

DOC19/277937

File No: 0744 - 2017

Entity: Namoi Valley Bricks Pty Ltd (ACN 125 186 138)

Issue: Whether to accept an enforceable undertaking in relation to alleged contraventions of the *Mining Act 1992*.

Decision maker: Anthony Keon
Acting Deputy Secretary, Resources Regulator

Section 378ZFB decision

As authorised by section 378ZFB of the *Mining Act 1992* (**Act**), and in accordance with the authority delegated to me by the Secretary of the Department of Planning and Environment (**Department**), I, Anthony Keon, Acting Deputy Secretary Resources Regulator, have decided to **accept** the enforceable undertaking given by Namoi Valley Bricks Pty Ltd (**NVBPL**), 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. The Wilga Park clay mine is located on land known as 'Wilga Park', near Gunnedah in north-west NSW and is comprised of Lot 121 DP755503, Lot 182 DP755503 and Lot 2 DP1183502.
7. NVBPL has been the responsible entity for mining operations at the Wilga Park clay mine since 2 May 2007.
8. On 21 June 2012, NVBPL lodged Mining Lease Application No. 429 for the scheduled minerals clay/shale and structural clay. This application covered three areas at the Wilga Park clay mine.
9. On 15 August 2017, Mining Lease 1760 (1992) and Mining Lease 1761 (1992) were granted in relation to this application.
10. It is alleged that, between 2 May 2007 and 15 August 2017, NVBPL mined clay/shale and structural clay from the Wilga Park clay mine without an authorisation, an offence under section 5 of the Act.
11. It is further alleged that between 1 July 2007 and 30 June 2017, NVBPL extracted 147,820 tonnes of clay/shale and structural clay from the Wilga Park clay mine without a mining lease for the purposes of making bricks.

Proposed undertaking

12. On 8 April 2019, NVBPL submitted an enforceable undertaking proposal to the NSW Resources Regulator (**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, NVBPL undertakes to:
 - (a) Donate \$10,000 to the Gunnedah Community Scholarship Fund administered and held by the Gunnedah Shire Council.
 - (b) Pay the Department of Planning and Environment the agreed amount of \$53,737 comprising:
 - i. \$51,737 for royalties
 - ii. \$1,000 for administrative levies
 - iii. \$1,000 for rental fees.
 - (c) Pay the Regulator's investigative, legal and administrative costs of \$5,000.
 - (d) Pay the Regulator's compliance monitoring costs of \$3,000.

Considerations and findings

14. While under the Act, the giving of an enforceable undertaking does not constitute an admission of guilt, NVBPL has acknowledged the allegation that it contravened section 5 of the Act.
15. I note that NVBPL had been providing annual statistical returns, both prior to, and during, the alleged periods to the then Department which detailed its extraction activities. Despite lodging regular returns NVBPL had not previously been advised that a mining title was required, and it was only following an audit that it was informed that an authorisation was required - following which NVBPL then took steps to regularise the activities and applied for a mining title.
16. While ultimately it is the responsibility for NVBPL to ensure it has the appropriate authorisations in place, having regard to the above I am satisfied the alleged behaviour was not wilful or deliberate.
17. I further note that period between NVBPL's application and ultimate determination was considerable. NVBPL's application for a mining lease was lodged on 21 June 2012 and not determined (granted) until 15 August 2017.
18. NVBPL has fully cooperated with the regulator's investigation and was forthcoming in providing all information when sought. Having regard to these and the above factors I am of the view that the alleged behaviour was at the much lower end of the scale.
19. In this respect, I am of the view that the primary harm caused by the alleged behaviour was the loss of royalties and fees to the state.
20. The undertaking proffered by NVBPL directly addresses this harm, with NVBPL committing to pay the department \$53,737 for royalties, rents and levies for the alleged mining. This payment will ensure the state is adequately compensated for the alleged activities carried out by NVBPL prior to the granting of the mining leases.
21. In addition, I note that NVBPL 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 prosecution action.
22. I am also satisfied that the donation of \$10,000 to the Gunnedah Community Scholarship Fund will provide a tangible community benefit to local youth by financially supporting them in pursuing tertiary studies.
23. Having regard to the specific circumstances of this case, I am satisfied that the quantum of \$71,737 to be paid by NVBPL provides a sufficient deterrent effect and is proportionate to the level of harm of the alleged behaviour. I am also of the view that the undertaking will achieve a better and more balanced outcome than pursuing potential prosecution action.
24. 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.

25. Accordingly, I have determined to accept the enforceable undertaking proposed by NVBPL.

Date of decision: 14 April 2019

A handwritten signature in black ink, appearing to read 'Anthony Keon', with a large, sweeping flourish extending to the left.

Anthony Keon

A/Deputy Secretary, Resources Regulator
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.