



File No: 0746-2016
Entity: Boral Limited (ACN 008 421 761)
Issue: Whether to accept an enforceable undertaking in relation to an alleged contravention of the Act.
Legislation: *Mining Act 1992* – Part 17A, Division 4B
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*, I, Lee Shearer, as a delegate of the Secretary of the Department of Planning and Environment, have decided to accept the enforceable undertaking given by Boral Limited, as attached to this decision.

The undertaking takes effect and is in force immediately upon Boral Limited being notified of this decision.

Reasons for decision

Legislation

1. Section 378ZFB 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 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 decision. The Secretary is also required to publish any decision to accept an enforceable undertaking.
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. Failure to comply with an undertaking may also result in prosecution action being taken in relation to the original alleged offence.

Background

6. Boral Limited ("Boral") (ACN 008 421 761) is the holder of Consolidated Coal Lease (CCL) 748 known as the Berrima and Loch Catherine Collieries, a historical mine located to the west of the township of Berrima NSW.
7. On 25 November 2016 the then Division of Resources and Energy within the Department of Industry ("the Department") raised concerns with the NSW Resources Regulator ("the Regulator") that Boral Limited may have breached their conditions of authorisation.
8. Evidence provided to the Regulator by the Department outlined that vegetation had been cleared at the Loch Catherine site, namely a historical access track to an adit without appropriate approval from the Department.
9. Boral and the Department have differed in their interpretations of a 2011 Review of Environmental Factors (REF) and Addendum in 2012, with Boral of the view that these documents provided approval for the clearing of the vegetation. The Regulator is of the view that the REF did not authorise the works conducted by Boral.
10. The investigation by the Regulator alleges that the clearing of vegetation at the Loch Catherine site has occurred without the relevant consent by the Department and therefore contravened condition 3A and 29 of CCL 748. The Regulator alleges that this conduct was in breach of section 378D(1) of the Act 'Contravention of condition of authorisation'.
11. At the time of the alleged offence the maximum penalty for these offences was \$1.1 million for a corporation and \$110,000 for a natural person.

Proposed undertaking

12. On 14 February 2018 Boral submitted a signed 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.

13. In summary, the Boral undertaking proposes to:
- a) Cease any activity that is not in compliance with section 378D of the Act
 - b) Pay the Department's costs of \$15,000 incurred during the investigation and review of the undertaking
 - c) Pay the Department the sum of \$3,000 to cover costs associated with monitoring the undertaking
 - d) Pay the above costs and fees within 30 days of being issued with an invoice from the Department
 - e) Provide \$50,000 to the 'Wall 2 Wollondilly' Project being run by Greening Australia that helps to restore critical habitat, reduce the impact of weeds, improve water quality and return the Wingecarribee River to a healthy state
 - f) Carry out training of all key management of its NSW operations in respect of the operation and compliance with conditions of mining leases
 - g) Develop material to include in the induction of new staff who have management responsibility in respect of operations that have an authorisation under the Mining Act
 - h) Complete an independent audit of its NSW operations, namely Berrima Shale mine, Marulan South Limestone mine and Wye Terracotta mine, to ensure compliance against the conditions of any authorisations under the Mining Act, including compliance in respect of operations against conditions in relevant Mining Operations Plans.
 - i) Complete an independent audit of its internal compliance programs to ensure that they adequately address the requirements to comply with the provisions of the Mining Act
 - j) Report to the Department on the implementation of each of the measures provided for in the undertaking on a quarterly basis until completed

Considerations and findings

14. While under the Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note that Boral acknowledges the allegations put forward by the Regulator that it contravened their conditions of authorisation and that such conduct was in breach of the Act.
15. In relation to the alleged activities, although the clearing of vegetation was extensive, I note that it was confined to an old access railway track that had historically been cleared to allow access to the mine site in the 1960's. In this respect the clearing involved the felling and removal of ground cover and mid story vegetation that had not fully regenerated from previous clearing conducted and did not include any mature vegetation.
16. I also note Boral's position that it was of the belief that it had approval to clear the vegetation as result of the approved Review of Environmental Factors 2011 and Addendum 2012 documents. While the Regulator is of the firm view that Boral was not authorised to undertake such works, I accept that the activities undertaken by Boral were not malicious or in deliberate contravention of its regulatory obligations.

17. However, Boral, together with its related entities, claims to be Australia's largest building and construction material supplier and holds a number of mining titles in NSW. There is a strong expectation that large companies such as Boral are aware of its obligations under the Act and have systems in place to ensure compliance.
18. I note that a subsidiary of Boral, Boral Bricks Pty Ltd ("Boral Bricks") entered into an enforceable undertaking on 16 November 2016 in relation to an alleged breach of the Act, namely the Regulator alleged Boral Bricks unlawfully mined at their Jinera and Lockhart sites. Taking into account the antecedents of Boral Bricks, Boral itself has not been the subject of any escalated enforcement action from the Regulator under the Act, with only minor administrative non-compliances recorded against it.
19. Boral has proposed to implement a number of measures to minimise the recurrence of the circumstances or behaviour that gave rise to the alleged offending conduct.
20. In this regard, Boral's undertaking to implement internal compliance training with key management and induction of new staff, and carry out independent audits of its operations to ensure compliance with the Act directly addresses the behaviour that is subject of the allegations and provides appropriate controls to prevent future possible contraventions.
21. The agreed terms proposed by Boral, including the \$50,000 donation, together with the costs associated with the audits and training are estimated to cost approximately \$115,000.
22. Boral has also undertaken to pay the Regulator's costs of \$18,000 to cover investigation and monitoring. This is an appropriate undertaking that will ensure that the Regulator, and ultimately the taxpayer, does not bear undue financial costs as a result of its actions in investigating and pursuing the alleged contravention.
23. The acceptance of an undertaking will ensure that the Regulator does not incur further costs in relation to the matter, particularly in relation to investigation and legal costs, which may never fully be recouped through prosecution action.
24. Having regard to the compliance history of Boral, the circumstances of the alleged breach of the Act, which I am of the view is not at the high end of the scale in terms of the level of seriousness, and proposed terms of this undertaking I am of the view that the terms offered in this undertaking are appropriate.
25. Boral's commitment to undertake training, auditing and other financial commitments is considered significant, and is likely to achieve a better compliance outcome than pursuing other enforcement options including prosecution.
26. Further, the quantum of approximately \$133,000 to be paid by Boral, having regard to the specific circumstances of this case, is likely to be commensurate or higher to any penalty imposed by a court if successfully prosecuted, which will create a significant deterrence effect.

Conclusion

27. I am satisfied that the proposed undertaking meets the requirements of the Act and the Guidelines.
28. I am of the view that the proposed undertaking will deliver tangible benefits to industry and community by strengthening the integrity and transparency of information submitted in connection with mining operations in NSW and provide training to key staff within Boral. The undertaking also provides financial and environmental benefits to the community.
29. 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.
30. I am satisfied that the initiatives proposed by Boral resolve the behaviour of concern that led to the alleged contravention.
31. Accordingly, I have determined to accept the enforceable undertaking proposed by Boral Limited.

Date of decision: 6.3.2018



Lee Shearer

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.