

13 April 2018

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

By email: [Marcus.Ray@planning.nsw.gov.au](mailto:Marcus.Ray@planning.nsw.gov.au)

Dear Mr Ray,

**South East Open Cut Project (PA 08\_0182) Modification: Proponent's Response to Submissions**

1. We act for Hunter Environment Lobby (**HEL**), a non-profit community environment group with a long-standing involvement with the above Project.
2. We refer to Ashton Coal's application under s 75W of the *Environment Planning and Assessment Act 1979* (NSW) (**EP&A Act**), dated 19 January 2017, to modify PA 08\_0812 (**Modification Application**). We also refer to our letter to you, dated 16 February 2017 (copy **enclosed**) and to Ashton Coal's 'Response to Submissions', dated March 2018 (**Response to Submissions**).
3. As discussed between Elaine Johnson, Principal Solicitor of our office, and Melanie Hollis, of your office, on 27 March 2018, the purpose of this letter is to raise our concerns regarding the Modification Application and Ashton's Response to Submissions.
4. The modifications sought can be divided into two groups:
  - (a) the insertion of a new condition, headed 'Commencement of development under this approval' (**Proposed Commencement Condition**); and
  - (b) the insertion of additional text in a number of conditions stating that those conditions will only operate if/when Ashton issues a notice to the Secretary stating that development has commenced.

In relation to the latter, our concerns relate to, and this letter addresses, amendment only to conditions that deal with land acquisition requirements.

5. We have three major concerns in relation to the Modification Application and Ashton's Response to Submissions, each of which are discussed in further detail below:
  - (a) In our view, the Modification Application is in effect a back door attempt to appeal the decisions of the NSW Land and Environment Court (**NSWLEC**),<sup>1</sup> which issued the Approval, and the NSW Court of Appeal

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<sup>1</sup> *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [2014] NSWLEC; *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 4)* [2014] NSWLEC 200.

(NSWCA),<sup>2</sup> which upheld the Approval (specifically in relation to Condition 10A of Schedule 2 (**Condition 10A**)).

- (b) On our reading, the Proposed Commencement Condition would create the possibility for the Approval to continue indefinitely. That is, even if Ashton is unable or unwilling to commence mining operations (for example, if Ashton is unable to acquire the requisite interest over Property 129), then so long as it completes what it considers to be the 'prerequisites' to the commencement of development (from which it notably excludes 'any conditions requiring the Proponent to acquire any property') and notifies the Secretary of the Department that it has 'commenced' the development, the Approval will be deemed to have commenced. As a result, even in the absence of physical commencement, being actual development work, the project would not lapse pursuant to Condition 5A of Schedule 2 (**Condition 5A**). Importantly, while Ashton states in its Response to Submissions that it is not seeking to modify Condition 10A, the amendments sought would fundamentally modify the *effect* of Condition 10A.
  - (c) Ashton seeks to rely on conditions in the approvals for the Warkworth Continuation Project (SSD-6464) and the Mt Thorley Continuation Project (SSD-6465) as 'precedents' for including the Proposed Commencement Condition. We do not think that those approvals offer support as 'precedents' for the Modification Application.
6. If approved, the Modification Application would fundamentally change what has been approved. It would also result in extreme prejudice to the owner of Property 129, as well as to the owners of all other properties to which acquisition rights apply.
7. For the above reasons, and as discussed in more detail below, we think that it is inappropriate and beyond the Minister's powers under (former) s 75W of the EP&A Act to approve the Modification Application.

***The Modification Application is in effect an unofficial 'appeal' of the NSWCA's 2015 decision***

8. Ashton argues in its Response to Submissions that the proposed modification is necessary because:

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

9. As noted earlier, the conditions of approval were:
- (a) determined by the NSWLEC;
  - (b) the subject of an appeal brought by Ashton in the NSWCA; and
  - (c) upheld by the NSWCA.

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<sup>2</sup> *Ashton Coal Operations Pty Ltd v Hunter Environment Lobby Inc* [2015] NSWCA 358 (**Ashton v HEL**).

10. Notably:
- (a) Ashton did not raise the argument that it now raises in its Modification Application before the NSWLEC or the NSWCA;
  - (b) Ashton only appealed the decision of the NSWLEC in relation to Condition 10A;
  - (c) Ashton did not appeal the decision of the NSWCA; and
  - (d) in argument before the NSWLEC, Ashton specifically contemplated that the land acquisition rights established in Table 1 of Condition 1 in Schedule 3 to the (then proposed) approval were 'the accepted planning resolution' to deal with the issue specific to Property 129. In other words, it did not identify any lawfulness issue with those conditions at that time.
11. As such, in our view the Modification Application is an attempt to appeal the decisions of the NSWLEC and the NSWCA through the 'back door'. In our view, this is both inappropriate and beyond the Minister's powers under s 75W.<sup>3</sup>
12. We note that the legal advice attached to the Modification Application and the Response to Submissions raise concerns about criminal liability for failure to comply with the conditions that Ashton says are unlawful. This appears to be one of the justifications given for the Modification Application. However, if criminal proceedings were brought against Ashton for alleged failure to comply with one of those conditions, it would be open for Ashton to make its argument of unlawfulness before the relevant court at that time and this would be an appropriate forum for such argument.

***The Proposed Modification creates the possibility of an indefinite approval***

13. Currently, pursuant to Condition 5A, the Approval will lapse 5 years after the date that approval is granted 'unless the project is commenced before that day'. This 5 year limit can be extended by up to two years by the Secretary on application by Ashton. In other words, Ashton must 'commence' the project within, at most, 7 years of the Approval date.
14. The proposed new condition (**Proposed Commencement Condition**) reads as follows (our emphasis):

*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.***

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<sup>3</sup> The scope of the Minister's power to approve 'modifications' was recently considered by the NSWLEC in *Billinudgel Property Pty Ltd v Minister for Planning* [2016] NSWLEC 139.

15. Critically, Condition 10A is in our view properly characterised as a prerequisite to the commencement of development. We also note that Ashton characterises Condition 10A as a 'prerequisite' at page 1 of its Response to Submissions.<sup>4</sup> Whilst Ashton's Response to Submissions seems to suggest that the Proposed Modification would not modify Condition 10A's status as a prerequisite, we disagree.
16. Condition 10A reads as follows (our emphasis):

*The Proponent must not carry out **any** development work on the Project site until it has:*

*(a) Purchased, leased or licensed property 129 from the owner of property 129.*
17. As a result, under the Approval Ashton cannot conduct any development work on the Project site until it has acquired the requisite interest in Property 129. If Ashton has not acquired the requisite interest in Property 129 before the 5 year (or 5 years plus 2 years) lapsing date pursuant to s 5A, and therefore cannot conduct development work prior to the lapsing date, the Approval will lapse.
18. In our view the Proposed Commencement Condition, when read together with Condition 10A, would mean that Ashton no longer needs to commence actual development works in order to be considered to have 'commenced' development for the purposes of Condition 5A. This is because the Proposed Commencement Condition specifically excludes the requirement to acquire property 129 from the meaning of 'prerequisites to the commencement of development'. The result is that even if Ashton has not acquired the requisite interest in Property 129, and is therefore prohibited under Condition 10A from undertaking 'any development work', it could nevertheless notify the Secretary of the commencement date and the Secretary could agree that all prerequisites under the approval have been met.
19. Once this has occurred, the lapsing provision would no longer have any effect. The result would be that the approval could operate for an undefined period of time, and potentially in perpetuity. The Approval would operate in perpetuity if either:
  - (a) Ashton never acquires the requisite interest in Property 129; or
  - (b) Ashton acquires the requisite interest in Property 129 but decides never to act on, or 'take up', the Approval.
20. This approach to 'commencement' is foreign to standard planning law principles and is contrary to the terms of the EPA Act as it is currently drafted, and was at the time the Project was approved. Under s 4.53 of the EPA Act (previously s 95, referred to by the former Clause 11, Schedule 6A in respect of the meaning of physical commencement for Part 3A projects), physical commencement means actual development work. It is not an abstract concept determined by the proponent and agreed to by the Secretary. As noted, under Condition 10A Ashton is not permitted to undertake any development work until

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<sup>4</sup> Notably, the land acquisition provisions set out in Schedule 3 to the Approval are not framed as 'prerequisites' to the commencement of development.<sup>4</sup> Rather, they only require Ashton to act if/when it receives a written request for acquisition from a listed landowner.

such time as it has secured the requisite property interest for Property 129. This was a key factor in gaining approval from the Court in the first place.

21. It is also clearly contrary to the intention of the Approval as granted by the NSWLEC and upheld by the NSWCA.
22. The NSWCA confirmed that Condition 10A was inserted by the NSWLEC for the primary purpose of ensuring that no development work would be carried out until such time as Ashton has full control of the development, thereby ensuring that the project proceeded in its entirety.<sup>5</sup> The Court of Appeal found no error in the NSWLEC's conclusion that if development were to proceed without Ashton acquiring the requisite interest in property 129, the development conducted would not be the development that the Court had assessed and approved.
23. The DPE ought not undermine the primary purpose of Condition 10A which was to ensure that no development work is carried out until such time as Ashton has full control of the development site.
24. Further, the NSWLEC did not consider the environmental impacts of a project approval that could operate in perpetuity and be exercised at an unknown and undefined time in the future. If the Minister were to approve the Proposed Modification, the effect would be to approve environmental impacts that have not been assessed. The Minister would be approving a project that is different to that which was assessed and approved by the NSWLEC and NSWCA.<sup>6</sup>
25. The NSWLEC specifically contemplated a situation where Ashton was unable to acquire the requisite interest in Property 129. In those circumstances, the Court considered that it would be necessary for Ashton to submit a new project application.<sup>7</sup> That reasoning remains valid. If Ashton cannot acquire the requisite interest in Property 129 within the time stipulated by condition 5A, the approval should lapse. Should Ashton wish to pursue the same or a similar project, it should be required to seek a new approval.
26. In our view, the proposed modifications are both inappropriate and beyond the scope of the Minister's power under s 75W and should not be made.

#### ***'Precedents' for the Proposed Commencement Condition***

27. Ashton argues that there is precedent for including the Proposed Commencement Condition and refers to 'the inclusion of a similar condition' in approvals issued by the (former) Planning Assessment Commission (**PAC**) for the Warkworth Continuation Project (SSD-6464) and the Mt Thorley Continuation Project (SSD-6454). Without making any detailed comment as to the operation or appropriateness of those conditions, we note that while both of those approvals include land acquisition conditions similar to those in the Approval:
  - (a) neither of those approvals include a 'note' that purports to exclude land acquisition conditions from the meaning of 'prerequisites to the commencement of development';

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<sup>5</sup> *Ashton v HEL* [2015] NSWCA 358 at [31], see also [34].

<sup>6</sup> This is in contrast to Ashton's position: see Response to Submissions at p 2.

<sup>7</sup> *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 4)* [2014] NSWLEC 200 at [13].

- (b) the land acquisition conditions in those approvals do not include provisions that state that they only have effect following the issuing of a notice of commencement by the Proponent;
  - (c) neither of those approvals contain conditions similar or equivalent to Condition 10A. The land acquisition conditions in those approvals do not, on our reading, create scope for approvals to operate indefinitely even if a proponent does not commence development work (we note the operation of s 4.53 (formerly s 95) of the EP&A Act ('Lapsing of consent') on those approvals in the event that the proponent does not physically commence within 5 years of the date of the approvals).
28. If the Modification Application is approved, then even if Ashton is unable to acquire the requisite interest in Property 129, Ashton would be able to 'commence' the project and would in effect have an approval with no lapsing date. This is contrary to the concept of 'commencement' embodied in the EP&A Act and is contrary to the intention of the NSWLEC and NSWCA in determining the conditions of approval, in particular Condition 5A. Further, it would cause extreme prejudice to the owner of property 129 as well as to the owners of all other properties to which acquisition rights attach, as all would be subject to interminable uncertainty as to whether the project will go ahead and whether they should or will ultimately exercise their acquisition rights. Finally, the NSWLEC did not consider nor approve an approval in perpetuity.
29. Accordingly, it is our view that Ashton's Response to Submissions does not provide adequate justification for the proposed modification. It is our view that the proposed modification is inappropriate and beyond the power of the Minister under s 75W of the EPA Act. It is not merely seeking to change the terms of the approval, but seeking to fundamentally change what has been approved. The Modification Application cannot be approved.
30. Please do not hesitate to contact us to discuss any of the matters in this letter.

Yours sincerely,  
**EDO NSW**



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Solicitor

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