NSW EDO
DEFENDING THE ENVIRONMENT
ADVANCING THE LAW

EDO NSW
ABN 72 002 880 864
Level 5, 263 Clarence Street
Sydney NSW 2000 AUSTRALIA
E: edonsw@edonsw.org.au
W: www.edonsw.org.au
T: + 612 9262 6989
F: + 612 9264 2414

16 February 2017

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

Dear Mr Ray,

South East Open Cut Project (PA 08_0182) Modification

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 represented HEL in an objector appeal against the project approval (granted by the Planning Assessment Commission on 4 October 2012) in the NSW Land and Environment Court. During the proceedings, the Court heard detailed submissions from experts and lay objectors on issues including noise, air quality and groundwater impacts of the proposed mine as well as the social impacts of the project on the local community and Aboriginal cultural heritage.

3. In August 2014, the Court ultimately found that the project could go ahead but that approval must be subject to adequate conditions imposed by the Court.

4. On 17 April 2015, the Court handed down its final set of conditions to the consent, including Condition 10A of Schedule 2 that prevents commencement of development on the project site until Ashton has purchased, leased or licensed Property 129 (which is located over the proposed mine pit) from the owner.

5. Ashton unsuccessfully appealed the imposition of the condition 10A to the NSW Court of Appeal in 2015.

Comments on the current modification application

6. According to Ashton's modification application dated 19 January 2017, and made under section 75W of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**), the proponent is now seeking the imposition of a new condition which seeks to amend the timing of certain obligations imposed on Ashton under the consent until such time that Ashton notifies the Secretary that it intends to "take up" its consent.

7. Under Ashton's proposed modification, notification to the Secretary of an elected date of commencement of development does not ultimately mean that

development may “physically commence” on the elected date. Rather, Ashton may not commence until such time as the Secretary has agreed in writing that Ashton has satisfied all requirements of the consent which must be completed before development can occur. In our view, this would also include compliance with Condition 10A, which is clearly a prerequisite to the development, because without compliance with Condition 10A, Ashton cannot commence development. The date of physical commencement is obviously relevant to both our client and Ashton as commencement prevents the consent from lapsing.

Condition proposed at Point 1.1 of the application

8. Under the Approval as made by the Court and currently in force, physical commencement cannot occur until Ashton has fulfilled the prerequisite set out in Condition 10A, and has satisfied other conditions requiring the approval of various management plans which must be obtained prior to carrying out development on the site (for example, Schedule 3 Condition 10: requires a Noise Management Plan to be approved before development is carried out). Making the proposed modification as sought by Ashton at Point 1.1 of its application will not change this fact. Therefore, the proposed condition appears unnecessary, and its inclusion could only serve to cause confusion as to when the Project may actually commence.

Amendments proposed at Point 1.2 of the application

9. Our client is concerned with the inclusion of the note below the proposed condition which provides that “Any conditions requiring the Proponent to acquire any property do not operate until the notice under this condition has been issued to the Secretary” and with the proposed amendments at Point 1.2 of the application that relate to rights to request voluntary acquisition.

10. Under the Approval made by the Court, at any point in time following the grant of consent, landowners listed in Table 1 to Schedule 2 in the Approval may seek voluntary acquisition of their properties. These landowners are entitled to ask Ashton to acquire their properties, as the Court has accepted that these properties will experience unacceptable impacts as a result of the Project that it approved. The Court approved the Project specifically on the condition that those owners have a right to request acquisition under the Approval **at any time after approval**. Those acquisition rights were included in the approval by the Court with full knowledge that Ashton may not be able to start its Project for some time, given the effect of Condition 10A. In fact, the Department as a party to the proceedings will recall that the Court heard from all parties specifically on the issue of the adjustment to timing for all conditions that might be affected by Condition 10A and the lapsing provisions in Condition 5A. The conditions of Approval have been carefully crafted by the Court following detailed written and oral submissions from all parties, including Ashton and the Department.

11. During the Land and Environment Court proceedings, the Court considered the social impacts of the development on Camberwell and the continuing viability of the village. The Court found that:

The vast majority of properties in Camberwell village and a number in its surrounds are owned by Ashton… The evidence before the court suggests that the amenity impacts on the few remaining residents in Camberwell village will be moderate and so may not necessarily result in those property owners taking up acquisition rights. This is ultimately a matter for those residents to choose instead of availing themselves of mitigating measures at their properties.[1]

12. Clearly the intention of the Court was to allow those landowners affected by the development to have their land acquired by the proponent if they so decided; that right was enlivened as at the date of project approval. Ashton had ample opportunity during the lengthy submissions process to ask the Court to suspend the operation of this condition until such time as development commences, however, it did not put this to the Court.

13. Accordingly, the rights of the landowners to seek voluntary acquisition ought not to be suspended until Ashton chooses to "take up" its consent. Such an amendment leaves the small number or remaining landowners in uncertainty and means that they must wait until the predicted dust, noise and blasting impacts occur before they can exercise their rights to sell their property.

14. Our client's position is that the note ought to be removed from the proposed condition and Condition 1 of Schedule 3 should remain unchanged.

15. Please do not hesitate to contact us to discuss any of the matters in this letter.

Yours sincerely,
EDO NSW

Sarah Roebuck
Solicitor

Our Ref: 1623374

[1] *HEL v Minister for Planning and Infrastructure* (No 2) [2014] NSWLEC 129 at [523].