

MinterEllison

10 May 2018

BY EMAIL: Marcus.ray@planning.nsw.gov.au

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

Dear Marcus

**Ashton South East Open Cut Project Modification (PA 08_0182) (Proposed Modification)
Proponent's Response to Further Submissions**

1. Introduction

- 1.1 We refer to the letter from the NSW Environmental Defenders Office (**EDO**) on behalf of the Hunter Environment Lobby (**HEL**) dated 13 April 2018 in relation to the Proposed Modification (**EDO Submission**).
- 1.2 The EDO Submission raises a number of legal issues associated with the Proposed Modification. For the purposes of clarity, and for the finalisation of the assessment of the Proposed Modification, we have been asked to respond to the EDO Submission.
- 1.3 As established below, the EDO Submission raises a number of inaccurate, tenuous or irrelevant matters and should be dismissed. A brief response is provided below. A more detailed and comprehensive response is provided in the table at Annexure A.

2. Summary of Response

- 2.1 The EDO Submission raises three major concerns with the Proposed Modification. In brief, our response to those concerns is as follows.

'Back door attempt to appeal decisions of the Court'

- 2.2 The EDO Submission suggests that the Modification Application is in effect a '*back door attempt to appeal the decisions of the NSW Land and Environment Court*' (**NSWLEC**), which issued the Approval, and the NSW Court of Appeal (**NSWCA**), which upheld the Approval (specifically in relation to Condition 10A of Schedule 2 (**Condition 10A**)).
- 2.3 This assertion should be rejected for numerous reasons:
 - (a) firstly, the expression 'back door attempt' implies that indirect or dishonest means are being used to modify the Project Approval. On the contrary:



- (i) the Modification Application has been made publicly available on the Department of Planning and Environment's website since January 2017;
- (ii) the EDO and HEL have taken the opportunity to make numerous submissions in relation to the Modification Application;
- (iii) the consent authority for a s75W modification is the Minister, not the court.

It follows that there is nothing which is unusual, indirect or dishonest about the Proposed Modification.

- (b) secondly, in relation to whether a modification can 'appeal' a decision of the Court, the *Environmental Planning and Assessment Act 1979 (EP&A Act)* has long made provision for modification by a consent authority of a consent granted by the Land and Environment Court of NSW after a merit appeal (see s4.56, formerly s96AA). It is usual practice for the proponent to lodge the request with the original consent authority. Further, it is difficult to imagine how the Land and Environment Court, or the Court of Appeal would be interested in discrete timing issues associated with the conditions of the Project Approval when the substance of those conditions is not being amended; and
- (c) thirdly, for completeness, the timing of the satisfaction of the relevant conditions was not at issue in either proceeding. Therefore, the Proposed Modification does not seek to directly overturn or challenge any finding of fact or law by the Court.

2.4 It therefore cannot reasonably be said that the Proposed Modification is in any way an 'appeal' of decisions of the Court.

Confusion in relation to commencement and possibility for approval to continue indefinitely

2.5 The EDO Submission suggests that the Proposed Commencement Condition would create the possibility for the Approval to continue indefinitely. In particular:

*"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**)."*

[emphasis added]

- 2.6 In response, this is a complete misreading of the Proposed Commencement Condition. The proponent does not notify the Department that it has 'commenced' the development, it notifies the Department that the prerequisites and preconditions to commencement have been satisfied. Only after the Department agrees in writing can the development be actually physically commenced. A written notification could not be sufficient to actually physically commence the Project Approval as required by condition 5A.
- 2.7 Further, the intent of the Modification Application is not to create the possibility of the Project Approval operating indefinitely. The intent of the Modification Application is to permit the proponent to accept the burdens of the approval after it is taken up.
- 2.8 For abundant clarity, it is intended that the following process would apply prior to the approved development being physically commenced:
 - (a) satisfaction of the relevant administrative preconditions to the carrying out of the development, including the submission and approval of relevant plans of management;
 - (b) notification of the Secretary by the proponent in writing of the intention to commence the approval and the proposed date of commencement;
 - (c) purchase, lease or licence property 129 from the owner of property 129 in accordance with condition 10A;

- (d) written notification from the Secretary that all prerequisites to the commencement of development under the approval have been met; and
- (e) physical commencement of the carrying out of the approved development, before the lapse of the approval pursuant to condition 5A.

2.9 The proponent's view is that the Project Approval is capable of being conditioned appropriately for this to occur. To avoid any confusion between the 'taking up' of the consent and actual physical commencement of the development, the Department may wish to consider the following amendments to the Proposed Commencement Condition:

"The Proponent shall:

(a) notify the Secretary in writing of the intention to commence the approval and the proposed 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 consent have been met.

Note 1:

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.

Note 2:

Satisfaction of this condition by obtaining the Secretary's agreement in writing is not sufficient to physically commence the development in accordance with condition 5A"

2.10 Further, for abundant clarity the Department should consider amending condition 5A to refer to "physical commencement" rather than "commencement". Such an amendment:

- (a) would appear to address a concern raised by the EDO Submission, as it would remove any remote possibility that the approval could be commenced by written notification or could remain 'valid in perpetuity';
- (b) would not fundamentally change the intent of condition 10A, as the project could not commence without lease, licence or purchase of property 129; and
- (c) would clarify the lapsing provisions of condition 5A to ensure the condition is consistent with other development consents and planning approvals in NSW.

Precedent

2.11 The EDO Submission states that the Warkworth Continuation Project (SSD-6464) and the Mt Thorley Continuation Project (SSD-6465) do not "offer support as 'precedents' for the Modification Application."

2.12 In response, we would note:

- (a) a precedent is not required in respect of the Modification Application – the proposed modification is within the scope of s75W and is therefore lawful (further detail provided below); and
- (b) the Department's practice with respect to other approved mines is perhaps relevant to the merits of the Modification Application as a matter of consistency and fairness.

EDO Submission silent on key issue

2.13 It is notable that the EDO Submission does not respond to the case law referred to in the Modification Application which establishes that:

- (a) a proponent "takes up" a development consent/planning approval and it does not commence automatically (*Pilkington v Secretary of State for the Environment and others* [1974] 1 ALL ER; *Prosser v Minister of Housing and Local Governments* (1968) 67 LGR 109); and
 - (b) 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 (*Heavens Door Pty Ltd* [2004] HCA 59, *Rao v Canterbury City Council* [2000] NSW CCA 471, *King, Markwick, Taylor, and others v Bathurst Regional Council* [2006] NSW LEC 505)
- 2.14 The only comment made by the EDO Submission is that "*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.*"
- 2.15 In response, it is an absurd proposition to suggest that unlawful conditions ought to remain on a public document such as a planning approval. It would be a significant waste of resources for criminal proceedings to be brought, only for Ashton to have a possible defence (as suggested by the EDO).
- 2.16 For these reasons, we consider that the EDO's submission does not bring anything relevant to this application, and should be dismissed.
- 3. Proposed Modification is lawful**
- 3.1 There is no credible suggestion that an approval of the Modification Application would be unlawful. In particular:
- (a) the EP&A Act clearly contemplates the modification of consents granted by the Court;
 - (b) as described above, the Approval is capable of being appropriately conditioned to allow for an appropriate process for commencement; and
 - (c) the modification is within the broad power of s75W as considered in *Barrick v Williams* [2009] NSWCA 275 (**Barrick**) and *Williams v Minister for Planning and Anor. (No 2)* [2011] NSWLEC 62. There is nothing in the *Bilinudgel* decision referred to in the EDO Submission or otherwise that would take the modification beyond power.
- 4. Proposed Modification has abundant merit**
- 4.1 Having established that the proposed modification is lawful, the issue for the Department then becomes a matter of the merits of the modification. In this regard, we note:
- (a) there is a serious legal issue with the conditions (as drafted);
 - (b) the modification application (and recent enforcement action from the Department) demonstrates that the proposed modification is necessary, desirable and reasonable. It is also consistent with modified approvals for other coal mines;
 - (c) as identified on a number of occasions, the proponent is seeking to accept the burdens of the approval when the approval is taken up, in accordance with the case law. The substance of the relevant conditions is not being amended.
- 5. Other issues**
- 5.1 The Department would be aware that on 1 March 2018, section 75W was repealed.
- 5.2 However, as the Modification Application was lodged before 1 March 2018, the continued application of section 75W is preserved by the savings and transitional provisions in Schedule 2, Clause 3BA(3) of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*.
- 5.3 We respectfully note that under Schedule 2, clause 3BA(4), a request to modify an approved project cannot be dealt with under section 75W if the request has not been determined by 1 September 2018. We therefore request that the Modification Application is determined without delay.

Please contact Simon Ball of this office if you have any questions in relation to this advice.

Yours faithfully
MINTER ELLISON



Simon Ball
Partner



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Response to EDO letter dated 13 April 2018

Para	Content	MinterEllison response
1.	We act for Hunter Environment Lobby (HEL), a non-profit community environment group with a long-standing involvement with the above Project.	No comment
2.	We refer to Ashton Coal's application under s 75W of the <i>Environment Planning and Assessment Act 1979</i> (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).	No comment
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.	No comment
4.	The modifications sought can be divided into two groups:	No comment
(a)	the insertion of a new condition, headed 'Commencement of development under this approval' (Proposed Commencement Condition); and	No comment
(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.	No comment
	In relation to the latter, our concerns relate to, and this letter addresses, amendment only to conditions that deal with land acquisition requirements.	No comment
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:	These concerns are addressed 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), ¹ which issued the Approval, and the NSW Court of Appeal (NSWCA), ² which upheld the Approval (specifically in relation to Condition 10A of Schedule 2 (Condition 10A)).	This assertion is unhelpful and inaccurate for numerous reasons. Firstly, the expression 'back door attempt' implies that indirect or dishonest means are being used to modify the consent. HEL would be aware that:

¹ *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.

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

Para	Content	MinterEllison response
		- o the Modification Application has been made publicly available on the Department of Planning and Environment's website since January 2017; - o HEL has had the opportunity to make numerous submissions in relation to the Modification Application; and - o the consent authority for a s75W modification is the Minister, not the court. • in relation to whether a modification can 'appeal' a decision of the Court, the EP&A Act has long made provision for modification by a consent authority of a consent granted by the Land and Environment Court of NSW (NSWLEC) after a merit appeal (see s4.56, formerly s96AA). • In this case, the substance of the conditions is not being modified, only the timing. The argument that the modification is a de facto 'appeal' is therefore not accepted. • It is difficult to imagine how the Land and Environment or the Court of Appeal would be interested in timing issues associated with the conditions of the Project Approval; and • for completeness, the timing of the satisfaction of the relevant conditions was not at issue in either proceeding.
(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.	In response, this is a complete misreading of the Proposed Commencement Condition. The proponent does not notify the Department that it has 'commenced' the development, it notifies the Department that the prerequisites and preconditions to commencement have been satisfied. Only after the Department agrees in writing can the development be actually physically commenced. A written notification of this type could not be sufficient to actually physically commence the Project Approval as required by condition 5A. Ashton considers it necessary to carry out physical works to commence the Project Approval. The intent of the Modification Application is not to create the possibility of the Project Approval operating indefinitely. The intent of the Modification Application is to permit the proponent to follow the following process prior to works commencing: • satisfaction of the relevant administrative preconditions to the carrying out of the development, including the submission and approval of relevant plans of management; • notification of the Secretary in writing of the intention to commence the Approval and the proposed date of commencement of the approval;

Para	Content	MinterEllison response
		• purchase, lease or licence property 129 from the owner of property 129 in accordance with condition 10A; • written notification from the Secretary that all prerequisites to the commencement of development under the approval have been met; and • commencement of the carrying out of the approved development, before the lapse of the approval pursuant to condition 5A. This process is a necessary response to the time based conditions of the Project Approval, some of which contain land acquisition requirements. The proponent's view is that the Project Approval is capable of being conditioned appropriately for this to occur.
(c)	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.	A precedent is not required in respect of the Modification Application – the proposed modification is within the scope of s75W and is therefore lawful. However, the Department's practice with respect to other approved mines is relevant to the merits of the Modification Application (and as a matter of consistency and fairness). It is noted that HEL do not offer a reason as to why other SSD approvals are not considered relevant or a precedent.
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.	The purpose of the Proposed Modification is to cure a ground of potential invalidity in the conditions of consent. The proponent re-iterates that the Modification Application does not alter any physical aspect of the approved development, it is administrative in nature only and simply ties to the timing of certain conditions with the commencement of the approved development. It is therefore not accurate to suggest that the Modification Application would fundamentally change what has been approved or result in extreme prejudice to any property owner.
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 reasons offered by HEL do not establish that it is inappropriate or unlawful to approve the Modification Application.
<i>The Modification Application is in effect an unofficial 'appeal' of the NSWCA's 2015 decision</i>		
8.	Ashton argues in its Response to Submissions that the proposed modification is necessary because:	No comment
	<i>There is significant doubt as to whether the existing conditions of the Project Approval (PA 08_0182) (which require compliance regardless of whether</i>	No comment

Para	Content	MinterEllison response
	<i>consent is taken up) are lawful. The modification seeks to clarify and regularise this issue.</i>	
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.	With respect to the NSWLEC and the NSWCA, the identity of the consent authority is not a relevant consideration with respect to the Modification Application, and a condition of consent granted by a court does not automatically cure it of all legal issues. The timing of the satisfaction of the relevant conditions was not at issue in either proceeding.
10.	Notably:	
(a)	Ashton did not raise the argument that it now raises in its Modification Application before the NSWLEC or the NSWCA;	The proponent obtained legal advice in respect of the issue regarding the timing of the satisfaction of the relevant conditions in 2016.
(b)	Ashton only appealed the decision of the NSWLEC in relation to Condition 10A;	Neither party was aware of the legal issue regarding the invalidity of certain conditions in 2014 and 2015. Not relevant to the Modification Application.
(c)	Ashton did not appeal the decision of the NSWCA; and	Neither party was aware of the legal issue regarding the invalidity of certain conditions in 2014 and 2015. Not relevant to the Modification Application.
(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.	Neither party was aware of the legal issue regarding the invalidity of certain conditions in 2014 and 2015. The proponent obtained legal advice in respect of the issue regarding the timing of the satisfaction of the relevant conditions in 2017.
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. ³	Please see response at row 5(a). There is no finding in <i>Billinudgel Property Pty Ltd v Minister for Planning</i> [2016] NSWLEC 139 that altered the scope of section 75W in a manner relevant to the Modification Application.
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	It is an absurd proposition to suggest that unlawful conditions ought to remain on a public document such as a development consent or project approval. It would be a

³ 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.

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	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.	significant waste of resources for criminal proceedings to be brought, only for Ashton to have a possible defence as suggested by HEL. This submission should be rejected.
<i>The Proposed Modification creates the possibility of an indefinite approval</i>		
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.	Agreed.
14.	The proposed new condition (Proposed Commencement Condition) reads as follows (our emphasis):	Agreed.
	<i>The Proponent shall:</i> (a) <i>notify the Secretary in writing of the date of commencement of development under this approval; and</i> (b) <i>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.</i> <i>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.</i>	Agreed. As stated above, the intent of the Modification Application is to permit the proponent to follow the following process prior to works commencing: • satisfaction of the relevant administrative preconditions to the carrying out of the development, including the submission and approval of relevant plans of management; • notification of the Secretary in writing of the intention to commence the Approval and the proposed date of commencement of the approval; • purchase, lease or licence property 129 from the owner of property 129 in accordance with condition 10A; • written notification from the Secretary that all prerequisites to the commencement of development under the approval have been met; and • commencement of the carrying out of the approved development, before the lapse of the approval pursuant to condition 5A.
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. 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.	Ashton agrees that the satisfaction of condition 10A is a prerequisite to the carrying out of any physical development work.

Para	Content	MinterEllison response
16.	Condition 10A reads as follows (our emphasis):	Agreed.
	<i>The Proponent must not carry out any development work on the Project site until it has:</i> (a) <i>Purchased, leased or licensed property 129 from the owner of property 129.</i>	Ashton agrees that the satisfaction of condition 10A is a prerequisite to the carrying out of any physical development work, and therefore the commencement of the Project Approval.
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.	Agreed.
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.	Ashton disagrees that the satisfaction of the Proposed Commencement Condition would be adequate to lawfully 'physically commence' the Project Approval as no physical development works are required to satisfy the condition. The intent of the Modification Application is to permit the proponent to follow the following process prior to works commencing: • satisfaction of the relevant administrative preconditions to the carrying out of the development, including the submission and approval of relevant plans of management; • notification of the Secretary in writing of the intention to commence the Approval and the proposed date of commencement of the approval; • purchase, lease or licence property 129 from the owner of property 129 in accordance with condition 10A; • written notification from the Secretary that all prerequisites to the commencement of development under the approval have been met; and • commencement of the carrying out of the approved development, before the lapse of the approval pursuant to condition 5A. The proponent's view is that the Project Approval is capable of being conditioned appropriately for this to occur.
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:	Disagree. See response at row 18
(a)	Ashton never acquires the requisite interest in Property 129; or	Disagree. See response at row 18

Para	Content	MinterEllison response
(b)	Ashton acquires the requisite interest in Property 129 but decides never to act on, or 'take up', the Approval.	Disagree. See response at row 18
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 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.	Disagree. See response at row 18.
21.	It is also clearly contrary to the intention of the Approval as granted by the NSWLEC and upheld by the NSWCA.	The timing of the satisfaction of the relevant conditions was not at issue in either proceeding. The proponent intends to comply with condition 10A prior to physical development works commencing.
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. 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.	Agreed.
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.	The Proposed Modification is consistent with the primary purpose of Condition 10A. No physical development work will be 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.	The intent of the Proposed Modification is not that the Project Approval will operate in perpetuity.
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. That reasoning remains valid. If Ashton cannot acquire the requisite interest in	Agreed.

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	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.	The reasons offered by HEL do not establish that it is inappropriate or unlawful to approve the Modification Application.
'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 precedent is not required in respect of the Modification Application – the proposed modification is within the scope of s75W and is therefore lawful. However, the Department's practice with respect to other approved mines is relevant to the merits of the Modification Application (and as a matter of consistency and fairness).
(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';	The Project Approval has unique land acquisition requirements, including condition 10A. It is necessary to address these conditions to ensure that they must only be satisfied when the development is to be 'taken up'.
(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;	See response at (a) above.
(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).	See response at (a) above and row 18.
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.	See responses at row 6, 18 and 27(a).

Para	Content	MinterEllison response
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.	Disagree. See responses at row 6, 18 and 27(a).
30.	Please do not hesitate to contact us to discuss any of the matters in this letter.	No comment.