

Ashton Coal Mine – South East Open Cut Project Modification 1 – Administrative changes (MP 08_0182 MOD 1)

Environmental Assessment Report

Section 75W of the Environmental Planning and Assessment Act 1979

1. BACKGROUND

1.1 Introduction

Ashton Coal Operations Pty Ltd (Ashton), a subsidiary of Yancoal, owns and operates the Ashton Coal Mine complex, located approximately 14 kilometres (km) northwest of Singleton in the Hunter Valley (see **Figure 1**).

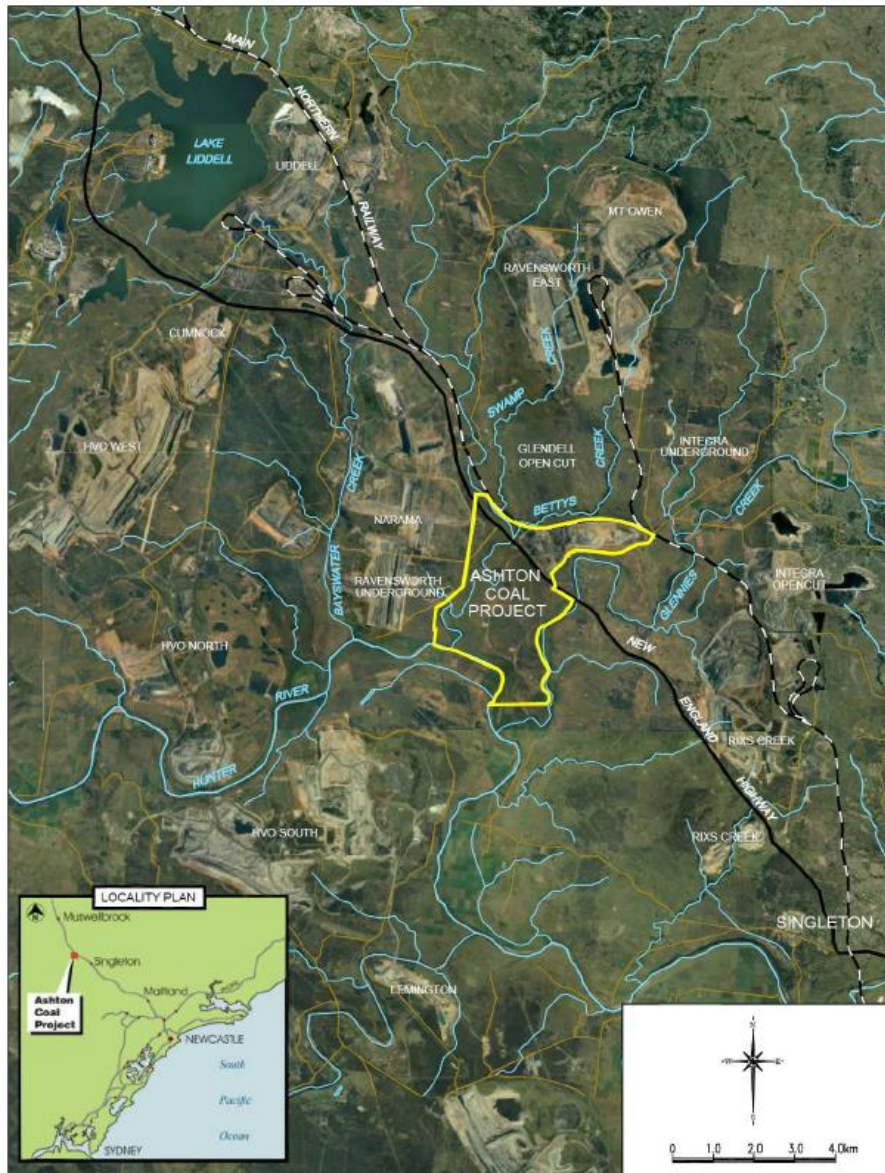


Figure 1: Location of Ashton Coal Mine complex

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 South East Open Cut (SEOC).

Ashton currently operates under an existing development consent, DA 309-11-2001-i, granted in October 2002 and subsequently modified ten times. Mining operations authorised under this development consent include the North East Open Cut (which ceased extraction in September 2011), Ashton Underground Mine, a Coal Handling and Processing Plant (CHPP) and rail transportation facilities. The North East Open Cut final void is now being used for reject disposal from the Ashton Underground Mine.

The SEOC is authorised under a separate project approval (MP 08_0182) approved by the Land and Environment Court (LEC) in August 2014.

The SEOC site is located close to the village of Camberwell. As a result of purchases by surrounding mining operations, the majority of properties in the village are mine-owned, however there are some remaining privately-owned residences which have voluntary acquisition rights under the SEOC approval.

1.2 Approval History of SEOC Project

The SEOC project application was originally lodged in November 2009 and was approved by the LEC in August 2014, subject to conditions. Conditions of approval for the project were finalised by the LEC in April 2015.

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.

A timeline for the SEOC project approval history is outlined in **Table 1**.

Table 1: Timeline of SEOC project determination

Date	Event
December 2011	The then Planning Assessment Commission (the Commission) refused the SEOC project due to potential impacts (water resources, health of Camberwell residents, potential dust and noise emissions) outweighing the benefits of the project.
April 2012	Ashton appealed this decision and the LEC ruled that the Commission must reassess the SEOC project, taking into account an Addendum Report prepared by the Department addressing the project's potential water and health impacts.
October 2012	The SEOC project was approved by the Commission, subject to conditions. The Commission noted that the project included substantial changes to address concerns highlighted in the December 2011 determination.
November 2012	Hunter Environment Lobby (HEL), represented by the Environmental Defenders Office NSW (EDO), appealed the merits of the Commission's approval in the LEC. HEL sought refusal of the SEOC project because of impacts on the health of residents, loss of Aboriginal heritage, reduced agricultural production, impacts to water resources and concern about the project's economics.
August 2014	The LEC determined that the SEOC project should be approved, subject to revised conditions.
April 2015	Conditions of approval were finalised by the LEC, including condition 10A of Schedule 2, which requires Ashton to purchase, lease or licence property 129 prior to any development work at the site.
November 2015	Ashton unsuccessfully appealed the LEC's inclusion of condition 10A in the Court of Appeal.

2. PROPOSED MODIFICATION

On 23 January 2017, Ashton lodged a modification application and supporting information (see **Appendix A**) under section 75W of the *Environmental Planning and Assessment Act 1979* (EP&A Act). Ashton had earlier obtained legal advice from MinterEllison to the effect that a proponent 'takes up' a project approval and therefore, approval requirements should not apply until after this approval is taken up (see **Section 5.1**). The modification seeks to clarify, principally by the inclusion of an additional condition, that the obligations of the project approval do not apply until Ashton elects to take up the approval and proceed with developing the SEOC project. Ashton contends that this clarification is consistent with the principles of planning law (including relevant case law) and would minimise the potential for misinterpretation of conditions by third parties.

In essence, Ashton is seeking to modify conditions that have specific timing requirements so they cannot be interpreted as non-compliances. Specifically, the proposed modification seeks the inclusion of a new commencement condition requiring that Ashton notifies the Secretary of the SEOC project's commencement. Several other administrative changes are also requested which relate to:

- amending property acquisition conditions;
- changing the implementation of the biodiversity offset strategy;
- maintenance of agricultural productivity;
- on-site fire management; and
- adjusting the Statement of Commitments to be consistent with conditions.

Ashton also stated that it has not yet elected to proceed with the SEOC project under the approval and that the modification is not seeking to amend condition 10A. Should Ashton not proceed with the SEOC project, the approval would lapse a maximum of seven years after the date of the LEC's approval on 17 April 2015 (see **Table 1**).

3. STATUTORY CONTEXT

3.1 Section 75W

MP 08_0182 was granted under the former Part 3A of the EP&A Act. The project is a transitional Part 3A project under Schedule 2 of the EP&A (*Savings, Transitional and Other Provisions*) Regulation 2017. The power to modify transitional Part 3A projects under section 75W of the Act, as in force immediately before its repeal on 1 October 2011, is being wound up. However, as the request for this modification was made before the 'cut-off date' of 1 March 2018, the provisions of Schedule 2 (clause 3) continue to apply. Consequently, this report has been 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.

The Department 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. The Department is therefore satisfied that the proposed modification is within the scope of section 75W and may be determined accordingly.

Under section 75W, there are no requirements that need to be satisfied prior to modifying any existing conditions of approval imposed by the LEC.

3.2 Consent Authority

The Independent Planning Commission of NSW (IPC) must determine the application under section 4.5 of the EP&A Act and clause 8A(i) of the *State Environmental Planning Policy (SEPP) (State and Regional Development) 2011*, because more than 25 public submissions in the nature of objections were received.

In determining this modification, the IPC is the approval authority and has the authority to consider changes to any conditions of approval.

3.3 Environmental Planning Instruments

A number of environmental planning instruments apply to the modification, including:

- *Mining SEPP*;
- *SEPP (State and Regional Development) 2011*;
- *SEPP No 44 – Koala Habitat Protection*; and
- *Singleton Local Environmental Plan 2013*.

The Department has assessed the proposed modification against the relevant provisions of these instruments. Based on this assessment, the Department is satisfied that the proposed modification can be carried out in a manner that is consistent with the aims, objectives and provisions of these instruments.

3.4 Objects of the EP&A Act

The approval authority must consider the objects of the EP&A Act when making decisions under the Act. The objects of the EP&A Act changed on 1 March 2018. The Department has assessed the proposed modification against the current objects in section 1.3 of the EP&A Act. The objects of most relevance to the decision on whether or not to approve the proposed modification are:

- Object 1.3(a): *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;*
- Object 1.3(b): *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment;*
- Object 1.3(c): *to promote the orderly and economic use and development of land;*
- Object 1.3(e): *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats;*
- Object 1.3(f): *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage);*
- Object 1.3(i): *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State; and*
- Object 1.3(j): *to provide increased opportunity for community participation in environmental planning and assessment.*

The Department is satisfied that the proposed modification 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.

The Department has considered the principles of ecologically sustainable development (ESD, Object 1.3(b)) in its assessment of the proposed modification. The Department considers that the proposed modification 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.

The Department exhibited the modification application and supporting information and also made it publicly available on its website (Object 1.3(j)). Public and special interest group (SIG) submissions were received and are discussed in **Section 4**.

4. CONSULTATION

The Department exhibited the modification application and supporting information (see **Appendix A**) from 2 February until 16 February 2017 at its Information Centre and at the offices of Singleton Shire Council and Nature Conservation Council and also made the application publicly available on its website. The Department also consulted with relevant Government agencies and sent notices to members of the community who made a submission on the original SEOC project.

The Department received 41 submissions in response to the exhibition, including:

- five Government agency submissions; and
- 36 public and SIG submissions objecting to or commenting on the modification.

A summary of the issues raised in submissions is provided below. A full copy of these submissions and Ashton's Response to Submissions (RTS) are provided in **Appendices B** and **C**, respectively.

4.1 Agency Submissions

The **Department of Industry** (DoI) requested further clarification of the prerequisites referred to in Ashton's proposed commencement condition and recommended that various water management plans and programs (required under conditions 34, 35, 37 and 38 of Schedule 3 of the approval) should be included. The Department notes that these conditions require the plans and programs to be approved by the Secretary prior to commencement of either the 'project' or 'mining operations'. The Department is satisfied that these conditions clearly outline when the approval of these documents is required.

DoI noted that any change to the availability and timing of acquisition rights should not disadvantage any neighbouring agricultural properties. This is discussed further in **Section 5.1**.

DoI also made recommendations surrounding land and pest management practices required under the project approval. This is discussed further in **Section 5.2**.

The **Office of Environment and Heritage** (OEH) advised that it had no objections to the proposed modification and supported linking the delivery of the biodiversity offset package and commitments to the commencement of development works for the project. The proposed changes to biodiversity offsets and commitments are discussed further in **Section 5.2**.

The Department's **Division of Resources and Geoscience** (DRG) noted that the project, if modified, could be effectively managed under other current approval conditions and that the modification would not impact on rehabilitation or resource obligations.

The **Environment Protection Authority** (EPA) advised that it had no comments to make as the modification is essentially administrative in nature.

The **Heritage Council** considered that the proposed modification would not impact historic heritage items and provided no further comment.

Roads and Maritime Services (RMS) did not object to the modification and considered there would be no significant impact on the nearby State road network.

Singleton Shire Council did not make a submission.

In response to these submissions, Ashton provided the Department with a RTS report on 22 March 2018 (see **Appendix C**). All agencies were satisfied with the responses provided (see **Appendix D**). Conditions recommended by agencies have been included in the proposed Notice of Modification where appropriate (see **Appendix E**), or are already addressed in the existing project approval.

4.2 Public and Special Interest Group Submissions

Of the 36 public and SIG submissions received, 35 objected to Ashton's proposed modification, while one submitter provided comments.

Several landowners with voluntary acquisition rights objected to the modification. Submitters noted that uncertainty surrounding land acquisition and mitigation rights had impacted on the social and economic fabric of the Camberwell community and on sustained agricultural use of productive farmland (see **Figure 2** and **Section 5**).

Many submitters noted concerns with cumulative noise, air quality, water and health impacts associated with existing adjacent mining operations and reiterated objections to the LEC's approval of the SEOC project. The Department acknowledges that many land owners residing near the SEOC objected to the project and continue to do so. Nevertheless, the SEOC was approved by the LEC and Ashton is permitted to request a modification to the project approval. The Department and ICP must consider the modification in accordance with relevant planning legislation.

There was also general dissatisfaction about commencement of the SEOC project increasing existing impacts (see **Figure 2**).

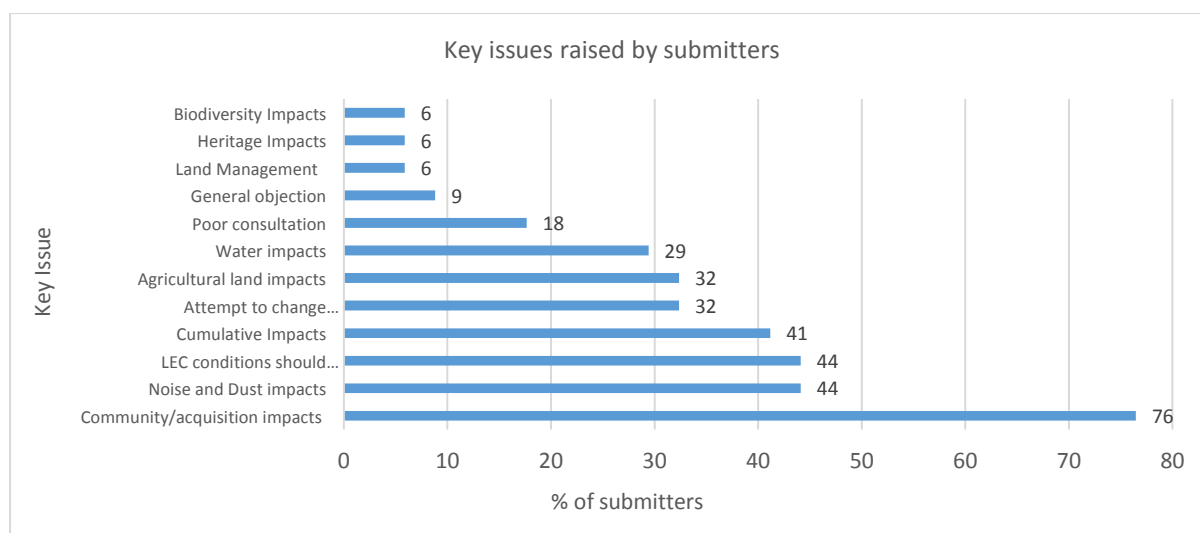


Figure 2: Key issues raised in public and SIG submissions

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.

Compliance with conditions of approval is dealt with separately under the EP&A Act. The Department's Compliance Team actively monitors all coal mines in the Hunter to ensure compliance with conditions of approval. This is achieved by unannounced surveillance, site visits, audits, and following up complaints made by community members.

Submitters raised concerns about the ability of the Department to modify conditions of approval established by the LEC. As described in **Section 3.1**, under transitional arrangements, 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. This means that any modification may change 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.

Several submissions, including from HEL (accompanied by a letter from the EDO) considered the application documentation did not clearly explain the intent of the proposed modification. Ashton provided further explanation to address these concerns in its RTS (see **Appendix C**).

The EDO later provided an additional submission, on behalf of HEL, in response to the RTS. The concerns raised by the EDO are discussed further in **Section 5.1.3**.

The Wonnarua Native Title Group submitted that the SEOC project and surrounding open cut mines impact on Wonnarua heritage and these impacts have not been addressed. The Department notes that the project's impact on Aboriginal heritage was a key consideration in the LEC's decision on HEL's merit appeal over the Commission's approval of the SEOC project. The proposed modification does not seek to materially change any conditions of approval that manage or mitigate impacts on Aboriginal heritage.

A number of objectors were unsatisfied with the level of consultation completed by Ashton prior to submission of the modification application, noting that neither Ashton nor the mine's Community Consultative Committee (CCC) had adequately informed them of the proposed modification. Ashton noted in its RTS that, due to the administrative nature of the modification, it did not consider extensive consultation necessary. Nevertheless, Ashton contended that it conducted consultation with key stakeholders prior to finalising the application. This involved contacting property owners and discussing the proposed modification at the CCC.

5. ASSESSMENT

The Department has assessed the merits of the proposed modification in accordance with the relevant objects and requirements of the EP&A Act. In assessing these merits, the Department has considered the:

- Environmental Assessment for the original project application;
- existing conditions of approval for the project as granted by the LEC;
- judgements of the LEC and Court of Appeal;
- modification application and supporting documents, submissions and RTS; and
- relevant environmental planning instruments, policies and guidelines.

The Department considers that the key matters to consider in respect of the proposed modification relate to the timing of when conditions of project approval are required to be met and the related implications for property acquisition. Other issues are considered in **Section 5.2**.

5.1 Commencement of Project Approval

5.1.1 Ashton's Proposal

Ashton states that it is seeking to clarify that its obligations under the SEOC approval are consistent with case law, which states that:

- a project approval does not commence automatically, but is 'taken up' by the proponent; and
- until a planning approval is taken up, none of the burdens of the approval should apply.

Ashton contends that the 'taking up' of a project approval allows an opportunity (between determination and commencement) to decide whether to proceed with the project. If an approval required immediate compliance with conditions, regardless of whether the approval had been taken up, the proponent's choice to carry out the project would be removed.

Ashton notes that it has yet to take up the SEOC approval. Ashton considers that the approval contains two types of conditions that conflict with relevant case law, these being conditions requiring compliance either:

- immediately, regardless of whether the project has commenced; or
- by an arbitrary date, which may pass before the project has commenced.

Consequently, Ashton considers that these conditions require amendment to clearly outline its responsibilities and enable it to demonstrate compliance. The proposed amendments would reflect that conditions:

- cannot require operational actions by the proponent, prior to the commencement of the approval; and
- can require administrative action by the proponent prior to the approval being commenced (ie a precondition to commencement). However, such conditions must be imposed so that they are only breached if Ashton chooses to commence the approval, and not as a matter of course on the granting of the approval or if an arbitrary date passes.

To clearly indicate when it elects to take up the SEOC approval, Ashton proposed a new commencement condition and note, to the following effect:

The Proponent must:

- (a) *notify the Secretary in writing of the date of commencement of development under this approval;*
and
- (b) *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.

It is important to note that the proposed note to this condition states that any conditions requiring property acquisition do not operate until a commencement notice has been submitted by Ashton to the Secretary. As noted in **Section 4**, agencies and SIGs raised concerns over the proposed inclusion of this condition and note, in particular its potential consequences for the lapsing provisions of condition 5A and requirements of condition 10A both in Schedule 2.

In its RTS, Ashton recognised that condition 10A is a precondition that would need to be fulfilled before commencing the SEOC project. Ashton maintains that its proposed condition provides greater transparency regarding commencement of the SEOC project.

Ashton also asserts that the existing voluntary acquisition conditions could be interpreted to allow an acquisition request to occur before the SEOC project had actually been commenced. Ashton considers its proposed commencement condition would clarify this timing without changing the overall intent of the acquisition conditions, and notes that this would also minimise the potential for misinterpretation by other parties.

Ashton similarly identified obligations in other conditions and its Statement of Commitments that it considers require clarification of when compliance with their obligations is necessary. The Department's consideration of these other changes is discussed in **Section 5.2**.

5.1.2 Community Concerns

As discussed in **Section 4**, the key concerns raised by submitters that are directly relevant to the proposed modification relate to the proposed changes to voluntary property acquisition (76% of submitters) and the LEC's conditions (44%).

The importance of retaining property acquisition rights was clearly expressed in community submissions, even though most submitters continued to oppose the SEOC project. Some submitters observed that, while condition 10A has so far delayed the SEOC project, it has also prevented the ability to request acquisition. In reviewing the submissions, it is evident there is a lack of clarity about Ashton's obligations to acquire properties. Submitters also noted confusion over Ashton's proposed amendments regarding commencement of the approval and their effect on the lapsing provisions, and requested confirmation that there would be no change to condition 10A. Likewise, SIGs noted that this modification, particularly Ashton's proposed commencement condition, is causing further confusion about the project's commencement.

Given their opposition to the project, submitters were also concerned about the potential for Ashton to either extend the lapse date or change the requirements of condition 10A. The EDO, on behalf of HEL, expressed concern that the note included in Ashton's proposed commencement condition (see **Section 5.1.1**) may act to facilitate this.

The EDO also expressed the view that the SEOC project was approved on the condition that landowners with acquisition rights would be able to exercise those rights at any time after approval. It further considered that the LEC realised the project's commencement could be affected by condition 10A and adjusted the lapsing provisions and timing of all conditions accordingly.

5.1.3 Department's Consideration

The Department considers 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. The Department is generally satisfied that Ashton is not required to comply with any conditions of its SEOC approval until the project has commenced. The only exception to this is the pre-condition set out in condition 10A of Schedule 2, which must be satisfied before the project can be legally commenced.

Proposed commencement condition

Ashton asserts that its proposed commencement condition (see **Section 5.1.1**) provides greater transparency to interpret when the SEOC project would commence. The Department first notes the importance of the concept of 'project commencement', as it has implications for the lapsing provisions of condition 5A of Schedule 2, and as established by case law, is also a trigger for compliance with all other applicable conditions of approval.

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, as the project could commence without lease, licence or purchase of property 129. If this occurred then the lapsing provisions of condition 5A would be satisfied and the

approval could remain valid potentially in perpetuity. Such an outcome would clearly be inconsistent with the decisions of the LEC and Court of Appeal.

Ashton's key rationale for this modification, that the existing conditions do not provide 'certainty', is also not supported by the Department. The key reason for this is that case law on this matter is clear, as indeed has been pointed out by Ashton itself. The Department therefore considers that 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). In coming to this conclusion, the Department also notes the views expressed by community members and SIGs, that Ashton's proposed modification confuses rather than clarifies both the issue of commencement and acquisition rights for the SEOC project.

However, the Department does accept Ashton's position that some conditions in the approval lack an appropriate degree of 'clarity' as to when they must be applied. The Department therefore considers there would be benefit in providing additional clarity to the conditions requiring property acquisition.

Implications for acquisition

The Department notes the key property acquisition condition (condition 1 of Schedule 3) provides that:

"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 condition 7-8 of Schedule 4."

Ashton has expressed concerns over the application of these requirements and the possibility that they could be seen as permitting lodgement of a written request prior to project commencement. However, the conditions of a project approval must be read as an interrelated and interdependent set. Therefore, condition 1 of Schedule 3 must be read in the light of condition 1 of Schedule 4 which requires:

"Prior to the carrying out of any 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..."

The Department considers that condition 1 of Schedule 4 establishes that the right of the landowner to request acquisition only crystallises after the landowner receives notification. This notification would be expected to only occur after Ashton has decided to take all necessary steps to commence the project. Furthermore, condition 1 of Schedule 4 outlines that acquisition can only be required during the project and not prior to the project commencing.

Some submitters, including the EDO, held the view that the LEC approved the SEOC project on the basis that property acquisition rights could be exercised at any time after approval. The Department 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.

The Department therefore considers 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).

An additional paragraph is also recommended to clarify that a written request for acquisition, under condition 1 of Schedule 3, can only be made after the requirements of condition 10A of Schedule 2 have been satisfied.

The inclusion of this paragraph 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.

The Department is satisfied that these amendments clarify Ashton's property acquisition responsibilities without changing the intent of the conditions. Affected landowners retain exactly the same right to

¹ This would also correct an error in the LEC's condition, where conditions 7 and 8 of Schedule 4 are incorrectly referenced. Instead, the condition should have referred to the procedures in conditions 8 and 9 of Schedule 4.

request that Ashton acquires their property once Ashton has notified them under condition 1 of Schedule 4. The proposed amendment also clarifies that condition 10A must be satisfied prior to acquiring other affected properties.

The Department considers that these amendments fully maintain the LEC's intent while providing additional clarity for both Ashton and the community in the interpretation of its conditions.

5.2 Other Issues

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 (see **Table 2**).

Table 2: Other issues

Impact	Department's Consideration	Recommendation
<i>Biodiversity</i>	<p>Ashton proposes to amend the timing of the implementation of the biodiversity offset strategy.</p> <p>OEH noted that linking the delivery of the biodiversity offset package to the commencement of development works for the project is a reasonable approach and is consistent with other mining projects.</p> <p>The Department notes that the offset is required as mitigation for clearing vegetation, which would not occur until after commencement of the project.</p> <p>The Department is satisfied that amending this condition would have a negligible environmental impact.</p> <p>If operating at maximum capacity the SEOC project life was estimated in the project application to be 7 years.</p> <p>The Department considers that given the rather short duration of proposed mining operations, the biodiversity offset strategy should be implemented within 12 months of starting mining operations.</p>	<p>The Department recommends this condition is amended to link the requirement to implement the biodiversity offset strategy to within 12 months of starting mining operations.</p>
<i>Agricultural Productivity</i>	<p>Ashton has requested amendments to condition 61 of Schedule 3. This condition requires Ashton to ensure that the agricultural productivity and production of non-operational project-related land is maintained or enhanced. Ashton is seeking to amend this condition to clarify that compliance is not required until after the project has commenced.</p> <p>Dol advised that Ashton should not suspend routine land management practices or any applicable pest management through any suspension of condition 61 of Schedule 3.</p> <p>The Department notes that the conditions of approval do not take effect until the project has commenced. Therefore, Ashton has no obligation to comply with the requirements of this condition until the project has commenced.</p> <p>Ashton noted that amending this condition would not result in the suspension of current land management practices or pest management on land it either owns or controls.</p>	<p>Given that Ashton has no obligation to comply with the requirements of this condition until after the project has commenced, the Department does not consider that this condition requires any changes.</p>
<i>Compensation and Mitigation</i>	<p>Ashton also requested to clarify the timing of obligations in conditions 2, 2A, 3 and 14 of Schedule 3.</p>	<p>The Department recommends these conditions are amended to include a note stating that each condition should</p>

	<p>Conditions 2 and 3 allow landowners with acquisition or mitigation rights to request alternative accommodation or noise and/or dust mitigation.</p> <p>Condition 2A specifically relates to properties 130 and 182, and offers compensation as an alternative to the property acquisition procedures detailed in condition 1 of Schedule 3.</p> <p>Condition 14 allows landowners within 2 km of blasting operations to request a property inspection.</p> <p>The Department considers that, consistent with case law, Ashton is not required to comply with any of these conditions before the project is commenced.</p> <p>Furthermore, the requirements of conditions 2 and 2A specify that compensation is limited to "the duration of coal production" or "during mining operations". Condition 3 would be limited in effect to the period after commencement of the development.</p> <p>The notification requirements of condition 1 of Schedule 4 also apply to these conditions (see Section 5.1.3). Therefore, Ashton is not required to provide mitigation or compensation until the project has commenced and the notification requirements of condition 1 of Schedule 4 have been fulfilled.</p> <p>While the Department considers that there is certainty in the obligations required by these conditions, it acknowledges that connecting these conditions to the notification requirements of Schedule 4 would provide additional clarity.</p>	be read in conjunction with condition 1 of Schedule 4.
<i>Realignment of Transmission Lines</i>	<p>Ashton considers that condition 12 of Schedule 2 requires amendments to specify that realignment of the 132kV and 66kV transmission lines is only required after the project has commenced.</p> <p>The conditions of approval do not take effect until the project has commenced. However, the Department considers that this condition could be strengthened by specifying that realignment of the transmissions lines should occur after commencement of the project.</p>	The Department recommends amending the condition to require realignment of the transmission lines once construction has commenced in the area shown in the site layout plan.
<i>Construction of Conveyor Bridge</i>	<p>Ashton has requested to amend condition 53(c) of Schedule 3 so that construction of the conveyor bridge over the New England Highway is not required until after the project has commenced.</p> <p>RMS raised no objection as it is considered there would be no significant impact on the nearby classified (State) road network.</p> <p>The conditions of approval do not take effect until the project has commenced. Nevertheless, the Department notes that the condition could be clarified by requiring construction to be complete before mining operations start.</p>	The Department recommends this condition is updated to require that the conveyor bridge is constructed prior to mining operations commencing.
<i>Fire Management</i>	<p>Ashton considers that condition 57 of Schedule 3, which requires management of onsite fires, should be amended so that compliance with this condition is not required until after the project has commenced.</p>	The Department recommends this condition remains unchanged.

	<p>The conditions of approval do not take effect until the project has commenced. Therefore, Ashton has no obligation to comply with the requirements of this condition until the project has commenced.</p> <p>Ashton acknowledges its responsibilities as a rural land owner. The Department also notes that Ashton's existing approval (DA 309-11-2001-i), includes the same condition which also applies to the Ashton Coal Mine complex as a whole, which encompasses the SEOC site. Therefore, in the event of a fire at the SEOC site, Ashton would be obligated to manage any fire impacts through the conditions of DA 309-11-2001-i.</p>	
--	--	--

Ashton has also requested amendments to its Statement of Commitments as some commitments are linked to a specific time period after project approval. The Department has considered these requests in **Table 3** below.

Table 3: Proposed changes to the Statement of Commitments

Requested changes to Statement of Commitments	Department's consideration	Department's recommendation
<p><u>C1: Additional property acquisition</u> Amend the timing of this commitment from 'Where requested by the owner' to 'Upon commencement of development of the Project'.</p>	<p>The Department notes these properties have acquisition rights and are included in Table 1, condition 1 of Schedule 3.</p> <p>Condition 3 of Schedule 2 gives precedence to the conditions of approval where there is an inconsistency between the Statement of Commitments or conditions.</p> <p>However, the Department considers that there is now opportunity to ensure consistency between the conditions of approval and the Statement of Commitments. This also provides clarification for those landowners with acquisition rights.</p> <p>For this reason, the Department considers that the timing of this commitment should be amended.</p>	<p>The Department recommends the timing of this commitment is amended to 'on commencement of development of the project where requested by the landowner'.</p>
<p><u>D2: Measures to minimise dust impacts on residents of Ashton-owned properties</u> Amend this commitment's timing to make air quality monitoring data available to tenants from 'where requested by the owner' to 'upon commencement of development of the project'.</p>	<p>Condition 1 of Schedule 4, requires Ashton to notify tenants of mine-owned property of their rights under the approval, including the Statement of Commitments.</p> <p>The Department notes that condition 3 of Schedule 2 gives precedence to the conditions of approval where there is an inconsistency between the Statement of Commitments and conditions.</p> <p>However, the Department considers that there is now opportunity to ensure consistency between the conditions of approval and the Statement of Commitments.</p> <p>For this reason, the Department considers that the existing timing of this commitment should be amended.</p>	<p>The Department recommends the timing of this commitment is amended to 'on commencement of development of the project where requested by the tenant'.</p>
<p><u>O8: Vegetation corridor</u> Amend this commitment's timing from 'within 3 years of project approval, subject to landownership authority' to 'within 3 years of commencing</p>	<p>Condition 3 of Schedule 2 gives precedence to the conditions of approval where there is an inconsistency between the Statement of Commitments or conditions.</p>	<p>The Department recommends the timing of this commitment is amended so that the enhancement and management of the</p>

<p>mining operations, subject to landownership authority'.</p>	<p>Reference to a period of time after 'project approval' is inconsistent with case law, under which that period may elapse before the approval is 'taken up'. The Department therefore considers it would be beneficial, particularly to the community, to establish consistency with the conditions of approval.</p> <p>However, the Department considers that the requested time period of "within 3 years of commencing mining operations" is not equivalent to the original time period. If operating at maximum capacity the project life is estimated to be 7 years. In the worst case, this could allow Ashton to complete nearly half of its mining operations before it would be required to begin managing the vegetation corridor.</p> <p>Instead, the Department considers a period of within 12 months of starting mining operations to be more appropriate.</p>	<p>vegetation corridor which makes up part of the offset strategy is commenced within 12 months of starting mining operations.</p>
<p><u>Q1: Offset strategy for SEOC</u> Amend this commitment's timing from 'within 3 years of project approval' to 'to be prepared prior to commencing mining operations and to be implemented within 3 years of commencing mining operations, subject to landownership authority'.</p>	<p>Condition 3 of Schedule 2 gives precedence to the conditions of approval where there is an inconsistency between the Statement of Commitments or conditions.</p> <p>Reference to a period of time after 'project approval' is inconsistent with case law, under which that period may elapse before the approval is 'taken up'. The Department considers it would be beneficial, particularly to the community, to establish consistency with the conditions of approval.</p> <p>However, the Department considers that the requested time period of "within 3 years of commencing mining operations" is not equivalent to the original time period. If operating at maximum capacity, the project life for coal extraction is estimated to be 7 years. In the worst case, this could allow Ashton to be nearly halfway through extraction before being required to implement its offset strategy.</p> <p>Instead, the Department considers a period within 12 months of starting mining operations to be more appropriate.</p>	<p>The Department recommends the timing of this commitment is amended to 'within 12 months of commencing mining operations' so that it is consistent with the changes to condition 39 of Schedule 3.</p>
<p><u>Q2: Management of offset areas</u> Amend this commitment's timing from 'within 3 years of project approval' to 'within 3 years of commencing mining operations, subject to landownership authority'.</p>	<p>Condition 3 of Schedule 2 gives precedence to the conditions of approval where there is an inconsistency between the Statement of Commitments or conditions.</p> <p>The Department considers it would be beneficial, particularly to the community, to maintain consistency with the conditions of approval. However, the Department considers that the requested time period of "within 3 years of commencing mining operations" is not equivalent to the original time period. If operating at maximum capacity coal extraction is estimated to occur for 7 years. In the worst case, this could allow Ashton to be nearly half way through extraction before being required to implement this commitment.</p>	<p>The Department recommends the timing of this commitment is amended to 'within 12 months of commencing mining operations' so that it is consistent with the changes to condition 39 of Schedule 3.</p>

	<p>Instead, the Department considers a period within 12 months of starting mining operations to be more appropriate.</p> <p>The Department also considers that this commitment should be amended to be consistent with the updates to condition 39 of Schedule 3 (see Table 2).</p>	
<p><u>X3: Enhancement of vegetation connectivity</u> Amend this commitment's timing from 'progressively' to 'within 3 years of commencing mining operations, subject to landownership authority'.</p>	<p>The Department notes that the enhancement of vegetation connectivity specifically relates to the area along Glennies Creek. This is the same area identified in commitment O8 (above).</p> <p>Condition 39 of Schedule 3 and commitment O8 specify when the enhancement and management of this area would commence.</p> <p>As noted above, instead of the 3 year period requested by Ashton, the Department considers a period within 12 months of starting mining operations to be more appropriate.</p>	<p>The Department recommends this commitment is amended to 'within 12 months of commencing mining operations', to maintain consistency with condition 39 of Schedule 3 and other commitments.</p>
<p><u>Z1: Prepare a Camberwell Village Enhancement Plan</u> Amend this commitment's timing from 'within 5 years of project approval' to 'within 12 months of commencing mining operations'.</p>	<p>Condition 3 of Schedule 2 gives precedence to the conditions of approval where there is an inconsistency between the Statement of Commitments or conditions.</p> <p>The Department considers it would be beneficial, particularly to the community, to maintain consistency with the conditions of approval.</p> <p>Condition 16 of Schedule 2 requires that a Camberwell Village Enhancement Strategy needs to be prepared within 12 months of mining operations commencing.</p> <p>The Department considers it is appropriate to align the timing of this commitment with the existing requirements of condition 16.</p>	<p>The Department recommends the timing of this commitment is amended to commence within 12 months of mining operations commencing.</p>

6. RECOMMENDED CONDITIONS

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.

The Department has drafted a recommended Notice of Modification (see **Appendix D**) and a consolidated version of the approval as it is proposed to be modified (see **Appendix E**). The Department considers that the environmental and social impacts of the project can be appropriately managed through the proposed amended conditions of approval.

Ashton has reviewed the recommended conditions and has no objections.

7. CONCLUSION

The Department has assessed the modification application, RTS and submissions in accordance with the relevant requirements of the EP&A Act. The Department has carefully considered the likely impacts of the proposal on the environment and nearby residents. The Department is satisfied that the modified conditions that it proposes are of minimal environmental impact. Moreover, the Department is satisfied that the 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.

The Department is therefore satisfied that the modification, subject to the conditions it proposes, is in the public interest.

Following on from its assessment of the project, the Department considers that the modification is approvable, subject to the proposed conditions (see **Appendix D**). This assessment report is hereby presented to the Independent Planning Commission of NSW for determination.

Recommended by:

Recommended by:



Howard Reed 29-6-18
Director
Resource Assessments



29/6/18

Oliver Holm
Executive Director
Resource Assessments and Compliance