

FILE NO: ABN-2015-0069, 0005-2017 and 0264-2017

TITLEHOLDER: Hans-Dieter Hensel

AUTHORISATION: M(C)L 146

LEGISLATION: Section 125 of the *Mining Act 1992*

DECISION MAKER: Anthony Keon, Acting Chief Compliance Officer,
NSW Resources Regulator

SECTION 125 DECISION TO CANCEL AUTHORITY

As authorised by section 125 of the *Mining Act 1992* (the Act), I, Anthony Keon, having delegated authority from the Minister, have decided to **cancel authorisation M(C)L 146**.

This decision takes effect immediately upon Dr Hans-Dieter Hensel being notified of the decision.

REASONS FOR DECISION

Legislation

1. Section 125 of the Act that provides that the decision maker may cancel an authority as to the whole or part of the land to which it relates if satisfied that one or more specified grounds have been met.
2. Section 125(1) sets out the grounds for cancellation of an authority, which include if the decision maker is satisfied that:
 - a. the holder of the authority has contravened a provision of the Act or the regulations (whether or not the holder is prosecuted or convicted of any offence arising from the contravention);
 - b. a person has contravened a condition of the authority (whether or not the holder is prosecuted or convicted of any offence arising from the contravention); or

- c. the holder of the authority has failed to use the land the subject of the authority in good faith for the purposes of which the authority has been granted, or has used the land for the purposes other than that for which the authority has been granted.
3. Section 126 of the Act provides that the decision maker must not cancel an authority unless the holder of the authority has been given at least 28 days in which to make representations with respect to the proposed cancellation, and any such representations have been taken into consideration.
4. The Minister may delegate any functions conferred under the Act to another person and has delegated the functions to cancel an authority under section 125 of the Act to the Chief Compliance Officer of the NSW Resources Regulator.

Background

5. M(C)L 146 was first granted to Dr Hans-Dieter Hensel (the titleholder) on 30 August 1994 and authorises the mining of dimension stone, granite. The site is approximately 1.98HA and is located about 14km south west of Tenterfield.
6. The authority was renewed on 2 June 2000 for a further term expiring on 29 August 2001.
7. An application to further renew the authority was lodged on 17 August 2001 and is still under consideration by the Division of Resources and Geoscience (DRG) (formerly Division of Resources and Energy). Under section 117 of the Act the authority continues to have effect until the application for renewal is finally disposed of.
8. On 15 November 2010, the mining claim was converted to a mining lease under amendments to the Act.
9. On 6 April 2017, the titleholder was invited to provide a submission in response to my proposed decision to cancel M(C)L 146 based on the following grounds:
 - a. Section 125(1)(c) – that I was satisfied that the titleholder had contravened the following conditions of authority M(C)L 146:
 - i. Condition 4 – Plan of Management
 - ii. Condition 62 – Security
 - iii. Condition 54 – Annual Report

- iv. Condition 53 – Working Requirement
- b. Section 125(1)(b) – that I was satisfied that the titleholder had contravened sections 73(1) and 378D of the Act by virtue of the contraventions of conditions 4, 53, 54 and 62 of the authority.
- c. Section 125(1)(g) – that I was satisfied that the titleholder had failed to use the land the subject of authority M(C)L 146 in good faith for the purposes for which the authority has been granted.

Response from titleholder

- 10. On 3 May 2017, the titleholder provided a submission in response comprising of three documents:
 - a. *A response to the recent communications by the NSW Dept. of Mines on the status of Mining Lease 146 dated 1 May 2017*
 - b. a one and a half page submission to ICAC (*ICAC submission b*)
 - c. an article on prospectivity of dimension stone in NSW (*Prospectivity of BS in New England*).

- 11. The key points of the titleholder's representations are summarised below:
 - a. There is an undercurrent of corruption in relation to the current action. The titleholder alleges potential collusion between the Department of Planning and Environment (the Department) and the landowner to 'railroad' him off the quarry.
 - b. A dimension stone quarry is not a mine.
 - c. Condition 4 was not complied with as he was under considerable duress with frequent harassment and threat of death from the landowner. He could not present a MOP not knowing what was going to happen.
 - d. A MOP is a Plan of Operations for Mining. It is not for quarrying a boutique granite and it is not an applicable document when there is no 'mining' taking place.
 - e. A request to the Department for a hiatus in quarrying was rejected, which is not consistent with other quarries in similar situations.
 - f. There was a total lack of sympathy shown by Department in relation to the threat from the landowner and the Department was unsupportive and not willing to help in any way.
 - g. The threat and harassment led to a waning interest in quarrying. Any potential production ceased and any promotion of the product for potential utilization on construction projects ceased.

- h. The landowner recently died, however the son has been equally intimidating and threatening.
- i. The condition 53 'working requirement' has been complied with as every year he has attended the quarry for several days to clean debris, maintain machinery, institute fire hazard management and check on granite morphology. At a daily rate of in excess of \$2000/day for his international expertise he has well and truly met this requirement.
- j. To be criticised for not quarrying stone for a period lacks any understanding of quarrying. It is certainly inconsistent with most of the other dormant granite quarries in NSW many of which have not been quarried for much longer periods and for which no punitive action has been taken.
- k. Although there was a long period where no annual reports were submitted by the titleholder, there was little point when there was no quarrying.
- l. The increase to the security was excessive with no rationale behind it. The titleholder partly complied with an increase that he considered to be more than fair in the circumstances.
- m. A stone quarry is intended to be available for production virtually forever. A boutique stone quarry is artisanal. Its development is greatly admired on a global scale for its achievement. It is literally an artistic feature that is looked upon favourably by the stone industry and quarries world-wide and is meant to stand forever. It is not meant to be hidden away or buried.
- n. Although still in its infancy there are positive signs for the stone culture in Australia however the Mines department is bent on suppressing this culture via its narrow minded bureaucracy.
- o. The titleholder has a strong attachment to the quarry as a result of thousands of hours spent hand-drilling the blocks and he does not want this ripped away from him.
- p. The titleholders eldest son has recently completed a 4-year geology degree with a view of segueing into his business.
- q. A quarry is essentially a monument of success, there to be utilized forever.

Considerations and findings

12. The titleholder's comments in relation the Department's conduct are noted, and the allegations of corruption or inappropriate conduct by departmental officers are not accepted. Any ongoing comments along these lines should be forwarded to either ICAC [GPO Box 500 Sydney, New South Wales, 2001 or phone 1800 463 909 (toll

free)] or the NSW Ombudsman [phone 1800 451 524 (toll free) or online complaints form at www.ombo.nsw.gov.au/complaints/making-a-complaint]. This decision is founded solely on the grounds set out below.

Condition 62 – Security deposit

13. I am satisfied that the titleholder has failed to provide the security required by condition 62 of the conditions of authorisation for M(C)L 146 and as such the titleholder has:
- a. contravened a condition of M(C)L 146, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(c) of the Act; and
 - b. contravened Section 378D of the Act, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(b) of the Act.
14. Details of the titleholder's contravention of condition 62 are set out below:
- a. Following the enactment of the *Mining Amendment Act 2008*, on 15 November 2010 existing mineral claims over land outside a mineral claims district were deemed to be mining leases over that land under the Act. Accordingly, mineral claim 146 was converted to a mining lease on that date.
 - b. Clause 75 of the then *Mining Regulation 2010* specified that the minimum security deposit for a mining lease was \$10,000.
 - c. On 26 March 2014, a delegate of the Minister formally varied the security condition on M(C)L 146 to align with the minimum requirements as set out in the Act and the *Mining Regulation 2010* to require a security deposit of \$10,000.
 - d. On 3 April 2014, the titleholder was advised of the variation of the security condition and the requirement to lodge the increased security with the Department by 2 May 2014.
 - e. On 1 May 2014, the titleholder emailed the Department disputing the increase in the amount of the security deposit and, as an alternative, committed to providing an increased security in the amount of \$2,000.
 - f. On 4 June 2014, the Department responded to the titleholder advising that the increase was a mandatory requirement of the legislation. The titleholder was further advised that in order to complete the renewal of the authority he was required to submit the additional security and signed renewal documents within 21 days.
 - g. On 30 October 2014, the Department acknowledged the receipt of an additional \$1,500 in security (in addition to the \$500 already held) from the

titleholder and reiterated that the full security of \$10,000 was required as a condition of the authority. The titleholder was again advised that in order to complete the renewal of the authority he was required to submit the additional security and signed renewal documents by 17 November 2014. The titleholder was further advised that a failure to submit the additional security and signed renewal documents within this timeframe would result in a recommendation to the Minister to refuse the renewal application.

- h. On 24 November 2014, the titleholder again emailed the Department disputing the required security and questioned whether there was a mechanism for placing the quarry into care and maintenance rather than surrendering the lease.
- i. On 4 February 2015, the Department responded to the titleholder's email providing information on the purpose of security deposits and advising that any request to go into care and maintenance would only be considered after the renewal of the authority. Standard Departmental procedure is to not consider a request for suspension of mining operations whilst any obligations associated with the authority remain outstanding (in this case the titleholder's failure to submit the signed renewal documents and provide the outstanding security).
- j. On 1 June 2016, the Department again wrote to the titleholder referencing the previous letters of 4 June 2014 and 30 October 2014 and advised that the failure to pay the additional security by 30 June 2016 would result in compliance action and a recommendation to the Minister to refuse the application for renewal of the authority.
- k. As of 24 May 2017, departmental records indicate that the additional security has still not been lodged by the titleholder, with only \$2,000 of the required \$10,000 currently held by the Department.

15. In his submission of 3 May 2017, the titleholder acknowledges the request by the Department for payment of the increased security. Despite acknowledging that he has been informed that the increase was a mandatory requirement under the Act, he has failed to comply with repeated requests for payment.

Condition 4 – Plan of management

16. I am also satisfied that the titleholder has failed to provide the plan of management as required by condition 4 of the conditions of authorisation for M(C)L 146 and as such the titleholder has:

- a. contravened a condition of M(C)L 146, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(c) of the Act; and
 - b. contravened Section 378D of the Act, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(b) of the Act.
17. I note that the approved 'plan of management' referred to in condition 4 of M(C)L 146 is commonly referred to as a 'Mining Operations Plan' (MOP).
18. The titleholder previously submitted a MOP in respect of M(C)L 146 in 2006, which was approved by the Department and expired on 1 September 2013 (2006 MOP). The titleholder failed to submit a new MOP for approval following the expiry of the 2006 MOP.
19. On 14 March 2017, the titleholder was issued with penalty notice 3149085226 for the offence under section 378D of the Act. In his submission of 3 May 2017, the titleholder acknowledged that he failed to comply with numerous requests by the Department for the submission of a MOP and stated *"This may be so technically, but did the Dept ever question why this wasn't forthcoming."*
20. The titleholder represents that he was unable to submit a MOP due to fears surrounding the actions of the landowner leading to uncertainty surrounding the future activities at the quarry, and that he could not present a MOP not knowing what was going to happen.
21. However, I note that the titleholder has not previously raised this issue in the numerous engagements with the Department between February 2015 and December 2016 when the Department repeatedly requested the submission of a new MOP. Rather, in an email of 27 October 2015 the titleholder stated that the 2006 MOP could be used *'because there has been no change in terms of mining'*.
22. I also note that the provision of a MOP, particularly where there is limited or no activity being conducted, is not an onerous task. Any uncertainty relating to future operations did not prevent the titleholder from complying with the condition, which could have been achieved by submitting a MOP based on current circumstances. A further MOP could have been submitted once future operations had been confirmed.
23. While the titleholder eventually submitted a MOP on 1 December 2016 to cover the period from 9 December 2016 to 9 December 2023, this did not rectify non-

compliance with condition 4 for the period between 2013 and 2016 following the expiry of the 2006 MOP.

24. The titleholder also puts forward an alternate argument that a MOP was not required as dimension stone is 'quarried', and not 'mined'. This is incorrect.
25. Under the Act, 'mine' (when used as a verb) is defined as 'to extract material from land for the purpose of recovering minerals from the material...'. Dimension stone is prescribed as a mineral under Schedule 1 of the *Mining Regulation 2016*, meaning the recovery of dimension stone from extracted material (that is, 'quarrying') falls within the definition of 'mine' under the Act.

Condition 54 – Annual report

26. Based on the material currently before me I am further satisfied that the titleholder has failed to provide the annual report required by condition 54 of the conditions of authorisation for M(C)L 146 and as such the titleholder has:
 - a. contravened a condition of M(C)L 146, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(c) of the Act; and
 - b. contravened Section 378D of the Act, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(b) of the Act.
27. Departmental records show that the last that the last annual report for the period ending August 1999 was lodged with the department on or after 12 November 1999, and no further reports have been lodged since that time.
28. In his submission of 3 May 2017, the titleholder submits that there was little point in providing annual reports as there was no quarrying being undertaken and further stated, "*Any annual reports of non-activity would have been inconsequential.*"
29. The titleholder was clearly aware of his obligations in relation to reporting, which is further evidenced by his previous provision of reports up until 1999. However, the titleholder appears to have made his own determination that continued compliance with his regulatory obligations was unnecessary.

Condition 53 – Operations and minimum expenditure

30. I am also satisfied that the titleholder has failed to comply with the requirements of condition 53 of the conditions of authorisation for M(C)L 146 and as such the titleholder has:
- a. contravened a condition of M(C)L 146, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(c) of the Act; and
 - b. contravened Section 378D of the Act, which constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(b) of the Act.
31. Condition 53 of the authority requires that the titleholder effectively and safely prospect or mine the claim area and spend at least \$2,000 on operations during each 12 month period of the authority. The titleholder contends that he has met his obligations under condition 53, as he claims he has attended the site for several days every year to clean debris, maintain machinery, institute fire hazard management and check on any changes to the granite morphology and aesthetic characteristics.
32. However, I note that he has not provided any details or evidence of his attendance at the site (e.g. dates of attendance), and this position is inconsistent with his general argument that he was unable undertake operations at the site due to fears in relation to the landowner. Further, no annual reports, which is the primary mechanism for evidencing such work, have been supplied since 1999.
33. Even if it were to be accepted that the titleholder attended the site each and every year, it is not appropriate to apply a specialist consultant rate to the undertaking of basic maintenance activities.
34. Furthermore, the condition not only requires the expenditure of \$2000 on operations each 12 month period, but that the titleholder effectively and safely prospect or mine the claim area. In this respect, I am not satisfied that the titleholder has complied with this condition for each and every 12 month period since 2006, as further evidenced by the following:
- a. The MOP submitted by the titleholder to the Department on 1 December 2016 states the following:

The last MOP was submitted in 2006. Negligible mining activity has occurred during the term of the last MOP.

There is unlikely to be any mining activity from this primary block for at least 2 years and possibly more due to foreseeable global supply and the demand situation.

In the absence of any foreseeable mining activity it is impossible to provide a material production schedule.

- b. The titleholder's submission of 3 May 2017 states that:
 - i. Annual reports were not supplied as there was no quarrying undertaken; and
 - ii. Any potential production ceased and any promotion of the product for potential utilization on construction projects ceased as a result of the alleged threats from the landowner.

Failure to use the land in good faith and for purposes for which authority was issued

- 35. Finally, I am satisfied that the titleholder has failed to use the land the subject of authority M(C)L 146 in good faith for the purposes for which the authority has been granted. This constitutes a ground for cancellation of M(C)L 146 pursuant to Section 125(1)(g) of the Act.
- 36. Details of the titleholder's failure to use the land the subject of authority M(C)L 146 in good faith for the purposes for which the authority has been granted are as follows:
 - a. No annual reports have been supplied for any period between August 2000 and August 2016.
 - b. No royalties have been paid to the state since the period ending 30 June 2006.
 - c. The land the subject of the authority has not been effectively mined for an extended period and the required yearly minimum expenditure on operations has not been undertaken.
 - d. The titleholder failed to submit a MOP for approval following the expiry of the previous MOP submitted in 2006. Accordingly, no approved MOP was in place for the period 1 September 2013 to 1 December 2016, meaning that mining operations could not lawfully be undertaken on the land the subject of the authority during this period.
 - e. In an email dated 27 October 2015, the titleholder expressed that quarrying operations had been essentially on hold for 6 years and further stated that:

“One of the main reasons for keeping this quarry operation is for credibility. When I am sent to inspect and assess quarrying operations domestically and overseas I am viewed initially as an academic who would know nothing about the physical practicalities of quarrying.”

- f. In his submission of 3 May 2017, the titleholder stated:

“The threat and harassment led to a waning interest in quarrying. Any potential production ceased and any promotion of the product for potential utilization on construction projects ceased.”
- g. Further, the titleholder has committed multiple contraventions of the Act and the conditions of the authority during this period, as set out in paragraphs 13 to 34 of this notice.
- h. On 3 April 2014, the titleholder was advised that the Department proposed to renew M(C)L 146, subject to a requirement that the titleholder submit the required security and documentation by 2 May 2014. The Department’s records confirm that these requirements were not met.
- i. On 4 June 2014, the Department again wrote to the titleholder advising that the required security and documentation was required to be submitted within 21 days to progress the renewal. The Department’s records confirm that these requirements were not met.
- j. On 30 October 2014, the Department again wrote to the titleholder advising that the required security and documentation was required to be submitted by 17 November 2014 to progress the renewal. The titleholder was further advised that failure to meet the timeline would result in a recommendation to the Minister to refuse the application for renewal of the authority. The Department’s records confirm that these requirements were not met.
- k. On 1 June 2016, the Department again wrote to the titleholder referencing the previous letters of 4 June 2014 and 30 October 2014 and advised that the failure to pay the additional security by 30 June 2016 would result in compliance action and a recommendation to the Minister to refuse the application for renewal of the authority.
- l. As of 28 March 2017, the titleholder has failed to provide the documentation and additional security in fulfilment of the requirements of the application for renewal of the authority.

37. While I accept that through the life-span of a quarry there will be various periods when production activity wanes due to a variety of external factors, the available material clearly demonstrates that there has been no material mining activity for a significant

and extended period spanning at least 11 years. Of further concern is that the titleholder has indicated that there is unlikely to be any activity for a further two years.

Conclusion

38. The multiple and repeated contraventions of the conditions of the authority over a lengthy period of time demonstrates a comprehensive failure to observe fundamental regulatory obligations and an inability to implement adequate management and compliance practices.
39. The titleholder has been unresponsive to regulatory engagement and has shown an unwillingness to work with the Department to meet his regulatory obligations. The Department has engaged with the titleholder over a protracted period in relation to the renewal of the authority, the requirement to pay increased security and the failure to supply a MOP. Despite this engagement, the titleholder has only remedied the issue in relation to the MOP following escalated action by the Resources Regulator in the form of issuing a notice under section 240 of the Act.
40. Of significant concern is that, despite being faced with the ultimate sanction of cancellation of the authority, the titleholder has made little attempt to rectify the identified issues or offer a pathway to return to compliance. Instead, the titleholder has taken an approach of dismissing these obligations as inconsequential, an inconvenience, or simply unfair.
41. In the complete absence of a commitment to return to, and maintain, compliance with the Act, it is only appropriate that the authority be cancelled.
42. I am satisfied the requirements of Section 126 (1) and (2) of the Act have been undertaken. The titleholder was notified of my proposed decision to cancel the authority on 6 April 2017. The titleholder was afforded a period of greater than 28 days in which to respond to my proposed decision to cancel the authority and did so. I have taken that submission into consideration. Based on the Department's compliance with the requirements of Section 126(1) and (2) of the Act, as well as the ongoing correspondence with the titleholder over a protracted period of time in relation to the issues identified in this notice, I believe that the titleholder has been afforded procedural fairness in respect of my decision to cancel M(C)L 146.

43. Based on the material before me, I am satisfied that the titleholder:

- a. has contravened conditions 4, 53, 54 and 62 of authority M(C)L 146, which provides grounds for cancellation of the authority under section 125(1)(c) of the Act.
- b. has contravened section 378D of the Act by virtue of the contraventions of conditions 4, 53, 54 and 62 of the authority, which provides grounds for cancellation of the authority under section 125(1)(b) of the Act.
- c. Has failed to use the land the subject of authority M(C)L 146 in good faith for the purposes for which the authority has been granted, which provides grounds for cancellation of the authority under section 125(1)(g) of the Act.

44. I am further satisfied that, both individually and collectively, the above grounds warrant the cancellation of the authority.

45. Accordingly, I have determined to cancel authorisation M(C)L 146 under Sections 125(1)(b), 125(1)(c) and 125(1)(g) of the Act effective immediately upon the titleholder being notified of this decision.

46. I note that the cancellation of the authority also in no way precludes the Resources Regulator from taking any other action against the titleholder in respect of the authority, including the commencement of legal proceedings in relation to any of the identified breaches that form the basis of this decision.

Date of decision: 01 June 2017



Anthony Keon
Acting Chief Compliance Officer
Resources Regulator

RIGHT OF APPEAL

Should you be aggrieved by this decision, you may appeal to the Land and Environment Court against the decision. Such appeal must be made within **14 days** of the date of the notification of this decision, or within such further period as the Land and Environment Court may allow.