

ASHTON COAL MINE - SOUTH EAST OPEN CUT PROJECT APPROVAL
ADMINISTRATIVE MODIFICATION OF CONDITIONS
RESPONSE TO SUBMISSIONS

PREPARED BY
ASHTON COAL
OPERATIONS PTY LIMITED

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1 INTRODUCTION

Ashton Coal Operations Pty Limited (Ashton Coal) submitted an application for an administrative modification to the conditions of the Project Approval (PA 08_0182) for the Ashton Coal Mine – South East Open Cut Project (the Modification) on 19 January 2017.

The Modification application was placed on public exhibition by the Department of Planning and Environment (DP&E) from 2 February to 16 February 2017. During this period, Government agencies, non-government organisations, businesses and members of the public were invited to provide submissions on the Modification application to the DP&E.

The DP&E has requested that Ashton Coal reviews and responds to the submissions that were received.

Ashton Coal's responses to submissions have been structured as follows:

- Part A – Responses to submissions from Government agencies.
- Part B – Responses to submissions from non-government organisations.
- Part C – Responses to submissions from members of the public.

There appears to have been some confusion on the part of some parties as to the reasons for the proposed modification. This document expands on that reasoning, and provides a legal advice at Appendix C which describes the legal issues associated with the existing Project Approval (08_0182) conditions.

1.1 JUSTIFICATION OF MODIFICATION

The Modification seeks to clarify, by the inclusion of an additional condition, that the conditions of Project Approval (PA 08_0182) do not apply until Ashton Coal elects to take up the approval and proceed with the development of the South East Open Project. The following additional condition has been proposed to this effect:

COMMENCEMENT OF DEVELOPMENT UNDER THIS APPROVAL

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.

Importantly, the inclusion of this proposed condition (or any other aspect of the Modification) does not seek to change the wording or the requirement of Condition 10A, Schedule 2 of the Project Approval (PA 08_0182).

Ashton Coal recognises that Condition 10A is a prerequisite to commencement of the South East Open Cut Project and it would need to fulfil this condition prior to it being able to commence the development. The proposed above additional condition does not change this requirement. (It should also be noted that while development cannot commence until Condition 10A is satisfied [among other requirements], there is no obligation on Ashton Coal to commence the development even if it were to satisfy Condition 10A).

A precedent for the inclusion of a similar condition to that proposed above was set by the Planning Assessment Commission in its approval (November 2015) of the Warkworth Continuation Project (SSD-6464) and the Mt Thorley Continuation Project (SSD-6465).

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.

This clarification is consistent with the principles of planning law (including relevant case law) and will minimise the potential for misinterpretation of the conditions by third parties. The case law clearly establishes that a planning approval is only binding on a proponent once it is 'taken up' and physically commenced. There can be no obligation to comply with a condition of consent if the consent is not implemented.

Austin J in the NSW Court of Criminal Appeal held: ¹

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 consent. *But in my view, once the development commences, the obligation to comply with the conditions becomes unqualified. [emphasis added]*

To date, Ashton Coal has elected not to take up the Project Approval (PA 08_0182) for the South East Open Cut Project. In other words, Ashton Coal has not commenced the development under Project Approval (PA 08_0182) and is therefore not obliged to comply with the conditions of the planning approval until it elects to take up the approval.

In the event that Ashton Coal elects not to proceed with the South East Open Cut Project, the Project Approval (PA 08_0182) would lapse in accordance with Condition 5A, Schedule 2 of the Project Approval.

Current mining activities at the Ashton Coal Mine are being conducted in accordance with the conditions of the separate Development Consent (DA 309-11-2001-i) for the Ashton Coal Project, which has contemporary conditions for the management, monitoring and reporting of environmental impacts from the current operations and which also contains acquisition rights for certain properties. The conditions in the Development Consent (DA 309-11-2001-i) were modified by the Planning Assessment Commission (PAC) in June 2016.

The Modification does not involve additional environmental, social or economic impacts beyond that already approved for the South East Open Cut Project. If the approved development proceeds, the conditions will be complied with. The Modification merely clarifies the timing for the satisfaction of these conditions, and regularises potential issues with unlawful conditions (refer Appendix C).

¹ [Rao v Canterbury City Council [2000] NSWCCA 471 at 75]

2 PART A – RESPONSES TO GOVERNMENT AGENCY SUBMISSIONS

Responses to issues raised by Government stakeholders are provided in the subsections below.

2.1 DEPARTMENT OF PRIMARY INDUSTRIES

Issue/Comment

The Department of Primary Industries made the following comment:

- *Care should be taken not to disadvantage neighbouring agricultural properties compared to those near other mining projects with respect to availability and timing of acquisition rights.*

Response

The Modification does not disadvantage any properties compared with any others. If the project proceeds, the conditions of consent will be complied with.

The Modification seeks to clarify the wording regarding acquisition upon request in Condition 1, Schedule 3 of the Project Approval (PA 08_0182), not change the intent of this condition.

As described in Section 1.1, there is no obligation to comply with the conditions of a planning approval unless and until the applicant elects to commence the development. Therefore, the availability and timing of acquisition rights (i.e. upon commencement of the development) is the same for all mining projects.

Issue/Comment

The Department of Primary Industries made the following comment:

- *The proponent should not suspend routine land management practices or any applicable pest management through any suspension of Condition 61 of Schedule 3.*

Response

The Modification would not result in the suspension of current land management practices or pest management on Ashton Coal owned or controlled land.

Notwithstanding that Ashton Coal has to date not elected to take up the approval for the South East Open Cut Project it acknowledges its responsibilities as the owner of various rural land holdings and continues to manage and maintain the land, including implementing (among other things) weed, pest and bushfire control, and providing access for third party agricultural or grazing use, where appropriate.

Issue/Comment

The Department of Primary Industries made the following recommendation:

- *Further detail should be provided on what constitutes “all prerequisites” under subsection (b) of the proponent’s proposed new administrative condition. DPI recommends that this includes the various plans & programs required under conditions 34, 35, 37 and 38 of Schedule 3.*

Response

The groundwater verification and monitoring program, Low Permeability Barrier detailed design and Water Management Plan are required under Conditions 34, 35 and 38 (respectively) of Schedule 3 of the Project Approval (PA 08_0182) “prior to carrying out any development on site”. Therefore, these conditions are prerequisites to the commencement of development under the Project Approval (PA 08_0182). These conditions will be complied with if the project proceeds.

The Low Permeability Barrier Monitoring and Management Plan is required under Condition 37 of Schedule 3 of the Project Approval (PA 08_0182) “prior to the commencement of mining”. Therefore, this plan is required prior to overburden removal or coal extraction, but is not required prior to the commencement of any development (e.g. construction). This condition will be complied with if the project proceeds.

Issue/Comment

The Department of Primary Industries made the following recommendation:

- *References to NSW Office of Water should be changed to DPI Water*

Response

Noted and supported.

2.2 DIVISION OF RESOURCES AND ENERGY

It is noted that the Division of Resources and Energy made the following comment:

DRE has reviewed and assessed the adequacy of information in relation to Ashton South East Open Cut Modification Application and believes the Modification can be effectively managed with current consent conditions.

2.3 ENVIRONMENT PROTECTION AUTHORITY

It is noted that the Environment Protection Authority made the following comments:

The Environment Protection Authority (“EPA”) notes that the modification is for administrative changes only in relation to commencement of conditions in relation to the project. The EPA has reviewed the application letter and does not have any response in relation to the modification.

The EPA notes that operating conditions in respect of air quality monitoring and mitigation still prevail in the existing consent.

2.4 OFFICE OF ENVIRONMENT AND HERITAGE

Issue/Comment

The Office of Environment and Heritage (OEH) requested that Conditions 39 to 46 of Schedule 3 of the Project Approval (PA 08_0182) are amended to include a requirement that OEH is notified at commencement of development.

Response

Condition 45, Schedule 3 of the Project Approval (PA 08_0182) requires the Biodiversity Management Plan to be prepared in consultation with the OEH prior to the carrying out of any development on site. OEH will be made aware of the pending commencement of the project through this process, hence amendment to Conditions 39 to 46 of Schedule 3 as requested by the OEH is not required.

2.5 HERITAGE COUNCIL OF NEW SOUTH WALES

It is noted that the Heritage Council of NSW made the following comment:

The proposed modification to the conditions of approval do not appear to affect or concern historic heritage matters for the South East Open Cut Project.

2.6 ROADS AND MARITIME SERVICES

It is noted that Roads and Maritime Services made the following comment:

Roads and Maritime has reviewed the information provided and raises no objection to or requirements for the proposed development as it is considered there will be no significant impact on the nearby classified (State) road network.

3 PART B – RESPONSES TO SPECIAL INTEREST GROUPS

Responses to issues raised by special interest groups are provided on the subsections below.

3.1 BROKE FORDWICH WINE AND TOURISM ASSOCIATION

Issue/Comment

Broke Fordwich Wine and Tourism Association opposed any change to the notification of commencement of the Project, and the removal of time obligations not linked to project commencement.

Response

Firstly, the Modification is necessary to ensure that the conditions of consent are lawful.

Secondly, the Modification proposes inclusion of the following condition:

COMMENCEMENT OF DEVELOPMENT UNDER THIS APPROVAL

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.

This is an additional requirement above the existing conditions to allow for transparency regarding the commencement of development under the Project Approval (PA 08_0182).

As described in Section 1.1, Ashton Coal currently has no obligation to comply with the conditions of the Project Approval (PA 08_0182) until it elects to take up the approval and proceed with the development.

Issue/Comment

Broke Fordwich Wine and Tourism Association raised concerns regarding the level of community consultation.

Response

Given the administrative nature of the Modification, Ashton Coal considered its consultation on the proposed changes was sufficient.

It is noted that the community was provided an opportunity to comment on the Modification through the public exhibition process. In response to submissions made on the Modification, further detail justifying the proposed changes is provided in Section 1.1 and Appendix C.

3.2 HUNTER ENVIRONMENT LOBBY

Issue/Comment

Hunter Environment Lobby raised concern that the Modification sought an amendment to Condition 10A, Schedule 2 of the Project Approval (PA 08_0182) imposed by the New South Wales (NSW) Land and Environment Court (LEC).

Response

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.

Issue/Comment

Hunter Environment Lobby raised concern regarding the level of community consultation.

Response

Given the administrative nature of the Modification, Ashton Coal considered its consultation on the proposed changes was sufficient.

It is noted that the community was provided an opportunity to comment on the Modification through the public exhibition process. In response to submissions made on the Modification, further detail justifying the proposed changes is provided in Section 1.1 and Appendix C.

Issues/Comments

Hunter Environment Lobby stated that landholders in Camberwell should be able to request acquisition at a time suitable to them. In addition, Hunter Environment Lobby contended that the LEC intended that those owners with a right to request acquisition could exercise this right at any time after approval.

Hunter Environment Lobby also raised concerns regarding landholder uncertainty.

Response

Acquisition timing

The Modification seeks to clarify the wording regarding acquisition upon request in Condition 1, Schedule 3 of the Project Approval (PA 08_0182), not change the intent of this condition.

As described in Section 1.1, there is no obligation to comply with the conditions of a planning approval until the applicant elects to take up the approval and commence the development. The acquisition rights relate to the impacts of PA 08_0182, so it is common sense that the rights only apply if the project is to be commenced.

Intention of the Court

The LEC approved the South East Open Cut Project subject to conditions in Project Approval (PA 08_0182) pursuant to section 75J of the NSW *Environmental Planning and Assessment Act, 1979* (EP&A Act). In reaching this decision, the LEC weighed up the environmental, social and economic impacts of the South East Open Cut Project.

In reaching this decision, it is expected that the LEC would have been aware of the case law discussed in Section 1.1 and Appendix C. This is demonstrated in the decision of *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [2014] NSWLEC 129 at [392-393]:

Given the scale of the SEOC project and environmental impacts associated with it, the Applicant submitted the Court should not grant approval where the project cannot currently be carried out due to the uncertainty this will cause landowners affected by the SEOC project (ASOFC par 68).

*The Minister submitted that this is not a rational basis to refuse approval. If the Court is otherwise satisfied that approval should be granted for the SEOC project, it would not be appropriate to withhold approval because there may be some uncertainty about whether the project will in fact be carried out. This is a common state of affairs. **Approval for a project, as with consent for a development, does not carry with it an obligation to carry it out.** Ashton submitted that this is a property ownership issue, not a planning issue. Landholder uncertainty is not a reason for refusing the project. Project approval will produce certainty that the project will proceed. [emphasis added]*

The purpose of the Modification is to clarify the timing of acquisition rights (among other things).

The concept that acquisition rights should only apply while the relevant impact is occurring is supported by the *Voluntary Land Acquisition and Mitigation Policy For State Significant Mining, Petroleum and Extractive Industry Developments* (VLAMP) (NSW Government, 2014), which states:

The period during which the voluntary land acquisition rights are available should be determined taking into account the periods during which the voluntary land acquisition criteria are predicted to be exceeded.

It is noted that the four privately-owned residences in Camberwell village (i.e. 18, 23, 34 and 35) with acquisition rights under the Project Approval (08_0182) do not meet the criteria for voluntary acquisition under the VLAMP (NSW Government, 2014).

Issues/Comments

Hunter Environment Lobby stated that commencement of the development cannot occur until Ashton Coal has met Condition 10A, Schedule 2 of the Project Approval (PA 08_0182) and other conditions requiring the approval of various management plans prior to carrying out development on the site.

On this basis, Hunter Environment Lobby contended that the additional condition proposed by the Modification at Point 1.1 was unnecessary and would cause confusion.

Response

Firstly, Ashton Coal is not seeking to change Condition 10A, Schedule 2 of the Project Approval (PA 08_0182) and acknowledges that were this condition to be satisfied it would need to meet all other prerequisite conditions prior to commencing construction of the project.

Secondly, it is likely that the conditions requiring compliance (regardless of whether the project is commenced) are unlawful.

Ashton Coal considers the proposed new condition will provide clarity and transparency regarding the commencement of development under the Project Approval (PA 08_0182) by clearly indicating when it elects to take up the approval (assuming it has first met Condition 10A).

Issue/Comment

Hunter Environment Lobby objected to the proposed changes to the Statement of Commitments to defer the timing of these requirements.

Response

As described in Section 1.1 and Appendix C, it is a fundamental planning principle that Ashton Coal can elect whether to proceed with the South East Open Cut Project under the Project Approval (PA 08_0182). Until such time that Ashton Coal elects to take up the planning approval it is not obliged to comply with the conditions of Project Approval (PA 08_0182), including the Statement of Commitments.

Ashton Coal therefore considers that it is reasonable to defer a number of provisions in the Statement of Commitments until it elects to take up the Project Approval (PA 08_0182), assuming it has satisfied Condition 10A.

Ashton Coal is seeking to defer these timeframes using Schedule 6A and the former section 75W of the EP&A Act.

Issues/Comments

Hunter Environment Lobby raised concerns with the air quality in Camberwell village and stated that the properties should retain acquisition rights due to “regular exceedances of the national air quality standards”.

Response

Ashton Coal continuously monitors the levels of particulate matter with an equivalent aerodynamic diameter of 10 micrometres or less (PM₁₀) in Camberwell village (at Site 8). The results of the PM₁₀ monitoring are published regularly on Ashton Coal’s website and reported in the Annual Review required under the Development Consent (DA 309-11-2001-i) for the Ashton Coal Project.

The 2016 Annual Review (Ashton Coal, 2017) reported no air quality exceedances in Camberwell village attributable to the existing Ashton Coal operations:

A summary of the results from the statutory real-time PM₁₀ TEOM monitoring site (Site 8) for the reporting period is provided in Table 15. During the reporting period the short term 24-hour impact assessment criteria of 50 µg/m³ was exceeded twice at Site 8, including air emissions from all sources. An investigation into each event was undertaken, including using wind directional data and upstream/ downstream monitoring points, as well as assessing regional air quality trends and localised influences or events at the time. For both events, results of the investigation showed that the ACP’s contribution was less than 50 µg/m³. During the reporting period TEOM monitoring Site 8 remained below the long-term annual impact assessment criteria.

Privately-owned residences 18, 23, 34 and 35 in Camberwell village are not predicted to experience exceedances of the relevant air quality criteria as a result of the South East Open Cut Project (Ashton Coal, 2011). It is further noted that these residences do not meet the criteria for voluntary acquisition under the VLAMP (NSW Government, 2014).

Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2) [2014] NSWLEC 129 at [377] also concluded that the South East Open Cut Project would not have unacceptable health impacts in Camberwell village:

The Applicant's submission that there would be serious health impacts in Camberwell village as a result of the SEOC project is not established by the expert evidence of the air quality modelling experts or the health experts. That does not mean there will be no impact on residents of Camberwell village but these impacts are likely to be moderate in terms of amenity and health impacts.

As described in Section 1.1 and Appendix C, there is no obligation to comply with the conditions of a planning approval until the applicant elects to take up the approval and proceed with the development.

For the existing operations operating under the Development Consent (DA 309-11-2001-i) for the Ashton Coal Project:

- Condition 12, Schedule 3 of the Development Consent requires Ashton Coal to employ all reasonable and feasible avoidance and mitigation measures so that the Ashton Mine Complex does not cause or contribute to exceedance of relevant air quality criteria in Camberwell village; and
- Condition 15, Schedule 3 of the Development Consent provides voluntary acquisition rights to any residence on privately-owned land where the Ashton Mine Complex causes or contributes to an exceedance of the cumulative criteria, as set out in this condition.

3.3 HUNTER COMMUNITY NETWORK

The Hunter Communities Network provided the same submission on the Modification to that provided by the Hunter Environment Lobby.

The issues/concerns of the Hunter Communities Network on the Modification are therefore addressed in section 3.2 above.

3.4 HUNTER VALLEY PROTECTION ALLIANCE

Issue/Comment

Hunter Valley Protection Alliance raised concern that the Modification sought an amendment to Condition 10A, Schedule 2 of the Project Approval (PA 08_0182) imposed by the LEC.

Response

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.

Issue/Comment

Hunter Valley Protection Alliance raised concerns that the Modification would affect the amenity of surrounding farmers.

Response

The Modification would not change the potential air quality or noise impacts of the approved South East Open Cut Project. If the project proceeds, all conditions will be complied with.

3.5 HUNTER WINE COUNTRY PRIVATE IRRIGATION DISTRICT

Issue/Comment

Hunter Wine Country Private Irrigation District raised concerns that the voluntary acquisition rights for property owners would be delayed until the commencement of the South East Open Cut Project.

Response

The Modification seeks to clarify the wording regarding acquisition upon request in Condition 1, Schedule 3 of the Project Approval (PA 08_0182), not change the intent of this condition.

As described in Section 1.1 and Appendix C, there is no obligation to comply with the conditions of a planning approval until the applicant elects to take up the approval and proceed with the development.

Issues/Comments

Hunter Wine Country Private Irrigation District raised concerns regarding water impacts associated with the South East Open Cut, including potential impacts on Glennies Creek and impacts on water supply.

Response

The Modification would not change the potential water impacts of the approved South East Open Cut Project. These impacts have been previously assessed and approved pursuant to section 75J of the EP&A Act.

3.6 OZENVIROMENTAL PTY LTD

Issue/Comment

OzEnvironmental Pty Ltd raised concern that the Modification sought an amendment to Condition 10A, Schedule 2 of the Project Approval (PA 08_0182) imposed by the LEC.

Response

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 acknowledges 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.

Issue/Comment

OzEnvironmental Pty Ltd raised concerns that the voluntary acquisition rights for property owners would be delayed until the commencement of the South East Open Cut Project.

Response

The Modification seeks to clarify the wording regarding acquisition upon request in Condition 1, Schedule 3 of the Project Approval (PA 08_0182), not change the intent of this condition.

As described in Section 1.1, there is no obligation to comply with the conditions of a planning approval until the applicant elects to take up the approval and proceed with the development.

3.7 LOCK THE GATE ALLIANCE

Issue/Comment

Lock the Gate Alliance raised concern that no environmental, social or economic assessment of the Modification was conducted and that a justification for the Modification was not provided.

Response

Further justification for the Modification has been provided in Section 1.1 and Appendix C of this document. The Modification does not involve additional environmental, social or economic impacts.

The Modification is administrative as it seeks to clarify in the wording of the Project Approval (PA 08_0182) that the approval conditions do not apply until Ashton Coal elects to take up the approval and proceed with the South East Open Project. This clarification is consistent with the principles of planning law (including relevant case law) and will minimise the potential for misinterpretation of the conditions by third parties.

The LEC approved the South East Open Cut Project subject to conditions in Project Approval (PA 08_0182) pursuant to section 75J of the NSW *Environmental Planning and Assessment Act, 1979* (EP&A Act). In reaching this decision, the LEC weighed up the environmental, social and economic impacts of the South East Open Cut Project.

As the Modification is administrative, there would be no material change to the environmental, social or economic impacts associated with the Modification.

Issues/Comments

Lock the Gate Alliance raised concerns regarding landholder uncertainty and social impacts due to a perceived delay in the voluntary acquisition rights under the Project Approval.

Response

As described further in Section 3.2, landholder uncertainty and social impacts were considered by Pain J in approving the South East Open Cut Project (*Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [2014] NSWLEC 129).

The Modification seeks to clarify the wording regarding acquisition upon request in Condition 1, Schedule 3 of the Project Approval (PA 08_0182), not change the intent of this condition.

As described in Section 1.1 and Appendix C, there is no obligation to comply with the conditions of a planning approval until the applicant elects to commence the development. The acquisition rights relate to the impacts of the development, and do not apply if the development does not proceed.

The concept that acquisition rights should only apply while the relevant impact is occurring is supported by the VLAMP (NSW Government, 2014), which states:

The period during which the voluntary land acquisition rights are available should be determined taking into account the periods during which the voluntary land acquisition criteria are predicted to be exceeded.

Privately-owned residences 18, 23, 34 and 35 in Camberwell village are not predicted to experience exceedances of the relevant air quality criteria as a result of the South East Open Cut Project (Ashton Coal, 2011). It is further noted that these residences do not meet the criteria for voluntary acquisition under the VLAMP (NSW Government, 2014).

Issue/Comment

Lock the Gate Alliance raised concerns regarding the maintenance of agricultural productivity of lands owned by Ashton Coal.

Response

The Modification would not result in the suspension of current land management practices or pest management on Ashton Coal owned or controlled land.

Notwithstanding that Ashton Coal has to date not elected to take up the approval for the South East Open Cut it acknowledges its responsibilities as the owner of various rural land holdings and continues to manage and maintain the land, including implementing (among other things) weed, pest and bushfire control, and providing access for third party agricultural or grazing use, where appropriate.

Issue/Comment

Lock the Gate Alliance raised concerns regarding the delays to the establishment of biodiversity offsets.

Response

It is noted that the Office of Environment and Heritage made the following comment in its submission in this regard:

The suggested change would tie the delivery of the biodiversity offset package to the commencement of works for this project. This appears to be a reasonable approach that is consistent with other mining consents.

3.8 PLAINS CLANS OF THE WONNARUA PEOPLE

Issues/Comments

The Plains Clans of the Wonnarua People Registered Native Title Claimants raised concerns regarding the heritage impacts of the South East Open Cut Project.

Response

The Modification would not change the potential heritage impacts of the South East Open Cut Project. These impacts have been previously assessed and approved pursuant to section 75J of the EP&A Act.

Issue/Comment

The Plains Clans of the Wonnarua People Registered Native Title Claimants stated the Modification should be rejected as Ashton Coal does not own all of the land within the open cut footprint.

Response

As held by Pain J², land ownership is not a relevant consideration in the determination. It is not relevant to the Modification.

² *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [2014] NSWLEC 129.

4 PART C – RESPONSES TO PUBLIC SUBMISSIONS

Responses to issues raised by members of the public relevant to the Modification are provided in Table 1.

Appendix A provides a reconciliation of the relevant issues raised in each public submission for the Modification.

Table 1
Responses to Public Submissions

Issue No.	Issues/Comments Raised	Response
1	Concerns were raised that insufficient justification for the Modification had been provided.	Further justification for the Modification, including the legal basis, is outlined in Section 1.1 and Appendix C.
2	Concern was raised that the Modification was seeking an extension to the date that the consent lapses.	Condition 5A, Schedule 2 of the Project Approval (PA 08_0182) regulates the date that the approval lapses. The Modification does not seek to amend this condition.
3	Concerns were raised regarding the perceived delay in the voluntary acquisition rights and other commitments under the Project Approval.	The Modification seeks to clarify the wording regarding acquisition upon request in Condition 1, Schedule 3 of the Project Approval (PA 08_0182), not change the intent of this condition. As described in Section 1.1 and Appendix C, there is no obligation to comply with the conditions of a Project Approval until the applicant elects to take up the approval and proceed with the development. The concept that acquisition rights should only apply while the relevant impact is occurring is supported by the VLAMP (NSW Government, 2014), which states: <i>The period during which the voluntary land acquisition rights are available should be determined taking into account the periods during which the voluntary land acquisition criteria are predicted to be exceeded.</i> Privately-owned residences 18, 23, 34 and 35 in Camberwell village are not predicted to experience exceedances of the relevant air quality criteria as a result of the South East Open Cut Project (Ashton Coal, 2011). It is further noted that these residences do not meet the criteria for voluntary acquisition under the VLAMP (NSW Government, 2014).
4	Concerns were raised that the Modification seeks to amend Condition 10A, Schedule 2 of the Project Approval (PA 08_0182) imposed by the LEC.	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 acknowledges 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.
5	The owner of a rural property described the experiential impacts of existing mining operations and expressed concerns regarding investment in the property and the ability to sell.	Ashton Coal notes that the owner of this property has acquisition rights under Project Approval (08_0102) for the Rix's Creek North Open Cut Project and can exercise this right under the conditions of that planning approval.

Issue No.	Issues/Comments Raised	Response
6	Concerns were raised regarding existing air quality in Camberwell village. Concern was also raised regarding the provision of air quality monitoring data to tenants of mine-owned land.	Ashton Coal continuously monitors the levels of PM₁₀ in Camberwell village (at Site 8). The results of the PM₁₀ monitoring are published regularly on Ashton Coal's website and reported in the Annual Review required under the Development Consent (DA 309-11-2001-i) for the Ashton Coal Project. The 2015 Annual Review (Ashton Coal, 2016) reported no air quality exceedances in Camberwell village attributable to the existing Ashton Coal operations. For the existing Ashton Coal Project operating under the Development Consent (DA 309-11-2001-i) : • Condition 12, Schedule 3 of the Development Consent requires Ashton Coal to employ all reasonable and feasible avoidance and mitigation measures so that the Ashton Mine Complex does not cause or contribute to exceedance of relevant air quality criteria in Camberwell village; and • Condition 15, Schedule 3 of the Development Consent provides voluntary acquisition rights to any residence on privately-owned land where the Ashton Mine Complex causes or contributes to an exceedance of the cumulative criteria, as set out in this conditions; and • Condition 14, Schedule 3 and Conditions 1 and 2, Schedule 4 regulate potential air quality impacts on mine-owned land, including requirements regarding the provision of monitoring results.
7	Concerns were raised regarding the level of community consultation.	Given the administrative nature of the Modification, Ashton Coal considered its consultation on the proposed changes was sufficient. It is noted that the community was provided an opportunity to comment on the Modification through the public exhibition process. In response to submissions made on the Modification, further detail justifying the proposed changes is provided in Section 1.1 and Appendix C.
8	Concerns were raised regarding the Community Consultative Committee (CCC) process.	As noted in the Modification application, the CCC was informed of the Modification at the 29 November 2016 meeting. The CCC was established and is operated in accordance with its Charter and Condition 7, Schedule 5 of the Development Consent (DA 309-11-2001-i) for the Ashton Coal Project.
9	The owner of property 182 noted that consultation was not conducted with them as part of the Modification.	The Modification application incorrectly stated that consultation had occurred with the owner of property 182, instead of the owner of property 130.
10	Concerns were raised regarding land management of surrounding lands, in particular in relation to bushfire risk, feral animal control, weed control and current monitoring programs. Concerns were also raised regarding the timing of biodiversity offset measures.	The Modification would not result in the suspension of current land and pest management practices on Ashton Coal owned or controlled land. Notwithstanding that Ashton Coal has to date not elected to take up the approval for the South East Open Cut Project it acknowledges its responsibilities as the owner of various rural land holdings and continues to manage and maintain the land, including implementing (among other things) weed, pest and bushfire control, and providing access for third party agricultural or grazing use, where appropriate.

Issue No.	Issues/Comments Raised	Response
		In relation to the timing of biodiversity offset measures, it is noted that the Office of Environment and Heritage made the following comment in its submission in this regard: <i>The suggested change would tie the delivery of the biodiversity offset package to the commencement of works for this project. This appears to be a reasonable approach that is consistent with other mining consents.</i>
11	Concerns were raised that the Modification was inconsistent with the LEC judgement.	As described in Section 1.1 and Appendix C, there is no obligation to comply with the conditions of a planning approval until the applicant elects to commence the development. It is expected that the LEC would have been aware of the case law discussed in reaching its decision, as discussed further in Section 3.2. It is also important that conditions are lawful. Ashton Coal considers the proposed new condition in Section 1.1 of the Modification application will provide clarity and transparency regarding the commencement of development under the Project Approval (PA 08_0182).
12	It was suggested that the owners of properties 130 and 182 should be able to make a request for compensation or the provision of alternative accommodation prior to coal production commencing, recognising that compensation is only payable for the duration of coal production under the South East Open Cut Project.	It is considered inappropriate that terms of a compensation package or provision of alternative accommodation could be determined when the timing for the commencement of the South East Open Cut Project is unknown (and dependent on fulfilment of Condition 10A, Schedule 2). For example, the compensation package is based on the findings of an independent valuer's report which is dependent on current market conditions (among other factors) and could not be completed in the absence of a known commencement date.
13	Concerns were raised regarding the timing for preparation of the Camberwell Village Community Enhancement Strategy.	Condition 16, Schedule 2 of the Project Approval (PA 08_0182) (imposed by the LEC) takes precedence in the required timing for preparation of the Camberwell Village Enhancement Strategy. Under Condition 16, Schedule 2, the Camberwell Village Enhancement Strategy would be submitted to the DP&E within 12 months after the commencement of mining operations. The proposed changes to the Statement of Commitments have been revised to be consistent with Condition 16, Schedule 2 of the Project Approval (PA 08_0182) and are presented in Appendix B.
14	General concerns were raised regarding the potential environmental and social impacts of the South East Open Cut Project, including: impacts on water resources; cumulative health and air quality impacts; social impacts on Camberwell village; biodiversity impacts; impacts on agricultural land; and potential climate change impacts.	The impacts of the South East Open Cut Project have been previously assessed and approved pursuant to section 75J of the EP&A Act. As the Modification is administrative, there would be no material change to the environmental, social or economic impacts of the project as a result of the Modification.

5 REFERENCES

- Ashton Coal Operations Pty Limited (2011) *South East Open Cut Project and Modification to Development Consent (DA 309-11-2001-i) Additional Information and Project Revisions*. Available at: <https://majorprojects.affinitylive.com/public/ddbab06d824a40407b631fff3fc5bca5/11.%20Ashton%20South%20East%20Open%20Cut%20Project%20-%20Additional%20Information%20and%20Project%20Changes.pdf>.
- Ashton Coal Operations Pty Limited (2017) *Ashton Coal 2016 Annual Review*. Available at: http://www.ashtoncoal.com.au/icms_docs/266579_2016-annual-review.pdf.
- NSW Government (2014) *Voluntary Land Acquisition and Mitigation Policy For State Significant Mining, Petroleum and Extractive Industry Developments*. Integrated Mining Policy. 14 December 2014.

**APPENDIX A –
PUBLIC SUBMISSIONS**

Name	Issues Raised
Alan Leslie	2,3,6
Alistair Bowman	7,10
AnneMaree McLaughlin	3,4,11,14
Bev Smiles	1,3
Charlotte McCabe	6,14
E Bowman	9,14
George Taskal	3,11,14
Graeme Gibson	3,4,11
Ian Napier	3,4,11
Janet Fenwick	3,6
John Krey	1,3,11
Judith Leslie	2,3,6,14
Julia Wokes	14
Leslie Krey	3,11
Margaret Edwards	3,6,14
Marie Mitchell	2,3,6,14
Mike and Lyn Campbell	3,14
Murray Scott	4,11
Name Withheld	3
Name Withheld (182293)	5
Name Withheld (183767)	14
Name Withheld (183975)	1,3,4,6,7,8,11,13
Name Withheld (183983)	3,4,14
Robert McLaughlin	3,11
Ron Fenwick	3,6,14
Sharyn Munro	3,6
Stewart Ewen	14
Wendy Bowman	3,6,10,12,13

**APPENDIX B –
REVISED CHANGES TO STATEMENT OF COMMITMENTS**

Revised Changes to Statement of Commitments (Appendix 3 of Project Approval PA 08_0182)

Commitment	Requirement	Amended Timing
C1	Additional property acquisition of affected Camberwell village residents: 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 property acquisition conditions of the Project Approval.	Upon commencement of development of the Project
D2	Measures to minimise dust impacts on residents of Ashton owned properties: Make air quality monitoring data available to tenants.	Upon commencement of development of the Project
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 Glennies Creek adjacent to the SEOC Project area, equating to an area of approximately 35 ha	Within 3 years of commencing mining operations, subject to landownership authority
Q1	Offset strategy for SEOC: Prepare and implement an offset strategy for the SEOC, including: - Offsetting the clearing of EEC with like vegetation at a ratio of 2.5:1. - Securing the offset areas in perpetuity. - Offsetting the loss of hollows with the replacement of 3 nest boxes/hollows for each hollow removed.	To be prepared prior to commencing mining operations To be implemented within 3 years of commencing mining operations, subject to landownership authority
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 (<i>Eucalyptus crebra</i>), Grey Box (<i>E. moluccana</i>), Forest Red Gum (<i>E. tereticornis</i>), Grey Gum (<i>E. punctata</i>), Gorse Bitter Pea (<i>Daviesia ulicifolia</i>), Western Golden Wattle (<i>Acacia decora</i>), Fan Wattle (<i>A. amblygona</i>) and Silver-stemmed Wattle (<i>Acacia parviflora</i>). - 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 commencing mining operations, subject to landownership authority

Commitment	Requirement	Amended Timing
X3	Enhancement of vegetation connectivity: Enhance vegetation connectivity in an east to west direction and north to south along Glennies Creek.	Within 3 years of commencing mining operations, subject to landownership authority
Z1*	Prepare a Camberwell Village Enhancement Strategy: Prepare a Camberwell Village Enhancement Strategy in consultation with the residents of the village, Singleton Council and the DP&E, including a description of how the plan will be implemented and funded.	Within 12 months of commencing mining operations

* Note: The wording of Commitment Z1 has been revised to change “Camberwell Village Enhancement Plan” to “Camberwell Village Enhancement Strategy” for consistency with Condition 16, Schedule 2 of the Project Approval PA 08_0182.

**APPENDIX C –
LEGAL ADVICE**

MinterEllison

5 April 2017

Mr Howard Reed
Director
Resource Assessments
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Dear Marcus

Ashton Coal Operations: South East Open Cut Project (PA 08_0182 MOD 1)

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 refer to your letter to the proponent dated 22 February 2017 in respect of the proposed modification. Your letter refers to legal advice and requests that the proponent include further details regarding the legal basis for the advisability or necessity of its proposed changes to approval conditions.

The purpose of this letter is to provide those details.

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)*.

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.

As an example of such a condition, condition 1 in Schedule 3 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 EP&A 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 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.

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 EP&A 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 EP&A 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 EP&A 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 EP&A Regulations that certain developments do not need land owner consent (see clause 49 and clause 8J of the former EP&A 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 EP&A Act that does this.

Given the significant financial implications and potential for criminal prosecution in respect of the above, we would suggest that a modification of the Ashton SEOC Approval is necessary.

The modification application proposes 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 in place prior to commencing the consent.

We consider this approach to be an appropriate solution to the issues identified above.

There is clearly a public interest in ensuring that conditions of a planning approval are lawful and enforceable. Accordingly, it is difficult to argue that the proposed modification is not necessary.

Yours faithfully

MinterEllison

A handwritten signature in black ink, appearing to read 'S Ball'.

Simon Ball

Partner

Contact: Simon Ball T: +61 2 9921 4353
F: +61 2 9921 8069 simon.ball@minterellison.com
OUR REF: SPB

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 Glennies Creek adjacent to the SEOC Project area, equating to an area of approximately 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 (<i>Eucalyptus crebra</i>), Grey Box (<i>E. moluccana</i>), Forest Red Gum (<i>E. tereticornis</i>), Grey Gum (<i>E. punctata</i>), Gorse Bitter Pea (<i>Daviesia ulicifolia</i>), Western Golden Wattle (<i>Acacia decora</i>), Fan Wattle (<i>A. amblygona</i>) and Silver-stemmed Wattle (<i>Acacia parviflora</i>). ▪ 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 compensate 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 dairy 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 Table 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 property 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.