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INDEPENDENT PLANNING COMMISSION

PUBLIC MEETING

ASHTON COAL MINE SOUTH EAST OPEN CUT

PARTICIPANTS:	**MR ALAN COUTTS** **PROF ZADA LIPMAN** **MR PETER COCHRANE** **MR DAVID WAY** **MR AARON BROWN**
LOCATION:	**SINGLETON CIVIC CENTRE** **12 QUEEN STREET** **SINGLETON, NEW SOUTH WALES**
DATE:	**10.01 AM, THURSDAY, 9 AUGUST 2018**

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MR A. COUTTS: Good morning, ladies and gentlemen. Before we begin, I would like to acknowledge the traditional owners of the land on which we meet. I would also like to pay my respects to their elders past and present and to the elders from other communities who may be here today. Welcome to this public meeting on the proposed modification from Ashton Coal Proprietary Limited, the proponent, who are seeking to amend their consent for the Ashton South East Open Cut project through the inclusion of a new commencement condition and other administrative changes.

My name is Alan Coutts. I'm chair of this Independent Planning Commission panel, which has been appointed to help determine this proposal. Joining me are my fellow commissioners Professor Zada Lipman on my right and Peter Cochrane on my left, and David Way and Aaron Brown from the commission secretariat. Before I continue, I should state that all appointed commissioners make – must make an annual declaration of interest identifying potential conflicts with their appointed role. For the record, we aren't aware of any conflict in relation to our determination on this proposed modification. You can find additional information on the way we manage potential conflicts of interest in our policy paper, which is available on the Commission's website. In the interests of openness and transparency, today's meeting is being recorded, and a full transcript will be produced and made available on the Commission's website.

This public meeting gives us the opportunity here to hear your views on the assessment report prepared by the Department of Environment and Planning before we determine the modification application. The Independent Planning Commission of New South Wales was established by the New South Wales Government on the 1st of March 2018 as an independent statutory body operating separately to the Department of Planning and Environment. The Commission plays an important role in strengthening transparency and independence in the decision-making process of major development and land-use planning in New South Wales. A detailed description of the role of the Commission is available at the back of the room and is also available on the Commission's website.

This meeting is one part of our decision-making process. We've also been briefed by the department and met with the proponent and Singleton Council. The Commission is not involved in the department's assessment of the project, the preparation of their report or any findings within it. After today's meeting, we may convene with relevant stakeholders if clarification or additional information is required on matters raised. Records of all meetings will be included in our determination report, which will be published on the Commission's website. Following today's meeting, we will endeavour to determine the development application as soon as possible; however, there may be delays if we find need for additional information.

Before we hear from our first registered speaker, I would like to lay down some ground rules that we expect everyone taking part in today's meeting to follow. First, today's meeting is not a debate. Our panel will not take questions from the floor, and

no interjections are allowed. Our aim is to provide maximum opportunity for people to speak and be heard by the panel. Public speaking is an ordeal for many people. Though you may not agree with everything you hear today, each speaker has the right to be treated with respect and heard in silence.

Today's focus is public consultation. Our panel is here to listen, not to comment. We may ask questions for clarification, but this is usually unnecessary. It will be most beneficial if your presentation is focused on issues of concern to you. It is important that everyone registered to speak receives a fair share of time. I will enforce timekeeping rules based upon the agreed time allocation for each speaker. As chair, I reserve the right to allow additional time provision – for provision of further technical materials. A warning bell will sound one minute before the speaker's allotted time is up and again when it runs out. Please respect these time limits.

Though we will strive to stick to our schedule today, speakers sometimes can't make it or decide not to speak. If you know someone will not be attending, please advise either David or Aaron. If you'd like to project something onto the screen, please give it to David or Aaron before your presentation. If you have a copy of your presentation, it would be appreciated if you would provide a copy to the secretariat after you speak. Please note any information given to us may be made public. The Commission's privacy statement governs our approach to your information. If you'd like a copy of our privacy statement, you can obtain one from the secretariat or from our website.

Audio recording of this meeting is not allowed, except for the official recording for transcription purposes. Notes made throughout the day on issues raised will be summarised in our determination report. Finally, I'd ask that everyone present please turn their phones either off or to silent. So thank you. We are in a rather large room, so hopefully it will work for us, and I now call on our first speaker, Kevin Taggart. Kevin's not here? We might go to Deidre Oloffson. Sorry, Deidre. Put you on a bit quicker than you thought.

MS D. OLOFFSON: Rightio. Do I start, or – okay. Wasn't quite sure. Ashton Coal Mine South East Open Cut project, modification 1. Background. Ashton was granted development consent for the North East Open Cut underground operation in 2002. On the onset of mining in the complex, the community has experienced significant issues associated to mining in such proximity to the village – 500 metres exact to the closest neighbour. Due to the concerns related to this modification, I object to the changes requested by the Department of Planning and Ashton Coal.

On these grounds I base my objection. (1) This modification is clearly a legal argument which should have been resolved in the court in 2014, where all parties had ample opportunity to make amendments or submissions related to the conditions of consent and the opportunity in the appeal in 2015 of conditions set by the Land Environment Court. All parties had the opportunity to work through conditions of consent in the court proceedings.

Landholders object to the administrative changes to the South East Open Cut project conditions set by the ..... Environment Court. Acquisition rights can be exercised at any stage of the project. The approval should not be altered or modified to change the rights of acquisition of landholders. The modifications requested by Ashton and the Department of Planning place the position of acquisition rights of landholders against property owner of 129. Clearly, there has been inadequate consultation process if Ashton Coal and Department of Planning make assumptions that the community didn't understand the Land and Environment Court judgment. Legal argument. Point 530 of Justice Payne 27 18 – 27.8.14:

> *On balance, I consider the approval can be granted, but the approval must be subjected to adequate conditions about which a number of issues of clarification and possible alterations remains.*

Ashton Coal should not be provided the opportunity or right to alter judgment of a court of law when there was ample time in the process of the merits appeal to submit arguments in relation to the approval, the conditions of consent and the approval of the conditions of the consent, which had considerable timespan apart of the court proceedings. Also, if the Department of Planning legal representation and Ashton Coal's legal representation didn't understand the context of the information in the courtroom, which is their part of work, like any employee, if you don't understand, it's your responsibility to ensure the instructions are understood before commencing a task, and also, it's your responsibility to provide communication of instruction that everyone understood the judgment.

Due to the legal argument presented in this modification – has taken two years after the judgment, which is absolutely absurd, that Ashton did to make assumptions related to understandings of the material, when they were provided adequate time to do so in the court proceedings. But the major concern now has been presented IPC. And this modification is not ..... merit of the application but a clear legal argument. Understanding instructions provided by the court. Are the IPC suitably qualified?

Acquisition Rights and Commencement of the Project. The landholders understood the information provided in the consent conditions provided by the Land and Environment Court related to acquisition and when Ashton can commence development of the South East Open Cut. Now, it is very clear the project is approved and that the proponent must not carry out any development work until conditions of tenor is met. Also, the conditions of the consent are explicit on the timeframe of the approval of five years and a condition of extended two years. Now, on no terms does it state when Ashton wants to take up the project. The instructions are clear and precise, that Ashton can commence development when it meets the requirements. It is Ashton's responsibility to meet the requirements of the consent.

In relation to acquisition of the component – of the consent conditions, it is clear that upon receiving a written request from an owner in table 1 or 2, the proponent shall acquire the land, land listed in table 1 of schedule 3; that they have the right to require the proponent to acquire the land at any stage during the project. This is a

fair and just outcome related to acquisition, that families have the right process in place, are part of conditions of consent to, effectively, activate their rights, to be acquired at any stage of the project, developed or not developed, as approval has been granted. The responsibility of the development of the resource is the responsibility of the proponent to meet the requirements of Land and Environment Court consent conditions under section 10A.

Ashton Coal had ample opportunity to make submissions related to these terms set in the consent conditions or request the court to explain the consent conditions ..... related to acquisition of the court case. It was not raised. Therefore, the IPC, under this legal-argument-absence in the original proceedings, should not alter the intent of the rights of families in the village to request the right of acquisition at any stage of the project, as the intent of the court.

The department's report – to recommend the terminology of take up and change the acquisition to when the term take up of the ..... has produced an outcome that effectively places the landholders against owner 129 and demand the owner to sell to allow them the right to ..... this effectively forces the responsibility on the families, ultimately, to take up the role of the proponent, to get the South East Open Cut developed, which would not be the intent of the court.

The Consultation Process and Objection of the Landholders. There seems to be a large emphasis in the report by Department of Planning that the landholder continues to object to the South East Open Cut. What is the relevance of this context of the consent condition? Ashton Coal sent a letter to the Honourable Minister Andrew Stoner in 2013 related to Glennies Creek Common Trust, and the Department of Planning report related to objectors had a similar tone regarding the group of people. Ashton Coal: "The group of people who strongly object to the South East Open Cut Project could possibly be appointed to the board of Glennies Creek Common Trust at the annual general meeting, and this was to occur, the trust adopt various courses of action which could jeopardise the future of the project." The Department of Planning report: "Several landholders with voluntary acquisition rights object to the modification."

The only conclusion, from my perspective, is the department has the same dislike towards these group of people. Or is it, the department's dislike, associated with the quest to seek information or an explanation of the assessment of the South East Open Cut from the landholder, from the commencement of the complaints lodged to New South Wales Ombudsman, State Records Commission, New South Wales Electoral Roll Authority, New South Wales Department of Planning (Compliance related to Political Donations) and, finally, a report to the Minister of concerns related to two departments' action and a perception that had raised in the community which went to the governance section?

In relation to the consultation process, in the department's report – my perception is that the department believes we are stupid, and no ability to comprehend information, as we are totally confused on the context of conditions of the consent

..... the court. The confusion arose from the non-existent consultation process with the landholders in the village; assumption made by the department and Ashton that we didn't understand the context of the Land and Environment Court judgment and conditions, hence the South East Open Cut modification application.

The consultation process I received was a phone call from the Department of Planning director of resources, Howard Reed, related to the media announcement in the local paper of a South East Open Cut ..... "It's only minor and nothing to worry about." In the Department of Planning's report, objectors were unsatisfied with the level of consultation. Ashton conducted consultation with key stakeholders prior to finalising the application. Wouldn't you expect the key stakeholders would be the landholders with acquisition rights under the consent conditions ..... because the legal argument you made was that we didn't understand the Land Environment judgment consent conditions related to our rights of acquisition. Also, the 2017 and '16 annual review, which has a section 10 10.17.48 consultation process:

> *Neighbours, particularly those who have the potential to be directly impact by the operation are kept to date with operations, key projects through phone calls, regular emails and face-to-face meetings if required.*

As a meaning, "local neighbours" mean a group of people living particularly local area. You would expect the consultation process would be consulting the nearest neighbours to the operation as well. The landholders in the village yet – and yet on consultation ..... neighbours related to key projects would be considered inadequate, requires further explanation and reason for lodgement complaint Department of Planning.

Conclusion. These are the points that are relevant and important this modification be rejected. This is a legal argument which should have been raised in the court and dealt with. It was Ashton and Department of Planning's responsibility to seek understanding if the court – in the court if they didn't understand the conditions. The assumption that landholders didn't understand is misleading when clearly there was no consultation process with the proponent. This modification should not impede the rights granted by the Land and Environment Court related to acquisition on request throughout the project. The Department of Planning believes this is only minor, nothing to worry about, and yet changes conditions of the consent. Thank you. That's it.

MR COUTTS: Thank you. Thanks, Deidre. Wendy Bowman.

MS W. BOWMAN: Good morning, Commissioners. Thank you for the opportunity to speak today. I am very concerned that the Ashton Coal Mine, and in particular, this proposed modification, is creating a situation that is disaster looming. There are several reasons why I believe this is the case. The risk of loss of water resources. Water is the world's most precious commodity, as we are noting each day during this drought. So therefore I am speaking for all the water users from Camberwell down to the Maitland tidal pools who totally rely on this water. I'll

explain why further on. Glennies Creek is the most important source of water in this mid to lower Hunter region.

The volume of water supplying the Hunter River from the Glenbawn Dam is fully allocated by the time the water reaches the Glennies Creek confluence due to the large quantity of water used by Bayswater Power Station and the water for the people upstream – all the towns upstream. That is why the Bayswater Power Station was built – St Clair Dam was built: to give people below Bayswater Power Station continuous water supply. If this mine does create a problem, then what do all the farms and the areas like Whittingham, Belford, the whole of the Pokolbin wine region, etcetera, etcetera, downstream – what do they do if this water becomes contaminated? There is no other water supply they can rely on. The economic and social impact of the loss of any of the water coming down Glennies Creek is incalculable for our region.

The nearest dam is the Lostock Dam, which of course is the Paterson River. There is no other water supply that any of these people downstream could link into if water becomes a problem in Glennies Creek. Glennies Creek, therefore, must be looked after for all those who totally rely on the water. Coal mining in the area of Glennies Creek puts a direct risk to water supply from Glennies Creek. We cannot quantify the possible leakage from the mine into the aquifers and the waterway itself, and we cannot be certain about the potential impact of mining on the integrity of the aquifers.

For these reasons, mining in the environment of such an important waterway is too dangerous and must therefore never be allowed. We know that previous mining has already destroyed nearly all the aquifers between Muswellbrook and Singleton, so that eventually we will all have to totally rely on the stored water in the two dams. Yancoal does not understand the water issues in our area.

Mining of alluvial soils. In the past, it has been public policy to prevent any mining of alluvial soils which are capable of significant agricultural production. However, that proscription has now been set aside, and it is proposed to mine the Glennies Creek soils, which are a rich, fertile alluvial loam. This area has been used for extremely productive dairy farms for over 70 years. Despite the extensive evidence of the fertility of this area, the mine reports claim that the soil is poor. This is not correct. I have photos of the area that they wish to mine, that were both dairies for over 70 years.

We are farming the same soils at the moment. We grow lucerne, oats, feed sorghum, make hay, and at the moment, we are lucky where I am because we were able to make hay and silage this last summer at a cost, which is pretty unbelievable, but at the moment we are not asking the government for any help, but it would be very nice if we could get a rebate on the electricity because we are not asking for any other help, and yet we – I have been able to give hay over this last couple of years to a few people who were – had run out of their hay.

There is a huge risk arising from mining this flood-prone area, with the possibility of leakage of toxic water into the Hunter River water supply during flood events. The proposed mining area has an ironstone ridge to the east. The ironstone attracts storms, and during a storm event, the water flow is extremely strong. The volume of water floods at the paddocks, and on the mine-owned land, I have been able to see where water has created huge tunnels down through the alluvial soils. The force of that water coming down from the top of the ridge during storms is incredible.

Another problem is the base of Glennies Creek is lower than the base of the Hunter River. Therefore, when we have heavy rain in the catchments – that is, the Hunter River, the Goulburn River, Bowmans and Glennies Creek – the Hunter River then flows upstream into Glennies Creek, and it's quite incredible to see this happen because there is no sound, and you've got to be very aware of how quickly that water comes upstream, meets Glennies Creek and rises up and goes over the flats where they wish to mine. Again, I have photographs of the flooding that has taken place only in 2007. In the 1955 flood, it was right up to the window ledges of the house I'm in, the same on the house where they wish – the mine owns the land and where they are now. So if we get a couple of the big storms that we seem to be getting these days – if we get those, look out.

Dams. The freshwater dam proposed to be built by the mine collecting the water coming down the eastern ridge is not allowed under the water scheme. It is too big. You are only allowed to build a dam of a certain size to collect fresh water, rainwater. A smaller dam runs the risk of washing away with the power of the water coming down from that eastern catchment. The contaminated mine water would then flow into the water supply and contaminate all the water in the Lower Hunter.

Ashton states that they wish to build a permeability wall, which is a wall dug down to the base, therefore, stopping the mine water going into the creek and the creek water going into the mine. Now, if you read up about these permeability walls by the people that design them in America, they state that this wall must be built in one section only, definitely not in sections. Ashton said they were going to build it in sections. Also, at the end of this screed that these people that designed it in America said they do not recommend this type of construction. This is all on the internet.

Yancoal has a poor environmental and safety record. Yancoal has had serious problems in their other mines, the ceiling fall in the Austar mine and the results of that. A young man on a drilling rig at Ashton is now a paraplegic. The breaking of tailings dams in the Ulan area and a wall collapse in the same area. Yancoal does not need another mine. They own Austar and Cessnock, East Maitland Mine, one at Gloucester, Ashton and Ulan, and they have just purchased the whole of Coal & Allied from Rio Tinto. Why do they want a very small little dam on the Glennies Creek?

Where is the coal? In the 1980s, I was told by a highly regarded mining engineer who the government had given the job of doing the original drilling in – from the walk ..... Jerry's Plains right the way up to Muswellbrook and round our area. He

did the early, early drilling to see where all the coal seams were. I was able to go and speak with him in his office in Sydney, and he told me that the seams flowed from west to east. But once these seams went below Bowmans Creek, they virtually disappeared. But they came up at Rixs Creek .....

Rixs Creek Mine recently purchased the land from our old Rambling boundary to the base of my eastern ridge on the eastern side. It was purchased by Rixs Creek Mine, not for mining but for dumping their overburden. There doesn't appear to be very much coal. They've done all the drilling there. Rio Tinto drilled the moxie property at Maison Dieu, five kilometres downstream from me, and did not find any coal. They then drilled the land to the east of the moxies owned by A.S. Bowman and the Estate of E&H Bowman; again no coal. What exactly is Ashton after?

My belief is that the eastern ridge was an upsurge millions of years ago, or that the coal seams have gone down so deep that an open-cut mine would not be viable. The eastern ridge between Glennies Creek and Bowmans Creek was definitely upsurge because many years ago when we owned the Ashton property and the Electricity Commission was drilling on the top of the ridge to put in their big KBA holes for the big new power coming from the newly built Bayswater Power Station, we were called to the site and the drillers showed us that on the top of that ridge there was 12 feet or more of washed gravel in silt, which, of course, is the base of a river. So there was an upsurge there on that whole of my – that western ridge, and I believe that the upsurge was again on that eastern ridge between Glennies Creek and Rixs Creek.

The mining engineer who set up the actual Ashton Mine originally was a particularly nice person to deal with. He was employed by Felix Resources and kept me in touch with any drilling, either water or coal, that they were doing during that period. And his exact words to me when he came to say goodbye when he was handing over, his words were, "You've no need to worry. We only found one seam on your place, and it goes straight up in the air." Sounds very like an upsurge to me. Camberwell Village, Hunter New England Health stated years ago that no one would be allowed to live in the village if this mine went ahead. The government has allowed the mining industry to wipe out villages, our history, creating very many angry and unhappy residents. For example, Ravensworth ..... and now Bulga. Enough is enough.

Dust pollution. The area of the Hunter Valley is the highest dust pollution due to the concentration of all open-cut mines plus the two power stations. The population of this whole area is suffering from the effects of air pollution. It causes respiratory asthma in particular and loss of lung function, especially in young children. The respiratory health of people in the Muswellbrook and Singleton Shires is appalling. Dust is in the atmosphere 24 hours a day.

Summary. I am extremely concerned about this proposal. I believe the potential impacts in terms of the risk to our water supply and the quality of the water and the health risk to the population are too great. No so-called stringent conditions put in place are adhered to by mining. Therefore, I object to this application. Thank you.

MR COUTTS: Thanks, Wendy. Jan Davis.

MS DAVIS: Thanks, Commissioners. It's this microphone? Speak up a little?

MR COUTTS: That's fine.

MS J. DAVIS: Okay. Thanks very much. I'd like to acknowledge we stand on the land of the Wanaruah people. I'd like to acknowledge their elders past, present and their future elders. This land was never ceded. So once again, thanks for the opportunity to talk to you today. As you can see, I've registered as an individual today because I'm president of Hunter Environment Lobby but will be represented by legal representatives from the Environmental Defenders Office after me. I'm president of Hunter Environment Lobby because I have a strong interest in sustainable development and protecting the future for all of our grandchildren. I'd like to provide some background on our activities and continued objection to the modification proposal before you.

HEL is a regional community-based environmental organisation that has been active for well over 20 years on the issues of environmental degradation, species and habitat loss and climate change. We have a particular interest in biodiversity and water management issues in the Hunter region, and we've held positions on the Hunter River Management Committee, the Hunter and Pattison Environmental Water Advisory Group and the Upper Hunter Air Quality Monitoring Network Advisory Committee.

Open-cut coal extraction is one of the worst offenders, we believe, when it comes to the loss and destruction of habitat and water quality and quantity. In the Hunter we've watched the systematic destruction of a large percentage of the valley floor, along with its endemic forest, flora and fauna. In the years HEL has been active, open-cut production has increased its footprint to over 10 times the initial area. HEL has objected to the Ashton South-East Open-Cut since it first appeared on public exhibition in 2010.

The project has had a chequered history of rejection and approval ..... appeal and Supreme Court appeal. We have demonstrated that there is a strong public interest in the decision-making around this coalmine and have supported the Camberwell community throughout this long and very arduous series of legal processes. We took a large step for a small non-profit community group by launching a merits appeal against the mine approval in the Land and Environment Court. We did this at our considerable cost because we did not believe the project had merit. The outcome of rigorous legal debate in this court and the New South Wales Court of Appeal is a strong set of clear conditions that should be upheld.

This modification proposal is completely inappropriate and should not have seen the light of day. There is an interesting history behind this modification application that we wish to share with the Commission. There are some key documents that were received after the public exhibition period in February 2017. These documents do

not appear to have been released on the DPE website or provided to the Commission. I will table both those letters. The first is a letter to DPE from Yancoal legal representatives dated 9 December 2015. This was approximately two weeks after the decision was handed down by the Court of Appeal on 20 November that rejected the Yancoal appeal of the Land Environment Court decision made in April 2015.

This letter basically lays out the legal arguments made in the modification proposal before the Commission now, that is, the conditions imposed by the Land and Environment Court are unlawful. This argument was not made to the Appeal Court – the Court of Appeal not two weeks earlier. Yancoal had every opportunity to raise these issues in their appeal case if unlawfulness of conditions is such a great concern. Having missed this opportunity, the most suitable forum for appealing the lawfulness of the conditions would be the High Court. Instead, Yancoal went to the DPE. How did DPE respond: they did not suggest that Yancoal to go to a higher court.

They did not point out that two courts of law had approved the conditions. On 8 January 2016 Marcus Ray, deputy secretary of DPE, responded to Yancoal legal representatives that the department acknowledges the concerns raised and will consider any modification application as a priority. So now we have these very complex legal arguments before the Commission even though the conditions of approval were considered by a panel of three judges in the Supreme Court. We consider it highly inappropriate for DPE to have advised the proponent that this modification would be given priority. We have commissioned the Environmental Defenders Office to lay out the legal arguments to assist the Commission in your deliberations.

The proposed modification is not a simple administrative amendment to conditions. It is a fundamental change to the approval that was arrived at through rigorous legal debate. We do not consider it the role of the Commission to make complex legal decisions about conditions that have been accepted by two courts of law in New South Wales. We believe it would be highly inappropriate for the Commission to make a contrary decision. We note that the DPE does not support the very spurious application of a commencement condition. This would set a dangerous precedent for state-significant development. EDO will be presenting our full legal position after me.

We expect that a fully laid out set of legal reasons will be supplied with the Commission's determination on this inappropriate modification. This will be important to demonstrate the Commission's independence and legal expertise. HEL commends Wendy Bowman for the stand she has taken against this mining project. We fully support the condition that no development can proceed without her property. 60 per cent of the coal resource identified in the project is under her property. The assessment of the mine was not as rigorous as it should have been because very little information was collected from Wendy's property. That was because she stood up to the mining company and refused to sell. Wendy's brave stand has been recognised through an international environment program, the Goldman Environmental Prize that was awarded to her in 2017.

This global recognition for standing firm to protect Glennies Creek, the surrounding environment, and significant downstream water users such as the world-famous Hunter Valley wine industry is important for all of us here in the Hunter. Yancoal is now a major player in the Hunter coal industry. They have acquired very large operations with significant annual coal production. The conditions placed on the Ashton South East Open Cut coal mine will make no material economic difference to the net worth of the company. HEL has also recently in the last 10 years or so objected to coal developments or expanding of modifications or mining timeframes on the grounds of increasing greenhouse gas emissions into the atmosphere both here in Australia in the case of fugitive emissions or overseas where the coal is burned to achieve power generation.

Any increase in Australia's greenhouse gas emissions, whether occurring here or overseas, over the period of mining will threaten Australia's ability to meet the Paris Agreement. At this time in history when over 97 per cent of the world's leading scientists agree that man-made climate change threatens not only human habitation and security but the habit of all living things, we must stop and examine our decisions. You commissioners are charged with a heavy responsibility and we urge you to use it wisely. Thank you very much.

MR COUTTS: Thanks, Jan.

MS DAVIS: Thanks.

MR COUTTS: Bev Smiles.

MS B. SMILES: Thank you. I would like to acknowledge the traditional owners of the land on which we meet today. The Hunter Communities Network, which I will refer to as the network, is an alliance of community based groups and individuals impacted by the current coal industry and concerned about the ongoing rapid expansion of coal mining in the region. I wish to thank the commissioners for holding this public meeting today to hear the position of the community on the proposal before you. I am convenor of the network and am an affected landholder living with an expanding coal industry at the far western end of the Hunter Valley.

I'm here today representing the many communities and individuals up and down the valley who are experiencing similar impacts on their lives and livelihoods. The network strongly objects to the proposed modification to the conditions of approval for the Ashton South East Open Cut coal mine. These conditions were approved by the New South Wales Land and Environment Court in 2015 and upheld by the New South Wales Supreme Court. Community members living near the coal mining industry deserve and expect equal consideration in the decision-making process. We also expect a higher level of certainty once a project has been subjected – excuse me – to a rigorous approvals process as has the Ashton South East Open Cut.

This project was the last coal mine approved in New South Wales where the community had the right to appeal the merit of the decision in the Land and

Environment Court. All approvals since late 2012 have had those rights extinguished. While the project was given approval through the legal system, this approval was based on a rigorous set of conditions that must be upheld. There is no legitimate legal reason for these conditions to be overturned. It is very disturbing to see the process undertaken by the Department of Planning and Environment, that I will refer to as DPE, since the outcome of the court case and its appeal in 2015.

We are here today to support the remaining community members of the Camberwell village and the emphasise the importance of certainty for those impacted by the coal mining industry. We trust the Commission will demonstrate its independence in considering this proposal and provide a full legal explanation for the final determining decision. So just to provide some background, following the Yancoal appeal in the Supreme Court that was overruled, legal representation was made to DPE in December 2015. DPE replied in January 2016 promising to give priority to any modification application. We consider this advice to be entirely inappropriate, providing a backdoor appeal option outside the court system. DPE had demonstrated a bias towards the coal industry by advising and accepting a 75W modification that proposes to make significant changes to conditions of approval determined through New South Wales law courts.

As Jan has mentioned, this issue should have taken up to the High Court, not through a spurious application of a 75W modification. The community has had a longstanding opposition to the application of the 75W modification loophole for part 3A mine approvals and objects to its application in this instance under DPE advice. The Yancoal application for the 75W modification was not received by DPE until 19 January 2017 so while DPE promised to give the modification priority in early 2016, the proponent did not give the matter any great urgency. This modification proposal is on public exhibition for comment for only two weeks between 2 and 16 February 2017. There was minimal consultation prior to the exhibition. This very short period of time that was afforded the community to comment on a complex and convoluted legal argument is further demonstration of the bias in the New South Wales planning system.

We are here before you today because community members strongly objected to the extent of change to the approved conditions. This modification should not have been accepted in the first instance. The issue of the Ashton South East Open Cut Coalmine has been highly contentious since it was first proposed in 2009. This 75W modification continues the ongoing conflict between the community and mining industry in this very heavily impacted area of the Hunter. So just to give an outline of the cumulative social impacts from mining, Hunter Communities Network was established in 2011 because of the growing tensions in the Hunter region, the increased land use conflict, and the massive scale of the coal industry expansion that has wiped out rural communities up and down the valley.

Communities in the Singleton district such as Woolworths, Ravensworth, Glennies Creek and Mount Olive had already virtually disappeared. Camberwell and Bulga were the next in the firing line. The severity of social impacts caused by large areas

of displaced rural communities is only just becoming a consideration under the New South Wales planning system. There is now a requirement to undertake a social impact assessment under new guidelines only adopted last year. This requirement for social impact assessment is a result of many years of campaigning by impacted communities across the Hunter region. Meanwhile, there have been numerous ongoing expansions of open cut mining operations in the Singleton area and further west. Camberwell is now one of the most heavily impacted communities in this part of the valley.

The Upper Hunter Air Quality Monitoring Network monitor that's based in Camberwell Village reports more exceedances of the national quality standards than any other monitor in the network. There have been 37 exceedance alerts so far in 2018 with 14 of those occurring in July alone. So for nearly half of the month of July the air quality in Camberwell was dangerous to the health of residents. These alerts are based on 24 hour average readings with air quality reaching extremely dangerous levels during that period. These very poor air quality conditions impacting severely on local residents' health are caused by the fact that Camberwell Village is nearly entirely surrounded by open cut mines. It is of considerable concern that the recent proposal to expand the Rixs Creek Mine, which is currently being reviewed by the IPC, did not identify any acquisition rights for private Camberwell residents. This is despite the project moving closer to the village and the regional air quality regularly exceeding national standards.

The only approval to date that has afforded acquisition rights to the remaining private property owners in Camberwell has been the approval of the Ashton South East Open Curt supported by two courts of law. These rights stand and must be maintained to provide certainty for these residents. The IPC, as the determining body, has a duty of care to consider the welfare of private community members. We do not support the DPE position that this modification meets object 1.3A of the EP&A Act. That is, to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources. The social and economic welfare of the remaining private residents of Camberwell must be maintained through this approval as it stands.

The planning process has seriously eroded the social and economic welfare of Camberwell residents by the ongoing expansion of mining around them. The Rixs Creek Mine is proposing to move closer. The Mount Owen Mine has yet another expansion on exhibition. The nearby Hunter Valley South operations has been approved to raise overburdened dumps to the height of a 40 storey building. The network strongly recommends that the current condition providing voluntary acquisition rights to the remaining residents of Camberwell be maintained as it now stands. We consider it to be quite churlish of Yancoal to be pursuing this condition change. The net worth of the company with its recent acquisition of Rio Tinto Mines and the scale of its operations in the Hunter is considerable.

The cost of acquiring the remaining residents of Camberwell, if and when they desire to move on, would not cause an economic impost on the company. We understand that there are now only four private properties in Camberwell Village eligible for acquisition under this condition. This would not be an onerous economic imposition on this large multinational mining company. The continued pursuit of the Ashton South East Open Cut Coalmine by both Yancoal and DPE is difficult to understand. The project is approved to produce 12 million tons of coal over a seven year period. Many mines owned by Yancoal now produce more coal than that in one year. The economic arguments and alleged unlawfulness of the acquisition condition are ill-founded and should not be accepted. The community needs certainty. The proposal to include a commencement condition is strongly rejected.

We note that DPE supports the community position on this part of the modification application. If this change to conditions were to be adopted it would set a precedent across all mine approvals. A new mine proposal or large expansion of existing operations in the Hunter is now highly contentious because of the scale of the industry and its cumulative social and environmental impacts. Land use conflict continues in the Hunter with social disruption, stranded assets and economic disadvantage for other industries and neighbours. The Upper Hunter Land Use – the Upper Hunter Strategic Land Use Plan fails to protect communities and other key industries, water sources, threatened biodiversity, and amenity in the region. Therefore, land use conflict continues. Because of the extent of current cumulative impacts the coal industry now causes serious social and economic disruption by merely proposing a new or extension mining project.

If approval is granted – which is currently the rule rather than the exception – it is entirely unacceptable for that approval to be taken up at the discretion of the proponent. The key justification for mine approvals in the Hunter now depends on the weighting of the predicted jobs, taxes and royalties as a public benefit against the significant environmental and social costs. For the proponent to have discretion of when those public benefits will be provided through the access of a publicly-owned resource while causing social and economic disruption cannot be supported. That is what Yancoal is proposing with the commencement condition, that a mine approval can hang around over the community head with absolutely no certainty of when it may proceed.

The Mount Pleasant Mine is a case in point. Even with a lapsed condition, mining companies can get around this and prolong the actual development of an approved project. The social disruption of the very late activation of the Mount Pleasant Mine approval was outlined recently at an IPC meeting in Muswellbrook, which a number of you Commissioners today are also on that panel. And we trust that the proposed commencement condition will not be accepted in the final determination of this modification. Providing certainty to the community is paramount in this decision.

Now, the changes to the commitments. The network supports the proposed updates to the conditions or commitments where there are specific requirements for compliance. The timeframe of various actions such as the implementation of the

biodiversity offset strategy and the enhancement and management of a vegetation corridor should occur within 12 months of the development commencing, not at commencement of mining operations. Many of the impacts such as clearing will occur prior to the commencement of mining and, therefore, mitigation measures should be in place within 12 months of the impacts occurring. We fully support the legal position that has been put to you through Hunter Environment Lobby representations.

So in summary, Hunter Communities Network does not support the argument that the conditions of approval for the Ashton South-East Open-Cut Coalmine are unlawful. The community of Camberwell must have certainty that their right for voluntary acquisition stands now as granted at the commencement of approval in April 2015. The proposed commencement condition is a dangerous precedent to set for all state-significant development. The proposed timeframes for commitments are supported on commencement of development activities, not on commencement of mining. This modification is not a minor administrative adjustment to conditions; it is a major change to the approval. The community expects a clear legal response that lays out the reasons for the final determination of this highly questionable 75W modification.

And finally, the IPC review of the Rixs Creek Open-Cut Mine expansion heading towards the Camberwell Village needs to take into account the high level of air pollution that currently exists there. The cumulative impact of mining operations in this area of the Hunter, the ongoing social and health stress and the economic disadvantage of local people who have lived in the area for most of their lives must be a key consideration. We trust that a fully independent, closely considered and clearly explained determination will be made in whatever time it takes for the IPC to be satisfied that the full legal implications have been taken into account for this modification. Thank you.

MR COUTTS: Thanks, Bev. Emily Long from the Environmental Defenders Office.

MS LONG: I'll just ask at the outset whether the Commissioners have been provided with a copy of the written submissions prepared on behalf of our client?

MR COUTTS: We have.

MS LONG: Yes. Great. Absolutely. If anyone can't hear me, just give me a wave. So to begin I'd like to acknowledge the traditional owners of the land on which we meet and pay my respects to their elders past, present and future. As the Commissioner is now aware, I'm a solicitor working for the Environmental Defenders Office of New South Wales. EDO New South Wales acts for the Hunter Environment Lobby, and I make these submissions on their behalf. As the Commission is aware, the Hunter Environment Lobby was the applicant in the merits appeal of the original approval of this project. The presentation I give today will reflect the position that's set out in the written submissions already provided to the

Commission. Those written submissions have been prepared by Robert White, counsel for the Hunter Environment Lobby and EDO New South Wales. Both EDO New South Wales and Robert White acted for the Hunter Environment Lobby in the merits appeal of the original approval and the appeal of that decision before the Court of Appeal.

At the outset I wish to draw the Commission's attention to the appendix to the Hunter Environment Lobby's written submissions, which sets out a summary of the amendments sought, and the Hunter Environment Lobby's position in relation to each. It also notes the position of the department and, hopefully, will allow the Commission to easily compare all three positions in relation to each amendment sought. As the Commission is aware, the Hunter Environment Lobby has previously submitted two written responses to this modification application. Both of these have been submitted by the EDO on the Hunter Environment Lobby's behalf. They're dated 16 February 2017 and 13 April 2018. In this presentation I'll touch on some of the matters raised in those letters. In some cases I'll canvass those issues more briefly. In other cases I'll be expanding in detail on some of the matters previously raised and raising some additional points for the Commission's attention.

Turning first to the proposed commencement condition. Our client has set out its views on this point in some detail in its written submission provided in April of this year. This position is also set out in the written submissions provided to the Commission for this hearing. To summarise, and as already noted, the Hunter Environment Lobby opposes the proposed commencement condition. On this point the Hunter Environment Lobby is in agreement with the Department of Planning and Environment that the proposed condition confuses, rather than clarifies, the issue of commencement and acquisition rights.

Given this agreement, I won't go into further detail on this point other than to reiterate our client's concerns that first, the proposed condition creates the possibility of an indefinite approval. The proposed condition has the potential to undo the important work of condition 10(a) of schedule 2, being the condition that prohibits development work under the approval until or unless Ashton requires the requisite interest in property 129. Second, as noted in the written submissions, the amendments that Ashton has proposed to this condition suggested in May of this year do not, in our client's opinion, adequately address its concerns with the proposed condition. The proposed condition is simply not necessary. At best, it causes confusion; at worst, it fundamentally modifies the nature of the approval and creates an approval that could exist in perpetuity. It should be rejected.

Moving then to the modification sought that seek to modify the acquisition rights under the approval. The Hunter Environment Lobby objects to any amendments that seek to modify the acquisition rights of the owners of the land identified in table 1 of schedule 3 to the approval. Specifically as noted in the appendix to our submissions, these are conditions 2 and 2(a), paragraph (a) and (b) of schedule 3. Our client's position on this point can be divided into three parts. First, it is that the correct interpretation of the current conditions of approval that the land acquisition rights

crystallised on the approval being given. Second, Ashton has not made out the argument that it has put that the land acquisition conditions are unlawful. Third, it is our client's position that the condition lacks the power to make a determination as to the lawfulness of the existing approval conditions and to make the amendments that have been sought by Ashton.

Turning first to the correct interpretation of the conditions. The Hunter Environment Lobby disagrees with the Department of Planning Environment's interpretation of the conditions. This interpretation is set out at page 9 of the department's assessment report and suggests that the land acquisition rights are dependent upon Ashton issuing a written notice to the landowners as to their rights. On this point close attention to the actual words of the conditions of the approval is required. As the Commission will be aware, condition 1 of schedule 3 states:

> *Upon receiving a written request for acquisition from an owner of land listed in table 1, the proponent shall acquire the land in accordance with the procedures in conditions 7 to 8 of schedule 4.*

These word are clear. The requirement to acquire land is tied solely to the receipt by Ashton of a written request from a listed landowner. The condition does not impose any limit on when such written request for acquisition may be made. Similarly, taking the Commission to condition 8 of schedule 4, this states, in part:

> *Within three months of receiving a written request from a landowner with acquisition rights, the proponent shall make a binding written offer to the landowner –*

and so on and so forth. The words of this condition confirm that it is receipt by Ashton of a written request from the landowner that triggers the requirement to make an offer. This condition, again, is not qualified in any way to suggest that a written request will only be valid if issued after Ashton has written – provided written notification or commenced development. Viewing the conditions of approval as a whole, including condition 10(a) of schedule 2, this confirms that this was indeed the intent of the New South Wales Land and Environment Court when issuing the consent.

As the Commission is aware, condition 10(a) was inserted by the court for the purpose of ensuring that no development work will be carried out until such time as Ashton has acquired the requisite interest in the whole of the development site. The court recognised that this may cause uncertainty within the local community as to whether and when the development could ever be constructed. So in order to create more certainty for landowners, who did not wish to wait wondering whether the development could ever be built, the court considered it appropriate to impose a condition requiring Ashton to acquire land at the landowner's request at any time after the grant of consent.

The court did not include any requirement for Ashton to have commenced development in order to trigger these acquisition rights. Indeed, the court recognised that commencement could be years away, if ever, and it would be unfair to leave the landowners in limbo during this period. It's notable to note that the wording of the conditions just discussed contrasts directly with the rights established under condition 2 of schedule 3. That condition, which relates to the obligations of Ashton to enable landowners to relocate during mining operations, is directly referable to mining operations. Condition 1 of schedule 4 is also relevant. It states, in part, that:

> *Prior to the carrying out of development, the proponent shall notify in writing the owners of the land listed in table 1 of schedule 3 that they have the right to require the proponent to acquire their land at any stage during the project.*

It is our client's position that it would be completely unjust and contrary to the purpose of the land acquisition conditions if it is failure by Ashton to notify a landowner of their rights that would be sufficient to deprive them of these rights. The Commission should not accept the department's interpretation of this clause, which suggests that the act of notification is a precondition to the exercise of acquisition rights. In any event, the terms of the condition – this condition just noted confirm the time from which land acquisition rights exist.

Once again, I draw the Commission's attention to the actual words of the condition. They clearly state that the landowners have acquisition rights at any stage during the project. This is not the same as saying, for example, "at any time after development has commenced" or "at any time after construction has commenced", and there is no warrant for reading such words into this condition. Ashton has founded its modification application on the proposition that there is, it says, significant doubt as to whether the existing conditions of the project approval – namely, those which require compliance even if the project isn't physically commenced – are unlawful.

I apologise. I've added in a paragraph there, but it's – I've – I haven't introduced what I'm about to say. Going back to what I was saying a moment ago, I have drawn the Commission's attention to the actual wording of the conditions and what they mean. Having done so, it is important to address Ashton's second point, which is that the land acquisition conditions are unlawful, in that they require Ashton to acquire land if requested even if it hasn't commenced development. In support of this, Ashton has made three arguments; however, closer review of each of these shows that the arguments have not been made out.

The first argument proposed by Ashton is that a proponent takes up an approval. Ashton is arguing that under the Environmental Planning and Assessment Act, a planning approval can be granted but is not taken up or implemented until a person who has the right to act on it chooses to do so. In support, Ashton relies on three cases, and Ashton submits that these cases demonstrate that there is an accepted and fundamental principle in New South Wales planning law that a planning approval is taken up by the holder and, in turn, an approval cannot lawfully impose any obligations on an approval-holder until such time as it is taken up.

It is notable that none of the cases relied on by Ashton were decided under New South Wales law nor Australian law. Each of the cases is over 30 years old, and Ashton has not identified any instances in which these cases have been referred to by a New South Wales court. Further, and importantly, none of the cases raise issues that are similar to those raised by this modification application. The extracts provided by Ashton in its application are drawn out of context. With respect, none of the cases, read alone or together, support the proponent's position that under the Environmental Planning and Assessment Act or any other planning law, a planning approval must be taken up, that it is only taken up when the approval-holder chooses to do so and that as a result, a planning approval cannot lawfully contain conditions requiring compliance prior to the time at which the approval-holder takes it up.

Our client's written submissions, at paragraph 48, provide further comments as to the proposition that these cases relied on do stand for and, importantly, highlight that these propositions are not relevant to the modification application. Further, it should be noted that it is commonplace for development approvals to require compliance with some conditions by an identified date. Such requirements are not conditioned upon whether the approval has been taken up or operations have commenced.

Indeed, the original approval conditions for this project, as granted by the former planning and assessment condition in 2012, included many conditions with specific timeframes that were not referable to commencement of the project. There was no argument raised before the New South Wales Land and Environment Court by Ashton that these conditions needed to be amended because the proponent must have a right not take up the project. Any such amendments were made as a matter of merit by consent of all of the parties, and they were made by reference to condition 10(a) of schedule 2.

The second position that Ashton puts in its lawfulness argument is that there is no requirement to comply with conditions of an approval until the development is commenced. Ashton again relies on case law in this – in support of this proposition, relying on three cases that it says clearly support it. With respect, again, these cases do not support the position. I'll briefly mention the cases relied on, just by simple name without reference to the citations, as the information is provided in the written submissions.

A decision of the New South Wales Criminal Court of Appeal, Rao v Canterbury City Council [2000] NSWCCA 471 is an appeal from a decision of the New South Wales Land and Environment Court. The case concerns a situation where the appellant was convicted of a criminal offence under the Environmental Planning and Assessment Act arising from their implementing a development consent contrary to the conditions of consent. It is notable that development under that consent had already commenced. This makes the decision immediately distinguishable from the point in issue. The appeal was brought on a range of grounds. Importantly, the court was not required to and did not consider whether and in what circumstances a development approval given under the Environmental Planning and Assessment Act

can include conditions that require compliance before development commences. The case does not assist Ashton.

In the second case relied on, King, Markwick, Taylor and Others v Bathurst Regional Council, another decision – this one of the New South Wales Land and Environment Court – the court considered whether conditions of a consent to subdivide become immediately unenforceable once the subdivision has been completed and the subdivided lot sold. With respect, this offers no support for the proposition that a development consent cannot contain conditions that require compliance prior to the commencement of development.

Finally, Ashton argues that this decision of King v Bathurst Regional Council quoted and applied another judgment, this one of the High Court of Australia, in Hillpalm v Heaven's Door. This is not correct. Rather, in King v Bathurst the court rejected a submission made that Hillpalm v Heaven's Door was authority for a particular proposition, that being that immediately upon issue of a subdivision certificate and the sale of certain subdivided lots within a subdivision, all conditions of subdivision consent necessarily become unenforceable. Again, the reference does not assist Ashton in its lawfulness argument.

The third aspect of Ashton's lawfulness argument is that a finding that land acquisition conditions can be enforced prior to it taking up the approval would result in a number of undesirable outcomes. Ashton first argues that rejecting its arguments that a proponent must take up an approval and that there can't be compliance to require – requirement to comply before that would undermine the entitlement of a landholder to – I quote – "make any number of land – number of applications for planning approvals". The Hunter Environment Lobby takes no issue with the proposition that a landholder can make multiple applications for consent. However, a landholder does not have a right to a development consent nor a right to a modification to the development consent.

Ashton relies on the decision of Pilkington v the Secretary of State. In that case, it states that a landholder is entitled – and I quote – "to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposal". End quote. Having done this, however, the landowner must accept the responsibilities that attach to any consents it obtains as a result. It would be absurd to limit the condition-making power of a consent authority simply because it would be inconvenient to those landowners who wish to maximise their development options by obtaining multiple consents.

Further, if the landowner considers that the conditions of the approval mean that the proposed development is no longer a worthwhile exercise, the Environmental Planning and Assessment Act has provisions that clearly enable that consent-holder to surrender the consent. In the current case, the land acquisition condition in issue here will only crystallise if or when a relevant land-owner issues Ashton with a written request for acquisition. In these circumstances, there is no uncertainty for the approval-holder as to when it will be required to comply.

Ashton also argues that if conditions of approval could require compliance prior to commencement, this would interfere with its right to – and I quote – "assess an application and determine whether it is economic or not and walk away from it if it isn't". this is incorrect. As already noted, an approval-holder is entitled to surrender a development consent if it is unsatisfied with the conditions that have been imposed.

Ashton also argues that it would be unjust if – I quote again – "a condition can be imposed requiring immediate compliance that a land-holder has no ability to meet", because that land-holder would then be in breach and subject to criminal sanction through no fault of their own. This may indeed be correct as a matter of general principle, but it is simply not the situation faced here. Ashton is not immediately required to comply with the land acquisition conditions. It is only required to comply if issued with a written request from a relevant land-owner. Further, compliance with that condition is squarely within Ashton's control.

The third aspect of our client's response to the proposal to modify the acquisition rights conditions is that the Commission lacks the power to make the determination sought. The submissions that have been filed by the parties make it abundantly clear that there are competing views as to the lawfulness of the conditions that go to the acquisition rights. It is equally plain that the proposed amendments have the potential to change significantly the rights of the land-holders. It is inappropriate and, in our client's view, beyond the Minister, and as its delegate the Commission's powers under section 75W to modify conditions on the grounds that those conditions are unlawful. That is a matter for the court process. It is not a function of the Independent Planning Commission.

The Hunter Environment Lobby draws the Commission's attention to the decision of the New South Wales Land and Environment Court made in 2016 in Billinudgel Property Proprietary Limited v Minister for Planning. In that decision, the Land and Environment Court considered when a modification application will fall within the scope of section 75W. The court summarised existing case law guidance. And an extract of that decision is provided in the Hunter Environment Lobby's written submissions.

By reference to that decision, the Hunter Environment Lobby is of the view that a modification that would substantially alter land acquisition rights cannot lawfully be characterised as minor or administrative; further, if, as the Hunter Environment Lobby and the department contend, the proposed commencement condition has the potential to fundamentally change the operation of condition 10(a), which provides that the project cannot commence without lease, licence or purchase of property 129, such amendment would not be minor but would have very significant effects.

Equally, an application that proposes modifications to conditions imposed by the Land and Environment Court on grounds that the existing conditions are unlawful cannot properly be described as being of an administrative nature. Rather, an application to modify conditions of the approval on the basis that they are currently unlawful, an application which seeks to deprive land-owners of their existing

acquisition rights and one which potentially modifies the intent and operation of condition 10(a), is an application which seeks a fundamental change in an underlying and essential part of the approval, and this constitutes a radical transformation to the nature, form and effect of the conditions and a radical change to the project. On this basis, the Commission lacks the power and should not make any of the following proposed amendments, namely, the proposed commencement condition and modification to any conditions that would have the effect of modifying the land acquisition rights.

I will briefly touch on the amendments that our client does consent to, which are identified clearly in our written submissions and in the appendix to those submissions. There are two sets of amendments that the Hunter Environment Lobby consents to in principle but, importantly, proposes either an alternative approach or some substantive amendments to the proposal. Paragraph 68 of the written submissions identifies a list of conditions that Ashton seeks to amend by way of the proposed commencement condition combined with the insertion of additional text into each of the amended conditions sought.

The Hunter Environment Lobby does not consider it strictly necessary to modify these conditions to clarify that the proponent is not required to comply with them unless or until it elects to commence development. However, our client does not object to minor amendments that would make this abundantly clear. However, as would be abundantly clear to the Commission at this point, our client objects to the mechanism suggested by Ashton and proposes instead a "plain English" approach, by the insertion of text into the relevant conditions that states words to the effect of, "This condition applies immediately upon the commencement of any development under the approval."

Paragraph 74 of the written submissions identifies one condition and a list of commitments for which Ashton seeks to amend the timing for compliance. Again, our client consents to amendments to the conditions of approval and statements identified. In terms of the timing for compliance, our client is in agreement with the department that the timeframe should be 12 months rather than the extended period sought by Ashton. Our client is also of the view that the time for compliance should be by reference to the commencement of development and not the commencement of mining operations, as the need for action is triggered by development, not merely mining operations.

To conclude, contrary to the proponent's description of the modification application, this application is neither minor nor administrative. It seeks, among other things, to make substantive and significant changes to the acquisition rights of certain land-owners on the basis that the current conditions of approval are purportedly unlawful. The amendments sought, other than those I have identified that our client consents to, are not necessary, appropriate, nor within the Minister or the Commission's powers.

To summarise, the Hunter Environment Lobby, like the department, opposes the proposed commencement condition. That condition at best muddies the waters and

at worst raises the risk of an indefinite approval. Contrary to the department's position, our client's position is that the terms of the approval are abundantly clear, that the land-owners identified in table 1 of schedule 3 do have land acquisition rights. And our client opposes any modification that would alter these rights. It is the clear intention of the New South Wales Land and Environment Court that acquisition rights could be exercised upon approval of the project, and with respect, Ashton has not made out its argument that such conditions are unlawful.

Finally, our client consents to certain amendments that, whilst not strictly necessary, would clarify compliance is not required until development is pursued, and consents to certain amendments to timeframes for compliance but requests shorter timeframes and a reference to development rather than mining. Our client thanks the Commission for holding the hearing and for giving us the time to make these presentations.

MR COUTTS: Thanks, Emily. So Scott Franks on behalf of the Wanaruah people.

MR S. FRANKS: Good morning, and thank you. Look, I'd like to thank everyone for acknowledging Wanaruah country ..... my people's country. I'm a descendant of the Wanaruah people, and I'm also the registered native title claimant for the Plains Clans of the Wanaruah people. So I obviously do pay respect to my old people that are not here today, and I obviously thank you on their behalf for standing up for our country.

I'd also like to acknowledge that this native title claim also ..... the New South Wales State Native Titles Act, which has been quite confused by Ashton Coal and a lot of mines. I think a lot of people try to believe that the Mabo case had ramifications on private land and people's livelihood. It didn't. The Mabo case demonstrated one thing: that Eddie lodged a claim to protect his own land and his six clans of those islands. What people in New South Wales do not understand is that we have a New South Wales Native Titles Act, which underpins the Federal Native Titles Act; it's a mirror image of the legislation that's here to protect me, my people, other mobs such as Wiradjuri, Darkinjung, Gamilaraay and whoever else is impacted by development on Crown land, not privately owned land. Although we have not ceded our country, we certainly use the European legal system to protect it, or try.

So in saying that, I'd like to say (foreign language spoken), which is "welcome to our homelands" in our language. And I'd like to start by saying welcome, Committee, again to deal with the Ashton Coal Mining Company and Yancoal. Committee, I'd like to confirm that the registered native title ..... the Plains Clans of the Wanaruah people do not support this project being approved. For several years, I as registered native title claimant have refused to work with Ashton Operations. I have raised several concerns regarding the way in which the operations ignores and fails to apply the full assessment process under the current Consultation Guidelines for Proponents 2010. This blame, however, ultimately cannot lay on the shoulders of these mining companies and operations, nor property owners and local councils in our claimed

area, some nine and a half thousand square kilometres. Unfortunately, it contains some of the most significant coal assets in the country.

As at your last PAC hearing – an objection I personally raised raised a position for a question to be asked by the Office of Heritage and Environment. I reviewed that after your decision, and I found it grossly misleading, to the point of corruption by a State Government body. I raised regarding the heritage assessment that was conducted on this operation and other operations that face the Planning Assessment Commission. It revealed a significant problem with the approval for the consent to destroy that would ultimately be approved and allow for the issue of an heritage impact or an Aboriginal heritage impact permit, a section 90, which is a consent to destroy, to destroy Aboriginal objects and places of significance.

The advice – or the department's response to the question raised by the Committee misled the PAC in its ability to properly assess this project. The issue that is constantly raised by every mine in this area is who has the right to make a decision on Aboriginal heritage? The advice was tested a few years ago in the Land and Environmental Court New South Wales. The court agreed that although a proponent's consultant had consulted with all registered Aboriginal parties, in fact did not consult or consider the position of identifying the traditional knowledge-holders. The result of the court action was to refuse the mining lease for that operations. That operations was the Calga Sand Quarry, and the case was Darkinjung v Calga Sand Quarry, which I think the EDO actually defended, with a few other legal firms.

If the PAC had proper advice and assessed aboriginal heritage assessments that has been conducted by this operation to seek approval, the PAC would see that this mining company has not bothered to identify the right people to speak about the heritage where the mine plans to build its operations. Instead, the mining company has in fact consulted with people that registered an interest based on a notice placed in a local paper, none of which have been confirmed of even being aboriginal. The heritage assessment fails to meet the current regulations in section 90K of the National Parks and Wildlife Act. The mine has only engaged an archaeologist who is trained in the identification of artefacts. This person does not have the required training or skills to assess who is the traditional knowledge holder for this area.

The lack of qualifications of that person puts at risk the real mandatory outcome that has to be applied to seek an ACHMP, an Aboriginal Cultural Heritage Management Plan for a consent to ..... That would underpin the approval of the – that the operation is seeking. The Planning Assessment Commission should consider the ruling of the Darkinjung v Calga Sand Quarry, ruling that the PAC – PAC should seek – sorry, that PAC should also seek independent advice outside of the advice that has been given to it by the Office of Heritage and Environment, now EPA in Newcastle. Based on the ruling OEH are encumbered and are not able to give advice on their own advice to this operation fails to allow for the followment of the compliance under the National Parks & Wildlife Act.

After the Planning Assessment Commission made its last decision and I reviewed it and I seen the response of OEH, I was absolutely gobsmacked of their response which was clearly misleading. The response that was sent through to PAC at that time was that the consultation was fine, everyone was happy, basically we consulted with everyone. I cut and pasted the question that the PAC asked and re-sent to OEH and got a response from a Peter Sard, archaeologist, planning, Hunter Region. Now, this is what should – I should have read in the report but you guys never got it, you were misled. Mr Sard, the regional archaeologist for planning for Hunter Central Coast Region, Newcastle office, who was dealing with this sent me back:

> *Hi Scott. On page 5 of the OEH guide to investigating and assessing and reporting on Aboriginal Cultural Heritage New South Wales cotans the reference that you refer to. The document is available at – go to page 5.*

At the top of page 5 this is what should have been sent back:

> *..... to investigate and assess aboriginal cultural heritage. The investigation assessment of aboriginal cultural heritage should make use of all relevant disciplines. The assessment of cultural significance is more than a component of an archaeologist assessment or investigation. It cannot be assumed that any one practitioner will have the full range of skills required to investigate and assess cultural significance and harm. During this task it may be necessary to engage additional practitioners with special expertise, ie, an anthropologist, an ecologist and so on, not an archaeologist. They are not skilled. They aren't an archaeological firm. We do not have the capability to assess the impacts of aboriginal culture on aboriginal land. We're not considering the use of the material that the song lines, the story lines and so on.*

It also says review of background information:

> *The purpose of carrying out background assessments is to compile, analyse and synthesise previous information and relevant contextual information to gain an internal understanding of the cultural landscape. This is primarily a desktop exercise with provisions for field visits. Gaining an initial understanding of the cultural landscape requires information such as the physical setting of landscape, history of the people living on that land, material evidence of aboriginal land use. Decisions on whether or not a proposed activity is likely to cause harm should not be based on a single source of information; only a multifaceted approach will ensure understanding of the cultural landscape. For more information on cultural landscape refer to OEH fact sheet.*

which is basically what should I do if I don't know what I'm doing. Physical setting of a landscape description:

> *The lands' characteristics greatly influence how aboriginal people interact with it, therefore, describing the landscape, the physical setting of the land, is to be assessed and its resources is essential to understanding the nature of the*

cultural landscape. The aim of the description is to provide a clear assertation between the types of occupation evidence and the landscapes that are found in it. The landscape context should also help identify a range of resources available to aboriginal people living there. So when compiling the description the landscape and land form unit used for the study at different levels of landscapes – landscape unit, landscape form, topographical units – must be described and mapped. The landscape feature places a mutual resource of interest to aboriginal people from that area. For example, water courses, food resources and other inorganic resources, eg, stone and ochre must also be identified and mapped. The physical setting review or landscape description must adhere to OEHs code of practices for archaeological investigation of the aboriginal objects in New South Wales available at website.

That's the response the PAC should have got but you didn't. What the PAC didn't – also didn't get was a clear definition of section 3.11 which underpins the rights or the consultation process. 3.11 clearly identifies traditional knowledge holders are the primary source of information of interpreting their country. It then identifies who and who only is the traditional owners, that is, either a registered native title holder such as Eddie Mabo, in his country. The second stage is a registered native title claimant, Scott Franks, in my country, along with Robert Lester. It does not allow a notice in a paper to then presume that any person without even confirmation of aboriginality or dependency from Wanaruah has the right to interpret our country.

The policy further goes on to say under 3.11 that it is with those people of traditional knowledge give consent for those people to speak on their country. I have made it clear in every meeting ..... an assessment ..... Planning Assessment Commission that the registered native title claimants, Scott Franks and Robert Lester, do not, will not and have never authorised another Aboriginal person to make a decision on our heritage ..... interpret it. They simply don't have the capability. They're not from here. 80 per cent of the registered Aboriginal parties for the Ashton coal mining operation are compiled of Gumaroy, Wiradjuri, Darkinjung ..... people. They're not Wanaruah.

Since the native title was lodged in 2015 we have had very little, if no, involvement with Ashton Coal because they simply don't comply with the regulations for the National Parks and Wildlife Act to obtain the permits that they're floating through. OEH Newcastle's regional manager has told me personally that they are underskilled and unmanned to assess these assessments because of the influx of mining operations in our claimed area. We have 38 mining operations. We have nine and a half square kilometres of land in our claimed area. We have 1.85 per cent of land left intact that represents our camp sites, our berthing sites, our fishing spots, our initiation ..... 78 per cent of our song line through initiation ..... boys became men are destroyed. Excuse me.

And you all – everyone sits here and obviously points the finger at the people at Camberwell. I'm from here. I come from Mount Olive. I'm a farmer's son, but first and foremost I'm a descendant of King Billy – excuse me – a man who was made to

wear a brass plate and stand in front of a post office so people could photograph and pay a few shillings for. In 1836 the mounted police along with a garrison came from Newcastle and actually turned up at the Lethbridge Estate which is across the road from Mrs Bowman's property today. One of our people, commonly known here as Bitter Bread because he was always running around scrounging for a feed because all the animals that he was used to hunting are gone, asked the property owner for a feed, and instead of getting a feed he was flogged. So as a result of that he speared that property manager.

The end result within 48 hours was the mounted police and the garrison turning up in the Hunter Valley with the local magistrate, and from the Ovralties' property at Denman through to Camberwell to the Mount Royal Ranges absolutely slaughtered our people. Slaughtered them. They were ordered to leave their bodies laying in the paddock to send a sign of fear to any other insurgents that wanted to pick up and fight. Now, when you look at the Ashton Aboriginal heritage assessment for this particular mine, there's not even one copy of a federal or a Commonwealth garrison dispatch from 1837, some 2000 of them describing and mapping the absolute slaughter of our people, our men, our women and our children.

Why isn't it there? I will tell you why it's not there: because under the National Parks and Wildlife Act there is two things in this country that cannot be impacted on. One is a Boracite, and that Boracite is at Bulga; the other one is a massacre site. That massacre site is at Camberwell. It's the grounds of our death and it needs protecting. The pact cannot depend on and rely on the advice given by OEH. The pact must, like dealing with any Aboriginal issues under the Bower Charter or the United Nations declaration for dealing with Indigenous people, must engage an Aboriginal person to assess the information provided dealing with Aboriginal heritage. I cannot see the Planning Assessment Commission being able to understand, interpret or assess the Aboriginal cultural traditional native positions that we've put unless you engage and Aboriginal person that understands what happened to us, the Wanaruah People. Thank you.

MR .....: Good response.

MR COUTTS: Thanks, Scott. Thank you for everyone. That's the end of our meeting today and I do appreciate those that attended and particularly those that made presentations. So thank you very much for your attendance.

RECORDING CONCLUDED **[11.49 am]**