Jan Davis (4)

Ashton SEOC Mod 1 HEL submission

Thank you for the opportunity to present to you at this public meeting.

I have registered as an individual because Hunter Environmental Lobby (HEL) is being represented today by our legal representatives, the Environmental Defenders Office.

I am president of HEL because I have a strong interest in sustainable development and protecting the future of all our grandchildren. I would 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 twenty years on the issues of environmental degradation, species and habitat loss, and climate change.

HEL has particular interest in biodiversity and water management issues in the Hunter Region and has held positions on the Hunter River Management Committee, the Hunter and Paterson Environmental Water Advisory Group and the Upper Hunter Air Quality Monitoring Network Advisory Committee.

Open cut coal extraction is one of the worst offenders when it comes to the loss and destruction of habitat and water quality and quantity. In the Hunter we have 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 coal 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 checkered history of rejection and approval, merit appeal and Supreme Court appeal.

We have demonstrated that there is a strong public interest in the decision-making around this coal mine 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 considerable cost because we did not believe the project had merit.

The outcome of rigorous legal debate in this court and the NSW 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 we 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 letters.

The first is a letter to DPE from Yancoal legal representatives dated the 9 December 2015. This was less than 2 weeks after the decision was handed down by the Court of Appeal on 20 November that rejected the Yancoal appeal of the Land and 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 Court of Appeal.

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 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 January 8 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 Environment 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 NSW. We believe it would be highly inappropriate for the Commission to make a contrary decision.

We note that 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 later in this meeting.

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% 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 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 ten years or so, objected to coal developments or expanding of modifications or mining timeframes on the grounds of increasing Green House Gas Emissions (GHGE) into the atmosphere both here in Australia in the case of fugitive emissions or overseas where the coal is burnt to achieve power generation.

Any increase in Australia's GHGE 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% of the world's leading scientists agree that man made climate change threatens not only human habitation and security, but the habitat of all living things, we must stop and examine our decisions.

You commissioners are charged with a heavy responsibility, we urge you to use it wisely.

Sincerely,

Jan Davis

Planning & Environment

16/01013

Mr Simon Ball
Partner
Minter Ellison
[redacted]
Sydney NSW 2001

Dear Mr Ball

Thank you for your letter dated 9 December 2015 on behalf of Ashton Coal Operations Pty Ltd regarding approval MP 08_0812 for the South East Open Cut Project.

You have raised concerns with the conditions of MP 08_0812 which impose timelines or require compliance at a time not linked to the physical commencement of the project and propose an administrative amendment to those conditions.

The Department acknowledges your concerns, and will consider any modification application submitted as a priority.

Please contact Mr Howard Reed, Director, Resource Assessments, at the Department on [redacted] to discuss lodgement of a modification application.

Yours sincerely

Marcus Ray
Deputy Secretary
Planning Services
08/01/2016

MinterEllison

9 December 2015

Mr Marcus Ray
Deputy Secretary - Planning Services
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Dear Marcus

Ashton Coal Operations: South East Open Cut Project

We act for Ashton Coal Operations Pty Ltd in respect of their South East Open Cut Project which was granted Major Project Approval by the Land and Environment Court on 17 April 2015 (MP 08_0812) (**Ashton SEOC Approval**).

We note that there are various approval conditions in this document that impose timelines or require immediate compliance prior to the lapsing period specified in section 95 of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**).

We are concerned that these conditions could be interpreted such that they must be complied with prior to the proponent of the project taking up the approval by way of physically commencing it in accordance with the EPA Act.

As an example of such a condition, we point you to condition 1 in Schedule 3 which requires that 12 separate properties attain the right to request immediate acquisition by the proponent. Clearly this has the potential to impose a significant financial burden on a proponent of a project prior to deciding to actually carry out the development the subject of the approval.

Our view is that such an interpretation of the approval is unlawful for the reasons outlined below:

1. Case law clearly indicates that a proponent "takes up" a development consent/planning approval and it does not commence automatically.
2. The flow on from such a position is that clearly until a planning approval is taken up, none of the burdens of the approval should apply.
3. Case law confirms this view, in particular the following decisions:
   (a) *Heavens Door Pty Ltd* [2004] HCA 59 which provides that a person cannot be in breach of the EPA Act unless they are carrying out development; and
   (b) *Rao v Canterbury City Council* [2000] NSW CCA 471 para 75 which states '...*since the applicant for developments is not obliged to undertake the development once consent is granted, there is no absolute obligation to comply with the conditions of the consent.*'.
4. Numerous undesirable results would attach if the alternate view was taken.

Each of these is addressed in more detail below.

1. A proponent "takes up" an approval

Pilkington v Secretary of State for the Environment and others [1974] 1 ALL ER on page 286, stated '*that permission was not implemented...*' and on page 287, '*for this purpose I think one looks to see what is the development authorised in the permission which has been implemented*'.

A similar terminology can be found in *Prosser v Minister of Housing and Local Governments* (1968) 67 LGR 109 at 113, '*The planning history of this site, as it were, seems to me to begin afresh... with the grant of this permission.... which was taken up and used...*' and similarly in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment and others* [1984] 2 ALL ER 358 where it states '*In this respect planning permission reveals its true nature, a permission that certain rights of ownership may be exercised but not a requirement they must be.*'.

Clearly the above demonstrates that the EPA Act is a planning scheme based on the concept that a planning approval can be granted but is not "taken up" or "implemented" until the person who has the right to act on it chooses to do so.

2 & 3 No requirement to comply with conditions of an approval until it is commenced

Non-compliance with a condition of a planning approval is a criminal breach of the law and carries with it significant sanctions which can run into the millions of dollars. See sections 125 to 127A of the EPA Act.

Given this it is vital that a proponent of a development knows exactly where it stands in terms of a requirement to comply with the conditions of the approval. Two cases have considered this position. The first is *Rao v Canterbury City Council*. This case involved a criminal prosecution for non compliance with the provisions of the EPA Act. This case clearly outlined that until a planning approval is "taken up", there are no obligations to comply with the conditions. The relevant passage follows:

> *"75 Obviously the directions and prohibitions in a case such as the present one are not absolute and unqualified. Since the applicant for development consent is not obliged to undertake the development once consent is granted, there is no absolute obligation to comply with the conditions of the consent. But in my view, once the development commences, the obligation to comply with the conditions becomes unqualified. That being so, the conditions are properly described as directions and prohibitions for the purposes of s 125(1)."*

A similar position was taken in *Hill Palm Pty Ltd v Heavens Door Pty Ltd* which was quoted in and accepted as being correct law in *King, Markwick, Taylor, and others v Bathurst Regional Council* [2006] NSW LEC 505 at paragraph 11:

> *"110 This claim was based upon the effect of the decision of the High Court in Hillpalm Pty Ltd v Heaven's Door Pty Ltd [2004] HCA 59; (2004) 220 CLR 472 to the effect that a person cannot be in breach of the EPA Act unless they are carrying out development."*

4. Undesirable outcomes

The following are a number of undesirable outcomes that would result if an alternative view was taken to that expressed above.

Firstly, it is an accepted principle of planning law that a land holder is entitled to make any number of applications for planning approvals (see *Pilkington v Secretary of State* at page 286). It is then up to the owner of the land to decide which development it proposes to proceed with. It would provide a perverse outcome if a proponent had that ability to do so but for each approval a condition could be imposed requiring the party to do something that had a significant economic cost and it would be a breach to not do that thing even where that planning approval was not proposed to be implemented and would not be selected.

Secondly, there is no ability for a proponent to negotiate the conditions of an approval. Accordingly, there needs to be an ability for a proponent to assess an application and determine whether it is economic or not and walk away from it if it isn't. Clearly this wouldn't be the case if an approval could be granted with a condition requiring compliance even if the approval had not been implemented or taken up. Again, this is an illogical result that can't have been the intended purpose of the legislature.

Thirdly, it is provided for in the EPA Regulations that certain developments do not need land owner consent (see clause 49 and clause 8J of the former EPA Regulation). Accordingly, if a condition could be imposed that applied to the land holder, and noting that a planning approval runs with the land, it could lead to a situation where a land holder has not provided consent but could be required to comply with a condition of an approval. Again another undesirable result.

Fourthly, a breach of a planning approval is a criminal offence, see sections 125 to 127A. A condition can be imposed requiring immediate compliance that a landholder has no ability to meet. He would immediately be in breach and subject to criminal sanction through no fault of his own. If an approval had to be "taken up" that would lead to a logical outcome as a person would only take up a consent with which he knows he can comply. However, if it is compelled upon him it leads to an unjust outcome that would breach numerous fundamental tenets of criminal law. Again, the alternate position would lead to an outcome which cannot have been the intended purpose of the legislature.

From the above it is clear that:

1. a condition cannot require the carrying out of development prior to the commencement of the approval;

2. a condition can require administrative action be taken prior to it being commenced, as a precondition. However, such conditions must be imposed such that they are only breached if a person chooses to commence the approval, and not as a matter of course upon the granting of consent or if an arbitrary date passes.

The Ashton SEOC Approval includes two types of conditions that fall foul of the above. The first requires immediate compliance or the carrying out of development regardless of whether the development is commenced. These are adequately addressed above. The second requires compliance by a certain date. The same issue applies in respect of these and the date should be set such that the requirement has to be met by a certain period prior to carrying out development under the approval, and not an arbitrary date.

We note that the above is based on case law that clearly can be overturned by express statutory provisions. We can find nothing in the EPA Act that does this.

Given the significant financial implications and potential for criminal prosecution in respect of the above, we urgently request that you indicate in writing whether or not you concur with the above views.

If you do agree with the above we would like to discuss with you an administrative amendment to the Ashton SEOC Approval granted by the NSW Land & Environment Court to make the above clearer in the consent. We would propose the following:

(1) The inclusion of the following condition:

> *8. The Applicant shall:*
>
> *(a) notify the Secretary in writing of the date of commencement of development under this consent; and*
> *(b) may only commence development under this consent once the Secretary has agreed in writing that all prerequisites to the commencement of development under this consent have been met.*
>
> *Note:*
>
> *The prerequisites under the consent include the approval of management plans etc that are required to be approved prior to the commencement of construction. Any conditions requiring the Proponent to acquire any property do not operate until the notice under this condition has been issued to the Secretary.*

We note that the above proposed condition is based on the conditions proposed by the Department and imposed by the Planning Assessment Commission in the Warkworth Continuation Project. This seems to indicate the Department has a similar view on the issues discussed above.

(2) The amending of any conditions specifying a date so as to remove the date and specifying these as pre-requisites that must be commenced prior to commencing the consent. Annexure A provides a list of the relevant conditions that require addressing.

We look forward to receiving your confirmation of this position. Please give me a call if you wish to discuss.

Yours faithfully
MinterEllison

Simon Ball
Partner

Contact: Simon Ball T:

APPENDIX A

Conditions with a specific deadline

Appendix	Condition	Requirement
3	O8	Vegetation corridor: Enhance and manage a corridor of vegetation approximately 100 metres wide (I.e. ~20m both sides of creek) along the length of Glennles Creek adjacent to the SEOC Project area, equating to an area of approxlmately 35 ha.
3	Q2	Management of offset areas: The management of offset areas will Include: ▪ Fencing to exclude cattle as required to remove grazing pressure. ▪ Control of feral animals where practical. ▪ Weed management program to reduce competition and encourage growth of native species in the understorey. ▪ Fallen timber and branches within the disturbance area will be relocated to the offset areas to provide additional nesting and foraging habitat, or beneficially used within the Ashton Project area. ▪ As a priority species to be used in any revegetation will include locally occurring species such as Narrow-leaved Ironbark (*Eucalyptus crebra*), Grey Box (*E. moluccana*), Forest Red Gum (*E.tereticornis*), Grey Gum (*E. punctala*), Gorse Bitter Pea (*Daviesia ulicifolia*), Western Golden Wattle (*Acacia decora*), Fan Wattle (*A. amblygona*) and Silver-stemmed Wattle (*Acacia parvlplnnuta*). ▪ Fallen hollow logs and branches will be retained and relocated for habitat. ▪ Searches for Speckled Warbler nests to determine habitat range of this population and to establish an appropriate monitoring strategy to ensure its long term viability in the area. ▪ Baseline assessment of the community and habitat values of the offset area. ▪ Identification of environmental weeds to be targeted in the weed management plan. ▪ An ongoing monitoring program. Within 3 years of Project Approval.
3	Z1	Prepare a Camberwell Village Enhancement Plan: • Prepare a Camberwell village Enhancement Plan in consultation with the residents of the village, Singleton Council and the DP&I, including a description of how the plan will be implemented and funded. Within 5 years of Project Approval

Other pre-conditions to undertaking activities on site

Schedule	Condition	Requirement
2	12	The proponent shall reconstruct the 132kV and 66kV transmission lines within the alignment shown on the relevant plan in Appendix 2 to the satisfaction of the Secretary

Schedule	Condition	Requirement
3	1	Upon receiving a written request for acquisition from an owner of the land listed in Table 1, the Proponent shall acquire the land in accordance with the procedures in conditions 7-8 of Schedule 4.
3	2A(a)	In the alternative to the owners of Property 130 and 182 (being a property listed in Table 1) making a request to the Proponent to acquire Property 130 and 182 in accordance with Condition 1 in Schedule 3 the owners of Property 130 and 182 may make a request in writing to the Proponent to: (i) require the Proponent to compensation the owners for the loss of the existing dairy businesses' net profits associated with the conversion of the owners' existing dairy farming operation to a beef cattle farming operation for the duration of coal production under this Project Approval; or (ii) in the alternative to (a)(i) above, and to enable the existing dairy business to continue during mining operations, require the Proponent to provide alternative residential accommodation for the diary manager as well as an agreed salary incentive for the dairy manager to move (should the dairy manager choose to do so) to the alternative residential accommodation, or at the owners' election an agreed salary incentive sufficient to allow the owners to employ a new dairy manager on the open market.
3	2A(b)	Upon receiving a request for the owners of Property 130 and 182 in accordance with this condition, the Proponent shall make an offer to the owners of Property 130 and 182 to enter an agreement with the Proponent in relation to the payment and amount of compensation or the provision of alternative accommodation and salary incentive referred to in (a). Any such agreement shall also address the interaction between the mining operations (including impacts of blasting) and the continued occupation and use of property 130 and 182.
3	3	Upon receiving a written request from the owner of any residence on the land listed in Tale 1 or Table 2, the Proponent shall implement additional reasonable and feasible noise and/or dust mitigation measures (such as double glazing, insulation, air filters, first-flush roof water drainage system and/or air conditioning) at the residence in consultation with the owner.
3	14	If the Proponent receives a written request for a property inspection, or to have a previous property inspection updated, from the owner of any privately-owned land within 2 kilometres of any approved blasting operations, the Proponent shall: (a) within 2 months of receiving this request commission a suitably qualified, experienced and independent person, whose appointment is acceptable to both parties to: (i) establish the baseline condition of any buildings and other structures on the (and, or update the previous properly inspection report; and (ii) identify measures that should be implemented to minimise the potential blasting impacts of the project on these buildings or structures; and (b) give the landowner a copy of the new or updated property inspection report.
3	39	The Proponent shall implement the Biodiversity Offset Strategy as outlined in Table 15 and as described in the EA (and shown conceptually in Appendix 5), to

Schedule	Condition	Requirement
		the satisfaction of the Secretary.
3	53(c)	The Proponent shall construct the conveyor bridge over the New England Highway to the satisfaction of the RMS.
3	57	The Proponent shall; (a) ensure that the Ashton mine complex is suitably equipped to respond to any fires on site; and (b) assist the Rural Fire Service and emergency services as much as possible if there is a fire in the vicinity of the site.
3	61	The Proponent shall ensure that the agricultural productivity and production of non-operational project-related land is maintained or enhanced.

Appendix	Condition	Requirement
3	C1	In addition to property acquisition requirements within the Project Approval where requested by any affected property owner within Camberwell village, Ashton will enter Into purchase negotiations in accordance with the properly acquisition conditions of the Project Approval.
3	D2	Measures to minimise dust impacts on residents of Ashton owned properties: ▪ make air quality monitoring data available to tenants –where requested by the Tenant.

Ashton Coal Mine – South East Open Cut MOD 1 (MP 08_0182) – D519/18

IPCN Public Meeting

Civic Centre, 12 Queen Street Singleton NSW 2330

9 August 2018 at 10am

APPENDIX TO THE WRITTEN SUBMISSIONS FOR THE HUNTER ENVIRONMENT LOBBY INC

SUMMARY OF PROPOSED AMENDMENTS AND HEL'S RESPONSE

Sch / App[x]	Cond[n]	Summary of current condition	Ashton proposed amendment	DPE proposed amendment[1]	HEL position
Sch 2	-	New commencement condition	As per modification application with proposed amendments in letter from Minter Ellison to Mr Ray dated 10 May 2018	DPE is of the view that the new commencement condition unnecessary because, as Ashton has submitted, 'case law on this matter is clear' such that 'Ashton is not required to comply with any conditions of its SEOC approval until the project has commenced'. Further 'Ashton's proposed modification confuses rather than clarifies both the issue of commencement and acquisition rights for the SEOC project'.	This condition should not be inserted in any form. It is confusing, overly complex, and unnecessary. It also specifically adds an unnecessary additional requirement for the Secretary to form a view as to whether the 'prerequisites' have been satisfied when this is an objective question that is for the proponent to determine. Further, the mechanism lacks transparency. Agree with DPE in that the proposed condition confuses rather than clarifies the issues of commencement and acquisition rights. (Disagree with DPE that acquisition rights only 'crystalise' after Ashton has provided notification to landowners under Condition 1 of Schedule 4.)
Sch 2	12	The requirement to re-	Insert new text: 'This condition only	Transmissions lines to be re-	Agree with DPE.

[1] The DPE has included other minor modifications such as replacement of all uses of the word 'shall' with the word 'must'. Unless otherwise stated, HEL agrees with the DPE.

Sch / App[x]	Cond[n]	Summary of current condition	Ashton proposed amendment	DPE proposed amendment[1]	HEL position
		construct 132 KV and 66 kV transmission lines	has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	constructed prior to commencing construction of the project within the existing 123kV and 66 kV alignment	
Sch 3	1	The requirement to acquire land upon receipt of a written request from an owner of the land listed in Table 1 of that conditions	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	Remove the reference to 'conditions 7 and 8 of schedule 4' and refer simply to the procedures in schedule 4.[2] Insert additional text: 'A written request for acquisition under this condition (other than in respect of Property 129) can only be made after the requirements of condition 10A of Schedule 2 have been satisfied.'	Disagree with Ashton and DPE. This condition should not be amended. Land owners listed in Table 1 of Schedule 3 are, and should remain, currently entitled to require Ashton to acquire their properties. There is no basis for tying this right to the acquisition of Property 129.
Sch 3	2	The right of landowners to find alternative accommodation 'at any stage during the mining operations' and to request the Proponent to pay the reasonable costs associated with that.	*No modification request*	Insert additional note: 'Note: This condition should be read as being subject to the notification procedures in condition 1 of Schedule 4.'	Disagree with DPE. 1. Ashton has not sought to amend this condition. 2. The rights under condition 2 exist independently of Ashton satisfying its obligation to notify landowners.
Sch 3	2A(a), (b)	The right of the owners of Property 130 and 182 to require Ashton to provide compensation in relation to impacted farming operations as an alternative to requiring acquisition, or to enable alternative accommodation arrangements that would permit farming	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	Insert note at the end of 2A: 'Note: This condition should be read as being subject to the notification procedures in condition 1 of Schedule 4.'	Disagree with Ashton and DPE. This condition should not be amended. The rights under condition 2A exist independently of Ashton satisfying its obligation to notify landowners.

[2] Note: This is the recommendation at p 9 of the Assessment Report. The DPE proposed conditions retains a reference to condition s 8-9 of Schedule 4.

Sch / App[x]	Cond[n]	Summary of current condition	Ashton proposed amendment	DPE proposed amendment[1]	HEL position
		operations to continue			
Sch 3	3	The requirement, upon receipt of written request to implement additional feasible noise and/or dust mitigation measures at residences listed in Table 1 or Table 2 of Sch 3	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	No amendment.	Consent to inserting additional text to the effect of: 'This condition applies immediately upon the commencement of any development under the Approval'.
Sch 3	14	The requirement for Ashton to arrange, on request, a property inspection of land privately owned that is within 2 km any approved blasting operations	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	Insert note at the end of 2A: 'Note: This condition should be read as being subject to the notification procedures in condition 1 of Schedule 4.'	Disagree with DPE. Landowners rights exist independently of Ashton satisfying its obligation to notify landowners. HEL proposed alternative: insert additional text to the effect of:'This condition applies immediately upon the commencement of any development under the Approval'.
Sch 3	39	The requirement to implement the Biodiversity Offset Strategy outlined in Table 15 and described in the EA	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	Insert additional text: 'Within 12 months of commencing mining operations…'	Should be tied to development rather than mining operations because land clearing and the need to offset may be caused by development activities other than mining operations.
Sch 3	53(c)	The requirement to 'construct the conveyor bridge over the New England Highway to the satisfaction of the RMS'	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	Amend condition 53(c) to require construction 'prior to the commencement of mining operations (excluding overburden removal required for construction of the environmental bund and site infrastructure'.	HEL consents to DPE proposal.
Sch 3	57	The requirement to ensure that 'the Ashton mine complex is suitably equipped to respond to any fires on site' and 'assist the Rural Fire Service as	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	No amendment; the condition only applies after the project has commenced.	Agree with DPE. Alternatively, consent to inserting additional text to the effect of: 'This condition applies immediately upon the commencement of any development under the Approval'.

Sch / App[x]	Cond[n]	Summary of current condition	Ashton proposed amendment	DPE proposed amendment[1]	HEL position
		much as possible if there is a fire in the vicinity of the site'			
Sch 3	61	The requirement to 'ensure that the agricultural productivity and production of non-operational project-related land is maintained or enhanced'	Insert new text: 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'	No amendment; the condition only applies after the project has commenced.	Agree with DPE. Alternatively, consent to inserting additional text to the effect of: 'This condition applies immediately upon the commencement of any development under the Approval'.
App[x] 3	C1	The commitment to enter into purchase negotiations with landowners of affected properties within Camberwell Village. Timing: Where requested by the landowner.	Amend timing to: 'Upon commencement of development of the Project'	Amend timing to: 'Upon commencement of development of the Project where requested by the landowner'	This commitment should not be amended. Land acquisition rights can be exercised at any time after the grant of the Approval.
App[x] 3	D2	The commitment to make air quality monitoring data available to Ashton tenanted residencies. Timing: Where requested by the tenant	Amend timing to: 'Upon commencement of development of the Project'	Amend timing to: 'Upon commencement of development of the Project where requested by the landowner'	Agree with DPE
App[x] 3	O8	The commitment to 'enhance and manage' a vegetation corridor. Timing: Within 3 years of Project Approval, subject to landownership authority.	Amend timing to: 'Within 3 years of commencing mining operations, subject to landownership authority'	Amending timing to: 'Within 12 months of commencing mining operations, subject to land ownership authority'	This condition should be tied to commencement of development, not to commencement of mining operations. Agree with 12 month period proposed by DPE.
App[x] 3	Q1	The commitment to prepare and implement	Amend timing to: Within 3 years of commencing mining operations,	Amending timing to: 'To be prepared prior to commencing	This condition should be tied to commencement of development, not to

Sch / App[x]	Cond[n]	Summary of current condition	Ashton proposed amendment	DPE proposed amendment[1]	HEL position
		an offset strategy. Timing: Within 3 years of Project Approval.	subject to landownership authority'	mining operations. To be implemented within 12 months of commencing mining operations, subject to land ownership authority'.	commencement of mining operations. Land clearing and the need to offset may be caused by activities under the Approval broader than mining operations. Agree with 12 month period proposed by DPE.
App[x] 3	Q2	The specific commitment applicable to the management of offset areas. Timing: Within 3 years of Project Approval	Amend timing to: Within 3 years of commencing mining operations, subject to landownership authority'	Amending timing to: 'To be prepared prior to commencing mining operations. To be implemented within 12 months of commencing mining operations, subject to land ownership authority'.	As above, this condition should be tied to the commencement of development, not mining operations. Agree with 12 month period proposed by DPE.
App[x] 3	Z1	The requirement to prepare a Camberwell Village Enhancement Plan Timing: Within 5 years of Project Approval.	Amend timing to: Within 3 years of commencing mining operations, subject to landownership authority'	Amending timing to: 'Within 12 months of commencing mining operations	This condition should be tied to commencement of development, not to commencement of mining operations. Agree with 12 month period proposed by DPE.

Ashton Coal Mine – South East Open Cut MOD 1 (MP 08_0182) – D519/18

IPCN Public Meeting

Civic Centre, 12 Queen Street Singleton NSW 2330

9 August 2018 at 10am

WRITTEN SUBMISSIONS FOR THE HUNTER ENVIRONMENT LOBBY INC

1. These submissions have been prepared by Robert White of Counsel and EDO NSW, solicitors acting for the Hunter Environment Lobby Inc (**HEL**). Both Robert White and EDO NSW acted for HEL in the merits appeal before the NSW Land and Environment Court, as subsequently appealed before the NSW Court of Appeal, in relation to Ashton's application for approval of the South East Open Cut Coal mine.
2. These submissions should be read in conjunction with the table at the Appendix to the submissions. The table summarises HEL's position in comparison to the position of Ashton and that of DPE.
3. HEL submits that the Independent Planning Commission (**IPC**) ought to refuse the modification application and uphold the conditions of the current approval, which was granted by the Land and Environment Court of NSW (**NSWLEC**) following a merits appeal in that Court brought by HEL. As the IPC can appreciate, the conditions imposed by the Court that Ashton now seeks to modify were the subject of extensive debate at that hearing. There would need to be very clear reasons shown in support of modifying those conditions.
4. Further, it is relevant for the IPC to note that Ashton challenged the validity of the Court-made approval and certain of the conditions by way of application to the NSW Court of Appeal. The Court of Appeal dismissed the appeal. At no point during that appeal were the legal arguments now raised by Ashton in this modification application put before the Court of Appeal.
5. Detailed submissions follow. A summary of HEL's position is set out in the concluding paragraphs of these submissions ([75]-[76]).

The modifications sought

6. A summary of the amendments sought by Ashton, DPE's proposals, and HEL's position in relation to each, is set out in the table at the **Appendix** to these submissions.
7. In short, Ashton seeks the following modifications:
    (a) to insert a new condition: 'Commencement of Development Under this Approval' (**Proposed Commencement Condition**).

(b) to insert additional text[1] in specific conditions in Schedules 2 and 3 of the Approval that purport to clarify from when the conditions apply; and

(c) to amend the timing requirements for certain commitments in its statement of commitments.

8. In its assessment report, DPE proposes some alternative amendments to those sought by the Proponent.

New Proposed Commencement Condition

9. Like the DPE, HEL opposes Ashton's proposed commencement condition. By its letter dated 10 May 2018, the Proponent has proposed an additional 'notation' to its Proposed Commencement condition. HEL does not accept that the proposed additional notation addresses the substantive objections set out below.

10. Currently, pursuant to Condition 5A of Schedule 2, the Approval will lapse 5 years after the date that approval is granted 'unless the project is commenced before that day'. This 5 year limit can be extended by up to two years by the Secretary on application by Ashton. In other words, Ashton must 'commence' the project within, at most, 7 years of the Approval date.

11. Pursuant to Condition 10A of Schedule 2, Ashton cannot conduct any development work on the Project site until it has acquired the requisite interest in Property 129. If Ashton has not acquired the requisite interest in Property 129 before the 5 year (or 5 years plus 2 years) lapsing date pursuant to s 5A, the Approval will lapse.

12. HEL submits that the Proposed Commencement Condition as set out in the Modification Application, when read together with Condition 10A, would mean that Ashton no longer needs to commence actual development works in order to be considered to have 'commenced' development for the purposes of Condition 5A.

13. This is because the Proposed Commencement Condition specifically excludes the requirement to acquire property 129 from the meaning of 'prerequisites to the commencement of development'. The result is that even if Ashton has not acquired the requisite interest in Property 129, and is therefore prohibited under Condition 10A from undertaking 'any development work', it could nevertheless notify the Secretary of the commencement date and the Secretary could agree that all prerequisites under the approval have been met.

14. Once this has occurred, the lapsing provision would no longer have any effect. The result would be that the approval could operate for an undefined period of time, and potentially in perpetuity. The Approval would operate in perpetuity if either:

(a) Ashton never acquires the requisite interest in Property 129; or

(b) Ashton acquires the requisite interest in Property 129 but decides never to act on, or 'take up', the Approval.

15. This approach to 'commencement' is foreign to standard planning law principles and is contrary to the terms of the EPA Act as it is currently drafted, and was at

[1] 'This condition only has effect following the issuing of the notice by the Proponent under condition [#] Commencement of Development Under this Approval'.

the time the Project was approved. Under s 4.53 of the EPA Act (previously s 95, referred to by the former Clause 11, Schedule 6A in respect of the meaning of physical commencement for Part 3A projects), physical commencement means actual development work. It is not an abstract concept determined by the proponent and agreed to by the Secretary. As noted, under Condition 10A Ashton is not permitted to undertake any development work until such time as it has secured the requisite property interest for Property 129. This was a key factor in gaining approval from the Court in the first place.

16. The proposed modification is contrary to the intention of the Approval as granted by the NSWLEC and upheld by the NSWCA.

17. The NSWCA confirmed that Condition 10A was inserted by the NSWLEC for the primary purpose of ensuring that no development work would be carried out until such time as Ashton has full control of the development, thereby ensuring that the project proceeded in its entirety.[2] The Court of Appeal found no error in the NSWLEC's conclusion that if development were to proceed without Ashton acquiring the requisite interest in property 129, the development conducted would not be the development that the Court had assessed and approved.

18. The IPC should not undermine the primary purpose of Condition 10A which was to ensure that no development work is carried out until such time as Ashton has full control of the development site.

19. The additional commencement condition should be rejected.

Amendments to conditions in Schedules 2 & 3

20. The primary basis stated by Ashton Coal (**Ashton/the Proponent**) for these amendments is as follows:[3]

> *There are various approval conditions in the Ashton SEOC Approval that impose timelines or require immediate compliance prior to the lapsing period specified in section 95 of the* Environmental Planning and Assessment Act 1979 (**EP&A Act**).[4]
>
> *These conditions could be interpreted such that they must be complied with prior to the proponent of the project taking up the approval by way of physically commencing it in accordance with the EP&A Act.*

21. Further, Ashton asserts that:[5]

> *There is significant doubt as to whether the existing conditions of the Project Approval (PA 08_0182) (which require compliance regardless of whether the consent is taken up) are lawful. The modification seeks to clarify and regularise this issue.*

22. HEL objects to the proposed amendments insofar as they seek to amend the acquisition rights of the owners of land identified in Table 1 of Schedule 3.

[2] *Ashton v HEL* [2015] NSWCA 358 at [31], see also [34].
[3] Letter from Minter Ellison to the Director of Resource Assessments, DPE, dated 5 April 2017.
[4] Our note: The lapsing period for the Project are set out in Condition 5A of Schedule 2 of the Approval.
[5] Ashton Response to Submissions, p 2.

23. Specifically, HEL objects to the insertion of additional text in Conditions 1, 2A(a)-(b) to the effect that these conditions are of no effect until or unless Ashton elects to commence development under the Approval.

24. HEL maintains that the owners of land identified in Table 1 of Schedule 3 currently do – and should – have the right to require the proponent to acquire their land. This was the clear intention of the NSWLEC in imposing the conditions.

25. As we set out below, HEL disagrees with Ashton that these conditions with this effect are unlawful. HEL disagrees that the case law relied upon by the Proponent supports its argument as to lawfulness. HEL rejects the proposition that there is any general principle of law that a development approval cannot contain conditions that require compliance even if development is not commenced.

The land acquisition rights are – and should remain – effective from the date of the Approval

26. The Proponent is of the view that, in their current form, the conditions of Approval may or do require it to acquire the land identified in Table 1 of Schedule 3 if a written request is issued by the relevant landowner.

27. But that is not a reason to modify the conditions.

28. HEL agrees that this is – and should be – the interpretation of the Approval. We are also instructed that this is the understanding held by the owners of properties 18, 23, 34 and 35 (listed in Table 1 of Schedule 3).

29. HEL disagrees with DPE's interpretation of the conditions that land acquisition rights are dependent upon the Proponent issuing written notice to the landowners of their rights. That was not the intention of the NSWLEC when issuing the consent subject to conditions.

30. Close attention to the actual words of the condition is required. To this end, we note that Condition 1 of Schedule 3 states that:

    > *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 7-8*[6] *of Schedule 4.*

31. The wording is plain that the requirement to acquire land is tied solely to the receipt, by the proponent, of a written request. This condition does not impose any limit on when a written request for acquisition may be made.

32. In a similar vein, Condition 8 of Schedule 4 states (in part) that:

    > *Within 3 months of receiving a written request from a landowner with acquisition rights, the Proponent shall make a binding written offer to the landowner based on …*

33. The condition goes on to detail the procedures that apply to valuation, acquisition and related matters.

[6] NB: This appears to be a typographical error and should refer to conditions 8-9 of Schedule 4.

34. The wording of this condition confirms that it is receipt by Ashton of a written request from the landowner that triggers the requirement to make an offer to purchase, and ultimately to purchase, the land. This condition is not qualified in any way to suggest that a written request will only be valid if issued after the proponent has commenced the development.

35. That this was the intent of the Court is confirmed by the terms of the consent and conditions, when viewed as a whole, including condition 10A. Condition 10A was inserted by the Court for the purpose of ensuring that no development work would be carried out until such time as Ashton had full control of the development site. The Court recognised that this might cause some uncertainty within the local community as to whether the development could ever be constructed. In order to create more certainty for those 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.

36. There was no requirement for Ashton to have commenced development to trigger the acquisition rights; as the Court recognised the commencement could be years away, if ever, and it is unfair to leave landowners in limbo during that period.

37. Notably, the wording of these conditions contrasts with the rights established under Condition 2 of Schedule 3. The wording of these conditions explicitly provides that landowners only have the right to require Ashton to pay their reasonable costs of relocating to and from, and renting, alternative accommodation 'during mining operations'.

38. Further, Condition 1 of Schedule 4 states (in part) that:

> *Prior to the carrying out of development, the Proponent shall:*
>
> *(a) notify in writing the owner(s) 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****;*
> - *any residence on the land listed in Table 1 and Table 2 of schedule 3 that they have the right to request the Proponent to pay for the provision of alternative accommodation* ***during mining operations*** *… ; …*

39. It would be completely unjust, and contrary to the purpose of the land acquisition conditions, if failure by Ashton to notify a landowner of their rights would be sufficient to deprive the landowner of those rights. The IPC should not accept DPE's interpretation of this clause which suggests that the act of notification is a pre-condition to a landowner exercising their right to acquisition.

40. In any event, the terms of this condition confirm the time from which land acquisition rights exist. Once again, the actual words used are important. They clearly state that the landowners have land acquisition rights *at any stage during the* project.

41. This is not the same as saying, for example, *'at any time after the development has commenced under the approval',* or *'at any time after construction has commenced'*. There is no warrant for reading those words into the condition.

The Proponent has not established that the land acquisition conditions are unlawful

42. Ashton argues that '[t]here is significant doubt as to whether the existing conditions of the Project Approval (PA 08_0182) (which require compliance regardless of whether the consent is taken up) are lawful'.[7]

43. In support of its position, Ashton makes three arguments. In relation to each, we say that Ashton has not made out its argument:

    (a) that a proponent 'takes up' an approval;

    (b) that there is no requirement to comply with conditions of an approval until it is commenced; and

    (c) a finding that the land acquisition conditions can be enforced prior to the approval being 'taken up' would result in 'undesirable outcomes'.

44. As discussed below, the IPC is not an appropriate forum in which to bring arguments as to lawfulness. In any case, Ashton has simply not made out its arguments. Each element of the argument is responded to below.

(i) Response to: A proponent 'takes up' an approval

45. Ashton argues that under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), 'a planning approval can be granted but is not 'taken up' or 'implemented' until the person who has the right to act on it chooses to do so.'[8]

46. In support of this proposition, Ashton relies on three cases.[9] The Proponent submits that these cases demonstrate that there is an accepted and fundamental principle in NSW planning law that a planning approval is 'taken up' by the holder and that, in turn, an approval cannot lawfully impose any obligations on an approval holder until such time as it is 'taken up'.

47. It is notable that:

    (a) none of the cases relied on were decided under NSW law (or the law of any Australian jurisdiction);

    (b) each of the cases is over 30 years old; and

    (c) the Proponent has not identified any instances in which the cases have been referred to by a NSW court.

48. Further, none of the cases raise issues that are similar to those raised by the Modification Application. The extracts that the Proponent has provided in its submissions are drawn out of context. With respect, none of the cases, read alone or together, support the Proponent's position that, under the EP&A Act

[7] Ashton Response to Submissions, p 2.

[8] Letter from Minter Ellison to Mr Ray, DPE, dated 9 December 2015, p 2.

[9] *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527; *Prosser v Minister of Housing and Local Government* (168) 67 LGR 109; and *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment and others* [1984] 2 ALL ER 358.

(or under any other planning law) a planning approval must be 'taken up', that it is only 'taken up' when the 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'.

49. In summary, the cases merely stand for the following (presently irrelevant) propositions:

   (a) it was possible at the relevant time, under the *Town and Planning Act 1971* (UK), for two different development approvals to exist simultaneously over the same land;[10]

   (b) if more than one development approval existed over the same land at the same time, and if one of these was executed such that its execution was inconsistent with the other development approval/s, the latter would become incapable of implementation;[11]

   (c) there was no general law concept of 'abandonment' of a planning approval at the relevant time, under the *Town and Planning Act 1971* (UK);[12]

   (d) general law cannot be relied on to interpret or develop principles in planning law if the statute already covers the field;[13] and

   (e) under the relevant law at the relevant time, a grantee of a planning permission may not be entitled to exercise land use rights that pre-existed a planning permission if those land use rights are prohibited by the planning permission.[14]

50. It is commonplace for development approvals to require compliance with particular conditions by an identified date. Such conditions are not conditioned upon whether the proponent has 'taken up' the approval or commenced operations. Indeed, the original approval for the Project, as granted by the former Planning Assessment Commission in 2012, included many conditions with specific timeframes that were not referrable to commencement of the project. No argument was raised before the NSWLEC that these conditions needed to be amended because the Proponent must have a right not to take up the project. Such amendments were only made as a matter of *merit*, and by consent of the parties, by reference to the new Condition 10A of Schedule 2.

(ii) Response to: There is no requirement to comply with conditions of an approval until it is commenced

51. Ashton further argues that 'until a planning approval is 'taken up', there are no obligations to comply with the conditions'.[15] The proponent relies on three

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[10] *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527.
[11] *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527.
[12] *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment and others* [1984] 2 ALL ER 358.
[13] *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527; *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment and others* [1984] 2 ALL ER 358.
[14] *Prosser v Minister of Housing and Local Government* (168) 67 LGR 109.
[15] Letter from Minter Ellison to Mr Ray, DPE, dated 9 December 2015, p 2. See also letter from Minter Ellison to Mr Ray, DPE, dated 8 April 2017, p 2.

cases that it says clearly support the proposition.[16] With respect, these cases do not support the Proponent's position.

52. *Rao v Canterbury City Council* [2000] NSWCCA 471 is an appeal from a decision of the NSW LEC in which the appellant was convicted of a criminal offence under the EP&A Act arising from their implementing a development consent contrary to the conditions of consent. Notably, development under that consent had commenced. This makes the decision immediately distinguishable from the point in issue in the Modification Application. The appeal was brought on a range of grounds. The extract relied on by Ashton is taken from the reasons of Austin J which considered the 'principal ground of appeal' which argued that the charges in the summonses failed to identify the essential factual ingredients of the offences.[17] In response, HEL notes the following:
    (a) Austin J's comments are specific to the case at hand;
    (b) development had already commenced and the conditions in issue did not purport to apply prior to commencement of development; and
    (c) accordingly, the Court was not required to, and did not, consider whether and in what circumstances a development approval given under the EP&A Act can include conditions that require compliance before development commences.

53. In relation to *King, Markwick, Taylor and others v Bathurst Regional Council* [2006] NSWLEC 505 at [110], the extract that has been relied upon by the Proponent, is of marginal relevance to the Modification Application. The Court in that case considered the question of whether conditions of a consent to subdivide become immediately unenforceable once the subdivision has been completed and the subdivided lots have been sold. This offers no support for the proposition that a development consent cannot contain conditions that require compliance prior to the commencement of development.

54. Finally, the proponent argues that *King v Bathurst* 'quoted and applied' the judgment in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472. This is incorrect. Rather, in *King v Bathurst* the Court rejected the proposition that *Hillpalm v Heavens Door* was authority for the proposition 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. …'[18]

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[16] *Rao v Canterbury City Council* [2000] NSWCCA 471; *King, Markwick, Taylor and others v Bathurst Regional Council* [2006] NSWLEC 505; and *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472.
[17] [71] per Austin J.
[18] [110]

(iii) Response to: Finding that the land acquisition conditions can be enforced prior to the approval being 'taken up' would result in 'undesirable outcomes'

55. First, the Proponent makes reference to the entitlement of a land holder 'to make any number of applications for planning approvals'. HEL takes no issue with this proposition. However:

    (a) A land holder does not have a *right* to a development approval, nor does the holder of a development approval have a *right* to a modification to that approval.

    (b) As discussed in *Pilkington*,[19] a landowner is entitled to *'test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposal'.*[20] Having done this however, the landowner must accept the responsibilities that attach to any consents obtained. It would be an absurdity 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. Further, if a landowner considers that the conditions of an approval mean that a proposed development is no longer a worthwhile exercise, the EP&A Act has provisions that clearly enable the consent holder to surrender the consent.[21]

    (c) The land acquisition condition in issue here will only crystallise if/when a relevant landowner issues the consent holder 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.

56. Second, the Proponent argues that if conditions of approval could require compliance prior to commencement, this would interfere with the approval holder's right to 'assess an application and determine whether it is economic or not and walk away from it if it isn't'. This is incorrect. As noted above, an approval holder is entitled to surrender a development consent if it is unsatisfied with the conditions imposed.

57. Fourth, the Proponent argues that it would be unjust if 'a condition can be imposed requiring immediate compliance that a landholder has no ability to meet' because that landholder would then 'be in breach and subject to criminal sanction through no fault of his own'. That might be correct as a matter of general principle, but is not the situation in this case.

58. Ashton is not 'immediately' required to comply with the land acquisition condition; it is only required to comply once it receives a written request from a relevant land owner. Further, compliance with the condition is squarely within Ashton's control. In relation to the other conditions of approval that Ashton say may or do require immediate compliance, as noted earlier, HEL disagrees that these require immediate compliance (but, as set out below, does not object to limited, plain English modifications that make this abundantly clear).

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[19] *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527.

[20] *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527at 1531 per Lord Widgery CJ.

[21] EP&A Act s 4.63.

The IPC lacks power to make a determination as to the lawfulness of the existing Approval conditions

59. It is plain from the submissions filed by the parties that there are competing views as to the lawfulness of the conditions identified above. It is equally plain that the proposed amendments have the potential to change significantly the rights of landholders (because landholders who currently have the right to request that Ashton acquires their land before commencement of development will have that right removed if the proposed modifications are granted).

60. It is inappropriate and, in HEL's view, beyond the Minister's (and the IPC, as the Minister's delegate) powers under s 75W to modify conditions on the grounds that those conditions are unlawful. That is a matter for the Court process, and is not the function of the IPC.

61. The decision in *Billinudgel Property Ptd Ltd v Minister for Planning* [2016] NSWLEC 139 recently considered when a modification application will fall within the scope of s 75W. Although the Court concluded that 'there is no established 'test'',[22] it summarised existing case law guidance on whether an application is in fact a s 75W modification application. On this, the Court said the following:

> *[58] Whilst there is limited guidance from previous cases on this point, the following can be surmised from the above authorities:*
>
> *(1) the making of a modification pursuant to s 75W of the EPA Act is constrained at least to some degree:* Barrick *at [53] (Basten JA);* Williams (No 1) *t [55] (Biscoe J);* Meriton *at [40] (Senior Commissioner Moore);*
>
> *(2) there is no clear dividing line between what is a modification and what is not a modification:* Barrick *at [51] and [53] (Basten JA);* Meriton *at [40] (Senior Commissioner Moore);*
>
> *(3) whether a proposed change constitutes a modification has generally been negatively defined as not being something else, whether that be:*
>
> > *(a) a change to 'an element of an underlying project':* Barrick *at [53] (Basten JA);*
> >
> > *(b) a 'radical transformation':* Williams (No 1) *at [57] (Biscoe JA);*
> >
> > *(c) a 'radical change to the existing project' or a change that meant that the modified development was 'substantially different'* Williams (No 2) *at [57] and [81] (Pain J), and*
>
> *(4) it is possible to determine whether a change is a modification without recourse to what does not constitute a modification, such as whether that change can be described as having 'sufficient linear descent' from the approval:* Meriton *at [41] (Senior Commissioner Moore).*
>
> *[59] Further to this, I consider it appropriate to look at two further matters. The first is the natural meaning of the word 'modification'. Whilst the Macquarie Dictionary provides a number of unhelpful definitions of this word, it does construe it as referring to a 'partial alteration'. The word 'modify', which is separately defined, is given the primary definition of 'to change somewhat the form or quantities of; alter somewhat'. Both these definitions support the proposition that a modification refers to a limited change.*
>
> *[60] The second is the meaning of the phrase 'changing the terms', which is found twice in the definition of 'modification of approval' in s 75W(1) of the*

[22] *Billinudgel Property Ptd Ltd v Minister for Planning* [2016] NSWLEC 139 at [53].

> *EPA Act. The Macquarie Dictionary relevantly defines 'terms' as being 'conditions or stipulations limiting what is proposed to be granted or done'. Further, to 'change' something is relevantly defined as 'to make something different; alter in condition, appearance etc.' or 'to substitute another or others for; exchange for something else'. Therefore, given its natural meaning, a modification is restricted to substituting the limiting conditions or stipulations that form part of an approval, rather than changing an underlying and essential part of the approval itself.*

62. Contrary to the proponent's characterisation of the Modification Application, a modification that would substantially alter the rights of the landowners listed in Table 1 of Schedule 3 cannot lawfully be characterised as 'minor', or 'administrative'.

63. Further, if as HEL and the DPE contend, the proposed commencement condition has the potential to fundamentally change the intent of condition 10A, as the project could commence without lease, licence or purchase of property 129, such a condition would not be minor but would have very significant effects.

64. Equally, an application that proposes modifications to conditions imposed by the NSWLEC on the grounds that the existing conditions are unlawful cannot properly be described as being of an 'administrative' nature.

65. Rather, an application to modify the conditions of the Approval on the basis that they are currently unlawful, and one which seeks to deprive landowners of their existing acquisition rights, and one which modifies the intent of condition 10A, is an application which seeks a fundamental change in an underlying and essential part of the approval, and constitutes a 'radical transformation' to the nature, form and effect of the conditions, and a radical change to the Project.

66. On this basis, the IPC lacks power to, and should not, make any of the following proposed amendments:

    (a) Insertion of the Proposed Commencement Condition

    (b) Modification to any of the conditions that would have the effect of modifying land acquisition rights (Conditions 1, 2 & 2A of Schedule 3; Commitment C1 of Appendix 3).

The proposed amendments would divide the community

67. Further, if the Approval is amended such that land acquisition rights can only be exercised once the Proponent has purchased, leased or licensed property 129, this would establish a direct conflict of interest between Ms Wendy Bowman (the owner of Property 129) and those with acquisition rights. Those community members with land acquisition rights would become completely reliant on Ms Bowman making a decision to grant the Proponent the requisite interest in Property 129 before being entitled to apply for compensation to leave the area. Such a result would be divisive and likely to cause tension and community discord. It would also place pressure on Mrs Bowman to sell to Yancoal, contrary to her rights to choose not to do so. It is inappropriate and undesirable to place these community members in this difficult position, forced to choose between their own interests and those of another community member.

Amendments to clarify that certain conditions do not require compliance unless Ashton intends to commence development

68. HEL does not consider it strictly necessary to amend the Approval to clarify that the Proponent is not required to comply with the following conditions unless or until it elects to commence development:

    (a) Schedule 2, Condition 12

    (b) Schedule 3, Condition 3

    (c) Schedule 3, Condition 14

    (d) Schedule 3, Condition 53(c)

    (e) Schedule 3, Condition 57

    (f) Schedule 3, Condition 61

    (g) Appendix 3, Statement D2

69. Nevertheless, HEL does not object to minor amendments that would make this abundantly clear. As discussed above, HEL objects to adopting the mechanism captured by the Proposed Commencement Condition. A clearer and simpler approach is available and preferable: each condition can be modified to insert text that states words to the effect of 'This condition applies immediately upon the commencement of any development under the Approval'.

70. HEL agrees that the reference in Condition 1 of Schedule 3 to 'conditions 7 – 8 of Schedule 4' is a typographical error and should be a reference to 'conditions 8 – 9 of Schedule 4'.

Amendments to clarify conditions or commitments where there are specific timing requirements for compliance

71. HEL consents to amendments to the conditions of approval and statements of commitments identified below at [74] so as to clarify the time within which compliance is required.

72. However, in relation to each of these HEL agrees with the (shorter) time frame proposed by DPE rather than the longer time frame sought by the Proponent.

73. Further, HEL also proposes that the time for compliance for each should be by reference to the commencement of development, not the commencement of mining operations.

74. Conditions and statements for amendment:

    (a) Schedule 3, Condition 39: Compliance should be required within 12 months of commencing development.

    (b) Appendix 3, Statement O8: Compliance should be required within 12 months of commencing development.

    (c) Appendix 3, Statement Q1: Compliance should be required within 12 months of commencing development.

    (d) Appendix 3, Statement Q2: Compliance should be required within 12 months of commencing development.

    (e) Appendix 3, Statement Z1: Compliance should be required within 12 months of commencing development.

Conclusions

75. Contrary to Ashton's description of the modification application, the application is neither 'minor' nor 'administrative'. The application seeks, among other things, to make substantive and significant changes to the acquisition rights of certain landowners on the basis that the current conditions of approval are purportedly 'unlawful'. It is not necessary, appropriate, nor within the Minister (or the IPC's) power to modify conditions in the manner sought.

76. To summarise HEL's position:

    (a) Like DPE, HEL opposes the proposed commencement condition. The proposed condition at best muddies the waters. At worst, it raises the risk of an indefinite approval and seeks to deprive relevant landowners of their acquisition rights. It is unnecessary, undesirable, and beyond the Minister's (and the IPC's) powers.

    (b) Contrary to DPE's position, the terms of the Approval make it clear that the landowners identified in Table 1 of Schedule 3 of the Approval currently do have land acquisition rights. HEL opposes any modifications that would alter these rights. It was the clear intention of the NSWLEC that acquisition rights could be exercised upon approval of the Project. Ashton has not made out its argument that such conditions are unlawful. The amendments sought would go beyond the Minister's (and therefore the IPC's) powers under s 75W.

    (c) HEL consents to certain amendments that, whilst not strictly necessary, would clarify that compliance is not required until or unless development is pursued. If such amendments are made, a plain English approach should be adopted.

    (d) HEL consents to certain amendments to timeframes for compliance. HEL agrees with the shorter time frames proposed by DPE and submits that compliance should be measured by reference to development generally, not mining operations.