that a person must not prospect for or mine any mineral except in accordance with an authorisation that is in force in respect of that mineral and the land where the prospecting or mining is carried on.
12. It is alleged that since 17 October 2012, HQQ extracted approximately 368,945 tonnes of clay/shale and structural clay from Kemps Creek Central Shale Mine without an authorisation, an offence under section 5 of the Act.

## Terms of the proposed enforceable undertaking

13. On 25 May 2021, HQQ submitted a proposed enforceable undertaking (signed on 24 May 2021), for the consideration of the Secretary.
14. Consistent with the Enforceable Undertaking Guidelines, the proposed undertaking was developed using the pre-proposal advisory services offered by the Regulator, which provided 'without prejudice', feedback on the proposed terms of each undertaking.
15. In summary, the HQQ enforceable undertaking proposes to:

    Pay $20,000 to Penrith City Council for the Strategic Bushland Regeneration Project (Regent Honeyeater Recovery). The aim of the Project is to achieve gains for a threatened species habitat for the Regent Honeyeater (Antheacherid Phrygia), currently listed as a critically endangered bird species.

    Penrith City Council has given written assurance in a Memorandum of Understanding with HQQ that it will accept the donation and commits to ensuring that the funds will only be

used for the Project. Payment will be made in full within 30 days of acceptance of the undertaking.

a. Conduct training by an appropriate legal practitioner for HQQ environmental staff and senior managers regarding compliance with the requirements of the Mining Act, at a minimum cost of $2,500.

b. Pay the Department the agreed amount of $42,191, comprising:

   i. $16,141 – Royalty

   ii. $25,714 – Administration levies (2012 – 2020)

   iii. $336 – Rental fees (2012 – 2020).

c. Pay the Regulators recoverable costs associated with the undertaking, including investigation, legal, administration costs and compliance monitoring costs of the undertaking totaling $8,000.

16. HQQ must spend a minimum of **$72,691**, excluding GST, in carrying out the terms of the proposed enforceable undertaking, inclusive of the Regulator's recoverable costs.

17. The activities proposed in delivering the benefits of this undertaking must be completed on or before 31 December 2021.

## Considerations and findings

18. Whilst under the Act the giving of an enforceable undertaking does not constitute an admission of guilt, HQQ has acknowledged the alleged contravention of section 5 of the Act.

19. There is a strong expectation that mining companies are aware of their legal obligations and undertake appropriate due diligence to ensure that all requisite approvals are in place. In this instance, it is of significant concern that the alleged offending occurred for almost seven (7) years before an application was made by HQQ for a mining lease.

20. However, in this respect I note that HQQ had obtained development consent and an environmental protection licence which covered the mining of shale/clay.

21. Further, I note HQQ lodged an application for a mining authorisation prior to any regulatory intervention and immediately ceased the extraction of clay/shale at the site after becoming aware of the alleged contravention. HQQ has also fully cooperated with the Regulator's investigation and has been forthcoming with providing information when sought.

22. Based on the above, I am satisfied that the alleged behavior was not a deliberate attempt to circumvent the regulatory system or a willful disregard of regulatory requirements. I am also satisfied that HQQ took proactive steps to become compliant prior to any regulatory engagement by the department.

23. It is also important to note that in the case of the Kemps Creek Central Shale Mine site that the minerals are classified as privately owned. Notably prior to November 2010, privately owned minerals could be extracted under a Private Mining Agreement and did not require an authorisation under the Act. Royalties were not payable prior to this time, and since then, the mineral owner is returned 7/8 of all royalties paid.

24. Having considered the information before me, I am of the view that the primary harm caused by the alleged contravention was the loss of royalties and fees to the state (in this case being 1/7 of the total royalties payable). Based upon the quantum of the extracted minerals, I am

satisfied that the payment of $42,191 in royalties, administration levies and rental fees is appropriate in the circumstances and will result in an appropriate return to the state.

25. I am also satisfied that the payment of $20,000 to Penrith City Council will contribute to tangible community benefits and environmental outcomes for a critically endangered species.
26. In addition, I note that HQQ has agreed to pay $8,000 in investigation and compliance monitoring costs. I am satisfied that this payment 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 and will ensure the Department does not incur further costs in relation to the matter, which may never fully be recouped through other enforcement actions.
27. I am also satisfied that the enforceable undertaking will provide important compliance training for key staff at HQQ to mitigate further risk of non-compliance with the Act.
28. In this regard, I am satisfied that the quantum of $72,691 to be paid by HQQ provides a significant deterrent effect and is commensurate to the alleged offending.
29. Finally, I note that HQQ does not have any antecedents recorded on its compliance history and the alleged offending behavior did not result in any environmental harm, Accordingly, I have determined to **accept** the enforceable undertaking given by HQQ.
30. This decision takes effect and is in force immediately upon HQQ being notified of this decision.

Date of decision: **17 June 2021**

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

**Note:** In accordance with Part 17A, Division 4B of the *Mining Act 1992*, a copy of the enforceable undertaking and this decision will be published on the Regulator's website: www.resourcesregulator.nsw.gov.au.