

12 December 2023

Ms Jessie Evans
Director
Energy and Resource Assessments
Department of Planning and Environment
Locked Bag 5022
PARRAMATTA, NSW, 2124

Cc: Ms Melanie Hollis
Principal Planning Officer, Resource Assessments
[REDACTED]

Dear Ms Evans,

Airly SSD 5581 Mod 5
IPC Request for Information

We refer to the letter dated 7 December 2023 from the Independent Planning Commission (**IPC**) to the Department of Planning and Environment (**DPE**) requesting information in relation to Modification 5 of the Airly Mine consent (**SSD-5581**).

The IPC have requested information on the following topics:

- Modification of power;
- Employment increase;
- Mine closure water management; and
- Assessment report.

We provide the below responses to the information requested.

Modification of Power

The IPC has requested information on the following:

*The NSW Court of Appeal made potentially relevant findings with respect to the Commission's power to decide this modification in **Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177**, including that the power in s 4.55(1A) of the Environmental Planning and Assessment Act 1979 to modify a consent can only be exercised if the modification will effect some change to the development the subject of the development consent. Can the Department please confirm that this power has been enlivened by the Application and on what grounds?*

Response:

The decision in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 (**Buyozo**) involved a matter where a condition of a consent for a commercial premises required a development contribution to be paid. The developer paid the full amount of the contribution required by the condition, but later applied to Council to modify the development contribution condition to reduce the amount of the contribution. The Land and Environment Court (**LEC**) made the modification that was sought, but the Court of Appeal overturned that decision for various reasons.

The key reasons given by the Court of Appeal were:

1. The proposed modification had no environmental, or any other effects, such that there was no proposal to modify the development.
2. The power to modify is only available where some future change is proposed with respect to the development for which consent was granted.

The relevant modification power arising for consideration in *Buyozo* was s 4.56(1) (the power to modify consents granted by the LEC), although the Court of Appeal made observations about the modification power in s 4.55(1A) of the EP&A Act as well. In particular, Preston CJ of LEC found, in respect of s 4.55(1A) of the EP&A Act, that:

- the language of s 4.55(1A) of the EP&A Act imposes a textual constraint that indicates a need for the modification to "effect some change to the development the subject of the development consent" (at [55]);
- only the carrying out of development can have an environmental impact and "neither the grant of a development consent subject to conditions nor the modification of a development consent in themselves can have any environmental impact; it is only the carrying out of the development authorised by the development consent or the development consent as modified that can have any environmental impact" (at [58]).

Modification 5 to the Airly Mine Consent is clearly in a different category to the modification that was the subject of *Buyozo*. That is because Modification 5 does seek to effect some change to the development the subject of the consent by increasing the number of employees working at the Mine from 155 FTE personnel (including contractors) to 190 FTE. As is explained in Section 6 of the Modification Report for Modification 5 (titled "Assessment of Impacts") and as is recognised in the Assessment Report produced by the Department, this change has some minor environmental impacts in terms of traffic, noise, greenhouse gases, water use and wastewater (see, eg, pp 9 to 12 of the Department's Assessment Report). In contrast, the modification in *Buyozo* had no impacts such that there was, in fact, no actual modification being proposed to the underlying development itself.

This aspect of Modification 5 is, in and of itself, sufficient to enliven the power to modify under s 4.55(1A) of the EP&A Act.

The additional aspect of Modification 5 (concerned with updating the rehabilitation management and performance conditions) can also be distinguished from the condition subject to consideration in *Buyozo*. Unlike the amendment of the development contribution condition in that case (which clearly would have no effects / did not involve a proposal to modify the development, as noted by Basten and Payne JJA at [10] in *Buyozo*), the modification of the consent conditions addressing rehabilitation in the Airly consent for the purpose of consistency with rehabilitation reforms under the *Mining Act 1992* would also effect some change to the development subject of the development consent (albeit limited), because the modification of those conditions would result in changes to the manner in which rehabilitation reporting and management at the Airly Mine is conducted in the future (see [39] of the Department's Assessment Report). Rehabilitation reporting and management actions are clearly practical steps taken by a proponent

while implementing a development, such that changes to the manner in which that is done affect development implementation.

For these reasons, Modification 5 is significantly distinguishable from the condition that was subject to the Court of Appeal's consideration in *Buyozo*.

The IPC can be satisfied that the modification power in s 4.55(1A) has been enlivened by Modification 5.

Employment Increase

The IPC has requested information on the following:

Can the Department please confirm how the extra 35 workers are intended to be utilised (with respect to traffic and other impacts) – eg more/larger teams within existing shift hours as opposed to additional shifts at different hours?

Response:

The Airly mine operates day and night shift roster, made up of different crews undertaking different mining functions.

The extra workers are intended to be applied to cover peak periods within the mining process within the existing shift roster. The additional workers will mainly be accommodated within the existing shift roster periods to operate shift periods that have capacity and idle machinery requiring manning, such as on weekends or night shift.

Less frequently, the extra workers, maybe applied to specific mining tasks that may or may not follow the normal shift roster periods.

The impacts, such as traffic, from the proposed additional workers will be distributed mainly within the Airly Mine current shift roster times. These impacts will also occur less frequently at other times outside of the current shift roster periods, where the proposed additional workers are undertaking specific mining tasks that, due to mine operational considerations, cannot be conducted during the normal shift roster periods.

Mine Closure Water Management

The IPC has requested an information on the following:

With respect to the proposed change to Schedule 4 Condition 27 (Rehabilitation Management Plan) and the consequent removal of clause (e) of that condition requiring a Closure Groundwater Monitoring and Management Plan, can the Department please confirm how the objectives of clause (e) would be addressed under the recommended conditions for Mod 5?

Response:

The objectives of the current Schedule 4 Condition 27 clause (e), which is proposed to be removed from the consent, are accommodated within the following conditions of the consent, as amended by Modification 5:

- Requirement for an Extraction Plan under Schedule 3 Condition 7 and component technical sub-plans including a Water Management Plan with requirements for impact assessment, monitoring, adaptive management, validation and reporting. Additionally, the Extraction Plan process is overseen by the Independent Expert Panel;
- Requirement for a Water Management Plan under Schedule 4 Condition 13 with component technical sub-plans including Groundwater Management Plan, which includes assessment of impacts on groundwater springs, seeps, inflows and plans to respond to any exceedances of performance measures associated with groundwater;

- Requirement for independent expert review under Schedule 4 Condition 14 of the Groundwater Management Plan, including the groundwater model. The independent expert review includes review of monitoring data, comparison of predictions to actual groundwater impacts and review of effectiveness of the Groundwater Management Plan;
- Requirement for progressive rehabilitation under Schedule 4 Condition 26; and
- Requirements under proposed Schedule 4 Condition 27 for a Rehabilitation Strategy and a Rehabilitation Management Plan to be prepared and implemented.

Assessment Report

The IPC has requested an information on the following:

The version of the Department's Assessment Report provided to the Commission on 24 November 2023 contains a number of broken hyperlinks (see paragraph 1, 5 and 26). Can the Department please provide an updated copy with working links?

Response:

The IPC comment is noted.

We assume that the DPE will provide the IPC with an updated DPE Assessment Report.

If you have any questions or require any further information, please do not hesitate to call Ron Bush – Early Phase Project Manager on [REDACTED]

Yours sincerely,

[REDACTED]

Ron Bush

Early Phase Projects Manager