



27 August 2018

**Independent Planning Commission Statement of Reasons
Ashton Coal Mine – South East Open Cut MOD 1 (MP 08_0182 MOD1)**

1. INTRODUCTION

The Independent Planning Commission

1. The Independent Planning Commission of New South Wales (the **Commission**) is a New South Wales Government agency, established under section 2.7 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*. The Commission is not subject to the direction or control of the Minister for Planning (the **Minister**), except in relation to the procedure of the Commission and any directions authorised to be given to the Commission under the EP&A Act.
2. The members of the Commission are appointed by the Minister. Each member of the Commission has expertise in at least one area of planning, architecture, heritage, the environment, urban design, land economics, soil or agricultural science, hydro-geology, mining or petroleum development, traffic and transport, law, engineering, tourism, or government and public administration. One member of the Commission is appointed as the chairperson. At present, the chairperson of the Commission is Professor Mary O’Kane.
3. The functions of the Commission are set out in section 2.9 of the EP&A Act. These functions include to:
 - determine State significant development applications where there is significant opposition from the community;
 - conduct public hearings for development applications and other planning and development matters where requested to do so by the Minister or the Greater Sydney Commission; and
 - provide independent expert advice on any planning and development matter, when requested by the Minister or Secretary of the Department of Planning and Environment (the **Department**).

Reason for determination by the Commission

4. Ashton Coal Pty Limited (the **proponent**) has lodged a modification application which proposes to amend the existing project approval MP 08_0182 to construct and operate the Ashton Coal Mine – South East Open Cut (**SEOC**) in the Singleton Local Government Area under section 75W of the EP&A Act.
5. The Commission will determine the proponent’s modification application in accordance with the Minister’s delegation dated 14 September 2011. This is because:
 - The project was classified as a major project under Part 3A of the EP&A Act because it constituted development for the purpose of coal mining, and met the criteria in Clause 5 of Schedule 1 of *State Environmental Planning Policy (Major*

Development) 2005. It is a transitional Part 3A project under Schedule 2 of the EP&A (Savings, Transitional and Other Provisions) Regulation 2017. The ability to modify transitional Part 3A projects under section 75W of the EP&A Act is being discontinued, however as the request for this modification was made before 1 March 2018, the provisions of Schedule 2 continue to apply; and

- the Department received more than 25 submissions from the public objecting to the application.
6. Professor Mary O’Kane, as chairperson of the Commission, nominated Mr Alan Coutts (Chair), Mr Peter Cochrane and Professor Zada Lipman to constitute the Commission to determine the proponent’s modification application.

1.1 Site and Locality

7. Based on the Department’s *Ashton Coal Mine – South East Open Cut Project Modification 1 – Administrative changes (MP 08_0182 MOD 1) Environmental Assessment Report* (the **Department’s assessment report**), the Ashton Coal Mine Complex comprises three areas: the completed North East Open Cut, the operating Ashton Underground Mine and the approved, but yet to commence, Ashton SEOC. This component is authorised under a separate project approval (MP 08_0182).
8. The Ashton SEOC site is located close to the village of Camberwell (Figure 1). As a result of purchases by mining operators, the majority of properties in the village are mine-owned, however there are some privately-owned residences which have voluntary landholder acquisition rights under the Ashton SEOC approval.

Figure 1 – Site context



Source: Department of Planning and Environment’s Assessment Report

1.2 Background to Modification Application and Project approval history

9. The project application was originally submitted by the proponent to the Department in November 2009 and was approved by the New South Wales Land and Environment Court (**NSW LEC**) in August 2014, subject to conditions, as set out in *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 4) [2014] NSWLEC 200*.
10. The conditions of approval for the project were finalised by the NSW LEC in April 2015. An outline of the Ashton SEOC's approval timeline is provided in section 1.2 of the Department's assessment report.
11. The Department's assessment report stated that:
"Several specific conditions, unique to the SEOC project, were imposed by the LEC. Significantly, condition 10A of Schedule 2 requires Ashton to purchase, lease or licence property 129 before carrying out any "development work" under the project approval. Ashton unsuccessfully appealed this condition of approval in the NSW Court of Appeal in November 2015.

The LEC recognised that condition 10A may limit Ashton's ability to immediately commence operations at the SEOC. To address this, the LEC included condition 5A of Schedule 2, which allows Ashton to request a two-year extension to the ordinary 5-year lapse date for a project approval. Ashton notes that condition 10A is a precondition of commencement for the SEOC project."

1.3 Summary of the Modification Application

12. The modification application before the Commission for determination proposes the amendment of the conditions of consent for the approved Ashton SEOC, which includes:
 - a new commencement condition:
"The Proponent shall:
 - (a) notify the Secretary in writing of the date of commencement of development under this approval; and*
 - (b) may only commence development under this approval once the Secretary has agreed in writing that all prerequisites to the commencement of development under this approval have been met.*

Note: The prerequisites under the approval 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."

that would require that the proponent notifies the Secretary of the Ashton SEOC's commencement; and
 - administrative amendments to conditions relating to property acquisition, the implementation of the biodiversity offset strategy, maintenance of agricultural productivity, on-site fire management, and adjusting the proponent's Statement of Commitments.
- (modification application)**

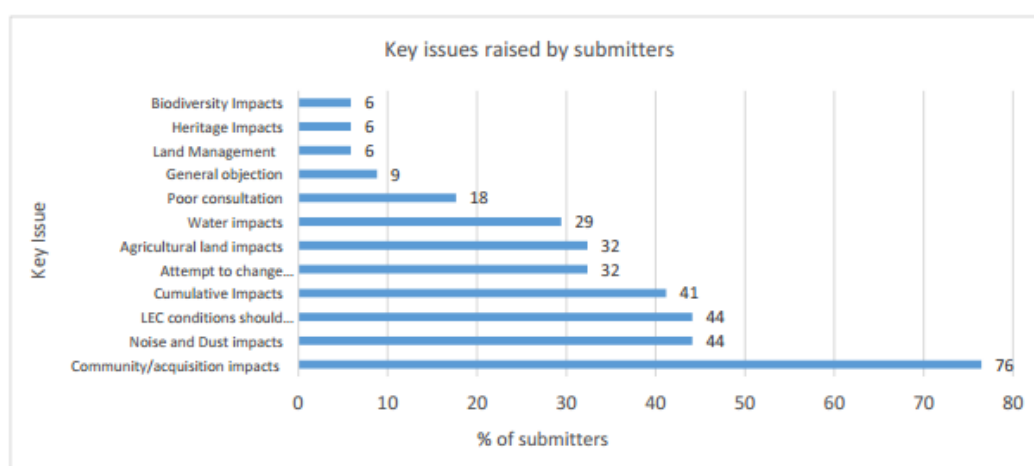
1.4 Need for Project

13. The proponent's modification application stated that a "proponent 'takes up' a project approval and therefore, approval requirements should not apply until after this approval is taken up." The proponent stated in its modification application that the proposed amendments to the conditions of consent are required to provide greater commercial and legal certainty for the community, Ashton Coal Pty Limited and the Department.
14. Accordingly, the modification application stated that administrative changes to the current development consent are required to clarify that the obligations associated with the approval of the Ashton SEOC do not apply until a point in time when Ashton Coal Pty Limited elects to 'take up' the approval and proceed with developing the project.

2. THE DEPARTMENT'S CONSIDERATION OF THE MODIFICATION APPLICATION

15. On 19 January 2017, the Department received the modification application from the proponent. The application outlined the proponent's legal considerations for the request and included advice from Minter Ellison Lawyers supporting the proponent's modification application.
16. The Department publicly exhibited the modification application from 2 February 2017 until 16 February 2017. The Department received a total of 41 submissions during the exhibition period, including 35 community submissions in the form of objections, one community submission providing comments on the project and five submissions from government agencies.
17. A breakdown of the matters raised and the percentage of community submissions attributed to these matters is provided in Figure 2.

Figure 2 – Issues raised in community submissions



Source: Department of Planning and Environment's Assessment Report

18. In response to the submissions made in respect of the modification application, the proponent lodged a Response to Submissions (**RtS**) report in March 2018. The report was made publicly available on the Department's website, and was provided to key government authorities for comment.
19. The Department then prepared an assessment report in respect of the modification application, which was finalised on 29 June 2018.

Statutory Context

20. The Department's assessment report identified that the modification application was made before 1 March 2018, allowing the provisions of Schedule 2 (clause 3) (Savings, Transitional and Other Provisions) to apply. Consequently, the Department's assessment report was prepared in accordance with the requirements of Part 3A and associated regulations, and the consent authority may approve or disapprove the carrying out of the project under section 75W of the EP&A Act.
21. The Department's assessment report stated that it is satisfied that the proposal can be characterised as a modification to the existing approval. It does not seek to change in any significant way the nature or scale of the approved mining operations.
22. The Department's assessment report stated that it is satisfied that the proposed modification is within the scope of section 75W and may be determined accordingly. This includes the absence of requirements that need to be satisfied prior to modifying existing conditions of approval imposed by the NSW LEC.

The Department's Assessment Report

23. The Department's assessment report stated that the modification application:
"does not impact on the proper management and development of resources (Object 1.3(a)) or the promotion of the orderly and economic use of land (Object 1.3(c)), since:
- there is no change to the targeted coal resource, determined by DRG to be significant from a State and regional perspective;*
 - the targeted coal resource is located in a region that is dominated by coal mining operations;*
 - the modification would not change the existing mine site or transport infrastructure; and*
the modification would not change the socio-economic benefits to the community of NSW."
24. The Department's assessment report also stated that the modification application:
"is able to be carried out in a manner that is consistent with the principles of ESD. The Department's assessment has sought to integrate all significant environmental, social and economic considerations.
The Department considers that the existing provisions of the approval which protect the environment and heritage (Object 1.3(e) and (f)) would largely remain unchanged by the proposed modification."
25. The Department's assessment report identified the timing of when conditions of a project approval are required to be met and the related implications for property acquisition as the key matters for consideration. With regard to the proposed commencement condition, the Department's assessment report considered that:

- “Ashton is correct in its application of case law, that a project only commences once the approval is ‘taken up’ and the EP&A Act cannot be breached unless the project has first been commenced. The SEOC project approval has not yet been ‘taken up’ and the SEOC project has therefore not yet commenced.”
- “However, the Department does not support Ashton’s proposed commencement condition. Instead, it considers that there is some merit in the EDO’s view that it could become an alternative way of commencing the project, potentially without physical commencement. This would fundamentally change the intent of condition 10A.”

26. With regard to the administrative amendments to the conditions of consent imposed by the NSW LEC, the Department’s assessment report:

“identified a significant number of drafting errors throughout the project approval. Given the issue of lack of clarity in other aspects of the project approval, the Department has taken this opportunity to correct all material errors. In updating these conditions, the Department has sought to ensure that the changes do not conflict with or change the intent of the LEC or Court of Appeal’s decisions.

27. With regard to the new commencement condition, the Department recommends that the proposed commencement condition should not be included in the condition of consent.

28. With regard to the proposed administrative amendments to the conditions of consent imposed by the NSW LEC, the Department’s assessment report recommended:

- *“the modified conditions that it proposes are of minimal environmental impact”;* and
- *“recommended updates to conditions of approval would provide more clarity to both the community and Ashton and maintain the same intent as the LEC and Court of Appeal.”.*

Government agency considerations

29. As set out in Section 4.1 of the Department’s assessment report:

- The Department of Industry and the Office of Environment and Heritage sought clarification regarding the impact of the proposed modifications on the proponent’s management responsibilities. This clarification was provided to the satisfaction of the relevant agency; and
- The Environment Protection Authority, the Heritage Council and NSW Roads and Maritime Services advised the Department that they did not object to the modification application.

3. THE COMMISSION’S MEETINGS

30. As part of its assessment, the Commission met with the Department, the proponent, Singleton Council, and conducted a public meeting. Minutes of each of these meetings are available on the Commission’s website.

3.1 Meeting with the Department

31. On 1 August 2018, the Department met the Commission on the modification application. Matters discussed at the meeting included the Department’s assessment report and the proponent’s justification for amending the conditions of consent.

3.2 Meeting with the Proponent

32. On 1 August 2018, the Commission met with the proponent. Matters discussed at the meeting included the Department's assessment report and the proponent's justification for amending the conditions of consent.
33. As the modification application is seeking to amend the conditions of consent for the approved project, specifically in relation to the timing of when the conditions commence, the Commission did not undertake a site inspection, as no changes to the approved mining operations or impacts were being proposed.

3.3 Meeting with Singleton Council

34. On 9 August 2018, the Commission met with Singleton Council to discuss the modification application. Matters discussed at the meeting included the Department's assessment report and Singleton Council's strategic view of mining in their local government area.

3.4 Public Meeting

35. On 9 August 2018, the Commission held a public meeting at the Civic Centre, 12 Queen Street, Singleton to hear the public's views on the modification application. The Commission received requests to speak from six people, with five of the six registered speakers electing to speak at the meeting. One unregistered speaker was provided the opportunity to speak on the day of the meeting. A list of speakers and the transcript from the public meeting are available on the Commission's website. Written comments from speakers who presented at the public meeting are available on the Commission's website.
36. An opportunity to lodge written comments was afforded until seven days following the public meeting. The Commission received 406 written comments, including 386 identical campaign submissions. All comments are available on the Commission's website.

4. THE COMMISSION'S CONSIDERATION

Material Considered by the Commission

37. In determining this application, the Commission has carefully considered the following material (the **Material**):
- **The modification application;**
 - the Department of Planning and Environment's *Determination of the Ashton South East Open Cut Coal Project, Camberwell, Singleton Local Government Area*, dated 4 October 2012, including all appendices;
 - the NSW LEC judgment for *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 4) [2014] NSWLEC 200*;
 - the *South East Open Cut Project Approval (PA 08_0182) – Administrative Modification of Conditions*, dated 19 January 2017;
 - the Department of Planning and Environment's assessment report, dated 29 June 2018, including all appendices;
 - Government Authority submissions on the modification application:
 - the NSW Department of Primary Industry submission dated 14 February 2017 and 16 February 2017;
 - the NSW Environment Protection Authority submission dated 13 February 2017;

- NSW Office of Environment and Heritage (**OEH**) Submission dated 13 February 2017 and 16 February 2017; and
- the NSW Roads and Maritime Services submission dated 24 March 2017.
- the Response to Submissions and appendices, dated 22 March 2018;
- the Response to Submissions (Government Authority Submissions):
 - OEH Submission on the RtS, dated 29 March 2018;
 - the Department's Division of Resources and Geoscience submission on the RtS, dated 4 April 2018; and
 - NSW Department of Industry – submission on the RtS, dated 12 April 2018;
- all submissions made to the Department in respect of the proposed modification during the public exhibition of the modification application, the RtS, and up to the publication of the assessment report;
- information discussed with the Commission at its meetings with the Department on 1 August 2018 and published on the Commission's website;
- information discussed with the Commission at its meeting with the proponent on 1 August 2018, including the provided PowerPoint presentation, and published on the Commission's website;
- information discussed with the Commission at its meeting with Singleton Council on 9 August 2018 and published on the Commission's website; and
- oral and written submissions made by the six speakers at the public meeting and the 406 written comments received after the public meeting.

4.1 Considerations under Section 75W of the EP&A Act

38. The Department's assessment report considered the ability of the Department, or other approval authority, to modify conditions established by the NSW LEC. The Department assessment report stated that:

"the repealed section 75W of the EP&A Act continues to apply to this modification and there is no particular limitation to modifying conditions imposed by the LEC, or by any other consent authority. In determining the merit appeal over the Commission's approval of the SEOC, the LEC was the approval authority, acting in the place of the Minister or delegate under the EP&A Act."

39. The Department's assessment report also stated that:

"This means that any modification may change the conditions imposed by the LEC because they are the conditions of the approval authority. Further it is the IPC, not the Department, which must make the final decision regarding the proposed modification."

40. The Commission accepts the conclusion of the Department on this matter, as set out in paragraphs 38 and 39. In the Commission's view, the proposed changes are within the broad scope of section 75W as it applies to the development, and therefore the request to modify may be considered under section 75W.

4.2 Proposed Commencement of Project Approval

Public comments

41. The Commission heard concerns at the public meeting in relation to the uncertainty surrounding the proponent's proposed amendments to the conditions established by the NSW LEC. The community submissions also questioned whether conditions imposed by the NSW LEC could be modified by the Commission.

Proponent's consideration

42. The proponent's RtS contained consideration of the separation between the approval of a project and the "take up" of a project approval by a proponent. This assessment, in part, concluded:
"the EP&A 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."
43. The proponent stated in its RtS that this created a level of uncertainty in the community, which could be addressed through the inclusion of the proposed commencement condition.
44. The proponent's RtS also responded to community concerns raised through the public submission process regarding a perceived attempt by Ashton Coal Pty Limited to circumvent the requirements of condition 10A of Schedule 2. The proponent's RtS stated that:
"The Modification does not seek any change to Condition 10A, Schedule 2 of the Project Approval (PA 08_0182), which relates to the purchase, leasing or licensing of property 129.
Ashton Coal recognises that this condition is a prerequisite to commencement of the South East Open Cut Project.
The proposed condition wording in the Modification does not change this requirement."
45. The proponent's response to the NSW EDO's submission, dated 10 May 2018, with regard to the proposed commencement condition concluded that:
"The proponent does not notify the Department that it has 'commenced' the development, it notifies the Department that the prerequisites and preconditions to commencement have been satisfied. Only after the Department agrees in writing can the development be actually physically commenced. A written notification could not be sufficient to actually physically commence the Project Approval as required by condition 5A."

Department's consideration

46. With regard to the proposed commencement condition, the Department's assessment report observed that there was: *"some merit in the EDO's view that it could become an alternative way of commencing the project, potentially without physical commencement. This would fundamentally change the intent of condition 10A, as the project could commence without lease, licence or purchase of property 129."*
47. The Department's assessment report concluded that while the conditions established by the NSW LEC could be amended, *"the proposed commencement condition is not necessary, since Ashton's claimed lack of certainty in the operation of condition 1 of Schedule 3 is not accepted as being substantive (ie Ashton is not required to comply with any conditions of its SEOC approval until the project has commenced)."*

Commission's Consideration

48. While the Commission recognises the community's concern regarding the Court's intent in relation to condition 10A of Schedule 2 of the project approval, the Commission also acknowledges the proponent's statements, as detailed at paragraphs 44 and 45,

regarding the intent of this condition in relation to the commencement of the Ashton SEOC and that notification could not be sufficient to physically commence the project.

49. The Commission notes section 1.4(1) of the EP&A Act, which defines “**work**” as “*any physical activity in relation to land that is specified by a regulation to be a work for the purposes of this Act, but does not include a reference to any activity that is specified by a regulation not to be a work for the purposes of this Act*” and section 4.53(4) of the EP&A Act, which refers to the development consent for the carrying out of a work not lapsing “*if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies*”.
50. Based upon the requirements of the EP&A Act, as set out in paragraph 49, the Commission does not accept the community submissions and the observations in the Department’s assessment report, as set out in paragraph 46, that the proposed condition could be utilised as an alternate way for commencing the project, potentially without undertaking physical commencement.
51. The Commission agrees with the statement in the Department’s assessment report that the proposed commencement condition “*confuses rather than clarifies both the issue of commencement and acquisition rights for the SEOC project.*”
52. The Commission does not accept the proponent’s view that the proposed commencement condition is necessary because the conditions currently lack clarity and require the proponent to comply with conditions imposing ‘burdens’ before they have decided to ‘take up’ the approval. The Commission agrees with the Department’s conclusions, as set out in paragraph 47, as the proponent would not be required to comply with conditions of consent until they decide to ‘take up’ the approval.
53. The Commission finds that the proposed commencement condition, to set commencement after the proponent has notified the Secretary, is not warranted, does not increase public certainty and should not be incorporated into the conditions of consent for the reasons set out in paragraphs 50 - 52.

4.3 Amendment of project conditions associated with land acquisition rights

Public comments

54. The Commission heard concerns at the public meeting in relation to the uncertainty surrounding land acquisition as a result of the proposed amendments to the conditions established by the NSW LEC.
55. In particular the NSW EDO, on behalf of the Hunter Environment Lobby (**HEL**), put forward their view that landholder acquisition rights are effective from the date of approval, not commencement, stating in their submission that:
“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 NSW LEC in imposing the conditions.”

Proponent’s consideration

56. The proponent’s RtS did not expressly consider the role of a written notification from the proponent for the activation of landholder acquisition rights. The proponent stated during their meeting with the Commission on 1 August 2018, that they agreed with the Department’s findings.

Department's consideration

57. With regard to the activation of land holder acquisition rights, the Department's assessment report stated that:
- "certainty is already inherent in the conditions of approval, however as previously discussed, clarification would be of benefit to all concerned parties. The Department recommends that condition 1 of Schedule 3 is amended to remove the reference to "conditions 7 and 8 of Schedule 4"¹ and refer simply to the procedures in Schedule 4. This would clarify that this condition must be read in conjunction with both the notification requirements (condition 1 of Schedule 4) and the processes for determining the acquisition (conditions 8 and 9 of Schedule 4)."*
58. The Department's assessment report also recommended the addition of a paragraph to condition 1 of Schedule 3, which would read:
- "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"*
59. The Department's assessment report stated the addition of the paragraph to condition 1 of Schedule 3 of the project approval would:
- "make absolutely clear that Ashton cannot be required to acquire any property otherwise subject to the acquisition conditions until the requirements of condition 10A of Schedule 2 are met, as this is a fundamental precondition to the commencement of the project."*
60. The Department's assessment report recommended the addition of the following explanatory note for conditions 2, 2A and 14 of Schedule 3 of the project approval:
- "Note: This condition should be read as being subject to the notification procedures in condition 1 of Schedule 4."*
61. The Department's assessment report considered that the amendments to condition 1 of Schedule 3 and the explanatory note for conditions 2, 2A and 14 of Schedule 3 of the project approval, would increase community certainty regarding when landholder acquisition rights could be exercised. The Department's assessment report stated:
- "instead considers that the conditions provide for an effective acquisition request only to be made after notification by Ashton, or at any subsequent time during the life of the project. The timing of this notification must be prior to carrying out any development as part of the project, but is otherwise at Ashton's discretion."*

Commission's Consideration

62. The Commission notes that the Department's assessment report identified the need to amend condition 1 of Schedule 3 of the project approval to remove the reference to 'conditions 7 and 8 of Schedule 4', but that this amendment has not been incorporated into the draft Notice of Modification and associated consolidated consent.
63. The Commission notes the Department's views, as set out in paragraphs 58 - 61, regarding public certainty for land holder acquisition rights as set out in condition 1 of Schedule 3 of the project approval. However, the Commission does not accept the Department's view that a requirement for a written notification from the proponent before the landholder can request acquisition is necessary or provides increased community certainty in this matter.

64. The Commission also considers that the Department's recommendations in paragraphs 58 - 61 that a landholder's request for acquisition in condition 1 of Schedule 3 of the project approval be subject to condition 10A of Schedule 2 of the project approval is unnecessary since condition 10A is a precondition to the Ashton SEOC project. No development work can be carried out on the project site until the proponent has purchased, leased or licensed property 129.
65. Accordingly, the Commission considers that acquisition rights become "active" upon the "take up" of an approval by the proponent and that adding a requirement for written notification may decrease community certainty regarding landholder acquisition rights.
66. Similarly, the Commission does not accept the view of the NSW EDO, on behalf of the HEL, as set out in paragraph 55, that acquisition rights for a property become "active" from the approval of a project and are currently active for the Ashton SEOC. As set out in paragraphs 63 - 65, the Commission considers landholder acquisition rights will become active once the proponent has elected to 'take up' their approval for the Ashton SEOC.
67. With regard to the proposed amendments to the conditions of consent the Commission concludes:
- for condition 1 of Schedule 3 the proposed amendment set out in paragraph 57 should not be adopted as set out in the Department's assessment report and should remain, reflecting changes in condition numbers from other amendments;
 - for condition 1 of Schedule 3 the proposed amendment by the Department's assessment report set out in paragraph 58 is unnecessary and should not be adopted; and
 - for conditions 2, 2A, 14 of Schedule 3 of the project approval the inclusion of the explanatory note set out in paragraph 60, does not increase community certainty and should not be adopted. This explanatory note has been removed from the instrument of modification and the consolidated conditions of consent.

4.4 Administrative amendments to the conditions of consent

Public consideration

68. The Commission heard views at the public meeting that the proposed administrative amendments to update the conditions of consent, including the inclusion of defined timeframes for implementing management actions and the correction of drafting errors, were broadly supported.

Proponent's consideration

69. The proponent's assessment did not expressly consider the proposed administrative amendments to update the conditions of consent. The proponent did state during their meeting with the Commission on 1 August 2018, that they agreed with the findings of the Department regarding the benefits of updating the conditions and incorporating these amendments.

Department's considerations

70. The Department's assessment report also stated that:
- *"Other potential issues resulting from Ashton's requested amendments to conditions (see Appendix A of Ashton's modification application) are not predicted to be significant, and the Department is satisfied that they can be controlled, mitigated or managed through conditions of approval"; and*

- *“In addition to Ashton’s requests, the Department has identified a significant number of drafting errors throughout the project approval. Given the issue of lack of clarity in other aspects of the project approval, the Department has taken this opportunity to correct all material errors. In updating these conditions, the Department has sought to ensure that the changes do not conflict with or change the intent of the LEC or Court of Appeal’s decisions.”*

Commission’s consideration

71. With regard to the proposed amendments to the conditions of consent the Commission largely accepts the Department’s findings and concludes:

- condition 39 of Schedule 3 of the project approval should be amended, but that the amendment should be altered to read “Within 12 months of carrying out any development work the Proponent must” to provide consistency with other conditions of consent; and
- the remaining administrative amendments, as identified in the draft modification instrument, to correct drafting errors in the conditions should be adopted.

72. The proposed administrative amendments, as set out in paragraph 71, have been incorporated into the modification instrument and the consolidated conditions of consent.

4.5 Community Concerns beyond the scope of the application

73. The Commission heard concerns at the public meeting and written submissions, including the campaign submissions, received after the public meeting in relation to a number of matters that are beyond the scope for consideration as part of this modification request. These concerns include cumulative noise, air quality, water, health and indigenous heritage impacts from adjacent mines and the approval of the Ashton SEOC.

Proponent’s consideration

74. The proponent stated in its RtS that as *“the Modification is administrative, there would be no material change to the environmental, social or economic impacts”*.

Department’s consideration

75. In response to the submissions raising these issues the Department’s assessment report identified that:

“Cumulative noise, air quality, water and health impacts from adjacent mines and the approval of the SEOC are outside the scope of this modification and, consequently, the Department’s assessment. Existing conditions of approval at adjacent mines (including Ashton’s existing operations) require monitoring of cumulative noise and air quality emissions to ensure there are no exceedances of applicable limits. Operations at each site must be adjusted to manage cumulative impacts to ensure that they remain within these limits.

Commission’s consideration

76. The Commission acknowledges the community’s concern regarding the management of impacts, including cumulative impacts, from mining development in the Hunter Valley, biodiversity impacts and indigenous heritage impacts. However, the Commission recognises that these impacts have been considered as part of the assessment, approval and subsequent consideration of the Ashton SEOC by the NSW LEC.

77. The Commission accepts the Department's conclusion as set out in paragraph 75 and concludes that these aspects are not materially changed through the modification application and that they do not form part of the consideration on whether the proposed modification application should be accepted.

5. THE COMMISSION'S FINDINGS AND DETERMINATION

78. The Commission has carefully considered the Material before it.

79. The Commission finds that on the information before it, the modification application would not generate a significant change in the environmental impacts that have previously been considered and approved as part of the approval of the Ashton SEOC (MP 08_0182). This is because, as set out in paragraphs 76 and 77, the proposed modification application does not materially change the approved scope, operations or impacts which were considered as part of the approval of the Ashton SEOC.

80. The Commission is satisfied that the findings in paragraph 67 demonstrate that the modification application, as it relates to the inclusion of the new commencement condition and notification requirements, is not in the public interest because it does not increase community certainty with regard to landholder acquisition rights.

81. The Commission is satisfied that the findings in paragraph 71 demonstrate that the modification application is otherwise in the public interest because it:

- meets the requirements of section 75W of the EP&A Act, as set out in paragraphs 20 - 22 and 40;
- is consistent with the objects of the EP&A Act, under section 1.3 (a), (b), (c), (e) and (f), as it satisfies the principles of ecologically sustainable development as the modification would not result in significant environmental impacts, as set out in paragraphs 76 and 77, and is an orderly economic use and development of land; and
- corrects drafting errors.

82. The Commission finds that the Department's proposed conditions should be amended to reflect:

- for the reasons set out in paragraph 62 - 67, the proposed condition of commencement requiring the proponent to notify the Department of the "take up" of the approval is unwarranted, unnecessary and does not increase community certainty because notification by a developer is not required for landholder acquisition rights to become active;
- for the reasons set out in paragraphs 62 - 67, the amendment to condition 1 of Schedule 3, setting out the requirement for a written request from the proponent for acquisition, is not required and does not increase community certainty because landholder acquisition rights are not dependent on such written notification;
- for the reasons set out in paragraph 64, the amendment to condition 1 of Schedule 3 making land acquisition subject to condition 10A of Schedule 2, is unnecessary since condition 10A is a precondition to the Ashton SEOC project; and
- for the reasons set out in paragraph 71, administrative amendments to the conditions of consent to improve consistency and to correct drafting errors.

83. For the reasons outlined above, the Commission has decided to incorporate some of the proposed amendments to the conditions of consent.

84. Therefore, the Commission has determined to approve the modification application, subject to the attached modification instrument, for the following reasons:

- the modification would have minimal environmental effects, as outlined in paragraphs 76 and 77;
- the amended conditions of consent would increase community certainty, as outlined in paragraph 71; and
- the project is in the public interest, as outlined in paragraph 81.

85. The reasons for the Decision are given in this Statement of Reasons for Decision dated 27 August 2018.



Alan Coutts (Chair)
Member of the Commission



Professor Zada Lipman
Member of the Commission



Peter Cochrane
Member of the Commission