

26 April 2012

Director-General
Department of Planning and Infrastructure
GPO Box 39
SYDNEY NSW 2001

Via Web Submission

Director-General,

Submission on Watermark Coal Project

We refer to Shenhua Watermark Pty Limited's (**Shenhua's**) proposed Watermark Coal Project (**Project**), for which planning approval is sought under the *Environmental Planning and Assessment Act 1979* (NSW) (application number SSD-5000), and for which the Environmental Impact Statement (**EIS**) is currently on exhibition.

NTSCORP Limited (**NTSCORP**) is the native title service provider for NSW and the ACT, with statutory responsibilities under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners and native title claimants and holders in NSW and the ACT. NTSCORP funds the legal service which acts for the Gomeroi People, the native title applicants in relation to the Gomeroi People native title claim, Federal Court Proceedings NSD 2308 of 2011 (**Claim**). The Claim was accepted for registration by the National Native Title Tribunal in January 2012. The Project lies within the area of the Claim.

NTSCORP makes the following submission on the EIS on behalf of the Gomeroi People native title claim group (**Claim Group**). This submission focuses on the Aboriginal Cultural Heritage Assessment (**ACHA**) undertaken for the Project, which is made up of the Aboriginal Archaeological Report (**AAR**), the Geotechnical and Geomorphology Investigation of the WM-GG1-11 and WM-GG3-12 Grinding Groove Sites and the Aboriginal Cultural Heritage Values Assessment (**ACHVA**). The AAR was conducted by AECOM and the ACHVA was conducted by Connect for Effect and both are included as an element of the EIS.

The majority of the concerns contained within this submission were raised directly with Shenhua during the consultation process for the development of the ACHA. Where appropriate, this submission comments on Shenhua's responses to these concerns, which are detailed in Table 8 of the ACHVA.

Executive Summary

NTSCORP submits that the ACHA provided as part of the EIS fails to meet the Director-Generals Requirements (**DGRs**), particularly the requirements that the EIS include:

an Aboriginal cultural heritage assessment (including cultural and archaeological significance) which must:

- *demonstrate effective consultation with Aboriginal communities in determining and assessing impacts, and developing and selecting options and mitigation measures;*

- *outline any proposed impact mitigation and management measures (including an evaluation of the effectiveness and reliability of the measures).*

The Claim Group submits that the content of the EIS is not sufficient to permit a complete and proper evaluation to be undertaken of the impacts of the Project upon the cultural heritage of the Traditional Owners of the Project area. This submission is based on the following key flaws, which are discussed in more detail in the main section of this submission:

- The EIS does contain enough detail to satisfy that the consultation process was sufficient and appropriate enough to enable the ACHA to be conducted to the extent required in the DGRs;
- There was no identifiable mechanism in the ACHA process to ensure that the appropriate Traditional Owners were involved in all cultural heritage identification and assessment processes, meaning that there is no certainty that the cultural significance of identified sites and objects has been properly assessed;
- Ongoing concerns of Registered Aboriginal Parties (RAPs) that recommendations made by RAPs were not properly implemented in the ACHA, which indicates that the EIS potentially misrepresents and mischaracterises the consultation process;
- Demonstrable deficiencies in the ethno-historical analyses in the EIS, caused by a number of factors including an unbalanced focus on recent ethno-historical literature and failure to utilise the services of an anthropologist or historian; and
- The methodology of assessing the archaeology of the Project area as a scientific issue detached from the cultural heritage value of the area severely limits the efficacy of the values assessment.

Accordingly, the Claim Group submits that planning approval not be granted for the Project until an ACHA has been conducted which remedies these failures, so that an informed decision on the Project, which fully takes into account the cultural heritage impacts of the Project, can be made.

Consultation Deficiencies

The ACHA undertaken by Shenhua is undermined by the ineffective consultation processes used.

Consultation Processes

There is insufficient information in the ACHVA to satisfy that sufficient consultations with the Aboriginal communities in the region were conducted in the carrying out the ACHA. Throughout the ACHVA it is repeated several times that 145 RAPs were consulted. However, the names of the individuals in attendance at each consultation are not mentioned. Without further evidence, such as meeting attendance lists and individual consultation records, there is no way to verify the assertion of having consulted, to a necessary extent, with 145 RAPs throughout the consultation process.

Consultation with Aboriginal communities requires a targeted interactive process which ensures that communities are not only aware of but fully comprehend the issues being conveyed to them. Although the ACHVA contains extensive discussion of consultation processes, there is not enough specific detailed information to prove sufficient consultation has taken place. For instance on page 66, it is stated that, although some

RAPs were not involved in early stages of assessment, a number of opportunities were provided for all RAPs to participate through various sessions. However there is insufficient detail on how the audiences for these sessions were selected and the basis on conducting consultation with sub-groups of RAPs rather than the body of RAPs as a whole. This lack of detail in the EIS on the consultation process adopted means that the EIS does not confirm that the consultation process was sufficient to enable the ACHA to be sufficient for the purposes of the DGRs.

In this regard, we also note the failure of Shenhua to consult specifically with the Claim Group. Although it is likely many of the RAPs are members of the Claim Group, Shenhua should have ensured that the Claim Group were consulted and included in the assessment process in their capacity as the Traditional Owners of the Project area, in order that the value of the cultural heritage in the Project area, in the context of the Gomeroi nation, could be properly assessed.

Failure to Identify Appropriate Persons to Speak for Country

There were a significant number of RAPs who expressed concern in the consultation process about a failure to identify who could speak for country (see page 68 of the ACHVA). In order to maintain effective consultation with Aboriginal communities for the purpose of an ACHA, it is necessary to do more than simply establish a dialogue with local Aboriginal groups. Effective consultation can only be achieved by identifying the correct Traditional Owners of the project area, and ensuring that these are the people speaking for their traditional country.

It is detailed in the ACHVA that elements of the consultation process were conducted with sub-groups of RAPs identified as 'elders' and 'senior elders'. Connect for Effect adopted the definition of an elder as 'the eldest representative of each family residing in the region and identified with cultural and historic knowledge' (page 61). Whilst age and residency are objective criterion, self-identification with traditional knowledge is subjective. Thus Connect for Effect relied merely on subjective claims of individuals to satisfy that they are the appropriate to be included in the sub-group. The Claim Group submits that the appropriate definition should be that a person is an elder if his/her senior position in the community as a traditional knowledge holder is recognised by the community. Individual assertions of their position as a knowledgeable elder should have been subsequently verified by Connect for Effect consulting with the broader community.

As there is no mechanism identified in the EIS to ensure that the appropriate Traditional Owners (being those RAPs with sufficient traditional connection to and knowledge of the area of the AACHA, as well as experience in carrying out heritage assessments) were involved in surveying each of the areas, there is no certainty that the cultural significance of identified sites and objects has been properly assessed.

Concerns Regarding Implementation of RAP Recommendations

Members of the Claim Group have expressed their concern to NTSCORP regarding the conduct of the ACHA consultations, in particular that recommendations made by RAPs have not been properly implemented.

For example, members of the Claim Group advised NTSCORP that, in the consultation process, it was suggested that a group of elders be taken to identified axe grinding groove sites for inspection purposes only. However when the site visit occurred, the

elders were asked to monitor geotechnical investigations at the sites, in contradiction of the purposes for which the elders group was selected. Members of the Claim Group have met with NTSCORP and Shenhua to discuss these concerns, however the incident is not addressed in the EIS (the geotechnical investigations are discussed at section 4.4 of Appendix N and page 86 of the ACHVA, but no comment is made in regards to the concerns of those Claim Group members). This failure raises legitimate concerns as to what other RAP recommendations have been improperly implemented and whether RAP feedback has been represented and considered appropriately in the EIS and in the ACHA process generally.

Deficiencies in Historical Assessment and Assessment of Ethno-Historical Literature

NTSCORP raised previously with Shenhua several concerns about the deficiencies of the ethno-historical analysis presented in the draft ACHA documentation. Although Shenhua in Table of the ACHVA assert that they addressed these in the final EIS, there are still some significant concerns in this regard.

The assessment of the ethno-historic literature in the ACHVA has an unbalanced focus on recent publications, whilst numerous anthropological writings from the period 1850-1950 were either omitted or referred to extremely briefly. Many of the early authors have each published extensively on the topics of Gomeroi social organisation, traditional country and kinship systems (Elkin (1944, 1945, 1979) Greenway (1878, 1901, 1902) and Radcliffe-Brown (1930, 1931, 1940, 1915-6)). These early authors conducted extensive fieldwork in Gomeroi country, resulting in detailed information about land use, customs and mythology. However, the only reference to these authors (Elkin, Greenway and Radcliffe-Brown) in the ACHVA is their being listed in a table at page 166. Other early anthropological writings which are briefly mentioned in no more than a sentence include Bootle (1899), Cameron (1885, 1902) and Palmer (1884). The insight offered in these writings on land use, customs and mythology are thereby overlooked, which brings into doubt the veracity of the cultural heritage value assessments performed.

This inadequate review and analysis of the available anthropology literature is likely due to the fact that neither an anthropologist nor an historian was employed in stage three of the consultation – ‘Gathering Information about Cultural Significance’. As well as being a source of the deficiencies outlined above, this omission in itself is concerning and brings into question the efficacy of the analyses and assessments contained within the EIS.

Deficiencies in Archaeological Assessment

The AAR inadequately assesses the cultural significance of archaeological sites, by failing to link with or reflect the findings of the ACHVA report. The approach of Shenhua in dividing the ACHA documentation into distinct reports dealing with the issues separately implies that the two are discrete and unrelated. However, one should inform the other. By assessing the archaeology of the project area as a scientific issue detached from the cultural heritage values report, the efficacy of the ACHA is severely limited. The response contained in table 8 of the ACHVA does not address the basis of these concerns.

The methodology behind the Archaeology Report is also flawed. All surveys were completed by a combined field team of two AECOM archaeologists and RAP representatives. The field team should also have included a qualified anthropologist who could adequately assist with the important task of identifying the cultural value of sites

and objects. Social and cultural values are best assessed through effective consultation by an anthropologist with Aboriginal people, which is not a feature of the processes which informed the EIS. We do not agree with AECOM and Connect for Effect's statements in table 8 of the ACHVA that there was no need for such specialist advice to be utilised and that the ACHVA sufficiently addresses the cultural significance of sites, objects and locations.

If you require any clarification on these matters, please do not hesitate to contact the undersigned on (02) 9310 3188 or at rmackay@ntscorp.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Ross Mackay".

Ross Mackay
Strategic Projects Officer
NTSCORP Limited