

<b>File No:</b>	0030-2015, 1200-2015 and ABN-2014-0047
<b>Entity:</b>	Boral Bricks Pty Ltd, ABN 66 082 448 342
<b>Issue:</b>	Whether to accept an enforceable undertaking in relation to an alleged contravention of the Act.
<b>Legislation:</b>	<i>Mining Act 1992</i> – Part 17A, Division 4B
<b>Decision maker:</b>	Simon A Y Smith Secretary of the Department of Industry

## Section 378ZFB decision

As authorised by section 378ZFB of the Mining Act 1992, I, Simon Smith, Secretary of the Department of Industry, have decided to **accept** the enforceable undertaking given by Boral Bricks Pty Ltd, as attached to this decision.

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

## Reasons for decision

### Legislation

1. Section 378ZFB of 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 the 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 Bricks Pty Ltd ("Boral Bricks") (ABN 66 082 448 342) operates several industrial minerals quarries in the Albury/ Wagga Wagga region in southern NSW.
7. The NSW Resources Regulator investigated allegations that Boral Bricks had conducted unlawful mining at several sites in southern NSW around the towns of Lockhart and Albury.
8. The locations include Morgan's Clay Pit at Lockhart, Lot 1 DP 1153001 ("Lockhart"), Jervois Shale Deposit, Part 3/883808 and Part 11/862965 ("Jervois") and Jindera Brickworks, Lot 4 DP 581243 ("Jindera").
9. Boral Bricks was the operator of Lockhart and Jindera until 1 May 2015 when these operations were transferred to Boral CSR Bricks Pty Ltd (ABN 68 168 794 821).
10. Boral Bricks has not been the mine operator at Jervois since 2001.
11. The NSW Resources Regulator's investigation found that Boral Bricks had mined clay at Jindera and kaolin at Lockhart and that no royalties had been paid in relation to this extraction. Notably, at both sites it was determined that the minerals were privately owned minerals.
12. The investigation also concluded that mining at Jindera and Lockhart was carried out between 1990 and 2015 by Boral Bricks and that in both instances mining had been conducted without an authorisation, allegedly in contravention of section 5 of the Act.
13. An authorisation is now held at the Jindera site and a mining lease application is currently being processed by the department for the Lockhart site.

## **Proposed undertaking**

14. On 2 November 2016 Boral Bricks submitted a signed enforceable undertaking proposal to the department. Consistent with the Enforceable Undertaking Guidelines the proposal was developed using the pre-proposal advisory services offered by the Resources

Regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.

15. In summary, the Boral Bricks undertaking proposed to do the following:

- a) Cease any activity that contravenes section 5 of the Act.
- b) Undertake compliance training of relevant staff, including staff employed by related bodies corporate in NSW including Boral CSR bricks Pty Ltd. Relevant staff being those who have operational control of an extractive industry process. This training will supplement the existing Boral Group compliance training programs.
- c) Engage an independent auditor (as agreed with the department) to review all operations of Boral Bricks (and related bodies corporate) and Boral CSR Bricks Pty Ltd to determine whether appropriate authorisations are in place. The audit will also look at whether operations which are being carried out under an authorisation are complying with all issued conditions.
- d) Engage a consultant to carry out industry training and present at the NSW Institute of Quarrying (or other relevant industry body) events for 6 regions on the application of, and obligations under, the Act.
- e) The total value of these actions is estimated to be \$100,000.
- f) In addition Boral Bricks will report to the department on the implementation of these measures quarterly.
- g) Boral Bricks will, further to these commitments, pay royalties of \$15,885 and rents and levies of \$17,671.07 to the department for mining undertaken (if any) on behalf of Boral Bricks since 1 November 2010 at Lockhart and Jindera.
- h) Boral Bricks will pay the department's costs of \$18,000 incurred during the investigation and review of the undertaking.
- i) Boral Bricks agrees to reimburse the department the sum of \$2,000 to cover costs associated with monitoring the undertaking.
- j) Boral Bricks commits to pay the above costs and fees within 42 days of the undertaking commencing.

## **Considerations and findings**

16. While under the Act the giving of an enforceable undertaking does not constitute an admission of guilt, I note Boral Bricks Pty Ltd acknowledges that it is alleged that it carried out mining operations in breach of the act, and that it has agreed to pay royalties and rents and levies for any mining undertaken since 1 November 2010.
17. Boral Bricks, together with its related entities, claims to be Australia's largest building and construction material supplier and, as such, could be considered to be a sophisticated operator. There is therefore a strong expectation that Boral Bricks is aware of its obligations under the Act and has systems in place to ensure compliance.
18. However, I note that in the case of both the Jindera and Lockhart sites that the minerals are classified as privately owned. Notably prior to November 2010 privately mined 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.
19. I further note that Boral Bricks has not previously been the subject of any escalated enforcement action from the department, with only a few advisory letters being recorded



against it. Given the size and operation of Boral Bricks, I would consider the compliance history in this context to be good.

20. I also note that Boral Bricks immediately ceased all mining activities at the identified sites once informed of the allegations, and has since taken steps to obtain the appropriate authorisations required.
21. Boral Bricks has proposed to implement a number of measures to ensure that there is no recurrence of the circumstances or behaviour that gave rise to the alleged offending conduct.
22. In this regard, Boral Bricks' undertaking to implement internal compliance training and carry out independent audits of its operations to ensure compliance with the Act directly addresses the behaviour that is the subject of the allegations and provides appropriate controls to prevent future contraventions. In particular, the independent audit will provide the department and community confidence that Boral Bricks is now operating in complete compliance with the Act.
23. Boral Bricks undertaking to pay \$15,885.00 in royalties together with \$17,671.07 in rents and levies payments ensures that the State receives appropriate compensation for the alleged activities carried during the period from 1 November 2010.
24. Boral Bricks has also undertaken to pay the department's costs of \$20,000 to cover investigation and monitoring. This is an appropriate undertaking that 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.
25. The acceptance of an undertaking will ensure that the department 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.
26. Having regard to the compliance history of Boral Bricks, the circumstances and changes that apply to privately owned minerals, together with Boral Bricks' actions since being made aware of the issue, I consider the level of offending to be at the lower end of the scale. In particular, and having regard to the relatively small amount owed to the State, I do not consider Boral Bricks' actions in relation to the alleged offence to be deliberate or malicious.
27. Boral Bricks' commitment to undertake training, auditing and industry education activities up the value of \$100,000 is considered significant, and is likely to achieve a better compliance outcome than pursuing prosecution action

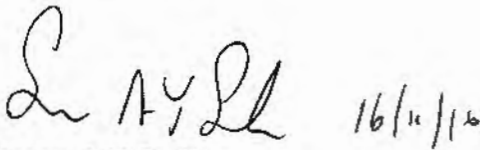
## **Conclusion**

28. I am satisfied that the proposed undertaking meets the requirements of the Act and the Guidelines.
29. I am of the view that the proposed undertaking will deliver tangible benefits to industry and community by further strengthening the compliance of the proponent and providing educational workshops to industry across 6 regions on the application and obligations of the Mining Act.
30. 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.

31. I am satisfied that the initiatives proposed by Boral Bricks resolve both the behaviour of concern that led to the alleged contravention and also rectify the consequences of the conduct.
32. Accordingly, I have determined to accept the enforceable undertaking proposed by Boral Bricks Pty Ltd. In accordance with the Act prosecution action will not be commenced in relation to the alleged offences whilst the enforceable undertaking is in force or after it has been completely discharged.

Date of decision:



**Simon A Y Smith**  
Secretary  
Department of Industry

**NOTE: In accordance with section 378ZFB of the Mining Act 1992 this decision will be published on the department's website.**

